

# LET'S MEDIATE

The official newsletter of  
Mediation in Motion Mediators



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# From the Editor

Who would have thought that we would see the **TENTH edition** of the official Mediation in Motion Mediators Newsletter.

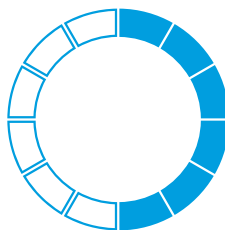
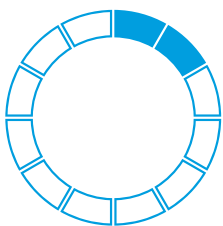


Who would have thought that so much would have happened since the first edition.

Ten memorable Moments (past and future):

1. The birth of Mediation in Motion Mediators - MiMM
2. Election of an Exco to start work on promoting mediation and serving their members
3. Creation of a website
4. Starting a social media campaign
5. Creation of a WhatsApp group for discussion, communication and networking
6. Ask the Expert
7. Working towards SAQA accreditation
8. MiMM - SAMA Mediation project
9. MiMM - Mediation Clinic starting with Magistrate Court mediation
10. MiMM - Medical Mediation Refresher Course

My sincere thanks to everyone who contributes to the newsletter and a very specific thank you to Adv Patrick Scott for his valuable and regular contributions, but also for proofing the newsletter (not an easy task)!



# Letter from the Chair

Dear Members,

Warm greetings to you all! I hope this letter finds you in good health and high spirits. As we enter the third quarter of the year, it is my pleasure to update you on the remarkable progress and achievements that our organization has made in the field of mediation thus far. Over the past few months, our EXCO have been actively engaged in various mediation initiatives, working tirelessly to promote mediation and our members. The impact of our efforts has unfortunately been slow; however, we are optimistic that we shall soon reap its rewards. I am delighted to share some of these key highlights with you.



With regards to the SAQA accreditation initiative, we have made tremendous strides towards our final submission. We have developed no less than 9 policies for this submission. These policies include continuous professional development, recognition of prior learning, professional designations, transformation, a code of conduct, organizational constitutional alignment, disciplinary procedures, human resources and finance. Our next steps are to ensure that all these policies are aligned and compliant with SAQA's requirements and, lastly, to prepare the bundle for final submission.

The South African Medical Association (SAMA) Project is gaining phenomenal momentum. We have finalized the protocol for a pilot project which includes a workflow process and a trial phase of using mediation to resolve medico-legal disputes. SAMA have committed to advising its 12000 plus members to insert the pre-mediation clause in each of their admission forms. Once this is complete, MiMM (NPO) can expect a steady stream of work from SAMA. A call for participants in this project will be made upon completion of the trial.

In light of the slow adoption of Rule 41A, another project spearheaded by Adv. Alan Nelson SC aimed at identifying champions for specific Magistrates courts across the country with the intention of getting more matters referred to mediation, is also making good progress. The EXCO have committed to have these initial matters mediated on a pro-bono basis as a token of goodwill, to show the courts the benefits of mediation and our commitment to the cause. This too will create a steady stream of work for our members.

Creating awareness about the benefits of mediation continues to be a top priority for us. Although our content on social media platforms and local media channels have become scarce over the past few months, the EXCO are committed to putting greater emphasis on this in the next half of the year. We believe that all our initiatives will make for good and captivating content and certainly bodes well for the profession as a whole and our members in general. We also continue to strengthen our partnerships with government bodies, NGO's and other stakeholders in an attempt to amplify our efforts to promote mediation.

I would like to express my sincere appreciation to the EXCO, who continue to work assiduously to ensure that mediation becomes a prominent tool for conflict resolution in our nation. Their dedication and commitment to this cause has been invaluable. As always, I continue to invite you, our dear members, to share your ideas, insights, and experiences with us. Together, we can continue to build a more peaceful and harmonious South Africa.

Best wishes.



Dr. Shamal Ramesar  
Chairman – MiMM (NPO)



# Patrick's Ponderings

## The Mediator's Frame of Mind

We know what mediator's do with regard to managing the process of mediation. They summarise, do reality testing, a bit of coaching of the parties, have private sessions, joint sessions, and so on. These are all things within the mediator's control and depend to a large extent on his or her experience and knowledge. Building up trust and rapport with the parties is also important. But what about the mediator's state of mind at the time of the mediation? What if the mediator is tired, or feeling a bit down, perhaps negative, maybe a bit stressed or in a hurry. How does this impact on the mediation?



I raise this as a point of awareness - I don't have any statistics or empirical studies. They may be quite difficult to conduct. But I have sometimes wondered whether a mediation might perhaps have achieved a better outcome if I had been in a better state of mind.

Sometimes, not often fortunately, a party really irritates you. Whether it be their attitude, lack of commitment to the mediation, bad time keeping or a sense of entitlement, you just don't like them, no matter how hard you try. You try and be civil, friendly even, but you definitely have a negative attitude towards them. Should you withdraw from the mediation? And if so, on what basis? Do you say "I'm sorry but you really p\*\*s me off, I think you need a different mediator"? Will another mediator react any differently? Will that party want to continue with a mediation? How will the other party to the mediation react? These are challenging questions!

What about if you are tired? You have had a busy day and you start a mediation at 4pm. You go through the motions, do all the right moves but you just don't give the same energy to the mediation. The matter doesn't settle. You ask yourself whether it might have got to a resolution if you had brought more energy to the discussion. If you had tried harder?

What about time pressures? You have limited time to do the mediation. You try and hurry it along. A party needs time to process matters. Perhaps you need to do some coaching. But time is an issue. What should you do? Perhaps time constraints are a lesser problem. You can always tell the parties in advance of the mediation (or even during the mediation) that you have limited time, and reschedule the mediation if time runs out.

I raise these issues for the sake of awareness. I don't have the answers. We are all sentient beings, with emotions, likes and dislikes, preferences, knowledge, experience and many more variables. How do these aspects affect our competence as mediators and what can we do to ensure that parties are given the best opportunity to resolve their matter? This ponder contains more questions than answers.

As a last comment, I might add that the mediator's frame of mind is not always a factor. Some matters may settle regardless of how the mediator feels, others may not settle. But there are some that can go either way. It is these where the mediator needs to be at his or her best!

*Patrick*

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 News

By Adv Alan Nelson



Important recent developments on the mediation front include the following:

- More than 150 Judges and magistrates have received training in mediation
- The Magistrates Courts Rules pertaining to mediation have been drastically amended
- MiMM have introduced a pilot project to promote mediation in the Magistrates Courts
- A pilot project with the South African Medical Association to promote the mediation of disputes in the medical industry.

## **TRAINING OF JUDGES**

We have it on good authority that approximately 150 Judges and Magistrates recently underwent training in mediation at the CTICC in Cape Town. This is extremely good news since without an informed judiciary, the promotion of mediation in our courts will probably not happen, at least not to the extent that we have all been hoping for.

## **AMENDMENT OF THE MAGISTRATES COURT RULES PERTAINING TO MEDIATION**

It is common knowledge that the Department of Justice's Court Annexed Mediation project in the Magistrates Courts was a dismal failure. This explains why the rules have been drastically amended so as to accord with the recently introduced High Court Rule 41A. In essence, this means that nobody can litigate in South Africa without first applying their minds to mediation and notifying opponents of their reasons for either agreeing or refusing to mediate, and with incorrect decisions possibly resulting in adverse costs orders.

So now, all that it will take for mediation to become mainstream in our courts is for one of our newly trained judges to make an adverse costs order against a litigant for incorrectly deciding not to mediate or better still, deciding to deprive a lawyer that furnishes incorrect advice regarding mediation of their costs and holding them liable for the consequential damages suffered by their clients.

## **MiMM's PILOT PROJECT TO PROMOTE MEDIATION IN THE MAGISTRATE'S COURTS**

EXCO are introducing a pilot project to promote mediation in the Magistrates Courts that will in due course hopefully have a spill over effect in the High Court.

The plan is to conduct mediations in a number of Magistrates Courts on a pro bono basis for a trial period. Data will be kept of the outcome. If, as is anticipated, the results are positive, they will be provided to both the Department of Justice and to the Chief Justice as evidence of mediation's ability to resolve conflict and to lighten the overburdened judicial system. The data will also be used as motivation for the state to provide financial aid to litigants that cannot afford to pay for mediation.

Experienced mediators are being sought to conduct the pro bono mediations. Firstly, to ensure positive statistics, but also so that they can provide inexperienced mediators with an opportunity to hone their skills by acting as co- mediators during the trial period.

One of our EXCO members, Adv Patrick Scott SC, who currently resides in Scotland, will be assisting me in this project - which will follow a Scottish model in which a Mediation Clinic has been introduced in the lower courts and in which Patrick plays a major role.

### **PILOT PROJECT TO PROMOTE MEDIATION IN THE MEDICAL INDUSTRY**

MiMM have concluded an exciting MOU with SAMA (the South African Medical Association) with a view to promoting mediation in the medical industry and of providing additional co-mediation opportunities for our members. Dr Trevor Frankish is leading this important project for our members on EXCO'S behalf.

Mediators ought to be pleased that the rules pertaining to mediation are now similar in both the high and lower courts. This means that people in our country (including companies and other artificial persons) are now precluded from litigating in any court without first applying their minds to mediation.

MiMM's Exco has resolved to do something about this.

The plan is to offer pro-bono mediation services in selected Magistrates Courts for a trial period. In each district, MiMM will appoint a competent and passionate MiMM mediator who has sufficient time to administer the process (the Administrator). The Administrator's responsibilities will include the following:

1. Regular liaison with the civil magistrates in their area to ensure that the magistrates have a good understanding of mediation and that they refer all suitable matters to mediation.
2. Conduct pre-mediation meetings with the parties during which they are told how the process works and what preparations will be required.
3. Ensuring that the parties (and all other attendees) sign a written agreement to mediate, in which the terms of engagement are recorded.
4. Allocating each mediation to a suitably qualified MiMM mediator.
5. Administering a co-mediator program that will afford MiMM mediators who have not mediated themselves an opportunity to see how it should be done.
6. Keep a record of the outcome of all mediations.
7. Compile a report at the end of the pro-bono period recording relevant information, including the nature of disputes dealt with, time spent by mediators, outcomes, success rate, etc.

After the pro-bono trial period is over, MiMM will compile a summary of these reports for submission to the Department of Justice with a view to getting the State to fund future mediations.



One of EXCO's members, Adv Patrick Scott SC, formerly a member of the Eastern Cape Bar, has kindly offered to assist in this new project. Patrick has been based in Scotland for a number of years now where he has been involved in the running of a similar Mediation Clinic there.

MiMM is a not-for-profit company that promotes mediation and takes care of the interests of its members. It is currently embarking on a program to establish mediation clinics in Lower Courts as a precursor to the High Courts. All qualified UCT/MiM mediators are eligible to participate in the program which will include co-mediating with experienced mediators to gain experience.

Adv Alan Nelson SC

Founder member and Vice Chairperson of Mediation in Motion Mediators NPO.



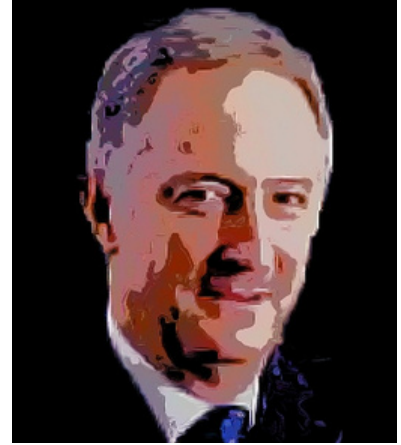
# TAKE NOTE

*Make sure you take note of page 12 of this newsletter!*

# ENFORCEMENT OF INTERNATIONAL MEDIATION SETTLEMENT AGREEMENTS

Although the consensual settlement of international commercial disputes was the preferred method of dispute resolution before the second world war, arbitration became the method of choice after the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention, came into operation in 1959. It currently has 170 signatories and is widely regarded as the most successful commercial convention.

Due to increased commercial complexity, costs and duration, commercial actors have been searching for an alternative solution.



Adv. Ettian Raubenheimer

Mediation of commercial disputes has been practiced for quite some time in the United States and the Government submitted a proposal to the UN for the creation of a convention for the Enforcement of Settlement Agreements resulting from mediation in 2014. This proposal eventually culminated in the United Nations Convention on International Settlement Agreements Resulting from Mediation, better known as the Singapore Convention, which came into force on 12 September 2020 and has so far been signed by 55 countries.

The Convention is applicable to written international mediation agreements that were concluded with the aim of resolving a commercial dispute.

An agreement is regarded as being in writing if its content is recorded in any form, including electronic, provided that it is accessible to be used as a reference in the future.

Mediation is defined as a process in terms of which parties to a dispute endeavour to settle the dispute amicably with the assistance of a third person. This third person is not permitted to impose a solution on the parties.

"Commercial dispute" is not defined.

A mediation agreement is international when:

1. At least two parties to the settlement agreement have their places of business in different States, or
2. The State in which the parties to the mediation agreement have their places of business is different from either:
  - the State in which a substantial part of the obligations under the settlement agreement are performed, or
  - the State with which the subject matter of the settlement agreement is most closely connected.

Where a party has several places of business, the relevant place of business is the one closest to the dispute to which the agreement relates. If a party lacks a definitive place of business, the party's domicile is considered to be its place of business.

The Convention is not applicable where the settlement agreement was entered into to resolve disputes caused by:

1. Consumer transactions for personal, family or household purposes;
2. Family, inheritance or employment law;
3. Settlement agreements aimed at resolving consumer disputes for personal, family or household purposes.

It is also not applicable where the settlement agreement has been approved by a court or if it was concluded during proceedings before a court and the agreement is consequently enforceable as a judgment of the courts of the particular State.

Where the agreement has been recorded as an arbitration award and is enforceable as such the Convention is also not applicable.

Enforcement can occur in two ways. The parties can either apply for a declaration of enforceability with the competent authority or invoke the mediation agreement as a procedural impediment and a defence, proving that the disputed matter has been resolved.

For a settlement agreement to be enforced the following requirements have to be met:

1. the agreement must be in writing and signed by the parties;
2. the agreement must contain evidence that the agreement resulted from mediation, such as a signature from the mediator or a document signed by the mediator indicating that he or she carried out the mediation, or an attestation by the administering institution.

The ground for refusal to enforce falls broadly into two categories; namely grounds that the parties may claim and grounds that a court may raise on its own initiative.

A party who wants to prevent the execution of the mediation agreement may rely on non-compliance with the formal requirements mentioned previously.

An opposing party may also oppose enforcement on the following grounds:

- a party to the settlement agreement was under some incapacity;
- the settlement agreement is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it;
- the settlement agreement is not binding according to its terms or that it has been subsequently modified.
- the obligations in the mediation agreement have been modified or that they are not clear or comprehensible.
- granting enforcement would be contrary to the terms of the settlement agreement.
- a serious breach by the mediator of standards applicable to the mediator or the mediation, without which breach that party would not have entered into the settlement agreement; or
- the mediator failed to disclose circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the agreement.

Courts have two grounds on which to refuse to enforce a mediation agreement.

1. granting enforcement of the settlement agreement would be contrary to the public policy of the state including national security and national interest, and
2. the subject matter of the dispute is incapable of being settled by mediation under the governing law of the nation.

The purpose of the Convention is to popularize mediation in the international commercial landscape. Time will tell whether this object have been achieved. Preliminary reports indicate an encouraging move toward mediation in the international commercial sphere.



## TAKE NOTE

### **Notice of Annual General Meeting 16 August 2023 at 18:00**

Dear MiMM member

Kindly take notice of Mediation in Motion Mediators' (NPO) annual general meeting (AGM) scheduled for Wednesday, 16th August 2023 at 18:00.

A detailed agenda and the meeting link will be sent out closer to the time.

We look forward to meeting with you and sharing ideas towards the growth of our organization and mediation as a whole.

Best wishes.

A handwritten signature in black ink, appearing to read 'James', written over a light blue rectangular background.





# TAKE NOTE

Our next *Meet the Expert* session will take place:

**Monday 4 September at 18:00**



*Keep your eyes open for:*

*Medical Mediation Refresher training*

MiM is planning Medical Mediation refresher training towards the end of August.

Keep your ears open and your eyes peeled for information in this regard.

MiMM premium members will have a huge advantage.

social

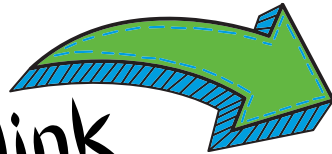


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media

If you have not  
joined yet - To join  
the  
WhatsApp group

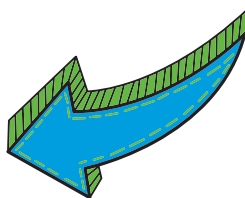
Follow this link

A white rectangular card with a light grey border. At the top center is a circular logo with a blue 'M' and a green leaf. Below the logo, the text reads "MiMM (NPO)" and "WhatsApp group". In the center of the card is a large QR code with a white WhatsApp logo in the middle. Below the QR code, there is a warning text: "This group QR code is private. If it is shared with someone, they can scan it with their WhatsApp camera to join this group."/>

MiMM (NPO)  
WhatsApp group

This group QR code is private. If it is shared with someone, they can scan it with their WhatsApp camera to join this group.

Or use this link



[FILE:///C:/USERS/SUSAN%20VERHOEF/DESKTOP/\(5\)%20WHATSAPP.HTML#:~:TEXT=GROUP%20CHAT%20INVITE-,HTTPS%3A//CHAT.WHATSAPP.COM/EREO68YTNDWCI9TSTECUKE,-18%3A51](FILE:///C:/USERS/SUSAN%20VERHOEF/DESKTOP/(5)%20WHATSAPP.HTML#:~:TEXT=GROUP%20CHAT%20INVITE-,HTTPS%3A//CHAT.WHATSAPP.COM/EREO68YTNDWCI9TSTECUKE,-18%3A51)