COMMENTS ON THE "COURT- ANNEXED MEDIATION RULES OF THE MAGISTRATES' COURTS"

Prepared and submitted by

The South African Dispute Settlement Accreditation Council ["DiSAC"]

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1 Introduction

1.1 DiSAC

The Dispute Settlement Accreditation Council ['DiSAC'] is a voluntary Industry Body that aims to provide a uniform system of dispute resolution practitioner accreditation, and aims to represents the collective view of the dispute settlement industry in South Africa. DiSAC was officially launched in March 2010.

DiSAC appreciates the opportunity to comment on the Draft Mediation Rules. The views expressed here arise from our cumulative experience of training, coaching, assessing and managing mediators and administering and conducting dispute resolution processes, and from practice in the field of mediation.

We trust that our contribution will enrich the process of deliberation about the Rules.

These comments represent the views of the Dispute Settlement Accreditation Council ("DiSAC"). These comments in addition have the express support of the following members of DiSAC:

- Africa Centre for Dispute Settlement, University of Stellenbosch Business School
- Tokiso Dispute Settlement (Pty) Ltd
- Equillore Group Limited
- Association of Arbitrators, Southern Africa
- Royal Institution of Chartered Surveyors SA
- Conflict Dynamics
- Arbitration Foundation of South Africa (AFSA)
- The Mediation Company.

DiSAC will appreciate the opportunity to engage in discussions on the various issues raised in these comments.

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2 The Comments

2.1 The meaning of "Voluntary Referral"

An earlier draft of the Mediation Rules proposed a compulsory mediation process. This has been amended in favour of what is referred to in the Rules as "voluntary referral" of disputes.

If one peruses the Rules it becomes clear that "voluntary referral" in these Rules actually means "referral by agreement between the parties". The Rules in essence allows one party to invoke the assistance of the Dispute Resolution Officer to facilitate an agreement between the parties to refer the dispute to mediation.

It is submitted that an alternative approach, that still constitutes "voluntary mediation" is possible – and potentially more effective. This approach would function as follows:

- Any one party to a dispute may refer that dispute to mediation.
- The task of the Dispute resolution officer (upon receipt of this referral) is to appoint the mediator and arrange the mediation
- Because these Rules postulate voluntary mediation – the other party to the dispute may validly (in writing, with reasons) refuse to participate in the mediation. In such an event the Dispute resolution officer will not appoint the mediation – BUT he/she must record this refusal on the Court record, and also the reasons for that refusal.

Though both these approaches are still fundamentally voluntary (ie both parties need to consent before a mediator is appointed), this alternative approach has significant benefits in that it places the onus on an unwilling party to justify his actions.

The assumption underlying such an approach is that where one party thinks mediation is appropriate (which he signifies by referring the case to mediation), it is likely to in fact be appropriate. This has logic to it – if one party is willing to engage in settlement discussions, there must be some possibility of its succeeding.

If despite this – the other party refuses to participate, reasons need then to be provided as to why mediation is not appropriate[1]. Of course such reasons may be perfectly valid – but they may also be unreasonable or invalid, which could then later have consequences for the refusing party in the form of a costs order.

It is submitted that this approach creates a stronger institution, and forces the parties to properly apply their mind to the issue at hand. The current Rule makes it very easy for the unwilling party to refuse, without any justification, and without any real threat of future sanction.

[1] It is conceivable that a party may refuse mediation on the basis that he/she cannot afford the costs of mediation. Given that this rule should not invoke undue obstacles to parties' Constitutional right of access to Court, this may well be a valid basis for objecting to the process.
If, as is suggested in paragraph 2.33, the Rule provides for greater flexibility with regard to payment for the mediation costs, this basis for objection may be overcome by the other party's willingness to pay for the costs of mediation.

The current Rule in effect only confirms what already exists – ie that parties may agree to mediation. It is submitted that the Rule should provide some additional imperative towards going for mediation (yet without making it compulsory).

This suggested approach is also in line with other pilot schemes[2] – where for instance the London County Court Practice Rules -

> *"…enables the Central London County Court to require the parties to… either to attend a mediation appointment or to give reasons for objecting to doing so."*

If the suggested approach is followed, the amended Rule should provide further clarity on:

- When and how such objections to the mediation should be lodged [preferably formally, in writing to the Dispute Resolution Officer]
- The status of any such objections, in any argument as to costs.

2.2 Restriction of Rules to Magistrate's Courts

The Industry has concerns regarding the fact that the roll out of these Rules are restricted to the Magistrates' Court and exclude the High Court:

- The Draft Rule does not indicate any clear rationale for this limitation. The Draft Rule also does not indicate whether it is anticipated that the Rule would be extended to the High Court at a later date, and if so under what circumstances. It is suggested that some clarity in this regard is required;
- This limitation excludes disputes about bigger value claims that fall outside the jurisdiction of the Magistrates' Courts. This has the risk of putting out the message to the public that mediation is a lightweight process: fine for neighbour disputes, but not really suited to bigger matters. International experience has demonstrated that mediation is equally suitable for addressing bigger value claims;
- It is submitted that the logistical challenge of implementing the Rule across numerous and dispersed Magistrate's Courts is even more daunting than implementation at the seats of the High Court.

2.3 Who pays for the Mediation Process

Rule 12 states that the parties participating in the mediation process must pay the mediator's fees, and that liability for the fees of the mediator must be borne equally between the opposing litigants participating in the mediation process.

[2] PRACTICE DIRECTION TO SUPPLEMENT CPR PART 26 (2005), PILOT SCHEME FOR MEDIATION IN CENTRAL LONDON COUNTY COURT

It is submitted that this Rule is problematic in that it does not allow for agreement between the parties that one of them will pay the mediation costs. It is a reality that the costs of mediation is one of the factors that may dissuade many parties from agreeing to participate. If the other party is willing to bear the costs, this obstacle is removed.

The fact that one party bears the costs of proceedings does not need to be disclosed to the mediator, and even if it is disclosed, should not have any impact on his independence. Fees are normally payable before the mediation event, and will therefore have no bearing on the conduct of the mediator.

Accordingly we propose that the parties should be allowed to agree to which of them will pay the costs of the mediator, or to share the fees of the mediator in whatever proportion they see fit, and only failing agreement that the fee be paid in equal proportions.

This Rule should in addition confirm that *the mediation costs will normally be considered to be costs in the cause*. This will remove any doubt and argument at subsequent taxation of bills of cost.

2.4 Administrative Burden on the Dispute Resolution Officer

These Rules place a very substantial administrative burden on the Dispute resolution officer. We have concerns as to whether the necessary infrastructure available / in place to support this function?

We further submit that the requirement in Rules 5 (3) and 6 (1)(b) that the parties "attend a conference" adds substantially to this administrative burden – and also increases the costs for the parties.

We point out that if the approach suggested in paragraph 2.1 is adopted the administrative burden and costs to the parties is VERY SUBSTANTIALLY reduced, as there is then in most cases no need for a pre-mediation conference.

The change proposed in paragraph 2.1 would therefore not only strengthen the Rule, but would also dramatically decrease the administrative burden of the process.

2.5 Penalties for non-participation

Current case law already places a duty on parties to consider using mediation, and raises the specter of punitive costs orders where parties unreasonably refuse to participate.

As the Rule currently stands it does not provide any support for this existing legal position: The Rule provides no mechanism for reporting to the Court the extent to which the parties refused to participate in mediation, or simply failed to turn up at the Rule 5(3) conference.

We propose that the Rule should provide a clear mechanism for the following:

- Reporting to the Court where parties failed or refused to participate in mediation proceedings;
- Recording the reasons why parties refuse to participate in mediation proceedings, and reporting to the Court on this.

This would not be introducing any new penalty or duty on the parties, but would merely serve to inform the Court on matters it already takes into account when considering costs orders.

2.6 Mediation outside of the Rule

It appears from the rule, read as a whole (and with particular reference to Rules 5(1) and 6(1)), that if parties wish to mediate any dispute which falls within the jurisdiction of a Magistrates' Court they MUST mediate in terms of the rule and may not mediate outside of it.

In addition, the wording of Rule 3(1)(b) indicates that where the trial has commenced the parties must obtain the authorisation of the court before they can refer a matter to mediation.

Given that mediation is a form of assisted settlement negotiation, it seems an unintended consequence of the current formulation of the Rules to exclude/limit parties' unfettered right to negotiate and or settle at ANY stage of the proceedings in whatever way they may agree on.

We suggest that there is no rationale for such a restriction, and that parties should continue to be entitled to mediate outside of the ambit of the rule if they choose to.

Clearly, if a party invokes the rule then the mediation should comply with the rule.

On the other hand parties should not be prevented, by agreement between them, from mediating, as they do at present, on mutually agreed terms.

This should apply whether or not litigation has commenced. This would require amendments to definitions which restrict the ambit of all mediation to mediation under the rule, sections 2(1)(a) (b), 3, 5, 7(2), and 10 amongst others.

2.7 Appointment of Service Providers

If the appointment of service providers to assist with implementation of these Rules is envisaged (as was indicated), careful attention must be paid to the mechanism that will be used for lawfully delegating / transferring these functions to the service providers.

We propose that if the use of service providers is indeed envisaged, the Rules must provide a mechanism for this, so as to ensure the legality of their appointment process.

2.8 Definition of "alternative dispute resolution" ("ADR") is problematic.

The definition of 'alternative dispute resolution' does not reflect the full range of the ADR processes available to disputing parties, including arbitration, early neutral evaluation, etc. The definition suggests that ADR only includes processes in which resolution is achieved through assisted negotiation and not adjudicative processes like arbitration, adjudication or early neutral evaluation. This is not the generally accepted definition of ADR, and potentially and unnecessarily limits the scope of ADR.

The term is used only in the preamble to the Mediation Rules, the definition of the "dispute resolution officer" and in rule 4(1)(a).

We propose that the definition of "alternative dispute resolution" be removed and that:

- the definition of "dispute resolution officer" be amended to read "'dispute resolution officer' means a person who administers and controls the mediation process and whose functions are set out in these rules"; and
- rule 4(1)(a) be amended to read "(1) The dispute resolution officer must explain to all parties - (a) the purpose of mediation, the meaning, objectives and benefits, including costs savings, of mediation; …"

2.9 Definition of "mediator"

The current definition of "mediator" is open to the interpretation that the mediator MUST be a person who is included in a panel established in terms of the Rules.

We would suggest the following definition:

> **'mediator' means an independent an impartial person who meets the standards of fitness determined by the Minister from time to time and who is either mutually agreed by the parties, or appointed by a dispute resolution officer from the list referred to in rules 14(2) to mediate a dispute between parties; [3]**

Such a definition would give recognition to the fact that the process is voluntary, and that the parties should be at liberty to appoint any person (even ones not on the Panel) – provided that he/she meets the qualifications and fitness standards.

We would suggest that it is, ultimately, the function of the Minister to ensure that anyone mediating in accordance with the Rule is a fit and proper person to do so and is properly trained, qualified and regulated - *but not to restrict the parties' right to choose the mediator that suits them best*. After all mediation operates because the parties agree to engage in the process – there seems no reason why their freedom to contract about how they do so should be curtailed by the imposition of a restricted list.

[3] Sub-rule 4(a) should then also be amended to reflect this change – and possibly as follows:
' assist the parties to reach agreement on the appointment of a mediator or, if the parties cannot agree on a mediator, then the dispute resolution officer must appoint a mediator from the list referred to in rule 14(2)'

The reality of the mediation profession internationally is that parties have moved away from generalist mediators to using mediators with expertise and experience in various fields, be that employment, personal injury, intellectual property, mergers and acquisitions, or the various specialisms within the built environment. Parties currently have freedom themselves to select a mediator who has the appropriate background, experience, expertise and availability to assist them.

Where the Dispute Resolution Officer needs to appoint the mediator, he/she should clearly be limited in making a selection from the Panel – and the definition gives recognition to this.[4]

2.10 Fitness Standards / Criteria for Mediators

We propose that rule 14 be amended to read as follows, so as to incorporate the all important element of independence:

"(1) The qualification and standards of fitness of suitably qualified and independent mediators to conduct mediation referred to in these rules must be determined by the Minister.

(2) The Minister must periodically provide a list of suitably qualified and independent accredited mediators to execute the functions and objectives in these rules."

DiSAC has previously made submissions with regard to the accreditation standards of mediators to be appointed in terms of these Rules. These standards are based on International best practice, and in our view set a minimum standard that should be reflected in the standards of fitness to be adopted by the Minister in accordance with Draft Rule 14(1).

DiSAC trusts that the Minister will engage with it prior to determining any such standard – especially if the Minister has divergent views with regard to these standards.

2.11 Statement of Claim and Statement of Defense

The Rules provide for Statements of Claim and Defense to be filed (where other pleadings have not yet been filed) once an agreement to mediate has been reached. The Rule provides that the Statement of Claim must be filed within 10 days, where after a further 10 days are allowed for the Statement of Defense.

In our view the proposed Statements of Claim and Defence appear to take the parties no further than the formal pleadings and run the real danger of steering the mediation process in the same

[4] This aspect of the implementation of the Rule also raises concerns:
There are a large number of Magistrates' Courts in South Africa and there will be a large number of individual Dispute Resolution Officers who cannot be expected realistically to know all the mediators on the Panel well enough to make the best appointment.
In addition, the Dispute Resolution Officers will quite possibly be subject to local pressures and inducements to appoint certain individuals on the panel who are known or otherwise favoured by them. The opportunity for a real or perceived lack of objectivity is significant and would mean the imposition of yet another level of bureaucracy to police the operation of the system.
The appointment of Service Providers – as discussed in paragraph 2.7 – may serve to address this problem.

legalistic direction as a trial or arbitration. It also risks creating the impression that the mediation process is merely an extension of what happens in court. Since legal representation is now being included, the mediation can quite easily be turned into a full scale litigation exercise.

It is common practice and in the spirit of mediation for the disputants to meet with the mediator without reference to written statements. Even where the mediation occurs during the course of litigation the pleadings can and in most cases should be discarded, as they steer the discussions back to rights based (as opposed to interest based) discussions.

It is further submitted that this Rule adds unnecessary costs and time delay to the process:

- The parties are in the best position to judge if additional material should be prepared for the mediator – the Dispute Resolution Officer can enquire whether they wish to file additional material, and if they do, record that. The Rule should not prescribe this.
- The fact of the matter is that pleadings – as well as these Statements of Claim / Defense are likely to be drafted by lawyers, and are likely to focus on the parties' positions (rather than their interests). The mediator is less interested in their positions than in the interests. This additional requirement therefore adds delay (up to four additional weeks!) and additional costs, without any real substantive benefit to the process.

Were the Parties do see the need for an exchange of useful information prior to the mediation process, this is clearly a useful way of giving the mediation process some structure.

We therefore propose that Rules 5(5), 5(6) and 6(4) be amended to indicate that such statements only be exchanged where the parties agree that this is necessary.

We propose that this clause 5(2)(e) be amended so that the parties are not unduly burdened by the preparation for mediation and the possible associated costs and delays, by adding 'a brief description of' at the start of the sentence so that it reads:

> *'a brief description of the nature of the dispute and the material facts on which the dispute is based'.*

2.12 The dispute resolution officer's files

It is not clear from the Mediation Rules whether the files of the Dispute Resolution Officer will be separate from the court's files.

It is suggested that they should be kept separate so as to reassure parties of the privileged and confidential nature of the mediation process and to ensure that statements of claim/defence and other similar documents prepared for the purposes of the mediation process are, indeed, kept confidential and do not become part of the court file.

It is suggested that the only documents relating to a court-annexed mediation which must be placed on the court file must be the referral to mediation (Form 1), an outcome report (confirming whether or not the mediation took place, the reasons why the mediation did not take place if it did not or the outcome of the mediation if it did take place) and a settlement agreement if the dispute has been

settled and the parties have agreed that the settlement be disclosed to the court and/or made an order of court.

We propose that a new sub-rule be included under rule 4, obliging the DISPUTE RESOLUTION OFFICER to open a file for the purposes of the mediation process which file must be kept separate from the court's file and which file will not be open to the public.

We further submit that the definition of the term "deliver" and its use in rules 6(4)(b) and (d) suggest that a statement of defense submitted by a defendant who has not yet filed a plea or answering affidavit, becomes a formal court document on the court file.

In our view, statements of defense in these circumstances are prepared for the purposes of mediation and must be treated as privileged and confidential documents and submitted to the DISPUTE RESOLUTION OFFICER, not the court. We propose that these rules be amended accordingly.

2.13 Referral by the Court

The draft Rule indicates some uncertainty as to whether or not the Court can recommend or direct the parties to mediation.

It is submitted that the preferred approach would be the one suggested in paragraph 1 above – ie that the Court must be able to *"..require the parties… either to attend a mediation or to give reasons for objecting to doing so.*"

This does not make mediation compulsory, but does require the refusing party to give due and proper consideration to the matter, (and exposes him to sanction for unreasonable conduct).

As also indicated above, the provision in 3(1)(b) to the effect that parties need the authorisation of the court to go to mediation after the commencement of trial seems unworkable – parties should always be entitled to agree to stand a matter down to attempt to settle. This provision seems to conflict with this and to that extent should be clarified or removed.

2.14 Suspension of time limits

The way that the Rule is currently drafted, a referral to mediation in terms of Rule 6 will have no immediate effect on time limits for filing additional pleadings, and the parties will be required to continue to meet their obligations in terms of filing pleadings.

The time limits are only suspended if and when an agreement to mediate is reached – and there is no limit on how long such a process may take. This creates uncertainty, and potentially wasted costs through the filing of additional pleadings, whilst the parties are considering mediation.

If the alternative approach suggested in paragraph 2.1 above is followed, the fact of referral to mediation could conceivably suspend time limits for a period of 10 days, within which the other

party must then either agree to participate (in which event the suspension continues), or refuse to participate, in which case the suspension is lifted.

2.15 Privilege and Confidentiality

Rule 8 indicates that the Mediator is required to explain to the parties that all statements made "that all discussions and disclosures, whether oral or written, made during mediation" are confidential and privileged.

It is unclear what the effect of this Rule is: Does it require the mediator to explain the common law position to the Parties – or does the Rule actually intend to establish a principle of confidentiality and privilege with regard to proceedings in terms of the Rule?

The fact of the matter is that our common law does not clearly and absolutely recognize a broad principle privilege for mediation proceedings. It would be far preferred if this Rule sets out in some detail the principles of confidentiality and privilege that apply to proceedings in terms of this Rule.

The use of the term "during a mediation" also does not make it clear whether the privilege extends to the Statement of Claim / Defense filed in terms of the Rule. It might be argued that have not been filed "during a mediation" – but are clearly intended to be part of the mediation proceedings, and should be covered by privilege.

We propose that the Mediation Rules explicitly provide for that mediations conducted in terms of the Mediation Rules are privileged and confidential and that a new rule to that effect be included. For example:

> *"Privilege and Confidentiality: All documents prepared for or exchanged for the purposes of mediations conducted in terms of these rules and all discussions and disclosures, whether oral or written, made during a mediation process conducted in terms of these rules are confidential, without prejudice and inadmissible as evidence in any court, tribunal or other forum unless the parties expressly agree otherwise or the documents, discussions or disclosures are otherwise discoverable in terms of the rules of court or any other law.* [5]

2.16 Mediation Agreement

[5] Please note that RICS have submitted a slightly divergent view on this matter:
"As we understand it, confidentiality arises by agreement, and the parties could agree to conduct a mediation in public if they wished. There seems to be a danger in passing legislation for confidentiality if there is no sanctions mechanism in place for enforcing it. We would favour leaving this to the parties, with the default position being that there would be the usual confidentiality clauses in the agreement to mediate, which the parties sign and are bound by contractually.
South African law, as we understand it, does however recognise the "without prejudice" principle which allows parties to enter into settlement negotiations in which offers, concessions or admissions made with a view to reaching that settlement are privileged and cannot be admitted in evidence in subsequent relevant proceedings. Given that mediation is merely an assisted settlement negotiation, would this principle not be sufficient, without proposing the introduction of a new species of mediation privilege?"

If the privileged and confidential nature of the mediation process is expressly protected by the Mediation Rules (as suggested in 2.15 above) then we do not think it is necessary to oblige the DISPUTE RESOLUTION OFFICER to conclude a written mediation agreement between the parties.

Again, the obligation of a written mediation agreement may unnecessarily add to the administrative burden of the DISPUTE RESOLUTION OFFICER or the legal costs (relating to the drafting of an agreement) of the parties.

If, however, the privilege and confidential nature of the mediation is not expressly protected by the Mediation Rules, then we propose that the obligation to conclude a written agreement be retained and that the list in rule 4(c) includes an additional particular to the effect that the parties agree that all documents prepared for or exchanged for the purposes of the mediation and all discussions and disclosures made during the mediation process are privileged and confidential.

2.17 Settlement Agreement

Rules 10 (2) and 10 (3) – It is not clear with whom the Settlement Agreement and Mediator's Report must be filed and who will have access to these documents once they are filed.

Considering that mediation is conducted entirely without prejudice it is difficult to understand the need to file the agreement. If the mediated agreement is reached during the course of litigation it can be made and order of court, if the parties require this.[6] Unless the parties wish it to become an order of court, all the court file needs to reflect is that the matter settled, not the terms upon which this took place.

We proposed that the rules make it clear that settlement agreements should only be filed with the court if the parties expressly agree so or if the parties agree that the settlement agreement is to be made an order of court.

We further propose that there should be no restriction on which settlement agreements can be made an order of court.

2.18 The Role of the Mediator in drafting settlement agreements

The Mediation Rules (specifically rules 8(1)(h) and 10(1)) obliges mediators to assist parties with the drafting of the mediation agreement.

[6] This is where the UK device of a Tomlin Order comes in very useful – it allows the settlement agreement to be made an order of court without the terms being revealed (or recorded in the court file) save in the event of non-compliance:
IT IS ORDERED that all further proceedings in this case be stayed upon the terms set out in the Settlement Agreement between Parties dated ….., an original of which is held by each of the Parties' solicitors except for the purpose of enforcing the terms of that Agreement as set out below.
AND IT IS FURTHER ORDERED that either Party/any of the Parties may apply to the Court to enforce the terms of the said Agreement [or to claim for breach of it] without the need to commence new proceedings.

This potentially places an onerous burden on the mediator who may well have to spend many hours drafting an agreement and further exposes the mediator to possible professional negligence risks. The obligation may also have the effect of limiting the scope of suitably qualified mediators to lawyers or advocates who have the technical legal knowledge and ability to draft agreements.

We propose that the rules be silent on the mediator's role in drafting settlement agreements and that rules 8(1)(h) and 10(1) be deleted. Alternatively, we propose that these rules be amended to say that mediators MAY (not must) assist parties with the drafting of the settlement agreement.

2.19 The Mediator's Report

Further clarity is required with regard to the matters that the mediator may report on.

We propose that the Rules should be specific as to what the mediator must report on. In our view these should be limited to the following:

- which parties attended the mediation process, and that
- mediation was attempted and failed or succeeded.

2.20 Suggested addition to Preamble

The Preamble should contain the additional point that even if a mediation is unsuccessful, in commercial cases it frequently brings about a narrowing of issues, thereby excluding the need e.g. to call certain expert witnesses; shortening the trial or arbitration and, and that this often brings about savings that far exceeds the cost of the mediation.

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