Contemplation No 71 – Real Estate Dispute Resolution – Part 03

The last two weeks, I have been discussing alternative dispute resolution in real estate disputes. Most people are not aware, that referring a dispute to mediation prior to any litigation, is going to become the norm.

In terms of Rule 41A of the Uniform Rules of the High Court (effective since 9 March 2020), at the commencement of any civil action or application, parties must formally consider mediation. The plaintiff or applicant must serve a Rule 41A notice together with the summons or notice of motion, stating whether they agree to or oppose referring the dispute to mediation. This notice, which is marked "without prejudice" and is not filed with the court, should include a brief reason for the party's position that they have taken towards mediation. The defendant or respondent must then serve their own Rule 41A notice by the time they file a plea or answering affidavit and also indicate whether they agree to the mediation or not. The reason for this process is to ensure that both parties have applied their mind to the use of a mediation as a means of alternative dispute resolution, especially given the time and cost associated with litigation.

Rule 41A defines "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 … or identify issues upon which agreement can be reached, or explore areas of compromise, or generate options to resolve the dispute … by facilitating discussions and assisting in their negotiations. It is clear, that in terms of Rule 41A, mediation is considered to be an alternative dispute resolution (ADR) process whereby a neutral third party mediator assists the parties to resolve the dispute and facilitates settlement discussions. The mediator is impartial and not empowered to make a decision.

Some interesting points to note:

1. Both parties must consent to the mediation process. In the event that one party refuses to mediate, the matter will proceed via the normal legal process.
2. Given that you cannot force the other party to mediate, it goes without saying, that one of the parties could just refuse mediation or not respond to any request for mediation, as a means of being obstructive. The Rules do however provide for potential cost consequences for an unreasonable refusal to mediate. Rule 41A(9)(b) allows a court, when making a costs order at the end of a case, to have regard to a party's refusal or failure to participate in mediation. This means that if a party unreasonably refused to even attempt mediation, the court, when handing down judgement, may penalise that party in terms of the recovery of their own legal costs, or even order them to pay the other party's costs, because those costs could have been avoided by mediation.
3. In the case of City and Atlantic Real Estate CC t/a Remax Living v Smith and Others (7118/2023) [2024] ZAWCHC 426 (13 December 2024), the court was called upon to determine which of two estate agencies was entitled to the commission from the sale of a house. I invite you to refer to my blog post number 65 for more details regarding this case. In its judgement, the court highlighted that, in future, should there be a dispute on similar facts, mediation or some other alternative dispute mechanism should first be considered to resolve the dispute in question, instead of resorting to litigation.
4. In the case of Brondani v Brondani (2021-52977) [2025] ZAGPJHC (17 November 2025), in a landmark decision, the Johannesburg High Court confirmed that mediation is not just a tickbox exercise but a process that needs to be taken seriously.
5. Interestingly, the case of Brondani v Brondani dealt with damages that arose from a case of assault with each party claiming damages from the other. The defendant refused mediation.

7. The judge in the Brondani case made the following important comments: “The purpose and the aim of the Directive and the Protocol, as expressly provided for in para 2 of the Protocol is to provide a structured standardised yet flexible framework for implementing court-annexed mediation in this Division of the High Court. Importantly, the Protocol aims to promote the use of mediation as an alternative dispute resolution mechanism to alleviate congestion on the court rolls, as well as to enhance access to justice by providing an efficient, cost-effective and less adversarial method of resolving disputes. Moreover, and this is important particularly in casu, the aim of the Protocol is to foster a culture of cooperation and mutual respect among litigants.

The point is that, if regard is had to the purpose and the aim of the Protocol, parties should be excused from subjecting their disputes to mediation only in exceptional circumstances. Extreme acrimony between the parties and the fact that one of the parties to the litigation believes subjectively that the mediation would be a waste of time, are not exceptional circumstances. The stance adopted by the defendant in this matter misses the point of Court-annexed Meditation and loses sight of the fact that a Mediator is an impartial third party who helps the parties identify solutions. The mediator asks questions, reframes issues and helps the parties understand each other. The Protocol also obliges the parties to act in good faith during the mediation process and to participate actively and constructively in mediation sessions. Moreover, the style of mediation for the Protocol is required to be facilitative in the Mediation Protocol. that the Mediator facilitates a process of communication between the parties, so as to assist the parties to craft their own unique solution to the dispute.

In the result, I make the following order in terms of the Mediation Protocol: -

(1) The defendant shall cooperate in the appointment of a mediator and in the furtherance of the mediation process in accordance with the Mediation Directive and the Protocol thereto.

(2) The defendant be and is hereby compelled to, within ten days from date of this order, deliver an amplified rule 41A notice in terms of para 4.6 of the Mediation Protocol, stipulating inter alia his preference for the administration of the mediation process in accordance with paragraph 3.1 of the Mediation Protocol and the name and relevant details of one or more proposed mediator(s).

(3) The plaintiff shall respond within ten days from date of delivery of the defendant’s aforesaid amplified rule 41A notice, by delivering his further amplified rule 41A notice in terms of 4.6.2 of the Protocol.”

So now you know. If you or your clients are involved in a legal matter, you are strongly advised to consider mediation. It is clear from the two court cases above, that the courts are taking a very dim view of litigious parties who refuse to even consider mediation.

If you currently have a dispute that you are dealing with, you are welcome to contact me for any advice regarding mediation or should you wish to appoint a mediator.

You are welcome to email me on graeme@cpmd.co.za