

## Emerging trends in dispute resolution in South Africa.

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Legal practitioners and their clients often, with justification, express dissatisfaction with the costly delays that are associated with traditional litigation. Clogged court rolls and savvy legal representatives who use numerous delaying tactics lead to many a protracted and costly process.

So what alternatives are available to replace traditional litigious court processes in South Africa? For some time now, legal practitioners have been referring matters to private arbitration, in which the litigation process is somewhat mirrored. Arbitration, generally, provides parties with an accelerated hearing date which normally resulted in matters being dealt with sooner while ensuring the same integrity as a court process because many retired judges and senior counsel provide private Arbitration services. Mediation, as an alternative dispute resolution mechanism, hasn't, however had the same draw as Arbitration.

In general mediation as a dispute resolution mechanism is, albeit slowly, beginning to be recognized as a viable alternative to traditional litigation. It is common cause that the wheels of Justice turn slowly as does change in the legal industry. Sometime attorneys need a nudge (and if you are a fan of Malcolm Gladwell, everyone needs a nudge from time to time).

This nudge has come in the form of an amendment to the Uniform Rules of Court, which Rules apply to all High Courts in South Africa (there are 13 High Courts in South Africa). On 9 March 2020, Uniform Court Rule 41A came into effect. Rule 41A formally introduces mediation as a pre-litigation step. For the most part, its implementation has been shadowed by the nation-wide lockdown which has forced legal practitioners and advocates to quickly come up to speed with running matters remotely and via Caselines (the electronic filing system introduced by the South Africa Judiciary).

Mediation is defined in the Rules as a voluntary process entered into by agreement between litigating parties in which an impartial and independent person (the mediator) assists the parties, through negotiations, to either resolve their dispute or generate options to do so, identify the issues which can be agreed on, explore areas of compromise or clarify the party's priorities.

The Rule does not mandate the parties to mediate but it does require the following. Sub rule (2)(a) compels a plaintiff/applicant to file a Rule 41A Notice, which sets out whether or not the plaintiff/applicant agrees to or opposes mediation. The Rule 41A Notice is to be filed in conjunction with the serving of summons or motions. Sub rule (2)(b) compels the defendant/respondent to also file a prescribed Rule 41A Notice of agreeing or opposing mediation. If one or both parties decide to oppose mediation, then they have to clearly and concisely indicate reasons in their sub rule (2) Notices that the case is or is not capable of being mediated.

According to sub rule (2)(d) the notices will be without prejudice and therefore same will not filed with the Registrar but served on the opposing legal practitioner only.

The Rule also opens up the possibility for parties to refer the matter to mediation at any stage. Furthermore, the Rule provides a judge or a judicial case manager with the power to direct that the parties are to consider referring a dispute to mediation.

During the mediation process, all time periods relating to the delivery of pleadings, notices or any further steps in terms of the Uniform Rules are suspended for the duration of the mediation.

Should the parties decide to pursue mediation they are required to deliver a joint signed minute recording their election to refer the dispute to mediation (Rule 41A(4)). Furthermore, the process of mediation will be governed by a mediation agreement signed by the parties. The Rule has in addition prescribed that the mediation process will be concluded within 30 days from signature of the minute, which ensures that the mediation process is not used to further delay a matter.

It is often the case that a frustrated plaintiff/applicant, will, after months or years of being embroiled in interlocutory applications, propose that the party refer the matter to private arbitration and/or mediation. Parties are often reluctant to move the matter to private arbitration on two grounds, firstly the costs of private arbitration (as most private arbitrators are retired judges or senior counsel and therefore charge accordingly) and secondly because the private arbitration award is binding on the parties. Mediation avoids both of these issues, as the costs of a trained mediator is often less and the mediator may not make a finding but rather assists the parties to find a middle ground and agreement.. Mediation, if done correctly, creates a problem-solving environment where a skillful mediator the parties to settle the case or limit the issues in dispute. Parties who craft their own solution are more likely to abide by this settlement agreement than a judgment imposed upon them.

The introduction of Rule 41A is a welcome innovation and gives further credence to mediation as a form of alternative dispute resolution. It is the latest in a series of amendments to the Rules which seeks to address the abuse of court process. Most notable in this regard, was the amendment that came into operation on 1 July 2019, which saw an inclusion of rules regulating Judicial Case Management, which allows for parties to apply to have a Judge assigned to their matter from the outset out the matter commencing. Under Judicial Case Management, legal practitioners are held accountable, interlocutory applications are heard swiftly and a matter is generally dealt with in a much shorter period of time all while remaining within the traditional court system.

Mediation provides parties with a chance to express their opinions in a forum that is not bound by the rules of evidence. Furthermore it provides parties with a chance to

partake in the ultimate decision that will bind them, which incentivizes parties to adhere to said decision. Mediation also has the potential to resolve conflict and mend relationships between commercial parties, which is often needed if the parties wish to continue the relationship after a dispute has arisen.