

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBERS: 2023-023750
2023-013424
2022-018047
2023-034222
2023-069790
2023-004262
2023-049964

(1)	REPORTABLE: <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: <u>NO</u>
(3)	REVISED. YES
	
S. VAN ASWEGEN	
12 AUGUST 2024	

In the matter between:

SIYABONGA FREEDOM NSELE

Applicant/Plaintiff

and

THE ROAD ACCIDENT FUND

Respondent/Defendant

CASE NUMBER: 2023-013424

In the matter between:

MMATHMELO FAITH LEKABE

Applicant/Plaintiff

and

THE ROAD ACCIDENT FUND

Respondent/Defendant

CASE NUMBER: 2022-018047

In the matter between:

NTSHKAZI MPUMELO

Applicant/Plaintiff

and

THE ROAD ACCIDENT FUND

Respondent/Defendant

CASE NUMBER: 2023-034222

In the matter between:

MOFOKENG THATO

Applicant/Plaintiff

and

THE ROAD ACCIDENT FUND

Respondent/Defendant

CASE NUMBER: 2023-069790

In the matter between:

LEGWETE MAGDELINE NTHABISENG

Applicant/Plaintiff

and

THE ROAD ACCIDENT FUND

Respondent/Defendant

CASE NUMBER: 2023-004262

In the matter between:

THIPE KENNETH KGOMO

Applicant/Plaintiff

and

THE ROAD ACCIDENT FUND

Respondent/Defendant

CASE NUMBER: 2023-049964

In the matter between:

DIYA DUDUZILE BRIDGET

Applicant/Plaintiff

and

THE ROAD ACCIDENT FUND

Respondent/Defendant

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded onto the online file. The date and time for hand-down is deemed to be 10h00 on 13 August 2024.

JUDGMENT

VAN ASWEGEN AJ:

Introduction

- [1] The matters before me concerns several interlocutory applications where the Applicant seeks the following relief:
- 1.1 The Respondent is ordered to refer the action to mediation as an alternative dispute resolution method and to a qualified mediator agreed upon by the parties within 15 court days of the granting of this order;
 - 1.2 *Alternatively*, to prayer 1 above, the Respondent is ordered to consider referral of the action to mediation as a means of alternative dispute resolution;
 - 1.3 The Respondent shall together with the Notice in terms of Rule 41A(2)(b) provide written reasons for its refusal in the event that it declines referral of the action to mediation;
 - 1.4 Costs in the cause
- [2] The applications are made in accordance with Rule 41A(1) and (2) of the Uniform Rules of Court read with paragraph 27 of the Consolidated Practice Directive 1 of 2024.
- [3] Paragraph 27.1 of the Consolidated Practice Directive 1 of 2024 indicates that the Special Interlocutory Court ("SIC") is established to address the delinquency of an adversary in respect of non-compliance with the provisions of this directive or of the practice manual of the court or of any of the Uniform Rules of Court, in all cases, i.e., trials, applications and appeals, regardless of whether or not such matters are opposed or unopposed. Any party aggrieved by the other party's neglect, dilatoriness, failure, or refusal to comply with any rule of court must utilize the SIC to compel compliance from the delinquent party.
- [4] Rule 41A(1) of the Uniform Rules of Court deals with mediation and provides a working definition of mediation it stipulates the following:

"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." (my underlining)

- [5] The purpose of rule 41A is clear, namely to ensure that parties explore alternative dispute resolution methods at the commencement of their matters in court to avoid protracted litigation.¹
- [6] The four pillars of mediation which are identified by Rule 41A are the following:
- 6.1 it is a voluntary non-binding non-prescriptive dispute resolution process;
 - 6.2 the terms of the process to be adopted are those agreed upon by the parties;
 - 6.3 the mediator facilitates the process to enable the parties to themselves find a solution and makes no decision on the merits nor imposes a settlement on them;
 - 6.4 the process is confidential.
- [7] The foundation of the aforesaid principles is that, unlike dispute resolutions by court or arbitration which takes the process and resolution out of the hands of the parties, mediation empowers the parties in that they are in control of the mediation process.
- [8] The Plaintiff/Applicant must in terms of Rule 41A (2) of the Uniform Rules of Court *serve on each Defendant or Respondent a notice indicating whether such Plaintiff or Applicant agrees to or opposes referral of the dispute to mediation.* The wording of the said rule is the following:

"(2) (a) 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.

(b) A defendant or respondent shall, when delivering a notice of intention to defend or a notice of intention to oppose, or at any time thereafter, but not later than the delivery of a plea or

¹ MD v RJD (053357/2022) [20241 ZAGPPHC 79 (5 February 2024).

answering affidavit, serve on each plaintiff or applicant or the plaintiff's or applicant's attorneys, a notice indicating whether such defendant or respondent agrees to or opposes referral of the dispute to mediation.

- [9] The Applicants in terms of the prayers in the Notice of Motion want this court to order the Respondent to mediate or to consider mediation. The Respondents filed their intention to oppose the current motions.
- [10] It is firstly necessary to consider the claims and the pleadings delivered in these matters. I will deal with all the matters separately under their different name headings.

NSELE MATTER:

- [11] The Applicant was involved in a motor vehicle collision on the 10th of November 2020. The Applicant's matter was duly lodged, and summons was served on the Respondent. Together with the Applicant's summons, a notice in terms of Rule 41A was delivered to the Respondent on the 4th of April 2023 – Annexure "KPA 1" ²
- [12] The Respondent subsequently served and filed its Notice of Intention to Defend and its Plea on the 18th of April 2023 and 31st of May 2023 respectively. However, the Respondent has failed to deliver a Notice in terms of Rule 41A (2)(b).
- [13] The Applicant has delivered to the Respondent the necessary documents and evidence in support of his claim against the Respondent.
- [14] In addition, the Applicant has applied for a Civil Trial Date, which is yet to have been allocated.
- [15] Subsequently, the parties held a pre-trial conference, exchanged discovery notices and the Applicant delivered his medico-legal reports.
- [16] The Applicant seeks an order that the Respondent be ordered to refer the matter for mediation *alternatively* to consider mediation.³

² 12-26.

³ 12-14.

[17] The Respondent delivered a Notice of Intention to Oppose⁴ as well as an answering affidavit⁵ opposing the relief sought.

[18] The Respondent raises two points in opposition namely that the Applicant did not himself comply with Rule 41A(2)(a) before bringing the interlocutory application and that the Respondent has waived his right to enforce compliance with Rule 41A 2(b).

[19] The waiver argument was demonstrated as follows:⁶

19.1 the Applicant was fully aware at all material times before service of the notice of bar and subsequently to the filing of the plea that the Respondent did not file the subrule 2(b) notice. Notwithstanding his full knowledge of such non-compliance, he raised no procedural issue and or irregular step by the filing of the Plea. The Applicant allowed the period of ten days to raise an irregular step to lapse and did not at no stage filed a Rule 30A notice.

19.2 Secondly, by the very act of filing the notice bar, despite having knowledge of the non-compliance with the subrule, the Applicant waived his right to enforce the Respondent to comply with the subrule.

19.3 Thirdly, whilst the Applicant avers that he is aggrieved by the Respondent's failure to decide on possible mediation in terms of the subrules, the Applicant did not put any prejudice about the same in the signed pre-trial minute.

19.4 Lastly, on the 21st of June 2024, notwithstanding this application, the Applicant proceeded to serve the Respondent with a notice of set down for a trial.

[20] In summary, the Respondent states that:

20.1 the Applicant allowed the aforementioned to occur and did not at one stage raise an issue of non-compliance with the subrule.

20.2 the Applicant acquiesced himself with the Respondent's non-compliance and by that very act, he cannot later cry foul.

⁴ 12-1.

⁵ 12-4.

⁶ 12-9.

20.3 The period within which he had the opportunity to enforce compliance lapsed and to raise the same issue more than a year later is improper.

LEKABE MATTER:

- [21] The Applicant on 26 August 2020 was involved in a motor vehicle accident. The claim was duly lodged and summons was issued and served on the Respondent.
- [22] Together with the Applicant's summons, a notice in terms of Rule 41A was delivered to the Respondent on the 21st of February 2023, being Annexure "KPA 1"⁷ In the aforesaid notice the Applicant indicated her willingness to refer the matter for mediation.
- [23] The Respondent subsequently served and filed its Notice of Intention to Defend and its Plea on the 28th of March 2023 and 10th of May 2023 respectively. However, the Respondent has failed to deliver a Notice in terms of Rule 41A (2)(b)
- [24] The Applicant has delivered to the Respondent the necessary documents and evidence in support of his claim against the Respondent.
- [25] In addition, the Applicant has applied for a Civil Trial Date and the matter has been setdown for hearing on the 9th of March 2027.
- [26] The Plaintiff's claims for Loss of Earnings remains in dispute.
- [27] In this matter the Plea was received during May 2023 and pleadings in this matter have closed.⁸
- [28] The matter is accordingly at a late stage in the litigation process where the preparation is being done for trial.

NTSHEKAZI MATTER:

- [29] The Applicant on 16 December 2020 was involved in a motor vehicle accident. The claim was duly lodged and summons was issued and served on the Respondent.

⁷ 12-12.

⁸ 03-11.

- [30] Together with the Applicant's summons, a notice in terms of Rule 41A was delivered to the Respondent on the 31st of August 2023, being Annexure "KPA 1"⁹ In the aforesaid notice the Applicant indicated his willingness to refer the matter for mediation.
- [31] The Respondent subsequently served and filed his Notice of Intention to Defend and its Plea on the 18th of November 2022 and 14th of December 2022 respectively. However, the Respondent has failed to deliver a Notice in terms of Rule 41A (2)(b)
- [32] The Applicant has delivered to the Respondent the necessary documents and evidence in support of his claim against the Respondent.
- [33] Subsequently, the parties held a pre-trial conference, exchanged discovery notices and the Applicant delivered his medico-legal reports. The Applicant has also applied for a Civil Trial Date, which has been allocated for 27 January 2026.
- [34] The aspects of Loss of Earnings and Past medical expenses remain in dispute.
- [35] In this matter the Plea was received during December 2022¹⁰ and pleadings in this matter have closed.
- [36] The fact that a pre-trial¹¹ was held is also indicative of the parties' evaluation of the readiness of the parties' respective cases for trial. During the pre-trial conference the case is assessed, procedural clarity is obtained and key issues identified in preparation for trial.

MOFOKENG MATTER:

- [37] In this matter the Applicant was involved in a motor vehicle collision on the 12th of December 2020.
- [38] The Applicant's matter was duly lodged, and summons was served on the Respondent. Together with the Plaintiff's summons, a notice in terms of Rule 41A was delivered to the Respondent on the 24th of April 2023 marked "KPA1".¹²

⁹ 12-13.

¹⁰ 26-204.

¹¹ 11-1.

¹² 10-19.

- [39] The Respondent subsequently served and filed its Notice of Intention to Defend and its Plea on the 23rd of May 2023 and 29th of June 2023 respectively. However, the Respondent has failed to deliver a Notice in terms of Rule 41A (2)(b).
- [40] The Applicant has delivered to the Respondent the necessary documents and evidence in support of her claim against the Respondent.
- [41] In addition, the Applicant has applied for a Civil Trial Date and the matter has been set down for hearing on the 10th of November 2026.
- [42] The Plaintiff's claims for Loss of Earnings and Future Medical Treatment remain in dispute.
- [43] A pre-trial conference was held on 14 July 2023.¹³
- [44] Given the extremely long period of time prior to the civil trial hearing, the Applicant submits that the Respondent should, at the very least, consider mediation as an alternative dispute resolution to resolve the Applicant's claim.
- [45] The Applicant pleads that mediation would be particularly advantageous as it would relieve the backlog of claims already lodged with the Respondent and preserve the Court's resources in light of the influx of applications for Default Judgment / Civil Trial hearings lodged (and the associated costs thereof) in the Gauteng Division.

LEGWETE MATTER:

- [46] The Applicant's minor child was involved in a motor vehicle collision on the 19th of November 2020. The Applicant's minor child's matter was duly lodged, and summons was served on the Respondent. Together with the Applicant's minor child's summons, a notice in terms of Rule 41A was delivered to the Respondent on the 20th of August 2023 – Annexure "KPA 1".¹⁴
- [47] The Respondent subsequently served and filed its Notice of Intention to Defend on the 22nd of August 2023 and failed to plea in the requisite period. The Defendant thereafter became *ipso facto* barred from pleading. However, the Respondent has failed to deliver a Notice in terms of Rule 41A (2)(b).

¹³ 01-17.

¹⁴ 10-77.

- [48] The Applicant has delivered to the Respondent the necessary documents and evidence in support of her minor's claim against the Respondent.
- [49] In addition, the Applicant has applied for a Default Judgment Date and the matter will be set down for hearing on the 20th of September 2024.
- [50] The Applicant's minor child's claim for General Damages remains in dispute.
- [51] The Applicant has been aggrieved by the Respondent's failure to decide on possible mediation of the Applicant's matter in accordance with Rule 41A of the Uniform Rules of Court. The Applicant now wants the court to order the Respondent to refer the action for mediation or *alternatively* consider the referral to mediation.

KGOMO MATTER:

- [52] The Applicant in this matter was involved in a motor vehicle collision on the 28th of July 2019. The Applicant's matter was duly lodged, and summons was served on the Respondent. Together with the Plaintiff's summons, a notice in terms of Rule 41A was delivered to the Respondent on the 30th of January 2023, marked "KPA 1".
- [53] The Respondent subsequently served and filed its Notice of Intention to Defend and its Plea on the 12th of May 2023 and 23rd of May 2023 respectively. However, the Respondent has failed to deliver a Notice in terms of Rule 41A (2)(b).
- [54] The Applicant has delivered to the Respondent the necessary documents and evidence in support of his claim against the Respondent.
- [55] In addition, the Applicant has applied for a Civil Trial Date and the matter has been set down for hearing on the 21st of March 2027.
- [56] The aspects of liability and the Plaintiff's claims for General Damages, Loss of Earnings, Future Medical Treatment and Past Medical Expenses remain in dispute.
- [57] The Applicant pleads that the Respondent should, at the very least, consider mediation as an alternative dispute resolution to resolve the Applicant's claim.

DIYA MATTER:

- [58] The minor child was involved in a motor vehicle collision on the 24th of January 2020. The Applicant's matter was duly lodged, and summons was served on the Respondent. Together with the Applicant's summons, a notice in terms of Rule 41A was delivered to the Respondent on the 5th of June 2023 – Annexure "KPA 1"¹⁵
- [59] The Respondent subsequently served and filed its Notice of Intention to Defend and its Plea on the 7th of June 2023 and 11th of July 2023 respectively. However, the Respondent has failed to deliver a Notice in terms of Rule 41A (2)(b).
- [60] The Applicant has delivered to the Respondent the necessary documents and evidence in support of her claim against the Respondent.
- [61] In addition, the Applicant has applied for a Civil Trial Date, which is yet to have been allocated.
- [62] The aspects of liability and the minor child's claims for General Damages, Loss of Earnings, Future Medical Treatment and Past Medical Expenses remain in dispute.
- [63] The Applicant also in this matter wants the court to order the Respondent to mediate *alternatively* to consider mediation.

CONSIDERATION OF RELIEF SOUGHT:

- [64] The question for consideration in all the aforesaid matters is therefore whether the court can order the Respondent to mediate *alternatively* order the Respondent to consider mediation when pleadings have closed, prior to trial stage.
- [65] In answering this question, it is necessary to consider Rule 41A which came into effect on 9 March 2020 deals with mediation. This rule prepares the grounds for litigants to mediate before venturing to court.
- [66] The wording of rule 41A stipulates that mediation is:-

"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

¹⁵ 12-12.

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."

RULE 41A(2)(b) AND RULE 41A(3)(a)

- [67] From the wording of rule 41A(2)(b) of the Uniform Rules of court the Respondent's notice to oppose mediation had to be delivered at the time of delivering a notice of intention to defend or a notice of intention to oppose, or at any time thereafter, but not later than the delivery of a plea or answering affidavit. (my underling)
- [68] To interpret the wording of the aforesaid rule one must ascertain the meaning of the words which must be read grammatically and in their ordinary sense. It is a primary rule of construction that words are to be given their ordinary and natural meaning, subject to the qualification that, if to give the words their ordinary meaning would lead to an absurdity or to something which, from the instrument as a whole, it can clearly be gathered that it could not have been intended, then a departure from the literal meaning of words so as to give effect to the true intention is justifiable. In matters of construction the grammatical and ordinary sense of the words used must prevail.¹⁶
- [69] It is accordingly clear that the stages for the delivery of the said notice rule in terms of Rule 41A(2)(b) is:
- 69.1 when the Notice of Intention to Defend or the Notice of Intention to Oppose was delivered or
- 69.2 at any time thereafter, *but*
- 69.3 not later than when the Plea was delivered.
- [70] The Applicant is only now - after close of pleadings and in certain of the matters a pre-trial conference having been held, on the eve of trial - seeking to get the Respondents to mediate.
- [71] Rule 41A(2)(b) cannot in light of the wording thereof find application in these matters as it could only have been given up to plea stage.

¹⁶ Kloppers v Ko-Operatiewe Wijnbouwers Van Zuid-Afrika, Beperk 1947 (3) SA 408 (C).

- [72] The Applicant however also placed reliance on rule 41A(3)(a) which stipulates that:

"Notwithstanding the provisions of subrule (2), to the parties may at any stage before judgment, agree to refer the dispute between them mediation: Provided that where the trial or opposed application has commenced the parties shall obtain the leave of the court."

- [73] It is therefore evident from rule 41A(3)(a) that the parties can mutually agree to mediate at:

73.1 any stage before judgment and

73.2 with the leave of court if the trial has commenced.

- [74] However, it is emphasized that such a referral has to be by consent of the parties – the Applicant and the Respondent - before judgment stage. This is not the position in the matters before me as there is no such agreement between the parties. Rule 41(3)(a) accordingly also does not come to the aid of the Applicant.

- [75] If one has reference to the Pre-trial minute in the Nsele matter ¹⁷ it is noted that the Plaintiff posed the question whether the Defendant agreed that the matter need not be referred for mediation and arbitration or a third-party referee, which was answered as follows:

"Save to reserve its right to reject the Plaintiff's entitlement to receive compensation for general damages (in which event the Plaintiff may elect to refer such issue to a third party), the Defendant agrees." (my underlining)¹⁸

- [76] It should accordingly be emphasized that the Defendant agreed with the Plaintiff that the Nsele matter should not be referred to mediation. It was recorded that "only in the event of the Defendant's rejection of the Plaintiff's entitlement for general damages" such an issue might have been referred to a third party to mediate.

- [77] The parties in the Nsele matter canvassed mediation and agreed to not mediate but to litigate.

¹⁷ 11-1.

¹⁸ Paragraph 5.2 at 11-7.

- [78] The fact that a pre-trial conference was held in several of the matters as alluded to here in before is also indicative of the parties' evaluation of the readiness of the parties' respective cases for trial. During the pre-trial the case is assessed, procedural clarity is obtained and key issues identified in preparation for trial.
- [79] The aspect of mediation was therefore canvassed by the parties at pre-trial stage and the parties clearly favoured the trial process. The Respondent also importantly did not note any prejudice suffered as a result of the matter not being mediated.
- [80] Mediation, as alluded to here in above, is a voluntary non-binding non-prescriptive dispute resolution process. Voluntary meaning that it is elective and non-compulsory. As such the court cannot order any party to adhere to the process. Both parties must therefore be amenable to mediation.
- [81] In *Kalagadi Manganese (Pty) Ltd & Others v Industrial Development Corporation of South Africa & (2020/12468) [2021] ZAGPJHC 127* at paragraph 30, Judge Spilg also posited mediation as follows:

"Mediation is entirely voluntary and if the parties, or only two of them, are so minded they are at liberty to agree on such terms of mediation as they wish;

An unwilling party cannot be compelled to mediate."

- [82] In *FFS Finance South Africa (Pty) Ltd t/a ABSA Vehicle and Asset Finance v Groenewald (2167/22) [2023] ZANCHC 76 (27 October 2023)* more specifically paragraph 8 thereof it is confirmed that:
- i) mediation is a voluntary process¹⁹ entered into by agreement between the parties and that
 - ii) a Court does not have the authority to order parties to litigation to refer the dispute between them for possible resolution by way of mediation.²⁰
- [83] In *Sokhani Development & Consulting Engineers (Pty) Ltd v Alfred Nzo District Municipality (1254/2024) [2024] ZAECGHC 40 (26 April 2024)* Zono AJ found

¹⁹ *Kalagadi Manganese (Pty) Ltd & Others v Industrial Development Corporation of South Africa & Others [2021] ZAGPJHC 127.*

²⁰ *Nedbank Ltd v D & Ano [2022] ZAFSHC 331.*

that non-compliance with Rule 41A and its provisions are not fatal to the proceedings.

- [84] Rule 41A is however clear in contemplating that a party must consider mediation earnestly prior to making an election as to litigate and there after give reasons why the dispute is not capable of mediation.
- [85] The purpose of Rule 41A is clearly to expedite the resolution of the dispute thereby alleviating the court's case load burden and promoting access to justice. The parties also benefit from mediation by saving substantial time and costs which are associated with litigation. Even if mediation is unsuccessful it still helps to indicate which issues have to be litigated.
- [86] The court in *P v O (21264/2019) [2022] ZAGPJHC 826* at paragraphs 19 - 20 stated as follows:

"Rule 41A was introduced as an amendment to the Rules and came into effect on 9 March 2020. Its underlying objective is to make it mandatory for litigating parties to consider mediation at the inception of litigation. (my emphasis) There is no provision in rule 41A to compel any party to submit to mediation. There is also no sanction provided in the rule for non-compliance[...]"

- [87] I am of the firm view that the parties are no longer at the inception of the court process but preparing for trial. Mediation was considered in the Nsele matter at pre-trial stage, but both parties elected to proceed with the trial process. It is however always open to both parties to consent to the mediation process even prior to judgment stage.
- [88] I am indeed mindful that mediation has numerous benefits. To name but a few of these advantages:
- 88.1 it offers a speedy resolution of disputes;
- 88.2 it is considerable cheaper than litigation;
- 88.3 the process is flexible and avoids technicalities;
- 88.4 it promotes reconciliation.
- [89] Notwithstanding all these benefits mediation remains voluntary. I am therefore of the opinion that no court can force a party to mediate. For a court to order

mediation or the consideration of mediation is to force a party to consider or partake in a process that is elective. Mediation then becomes not discretionary and loses its original nature namely being voluntary. The purpose of mediation and the very core of the process is then tainted.

- [90] I pause to mention and emphasize that as discussed here in before the parties can always prior to judgment agree to mediation or even at trial stage with the leave of court seek mediation. Rule 41A(3)(a) allows both parties who are in agreement that they want to mediate to refer a matter to mediation prior to judgment stage and even when the trial has commenced. Mediation as process is accordingly available even at the late stages of litigation if parties consent thereto.
- [91] The Applicants had the right to seek compliance with rule 41A(2)(b) up until plea stage in all the matters. This right was not exercised. Thereafter mediation is to either be agreed upon between the parties or by leave of the court if the trial had commenced. I am of the view that mediation as a process and an alternative dispute resolution tool remains available to the parties *post* plea stage up to judgment stage as long as it is consented to and remains voluntary.
- [92] In the Nsele matter the Respondent raised the valuable point that in this interlocutory application the Applicant also had to comply with Rule 41A(2)(a).
- [93] The Applicant had to together with the application also give notice either to agree to or oppose the mediation process. This was not done. Failure to comply amounts to an irregular step.²¹ The Applicants are in my opinion seeking relief in terms of Rule 41A but not complying with the rule themselves.
- [94] Rule 41A(2)(a) is clearly worded in that a notice to agree to or oppose mediation should be given in every new action or application. (my underlining) In order for mediation to succeed as an alternative dispute resolution mechanism it is time for our courts to not only seek compliance with Rule 41A but to seriously consider and endorse it as a valuable process with its own advantages.
- [95] As to whether the Applicant waived its right to seek compliance with Rule 41A (2)(b) it is clear that the Applicant could have seek compliance at the following stages:

²¹ Madikizela v Nkosi and Another (19408/2021) [2023] ZAGPJHC 322 (13 April 2023).

95.1 when the Notice of Intention to Defend or the Notice of Intention to Oppose was delivered *or*

95.2 at any time thereafter, *but*

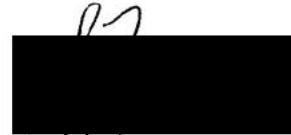
95.3 not later than when the Plea was delivered.

[96] The Applicant did not seek compliance with the said rule at any of the three stages and can only now mediate if both parties agree or with the leave of court at the time of trial. If there is no consent the process of mediation can simply not be utilised.

[97] In light of the aforesaid the relief sought cannot be granted as the time for compliance with rule 41A(2)(b) has long passed and due to the absence of consensus between the parties to mediate.

[98] I accordingly make the following order in all the matters:

1. The application is dismissed with costs.



S. VAN ASWEGEN
Acting Judge of the High Court
Gauteng Division, Johannesburg

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2023-049964 (27 June 2024)

Judgment: 13 August 2024

Appearances

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