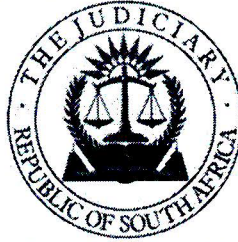


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2022/20090

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED. YES

S. VAN ASWEGEN

5 NOVEMBER 2024

In the matter between:

ZWANE CECILIA

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 5 November 2024.

JUDGMENT

VAN ASWEGEN AJ:

Introduction

[1] The matter before me concern, as did several other matters in which I gave judgment on 13 August 2024 by the same attorneys – *Kruger & Pottinger Attorneys* acting on various Applicants' behalves, an interlocutory application where identical relief was sought.¹ I have today been made aware that this matter similarly stood down for judgment and I will accordingly deal with this

¹ Siyabonga F Nsele v RAF 2023-023750, MF Lekabe v RAF 2023-013424 and 5 others;

matter as the principles applicable remain the same. 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 cause²
- [2] The application is 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

² 006-126

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.³
- [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 answering affidavit, serve on each plaintiff or applicant or the plaintiff's or applicant's attorneys, a notice indicating whether

³ MD v RJD (053357/2022) [2024] ZAGPPHC 79 (5 February 2024).

such defendant or respondent agrees to or opposes referral of the dispute to mediation.

- [9] The Applicant in terms of the prayers in the Notice of Motion wants this court to order the Respondent to mediate or to consider mediation.
- [10] It is firstly necessary to consider the claim and the pleadings delivered in this matter.
- [11] The Applicant was involved in a motor vehicle collision on the 31st of MAY 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 27th of June 2022 – Annexure "KPA1" ⁴
- [12] The Respondent subsequently served and filed its Notice of Intention to Defend and its Plea on the 12th of January 2023 and 14th of FEBRUARY 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 has been set down for hearing on 21 August 2025.⁵
- [15] The aspect of loss of earnings remain in dispute between the parties.
- [16] The Applicant seeks an order that the Respondent be ordered to refer the matter for mediation *alternatively* to consider mediation.⁶
- [17] In this matter the pleadings have closed.
- [18] The matter is accordingly at a very late stage in the litigation process where the preparation is being done for trial.

⁴ 006-136

⁵ KPA 2 at 006-140

⁶ 006-126

CONSIDERATION OF RELIEF SOUGHT:

- [19] The question for consideration in this matter 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.
- [20] 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.
- [21] 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 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)

- [22] 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 underlining)
- [23] 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.⁷

⁷ Kloppers v Ko-Operatiewe Wijnbouwers Van Zuid-Afrika, Beperkt 1947 (3) SA 408 (C).

[24] It is accordingly clear that the stages for the delivery of the said notice rule in terms of Rule 41A(2)(b) is:

[24.1] when the Notice of Intention to Defend or the Notice of Intention to Oppose was delivered or

[24.2] at any time thereafter, *but*

[24.3] not later than when the Plea was delivered.

[25] The Applicant is only now - after close of pleadings on the eve of trial - seeking to get the Respondent to mediate.

[26] Rule 41A(2)(b) cannot in light of the wording thereof find application in this matter as it could only have been given up to plea stage.

[27] 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."

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

[28.1] any stage before judgment and

[28.2] with the leave of court if the trial has commenced.

[29] 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 matter 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.

[30] 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.

- [31] 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."

- [32] 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 process⁸ 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.⁹

- [33] In *Sokhani Development & Consulting Engineers (Pty) Ltd v Alfred Nzo District Municipality (1254/2024) [2024] ZAECGHC 40 (26 April 2024)* Zono AJ found that non-compliance with Rule 41A and its provisions are not fatal to the proceedings.

- [34] 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.

- [35] 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.

- [36] 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

⁸ *Kalagadi Manganese (Pty) Ltd & Others v Industrial Development Corporation of South Africa & Others [2021] ZAGPJHC 127.*

⁹ *Nedbank Ltd v D & Ano [2022] ZAFSHC 331.*

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[...]"

- [37] I am of the firm view that the parties are no longer at the inception of the court process but preparing for trial. It is however always open to both parties to consent to the mediation process even prior to judgment stage.
- [38] I am indeed mindful that mediation has numerous benefits. To name but a few of these advantages:
- [38.1] it offers a speedy resolution of disputes;
- [38.2] it is considerable cheaper than litigation;
- [38.3] the process is flexible and avoids technicalities;
- [38.4] it promotes reconciliation.
- [39] 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.
- [40] 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.
- [41] The Applicant had the right to seek compliance with rule 41A(2)(b) up until plea stage in this matter. 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.
- [42] 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.

[43] In terms of Rule 41A (2)(b) it is clear that the Applicant could have seek compliance at the following stages:

[43.1] when the Notice of Intention to Defend or the Notice of Intention to Oppose was delivered *or*

[43.2] at any time thereafter, *but*

[43.3] not later than when the Plea was delivered.

[44] 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 thereto 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.

[45] 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.

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

[46.1] The application is dismissed with costs.



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

Heard: 26 June 2024

Judgment: 5 November 2024

Appearances

For Applicant: L Schoombie
Instructed by Kruger & Pottinger Attorneys

For Respondent: D. Sondlani
Instructed by State Attorney (Johannesburg)