AFRICA MEDIATION ASSOCIATION

# BRIEFING PAPER 3:

# A DISCUSSION OF THE FORMAL CASE PRECEDENT IN SOUTH AFRICA ON CUSTOMARY LAWS: A TALE OF OVERLAPPING LAWS

**This briefing paper results from a webinar held in April 2024 that aimed at discussing the formal case precedent in South Africa on customary laws of which mediation is a crucial component. The webinar was presented by academic researcher Macdonald Rammala, moderated by Dr. Agada Elachi, and hosted by the Africa Mediation Association (AMA) and Mediators Beyond Borders International (MBBI).**

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## INTRODUCTORY REMARKS

The webinar was opened with a remark on how **mediation**, as an alternative dispute resolution model, **has come to stay**, having been embraced on a wide scale, both informally and formally, in Africa. When talking about African meditative practices, these are not practices that were lent from the Western world but rather **practices that Africans have exercised over the years**. These practices were previously carried on in informal ways and have recently benefited from education, colonisation, and globalisation. Meditative practices now specify what the process of mediation is, how to open a mediation session, and include factors such as confidentiality, privacy, integrity, and impartiality. Mediation is not only applicable within the context of daily lives, private settings, or business settings; it has also been taken to the level of leadership of the regions and the continent.

**SPEAKER:**

**MACDONALD RAMMALA**

**Social Sciences and Law Researcher at the College of Law of the University of South Africa**

Macdonald Rammala is currently pursuing a postgraduate qualification with a special focus on African jurisprudence and African indigenous laws. Mr. Rammala has presented at both South African and international academic conferences such as in the United Kingdom, China, Ethiopia, and Nigeria. He has been involved with community-engaged participatory research for over 10 years and has received multiple awards in the field of research within the context of collaborative community work. Mr. Rammala has several publications of his own and together with established scholars in multinternational interdisciplinary fields.

## SCHOLARLY THOUGHTS ON MEDITATIVE PRACTICES

- In South Africa, the Truth and Reconciliation Commission highlighted meditative practices which to some extent contributed to societal reconciliation.

- Section 211 (3) of the Constitution of the Republic of South Africa 1996 encourages formal courts to apply customary laws in line with the Constitution and legislation dealing with customary laws. Mediation remains the core of customary law.

- In an African context, mediative practices on various disputes consider cultural practices, restorative justice, rebuilding the social balance, and ceremonies which differ from one context to another.

## THE LINK BETWEEN MEDIATIVE PRACTICES AND CERTAIN LEGISLATIONS IN SOUTH AFRICA

- Traditional Courts Act No 09 of 2022 (focusing on traditional courts in South Africa).

- Traditional Leadership and Governance Framework Act 41 of 2003.

- Traditional and Khoi-San Leadership Act 3 of 2019.

- The Black Administration Act and Amendment of Certain Laws Act 28 of 2005.

- Recognition of Customary Marriages Act 120 of 1998.

- Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

- Commission for Conciliation Mediation and Arbitration (created by the Labour Relations Act, 1995.

- Customary Initiation Act, 2021.

# FORMAL CASE PRECEDENT ON CUSTOMARY LAWS

- Kievitz Kroon Country Estate (Pty) Ltd v Mmoledi and Others: highlighted the human dignity of "ancestral calling" and the values aimed at achieving equality, rights, and freedoms in this instance.

- Mabena v Letsoalo 1998 (2) SA 1068 (T): stated that the absence of the consent of the father of an adult man in Lobolo negotiations does not affect the validity of the marriage. The court further asserted that an independent adult man (the deceased) could not be disqualified from negotiating for the payment of Lobolo regarding his chosen bride.

- Mabuza v Mbatha 2003 (7) BCLR 43 (C): the court disagreed with the notion that the cultural practices of Ukumekeza in customary marriages should not change. Instead, they should change with the times.

- MN v MM 2013 (4) SA 415 (CC) [also reported as Mayelane v Ngwenyama 2013 (8) BCLR 918 (CC)]: indicated that the consent of the first wife for the second wife in Xitsonga marriage is required and valid.

- Bhe v Khayelitsha Magistrate 2005 1 BCLR 1 (CC): challenged the primogeniture rule.

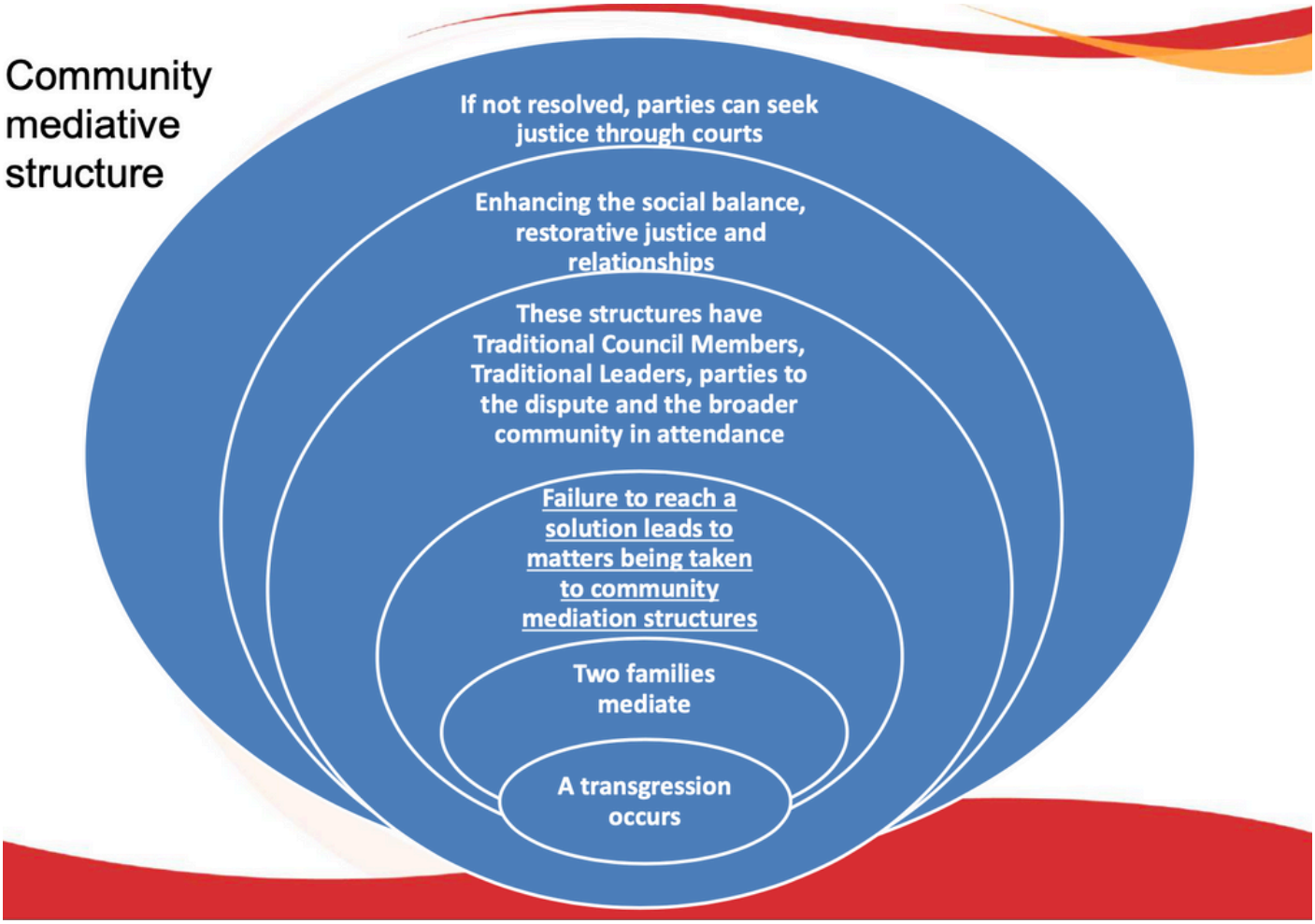
After sharing some examples on previous cases on customary law, the speaker questioned the audience as to whether the court could have arrived at a different solution or resolution had mediation been part of it. According to Mr. Rammala, a closer look into these cases shows that **meditative practices have played a critical role** whereby researchers from the courts had to go into communities and learn about mediation, cultures and the way things are done outside of the formalities of a court.

## REFLECTION ON MEDIATIVE PRACTICES

- In South Africa, community dispute resolution practices reflect mediative contexts.
- Culture cannot be eliminated from these processes as they often utilise idiomatic expressions and cultural protocols.
- Lekgotla, as a mediative practice, is also an authentic African Indigenous process of resolving disputes which is centred on a collaborative community system of negotiation, mediation, and reconciliation.
- This mediative practice embraces a humanistic value system founded on the interconnectedness of human beings.
- The practice is an inclusive group process that has the restoration of social equilibrium as its objective (restorative justice).

## OBSERVATIONS ON MEDIATIVE PRACTICES

- Legal pluralism, such as the hybrid legal system in South Africa, often encounters challenges with mediative practices embedded within the “unwritten laws” of many cultural groups.
- There exist constant perceptions to weigh these cultural mediative practices with “common law” and not the Constitution.
- In many African countries where colonialism, Apartheid and various oppressive strategies were implemented, mediative practices within various cultures were immensely affected and were passed down from one generation to the next.
- Although constitutions may guarantee access to justice, the reality proves the opposite where the indigents lack the means to access justice.




Mr. Rammala conducted research in various communities in East, West and Southern Africa, and summarised his findings in the above structure. In this relationship, it is important to note that **ancestral ties should also be included**. In this respect, Mr. Rammala added that it is not just about the individual but also about those who were there before them.

In addition, **if the transgression is not resolved, parties are free to seek justice through formal courts.** It is not a prerogative that people should be confined to the meditative practices within their communities. Like other African countries such as Nigeria and Kenya, South Africa has **hybrid legal systems** where people can seek justice elsewhere if they are unhappy about a certain process or outcome.


Images of research done by Mr Rammala over 10 years with mediative groups within various communities, both in formal settings and in their villages.


Various awards and accolades from national and international structures that Mr Rammala has received.

# DISCUSSION

After the presentation, the audience engaged in a Q&A session where topics such as customary laws and practices were discussed. In particular, **customary laws and practices such as Ubuntu and Lekgotla** were the subject of inquiry by the members of the webinar audience. Mr Rammala explained that **Ubuntu** describes the idea that **our humanity is connected with the humanity of others.** In 1993, when South Africa drafted its first democratic constitution, Ubuntu was included in the document. However, the philosophy was not included in the 1996 constitution. When the late archbishop Desmond Tutu was tasked with leading the Truth and Reconciliation Commission (TRC), the majority of South Africans were in favour of an “eye for an eye” approach as this was a time when people were transitioning from apartheid into a democratic era.

There are also scholars who challenge Ubuntu given the current context in South Africa in terms of governance and justice and the unequal possibility to afford lawyers. Notwithstanding, the word Ubuntu still plays a critical role in South Africa, especially in terms of justice, being reflected in Chaper 2 of the Bill of Rights. In addition, drafts of the time of the TRC also confirm its importance in that era. Questioned on how the philosophy of Ubuntu could be applied in the United States of America, Mr Rammala stressed that transformation must happen first so that the humanity of others can truly be embraced.

Asked to describe the **Lekgotla** process and how it works, Mr Rammala explained that it is a **community dispute-resolution practice**, centred around negotiation, reconciliation, restorative justice, and social justice. Lekgotla is when people in the community, through their traditional leader, come together to resolve a dispute that has occurred between the aggrieved parties, both the victim and the perpetrator. Both families would first sit together and try to resolve the matter. When they fail to resolve the matter, they then elevate it to the village council, where the chief, the king, or the queen is also a part of the sitting. Lekgotla is about **restorative justice** and aims at restoring the status quo. Mr Rammala also stressed that **there is also an ancestral component** in which previous and future generations are also taken into account.

Regarding **the practice of mediation in South Africa**, Mr Rammala stated that it is difficult to ascertain the **statistics on how effective mediation has been** in helping in the resolution of disputes because many meditative practices take place in different villages and places across South Africa and across the African continent and many of them are **not documented like formal cases are**.

On the same topic, the audience questioned how the **rules of courts** have been framed or amended in such a way that **traditional dispute resolution mechanisms are recognised**. In the case of South Africa, the constitution states that courts are allowed to revert to customary laws as long as it is in line with its legislation. Again, the challenge for many African countries lies in the fact that many customary laws are unwritten and differ from family to family. A webinar participant commented on the importance of looking at conflict and conflict resolution mechanisms from a cultural lens.

The audience also posed questions regarding the specific **application of mediation in the resolution of crime and land disputes** in South Africa. In countries like Zimbabwe, South Africa, Kenya, and Ethiopia, **there are limitations** in the use of mediation where issues such as rape or high treason exceed the capacity of Lekgotla, for example. Then, formal court processes, including law enforcement, take place.

Regarding **land disputes**, these have gone to the Supreme Court but people often resort back to traditional mediation practices in order to implement the decisions of the Court. Mr Rammala concluded by saying that while there are modern practices, **the application of traditional practices cannot be disregarded**. It is an all-encompassing effort where dispute resolution always looks at how it can benefit the community and promote harmony.

In addition, for both traditional rulers and courts, the **principle of neutrality** needs to be upheld when delivering judgements. However, while African meditative practices are slowly being infused into formal processes, the acknowledgement is not being given as shown by the lack of infrastructure and lack of compensation for traditional leaders.

At the end of the discussion, the presentation of Mr Rammala was commended on how it agitated the minds of all participants. In addition, the audience was challenged with questions such as whether formalising mediation would mean losing its flexibility.

To conclude, it was reaffirmed that African mediative practices have come to stay and that the relationship between them and the formal judicial systems must be fine-tuned **to ensure it works well for all.** A participant finalised by stating that "we keep on doing our best because we are Africans, despite our cultural differences".

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## CONTACT US

The Africa Mediation Association (AMA) is a non-profit organization that is legally registered in Kenya. AMA works collaboratively with citizens, public and private institutions to promote mediation as a viable, responsive, and amicable dispute resolution model on the African continent.

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