DISPUTE RESOLUTION
ALERT

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IN THIS ISSUE

Ignore mediation at your own peril: Rule 41A reconsidered

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The concept of "*dispute resolution*" has, to a large extent, evaded definition. It merges two fairly well understood yet loaded terms into a single catch-phrase. Actors in a dispute often neglect to define when something can be considered to be a "*dispute*" and further neglect to consider what it actually means for a dispute to be "*resolved*". Despite this theoretical uncertainty, most people have a sense of what the concepts, both in isolation and in conjunction, mean.

Alternative dispute resolution (ADR), such as mediation, forms part of the dispute resolution toolkit available to those involved in disputes. In this sense it becomes useful to consider our legal system's formal approach to mediation in the context of traditional court proceedings.

Here, Rule 41A, introduced into the Uniform Rules of Court (Rules) in February 2020, mandates that parties to a dispute consider mediation as a dispute resolution mechanism. Rule 41A(2)(a) prescribes that in every new action or application proceeding, "*the plaintiff or applicant shall, together with the summons or combined summons or notice of motion, serve on each defendant or respondent a notice indicating whether such plaintiff or applicant agrees to or opposes referral of the dispute to mediation*". As a result, the so-called "*Rule 41A Notice*" has become commonplace and somewhat formulaic in practice.

While it is now mandatory for parties to, at the very least, formally consider mediation as a dispute resolution mechanism, this compulsory mechanism presents issues in and of itself. On a surface level, the mandating of what the Rules themselves define as "*a voluntary process entered into by agreement between the parties to a dispute*" appears to be contradictory. The Rules go further to define mediation as "*a voluntary process entered into by agreement between the parties to a dispute in which an impartial and independent person, the mediator, assists the parties to either resolve the dispute between them, 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*". This speaks to the issues identified by the SALRC, particularly whether mediation should ever be mandatory.

COURT FINDINGS AND MEDIATION APPROACHES

The courts have adopted varying approaches to the manner in which parties approach mediation in the pre-litigation phase of a dispute, as required by Rule 41A.

In the unreported case of *Koetsioe and Others v Minister of Defence and Military Veterans and Others* (12096/2021), the court illustrated that:

Ignore mediation at your own peril: Rule 41A reconsidered

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"[Rule 41A] not only requires a notice but clearly contemplated that a party must have considered the issue earnestly prior to exercising its election. This is clear from the requirement that a party must state its reasons for its belief that a dispute is or is not capable of being mediated."

The court noted that the applicant disregarded the rule and its requirements, and held that the parties' dismissive approach to the concept of mediation was *"clearly wrong"*. The court went further to note that the circumstances of that particular case "screams for an alternate dispute resolution attempt, rather than a purely legal challenge".

In adjudicating the issue of costs the court also found that the costs of the application could have been avoided had the parties mediated their dispute. The court, in exercising its discretion, made no order as to costs and there is no doubt that the lack of mediation played a roll in coming to this finding.

While this decision offers useful insights into the legal system's shifting perception of mediation, it also highlights valuable practical considerations that litigating parties should consider in attempting to resolve their disputes. Aside from the clear endorsement of mediation as an appropriate dispute resolution mechanism, the court went a step further and considered the refusal to consider mediation to be a relevant factor in the determination of whether costs should award. Here, Davis J reasoned that *"the costs of the application might well have been avoided by mediation in the same fashion as many of the previous aspects of occupation or relocation have been dealt with"*.

While mediation itself remains voluntary, the manner in which parties to a dispute approach mediation should be considered carefully. The increasing use of and deference to ADR, especially mediation, is a relevant factor that may only grow in strength and it appears that going forward mediation will play a significant role in our legal system. The approach that one adopts to this ADR mechanism may no longer be a mere formality, and public policy may require careful consideration and reasoning when electing whether or not to refer a dispute to mediation. The potential benefits of mediation are extensive and exciting, and parties must likewise not overlook the obvious positives of mediation in the resolution of disputes, especially in the face of its increasing presence in our legal system.

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Can the enforcement of an international arbitral award be stayed pending the finalisation of a separate action instituted in court?

The High Court in *Industrius D.O.O v IDS Industry Service and Plant Construction South Africa* (Pty) Ltd [2021] JOL 51033 (GJ) recently dealt with this issue.

It is common cause that a dispute arose between the applicant (Industrius) and the respondent (IDS) and by agreement the parties referred the matter to arbitration. As a result of the parties being based in separate states during the conclusion of the arbitration agreement, it was agreed that the arbitration would be conducted in accordance with the International Arbitration Act 15 of 2017 (Act) and Model Law, with the seat of arbitration to be South Africa.

The disputes referred to arbitration consisted of a contractual claim by Industrius and a counterclaim by IDS. The hearing proceeded in the absence of IDS as IDS ceased participation in the hearing due to a dispute with its former attorneys. The arbitrator ruled in favour of Industrius, which then applied to court for the enforcement of the award. IDS opposed the application, contending that the enforcement of the arbitration award should be stayed pending the finalisation of a separate action instituted against Industrius in the High Court. The relief IDS sought in this action was the same relief it sought in its counterclaim in the arbitration.

In this regard, the court found that the Act and Model Law do not provide for the court to refuse or delay the enforcement of the award on the basis that a party has instituted other proceedings that are not related to the arbitral award or have no bearing on the finality or enforceability of the award. The judge found it difficult to understand why IDS contended that the same action which failed at the arbitration hearing could be pursued through action proceedings.

IDS further contended that the arbitration award was not final since its counterclaim was dismissed by default due to its absence at the hearing. The counterclaim was thus not decided on the merits thereof.

FINDINGS

The court found that the counterclaim in the arbitration hearing was not dismissed by default and was properly considered by the arbitrator when the arbitral award was made. The arbitrator in the arbitration was quoted by the court as saying "*the version advanced by the defendant in its counterclaim given the evidence which was adduced before me, it seems to me, is so improbable as to warrant rejection*." The arbitrator articulated and dealt with all the issues before him. He was required to deal with all the disputes of the parties and he fulfilled that requirement.

In respect of the submission that the counterclaim was not decided on the merits, the court stated that contending simply that the arbitrator had erred in dealing with the counterclaim on merits in the absence of IDS was not a valid ground to refuse enforcement of an arbitral

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award. In this regard, the court cited *Phalabora Copper (Pty) Ltd v Motlokwa Transport & Construction* (Pty) Ltd [2008] (3) SA 585 (SCA) in which the court held that:

> *"The party alleging the gross irregularity (of the arbitrator) must establish it. Where an arbitrator engages in the correct enquiry but errs either on the facts or the law, that is not an irregularity and is not a basis for setting aside an award. If parties choose arbitration, courts endeavour to uphold their choice and do not lightly disturb it. The attack on the award must be measured against these standards."* (para 8)

As a result, the court made the arbitration award an order of court.

It is evident from the authorities quoted above that the Act and Model Law are pro enforcement of arbitral awards. A party bringing an action in court seeking the same relief sought in arbitration should not be a means of delaying the enforcement of the arbitral award.

In this regard, the Chief Justice of the Supreme Court of Victoria, Australia is quoted as saying: *"In arbitration, the directive role of the court needs to be minimised. The focus instead, turns to ways in which the court can support the arbitration process and enforce arbitral awards in a timely and cost-effective manner."*

This does not mean that the courts can never delay or stay an arbitral award. In terms of section 18 of the Act, a court may refuse to enforce a foreign arbitral award under certain circumstances. These circumstances include, but are not limited to, the court finding that a reference to arbitration is not permissible under the law of the Republic, the enforcement of the award is contrary to public policy, the court is satisfied that a party had no capacity, and the arbitration agreement is found to be invalid.

When opposing a court action to enforce an arbitral award, parties are advised to ensure that the reasons for opposing the action fall within the scope of section 18 of the Act. If the reasons do not fall within the ambit of section 18, a party may apply to have the decision reviewed or set aside in terms of Model Law, which is the exclusive recourse to a court against an arbitral award.

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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