NOTICE OF MEDIATION IS INUNDATED COURTS' BEACON OF HOPE

Category: Administrative and Procurement Law,Commercial Law,Dispute Resolution
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If you don't comply with a Rule 41A of the Uniform Rules of Court, you run the risk of being stopped dead in your tracks or being turned away by a Registrar when attending court to issue summons or a notice of motion. The primary purpose of Rule 41A is to ensure that courts are not inundated with civil matters that could be resolved between the parties by means of mediation.

What Rule 41A entails and how to comply

Rule 41A was introduced to ensure that in every new action or application, the plaintiff or applicant, along with the summons or notice of motion, includes a notice indicating whether the plaintiff or applicant agrees to, or opposes a referral of a dispute to mediation.

Rule 41A(2)(a) requires an initiating party to annex a Form 27 – notice of agreement to mediation – to a summons or a notice of motion ("**underlying pleading**"). The purpose of annexing Form 27 is to give the plaintiff/applicant an opportunity to advise on whether it/he/she is amenable to mediation or not. In turn, the defendant/respondent is required, 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, to serve on the initiating party, a notice indicating whether the defendant/respondent agrees to or opposes referral of the dispute to mediation – Rule 41(2)(b).

If the defendant/respondent is agreeable to mediation, and a dispute is referred to mediation, Rule 41(4) requires both parties to deliver a joint signed minute ("**minute**") recording their election to refer a dispute to mediation. When a dispute is referred to mediation, *dies* (time limits) on the delivery of pleadings are suspended until mediation is concluded. The parties are also required, prior to the commencement of mediation proceedings, to enter into an agreement to mediate.

The process of mediation shall be concluded within 30 days from the date of signature of the minute. In certain instances, a Judge or the court may extend such time period for completion of the mediation session if parties provide good reasons for the extension.

Where the parties have reached settlement at mediation proceedings, the plaintiff/applicant may withdraw such proceedings, either by consent between them or with leave of court.

What are the differences between Rule 41A mediation "court mediation" and ordinary mediation?

More often than not, when parties enter into an agreement/contract, they include a "*Dispute Resolution"* clause which sets out a procedure to be followed in the event of a dispute between them circumscribed to that agreement or contract. Such Dispute Resolution clauses usually provides for a mediator to be appointed and the associated costs to be borne by parties in their respective proportions. Most agreements provide for an arbitration to follow should mediation fail.

On the other hand, with court mediation, once parties opt for mediation, if mediation fails, no arbitration follows. Instead, parties may resume litigation. Unless the parties agree otherwise, with court mediation, both parties pay the mediator's fees in equal proportions. In an ordinary mediation, a "Dispute Resolution" clause almost always stipulates as to which party is liable for mediation costs.

Consequences of non-compliance with Rule 41A

Although the Rule 41A procedure is in place, some courts have no problem with litigants who overlook this process and proceed to issue underlying pleadings without a Form 27. However, some High Courts are cracking the whip and ostensibly refuse to issue any underlying pleadings without a Form 27. Failure to include a Form 27 does not appear to be totally flawed as the parties may at any time, before the judgment is granted, refer the matter to mediation. If the trial has commenced, mediation can only be entertained by a leave of court.

In its judgment in the matter between M N v S N((10540/16 [2020] ZAWCHC 157 (13 November 2020.))), when referring to non-compliance with Rule 41A, the Honourable Judge Rogers held that *"…I do not wish to be understood as under-estimating the value of mediation and the importance of compliance with the rule. Nevertheless, it is a relatively new provision, so one can understand that it will on occasion still be overlooked…"*

This Rule ought to alleviate the overburdened court system should the parties agree to mediation. However, since it is still being overlooked by certain courts, it does not seem beneficial. In addition, if mediation fails, the matter will proceed to litigation in court.

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