

# LET'S MEDIATE

The official newsletter of  
Mediation in Motion Mediators



## MEDIATION IN MOTION MEDIATORS

- From the Editor
- Letter from the Chair
- Patrick's Ponderings
- The role of legal advisors in mediation
- "Sorry Mediator! Can you speak my language?"
- Take Note
- Social Media

# From the Editor

Dear MiMM Member

If you have not yet joined our MiMM NPO WhatsApp group, you have missed out on some thought provoking conversations and you have certainly missed out on some fantastic shared content around mediation and conflict resolution.

Some of the interesting topics that were discussed and debated include:

Perspective and conflict

Impartiality - is it possible?

I would urge each and everyone to join, contribute, debate, challenge and share. You will find more information on the group and how to join, later in this issue.

As if missing out on the WhatsApp group is not enough, you missed out significantly if you were not part of our first meet-and-greet session on 20 March 2023. Not even a looming National shutdown could stop an informative and social virtual gathering of like-minded mediators.

Exciting information was shared around upcoming opportunities to expand your experience and learning by becoming part of mediation as an observer, co-mediator or mediator .

You would have heard about the progress made in MiMM's SAQA submission and what this entails, what you can expect. and how you will benefit.

You would have heard that an MOU was signed between MiMM and SAMA to conduct mediations that will also provide opportunity for exposure and training..

You would have met our resident Experts in a slot called Ask the Experts, a platform where you can put your questions and comments to the experts for discussion, a session that will be available monthly.

Our next formal Ask the Experts session will be on Monday 24 April at 18:00. Keep an eye on the WhatsApp group for more information.

The message is:- Join the WhatsApp group and do not miss the next session of Ask the Experts.

# Letter from the Chair

Dear MiMM member,

As we approach Easter, it seems almost cliché to mention how quickly the first few months of this year have whizzed by, but indeed they have. In the first quarter of 2023 alone, we have witnessed numerous conflict situations within South Africa. The two that certainly stand out were the university student protests and the NEHAWU (health care workers) strike. What was certainly encouraging to see, was that two major Universities publicly announced that they have opted for mediation as a means to help resolve the situation. Even more encouraging was that the NEHAWU



strike was also resolved through a facilitative process. This is undoubtedly a testament towards mediation gaining momentum as a genuine mechanism for conflict resolution in South Africa.

Our organization still remains committed towards promoting mediation and our members as mediators. We have made significant strides towards our SAQA submission as mandated by our members at the AGM last year. The MiMM (NPO) EXCO have worked tirelessly to develop all the necessary policies as required by SAQA. This registration will certainly give us the competitive advantage in the marketplace. It will also ensure that our members are kept up to date with the latest trends in mediation and allow for the continuous sharpening of our skills as mediators. Most importantly this registration will increase the public's trust in mediation and lend credibility to our panel of mediators. Lastly, this will also allow mediators to develop a proper career path in the field of mediation.

We have successfully presented and demonstrated the benefits of mediation to the South African Medical Association (SAMA), which subsequently led to the signing of an MOU between our organizations. In essence, SAMA has committed to referring all their members who find themselves at risk for medico-legal litigation to us for mediation of the matter. A workflow process has been developed and finalization of the exact protocol will be discussed and implemented shortly. Our intention is to have a panel of suitable mediators available immediately for matters, and more importantly create opportunities for observations for our less experienced mediators. Details of how individuals will be selected will be communicated via our various platforms.

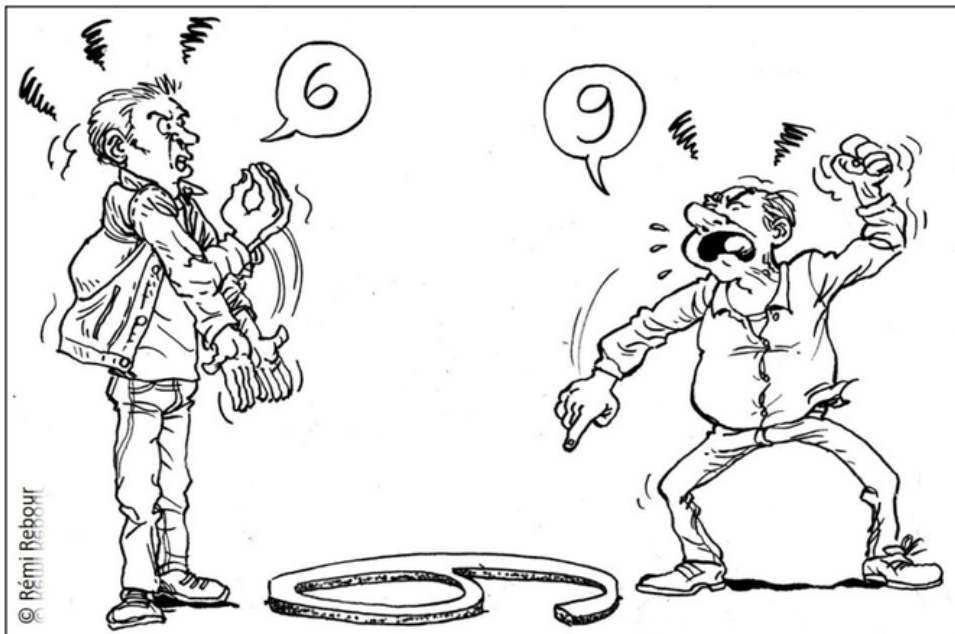
We have been made aware of the various challenges with our current website. The EXCO have taken the decision to do a website revamp and welcomes any suggestions from our members for improvements thereof. We have further decided to delay the appointment of the digital marketing agency, as previously discussed, due to these eminent changes. We have in the meantime started at WhatsApp TM group for our members and it has already sparked some interesting thoughts and discussion. We encourage all our members to join the group and participate in these discussions.

These are certainly exciting times for our organization and we encourage all our members to please share any thoughts and ideas that will help improve our offering to our various stakeholders. It is not defeat nor an obstacle that will stand in the way of our vision. The dream continues. The journey continues – Lyoto Machida.

Best wishes.



Dr. Shamal Ramesar  
Chairman – MiMM (NPO)



# Patrick's Ponderings

## And then there was one .....

Sometimes an apparent negative move can be the catalyst for a settlement!

This ponder is about the effect that facts and circumstances beyond the mediator's control can have on the outcome of a mediation and bring about an unexpected settlement.



My co-mediator and I had private sessions with the parties, starting with Paul. "There are three possible options," we told him.

"You persuade Alistair to move to your figure of £2000, he persuades you to move to his figure of £1475 or you settle on a figure somewhere between those two figures." Paul gave this some thought and, probably a bit reluctantly but realising that the first two options were not possible, agreed to split the difference. It was time to have a private session with Alistair.

The next move from us as the mediators could have been to obtain Paul's consent to convey that offer to Alistair, the consent being required because private sessions are confidential. However, the most probable response from Alistair (if he was prepared to move at all) would have been to again split the difference. In other words, Paul's offer would have been for Alistair to refund him an amount of £1737.50 and he would very likely have come up with a figure of halfway between £1475 and £1737.50, and also dressed it up as splitting the difference. The unfortunate result of this type of approach is that, whilst both parties are ostensibly reaching a compromise, Paul concedes 75% and Alistair only 25%.

So, with that in mind we suggested that Paul not consent to us conveying his offer but, instead, had a similar conversation with Alistair as we had had with Paul. That drew a complete blank. In hindsight we considered that perhaps Alistair had concluded that Paul was of a similar mind not to move from his position, and he decided to do likewise. We had another private session with Paul and obtained his consent to convey the offer, which we did.

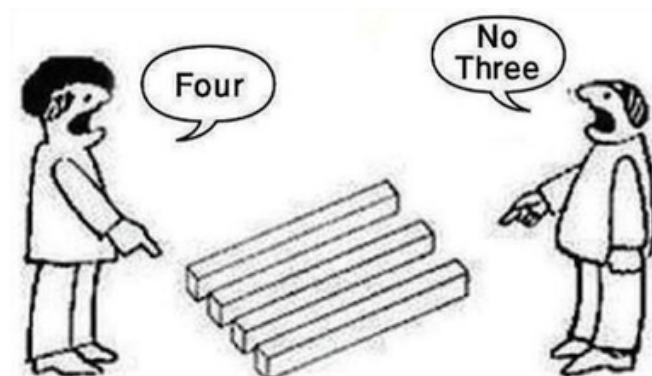
It was at this point that circumstances worked in our favour. Alistair had a client waiting to see him and was anxious to bring the process to an end. However, he still wanted to save face and be in control of the outcome.

He did this with two stipulations. He wanted to round off the figure (in his favour, of course) to £1725 (which was £12.50 less than Paul's offer) and he wanted to include a clause precluding Paul from making negative comments about his company on social media. That, he said, was as good as it was going to get, and he said that he was leaving the Zoom meeting. We could advise him via email whether the offer was accepted. I would usually see this as a negative development in the mediation but in this instance, it probably brought about the settlement!

We conveyed these stipulations to Paul. Wanting to also save face and be seen as the party in control of the outcome, he said that if Alistair wanted to include the bar on social media posts, he wanted the figure to be £1737.50. It was coming down to £12.50. We then revealed that Alistair had left the meeting, which meant that any further negotiations would have to be by way of emails and may not result in a resolution. Paul gave this long and hard thought, and the matter settled on Alistair's figure of £1725. My feeling is that, if Alistair had still been present, there is a fair chance that negotiations would have broken down as a result of two obstinate characters who were trying to get one up on each other.

*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).





# The role of legal advisers in mediation

By Adv Alan Nelson



The more matters I mediate the more convinced I become that legal advisers have an extremely important role to play in every phase of the mediation process. I intend to deal with these under separate headings in the next few newsletters under the following separate headings:

- 1.The decision to mediate
- 2.The terms of engagement.
- 3.Preparation for mediation
- 4.Keeping parties at the negotiation table
- 5.Providing legal advice during the mediation
- 6.Settling the terms of the agreement
- 7.Dealing with any subsequent issues

## The decision to mediate

It is trite that when people are in conflict they find it very difficult to talk to one another and frequently act contrary to their own interests. This is because in conflict situations emotions run high and rational thinking is often impeded. When this happens people often turn to their lawyers for advice and normally follow whatever the advice is that they are given. The situation is not dissimilar to that of a patient, who when traumatised by an unfamiliar ailment, will seek and follow expert medical advice - especially if it emanates from a trusted family practitioner or an expert that the family practitioner recommends.

This means that in many instances where disputants are advised by their lawyers not to mediate, mediation will not follow, especially in those instances where their lay clients are not familiar with the process.

It is accordingly critically important that legal advisers have an in depth understanding of mediation and when it is or is not appropriate. It is disconcerting to note that even highly regarded and experienced practitioners are not furnishing sound advice as to whether or not matters can or cannot be mediated.

In this regard the following extract from the case of *Koetsie and Others v Minister of Defence and Military Veterans and Others* (12096/2021)ZAGPPHC 2021 (6 April 2021) paras 6.2 to 6.4 is instructive:

“6.2 The fairly recently introduced Rule 41A of The Uniform Rules of Court obliges a party ‘in every....application...to indicate by notice whether such a party agrees to or opposes referral of the dispute to mediation.’ In the past year, many disputes in this division have successfully been referred to mediation mostly by judges especially trained in alternate dispute resolution. The rule not only requires a notice but clearly contemplates that a party must have considered the issue earnestly prior to exercising its election. This is clear from the requirement that a party must state its reasons for its belief that a dispute is or is not capable of being mediated.

6.3 The applicants have completely disregarded this rule and its requirements. In the answering affidavit of the Chief of the South African Army, this point is expressly raised. The applicants’ response is surprising to say the least. It is simply this. ‘This is an urgent application brought by the applicants following violent and unlawful actions by the respondents. The Rule 41A process is not required in this instance.’ Adv De Vos SC, who appeared for the applicants together with Adv Van Garderen was equally dismissive of the concept of mediation.

6.4 I find the attitude of the applicants and their legal advisers to be clearly wrong on this score. The circumstance of this case actually screams for an alternative resolution attempt rather than a purely legal challenge. “

In my experience, misconceptions amongst lawyers who have not undergone mediation training are rife and those mentioned by name in the *Koetsie* matter above are certainly not alone. Recently I attended a series of lectures on mediation and was astounded when a very senior and competent partner in a leading law firm, whilst passionately extolling the virtues of mediation, went on to erroneously say that despite its virtues, mediation was only appropriate in those instances where the relationship between the disputants needed to be restored.

In my view this is a serious mistake since mediation has an important role to play in almost all conflict situations. Since mediation is defined in the Rules as assisted negotiations, it follows that in all matters where negotiations could render positive results, mediation is appropriate. It furthermore bears emphasis that Rule 41A envisages mediation as being appropriate not only in those instances where it results in an out and out settlement of the entire matter but also where it can ‘identify issues upon which agreement can be reached, or explore areas of compromise, or generate options to resolve the dispute, or clarify priorities.’

It is often suggested that lawyers discourage their clients from mediating in the selfish pursuit of their own fee-generating interests. Perish the thought! And so, I prefer to believe that mostly this is because of a lack of insight into the benefits of mediation and I hope that I am correct. For what would you think if your trusted medical practitioner were to perform an expensive and traumatic operation on you in circumstances where he or she knows of an inexpensive pill that could have cured all your ailments!



# "Sorry, Mediator! Can you speak my language?"

By Jonathan Rodrigues[1]

“Mediation is an assisted negotiation, facilitated by a third neutral party, held in a secure, confidential...” I went on blabbing, until I noticed a blank expression on the face of the party, who was an HR Manager at a reputable company.

I stopped in my tracks and checked in with him, saying, “You seem a little lost, would you like me to repeat myself?”

He shook his head in disagreement and said, “Why should my organisation send two employees to mediation? Tell me...!”

I began again, “As I was saying, it’s voluntary nature, coupled with the practice of neutrality by the mediator allows parties in dispute...”, but was stopped again in my presentation.

He said, “Are you at a conference or giving a lecture in class? Can you please speak my language? Just simply tell me why...”

What a horror show, I thought. I was embarrassed that I wasn’t able to connect with this party, who was exploring mediation for the first time. Luckily for me, this was only a fictional role-play at a workplace mediation training session, hosted by The TCM Group, as part of my induction into the world of workplace mediation in London. Though it was simply a training simulation, it did make me introspect into the language that I use as a mediator.

It is often taken for granted that everything that we say as mediators will be kindly accepted by the parties in dispute who wish to mediate – but, what about those who refuse to carry on with mediation after an opening session? Could it be that they are unable to relate to the mediator’s language that we expect them to grasp? We are trained to speak about the key principles – voluntariness, neutrality, confidentiality, self-determination – as essential selling points while attempting to confirm participation of the parties in mediation. However, might it be possible that there are other things important to them, besides this? Below are some key words parties might be wanting to hear whilst we pitch mediation to them... could we think of some more?

- “Mediation helps parties who do not see eye-to-eye to share their perspectives with each other, no matter how contradictory they may seem.”
- “There will be no one else listening to this conversation in the mediation room, except us, and as the mediator, I will ensure civility and physical safety throughout.”
- “A resolution may be reached within hours of beginning the conversation, and I will be there to help you draft that agreement, and you can sign it only after reading it.”
- “As your mediator, I am available to coach and guide you (and the other side) on how to collaboratively communicate your interests and needs without upsetting the other side.”

As part of the same simulation, where I was still on this phone call with the HR Manager, attempting to get a buy-in for mediation, I was asked another question – “This dispute has layers of tensions dating back to the pre-Covid times, and you expect to get this sorted in a day’s session? How are you so sure of this speed mediation round?” Once again, a reasonable question and a valid concern from the user lens. I must confess that my instinctive response to this query then was not quite accurate, and a better answer only became clearer after many rounds of roleplaying and understanding the process design. This once again reminded me that users may not have complete faith in the process of mediation, and that we may need to go beyond the routine description of the structure of the sessions.

In my opinion, institutions offering third-party funded mediation sessions – something common to both the Strathclyde Mediation Clinic (University / Government Grant) and The Mediation Company at The TCM Group (Organisation / Company that the parties in conflict are affiliated with) – would require to have the following essentials in their framework to encourage parties to make the best of their days’ efforts, in addressing and resolving conflict.

- Structure

For starters, it would be crucial to have a clear structure of the number of sessions designed for a day’s mediation, with defined guidelines on the scope and limitation of conversations in each session, along with a specified time limit per session. A strong process design allows for a focussed conversation, avoids distractions, and invites parties to engage a progressive and collaborative approach to the conflict, from start to finish. Parties also feel comfortable and prepared to engage and distribute their energies and efforts during the course of the day.

- Skills

There is no room for hiding in a pre-designed mediation session, where the parties may not really offer the mediator any warning signs before tipping over the boiling point. Therefore, mediators would be expected to be sharp and demonstrate communication and problem-solving skills. Due to time constraints, it is also crucial for the mediator to be able to strategically summarise all the information at the table, whilst simultaneously reflecting the priorities and respecting the emotions.

- Standards

High standards are expected to be practiced across the board, and this can be ensured by training all mediators to follow the same mediation process design and subscribe to the code of ethics in their practice. Regular contact with trained mediators, either through follow-up refresher trainings or reflective practice groups or networking events, can serve well to maintain quality control and reiterate best practices. As part of the mediation process itself, it is good practice to encourage parties in conflict to offer feedback to the mediator and institution.

- Servicing

Post-mediation follow-up and check-in is also an important aspect of preserving trust and maintaining contact with the disputing parties. Through this effort, the mediators and institutional service providers (private or non-profit) also extend their empathetic approach beyond the mediation session. I would dare say that is, ultimately, a professional responsibility to ensure the satisfaction of process and outcome, beyond the confines of the mediation room. Obviously, it is also a smart way to keep in touch with happy clients, who may be inclined to refer others in conflict to mediation.

Although the value of mediation is quite commonly understood and fairly acknowledged among the legal and HR professionals, other users who constitute an important stakeholder of the collaborative process may not possess similar levels of awareness and exposure. It is our responsibility as mediators to take the message to them in a language that is practical and something to which they can relate.

[1] *Jonathan Rodrigues completed the LLM in Mediation and Conflict Resolution course at Strathclyde University in 2020. He currently works at The TCM Group in London, as the Coordinator of the People and Culture Association, as well as volunteering for Strathclyde Mediation Clinic.*



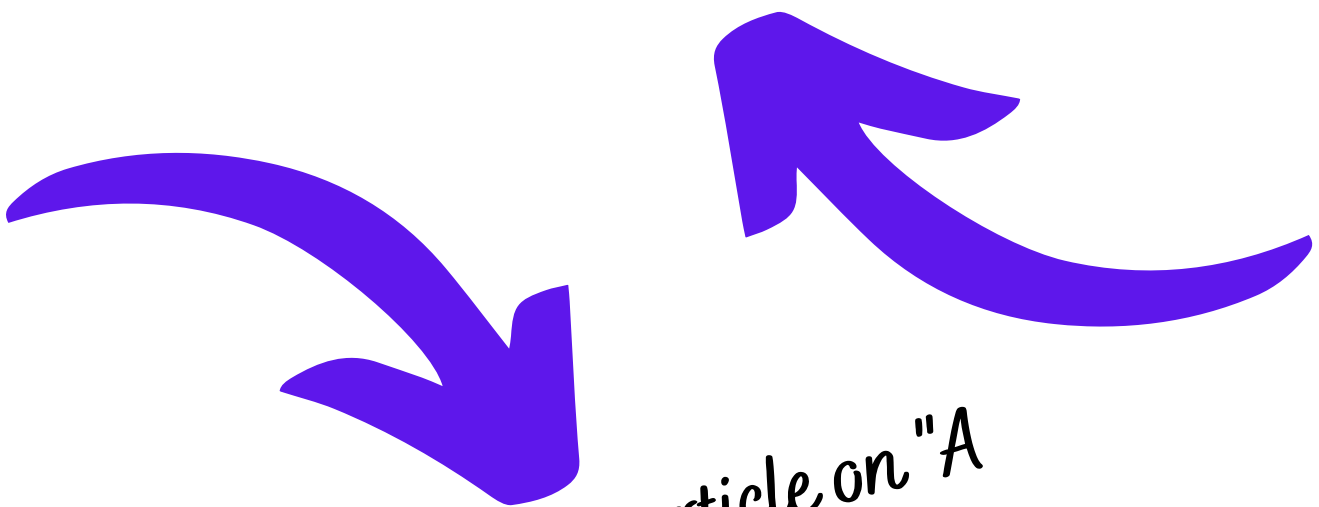
# TAKE NOTE

We are delighted and honoured that we have been granted permission to share with our members, "**Mediation Matters!**", the official newsletter of the University of Strathclyde Mediation Clinic.

You can find a copy of the newsletter on our website.

You will find many thought provoking articles, mediation insights and excellent book reviews.

Do not miss out on this exceptional publication.



*You might find the article on "A Pilot Project" on page 8 & 9, insightful and relevant.*



# TAKE NOTE

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

**Monday 24 April at 18:00**



## IMPARTIALITY



- Involves the idea that each individual's interest and point of view is equally important;



