

MEDIATION: RULE 41A

HOW DOES IT APPLY TO ME?



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INTRODUCTION

- ▶ Are you currently facing a dispute or considering taking legal action?
- ▶ Have you considered mediation?

Below are examples of common cases in which mediation is an effective tool to settle a dispute fairly, timeously, and at a fraction of the cost of litigation:

Contract disputes

A situation where a service provider and a company disagree about some aspect of the contract after service delivery. For instance, IT Firm A has to design a complex website for Company B. After delivery, Company B is not satisfied with the automatic customer payment system, which is not sufficiently secure in their opinion, while IT Firm A maintains they have delivered according to specification.

Commercial Landlord / Tenant disputes

Disputes between landlords and tenants over, for instance, rent payment, property damage, return of security deposits, repair and maintenance of facilities.

Workplace Conflicts

Conflicts between managers or even between two departments, or between employer and employee.

Divorce Proceedings

Married couples who want to end their relationship, but disagree about the handling of the children and the distribution of assets.



INTRODUCTION

The public often think that legal disputes can be resolved only by a court.

Furthermore, they may feel personally hurt or cheated and may feel the court system will “sort out” the culprit. However, there are various alternative dispute resolution mechanisms. The alternative we are focusing on, in this e-book, is MEDIATION.

CHAPTER 1

The court system and litigation

The South African court system is broadly divided into High Courts and Magistrates' courts. The ordinary Magistrates' Courts can hear civil cases when the claims are for less than R100 000. For minor cases, one can also make use of the Small Claims Court – since 2019, the cap is for matters of up to R20 000. This cap is regularly reviewed. If your matter concerns R100 000 or more, you will have to approach the High Court to assist you.

The top drawback of the litigation process system is how slow the process is. Not only are the courts clogged up, but even if you are granted a hearing, matters are often subject to postponement after postponement.

Time translates into costs.
The longer a matter takes to
resolve, the more costly it
becomes.

CHAPTER 1

The court system and litigation (Continued)

Legal action means a judge or magistrate will make a ruling that will be binding on both parties. Therefore, not only will the judge or magistrate have to come to grips with the details of a matter, but they will also have to rule about what should happen.

It is often said that even a good ruling may leave both parties somewhat dissatisfied with the outcome! (Or worse: A bad ruling may leave one of the parties completely disadvantaged!)

Judges are only human and, at times, they may simply not have enough background to make the best ruling.



“... A BAD RULING MAY LEAVE ONE OF THE PARTIES COMPLETELY DISADVANTAGED...”

CHAPTER 2

What is rule 41A and how does it apply to me?

As so many matters unnecessarily land in High Court, the so-called Rule 41A was created.

Rule 41A implies that parties to a dispute are required to first consider mediation. The rule does not force mediation and parties are still free to skip mediation if they feel their dispute is not suitable for mediation.

However, people who are in dispute most often involve attorneys. And, currently, many perceive attorneys to be (1) ignorant about mediation; and (2) resistant to mediation as they perceive it will mean they lose out on fees.

So, if you have consulted an attorney who advises you not to mediate, you may want to take it with a pinch of salt or get a second opinion. Refusing to mediate can be costly – as the judge may ultimately grant an adverse cost order if the judge feels mediation should have been followed. Such an adverse order means that if you initiated the legal action, you may be liable for the legal costs of the other party.

CHAPTER 2

What is rule 41A and how does it apply to me?

(Continued)

According to Lexis Nexis, a legal information firm, “Rule 41A is a new amendment to the existing rules of court procedures. It demands that prior to litigation, parties must attempt mediation (either with or without the guidance of their attorneys). Previously, this was not demanded, so people went straight to litigation and the matter could take years to be settled. The new rule 41A is meant to fast-track access to justice, cut down on court costs etc.” (Lexis Nexis, 2022).

According to them, this will not force people into mediation; they are simply required to attempt it before they can proceed with litigation and, if they do not agree, they can still litigate.



Here is a link that you can follow to read more about the subject: [ConflictDynamics](https://www.conflictdynamics.co.za)

A vertical stack of wooden blocks with letters on the left side of the page. The visible letters from top to bottom are: Z, O, I, E, A, I, D, E, M.

CHAPTER 3

Mediation and its benefits

The creation of Rule 41A shows the high regard the court system has for mediation. Internationally, mediation has been a very successful method to supplement conflict resolution.

Countries like the UK and Australia have had huge success with this method and South Africa is somewhat lagging behind; hopefully, with Rule 41A it will become more common practice.

Mediation is a much more informal method of conflict resolution than court procedures – but the end result is still a formal agreement that is legally binding.

Instead of a magistrate or judge, an impartial mediator is obtained to assist with the dispute resolution. However, the mediator does not make a ruling. Instead, the mediator facilitates discussion between the parties and helps them to come to an acceptable agreement.

CHAPTER 3

Benefits:

- ▶ As the parties come to a resolution themselves, the risk of bad rulings is hugely reduced.
- ▶ The cleverest aspect of mediation is that parties agree that it will be “without prejudice” – that means nothing that is said or revealed during mediation can be used elsewhere – such as in a court of law. Everything that happens during mediation is completely confidential (off the record).
- ▶ This frees up the parties to relax about the threat of revealed information that can be used against them. For instance, it allows a party to admit to making mistakes and to apologise. Outside of mediation, such an action could have led to costly rulings against someone.
- ▶ Partial agreements are possible. That means that some parts of a dispute may be resolved while other parts can then still be litigated.

CHAPTER 3

Benefits:

(Continued)

- ▶ Mediation also allows exploration of solutions: For instance, in a divorce matter, the husband may agree to pay additional money for tuition, provided the wife allows ample child visitation. They can then explore this and, if they do not settle on it, they are not bound to concessions already made.
- ▶ So only final signed agreements are binding. Admissions, suggestions, concessions and replies provided on the way to finding solutions can be retracted if final settlements are not reached.
- ▶ Mediation is voluntary. This means a party can opt-out at any point. Although this may seem like an unsteady foundation for the process, it is a very important principle. This means that a party cannot be “strong-armed” into an agreement. For instance, if a party feels that the mediator is taking sides or placing undue pressure on them to move in a certain direction, they are allowed to leave.

CHAPTER 3



Although some legal professionals fear that mediation will reduce their fees as matters are resolved more quickly, it is also to their benefit.

As mediation speeds up the resolution, more clients can be served. So, instead of milking a few clients to a point where it is hard to recover the money, earnings can be spread across more clients who can probably pay the fees easier and quicker. Legal professionals can also become mediators themselves, which opens up alternative career opportunities.

CHAPTER 4

What can you do?

Explore the possibilities of mediation for your matter.

If you have not yet approached an attorney, you may find it is possible to resolve your matter completely via mediation. However, here is a warning. If large amounts are involved in your matter and/or it is complex and would require comprehensive agreements, it is advisable to rather involve an attorney experienced in your type of dispute.

Remember that your attorney can participate in the mediation and act as a legal consultant for you during the process. If you already have an attorney dealing with your matter, involve them in the decision to mediate or not to mediate.

To assist you with your decision, we offer free pre-mediation sessions where you and the other party to the dispute get an opportunity to explore the possibilities of mediation and sign an agreement to mediate if you are both comfortable.

Contact us today for a consultation.



REFERENCES

- ▶ Lexis Nexis. (2022, July 6). Retrieved from www.lexisnexis.co.za: www.lexisnexis.co.za