



**RULES BOARD FOR COURTS OF LAW
REPUBLIC OF SOUTH AFRICA**

2nd Floor, Centre Walk East Tower, 266 Pretorius Street, PRETORIA • P.O. Box 13106, The Tramshed, 0126 • Tel (012) 326 8014/ 8045, Fax (012) 326 8018

28 April 2023

Our ref: JB/ASEbola/SCC Your ref:

Per: e-mail

Dear Sir/Madam,

PROPOSED AMENDMENTS TO UNIFORM RULE 41A (MEDIATION AS A DISPUTE RESOLUTION MECHANISM)

The Rules Board for Courts of Law (Rules Board) has considered amending Uniform Rule 41A of the Uniform Rules (Mediation as a dispute resolution mechanism).

Arising out of the operation of the rule in practice and out of certain judgments, the Rules Board considered that certain amendments to the rule are necessary and desirable for the efficacious functioning of the objects of the rule and the process of mediation. The Rules Board had regard to *inter alia* the following factors:

- (a) In urgent applications there is no provision for what should occur if a party is unable to comply with the provisions of subrule (2), in particular the notice required, especially in applications launched in terms of the Prevention of Organised Crime Act, 1998 (Act No 121 of 1998); and
- (b) That in considering costs in terms of subrule (9), the court may consider the notice in terms of subrule (2) as well as any other factor which the court may consider relevant, so as to require parties to give serious consideration to mediation.

The Rules Board considered addressing the issue in paragraph (a) above by inserting a proviso to subrule (2) to indicate that “in urgent applications the court or a judge may dispense with compliance with paragraphs (a) and (b).”.

In settling on the proviso the Rules Board had regard to subrule (12) of Uniform Rule 6 (Applications) which regulates urgent applications and provides for the court or a judge to dispense with the forms and service provided for in the rules and considered that it would be useful for purposes of clarity to include in subrule (2) of Uniform Rule 41A, a provision that in urgent applications the court or a judge may dispense with compliance with paragraphs (a) and (b) of Uniform Rule 41A(2).

Board members appointed in terms of Section 3 of the Rules Board for Courts of Law Act 107 of 1985

Justice N Dambuza (Chairperson) | Justice N Mabindla-Boqwana (Vice Chairperson) | Adv L Haupt SC | Ms J Wessels | Adv M Sishuba | Mr G Bellairs | Mr T Thupaatlase | Ms N S Khanyile | Mr R R Titus | Mr V P Maluleke | Adv S Makoasha | Professor T Broodryk | Mr P Setati

In considering the issue in paragraph (b) above, the Rules Board considered that in considering an appropriate costs order under subrule (9), the court may have regard to any other factor which is relevant to the awarding of costs in favour of or against any party.

Draft amended Uniform Rule 41A is attached for consideration.

[ANNEXURE A]

As part of its rule-making and consultation process, the Rules Board invites your comments on the draft amendment proposed to Uniform Rule 41A (ANNEXURE A).

Your comments and inputs should be submitted to the Secretariat of the Rules Board by no later than 30 June 2023 and may be sent via hand delivery, post or email to:

Physical: 2nd Floor, Centre Walk East Tower, 266 Thabo Sehume (Andries) Street, Pretoria

Postal: P.O. Box 13106, The Tramshed, 0126

Email: AmSebola@justice.gov.za

The Rules Board looks forward to receiving your inputs (if any) and thanks you for same.

Yours sincerely,



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**RULES BOARD FOR COURTS OF LAW
REPUBLIC OF SOUTH AFRICA**

UNIFORM RULE 41A: PROPOSED DRAFT AMENDMENTS

GENERAL EXPLANATORY NOTE:

[] Words or expressions in bold type in square brackets indicate omissions from existing rules

_____ Words or expressions underlined with solid line indicate insertions into existing rules

41A Mediation as a dispute resolution mechanism

(1) In this rule—

‘**dispute**’ means the subject matter of litigation between parties, or an aspect thereof.

‘**mediation**’ means 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.

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

Provided that in urgent applications the court or a judge may dispense with compliance with paragraphs (a) and (b).

(c) The notices referred to in paragraphs (a) and (b) shall be substantially in accordance with Form 27 of the First Schedule 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(b) [sic] the notices referred to in this subrule shall be without prejudice and shall not be filed with the registrar.

(3)(a) Notwithstanding the provisions of subrule (2), 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 shall 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 to mediation.

(4) Where a dispute is referred to mediation—

(a) the parties shall deliver a joint signed minute recording their election to refer the dispute to mediation;

(b) the parties shall prior to the commencement of mediation proceedings enter into an agreement to mediate;

(c) the time limits prescribed by the Rules for the delivery of pleadings and notices and the filing of affidavits or the taking of any step shall be suspended for every party to the dispute from the date of signature of the minute referred to in paragraph (a) to the time of conclusion of mediation: Provided that any party to the proceedings who considers that the suspension of the prescribed time limits is being abused, may apply to the court for the upliftment of the suspension of the prescribed time limits; and

(d) the process of mediation shall be concluded within 30 days from the date of signature of the minute referred to in paragraph (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.

(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: Provided that any party to the proceedings who

considers that such suspension of time limits is being abused, may apply to the court for the upliftment of such suspension.

(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 paragraph (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) Mediation shall be deemed to be completed within 30 days from the date of signature of the joint minute referred to in subrule (4)(a), from which date the suspension of the time limits prescribed for the delivery of pleadings and notices and the filing of affidavits or the taking of any step referred to in subrule (4)(c) shall lapse: Provided that where mediation is completed before the aforesaid period of 30 days, the parties who engaged in mediation shall deliver a notice contemplated in subrule (7) indicating that mediation has been completed.

(b) The parties who engaged in mediation and the mediator who conducted the mediation shall within five days of the conclusion of mediation, 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.

(c) It shall be the joint responsibility of the parties who engaged in mediation to file with the registrar, the minute referred to in paragraph (b).

(d) No offer or tender made without prejudice in terms of this subrule shall be disclosed to the court at any time before judgment has been given.

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

(9)(a) Unless the parties agree otherwise, liability for the fees of a mediator shall be borne equally by the parties participating in mediation.

(b) When an order for costs of the action or application is considered, the court may have regard to—

(i) the notices referred to in subrule (2) or to any offer or tender referred to in subrule (8)(d) and any party shall be entitled to bring such notices or offer or tender to the attention of the court; or

(ii) any other factor which is relevant to the awarding of costs in favour of or against any party, or to the refusal of all or any portion of the costs or to the making of any special order for costs.