

THE IMPORTANCE OF MEDIATION IN RESOLVING DISPUTES AND RULE 41A

Introduction

Prior to the COVID-19 pandemic, there were long court delays, and despite this, very few South Africans considered mediation. However, with the limitations on movement and the increased risk posed to court employees and the public by the COVID-19 pandemic and lockdown regulations, this has placed a severe strain on our courts and furthermore has resulted in significant delays in court matters. Therefore, Notwithstanding the aforesaid, litigation remains the primary means of dispute resolution in South Africa.

What is Mediation

Mediation is an alternative dispute resolution that is used as an alternative to litigation to resolve disputes through this form of dispute resolution. This unbiased and impartial third party is usually formally trained to assist the parties in resolving the matter. In addition, this third party or mediator facilitates engagement between the parties to work through the issues and find reasons for compromise to ultimately reach a mutual understanding.

Mediation versus Litigation

The litigation process in South Africa follows an adversarial system to resolve disputes. In this kind of system, disputes tend to become more combative than necessary, which places more strain on the relationship between the parties and often can result in the conflict between the parties escalating. In addition, litigation can be quite costly depending on the complexity of the matter compounded with long court delays. Alternatively, with mediation, the relationship between the parties can be salvaged, and the dispute resolved in a more timeous and cost-effective manner,

Mandatory mediation and Rule 41A

Although litigation is the most common form of dispute resolution in South Africa, there are certain instances in which mediation is mandatory, such as divorce matters or labour matters as provided for by the Mediation in Certain Divorce Matters Act¹ and the Labour Relations Act², to name a few.

¹ Mediation in Certain Divorce Matters Act 24 of 1987

² Labour Relations Act 66 of 1995

In modern legal systems, mandatory mediation has become more common. With the introduction of Rule 41A of the Uniform Court Rules³, which came into effect on 9th March 2020, the rule has established and encourages mediation taking place prior to further litigation in the High Court. The rule provides for a party to notify the other party of their intention to refer the matter for mediation and gives the receiving party the opportunity to either agree to the referral or, with good cause, refuse it.

Conclusion

In conclusion, Rule 41A only provides for participation in mediation is mandatory and therefore reaching an agreement is not a requirement of the rule. However, due to participation being mandatory in terms of the rule, refusal to participate without good cause could result in the refusing party being penalised with legal costs. Therefore, mediation should be promoted more in South Africa as it is a great tool to resolve disputes amicably, cost-effective, and timeous. Consult with a legal professional before pursuing litigation to review your options and confirm whether you may use the alternative dispute process of mediation to save you time and money. Contact an attorney at SchoemanLaw for your legal needs!

³ Uniform Court Rules, as updated in December 2020