

COURT ANNEXED MEDIATION; A STUMBLING BLOCK FOR PRACTISING FAMILY LAW MEDIATORS?



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INTRODUCTION

The confusion on how the Court-Annexed Rules impact on the mediation landscape in South Africa and NABFAM ¹ member organisation mediators have resulted in more questions than answers for many. Have the rules now made it impossible for mediators to practise without court-annexed mediator accreditation?

This article hopes to-

1. Explain why court-annexed mediation has no impact on family law mediation and,
2. Explain why court-annexed mediators do not necessarily meet the requirements to practise in family courts.
3. Empower family law mediators with the necessary technical, legal information to confirm their role in family law matters and to educate others on this vital aspect.

The following downloadable documents inform the discussion:

1. Court Annexed Mediation Accreditation Standards For Mediators ² @ <http://www.justice.gov.za/mediation/Mediation-Application.pdf>

¹ The National Accreditation Board for Family Mediators

² The Court Annexed Mediation Accreditation Standards For Mediators form part of the document "Application To Be Enrolled As A Court-Annexed Mediator"

2. Amendment Of Rules Regulating The Conduct Of Proceedings Of The Magistrates' Court's of South Africa (The Rules) ³ @ http://www.justice.gov.za/legislation/notices/2014/2014-03-18gg37448_rg10151_gon183-rules-mc.pdf
3. The DOJ Court Annexed Mediation booklet ⁴ @ https://conflictdynamics.co.za/_Files/107/Mediation-Rules-Booklet-.pdf
4. The Children's Act @ http://www.justice.gov.za/legislation/acts/2005-038_childrensact.pdf
5. The Consolidated Regulations On The Children's Act, 2005 @ https://www.westerncape.gov.za/Text/2010/12/childrens.act.final_regulations_26_jan_2010.pdf

THE CHILDREN'S ACT

The Children's Act is prescriptive in respect of who can draft Rights And Responsibility Agreements and Parenting Plans. See in this regard section 21(3)(a) and 33(5) of the Act;

21(3)(a) *If there is a dispute between the biological father referred to in subsection (1) and the biological mother of a child with regard to the fulfilment by that father of the conditions set out in subsection (1)(a) or (b) , the matter must be referred for mediation to a family advocate, social worker, social service professional or other suitably qualified person.*

33(5) *In preparing a parenting plan as contemplated in subsection (2) the parties must seek- (a) the assistance of a family advocate, social worker or psychologist; or (b) mediation through a social worker or other suitably qualified person.*

The Children's Act is also prescriptive concerning the format and information of the documents. See sections 22(3) and 34(2)(a).

22(3) *A parental responsibilities and rights agreement must be in the prescribed format and contain the prescribed particulars ⁵.*

³ Published in Government Notice No. 37448 dated 18 March 2014

⁴ The Court-Annexed Mediation Booklet / Rules on Court-Based Mediation [Version: March 2014] issued by the Department of Justice and Constitutional Development

⁵ The Children's Act Regulations further require that a certificate in terms of regulation 8(3)(b) read with regulation 8(4) and section 10 of the Children's Act 38 of 2005 be issued to confirm that child was informed of the contents of the parental responsibilities and rights agreement by the family advocate, a social worker, social service professional, psychologist or the child's legal representative unless the court explains it to the child.

34(2)(a) *An application by co-holders contemplated in section 33 (1) for the registration of the parenting plan or for it to be made an order of court must be in the prescribed format and contain the prescribed particulars;*

The courts are obligated to ensure that it satisfied itself of the burden that applies to the respective applications. See sections 22(5) and 34(3)(b)(ii).

22(5) *Before registering a parental responsibilities and rights agreement or before making a parental responsibilities and rights agreement an order of court, the family advocate or the court concerned must be satisfied that the parental responsibilities and rights agreement is in the best interests of the child.*

34(3)(b)(ii) *An application by co-holders contemplated in section 33(2) for the registration of a parenting plan or for it to be made an order of court must be accompanied by a statement by-*

(aa) a family advocate, social worker or psychologist contemplated in section 33(5)(a) to the effect that the plan was prepared after consultation with such family advocate, social worker or psychologist; or

(bb) a social worker or other appropriate person contemplated in section 33(5)(b) to the effect that the plan was prepared after mediation by such social worker or such person.

From the quoted sections of the Children's Act strict compliance with the prescribed standards is mandatory. The following are highlighted;

1. Mediators that may mediate section 21/22 or section 33/34 matters must belong to the prescribed occupational classes or other suitably qualified person.
2. Mediation in section 21/22 or section 33/34 matters is mandatory before parties may approach the court ⁶ ⁷.
3. Mediation to develop Parental Rights And Responsibilities Agreements and Parenting Plans have been in practice in the Children's Court before the Rules became relevant to mediation in the lower courts ⁸.

⁶ section 21(3)(a)

⁷ section 33(2)

⁸ The Rules for court annexed mediation were published on 14 March 2014 whilst the Children's Act commenced on 1 April 2010

4. The Children's Court Commissioner ⁹ must exercise his judicial discretion after applying his mind to the matter to ensure that the parties adhered to the prescribed standards before making the agreed applications orders of the court, even if the parties have mediated the outcome. The court is obligated to do so as a creature of a statute and cannot simply rubber-stamp the parties agreement ¹⁰.
5. The legislature with the inclusion of the wording "other suitably qualified persons" in the Act have intended for such persons to be of the same calibre or gravitas in qualifications and experience as the occupations group of mediators mentioned in the Act. Therefore an "other suitably qualified persons" must have an NQF level 7 qualification in Law, Social Work or Psychology or closely associated field whereafter accreditation may follow provided the applicant complied with the other requirements and formalities.

In the further discussion, it will become evident that court-annexed mediators will therefore not be able to mediate family law matters unless they are also suitably accredited to do so and Level 2 court-annexed mediators.

COURT-ANNEXED MEDIATION PROVIDED IN CHAPTER 2 OF THE RULES DOES NOT APPLY TO ALL MATTERS.

The opinion that court-annexed mediation applies to all matters in the lower courts is ill-informed for several reasons.

It was not the intention of the Minister to extend court-annexed mediation to all matters.

The Court-Annexed Mediation Booklet issued during March 2014 were released before the Rules were published. In the forward to the booklet the Minister of Justice and Constitutional development confirms the following;

1. The Court-Annexed Mediation Rules form part of the Government's concerted effort to transform the civil justice system ¹¹.
2. The Minister requested the Rules Board for Courts of Law to consider developing rules that will facilitate diversion of criminal cases to mediation in appropriate instances ¹².

⁹ The presiding officer in the Children's Court is a Magistrate but referred to in the court as the Children's Court Commissioner.

¹⁰ The court is required to follow the legislation and cannot deviate from it. In other words the Commissioner cannot merely rubber stamp the decision or agreement of the parties.

¹¹ Page 2, par 1

¹² Page 2, last par

3. The Minister confirms the appoint of an Advisory Committee to advise him on norms and standards for mediators and the accreditation of mediators for enlistment to the panel as required by the rules that lead to the development and inclusion of Chapter 2 in the Magistrates' Courts Rules ^{13 14}.

The Rules confirm the Minister's position.

The Minister and the Rules Boards' intention with the introduction of Chapter 2 to the Magistrates Court Rules was to make dispute resolution generally more accessible to the general public in civil matters ¹⁵.

I submit that The Rules never intended for the Rules to apply to the Children's Act as rule 74(3) directs;

The application of these rules is subject to the provisions of any other law and the procedure provided for in any other law, for the mediation of disputes between parties to litigation.

The Rules Board, therefore, specifically ensure that The Rules do not conflict with existing legislation and acknowledge that mediation in terms of The Rules does not apply to all forums in the lower courts. The sections in the Children's Act quoted above is good examples hereof.

In terms of established principals regarding the interpretation of statutes legislation; e.g. the Children's Act takes preference over secondary law, e.g. regulations and The Rules published by the Rules board ¹⁶. As a result even if The Rules, intended to amend legislation will not be possible to do so.

It is not necessary to explain the principal in our law of interpretation of statutes further than to confirm that Rules are subservient to legislation. Even if The Rules did not include the provisions of Rule 74(3), the interpretation of law principals will result in the Children's Act being the law that has to be complied with by our courts ¹⁷.

¹³ Page 3, first par

¹⁴ The reference to diversion in criminal cases is significant as the Minister acknowledges that criminal matters are excluded from court-annexed mediation despite the reference to criminal matters in Rule 64 to 67 of the Rules Regulating The Conduct Of The Proceedings Of The Magistrates' Courts Of South Africa

¹⁵ refer to Objectives Rule 70 and 71 of the Rules.

¹⁶ in terms of sec 6(1) and 6(2) of the Rules Board for Courts of Law Act, 107 of 1985 as amended.

¹⁷ Acts of Parliament are signed into law by the President of the Republic. Regulations are signed into law by the Minister of a State Department subject thereto that the Minister is authorised in the Act to issue Regulations. Rules of the Rules board are approved by the relevant Minister and published in a Government Notice in terms of sec 6(1) and 6(2) of the Rules Board for Courts of Law Act, 107 of 1985 as amended.

The qualification requirement for mediators to practise in terms of the Rules allow persons with an NQF level 4 (Matric certificate) to accredit as level one mediators ¹⁸. The standard is clearly different from the Children's Act that requires mediators to have an appropriate NQF level 7 qualification.

The Rules are also silent on The Children's Act and the application thereof in the Children's Courts.

Contradictions between the Children's Act and The Rules confirms The Rules do not apply to family law mediation.

The Children's Act contrast with The Mediation Standards provided for in The Rules on several aspects:

The Rules does not reference any limitations on occupational classes except for compulsory training for 40 hours ¹⁹ and certification and affiliation ²⁰. The prescribed mediator levels in The Rules confirm a minimum entry competency level of NQF 4 for level 1 mediators ²¹.

The Rules are voluntary ²². Mediated outcomes are confirmed by the court and place no additional burden on the judicial officer to apply his mind to agreed outcome between the parties. Rule 82(4) provides:

If a settlement is reached at mediation in a dispute which is the subject of litigation, the clerk or registrar of the court must at the request of the parties and upon receipt of the settlement agreement from the mediator, place the settlement agreement before a judicial officer in chambers for noting that the dispute has been resolved or to make the agreement an order of court, upon the agreement of the parties.

This is in stark contrast with the Children's Act that requires the Children's Court Commissioner to apply his mind as set out in the relevant sections here below.

22 (5) Before registering a parental responsibilities and rights agreement or before making a parental responsibilities and rights agreement an order of court, the family advocate or the court concerned must be satisfied that the parental responsibilities and rights agreement is in the best interests of the child.

¹⁸ see the Court Annexed Mediation Accreditation Standards For Mediators Clause 3.1

¹⁹ Annexure A par 1

²⁰ Rule 72

²¹ Annexure A par 3

²² Rule 72 and 74(1)

28(4) *When considering such application the court must take into account;*

- (a) the best interests of the child;*
- (b) the relationship between the child and the person whose parental responsibilities and rights are being challenged;*
- (c) the degree of commitment that the person has shown towards the child; and*
- (d) any other fact that should, in the opinion of the court, be taken into account.*

Similar to the mediator standards provided in the Children's Act, The Standards in Chapter 2, only apply to mediators registered to practise as court-annexed mediators.

While mediation in terms of the Children's Act is mandatory ²³, Rule 74(1) provides:

The rules in this Chapter apply to the voluntary submission by parties to mediation of -

- (a) disputes prior to commencement of litigation; and*
- (b) disputes in litigation which as already commenced and as contemplated in rules 78 and 79.*

Rules 74(3) by implication distinguish family law mediation from court-annexed mediation in the providing-

The application of these rules is subject to the provisions of any other law and the procedure provided for in any other law, for the mediation of disputes between parties to litigation.

CERTIFICATION AND AFFILIATION

It suffices to say that accredited mediators are all familiar with the NABFAM and member organisation accreditation requirements to practise as family law mediators, and that the accreditation requirements are in line with occupational requirements in the Children's Act.

²³ Section 21(3)(a) and 33(2)

Court-Annexed Mediators are certified entirely differently and accredited by the Minister of the Department of Justice ²⁴.

Court-Annexed Mediators must affiliate to an institution approved by the Minister which offers mediation training ²⁵.

The mediation accreditation requirements specifically refer to civil cases ²⁶. It can only be because the Rules intended from the onset to provide for mediation in civil matters only.

Except for a view references to maintenance matters ²⁷ and criminal cases, ²⁸ the Rules in Chapter 1 exclusively focus on civil cases.

CONCLUSION

The view that the Court-Annexed Rules is the only legal framework setting mediation qualification standards is incorrect.

The perception that court-annexed mediation now provides the only framework for mediation to allow mediators to practise in South Africa is wrong. Court-annexed mediators are not able to practise in the family courts unless they also meet the discussed criteria to accredited as family law mediators.

Family Law mediators will, in turn, be obligated to comply with the discussed accreditation criteria to practise as court-annexed mediators.

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²⁵ Annexure A, par 2

²⁶ Annexure A, par 1

²⁷ Rule 58

²⁸ Rule 64 to 67