

LETS Mediate

DECEMBER 2023 ISSUE # 12

2023 FINAL
ISSUE

*Exciting
News*

MIMM SAMA Collaboration

We are thrilled to announce the official launch of the MiMM-SAMA Mediation Collaboration, a significant milestone for MiMM

MISCOMMUNICATION
AND AN UNLIKELY
SETTLEMENT

NAVIGATING
SETTLEMENT
AGREEMENT DRAFTING
WITHOUT LEGAL
EXPERTISE



FROM THE EDITOR



TIME TO UPDATE

Dear MiMM Members,

In this edition of our newsletter, I'm delighted to bring you an array of exciting updates and additions that reflect the vibrancy and growth of MiMM.

MiMM-SAMA Mediation Collaboration Launch

We are thrilled to announce the official launch of the MiMM-SAMA Mediation Collaboration, a significant milestone for MiMM.

This groundbreaking initiative marks a significant step forward in the field of mediation, and we couldn't be more pleased to share the details with you.

The launch webinar, hosted by SAMA, was met with enthusiasm and attendance that underscored the collective excitement for mediation. As we forge ahead, the Pilot project is already in progress, with dedicated mediators actively preparing for MiMM-SAMA mediations, through attending various refresher courses provided by MiM.

These refresher courses are not only designed to hone and refresh the skills of our mediators but also serve as a comprehensive guide to the specific processes and protocols integral to the success of the project. Attending these courses ensures that our mediators are well-equipped and informed, ready to navigate the intricacies of MiMM-SAMA mediations seamlessly.

Special thanks are due to Dr. Frankish, the visionary behind this collaboration, who not only masterminded the project but will continue to play a crucial role in its ongoing success.

If you're interested in being part of this groundbreaking project and haven't attended a refresher course, please reach out to Dr. Frankish, Dr. Ramasar, or Susan Verhoef for more information.

The MiMM-SAMA Mediation Collaboration is not just a partnership; it is a commitment to excellence and the advancement of mediation as a powerful tool for conflict resolution. As we move forward, let's embrace this exciting chapter with open arms and a shared dedication to making a positive impact in our field.



"WE'RE PLEASED TO INTRODUCE A
NEW SEGMENT CALLED
"EMPOWERING MEDIATORS."

Empowering Mediators: A New Newsletter Feature

We're pleased to introduce a new segment called "Empowering Mediators." Attorney Michiel Bouwer takes the lead, offering practical advice and support to help mediators become the best version of themselves. The inaugural article addresses a crucial topic: "Drafting a Settlement Agreement." Michiel provides clear guidelines, especially beneficial for those without a legal background. We eagerly anticipate more insightful contributions that promise to enhance our collective expertise.

Pondering with Advocate Scott: Real-Life Mediation

In our ever-popular segment, "Patrick's Ponderings," we dive into real-life mediation experiences and outcomes. Advocate Scott's reflections remind us that mediation is dynamic, and outcomes, even the unexpected ones, contribute to the richness of our field.

Festive Wishes for Mediators

As we approach the festive season, I want to extend my heartfelt wishes to each mediator. May this time be filled with rest, blessings, and joy. Take this opportunity to recharge, reflect, and return with renewed energy, buckets full of motivation, and an unyielding hunger to propel mediation to new heights.

Here's to celebrating milestones, embracing new beginnings, and fostering a vibrant community dedicated to advancing the art of mediation.

Wishing you all a restful, blessed, and joyous festive season!
Warm regards,

NEW

“ THE ULTIMATE USE OF
POWER IS TO EMPOWER
OTHERS ”

SEE PAGE 12 TO FEEL
EMPOWERED



*Susan
Verhoef*

NEXT ONLINE

ASK THE EXPERT

07 February, 2024 | 6:00pm



**ALAN
NELSON**
EXPERT



**PATRICK
SCOTT**
EXPERT

JOIN US

Have burning questions or fascinating mediation topics you're dying to learn more about? Simply email your questions and topics to us, and engage with our experts to get some insight.



Info@mimmediation.org

Zoom links and future dates will be sent on the MIMM Members WhatsApp group.

Letter From the Chair

DR SHAMAL RAMESAR



Dear MiMM members,

As we approach the end of another eventful year, it gives me great pleasure to reflect on the highlights and accomplishments of our organization in 2023. While our beautiful country finds itself amidst so many challenges such as the ongoing load-shedding crisis, the ever-growing inflation rates,

the mismanagement of government funds and the deterioration of infrastructure, I take courage and inspiration from the spirit of our people. Our desire for change and beliefs of hope has undoubtedly been exacerbated by the efforts of our beloved Springboks who brought home the Rugby World Cup for a record 4th time. Their resilience in the face of adversity and unwavering commitment to succeed is metaphoric of who we are as a nation. It is for this reason that I believe that we as mediators have a vital role to play in the healing of our country. We have the unique ability to resolve conflict while providing an opportunity to restore relationships and foster a sense of peace in our country.

While our organization has been marked by many challenges that have tested our resilience and commitment to promoting positive change through mediation in South Africa, our dedicated team of professionals, volunteers, and supporters have worked tirelessly to achieve the objectives that have been mandated by our members. Despite these obstacles, we have made significant strides in advancing our mission of promoting mediation as a preferred mechanism of conflict resolution.

Throughout the year, we have focused on our SAQA submission for the accreditation of our mediators as professionals in South Africa. The required policies have been panel-beaten and workshopped thoroughly, and I can proudly announce that they

“Looking ahead, we anticipate new opportunities and challenges in the coming year.”



have now been finalised and sent to an independent body for review. I wish to express the extreme gratitude of our entire organization to our esteemed EXCO under the leadership of Adv. Ettian Raubenheimer for their commitment and dedication towards completing this mammoth task.

Our initiative with the South African Medical Association (SAMA) has been solidified through a memorandum of understanding and a recent webinar detailing the protocol towards serving their members as mediators in all their medicolegal matters. To date, we have had 3 successful refresher courses hosted by MiM to ensure that there is a panel of mediators who are ready for any matters that are referred to us by SAMA. On behalf of our organization, I wish to express a huge thank you to Dr. Trevor Frankish for driving this project. A further thanks is expressed to Adv. Alan Nelson SC and Mr. Daniel Nelson for volunteering their time to prepare and execute the refresher courses.

As promised during our AGM, we have made tremendous progress on our digital footprint, especially on social media under the guidance of Mrs. Sasha Wait. Various social media platforms are now active, and we are starting to see a significant increase in traffic through our pages. We have also delivered phenomenal quarterly newsletters, hosted five “Ask the Expert” sessions and have a vibrant and active community chat platform on

WhatsApp. We encourage all of our members to follow our pages and share them with your contacts. We further encourage you to supply us with content or request for content to be highlighted or discussed on our different platforms.

We are continuing to make progress on our “Magistrates Court” project under the leadership of Adv. Alan Nelson SC, Adv. Fazlin Jakoet and Adv. Patrick Scott SC. Various engagements with the legal fraternity have taken place, and we are tailoring the proposal to get the buy-in of the local courts. This project will also see a considerable stream of work for our members. We remain confident that the already overwhelmed magistrates’ courts see the value of mediation in reducing the backlog that is currently experienced across the country.



“Your dedication to the principles of mediation and conflict resolution is what makes our organization a beacon of hope in South Africa.”



Looking ahead, we anticipate new opportunities and challenges in the coming year. With your continued support, we are confident in our ability to navigate these waters and emerge stronger and more resilient. In closing, I want to express my gratitude to each and every member of our organization, our partners, and our broader community. Your dedication to the principles of mediation and conflict resolution is what makes our organization a beacon of hope in South Africa.

Wishing you a safe and joyous holiday season and a prosperous New Year filled with peace, understanding, and unity.

Best wishes,

A handwritten signature in black ink, appearing to read "Shamal Ramesar".

Dr. Shamal Ramesar
Chairman,
Mediation in Motion Mediators (NPO)



Page 14 explains how



MEDIATION IN MOTION MEDIATORS AND SA MEDICAL ASSOCIATION LAUNCH A MEDIATION COLLABORATIVE.



MEDIATION IN MOTION MEDIATORS

After several months of planning, the SA Medical Association (SAMA) launched a collaborative initiative for its members with MiMM with a webinar entitled "Why mediation is the preferred alternative". In his introductory remarks, the chairperson of SAMA, Dr Mvuyisi Mzukwa, spoke to the issue of how conflict and disputes can damage professional relationships and negatively affect patient care. While litigation has traditionally been the "go to" route for resolving disputes, mediation is gaining ground as a preferred alternative as a more constructive and less confrontational approach. Through the mediation process a neutral mediator provides a structured and confidential framework for parties involved to themselves find mutually acceptable solutions to conflict.

SAMA is a not-for-profit professional organization for medical doctors in the public, private and NGO health sectors. With about 12,000 members, it is the largest single representative body for the medical profession in South Africa. For approximately five years, the Association has engaged with statutory bodies and health authorities on finding solutions to the medico-legal crisis affecting the country. Mediation of these disputes has been one of the options. After exploring how best to offer mediation, SAMA decided to partner with an association which has experience of mediation, particularly in the field of disputes related to medical practice.

"...CONFLICT AND DISPUTES CAN DAMAGE PROFESSIONAL RELATIONSHIPS AND NEGATIVELY AFFECT PATIENT CARE."

SAMA, through its monthly newsletters, has advertised the mediation project, the launch of which occurred on 9 November 2023. During the webinar, Advocate Alan Nelson explained the benefits of mediation over litigation as consensual and adversarial forms of conflict resolution. In mediation, costs are substantially less in terms of time, finance and personal trauma. There is a much wider variety of solutions possible through mediation which focuses on the future needs, interests and concerns of the parties. Advocate Nelson explained to participants the essential features of mediation.

ONE SAMA - Uniting Doctors for the Health of the Nation

CAN MY LAWYER ATTEND MY MEDIATION SESSION?

Yes, lawyers can attend mediation in support of their clients and this is welcomed by the mediator. In mediation, however, it is the clients who take centre stage, while the mediator explores their interests and concerns. While it is not essential for lawyers to be present during mediation, it is often helpful to both parties.

For assistance with mediation, email mediation@samedical.org



MiMM Chairperson Dr Shamal Ramesar described how MiMM conducts mediations from the time of receiving a request for mediation, through the pre-mediation phase and then the mediation proper. It was emphasised that pre-mediation is offered free of any charge by MiMM members. Doctors and hospitals are encouraged to include in their contracts and admission conditions that, should a dispute or complaint arise, the aggrieved patient will agree to a free pre-mediation session before instituting legal action or complaints to the Health Professions Council of SA. The mediation offered is not restricted to disputes between doctors and patients but extends to other conflict situations, for example between doctors themselves or between doctor and hospital.



The immediate next step is a pilot project to demonstrate the value of mediation in the context of SAMA and its members. Shamal described the pilot project and how its outcomes will be measured. Nine cases of conflict referred by SAMA will be mediated pro bono by MiMM. The conflict situations will be between doctor and patient, between doctors themselves and between doctor and hospital. The professional indemnity insurers for doctors have been engaged by SAMA and have responded positively to the idea of a pilot project.

SAMA has provided a dedicated confidential e-mail address through which members may contact SAMA requesting mediation: mediation@samedical.org. MiMM appreciates the substantial effort on the part of SAMA management and its Legal and Marketing departments they have put in to get to this point.

In order to respond to the potential need for mediators with this project, Mediation in Motion Training has provided refresher courses in medical mediation for its alumni who are MiMM members.

MiMM is optimistic that raising awareness of mediation as a preferred way of resolving disputes within the medical profession will benefit patients, doctors and mediators.



Dr Trevor Franklin



Miscommunication and an Unlikely Settlement

John became the proud owner of his first property! A comfortable two-bedroomed flat, which would provide a home for him and his partner, Susan. The seller, Paddy, lived in Ireland and the flat, which was in Scotland, was a rental property. Having decided to downscale, he put the property on the market and, a month or two later, sold it to John. John and Paddy had never met and the first time they ever communicated with each other was at the mediation. How did the mediation come about? Well, shortly after moving into the flat, John noticed that the boiler wasn't working properly. It was building up excessive pressure. He informed his solicitor, who in turn informed Paddy's solicitor. Paddy had had the boiler checked by an engineer not long before the sale, so he told his solicitor that he could send that engineer around to check the boiler and repair it if necessary. That information never got to John. John was surprised that he had not got a response from the seller and Paddy was peeved that he had not had a response from the purchaser. John obtained a quote from an engineer and decided to sue Paddy for the amount on the quote. Paddy defended the claim, mentioning in his court papers that he had offered to have the boiler repaired. John knew nothing of this.

The judge referred the parties to mediation.



I held pre-mediation meetings with the parties, after which I was confident that the matter would settle. John had not yet had his boiler repaired and Paddy said that he had offered to have the boiler repaired but John had not responded to that offer. The obvious resolution was that Paddy would repeat that offer and have the boiler repaired. An issue that often arises in mediations is that the claimant has had remedial work done and there is a dispute about the cost, with the respondent saying that he or she should have been afforded the opportunity of having the repairs done. Here the situation was perfect as that option was still available to Paddy. This was fortunate as Paddy made it quite clear that he was not paying John any money.

The mediation opened with a joint session and, after ten minutes, Paddy proposed that he send his engineer to inspect the boiler and do the necessary. Both parties were amenable to that. I started to draft the settlement agreement and then a small problem arose.



John was happy for Paddy's engineer to do the repairs, but he wanted the engineer to warrant the work for 12 months. He also wanted the engineer to undertake the work which was detailed in the quote which he had obtained. The reason for this was that the engineer concerned had said that it was in good order when he checked it shortly before the sale of the flat and John's concern was that he would adopt a similar attitude when attending to the boiler.

Paddy was not averse to agreeing to the condition of the engineer providing a warranty, but I had a problem with that – I did not see how he could bind the engineer to such a condition and my concern was what would happen if the engineer said no. I suggested private sessions in breakout rooms and raised this issue with Paddy. He understood the difficulty. I asked him whether it would not be a more practical resolution if he paid the amount claimed and leave John to have the boiler repaired. He was tempted but he wanted some discount. The claim was for £534, and he suggested £400. I asked whether he would consider £500 and he immediately agreed. I took this to John, but he was not happy. He said that he had already had to pay a fee of £110 for raising the action and was short on money.

I went back to John, who was now starting to have some misgivings about his offer. He said that he thought that his solicitor had told him that a purchaser who had a claim against the seller for defects, was limited to claiming £400. I said that I didn't know whether or not that was correct but suggested that we look at the Scottish Standard Clauses that were incorporated into the conditions, forming part of the agreement of sale. I shared them on the screen, and we worked through them. Paddy spotted the reference to what he was saying but it said the opposite of what he thought. It said that a purchaser couldn't claim for any item of less than £400. He threw in the towel and offered the full amount of the claim, and the matter settled.

Why do I say that this was an unlikely settlement? Remember what Paddy had told me at the pre-mediation meeting. He said that he was not paying any money to John, and yet he ended up paying the claim in full.

Sometimes it is important to look past what the parties agree. There is a slight risk of derailing the settlement, but my thought here was that, if they agreed to what was initially proposed (and Paddy would have agreed to the condition), there was a good chance that there would be further issues down the line. So, what may appear on paper to be a good settlement would actually create further difficulties for the parties. What would have happened if the engineer had refused to provide a warranty? What would have happened if the engineer had said that there was nothing wrong with the boiler? The parties would have ended up back in Court and perhaps back at mediation!



Patrick Scott has a Master's degree in Mediation and Conflict Resolution from the University of Strathclyde in Glasgow, serves on the Board of Mediation in Motion Mediators and practises as a mediator in Scotland and South Africa (remotely).



MEDIATION IN MOTION MEDIATORS

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Navigating Settlement Agreement Drafting Without Legal Expertise



MIMM represents a diverse community of mediators. Today, I want to address a common concern among many mediators who may not have legal backgrounds – the apprehension around drafting settlement agreements. The fear of being responsible for crafting a document that could potentially be legally complex can be daunting. However, I believe that simplicity and clarity should be at the forefront of our approach to settlement agreements, regardless of our legal expertise.

Embracing Simplicity in Settlement Agreements:

In recent discussions within our community, the issue of drafting skills surfaced. Some mediators expressed concern about their ability to draft settlement agreements, given the lack of legal expertise. The truth is, not every mediator is a legal practitioner, and that's perfectly okay. Our strength lies in facilitating dialogue and understanding, not necessarily in navigating the intricacies of legal language.

Collaborating with Legal Practitioners:

Some mediators prefer to involve legal practitioners in the drafting process, and indeed, their expertise can be invaluable. Having legal professionals as part of the mediation team (perhaps even as a co-mediator) provides a safety net, ensuring that the final settlement agreement is legally sound. This collaboration allows us to rely on their drafting skills, providing a swift resolution. In mediations where the parties have their legal representatives present, it will be sensible to leave it up to them to jointly draft the settlement agreement.

The Power of Clear Intentions:

Despite the potential involvement of legal practitioners, my firm belief is that settlement agreements should be as simple as possible. They should reflect the genuine intentions of the parties in clear and concise terms. The focus should not be on complex legalese but on constructing a document that unambiguously represents the terms of the settlement. Complex legal language can hinder, rather than facilitate, the resolution process. Complicated legal terms and concepts may alienate the very individuals they seek to assist. Mediation aims to empower parties to reach their own agreements, fostering a sense of ownership and satisfaction. By employing clear and concise language, we empower parties to fully comprehend the terms of their agreement, promoting a greater sense of control over the resolution process.

Overcoming the Fear of Scrutiny:

One concern raised by a fellow mediator was the fear that parties might take the agreement to an attorney who could exploit any ambiguity. While this is a valid concern, the solution isn't to overload the document with legal intricacies. Instead, by ensuring the settlement is clearly understood by the parties, we create a foundation for enforceability that withstands scrutiny. A simple and straightforward settlement agreement minimizes the risk of misinterpretation, ensuring that both parties are on the same page and reducing the likelihood of future disagreements.

SETTLEMENT

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Promoting Understanding and Enforcement:

A settlement agreement's primary purpose is to capture the essence of the parties' resolution in a way that is legally enforceable. This doesn't necessitate convoluted language. On the contrary, simplicity promotes understanding, reduces the risk of misinterpretation, and enhances the enforceability of the agreement.

Proposed Structure for a Simple and Clear Settlement Agreement:

In crafting a settlement agreement that aligns with the principles of simplicity and clarity, the following structure is recommended:

1. Parties to the Dispute:

Clearly record the names and details of the parties involved in the dispute.

2. Identification of the Document:

Explicitly state that the document is a settlement agreement to avoid any ambiguity.

3. Recordal:

Begin with a recordal section, articulating the background with a statement such as: "WHEREAS Party A instituted proceedings/declared a dispute against Party B (collectively 'the parties').

AND WHEREAS the parties have agreed to settle their disputes.

NOW THEREFORE, the parties agree as follows."

4. Terms of Settlement:

In the next section, articulate the terms of the settlement in straightforward language. Clearly stipulate that the agreement is in full and final settlement of all claims between the parties arising out of the proceedings or related to the subject matter thereof (or indicate which disputes are deemed settled, and which aren't). If applicable, address issues related to legal costs.

5. Court Order

Include a provision stating that either party may make the agreement an order of court on notice to the other party.

6. Entire Agreement:

Conclude the agreement by specifying that "This agreement represents the entire agreement between the parties concerning the subject matter. No variations, amendments, waivers, or cancellations will be valid unless reduced to writing and signed by or on behalf of each of the parties hereto."

7. Execution and Signature:

The agreement should be signed by, or on behalf of, the parties, by a duly authorized representative with the necessary settlement authority (indicate the name of the party as well as the name and designation of signatory and record that he or she "warrants his/her authority hereto"). Indicate the place and date of signature for added clarity.

This proposed structure aims to streamline the settlement agreement, making it accessible and understandable for all parties involved. By focusing on simplicity and clarity, we enhance the

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enforceability and effectiveness of the document while ensuring that it serves as a fair and comprehensive resolution of the disputes at hand.

Conclusion: Advocating for Clear and Concise Resolutions

In conclusion, while the fear of drafting may linger, it's crucial to remember that our role as mediators is to empower parties through dialogue and understanding. Collaboration with legal practitioners is an option, but the essence of a settlement agreement lies in its simplicity. Let's champion the idea that a settlement agreement, even in the absence of legal expertise, can be a simple, clearly written document that reflects the true intentions of the parties.

Here's to fostering resolutions that are accessible, understandable, and, above all, impactful.

Michiel Bouver

Bouwer & Olivier Inc
mb@bolaw.co.za



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ENHANCING SOCIAL FOOTPRINT AND COLLABORATIVE ENGAGEMENT

As we welcome another promising year, it's an opportune moment to delve into exciting new ventures and possibilities. In the spirit of growth and community, I am sure you can tell how thrilled we are to announce some enriching initiatives and collaborations within our mediation community.

Joining the Executive Committee (EXCO) was an invitation to explore strategies for gaining access and fostering a stronger connection with our audience. Creating engaging content, insightful discussions, and a redesigned newsletter are among the many initiatives we're embarking upon.

As you have read throughout the newsletter, we've joined hands with the South African Medical Association (SAMA). During the planning phase of their launch, the EXCO team did an excellent job in providing advice and content for their launch to introduce mediation to their members - this was bolstered by a professional presentation (see page 8 for a link to the webinar). This collaboration signifies a significant step in extending the reach of mediation to a new audience. Additionally, we've developed professional document templates, with the initial set being used for our SAQA submission,, aiming to enhance our professional presence in industry.

As we step into the new year, our focus turns towards creating an impactful social presence. Members and the public alike will witness informative posts shedding light on mediation, updates on the endeavors of our Mediation in Motion mediators, engaging webinars, enlightening video shorts, and the latest mediation news. It will be a dynamic platform designed to inform, engage, and inspire.

Collaboration Invitation

Your contribution is invaluable to us. We warmly invite collaboration from our esteemed members. Your insights, experiences, and ideas are pivotal in shaping our collective journey forward. Feel free to share your thoughts via email at sw@jwpartners.co.za. We also encourage you to write articles, share testimonials and provide video content. Let's synergize and create a more enriched mediation community together.



As we welcome the new year, let's collectively work towards greater connectivity, knowledge sharing, and collaborative engagement. Together, we can reach a wider audience and elevate MIMM's brand to elite status.

Warm Regards,



*Sasha
Wait*



WISHING
YOU

HAPPY HOLIDAYS

& A BRIGHT NEW YEAR

FROM THE

WHOLE



TEAM

MEDIATION IN MOTION MEDIATORS

