Transformative Methodologies for Conflict Resolution

1 Introduction and background

Conflict resolution is embedded with complexities and different theories. In the Western systems, a formalised epistemology of conflict resolution gained traction with various known scholars in the 1950s. However, now in the twenty-first century, having moved past the humble beginnings of Western conflict resolution, it must also be noted that indigenous tribes across the world have for thousands of years used different communal methods to resolve conflict in a participatory manner for the benefit of everyone. Using such methods, we have seen the abolition of apartheid in South Africa for the benefit for all and the avoidance of civil war, upholding the principle of *ubuntu*, and the realisation of democracy. In a world that has moved on from World War II, it is important to use existing knowledge and theory and adapt it to the circumstances of current global conflicts. Consonant with the concept of constitutional axiology, adaptation to changes in social, political and economic circumstances ensures that the law, rule of law, and theory of conflict resolution remain relevant. Moore's five sources of conflict, namely interest conflict, structural conflict, values conflict, information conflict and personal conflict underpin the foundations of conflict. Thomas Kilmann's five conflict-handling styles guide a specific strategy employed such as collaborate, compromise, compete, accommodate and avoid to overcome conflict. These tactics for overcoming conflict are still used in daily relationships to defeat conflict. Using transformative methodologies to resolve conflict is the key to unlocking sustainable eradication of conflict to achieve lasting relationships without conflict impasses. Applying the rational theory and the game theory of problem-solving to the actors in known conflicts such as the war between Russia and Ukraine does not overcome the complexities of social, political and economic issues. Using a critical approach to the war complexities would go beyond the known glass ceilings and conventional paradigms of thinking to reveal infinite possible solutions. Deconstructing the notion of "just institutions" for resolving conflict as well as just being ideally suitable is technically difficult because there is a plethora of challenges that confronts these different institutions on a daily basis, and a handful of solutions also triggers more burdensome challenges to overcome. This note uses an explorative and investigative approach to propose "just" recommendations for institutions to become sustainable in maintaining conflict eradication and management of complex issues in overcoming conflict. The note's recommendations pertain to particular institutions, mobilising private and public organisations to work harmoniously and

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collaboratively in providing mechanisms to overcome conflict through sharing resources and knowledge. The note encourages the upholding of treaties and conventions in the enforcement of foreign arbitral awards, and ensuring that there is no conflict of law or impossibility of enforcement before choosing the arbitral seat for determination of conflict. Compensatory mechanisms to address harm caused should also address emotional loss; compensatory functions for restoration, and reconciliatory methods do not operate in silos and should not be isolated from each other.

For example, companies' carbon emissions have had a direct impact on climate change, causing more natural disasters affecting countries, economies and losses of livelihood. However, mere compensation does not end the violation of carbon emissions regulations. Such violations may be made deliberately for economic gain, which may outweigh the paying of penalties and fines, meaning that more initiatives need to be undertaken to achieve sustainable economies and livelihoods, and not merely maximum profits that disregard expanding inequality between people and multinational companies.

The note explores different types of conflict, conflict theory, and cases from arbitral forums in South Africa, the African region, and the Permanent Court of Arbitration with the aim of enhancing and improving conflict resolution methodologies.

In the 1950s, alternative dispute resolution (ADR) gained momentum in Western systems of knowledge. However this interdisciplinary phenomenon (Hensler "Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System" 2003 108 *Penn State Law Review* 165) has existed for centuries within indigenous cultures (Mkhize "Conflict Resolution: An African Style" 1990 28 *Family and Conciliation Courts Review* 71). In a different vernacular, meetings held among different tribes and communities were termed "lekgotla" or "induna", which were translated as community meetings and gatherings (Olowu "Indigenous Approaches to Conflict Resolution in Africa: A Study of the Barolong People of the North-West Province, South Africa" 2017 1(1) *Journal of Law and Judicial System* 10). When any member of the tribe or community had a dispute with other tribal members, the elders would meet with the tribal members to seek a resolution (Kariuki "Conflict Resolution by Elders in Africa: Success, Challenges and Opportunities" (9 July 2015) https://ssrn.com/abstract=3646985 or http://dx.doi.org/10.2139/ssrn.3646985 (accessed 2023-09-01)). There was respect and reverence for authority, wisdom and the ways of their culture (Rammala "Lekgotla and Idiomatic Expressions in Traditional Dispute Resolution: The Case of Makapanstad, North-West Province, South Africa" 2021 16(1) *International Journal of African Renaissance* 220). This meant there was a sacred circle of fostering healing and development to ensure succession and protection of cultural and tribal life (Seng "Restorative Justice: A Model for Conciliating Fair Housing Disputes" 2021 21 *Journal of Law in Society* 63). The concept of "circle justice" was also used by American communities to oust drug abuse and petty crimes taking place in small communities (Seng 2021 *Journal of Law in Society* 63). The community came together to support both victims and perpetrators causing the conflict, and to protect the victims from harm

(Seng 2021 *Journal of Law in Society* 63). The concept of circle justice is thus meant to protect all parties in the community who are involved and affected; to leave any person out of the process or isolated would mean weakening the collective tribe. The weakness of an individual was etched into the soul of the community as the weakness of the collective. This ethos reflects the concept of *ubuntu*, meaning that actions are taken for the collective good and not for individual benefit (Aiyedun and Ordor "Integrating the Traditional With the Contemporary in Dispute Resolution in Africa" 2016 20 *Law, Democracy and Development* 154). These sacred principles were encapsulated in tribal living and living for each other devoid of selfishness. In modern Western civilisations, these sacred principles have been lost, in part owing to social media and living in isolation from each other, which was exacerbated by the COVID-19 pandemic. It is still pertinent to use aspects of circle justice that work both in tribal and urban communities to mend the brokenness within communities and eliminate conflict within families, communities and homes. Using cultural practices of ADR to overcome current barriers to resolution of conflict becomes an important pursuit (Maria "A Re-Assessment of the Impact and Potency of Traditional Dispute Resolution Mechanisms in Post-Conflict Africa" 2017 6 *International Law Journal* 1). The theory of circle justice and community living encapsulates the notion of an African proverb: if you want to "travel fast, then you travel alone" "but if you want to travel further, then you go together". We need to garner the strength of the collective to move towards long-term sustainability and the fostering of goodness, eradicating conflict and living peacefully for the betterment of the collective global community.

The notion that conflicts are part of daily life is an accepted phenomenon in society (Shell "Bargaining Styles and Negotiation: The Thomas-Kilmann Conflict Mode Instrument in Negotiation Training." 2001 17(2) *Negotiation Journal* 157–159. See also Moore "The Mediation Process: Practical Strategies for Resolving Conflict (2014) 143–146). Conflict arises daily and is resolved in different ways through a multitude of ADR mechanisms – from internal squabbles in family households resolved in private forums, to international conflict being facilitated by international organisations (Majinge "Emergence of New States in Africa and Territorial Dispute Resolution: The Role of the International Court of Justice" 2012 13 *Melbourne Journal of International Law* 462). Conflict has become a natural part of daily life as we know it, breathe it, tolerate it and live with it, and people have adapted accordingly. Despite multiple mechanisms to help reduce conflict, we still live in times of persistent conflict within the African region and globally (Price "Alternative Dispute Resolution in Africa: Is ADR the Bridge Between Traditional and Modern Dispute Resolution" 2018 18(3) *Pepperdine Dispute Resolution Law Journal* 393). Although there are more platforms for the resolution of conflict arising in commercial trade agreements, and more advances in technology such as artificial intelligence mechanisms and machine-generated software to filter and reduce conflict, conflict is still present and an obstacle to peace. It becomes necessary to unpack these active barriers to conflict resolution (Ijeoma "Transformation of Dispute Resolution in Africa" 2015 2(2) *International Journal of Online Dispute Resolution* 77).

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Challenges exist to overcoming conflict permanently. These include the fact that each matter is unique and special, so that even when conflict is overcome, disputes do not cease in their entirety but continue and require specialised forums and progressive techniques for complete and sustainable resolution. As mushrooms arise in damp and wet conditions, conflicts keep mushrooming despite idyllic forums and facilitators to resolve them. To treat damp for good, the environment needs to change, so as to foster different conditions of growth and opportunity. Similarly, conflict needs to be removed from the ideal conditions that foster more conflict; the energy of the environment needs to change or be transformed. Private dispute-resolution forums are expensive; they are meant, not for lay people, but for private companies and wealthy elite led by lawyers with impeccable legal education, training and expertise; they need their legal representatives and advisors to explain the rules and procedures of these forums and to broker deals that are ideal for business longevity. Skillful and accurate use of language plays a pivotal role in translation, creating a clear and distinct narrative, an active voice with a particular purpose, and adequate legal or consultative representation. In this manner, it can promote fairness and equity. The importance of accurate language cannot be denied; more positive and active measures to ensure precision in translation and interpretation of foreign languages in particular forums. The question that arises constantly is how the notion of ADR can be extended to community entities, tribal entities and other people who require it but do not have the means to pay for it?

2 The current system and tools in place

When we look at the beginnings of ADR, we must acknowledge that the terminology originated in Western civilisations and gained momentum in the 1950s among American scholars; it gained traction worldwide in multiple schools of thought, fostering a plethora of scholarship. However, the concept of ADR is deeply embedded in various ancient civilisations where it was known by different terms. Ancient Romans, Greeks and Indians had forums for the resolution of disputes that were activated within their hierarchy and tiers of governance. The elements of trust, community growth, well-being and collective needs were the focus of these civilisations with the aim being to foster harmony and sustainable living.

3 Challenges in the South African and African context

In South Africa, a challenging terrain is the area of cybercrimes, which have ballooned as cybersecurity laws are inadequate and there is insufficient cybersecurity to prevent crime. Instead, a plethora of sophisticated cybercriminal activities take place, making banking institutions unsafe for banking as bank accounts and online banking have become a target for criminal penetration (Hoffman “The Contribution Mediation Can Make in Addressing Economic Crime in Corporate and Commercial Relationships in South Africa” (PhD dissertation, Stellenbosch University) 2019 i-456 at 1–9). Despite being in the fourth industrial revolution in which technology is supposed to be at the forefront of development and of the protection of societal needs, moving our civilisation into a future formed by the

advancement of technology, we are still victims of technological manipulation and crime. There is a dire need for the government to do more, and to tighten security measures and laws against hacking by advanced criminals. These crimes lead to disputes and conflicts between users and the banks and with security companies. These are difficult to resolve without monetary compensation as a settlement for losses suffered.

It is apparent in South Africa that the government needs to play a more active role in educating and bringing awareness to communities in resolving conflict for the common good of everyone. Unfortunately, current circumstances include a global recession, economic downturn, rising inflation and an energy crisis on the cusp of total breakdown. It becomes pertinent to create and build a future that is relevant to the changing and challenging circumstances in which we find ourselves. Building a forward-thinking future now by defeating conflict and the metaphorical shackles that bind people has become urgent for the preservation of relationships and humankind.

Conflict can threaten to tear down nations as we have seen in South African unrest during the riots in July 2021, which exposed factions in political parties and uprisings against the government caused by people's growing dissatisfaction with the government's lack of action to redress poverty, unemployment, inflation, the energy crisis, crime, corruption and general displeasure over the mismanagement and misappropriation of public funds. It is essential to emphasise that conflict causes lasting damage to relationships, and territorial land disputes invariably affect nature too. Territorial land disputes are a universal age-old conflict and are prevalent on the African continent. There have been wars between neighbouring States, as well as State conflicts over land in the fight for natural resources, livelihoods and stability (Bosman "The PCA's Contribution to International Dispute Resolution in Africa" 2014 25(2) *Stellenbosch Law Review* 308). Raw natural resources and commodities such as oil, diamonds, gold and iron ore bring wealth and power, causing nations to thrive and inevitably creating jobs, allowing locals to thrive and live off the land. There are no easy solutions to demarcating land and resources; it has been said that fish and animals do not understand territorial boundaries, as they will wander the vast oceans without the limitations or boundaries that have been created by mankind (Okonkwo "Maritime Boundaries Delimitation and Dispute Resolution in Africa" 2017 8 *Beijing Law Review* 55). It has also been stated that there is enough land and resources for every person on earth but insufficient wealth for the greed of man. It is the greed of man (more specifically the greed of nations and the greed of individual men) that one navigates to avoid the shedding of blood over resources that never belonged to one person to begin with and were the reward of the land for everyone. Although we have seen periods of conflict and peace throughout the ages, it is submitted that the greed of man has grown over time. Greed creates animosity, unnecessary harm and destruction to nature and the environment with negative consequences for global warming and the rise of natural disasters and catastrophic phenomena. The only way to transform conflict into peace is to transform the thinking and flaws of man into strengths and virtues by tapping into insights gained.

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4 Transformative methodologies

Transformative methodologies change existing systems into new systems and amend systems to enhance and create effective, improved dispute resolution mechanisms. However, tensions exist in pluralistic societies between indigenous ADR practices and Western practices: how does one bridge the gap? Some have argued for the continuation of separate systems owing to the difference and variation in normative ideals. Choosing attributes of indigenous ADR achieves restorative, retributive, transformative, procedural and participative justice, as elders and communities partake in active discussions. The repercussions and consequences are for both the individual and the tribe; solutions are possible not only for the individual but also the collective, as the community and collective living is paramount to the sustainability and survival of tribal communities and practices. Indigenous communities depend on each other to partake in the community to fulfil their role. It has been stated that a weakness of an individual in a tribe is a weakness of the collective. This means that responsibility and accountability is pursued mercilessly by the collective, prompted by the ethos postulated in the African proverb. A simplistic aspect of tribal inclusivity in overcoming conflict is that individuals actively and meaningfully participate in addressing conflict. The approach is participatory, postulating equality and allowing everyone to be heard. No behaviour that is combative or disrespectful to the tribe or individuals is tolerated. In some instances, the tribe would also pray over the victim and perpetrator when wrongful actions harmed the collective or individual of the tribe.

5 Doing conflict differently

Upon deep reflection, the question posed is how we address or redress the tools of resolving conflict resolution. Do we throw out the current methodologies and tools, or do we reinvent them, or do we change as a nation? What would we design if we had a limitless spectrum of design? What would we keep, what would we improve, and what would we destroy in totality? The quest requires honesty about lasting solutions and how one would go about creating them using a sustainable bridge between the Western, Eastern and African epistemologies of long-term justice achieved through ADR mechanisms that benefit the collective. Slocum-Bradley argues for a "meta-theoretical shift in conflict engagement and transformation" (Slocum-Bradley "Relational Constructionism: Generative Theory and Practice for Conflict Engagement and Resolution" 2013 1 *IJCER* 114). The essential approach is based upon the fostering of relationships including with the self and others and harnessing skills to build "generative relationships" (Slocum-Bradley 2013 *IJCER* 114). The Action Research for Transformation of Conflict [ART-C] is an informative step process and is also cyclical for a transformative, innovative and pragmatic approach to resolution. It is necessary to consider each step as follows: Step 1: Formulate Action-Research Questions and Goals; Step 2: Conflict and Peace Analysis; Step 3: Vision Building; Step 4: Planning; Step 5: Implementation and Monitoring; Step 6: Evaluation and Reflection (Slocum-Bradley 2013 *IJCER* 119). This stepped process is embedded within the human experiential learning of

"personal, relational, structural and cultural" dimensions of human experience (Slocum-Bradley 2013 *IJCER* 121). The aim of the cyclical process is to move away from human relational violence and destruction lived by human experience towards harmony and peace (Slocum-Bradley 2013 *IJCER* 122). Vision building assists parties to reimagine how a problem is to be resolved, motivating for collective community peace and building a new story (Slocum-Bradley 2013 *IJCER* 122). An important ethos is that in our differences we recognise there are similarities, which creates the space for collaborative solutions (Slocum-Bradley 2013 *IJCER* 125). When we analyse polarities, we see that in opposites we appreciate positivity over the negativities. Similarly, in confronting conflict and the infliction of violence and harm – that is, negativity – people appreciate the next positive phase of working towards, peace, harmony and resolution of conflict, by eradicating violence and harm to the community, tribes and global community.

Transitional justice has been used as a method to resolve conflict through the creation of commissions of inquiry, sometimes successfully, and in other instances unsuccessfully (Pincock and Hedeen "Where the Rubber Meets the Clouds: Anticipated Developments in Conflict and Conflict Resolution Theory" 2016 30 *Ohio St J on Disp Resol* 431 438). Pincock and Hedeen postulate that theorists studying conflict resolution should focus on certain salient aspects:

> "[S]eek to comprehend the dynamics of intractable conflict – the nature, number, and characteristics of the parties, as well as their relationship to each other, the number, intensity, and complexity of the issues; the role of context, identities, audiences, intermediaries, and time, among other dimensions – in efforts to explain their origins and offer hopeful prescriptions for their transformation toward tractability." (Pincock and Hedeen 2016 *Ohio St J on Disp Resol* 439)

When parties are fixated on their positions, anti-solution, anti-solving the conflict, they become stubborn about the conflict, and delusional that it is unsolvable. It then becomes necessary to explore these aspects, to understand the fixed positions. It is apparent that parties change their position, when the consequences and impact of the conflict impact negatively on their daily lives, so that it becomes uncomfortable to make simple decisions, owing to the debilitating nature of the conflict that is unresolved. There is a natural progression to restorative justice working hand in hand with transformative justice to ensure the breaking and healing of impasses to overcome barriers to conflict resolution for lasting foreseeable futures.

6 A view of South African cases in the last two years relating to enforcement of arbitral awards and arbitral agreements

It is important to navigate the South African cases dealing with enforcement of arbitral awards and arbitral agreements because they speak to the effectiveness of our courts in aligning to ADR forums and the decisions reached. The courts uphold the sanctity of the principle of party autonomy.

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In the case of *Lukoil Marine Lubricants DMCC v Natal Energy Resources and Commodities (Pty) Ltd* ([2023] ZAKZPHC 31), the applicant was a company registered in terms of the laws of the United Arab Emirates in Dubai, and was a subsidiary of a holding company in Moscow, Russia. The respondent was a South African company. The applicant tried to enforce the contractual agreement between the parties in South Africa, but it was clear that once a dispute arose between the parties, the matter had to be ventilated before an arbitral tribunal in London as the seat of arbitration. Thus, proceedings had to be stayed until the matter in London was finalised and fully completed (*Lukoil Marine Lubricants DMCC v Natal Energy Resources and Commodities (Pty) Ltd supra* par 20). A court would not entertain an issue that was *res judicata*, meaning that a matter already adjudicated in another forum, as set out in the contract. A party cannot be heard at multiple forums as this would defeat the principles of justice as set out by the High Court of South Africa.

In *Momoco International Limited v GFE-MIR Alloys and Minerals SA (Pty) Ltd* ([2023] ZAGPJHC 764), the respondent tried to evade payment due in terms of an arbitral award by fabricating it, without proof or a factual basis, speculations about tax evasion committed by the applicant. The court referred with approval to two previous decisions. In the first, the apex court being the Constitutional Court stated that "public policy demands that contracts freely and consciously entered into must be honoured" (*Beadica 231 CC v Trustees, Oregon Trust* [2020] ZACC 13 par 83). The Constitutional Court further reiterated that parties are bound by their contractual agreements (the principle of *pacta sunt servanda*, which gives effect to the "central constitutional values of freedom and dignity") (*Beadica 231 CC v Trustees, Oregon Trust supra*). The court also referred to the Supreme Court of Appeal decision in *Telcordia Technologies Inc v Telkom SA Ltd* (2006 ZASCA 112 par 48), which upheld the principle of party autonomy, in that parties may choose arbitration as their mode of conflict resolution, and that party autonomy should not be disturbed, as it is akin to a sacrosanct principle in international arbitration model law. The court held that the arbitral award was enforceable and payable and that the respondent could not renege on the basis of mere speculation of criminal tax evasion.

The case of *GR Sutherland and Associates (Pty) Ltd v V&A Waterfront Holdings (Pty) Ltd* ([2023] ZAWCHC 67; 2023 JDR 1102 (WCC)) dealt with the issue of declaring an arbitration agreement void. In terms of the Arbitration Act (42 of 1965; s 3(2) provides: "The court may at any time on the application of any party to an arbitration agreement, on good cause shown– *(a)* set aside the arbitration agreement; or *(b)* order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or *(c)* order that the arbitration agreement shall cease to have effect with reference to any dispute referred."), this is only allowed upon "good cause" shown, which has not been defined but is onerous to prove. Usually, there is some form of duress or illegality involved. Binns-Ward J stated:

> "The provision allows for a negation of the usually hallowed principle of sanctity of contract often expressed by lawyers through the maxim *pacta sunt servanda* (viz. agreements are to be respected). Ordinarily, agreements competently concluded between contracting parties will be upheld and

> enforced by the court according to their tenor provided only that they are lawful and not contrary to public policy. It is for that reason that showing 'good cause' within the meaning of the subsection has been held to be a difficult case to make out." (*GR Sutherland and Associates (Pty) Ltd v V&A Waterfront Holdings (Pty) Ltd supra* par 9. See also *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) 391E–F. In *The Rhodesian Railways Ltd v Mackintosh* 1932 AD 359, it was said that "a very strong case" had to be proved (375). See also *Universiteit van Stellenbosch v JA Louw (Edms) Bpk 1*983 (4) SA 321 (A) 334A)

The court endorsed the firm position of upholding contracts that parties have willingly signed and consented to and on which they may not renege owing to a change in strategy or inability to pay what is due to the other party as set out in the agreement. The court referred to the Constitutional Court's dictum in relation to good cause, and reneging upon terms of an arbitration agreement as set out in section 3(2) of the Act as follows:

> "The question remains whether [the applicant] has advanced good cause to escape the agreement. The Act is not particularly helpful on what would make up good cause. Nor have our courts expressly defined good cause. It is, however, clear that the onus to demonstrate good cause is not easily met. A court's discretion to set aside an existing arbitration agreement must be exercised only where a persuasive case has been made out. It is neither possible nor desirable, however, for courts to define precisely what circumstances constitute a persuasive case." (*De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being* [2015] ZACC 35 par 36)

The court reiterated the position, which is still unclear, about the demarcation of the term "good cause", and stated that courts look at the consequences caused by setting aside an arbitration agreement and the undue prejudice caused. Parties should not easily be able to get out of the contractual obligations of arbitration agreements, as it would destroy the principle of party autonomy.

The Constitutional Court further emphasised "Absent infringement of constitutional norms, courts will hesitate to set aside an arbitration agreement untainted by misconduct or irregularity unless a truly compelling reason exists." (*De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being supra* par 37; n35 of the judgment cites as examples: "where allegations of fraud are best adjudicated in open court rather than private arbitration proceedings, or where a party's counterclaims affect third parties who were not subject to the arbitration and in respect of which the arbitrator lacks investigative powers." See also *Sera v De Wet* 1974 (2) SA 645 (T) 654fin–655. The factors of consideration were fraudulent conduct of an architect, and his reasonable apprehension that he would be treated fairly, which cannot be applied in the present case.)

This same position was reaffirmed by the Constitutional Court in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* ([2009] ZACC 6 par 219. The court held: "The decision to refer a dispute to private arbitration is a choice which, as long as it is voluntarily made, should be respected by the courts. Parties are entitled to determine what matters are to be arbitrated, the identity of the arbitrator, the process to be followed in the arbitration, whether there will be an appeal to an arbitral body and other similar matters."), where

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the principle of party autonomy was upheld and respected. It is evident from these cases that span over fourteen years that the same issue persists. It is therefore only prudent that the Arbitration Act of 1965 be amended to pronounce more precisely upon the limitations and demarcations of what is "good cause" for the setting aside of an arbitration agreement. Using previous courts' dictums, especially those of the apex court, the decision reached in the case of *GR Sutherland and Associates (Pty) Ltd v V&A Waterfront Holdings (Pty) Ltd* (*supra* par 39) was that the application to set aside the arbitral award did not succeed.

The case of *Industrius DOO v IDS Industry Service and Plant Construction South Africa (Pty) Ltd* ([2021] JOL 51033 (GJ)) dealt with an application to make an arbitral award an order of court. It was opposed on the basis that the dismissal of the counterclaim could not be upheld, and that objection to the dismissal was brought in a whole new application to the courts since the principle of *res judicata* did not apply in this instance. The court held that opposition should have been raised before the arbitral tribunal, and not thereafter. The court referred to the dictums upholding the principle of party autonomy and the contractual terms binding parties to arbitration before a tribunal, and the effect of the final award as being binding upon the parties. The court referred to the dictum in *Phalabora Copper (Pty) Ltd v Motlokwa Transport & Construction (Pty) Ltd* (2008 (3) SA 585 (SCA)):

> "The party alleging the gross irregularity (of the arbitrator) must establish it. Where an arbitrator engages in the correct enquiry but errs either on the facts or the law, that is not an irregularity and is not a basis for setting aside an award. If parties choose arbitration, courts endeavour to uphold their choice and do not lightly disturb it. The attack on the award must be measured against these standards." (par 8)

Interfering with an award requires a higher standard because otherwise contractual obligations would have very little effect and chance of enforcement. Notably, the court mentioned another case asserting that invariably the arbitrator needs to apply their mind to the set of facts and evidence given. (*Wilton v Gatonby* (1994 (4) SA 160 (W) 166H–167B) held as follows: "[The] tribunal should not simply issue an award as though entering judgment under the Rules of Court but rather should proceed to hear such evidence as may be tendered. Short of an express agreement between the parties, any award resolving the dispute between the parties should be made only on the available evidence. The arbitrator's decision to hear no evidence at all resulted in an award being made simply as a procedural consequence of the respondent's wilful absence from the arbitration and without the arbitrator bringing his mind to bear upon the issues between the parties as defined in the pleadings.") An arbitrator has a duty in the proceedings to be impartial and apply their legal aptitude objectively, adopting a rational, common-sense approach.

7 Influential African cases heard in the permanent court of arbitration

Taking a bird's eye view of the landscape of African cooperation, it is noteworthy that Mauritius holds a host agreement with the Permanent Court of Arbitration at Port Louis Waterfront (PCA "Host Country Agreements" (undated) https://pca-cpa.org/en/relations/host-country-agreements/ (accessed 2023-09-01)). There are also numerous cooperative agreements in the African region with different forums located in centres such as Cairo, Lagos, Johannesburg, Cape Town and the African Union (PCA "Cooperation Agreements" (undated) https://pca-cpa.org/en/relations/cooperation-agreements/ (accessed 2023-09-01)). There are a few cases within the African region that are still pending and ongoing.

One case worthy of mention is *The Republic of Mauritius and The United Kingdom of Great Britain* (PCA "Arbitration Award" (18 March 2015) https://files.pca-cpa.org/pcadocs/MU-UK%2020150318%20Award.pdf (accessed 2023-09-01)), which lasted over four years. A few interlocutory applications were brought before the main dispute was ventilated before the tribunal. For example, the parties could not agree on the appointment of the three arbitrators, who were appointed by the President of the Permanent Court of Arbitration. Thereafter, the Republic of Mauritius brought an application to strike the one judge who had been appointed, arguing that he was not impartial, irrespective of his undertaking, but this application did not succeed. Thereafter, the United Kingdom sought to bring an application to not allow certain admissions from previous documents. The redaction on the documents was upheld owing to the prejudice that the admissions would cause. There was also an attempt by the United Kingdom to thwart the matter with the averment that the Permanent Court of Arbitration lacked jurisdiction, but this failed. It is evident that two countries battling for territorial power and access to resources did not stop at the main thrust of the application and attempted every litigious strategy (although they failed) to attempt to sway the judges in their favour at an earlier juncture. However, questions inevitably arise on how this can be just; these delays and tactics increase time and costs and invariably require lengthy awards to be made to sort out innumerable interlocutory issues.

8 4 Rs in the Fourth Industrial Revolution

The fourth industrial revolution embraces technological developments such as artificial intelligence, machine-generated software and online ADR. Employing tools of enhancement to conduct more ADR online, and more streamlined hearings for the convenience of users across continents and different jurisdictions, allows parties to meet in online rooms and take the matter forward to resolution. Adopting a constitutional axiology approach in the context of the constantly changing and developing current needs of society, it becomes pivotal to revisit the manner in which we digest disputes and employ tools and mechanisms for resolution in alignment with the Constitution. In this process, the author proposes the employment of 4 Rs – namely, redesign, recreation, revisiting and revision. This means that when

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we look at the tools that we employ for resolving disputes, we need to analyse, reflect, and consider a redesign to reflect current developments in societal norms aligned to technological advancement for convenience and within the realm of cutting-edge cybersecurity systems. Recreation of software, systems and information technology is a necessary measure to ensure that systems are not hacked, and that personal information is not unlawfully disseminated or confidential information publicised on illicit platforms not duly authorised by the parties. Revisiting what works entails engaging tools of enhancement for streamlined processes, ventilation of disputes, and enhancement of access to justice for the parties, and encouraging restorative and retributive justice measures to ensure sustainability of relationships between parties with long-term e-commerce relations and trade relationships. The sustainable measures address both the SDGS (sustainable development goals: 9, 15, 16 and AU 2023: 1, 7-14) Lastly, revision is an essential measure to weed out tools that are outdated, irrelevant, redundant and not working efficiently or effectively. Revision is an active measure that should not be taken for granted and requires critical engagement of specific allocated focus groups with a mandate to foster innovation and creativity.

9 Conclusion and recommendations

This note has explored and investigated various institutions, courts of law in South Africa, the African region and the Permanent Court of Arbitration and has illustrated the problems and challenges that exist. However, the challenges are not irresoluble, and the impasses that occur while navigating or overcoming conflict can be easily broken for restoration of harmonious relationships and resolution of conflict. Creating a bridge between Western, Eastern, African and indigenous practices employs the values, virtues and ethos that work for the community of the fourth industrial revolution, including communities that are not yet technologically mobilised. The higher courts of South Africa such as the Constitutional Court and the Supreme Court of Appeal have been impeccable in the enforcement and execution of arbitral awards and agreements in upholding the principle of party autonomy. The courts have aligned to the arbitral agreements of enforcement of the arbitral awards as final and binding between the parties.

To secure a sustainable future for just ADR forums, the note makes the following recommendations:

i. Employ the 4Rs in the Fourth Industrial Revolution.
ii. Prioritise language for accurate and precise translation and interpretation.
iii. Bridge the gaps between different cultures, civilisations, customs and norms.
iv. Never leave a system that works behind, as any system and its tools will eventually become outdated.
v. Mobilise people and the community to participate in the change they want to employ in the resolution of conflict.
vi. Create accessibility by reducing the costs of forums.
vii. Aim to create “just” forums and outcomes.

viii. Amend legislation for clearer direction of terms in balancing rights of both parties.

ix. Apply the ART-C approach to conflict embedding a transformative approach.

x. Apply retributive, transformative, restorative, procedural and transitional justice to overcome barriers to conflict.

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