

Professionalising Dispute Resolution Practice

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1. Background

Mediation practice in South Africa took a first step towards uniformed accreditation and qualification standards in 2010, with the establishment of the Dispute Settlement Accreditation Council (for commercial mediation, also referred to as “DiSAC”) and the National Accreditation Board for Family Mediators (for family and divorce mediation, also referred to as “NABFAM”).

Both DiSAC and NABFAM were established through voluntary collaboration between the major service providers in these fields of practice.

The broad consensus in the mediation industry was that everyone will benefit from the establishment of uniformed minimum standards. These would serve to improve the quality of mediation, would help to establish mediation as a profession, and would serve to protect the public who made use of the services of mediators.

Today the great majority of mediation service providers in South Africa are members of and abide by the standards set by these organisations. These standards include:

- Mediator accreditation standards
- Minimum qualification standards for mediators
- Minimum standards for mediation training courses
- CPD requirements for mediators
- Codes of Conduct and Practice Supervision requirements.

Although this has brought a standards-based approach to mediation practice, it remains a voluntary system. This means that non-compliant practitioners can continue to call themselves mediators and practice without any supervision. This scheme of regulation also has no standing with or recognition from government.

2. Why Professionalising Dispute Resolution Practice?

When we talk about professionalising Dispute Resolution Practice, we mean moving from a voluntary approach to one where the industry standards are formally recognised by the standards authorities in South Africa, and where a professional body is in place to administer and uphold these standards.

For practitioners this will mean that they have to meet the minimum standards in order to practice in certain areas, and that are required to affiliate with the professional standards body,

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who has authority to supervise their practice. For the public this means that practitioners will be of a certain standard, and can be held accountable to transparent practice standards.

An overview of developments in other countries indicate that the need for professionalising mediator practice becomes pressing as soon as the use of mediation becomes institutionalised through a government initiative and becomes more widely used.

It is clear that in South Africa mediation is on the cusp of becoming more institutionalised through a government initiative (e.g. Rule 41A), and hopefully as a result will become more widely used. This is the strongest motivation for professionalising dispute resolution practice.

Some of the benefits will be:

- It would enhance the stature and visibility of the profession
- It would contribute to improved standards of qualification and practice
- It would assist to provide a sustainable financial basis for administering the profession
- It would improve our ability to enhance inclusivity of the industry
- It would enhance the ability of the industry to engage with government and policy makers on issues of importance to the industry.

Another development that must be noted is that the SA Reform Commission [“SALRC”] has established a project that is developing a draft Mediation Bill for South Africa. This Bill will amongst other things, address the issue of accreditation of mediators.

The SALRC is developing a discussion paper on this issue and have debated the various options for establishing an accreditation framework for mediators in South Africa. The early indications are that there is a preference for a model where the Minister accredits an established Professional Body with additional powers to regulate the industry.

However for this option to work, there has to be an established Professional Body. This puts increased pressure on the industry to actually establish such a Professional Body. In the absence of any credible professional body, the remaining option is probably that the industry be regulated by a statutory regulatory body.

3. How do we professionalise Dispute Resolution Practice?

The National Qualifications Framework Act, 67 of 2008 [“NQF Act”] allows for certain organisations to be recognised as a professional body, on fulfilment of the criteria for recognition as a professional body. Such a body will then have statutory embedded powers to represent and/or regulate a recognised community of expert practitioners within the regulatory framework of the NQF Act.

The process of recognising such a professional body is managed by the South African Qualifications Authority, in accordance with a formal policy. In terms of this policy some of the criteria for recognition are:

- Be a legally constituted entity with the necessary human and financial resources to undertake its functions, governed either by a statute, charter or a constitution and be compliant with and adhere to good corporate governance practices;

- Protect the public interest in relation to services provided by its members and the associated risks;
- Develop, award, monitor and revoke its professional designations in terms of its own rules, legislation and/or international conventions;
- Submit a list of members in a form acceptable to SAQA;
- Set criteria for, promote and monitor CPD for its members to meet the relevant professional designation requirements;
- Publish a code of conduct and operate a mechanism for the reporting and investigating of members who are alleged to have contravened the code;

Currently SAQA recognises some 107 professional bodies. Seventeen of these professional bodies are established through other legislation (i.e. not in terms of the NQF Act), whilst the other 90 professional bodies supervised by SAQA are established through registration in accordance with the NQF Act. These include the Corporate Counsel Association of South Africa, South African Institute of Tax Practitioners, South African Sports Confederation and Olympic Committee, Southern African Communications Industries Association, Southern African Institute of Government Auditors, and the Institute of Chartered IT Professionals. .

Once a professional body is recognised by SAQA, that professional body will then manage the designated professions recognised by SAQA as being part of its remit. This means that the professional body can then set compulsory minimum qualification and accreditation standards for any person who wants to use the designation.

In view of the above, the scope of work that is required in order to establish a professional body includes:

- Establish a legal entity (a not for profit company) with governance structures and operating procedures
- Set up and ongoing financial management and reporting of the legal entity
- Fundraising to support the activities of the legal entity
- Design and development of membership categories and member value proposition
- Implementing member enrolment activities
- Design and development of professional designations
- Resourcing for ongoing day to day management of the entity
- Manage and complete the SAQA registration process.

The outcome of all of the above work needs to be fully functional professional body that is financially sustainable, and that has the support of the bulk of the industry. Only if this is achieved will SAQA consider registering it as a professional body.

4. Developments to date & the way forward

In 2016 DiSAC and NABFAM took a joint decision that a professional body for dispute resolution practitioners should be established under the existing SAQA framework that governs professional bodies. This was again debated in 2019, and the decision was reconfirmed.

DiSAC and NABFAM have set up a joint Steering Committee to take this work forward. The Steering Committee has explored various options for taking this initiative forward.

In July 2020 the Steering Committee called a general stakeholder meeting to debate the way forward. The meeting unanimously reconfirmed the mandate to establish a professional body, and again mandated the Steering Committee to take the work further.

The Steering Committee has developed substantial proposals for a process to establish a professional body. At the end of 2020 this proposal was widely shared with stakeholders, who were asked to comment. The Steering Committee has reviewed this feedback, and will shortly share a revised process with all stakeholders.

In essence the next steps will be:

STEP 1 – Complete application process for founding membership of the professional body

Stakeholder organisations will be invited to apply for membership of the (to be established) professional body, and all applying organisations who meet the criteria will be confirmed as founding members of the (to be established) professional body.

Founding membership be available to any organisation that (i) supports the process for establishing a professional body, and (ii) who represent a minimum of 20 dispute resolution practitioners (mediators, facilitators, arbitrators).

STEP 2 – First meeting of the Members' Council

The Members' Council will consist of one representative from each founding member, and will effectively act as the "shareholders' meeting" of the organisation. The first meeting of the Members' Council will be called as soon as the membership application process is completed.

The order of business for the first meeting of the Members' Council will be to

- Consider and finalise the Memorandum of Incorporation (Mol) for the to be established professional body.
- Elect the founding Board members (in accordance with the approved Mol); and
- Instruct founding Board to register the NPC Company.

Stakeholders have expressed strong views about (i) the need for independent board members, (ii) the need for public interest representation on the Board, and (iii) the need for the Board to have proper representation of historically disadvantaged persons.

STEP 3 – The Elected Board must begin its work

After the Members' Council meeting the elected Board must take steps to formally register the not-for-profit company and co-opt additional board members.

The Board must then begin to execute its broad mandate (as set out in the Mol) to develop and establish a professional body for dispute resolution practitioners. This will include:

- Taking all the necessary steps to establish a fully functional professional body
- Indicating how professional standards and professional designations will be formulated
- Developing the various classes of professional membership of the organisation
- Defining the criteria for designating specific practice areas as professions (such as commercial mediation, and family mediation, labour mediation).
- Taking the necessary steps to have the professional body as well as the designated professions registered with SAQA
- Taking all steps necessary to implement the above, including raising funds and contracting with service providers.

The Board will be required to provide quarterly updates to the Members' Council, who can exercise their rights as members if they are not satisfied with the work of the Board. Any major developments that involve an amendment of the Mol will have to be approved by the Members' Council.

This will ensure that the development of a professional body for dispute resolution practitioners is a transparent and participative process, that takes full account of the needs and interests of not only practitioners, but also of the public that it must serve

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