

**ALTERNATIVE DISPUTE RESOLUTION:
A MECHANISM FOR RESOLVING ENVIRONMENTAL DISPUTES IN SOUTH
AFRICA**

By

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**Research proposal submitted in fulfillment of the requirements for the Degree
Magister Legume in the Faculty of Law, University of the Free State**

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ABSTRACT

Environmental disputes are ever present. In view of the nature of and the complexity of environmental disputes apposite and unique alternative dispute resolution mechanisms are indispensable for resolving environmental disputes speedily, proficiently and effectively. Section 34 of the Constitution of the Republic of South Africa, 1996 provides the right to have disputes resolved by means of a public hearing before a court, alternatively, where appropriate, by means of an independent, impartial forum. The National Environmental Management Act 107 of 1998 (NEMA) provides alternative dispute resolution mechanisms.

The study identifies the provisions of the NEMA, which provides the Alternative Dispute Resolution (ADR). The study also identifies and examines the ADR provisions from other parts of the environmental legislation. These alternative dispute resolution mechanisms are informal and non-litigious. The ADR has not been utilized in environmental disputes in South Africa, although the NEMA provides it.

The study examines the nature and requirements for the ADR mechanisms. The study entails an analysis of how these requirements make the ADR mechanisms appropriate for environmental dispute resolution instead of litigation. Litigation has failed to adequately resolve environmental disputes. The study identifies the disadvantages of using litigation in environmental disputes instead of the ADR.

This study analyses the influence of international environmental law on South Africa's environmental legislative developments. The study further identifies international environmental legal instruments which provide for the ADR. These international environmental legal instruments have conventions and resolutions to which South Africa is a party. The study further examines the specific international legal instruments which have been incorporated into the law of the Republic of South Africa.

The study will explore the potential of the ADR in resolving environmental disputes, and also examine the benefits of the ADR when utilised to resolve environmental disputes. Finally, the study makes recommendations and suggestions that aim to

encourage the use of the Alternative Dispute Resolution in resolving environmental disputes.

LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
CCMA	Commission for Conciliation, Mediation and Arbitration
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
DEA	Department of Environmental Affairs
MLRA	Marine Living Resources Act
MPRDA	Mineral and Petroleum Resources Development Act
NEMA	National Environmental Management Act
NEMNWA	National Environmental Management: National Water Act
NEMBA	National Environmental Management: Biodiversity Act
NEMPA	National Environmental Management: Protected Areas
NEMWA	National Environmental Management: Waste Act
NFA	National Forests Act
UNEP	United Nations Environment Program
WSA	Water Services Act

DECLARATION

I declare that *ALTERNATIVE DISPUTE RESOLUTION: A MECHANISM FOR RESOLVING ENVIRONMENTAL DISPUTES IN SOUTH AFRICA* is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Signed

ACKNOWLEDGEMENTS

Ms. Gerda Du Toit has been the ideal dissertation supervisor. Her sage advice, insightful criticisms, and patient encouragement aided in the writing of this work.

I want to acknowledge that this work was successful because of the spiritual, financial, emotional and professional support I received from my family and friends. Thank you!!

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Chapter 1: Background and rationale

South Africa inherited many environmental challenges from the apartheid Government¹. The post-apartheid Government has, for political and social reasons, pursued socio-economic development and largely ignored environmental protection². In order to address these environmental challenges the post-apartheid Government implemented an array of environmental laws and policies that cut across different sectors.

These environmental laws include the framework of the National Environmental Management Act 107 of 1998 (the NEMA), the National Environmental Management: National Water Act 36 of 1998 (the Water National Act); the National Environmental Management: Biodiversity Act 10 of 2004 (the Biodiversity Act); the National Environmental Management: Protected Areas Act 57 of 2003 (the Protected Areas Act); the National Environmental Management: Waste Act 59 of 2008 (the Waste Act); the Water Services Act 108 of 1997 (the Water Services Act); the Marine Living Resources Act 18 of 1998 (the MLRA); the National Forests Act 84 of 1998 (the Forests Act) and the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA).

Therefore, much of South Africa's environmental laws are new and still developing. For this reason, South African courts find it difficult to adequately resolve environmental disputes³. Even with the advent of the United Nations Environment Program (UNEP) Global Judges Program in 2005, this position has not improved⁴.

Many of the environmental disputes are linked with other issues such as agriculture, urbanization, mining, fishing, housing and health. Thus, by being interconnected with

¹ Glazewski J. *Environmental Law in South Africa* 2014: 8.

² 20 Year Report on Sustainable Development

<http://www.thepresidencydpme.gov.za/news/Documents/20YR20Chapter206%20Sustainable%20Development> pdf. [Accessed 22-09-2015]. See also *Millennium Development Goals Country Report*, October 2015 electronic available at

http://www.statssa.gov.za/MDG/MDG_Country%20Report_Final30Sep2015.pdf [Accessed 22-09-2015] at 96-99.

³ *Bareki NO and Another v Gencor Ltd and Others* 2006 (1) SA 432 (T) section 28 of NEMA, an important provision relating to the duty of care in respect of the environment was judicially considered for the first time. Unfortunately, the court failed to correctly interpret the provisions of section 28 of NEMA. In *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2006 (5) SA 512 (T). Also see Kidd M. 2006: 74-78.

⁴ UNEP Global Judges Program

www.google.com/search?q=UNEP+Global+Judges+Programme&oq=UNEP+Global+Judges+Programme [Accessed 22-09-2015].

the above aspects, the disputes are intricate and difficult to resolve by way of litigation only. A court judgment on an ordinary dispute, with the losing party holding the winning one in contempt, has far-reaching negative fall-outs for the environment⁵.

Environmental disputes require special focus, appreciation and expertise, which the regular courts lack⁶. Thus, even if a court order would be issued by a court of law, damage has already been done to the environment, some of which is very expensive to clean up or remediate.

1.2 The problem

Environmental and natural resource disputes are ever-present. Failure to follow due processes, as prescribed by the law, and the lack of consulting with other affected or interested parties, often result in disputes. Litigation has largely been used as the only mechanism in dispute resolution. Even though it is regarded as the conventional mechanism of resolving disputes, litigation has failed to adequately resolve environmental disputes⁷.

An environmental dispute is very different from an ordinary dispute, over which regular court ruling is tense, with too many risks and with the inevitable results of one party winning and the other party losing⁸. An environmental dispute often requires extensive factual investigations⁹. The situation is further compounded by the fact that environmental disputes comprise of multiple parties. Litigation is also costly and time consuming¹⁰. The court route for settling environmental disputes has not only been costly, but the justice itself has up until now proved vague¹¹. A need for an alternative dispute resolution mechanism is thus evident.

⁵ Kumar A. *The Potentials of Mediation in the Settlement of Environmental Disputes* 2012: 10-12.

⁶ Higgs S. *The Potential for Mediation to Resolve Environmental and Natural Resources Disputes* 2011:7-8.

⁷ Glazewski J. (n 1 above) at 26. See also the Constitution of the Republic of South Africa 108 of 1996: Section 34.

⁸ Kumar A. (n 5 above) at 11.

⁹ Higgs S (n 6 above) at 2.

¹⁰ Kumar A. (n 5 above) at 10.

¹¹ *Ibid.*

This difficulty necessitates the use of a more inclusive mechanism, such as the ADR, in order to resolve environmental disputes. A system of environmental dispute resolution, wherein the parties engage and find amicable resolutions, which can go a long way in preserving the environment and also keep the relationship between the parties healthy, is desirable. The ADR provides a wide variety of dispute resolution mechanisms that serve as alternatives to litigation. The ADR mechanisms are designed to provide parties with a way to settle their disputes without resorting to costly, formal and time-consuming litigation¹².

1.3 Central research question

Is an alternative dispute resolution the appropriate mechanism in resolving environmental disputes in South Africa?

1.4 Importance of the study

The NEMA provides an alternative dispute resolution, but however, it is not utilized in resolving environmental disputes in South Africa. This research will contribute in analyzing the specific provisions of the NEMA and other legislation, which provides for the ADR. This research will contribute in explaining why the ADR is an appropriate means in resolving environmental disputes. This research will contribute in explaining and analyzing why the ADR should be preferred over litigation as an appropriate mechanism in resolving environmental disputes.

The study will contribute in analyzing the relevance of international environmental legal instruments to national legislation. The study will also contribute in explaining the influence of the international environmental legal instruments on South Africa's environmental legislation. The study will further analyse the importance of the incorporation of international environmental legal instruments into the environmental law of the Republic of South Africa.

¹² <http://adr.findlaw.com/mediation/mediation-vs-arbitration-vs-litigation-whats-the-difference.html> [Accessed 04-09-2015]. See also sixth meeting of the Task Force on Access to Justice under the Aarhus Convention 17-18 June 2013, UNEP.

1.5 Research questions

1. What are the various ADR mechanisms?
2. What is the nature and essential requirements of the ADR mechanisms?
3. Is there an influence of international environmental law on South Africa's environmental legislation?
4. How does the incorporation of the ADR mechanisms in international environmental law influence South Africa's environmental laws?
5. To what extent does South African environmental laws and policies provide for the ADR mechanisms, with specific reference to conciliation, mediation and arbitration?

1.6 Methodology

The study is expository, analytical and critical. The research will be based on a critical and integrated analysis of primary sources of law (Constitution of the Republic of South Africa, 1996, legislation, and cases) and secondary sources of law (texts books, scholarly articles and general reports). Thus the position of the law will be exposed before it is analyzed and, if need be, criticized.

Primary and secondary sources of law will be obtained through the University Library, databases, and through the general use of the internet.

To have substantial information on what the ADR in the environmental rights discourse means, and its potential in resolving environmental disputes by referring to international environmental law instruments.

1.7 Demarcation of the study

The study deals with an area of law that is still developing and is thus limited in terms of clear judicial precedents and literature. This is especially true when it comes to the new South African Constitutional dispensation, which is less than 30 years old. There are no cases where the ADR was utilized successfully since it came into effect in the new Constitution and later the NEMA.

1.8 Organization of the work

Chapter 1 : Background and Problem Statement.

Chapter 2 : The nature of, and requirements for an alternative dispute resolution.

Chapter 3 : The influence of the international environmental law instruments on South Africa's environmental legislation.

Chapter 4 : ADR in South African environmental law.

Chapter 5 : Conclusion, recommendations and suggestions.

Chapter 2: Nature of and requirements for the Alternative Dispute Resolution (ADR)

2.1. Introduction

This chapter analyses and discusses the nature and essential requirements of the ADR as a mechanism to resolve environmental disputes. An examination of the nature of and requirements for the ADR is an important step before analyzing its potential in resolving environmental disputes. Although the characteristics of these mechanisms vary, all share common elements of distinction from the formal judicial structure.

2.2. Alternative dispute resolution

The ADR comprises of different mechanisms through which disputes are resolved without litigation¹³. Various methods of dispute resolution fall within the ADR. Promoters of the ADR claim that the more control disputing parties retain over the settlement process, the more likely the outcome will be supported and implemented by the parties¹⁴. In South Africa the ADR has extensively been used in the field of labor law¹⁵. The ADR has also been utilized with success in other complicated fields of law, such as family law¹⁶, construction law¹⁷ and in civil law¹⁸.

An important feature of all the ADR mechanisms is that they are all voluntary¹⁹. This emphasises the control of the parties over their own agreement from facilitation where the whole decision making process is created by the parties, to arbitration where a

¹³ Simokat C. *Environmental Mediation Clauses in International Legal Mechanisms* 2008: 3 – 4, Electronic available at www.mediate.com [Accessed 05-11-2015]. Also see Grogan *Work Place Law* 2014: 495-497.

¹⁴ Simokat C (n 13 above) at 6.

¹⁵ Glazewski J (n 1 above) 26-44. Also see Grogan J. *Work Place Law*: 495-497.

¹⁶ *MB v NB 2010 (3) SA 220 (GSJ)*. Also See *Townsend-Turner and Another v Morrow (524/2003, 6055/2003) [2003] ZAWCHC 53*; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

¹⁷ Loots PC *Construction law* 1063; Ramsden, P *McKenzie Law of Building and Engineering Contracts and Arbitration* 2014 : 1

¹⁸ Rule 37(6) (d) – Pre Trial Conference, states that parties must have tried mediation, arbitration before the matter can be set down for trial. In *Cashbuild (South Africa) (Pty) Ltd v Scott and Others* 2007 (1) SA 332 (T) and *Lingwood and another v Occupiers of R/E ERF 9 Highlands* 2008 (3) BCLR 325 (W) the courts ordered municipalities to consider mediation.

¹⁹ Grogan J *Work Place Law* 2014: 456.

decision still requires the parties' consent for implementation and that the choice of the third party to assist must be agreed upon by all parties²⁰.

Environmental disputes involve a diverse range of issues due to the technical and complex nature of environmental disputes. The environment has a great influence on the growth of the national economy, it contributes to social as well as economic development²¹. It is therefore important that environmental disputes that arise are dealt with in a cost effective and expedient manner that ensures fairness, confidentiality and privacy.

The ADR is suited to addressing these needs, as the outcome of the ADR is usually a win-win solution. These mechanisms are designed to provide parties with a way of resolving or settling their disputes without resorting to litigation. These mechanisms are conciliation, negotiation, mediation and arbitration and will be discussed below.

2.2.1. Conciliation

Conciliation is another ADR mechanism, which is used to resolve disputes between private parties²². Conciliation is a process where a conciliator or panellist meets with the parties in a dispute and seeks resolution of the dispute by mutual agreement²³. Conciliation is a voluntary process, where the parties involved are free to agree and attempt to resolve their dispute by conciliation²⁴. The process is flexible, allowing parties to define the time, structure and content of the conciliation proceedings.

Conciliation is an established mechanism in labour disputes in terms of the Labour Relations Act of 1995 through the Commission for Conciliation, Mediation and Arbitration ("CCMA"). The decision to settle is in the hands of the parties involved in the dispute, the conciliator only 'facilitates' the process. The conciliation process is fast, uncomplicated, inexpensive and does not allow for any legal representation²⁵.

²⁰ Simokat C (n 13 above). Also see Susskind *et al* (2000) at 34-45.

²¹ *Fuel retailers Association of SA Pty Ltd v Director-General: Environmental Management Mpumalanga and Others* 2007 6 SA 4 (CC) at paragraph 61; *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W) at paragraphs 140E-151H.

²² Simokat C (n 13 above) at 3. Also see Cotton J. *The Dispute Resolution Review* 2016: 595.

²³ Pretorius P. *Dispute Resolution* 1993: 4.

²⁴ Bosch *et al The Conciliation and Arbitration Handbook* 2004: 8-9.

²⁵ Pretorius P (n 23 above) at 3. Also see Kumar (n 5 above) at 10-12.

2.2.2. Negotiation

Negotiation is a process whereby parties attempt to personally reach a settlement without the use of an independent third party²⁶. Negotiation is the most economical ADR mechanism used²⁷. It is expedient, unstructured, and a voluntary process available to parties that often preserve their working relationship²⁸.

The success of the negotiations rests entirely with the parties involved in the dispute, and the third party facilitates the negotiations. Sometimes negotiation is not successful in resolving disputes²⁹. This is often caused by the parties' lack of objectivity during negotiations. It is caused by parties being emotionally involved and due to a power imbalance, or as a result of a lack of knowledge and similar factors³⁰.

2.2.3. Mediation

Mediation is an ADR mechanism that is also non-adjudicative. Mediation is conducted by an impartial third party (the "mediator") who assists the parties in reaching a mutual agreement³¹. Resolution of the dispute in mediation is achieved by negotiation and agreement between the parties. Mediations do not produce binding resolutions unless the parties reduce the agreement reached into a binding contract³².

Mediation is commenced by means of a written agreement, which the parties to a dispute voluntarily conclude to engage in the mediation proceedings. The mediation agreement sets the terms of the agreement to mediate. The agreement stipulates the mediator chosen with the consent of both parties. It further provides for time frames suitable to the parties, within which a settlement must be reached. It also stipulates the procedure within which the mediation must take place, and similar

²⁶ Ramsden P *Law of Arbitration* 2010: 2

²⁷ Cotton J. *The Dispute Resolution Review* 2016: 594.

²⁸ Bosch *et al* (n 24 above): 8-9.

²⁹ Ramsden P (n 26 above): 37.

³⁰ Gazal-Ayal O and Perry R *Imbalances of Power in ADR: The Impact of Representation and Dispute Resolution Method on Case Outcomes* 2014: 3.

³¹ Ramsden P (n 26 above): 9.

³² Cotton J (n 27 above) at 594.

aspects³³. Therefore mediation is a voluntary process from its launch until and including its termination³⁴.

The South African courts recognise and endorse mediation as an ADR mechanism that is suitable in resolving environmental disputes. In the case of *Port Elizabeth Municipality v Various Occupiers*³⁵ the Constitutional Court held as follows:

“Not only can mediation reduce the expenses of litigation, it can help avoid the exacerbation of tensions that forensic combat produces. By bringing the parties together, narrowing the areas of dispute between them and facilitating mutual give-and-take, mediators can find ways around sticking-points in such a manner that the adversarial judicial process might not be able to do. Money that otherwise might be spent on unpleasant and polarising litigation can better be used to facilitate an outcome that ends a stand-off, promotes respect for human dignity and underlines the fact that we all live in a shared society³⁶”.

The Constitutional Court in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others*³⁷ re-emphasised the need for the parties to utilise mediation in resolving environmental disputes. The Court held that the parties are required to engage with each other in a pro-active and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arm's-length combat by intransigent opponents³⁸.

Although litigation happens in courts, it is important to note that the South African courts have endorsed and encouraged parties to utilise mediation as a mechanism in resolving disputes. This shows that mediation is a better dispute resolution mechanism compared to litigation.

³³ Ramsden P (n 26 above). Also see Cotton (n 27 above) at 594-495.

³⁴ Pretorius P (22 above) at 4.

³⁵ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

³⁶ *Port Elizabeth* (n 35 above) at paragraph 40.

³⁷ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC)

³⁸ *Occupiers* (n 37 above) at paragraph 12.

2.2.4. Arbitration

Arbitration is another ADR mechanism which occurs pursuant to an agreement between the parties of a dispute³⁹. Arbitration in South Africa is governed by the Arbitration Act⁴⁰. In terms of section 1 of the Arbitration Act, parties must agree in writing to arbitrate for the Act to be applicable. Ramsden⁴¹ defines arbitration as a mechanism whereby the parties of a dispute enter into a formal agreement that an independent and impartial third party, the arbitrator, chosen directly by the parties, will hear both sides of the dispute and make an award, which the parties undertake to accept as final and binding⁴².

Arbitration has become the preferred ADR mechanism when compared to other mechanisms, especially disputes arising in terms of written contracts⁴³. In terms of arbitration the parties to a dispute agree to refer to arbitration where an independent and impartial arbitrator or tribunal, appointed by or on behalf of the parties⁴⁴ will preside. Arbitration also occurs under the auspices of the Arbitration Act⁴⁵.

2.3. Features of the ADR mechanisms

The ADR mechanisms discussed above have distinct features from litigation. It is thus essential to analyze the features of these ADR mechanisms. Shmueli and Kaufman, (2006) identify the following features in the ADR mechanisms⁴⁶. These features are informality, multiple parties, application of equity, direct participation of the parties, preservation of the relationship of the parties, a neutral third party. These features will be separately discussed below.

³⁹ LAWSA (Volume 2 - Third Edition) at paragraph 75.

⁴⁰ Arbitration Act 42 of 1965.

⁴¹ Ramsden P (n 26 above) at 173.

⁴² Ramsden P (n 26 above) at 174.

⁴³ Ramsden P (n 26 above) 175.

⁴⁴ *Ibid.*

⁴⁵ Arbitration Act 42 of 1965.

⁴⁶ Shmueli D and Kaufman S. 2006, electronic available: <http://www.jiis.org>. [Accessed 05-11-2015].

2.3.1. Informality

The ADR mechanisms are less formal than the litigation processes⁴⁷. With the ADR mechanisms the rules of procedure are flexible, without formal pleadings, extensive written documentation, or rules of evidence as compared to the traditional litigation⁴⁸. This informality is appealing and important for increasing access to dispute resolution for parts of the population who may be intimidated by or unable to participate in more formal systems⁴⁹.

Due to the informal nature of the ADR mechanisms, parties designate the manner in which they want to resolve their dispute. The parties are able to participate and agree on their own suitable time limits.

2.3.2. Multiple Parties

Sometimes disputes comprise of multiple parties such as Government, public interest groups or non-governmental organizations, private companies and private individuals⁵⁰. Each of these parties has different ideological perspectives, organizational structures, strategies, and capacities to engage in dispute resolution⁵¹.

The ADR requires the consideration of the interests of several parties (some of which may be organizations and not individuals), manifold interconnected issues, numerous decision-makers, technical and scientific uncertainty and various arenas in which problems may potentially be solved⁵².

⁴⁷ Document Series No. 14: *Alternative Dispute Resolution Methods* electronic available www.unitar.org/dfm. Also see Kumar A (n 5 above) at 3-5.

⁴⁸ Higgs S (n 6 above) at 10-12.

⁴⁹ Kumar A (n 5 above) at 4.

⁵⁰ Shmueli D and Kaufman S (n 46 above) at 21. Also see Kumar A (n 5 above) at 11.

⁵¹ *Fuel retailers* (n 21 above); *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another* 2001 3 SA 1151 (CC). The above cases involved the government and private group and non-governmental organisations.

⁵² *Alternative dispute resolution practitioner's guide-usaid* 2011: 5-6, electronic available www.usaid.gov/./200sbe

2.3.3. Application of Equity

The ADR supports the application of equity rather than the rule of law⁵³. Each dispute is resolved with negotiations among the parties and with the assistance of a third party. The parties to a dispute set principles and terms that seem equitable in the particular case⁵⁴.

Those principles and terms serve as guidelines for the parties and the third party. This ensures equal treatment between the parties to a dispute. The ADR mechanisms increase the access to justice and the legal system for marginalised groups of the society⁵⁵.

2.3.4. Direct participation and communication between parties

Other characteristics of the ADR mechanisms include more direct participation by the disputants in the process and in designing settlements. It includes more direct dialogue and opportunity for reconciliation between disputants⁵⁶. The parties to the dispute participate in finding a resolution⁵⁷.

The parties set time limits, which are suitable to them and the third party. This is a distinct feature when compared to litigation, which has rigid rules and procedures⁵⁸.

2.3.5. Relationship of the parties

The main attraction of the ADR mechanisms is that it preserves relationships among the parties. This is a unique feature, as opposed to the confrontational and legalistic approach of traditional litigation⁵⁹. Many disputes occur in the context of relationships that will continue over future years. Unlike litigation, a settlement reached using the ADR addresses all the parties' interests⁶⁰. This often helps to preserve a working

⁵³ *Ibid.*

⁵⁴ Mirindo F, *Environmental Dispute Resolution in Tanzania and South Africa: A Comparative Assessment in the Light of International Best Practice* 2008:3.

⁵⁵ McHugh S. *Alternative Dispute Resolution: The Democratization of Law?* 1996: 17

⁵⁶ Alternative dispute resolution practitioners guide (n 52 above) at 8.

⁵⁷ Higgs S (n 6 above) at 10-11.

⁵⁸ Loggerenberg V. *Erasmus Superior Court Practice* 2015.

⁵⁹ Kumar A (n 5 above) at 4.

⁶⁰ Simokat C (n 13 above).

relationship in ways that would not be possible in litigation, which is often perceived as rigid and intimidating.

In *Townsend-Turner and Another v Morrow*⁶¹ the full bench of the Western Cape Division observed that litigation had only succeeded in increasing the hostilities between the parties. The ADR instead, preserves relationships. In the event that such relationships are not working, the ADR makes the termination thereof more amicable⁶².

2.3.6. Use of a neutral third party with no decision-making authority

The ADR has a unique feature, which is the use of a third party who is chosen by the parties. With litigation parties do not have the liberty to choose a presiding officer to hear their matter. The presiding officer is allocated to that specific case by the designated authority. The third party is neutral and impartial⁶³. Unlike in litigation, the third party can meet with the parties separately, with the view of settling the dispute.

The third party plays a role in assisting the parties to come to an amicable resolution. The impartiality of the third party is derived from the fact that he has no interest in the dispute⁶⁴. The third party is far removed from the dispute concerning the parties. The process is conducted by an independent person⁶⁵. This ensures the strictest confidentiality⁶⁶. The third party uses his skill to isolate underlying interests and uses the information at his disposal to identify common ground and, by drawing on his or her own legal and other knowledge, sensitively encourages a settlement between the parties⁶⁷.

In *MB v NB*⁶⁸ the court remarked that part of the third party's role included the evaluation of the prospects of success in the litigation and an appreciation of the costs and practical consequences of continued litigation⁶⁹. The appointed third party helped the parties to identify the important issues in the dispute and helped them

⁶¹ *Townsend-Turner and Another v Morrow* (524/2003, 6055/2003) [2003] ZAWCHC 53

⁶² Kumar A (n 5 above) at 5.

⁶³ Mirindo F (n 54 above) at 6-7.

⁶⁴ Alder J. *The use of mediation to resolve environmental disputes in South Africa and Switzerland*, 2005: 6-7

⁶⁵ *MB v NB* (n 16 above) at paragraph 50.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ *MB v NB* (n 16 above) at paragraph 50.

⁶⁹ *Ibid.*

decide how they can resolve it themselves⁷⁰. The third party does not tell the parties what to do or make a judgment about who is right and who is wrong⁷¹. The third party maintains the reasonable expectations of confidentiality, depending on the circumstances of the proceedings and any agreements they make⁷². The parties retain control over the process, and the outcome of the case still lies with the parties⁷³.

2.3.7. Cost Effective

Litigation can take a long time to bring the matter to finality⁷⁴. This protracted delay is accompanied by a very expensive bill. In *MB v NB* the court held that litigation is very expensive,⁷⁵ and that the parties should have explored cheaper means of resolving their dispute. In this case the court strongly recommended that the parties should have used mediation as a means to resolve their dispute, in order to save costs to their estates⁷⁶. It is submitted that the Government can save money spent on litigation if it can optimally use the ADR as contemplated in the National Environmental Management Act⁷⁷.

In *S v J*⁷⁸ the Supreme Court of Appeal endorsing the dictum in *MB v NB* held that mediation in family matters is a useful way of avoiding protracted and expensive legal battles, and that litigation should not necessarily be the first resort⁷⁹. This *inter alia*, shows that even courts are mindful of the potential of the ADR in resolving disputes. It is submitted that the courts have held⁸⁰ that the ADR should be considered as the first option, since it is a cheaper mechanism in obtaining justice. This further shows that the ADR can augment and complement litigation. The fact that the ADR is cheaper than litigation means it has the potential to increase access to justice to disadvantaged groups⁸¹.

⁷⁰ Mirindo F (n 54 above) 6-7

⁷¹ Panchu S. *Mediation: Practice and Law* 2011: 64-67.

⁷² Alder J (n 64 above) at 8.

⁷³ Panchu S (n 71 above) at 64-67.

⁷⁴ *Ibid*.

⁷⁵ *MB v NB* (n 16 above).

⁷⁶ *Ibid*

⁷⁷ Act 107 of 1998.

⁷⁸ *S v J* (695/10) 2010 ZASCA 139.

⁷⁹ *S v J* (n 71 above) at paragraph 54. Also see Van de Berg, *Environmental Dispute Resolution in South Africa – Towards a sustainable development*, 1998, at 82.

⁸⁰ *MB v NB* and *S v J* above.

⁸¹ SA Law Reform Commission 1997, *Alternative Dispute Resolution*, Issue 8 at page 18.

2.3.8. Privacy

Litigation takes place in an open court. Both the public and media have access to the proceedings⁸². The ADR processes take place in private and are confidential. This ensures that sensitive information of the parties is not disseminated to the public. Unlike with litigation, the parties to a dispute choose who may have access to the proceedings.

2.4 Interim conclusion

The ADR comprises of various informal and flexible mechanisms for the resolution of environmental disputes. Environmental disputes are technical and complex in nature. The ADR is suited for such complex environmental disputes and provides parties with privacy and confidentiality. It is not formal like court processes that have rules and complicated procedures. With the ADR parties negotiate without the intimidating court environment.

The NEMA provides for the use of the ADR in resolving environmental disputes. Courts have also encouraged parties to use the ADR mechanisms in resolving their disputes. It is apparent from the case law above that the ADR is better than litigation in many respects. It is submitted that the distinct features of the ADR makes it a suitable dispute resolution mechanism for environmental disputes.

The environment has a great influence on the growth of the national economy, in that it contributes to social as well as economic development⁸³. It is therefore important that environmental disputes are resolved within a cost effective and expedient manner that ensures fairness, confidentiality and privacy.

Litigation has not resolved environmental disputes. Therefore, preference must be given to resolving the disputes outside the court and by means of the ADR mechanisms. The outcome of using the ADR is a win-win settlement in light of the fact that the ADR procedure is interest based and not rights based, as is the case with litigation.

⁸² Section 34 of the Constitution 1996.

⁸³ *Fuel Retailers* and *BP* cases (n 21 above).

Chapter 3: The influence of international environmental law on South Africa's environmental legislation

3.1. The Status of International Environmental Law within South Africa

The Constitution of the Republic of South Africa states that customary international law is the law in the Republic, unless it is inconsistent with the Constitution or an Act of Parliament⁸⁴. It also confirms that all international agreements, which were binding in the Republic prior to the enactment of the Constitution, continue to be in force⁸⁵. The Constitution thus gives the framework through which international law may be applied in South Africa.

Section 233 of the constitution provides that international law must be applied in South African courts, in so far as it has its reasonable interpretation of the legislation that is consistent with the international law over an alternative interpretation that is inconsistent with the international law⁸⁶. The language of section 233 of the constitution is instructive and authoritative. It submitted that this section does not give courts discretion on the interpretation of the international instruments of law.

The wording adopted in section 233 accords with section 39(1) (b) of the constitution, which states that courts, when interpreting the bill of rights, must consider international law. It submitted that the use of the word "must" makes the language of the section instructive. This position also applies to treaties, conventions and protocols which deal with the environment.

3.2 The status of international environmental law on South Africa's environmental legislation

The influence of the international environmental law on South Africa's environmental legislation has seen the inclusion of international environmental principles into domestic law. To date several treaties have been transformed into domestic law⁸⁷. The World Heritage Convention Act 49 of 1999 was incorporated as a statute by

⁸⁴ Section 232 of the Constitution.

⁸⁵ Section 231(5).

⁸⁶ Section 233 headed: Application of International Law.

⁸⁷ Glazewski J (n 1 above) 2 - 20, see list of ratified treaties in M van der Linde & L Ferris (eds) *Compendium of South African environmental legislation* (2010) 678.
http://www.pulp.up.ac.za/pdf/2010_01/2010_01.pdf (accessed 12 November 2015).

South Africa⁸⁸ and the Convention on Biodiversity of 1992, which was infused into the domestic environmental law relating to biodiversity⁸⁹.

3.2.1 National Environmental Management Act 107 of 1998 (NEMA)

The NEMA is considered to be the principal framework for environmental law enacted in fulfillment of the State's constitutional duty to take reasonable legislative measures to protect the environment⁹⁰. The NEMA incorporates several principles of international environmental law, whether embedded in a treaty, customary principles or soft law declarations. These principles include polluter pays principles⁹¹, sustainable development⁹², the precautionary principle⁹³ and the preventive principle⁹⁴.

The NEMA provides for the implementation of international environmental instruments to which South Africa is a party⁹⁵. South Africa signed and ratified conventions⁹⁶, which include the ADR as a means for dispute settlement⁹⁷. The NEMA provides that the minister responsible for the environment must report to parliament with regards to international environmental instruments for which he or she is responsible⁹⁸.

Section 25 of the NEMA shows that South Africa not only subscribes but also implements the international environmental instruments. The country has supported the development of the international environmental law by becoming a member,

⁸⁸ Section 3 (1)(c) states that one of the objectives of the Act is to make the Convention part of South African domestic law and to create a framework to ensure that the Convention and the Operational Guidelines are effectively implemented in the Republic, subject to the Constitution and the provisions of this Act;

⁸⁹ Section 5 of the Biodiversity Act 10 of 2004 provides for the application of ratified international agreements affecting biodiversity to which South Africa is a party and which binds the republic.

⁹⁰ The preamble to the NEMA.

⁹¹ Section 28 of NEMA.

⁹² Section 24 (b)(iii). It was defined by the World Commission on Environment and Development (WCED) as to mean the development that meets the needs of the present without compromising the ability of future generations to meet their own needs.

⁹³ Principle 15 of the Rio Declaration.

⁹⁴ Section (2)(4)(a)(ii) of NEMA.

⁹⁵ *Ibid.*

⁹⁶ These conventions include United Nations Convention for the Law Of the Sea (UNCLOS), The United Nations Charter, The Vienna Convention for the Protection of the Ozone Layer of 1985.

⁹⁷ See further discussion on the above conventions.

⁹⁸ Section 26 of NEMA.

party and signatory to many international legal instruments. South Africa played a pivotal role by hosting the World Summit on Sustainable Development in 2002 in Johannesburg.

3.2.2 National Environmental Management: Biodiversity Act

The Biodiversity Act is one of the practical cases of incorporating the international environmental law into the domestic law. The National Environmental Management: Biodiversity Act⁹⁹ provides for and gives effect to ratified international agreements¹⁰⁰ affecting biodiversity to which South Africa is a party, and which binds the Republic¹⁰¹. South Africa is a member to the Convention on Biodiversity of 1992¹⁰². The objectives and principles of the NEMBA are directly derived from the CBD¹⁰³.

With regards to the settlement of disputes among parties the CBD is concrete in its placement of the ADR in resolving disputes. It provides for mediation as a step after negotiation, and if resolution is still not reached, then the dispute will escalate either to arbitration or the International Court of Justice or both. In this convention, litigation in the form of the international court of justice is seen as a last resort. South Africa is a party to this convention¹⁰⁴. The enactment of the NEMBA does not only show South Africa's reception of international environmental law into domestic law, but also shows the application of the international environmental law.

South Africa hosted the 17th session of the Conference of the Parties (COP 17) to the United Nations Framework Convention on Climate Change in 2011 to mobilize support for the Climate Change Program. The most notable outcome of the COP 17 was the Durban Platform for Enhanced Action, which set timelines for negotiating a new climate regime from 2015 onwards¹⁰⁵. All these principles now form part of

⁹⁹ National Environmental Management: Biodiversity Act 10 of 2004.

¹⁰⁰ The Convention on International Trade in Endangered Species of Wild Fauna and Flora of Wild Fauna and Flora,

¹⁰¹ Section 5 headed: Application of international agreements.

¹⁰² Convention on Biological Diversity (CBD, 1992). Available at <http://www.cbd.int/convention/articles/?a=cbd-27> (accessed on 06-11-2015).

¹⁰³ Section 2 of NEMBA.

¹⁰⁴ Fuggle and Rabie, 2009: 157. See Glazewski, (n 1 above) page 46.

¹⁰⁵ 20 Year Report on Sustainable Development (n 3 above).

binding South African environmental law, having been directly incorporated in section 2(4) of the NEMA¹⁰⁶.

3.2.3 World Heritage Convention Act

The World Heritage Act¹⁰⁷ is another example of incorporation of the international environmental law into South African law. Section 2 of the world heritage law provides that the convention was enacted into the law of the Republic of South Africa. The enactment of the Act demonstrates the positive influence international environmental law has on South Africa. The enactment also creates a framework to ensure that the Convention and the Operational Guidelines are effectively implemented in the Republic of South Africa, subject to the Constitution and the provisions of the Act¹⁰⁸.

3.3. ADR in international environmental instruments

As demonstrated above, South Africa has drawn from the experience in international environmental instruments. South Africa has been actively implementing the principles flowing from international environmental instruments within the confines of the Constitution. In this regard section 233 of the constitution provides a framework within which the application of the international environmental law principles can be effected. South Africa is a party to certain specific international environmental instruments which will be discussed below.

3.3.1 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) of 1985

¹⁰⁶ The principles in NEMA (n 37 above) sec 2(4) are also incorporated by reference in other environmental management legislation, for which see NEMBA (n 47 above) sec 7, Protected Areas Act 57 of 2003 sec 5(1) (a), Minerals and Petroleum Resources Development Act 28 of 2002 sec 37(1), Air Quality Act 39 of 2004 sec 5(2), Integrated Coastal Management Act 24 of 2008 sec 5(1).

¹⁰⁷ South Africa ratified the World Heritage Convention 10 July 1997 and enacted the Act in 1999.

¹⁰⁸ Section 3 (b).

This convention is aimed at ensuring that international trade in specimens of wild animals and plants does not threaten their survival¹⁰⁹. South Africa is well known for its diversity of plant and animal communities that reflects the wide range of environmental conditions in the country¹¹⁰. South Africa ratified CITES on 15 July 1975¹¹¹ which recognizes and provides for the ADR¹¹².

Although CITES is legally binding on States it is generally not self-executing¹¹³. Article XVIII of CITES provides that if a dispute arises between two or more parties with respect to the interpretation or application of the provisions of the Convention such a dispute shall be subject to negotiation between the parties involved in that dispute¹¹⁴. It is apparent that the ADR in this convention is mandatory. The parties to a dispute shall first negotiate with the view of resolving their dispute.

CITES further states that if the dispute cannot be resolved through negotiation, the parties may, by mutual consent, submit the dispute to arbitration. Mutual consent is central to an alternative dispute resolution. This convention is aimed at ensuring that international trade in specimens of wild animals and plants does not threaten their survival¹¹⁵.

3.3.2 The Vienna Convention for the Protection of the Ozone Layer of 1985

Article 11 of this convention states that the parties shall seek a solution by means of negotiation¹¹⁶. The Article further states that if a resolution fails by means of

¹⁰⁹ South Africa has been fighting rhino poaching in the recent years, this convention ensures that other countries come on board and assist South Africa in fighting rhino poaching.

¹¹⁰ www.environment.gov.za/legislation/international_agreements/sapartytocites [Accessed 15 -11-2015].

¹¹¹ www.environment.gov.za/legislation/international_agreements/sapartytocites [Accessed 15 June 2016] (n 81 above). Also see Kidd M (n 3 above) at 67.

¹¹² Article XVIII headed: Resolution of disputes.

¹¹³ <https://cites.org/legislation>

¹¹⁴ Article XVIII sub art 2.

¹¹⁵ South Africa has been fighting rhino poaching in the recent years, this convention ensures that other countries come on board and assist South Africa in fighting rhino poaching. See www.environment.gov.za/legislation/international_agreements/sapartytocites [Accessed 15 -11-2015].

¹¹⁶ Article 11 (1).

negotiation, the parties must refer the matter to mediation wherein a third party will assist the parties¹¹⁷. The Vienna convention makes the ADR mandatory in that article 11(3) states that if the parties have failed to find a resolution by using negotiation and mediation, they must submit to arbitration.

It is important to note that litigation is not listed as a mechanism through which environmental disputes in as far as the Vienna convention is concerned can be resolved. This affirms the trust in the potential of the ADR by the international community to which South Africa is a party.

The provisions of the Vienna convention are identical to those of the United Nations Framework Convention on Climate Change (FCCC), which South Africa ratified on 29 August 1997¹¹⁸. Similar to the Vienna convention, Article 14(1) of FCCC provides that in the event of a dispute the parties shall seek a settlement of the dispute through negotiation or any other peaceful means of their own choice.

3.3.3. Nations General Assembly Resolution 65/283 Adopted 22 June 2011

The United Nations also encourage the use of the ADR and has since incorporated it in most of its resolutions¹¹⁹. Resolution 65/283 aims at strengthening the role of mediation in the peaceful settlement of disputes, conflict prevention and resolution. Mediation is one of the ADR mechanisms used in resolution of disputes. Resolution 65/283 recognizes the growing interest in the use of mediation as an ADR mechanism, which has the potential to resolve environmental disputes. Resolution 65/283 further recognizes the useful role that mediation as a dispute resolution can play in preventing disputes from escalating into conflicts.

¹¹⁷ Article (2).

¹¹⁸ Kidd M (n 3 above) at 65.

¹¹⁹ UN General Assembly Resolution 65/283 Adopted 22 June 2011 available at www.peacemaker.un.org/./key-un-documents [Accessed 15-11-15].

In 2015, the United Nations Environmental Program (UNEP) launched a guide for mediation practitioners¹²⁰. The United Nations, as seen above, encourages the utilization of the ADR mechanisms, which ensure peaceful dispute resolution.

3.3 interim conclusion

In conclusion, South Africa has been implementing the international environmental law principles through adopting the international environmental instruments into national legislation. The constitution and the NEMA provide a general framework through which South Africa implements international environmental legal instruments. As discussed above, the World Heritage Convention and the Convention on Biodiversity respectively were enacted into the law of the Republic. These are examples of the influence drawn by South Africa from the international environmental law.

There is no doubt that the ADR has been preferred as a means of dispute resolutions in many of the treaties, conventions, agreements and protocols as discussed herein. As demonstrated above, South Africa is party to international environmental instruments, which specifically provide for the ADR as a method for dispute resolution. With the influence of these instruments South Africa can improve the optimal use of the ADR in resolving environmental disputes.

¹²⁰ Guide for Mediation Practitioners available at www.unep.org/ecp/mediation/ [Accessed 06-11-2015].

Chapter 4: ADR in South Africa environmental law

4.1 Introduction

The Alternative Dispute Resolution is not a new phenomenon in South African law, but what is new is the wider application of the concept. The first legislative framework, which generally recognized the ADR as a tool for resolving environmental disputes, was the Environment Conservation Act (ECA)¹²¹. Although the ECA preceded the 1996 Constitution, it already gave effect to the environmental provision that was taken up in the Constitution¹²².

With increasing pressure on our natural resources, environmental disputes are an increasing part of environmental management. It is important that these are managed effectively. Environmental law consists of environmental legislation which gives effect to section 24 of the Constitution of 1996¹²³. The NEMA is complemented by many national laws, which seek to regulate sector specific environmental issues including: water laws¹²⁴, air quality¹²⁵, and mining¹²⁶ to mention a few.

4.2 ADR mechanisms in South African legislation

4.2.1 National Environmental Management Act

The NEMA is the main legislative piece of South African environmental law.¹²⁷ It is also the first umbrella national legislation, which endeavors to establish an integrated environment management framework, which will transform and co-ordinate most of the currently diverse and fragmented sectors of the environment. This chapter will explore the extent to which environmental legislation provides for the ADR. The discussion will start with the provisions of the NEMA as the main environmental legislative piece.

¹²¹ Environment Conservation Act 79 of 1989.

¹²² Constitution of the Republic of South Africa, Act 108 of 1996.

¹²³ Section 24(b) of the 1996 Constitution.

¹²⁴ National water Act 36 of 1998.

¹²⁵ Air Quality Act 39 of 2004.

¹²⁶ Mineral and Petroleum Resources Development Act 28 of 2002.

¹²⁷ In chapter 3 of this work NEMA is discussed to the extent it relates to international law and not specific provisions pertaining to ADR.

The dispute resolution provisions in the NEMA are set out in Chapter 4: *Fair Decision-Making and Conflict Management*. It refers to four different dispute resolution procedures: conciliation/mediation¹²⁸, arbitration¹²⁹ and investigation¹³⁰. These ADR mechanisms will be discussed separately below.

4.3. The relevant provisions

4.3.1. Conciliation

In terms of section 18 of the NEMA parties must agree on the person of their choice to be appointed, failing which the DG will appoint a person who has adequate experience in or knowledge of the conciliation of environmental disputes¹³¹. This demonstrates the control the parties have with the ADR mechanism. In appointing the conciliator, the Director-General may consider factors such as time-limits and other conditions that he or she may determine and appoint a conciliator acceptable to the parties to assist in resolving a difference or disagreement¹³².

Section 18 enjoins the appointed conciliator to engage and work with the parties to the dispute with a view of finding an amicable solution¹³³. The conciliator must take into account the principles as stated in section 2 of the NEMA, which *inter alia* provides that environmental management must place people and their needs at the center and those conflicts must be resolved harmoniously¹³⁴. The Conciliator does not decide for the parties, where conciliation does not resolve the matter, a conciliator may enquire of the parties whether they wish to refer the matter to arbitration and may, with their concurrence, endeavor to draft terms of reference for such an arbitration.

Section 17 entails the procedure through which a matter may be referred to conciliation¹³⁵. In terms of section 17 any Minister, MEC Council or Municipal Council is enjoined to refer a difference or disagreement concerning the exercise of any of its

¹²⁸ Section 18 and 17 of NEMA.

¹²⁹ Section 19 of NEMA.

¹³⁰ Section 20 of NEMA.

¹³¹ Section 21 provides for the establishment of the panel that will render facilitation, conciliation, arbitration or investigation services. The department of environmental affairs appointed arbitrators, a list can be found at www.environment.gov.za/panelofmediatorsandarbitrators [Accessed 09-06-2016].

¹³² Section 18 (1).

¹³³ Section 18 (2) (a)-(d).

¹³⁴ Section 2(m).

¹³⁵ Section 17 headed: Reference to conciliation.

functions, which may significantly affect the environment¹³⁶ to conciliation. In terms of section 17 an internal appeal against the MEC or Minister, as the case may be, may also be referred to conciliation. This recognition of conciliation affirms its potential as a mechanism in resolving environmental disputes.

Section 17 provides that even if litigation has commenced in the court or tribunal hearing, a dispute regarding the protection of the environment, may order the parties to submit the dispute to a conciliator appointed by the Director- General and suspend the proceedings, pending the outcome of the conciliation¹³⁷. This demonstrates the flexibility of the ADR mechanisms. It also demonstrates that the ADR mechanisms can supplement the shortcomings experienced in litigation.

In *Space Securitization (Pty) Ltd v Trans Caledon Tunnel Authority and Others*¹³⁸ the court held that environmental disputes necessitates that the parties to a dispute must engage with the view of mediating¹³⁹. This was about whether an interim interdict can be granted to stop short-term remedial measures put in place to treat acid mine drainage (AMD)¹⁴⁰. The purpose of the treatment plant was to avert an imminent environmental crisis¹⁴¹. The court further held that environmental mediation is a tool which can be used to solve very difficult problems, but is still an emerging approach in South African environmental jurisprudence¹⁴².

In this case the applicants invoked the provisions of section 17(3) and asked the court to order the parties to submit the dispute to a conciliator appointed by the Director General in terms of the NEMA¹⁴³. The parties were given a chance to mediate the matter among themselves, but this exercise proved fruitless¹⁴⁴. The court held that the failure was caused by the adversarial atmosphere, which was intense and at that stage inconsistent with conciliation¹⁴⁵.

¹³⁶ Section 17 (1) (a).

¹³⁷ Section 17 (1)(3).

¹³⁸ *Space Securitisation (Pty) Ltd v Trans Caledon Tunnel Authority and Others* 2013 4 All SA 624 (GSJ).

¹³⁹ *Space Securitisation* (n 162 above) at para 5.

¹⁴⁰ *Space Securitisation* (n 162 above) at para 1.

¹⁴¹ *Space Securitisation* (n 162 above) at para 1.

¹⁴² *Space Securitisation* (n 162 above) at para 5.

¹⁴³ *Space Securitisation* (n 162 above) at para 6.

¹⁴⁴ *Space Securitisation* (n 162 above) at para 6.

¹⁴⁵ *Space Securitisation* (n 162 above) at para 6.

This section also makes provision for any member of the community to request the Minister, a MEC or Municipal Council to appoint a facilitator to call and conduct meetings of interested and affected parties with the purpose of reaching an agreement to refer a difference or disagreement to conciliation in terms of this Act¹⁴⁶.

4.3.2. Mediation

Both sections 17 and 18 of the NEMA provides for mediation. In both sections conciliation and or mediation are used interchangeably¹⁴⁷. Mediation and conciliation are usually used interchangeably¹⁴⁸. It is important to note that section 18 provides that the appointed conciliator must be mediate the dispute the between the parties¹⁴⁹. The mediator, in terms of section 18, must make recommendations regarding the dispute to the parties. This demonstrates the fact that with a mediator, the mediator does not make decisions for the parties in the dispute.

The parties may decide to use the recommendations or they may take the matter even further to arbitration.

4.3.3. Arbitration

Chapter 4 also contains provisions for arbitration and for directing a more detailed investigation. Ramsden¹⁵⁰ defines arbitration as a platform whereby the parties to a dispute enter into a formal agreement that an independent and impartial third party, the arbitrator, chosen directly by the parties, will hear both sides of the dispute and make an award, which the parties undertake through the agreement, to accept as final and binding¹⁵¹. Arbitration is also different in the sense that it is governed by the Arbitration Act¹⁵².

Subsection 19(1) provides that a difference or disagreement regarding the protection of the environment may be referred to arbitration in terms of the Arbitration Act. Subsection 19(2) provides that where a dispute or disagreement referred to in subsection (1) is referred to arbitration the parties to the dispute must appoint, as

¹⁴⁶ Section 17 (1)(2)

¹⁴⁷ Section 17 (1)(b)(ii)(cc).

¹⁴⁸ Ramsden P (n 26 above) at 173; Cotton J (n 27 above) at 593.

¹⁴⁹ Section 18(2)(c).

¹⁵⁰ *The Law of Arbitration, South African and International Arbitration*, 2010,

¹⁵¹ Ramsden (n 174 above) at page 5.

¹⁵² Arbitration Act No. 42 of 1965.

arbitrator, a person from the panel of arbitrators established in the terms of section 21¹⁵³.

4.4. National Water Act

The NWA provides the legal framework for the effective and sustainable management of our water resources. The NWA aims to protect, use, develop, conserve, manage and control water resources as a whole, promoting the integrated management of water resources with the participation of all stakeholders¹⁵⁴.

The NWA provides mechanisms for the ADR¹⁵⁵. It states that the Minister may at any time and in respect to any dispute between any persons relating to any matter contemplated in this Act, at the request of such a person involved or on the Minister's own initiative, direct that the persons concerned attempt to settle their dispute through a process of mediation and negotiation.

It is submitted that in terms of section 150(1) the ADR mechanisms can be utilized and even litigated as stated. This position is similar to section 17 of the NEMA as discussed above¹⁵⁶. In terms of the NWA the minister or one of the parties of the dispute can request that the matter be referred to conciliation or mediation, as the case may be. It is important to note that similar to section 18, the NEMA conciliation and mediation are used interchangeably¹⁵⁷.

Section 150 (1) confers responsibility¹⁵⁸ to the Government to actively assist any person who wants a water related dispute to be resolved¹⁵⁹. Subsection 150 (1)

¹⁵³ Section 21 makes provision for the establishment of the panel that will render facilitation, conciliation, arbitration or investigation services. The department of environmental affairs appointed arbitrators, a list can be found at www.environment.gov.za/panelofmediatorsandarbitrators [Accessed 09-06-2016].

¹⁵⁴ Section 2 of the NWA.

¹⁵⁵ Section 150 of NWA.

¹⁵⁶ Section 17 (n 129 above).

¹⁵⁷ Section 17 (n 139 above).

¹⁵⁸ In s 13 of the Restitution of Land Rights Act 22 of 1994 it is the Chief Land Claims Commissioner who has the discretion to refer the matter to mediation. In s 22 of the Development Facilitation Act 67 of 1995, while a party can apply for mediation, it is the tribunal which has the discretion to allow it. In s 18(3) of the Land Reform (Labour Tenants) Act 3 of 1996 it is the Director-General who alone can decide to appoint a mediator. In s 7 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 it is the municipality which alone decides on mediation.

¹⁵⁹ Section 2 of NEMA states that the principles set out in this section apply throughout the Republic to the actions of all organs of state that may significantly affect the environment and-

(a) shall apply alongside all other appropriate and relevant considerations, including the State's responsibility to respect, protect, promote and fulfil the social and economic rights in Chapter 2 of the Constitution and in particular the basic needs of categories of persons

empowers the parties to settle their dispute through the ADR mechanisms. As discussed above, it admitted that the Government has a huge responsibility in so far as it relates to effecting the ADR provisions in the NEMA and other pieces of environmental legislation¹⁶⁰.

4.5 Interim conclusion

South African environmental legislation provides for the ADR mechanisms. The provisions discussed above indicate that parties of a dispute of any kind may utilize the ADR mechanisms. The NEMA and other subordinate environmental legislation provides for various ADR mechanisms. As stated above, the legislative provisions confer a positive obligation to the Government to resolve any environmental dispute through the ADR mechanisms. This is so because in terms of section 2 of NEMA the Government is the custodian of the environment.

disadvantaged by unfair discrimination. Also section 21 of NEMA states that the minister must appoint a panel of mediators to give effect to the ADR provisions in the Act.

¹⁶⁰ *Ibid.*

Chapter 5: Conclusion and Recommendations

5.1 Conclusion

Environmental disputes between parties are unavoidable. However the manner in which such disputes are resolved is important as the outcome thereof can have various consequences. The first question this paper seeks to answer is; what the different ADR mechanisms are?

The ADR comprises of various dispute resolution mechanisms. These mechanisms are negotiation, conciliation, mediation and arbitration. These ADR mechanisms are informal and flexible dispute resolution mechanisms. Environmental disputes are technical and complex in nature. The ADR mechanisms are suited for such complex environmental disputes and provide parties with privacy and confidentiality. These ADR mechanisms are not formal like litigation that has rules and complicated procedures.

These ADR mechanisms can be used interchangeably if negotiation fails, the parties can employ conciliation or mediation in resolving their dispute. Also the parties can make use of arbitration in the event that conciliation or mediation fails. With arbitration the parties agree on the terms of the arbitration. The parties can also agree to be bound by the decision of the arbitration proceedings.

It is submitted that these ADR mechanisms can be used at different stages of the dispute. It is submitted that during the early stages of the dispute, negotiation must be employed as a means of resolving a dispute before the dispute can escalate. It is submitted that the ADR mechanisms discussed above, when optimally utilized, can resolve environmental disputes.

The second question this research seeks to answers is: what is the nature and essential requirements of the ADR? The ADR mechanisms stated above share a common feature in that they are informal. The ADR has been utilized successfully in certain fields of law. It is the main dispute resolution mechanism in labor law, or at least the first attempt in resolving a dispute. It is submitted that environmental disputes need a dispute resolution mechanism like the ADR. The ADR mechanisms are informal, private and they allow direct participation of the parties in resolving a dispute.

The ADR mechanisms provide parties with a less expensive means of resolving a dispute. These features make the ADR mechanisms suitable for resolving environmental disputes and provide an environment where parties can have respectful face-to-face engagement through a third party, as opposed to the arms-length combat by intransigent opponents. With complexity, that often comes with environmental disputes, the ADR mechanisms are better equipped and suitable to resolve such intricate disputes.

The features of the ADR mechanisms, as discussed above make these ADR mechanisms suitable for resolving environmental disputes. As discussed above, litigation is expensive and can take a long time before a dispute is resolved. It is thus prudent for environmental disputes to be resolved by one of the ADR mechanisms. Environmental disputes are often complicated. By using one of these ADR mechanisms the complexity of the dispute can be alleviated. It is submitted that the ADR mechanisms are also suitable for multiple parties. Environmental issues often involve various and multiple parties, such as Government departments, NGO'S and private parties at the same time in the same dispute.

The research also sought to answer the question on whether there is an influence of international environmental law on South Africa's environmental legislation.

The Constitution of the Republic of South Africa recognizes the international law. The constitution and the NEMA provide a general framework through which South Africa implements international environmental legal instruments. The influence of international environmental law also originates from the fact that South Africa is part of the international community. It also stems from the fact that South Africa's constitution not only recognizes international law, but is bound by the international agreements.

South Africa ratified certain international environmental legal instruments, which provides for the ADR mechanisms as a preferred means of dispute resolution. It is submitted that South Africa is bound by those international environmental legal instruments it ratified and therefore must uphold them and apply them. South Africa implemented the provisions of these international environmental legal instruments. The World Heritage Convention and the Convention on Biodiversity respectively were enacted into the law of the Republic of South Africa. The adoption and

incorporation of these international environmental legal instruments demonstrates the influence that the international environmental law has on South Africa. The incorporation of these two international environmental legal instruments is also demonstrated that South Africa does not only recognize the principles of international law, but implements its provisions in the Republic of South Africa.

It is important to note that South African courts have welcomed the utilization of the ADR mechanisms by the parties that have already commenced litigation. As discussed above, the Courts have decided to order parties which have already commenced with litigation to move to the ADR mechanisms. In recognizing the fact that the ADR mechanisms have the potential to resolve disputes, the court in the case *MB v NB*¹⁶¹ reduced or capped the fees to be recovered by attorneys in the matter. The Court, in this matter, reasoned that because the attorneys have failed to refer the case to be resolved by the ADR mechanisms¹⁶² they do not qualify for remuneration.

The Constitutional Court has held its decisions stated above, that parties that dispute must utilize the ADR mechanisms. The Constitutional Court attributes to the fact that litigation is expensive and parties can be involved in long protracted litigation without finding a resolution for their dispute. This show that, even in court, where litigations happen frequently, the ADR mechanisms have been recognized as having the necessary potential to resolve disputes. It is submitted that the ADR mechanisms can resolve environmental disputes.

The NEMA is the umbrella environmental legislation. Chapter 4 on NEMA provides for various ADR dispute resolution mechanisms. It lists conciliation, mediation, and arbitration as dispute resolution mechanisms through which an environmental dispute should be resolved. It is important to note that the responsibility to refer any dispute to the ADR rests with Government officials such as the MEC or a Minister. The NEMA provisions do not preclude any party to refer the matter to the ADR; however that referral must still go through the Government officials such as the Minister or the MEC.

¹⁶¹ *MB v NB* (n 16 above) at paragraph 60.

¹⁶² *MB v NB* (n 16 above) at paragraph 61.

It is submitted that with the lack of expertise from the Government officials in so far as it relates to the ADR mechanisms, the responsibility bestowed upon by the NEMA and the Government may not be properly executed. The lack of expertise in the ADR mechanisms may frustrate the implementation of these NEMA provisions.

Similar to the NEMA, the NWA also provides for the ADR mechanisms. The NWA also provides that the referral of a dispute for the ADR be done by the Minister. Similar to the NEMA, the parties cannot, on their own initiative, refer the dispute to the ADR.

5.2 Recommendations

5.2.1. South African courts

It is apparent that South African courts encourage the use of the ADR mechanisms in resolving disputes. It is suggested that the court should not allow parties to start with litigation without having exhausted the ADR mechanisms. As seen above, the South African courts have ordered parties in litigation to go back and attempt to resolve the dispute with the ADR mechanisms. It submitted that the courts can enforce that position.

Environmental disputes are often complicated. It is also recommended that an establishment of an environmental court is necessary. A specific court, which deals with environmental disputes, would help in resolving the environmental disputes.

5.2.2. The role of the Department of Environmental Affairs (DEA)

In terms of the NEMA the department is the custodian of the environment. The DEA has failed to use the ADR mechanisms in resolving environmental disputes. Being the custodian of the environment in South Africa, any environmental dispute should also be the DEA's responsibility. Although the DEA accepts the advantages that the ADR mechanisms have over litigation, this is not commensurate with its actions¹⁶³. It is suggested that the DEA should start implementing the dispute resolution provisions in the NEMA.

¹⁶³ See the department's Environment Sector Conflict and Dispute Resolution www.environment.gov.za/projectsprogrammes/environment_sectorconflict_disputeresolution [Accessed 15-06-2015].

The DEA should also look at utilizing the expertise of the panel of arbitrators that the Minister appointed in terms of section 21 to handle environmental dispute resolution¹⁶⁴. As the custodian of the environment the DEA is the one that should use, advocate and encourage the use of the ADR mechanisms. The DEA should also conduct public workshops and educate the communities about the importance of the ADR mechanisms and how relevant the ADR mechanisms are to environmental dispute resolution and management.

5.2.3. A possible NEMA amendment

The NEMA does not give clarity as to when the parties should refer their dispute to the ADR. It is the court, which ordered the parties, even when litigation has already commenced, to utilize the ADR mechanisms. This makes the ADR ineffective, as parties have already tested the strength of their case against each other. An amendment to the NEMA, clarifying the position with regards to when the ADR mechanisms must be used, is thus necessary. It is suggested that such an amendment would not take away the discretion vested in courts.

Chapter 4 about the NEMA confers responsibility to the MEC or Municipal Council or the Minister to refer the dispute for the ADR. This statutory position limits the liberty of the parties to refer the dispute to the ADR. This statutory position may further frustrate the speedy resolution of environmental disputes, which are by their own nature, complex. It is the feature of the ADR mechanisms that the parties are at liberty to refer their own dispute. It is suggested that such an amendment would decentralize the power given to the MEC or Municipal Council and the Minister.

The South African High Courts have the discretion to regulate their own processes. This includes the discretion to order the parties to attempt to first resolve their dispute by means of the ADR mechanism. It is suggested that an amendment to the NEMA is necessary. This amendment would mandate that the parties first attempt to resolve an environmental dispute through the means of the ADR mechanisms. Such an amendment would mean that South African courts do not adjudicate on the environmental dispute until the parties have attempted to resolve the dispute through one of the ADR mechanisms.

¹⁶⁴ The Panel of Arbitrators and Mediators www.environment.gov.za/panelofmediatorsandarbitrators [Accessed 15-06-2015].

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