

RULE 41 A: THE PROMISE OF MEDIATION AND THE ROLE OF THE SOUTH AFRICAN COURTS

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BACK

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Judge Roland Sutherland has been a Judge of the Gauteng Division of the High Court since 2012. He has also been Acting Deputy Judge-President, Gauteng Division, Judge of Appeal in the Labour Appeal Court, and Acting Judge, Supreme Court of Appeal. He trained and worked as a mediator and arbitrator for the Independent Mediation Service of South Africa.

Understanding the rationale for a resort to mediation is important. This aspect is usually glibly addressed as being quicker and cheaper than litigation. That is sometimes true, but it is an underselling of mediation with a significant drawback. Regrettably, the huge emphasis on mediation as an evasive tactic against delay, cost and lawyers, bedevils the public imagination. The fundamental underlying legitimate premise for positioning mediation as a primary dispute resolution option which should occupy centre-stage is the root thought that it is a social responsibility, if not, indeed, an ethical imperative, that disputants exhaust negotiation before litigating.



It is in that context that mediation justifies its role by the catalytic effect it can have on propelling disputants towards a negotiated settlement which, not merely will end the dispute, but can bring about a fair outcome for everyone.

The true value in mediation is in the techniques that mediators use to trigger fissures in the impasse of a particular dispute, and the intrinsic bias towards a fair result. Measures to encourage disputants to use mediation should emphasize the character of mediation as a technique suitable for a particular dispute; i.e. mediation as a professional intervention possessing role-specific attributes.

Rule 41A defines mediation aptly and practically:

“...a voluntary process entered into by agreementin which an impartial and independent person, the mediator, assists the parties to either resolve the dispute...or identify issues upon which agreement can be reached, or explore areas of compromise, or generate options to resolve the dispute, or clarify priorities, by facilitating discussions between the parties and assisting them in their negotiations to resolve the dispute.”

Plainly, the policy choice evidenced rejects any notion of compulsory mediation.”^[1]
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 (https://www.conflictdynamics.co.za/Blog/Rule-41-A-The-Promise-of-Mediation-and-the-Role-of-the-South-African-Courts#_ftn1) In R41A there is only one compulsory obligation: R41A (2)

requires the parties to declare, when pleading, their willingness to engage in mediation or refuse to do so. Self-evidently, this assumes each party actually applies their minds to that option.[2] (https://www.conflictdynamics.co.za/Blog/Rule-41-A--The-Promise-of-Mediation-and-the-Role-of-the-South-African-Courts#_ftn2) Practically, the choice is made on advice, usually, from their attorneys.

R41A(3)(b) is the only provision that exercises the judge. This rule provides for a discretion:

“...at any stage before judgment [to] direct the parties to consider ...mediation, whereupon the parties may agree...”

Plainly, R41A is a weak, perhaps even tepid, genuflection in the direction of mediation. R37A is even weaker. Within a general scheme of judicial oversight through case management as a precondition for a certificate of readiness to get a hearing, R37A(11)(a) provides that a judge shall:

“...explore settlement, on all or some of the issues, including where appropriate, enquiring whether the parties have considered voluntary mediation”

Where does this leave the judges who think mediation is a good idea?

Certainly, the rules do not contemplate the judges themselves acting as mediators. Even before a judge “encourages” mediation there has to be a pool of mediators accessible, both geographically and financially, which can be mobilised. In Johannesburg, such a pool is incrementally being built, but effective awareness of their identities among litigation attorneys, no less the bench, requires more work.

In that context, to what do judges, practically, apply their minds, in order to justify the ‘encouragement’. No real information is yet to hand about what various judges actually do. Partly, that is because few cases have, as yet, travelled along the path mapped out by R41A. Mediation in family matters is frequently employed outside of the ambit of R41A. In commercial matters, mediation is rare. The vast majority of commercial cases are settled well before a hearing in untracked circumstances; some might have been mediated. In the Johannesburg High court, in 2020 – 2021, some 68 -72 % of civil process issued per year was commercial, but only 11-14 % of the civil trial roll was commercial.

Conceptually, what would justify a judge driving particular parties towards mediation is twofold; first the nature of the dispute and its implications of an order for the parties, and second, whether the judge is convinced there is a prospect of a mediated agreement being reached.

A quarrel over access to a child by estranged parents is quintessentially a matter suitable for mediation. There are few other generic examples that can be said to be so obviously suitable. In an eviction dispute, the space for mediation is confined to one aspect – on what terms and timetable do the respondents move out. This illustrates an important insight: a case suitable for mediation is one which, by reason of its individual peculiar circumstances, is rendered suitable. The most critical attribute is one in which both parties’ objective interests would be served by an agreement in which a degree of compromise is feasible. Where there is reluctance or recalcitrance by parties in such a case, it is likely to be the result of bad advice or a lack of realism. Thus, there remains room to use the gravitas of the judge to nudge the parties along.

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Suitability for mediation

But the real challenge to the judge is in being able to recognise the relevant symptoms of a suitable case. This is a function of the judge's own experience in the type of case and an awareness of the techniques used in mediation. To belabour a point already made, a matter with prospects of success is one which is susceptible to mediation techniques; scaring litigants by the horror of costs and delay into mediating is to miss the point of divining what there is about a case that makes it suitable. The practical implication is that judges need to be familiar with the techniques of mediation to make the appropriate judgment call; to borrow terminology from the retail trade, a judge needs to have good product-knowledge to match the appropriate goods to the customer's needs.

The case-management procedure in R37A has offered an opportunity for judges to drive a matter towards settlement, and if useful, towards, mediation. In Gauteng, detailed prescriptions exist in the Judge-President's Directive 1 of 2021 which is an elaboration of R37A norms.[3] (https://www.conflictdynamics.co.za/Blog/Rule-41-A--The-Promise-of-Mediation-and-the-Role-of-the-South-African-Courts#_ftn3) The case management conference occurs after pleadings have closed and discovery is complete, including all expert reports. At that stage of the case, a judge can analyse the issues and de facto interrogate the counsel on how the case might play out. The weaknesses of one or more aspects of both parties' cases can be revealed propelling the parties to a realistic appreciation of the risks involved and the prospects of convincing a court of their critical propositions. This is the arena in which the judges can effectively perform "encouragements" to mediate, if not to settle outright.

In Halsey v Milton Keynes General NHS Trust and others, the Court of Appeal in England remarked that many cases are suitable for a mediation to take place as part of a justification for a policy of imposing a punitive costs order if a party "unreasonably" refuses to agree to a mediation.[4] (https://www.conflictdynamics.co.za/Blog/Rule-41-A--The-Promise-of-Mediation-and-the-Role-of-the-South-African-Courts#_ftn4)

There is no immediate prospect of a South African Court imposing such a costs order, given the clearly limited intervention role provided in the Rules of Court cited. Moreover, the guarantee of access to a court to have a dispute decided, in S34 of the Constitution, would inhibit such a policy choice. The critical issue is by what norm is "unreasonableness" to be measured? The decision to mediate or not is a strategic choice by a litigant: how is a judge able to unearth the facts upon which to discern that the choice was unreasonable? Where a refusal to agree to mediate occurs, it may sometimes be apparent that a litigant is deliberately obstructive in other ways, eg by adopting Stalingrad tactics. There would be room for punitive costs order in such an example, but not primarily on account of a refusal to mediate.

In conclusion

The upshot of the present circumstances in applying R41A is that there are bleak prospects of mediation becoming a standard dispute resolution option in the near future. The Law Reform Commission is at present engaged in developing a bill to heighten the profile of mediation and strengthen the role of judicial officers. The policy options, likely to be favoured and not known at this time, but compulsion is being considered.

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