RULES BOARD FOR COURTS OF LAW
REPUBLIC OF SOUTH AFRICA

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13 December 2018 Our ref:Raj Daya/J Balkishun/URC41A Your ref:

Dear Sir/Madam,

PROPOSED UNIFORM RULE 41A: MEDIATION AS A DISPUTE RESOLUTION MECHANISM

The Rules Board for Courts of Law (Rules Board) intends introducing into the Uniform Rules, a rule to regulate the procedure for referral to mediation of cases in the High Court.

The proposed new rule is intended to be numbered and named: '41A Mediation as a Dispute Resolution Mechanism'.

Unlike the Chapter 2 rules of the Magistrates' Courts, the mediation contemplated for cases in the High Court is not intended to be court-annexed. The proposed new rule is intended to facilitate mediation contemplated by the parties, or recommended by the court and to provide the procedure for referral to mediation in terms of rule 37(6)*(d)* (Pre-trial conference) and rule 37A (10) (Judicial Case Management).

The main features of proposed new rule 41A are:

(a) To require the parties, when issuing a summons or application or delivering a plea or answering affidavit, to indicate whether they consider mediation to be possible or not and to give reasons for either consideration;

(b) The parties are to deliver a joint minute recording their agreement to refer the dispute to mediation;

(c) The suspension of time limits to deliver pleadings whilst mediation is in progress;

(d) The procedure where multiple parties are involved in the litigation and some parties proceed to mediation, whilst others do not;

(e) The admissibility and confidentiality of documents;

Board members appointed in terms of Section 3 of the Rules Board for Courts of Law Act 107 of 1985
Justice N Dambuza(Chairperson)I Justice FE Mokgohloa(Vice-Chairperson)I Mr.M Kutama I Adv.L Haupt SC I Mr.A Essa I Ms.J Wessels
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(f) A joint minute indicating the outcome of mediation proceedings; and

(g) Costs of the mediation proceedings and costs orders.

The proposed rule does not contemplate provision for pre-litigation mediation, since mediation is not court-annexed.

Draft rule 41A is attached as **Annexure "RB 1".**

The draft form referred to in subrules (2)*(a)* and *(b)* is attached as **Annexure "RB 2".**

As part of its consultative process in rule making and amendment, the Rules Board invites your comments on the draft proposed rule and form (Annexures RB 1 and RB 2 respectively). Your comments and input may be delivered to the Rules Board or may be emailed to JBalkishun@justice.gov.za and must reach the Rules Board on or before **28 February 2019.**

The Rules Board looks forward to receiving your input and thanks you for same.

Yours sincerely,

Raj Daya

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"ANNEXURE RB 1"

RULES BOARD FOR COURTS OF LAW
REPUBLIC OF SOUTH AFRICA

PROPOSED NEW UNIFORM RULE 41A

41A Mediation as a dispute resolution mechanism

(1) In this rule—

"dispute" means the subject matter of litigation between parties, or an aspect thereof, including litigation which is about to be commenced;

"mediation" means (1) the process by which a neutral and independent person, the mediator, assists the parties to resolve the dispute between them by facilitating discussions between the parties, assisting them in identifying issues, clarifying priorities, exploring areas of compromise and generating options to resolve the dispute;

"mediation" means (2) the process by which an impartial third party (the mediator) will facilitate communication between the parties and assist them in their negotiation as they attempt to reach an agreed settlement of their dispute'

"mediator" means (1) a person who has undergone training and who is certified competent to conduct mediation.

"mediator" means (2) a person who in the opinion of the parties is (sufficiently skilled and) competent to conduct mediation.

Notes:

1. It is preferable to include the definitions within proposed rule 41A itself, rather than in URC 1 (Definitions), since the proposed new rule has a very specific purpose.

2. The phrase 'including litigation which is about to be commenced' has been included in the definition of "dispute" since a plaintiff or applicant may claim that there is no dispute at the stage summons is launched or an application is issued and may thereby seek to avoid complying with subrule (2).

3. Two possible definitions of "mediation" are suggested.

4. Two possible definitions "mediator" are suggested.

(2)

(a) In every new action or application commenced, the plaintiff or applicant shall, together with the summons or notice of motion, deliver a notice indicating whether such plaintiff or applicant agrees to or opposes referral of the dispute to mediation;

(b) A defendant or respondent shall, when delivering a plea or answering affidavit, deliver a notice indicating whether such defendant or respondent agrees to or opposes referral of the dispute to mediation;

(c) The notice referred to in subrules *(a)* and *(b)* shall be as closely as possible in accordance with Form *** and shall clearly and concisely indicate the reasons for such party's belief that the dispute is or is not capable of being mediated;

(d) Subject to the provisions of subrule 9*(c)* the notice referred to in this subrule shall be of a without prejudice nature and shall not form part of the record of the trial or hearing.

Notes:

1. The notices referred to in subrule (2) will have to be kept out of the knowledge of the trial Judge or the Judge hearing the opposed motion.

2. It should be considered whether a provision similar to rule 34(13) should be included. Rule 34(13) provides: 'Any person who, contrary to this rule personally or through any person representing him, discloses such offer or tender to the judge or the court shall be liable to have costs given against him even if he is successful in the action.'

(3)

(a) The parties may at any stage before judgment, agree to refer the dispute between them to mediation: Provided that where the trial or opposed application has commenced the parties must obtain the leave of the court;

(b) A Judge, or a Case Management Judge referred to in rule 37A or the court may at any stage before judgment direct the parties to consider referral of a dispute to mediation, whereupon the parties may agree to refer the dispute or any aspect thereof to mediation;

(c) Any issue of fact which is in dispute, the mediation of which may not necessarily result in settlement but which may result in the curtailment of the issues, may be referred to mediation, as provided in this subrule.

(4) Where a dispute or any aspect thereof is referred to mediation—

(a) The parties shall deliver a joint signed minute recording their election to refer the dispute or any portion thereof to mediation;

(b) The parties shall prior to the commencement of mediation proceedings enter into an agreement to mediate, which shall be as closely as possible in accordance with Form ***;

(c) The time limits prescribed for the delivery of pleadings and notices and the filing of affidavits or the taking of any step shall be suspended for every party from the date of signature of the minute referred to in subrule *(a)* to the time of conclusion of mediation; and

(d) Mediation shall be concluded within 30 days from the date of signature of the minute referred to in subrule *(a)*: Provided that a Judge or the court may on good cause shown by the parties extend such time period for completion of the mediation session.

Note:

Although a Judge or a Case Management Judge or court may direct the parties to consider mediation, the decision to mediate remains voluntary and the factors in subrule (4) can only apply from the time of election by the parties to mediate.

(5)

(a) In proceedings where there are multiple parties some of whom are agreeable to mediation and some of whom are not, parties who are agreeable to mediation may proceed to mediation notwithstanding any other party's refusal to mediate;

(b) The time limits prescribed for the delivery of pleadings and notices and the filing of affidavits or the taking of any step shall be suspended for every party from the date of signature of the minute referred to in subrule (4)*(a)* to the time of conclusion of mediation by the parties who have elected to mediate;

(c) In any matter where there are multiple issues, the parties may agree that some issues be referred to mediation and that the issues remaining in dispute may proceed to litigation;

(d) If any issue remains in dispute after mediation, the parties may proceed to litigation on such issue in dispute.

(6) Except as provided by law, or discoverable in terms of the rules or agreed between the parties, all communications and disclosures, whether oral or written, made at mediation proceedings shall be confidential and inadmissible in evidence.

(7) *(a)* Upon conclusion of mediation the parties who engaged in mediation shall inform the registrar and all other parties by notice that mediation has been completed;

(b) Notwithstanding the failure of parties who have engaged in mediation to deliver the notice referred to in subrule *(a)*, the suspension of the time limits referred to in subrule (4)*(c)* shall lapse unless a Judge or a court has extended the time limit and notice thereof has been given to all parties to the proceedings within 5 days of such order.

(8) *(a)* The parties who engaged in mediation and the mediator who conducted the mediation shall issue a joint minute indicating—

(i) Whether full or partial settlement was reached or whether mediation was not successful; and

(ii) The issues upon which agreement was reached and which do not require hearing by the court;

(b) It shall be the joint responsibility of the parties who engaged in mediation to file with the registrar, the minute referred to in subrule *(a);*

(c) Where the parties have reached settlement at mediation proceedings the provisions of rule 41 shall apply *mutatis mutandis.*

Notes:

1. Since the type of mediation proposed for the High Court is not court-annexed, there is no obligation on the mediator to file a report in the court file. Hence the parties and the mediator should file a joint minute indicating the outcome of mediation.

2. The minute would usually be used for purposes of Rules 37 or 37A or by the Judge or court which directed the parties to consider mediation.

3. It should be considered whether:
(a) The minute, agreement or report should be placed in a sealed container such as an envelope;
(b) The envelope should be marked with the court file number, marked "Not to be opened without an order of court" and should be filed in court.

(9)

(a) The parties may agree amongst them how the costs of the mediation proceedings are to be borne: Provided that any party may, prior to an agreement to mediate, offer or undertake to pay the mediation costs in full or the portion due by any other party;

(b) The court may, at the trial or hearing of a matter which has been referred to mediation and where the parties have not been able to reach agreement on the liability for the costs of the mediation proceedings, make an appropriate order for such costs;

(c) In considering an appropriate order for costs the court may have regard to the notices referred to in subrule (2) and any party shall be entitled to bring such notices to the attention of the court.

Note:

It should be considered whether it is preferable not to disclose to the mediator which party pays the mediator's fees under subrule 9*(a)*.

"ANNEXURE RB 2"

FORM ***

NOTICE OF AGREEMENT OR OPPOSITION TO MEDIATION

IN THE HIGH COURT OF SOUTH AFRICA

(DIVISION)

In the matter between:

Plaintiff/Applicant

And

Defendant/Respondent

Please take notice that the Plaintiff/Applicant/Defendant/Respondent agrees to/opposes the referral of this matter to mediation.

The Plaintiff/Applicant/Defendant/respondent does so for the following reasons:

_____

_____

_____

_____

_____

_____

_____

_____

_____

Dated at _____on this _____day of _____

_____

Plaintiff/Applicant/Attorney
Defendant/Respondent/Attorney
Address

To: The Registrar of the above Honourable Court