

PRE-READING MATERIAL



Webinar: **HOW TO CONDUCT MEDIATION IN MAINTENANCE MATTERS?**

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1. Introduction

Mediation is a form of alternative dispute resolution ("ADR"), which amounts to problem-solving outside of court. Mediation is therefore not part of the court process, but an attempt between the parties to reach a settlement on the issue at dispute before the dispute goes to trial. Mediation is therefore a crucial first step to attempt to solve a dispute outside of costly and lengthy court trials. The focus of this webinar is on mediation in maintenance matters.

2. What is mediation?

Mediation is an informal process, whereby an impartial third party (the mediator) facilitates problem-solving between the parties in a controlled environment. This definition can however be unpacked to show the flexible nature of mediation. The entire mediation process is informal, meaning it is not done in court and that it is a voluntary process which the parties choose to undergo. The mediator is a completely neutral party who only helps the parties to negotiate, but the mediator does not make decisions for the parties and only assists them to reach conclusions themselves.

3. History of mediation and accreditation

3.1 Legislative development

In the 1980's and 1990's, mediation became popularised as a form of ADR due to the input of Justice GG Hoexter in the court structure. In 1987, the Mediation in Certain Divorce Matters Act came into effect and propagated the idea of divorce mediation. Other legislative instruments were also enacted between the 1990's and 2000's, such as the Recognition of Customary Marriages Act, the Children's Act and the Child Justice Act. In 2019, a draft Family Dispute Resolution Bill was published in the SA Law Reform Commission's Discussion Paper 148, which advocated for mandatory mediation in all family law disputes.

3.2 Accreditation development

The South African Association of Mediators (SAAM) was founded in 1988. Thereafter, other regional organisations were also founded, such as the Family Mediator's Association of the Cape (FAMAC), the KwaZulu-Natal Association of Family Mediator's (KAFam) and the Arbitration Foundation of Southern Africa (AFSA). Since there is legal regulation of mediators' accreditation, these organisations have formed in the name of self-regulation. There are numerous other ADR-related organisations that offer accreditation and training to their members as a form of self-regulation or voluntary compliance. Members of these organisations are usually professionals from various disciplines, including attorneys, psychologists and social workers.

4. Why is mediation so important in maintenance matters?

Mediation is of paramount importance in general family law related matters. This is so because the adversarial, war-like nature of court litigation is almost never in the best interest of the children involved in the maintenance dispute. Litigation results in a court-imposed outcome, of which the parties have no control over. The parties to a trial only have the power to vary the outcome of the court-ordered judgment by appealing or reviewing the matter, whereas parties to a mediation have full control over the outcome of their mediative process. Some academics have also noted that litigation is flawed in that it does not promote the emotional healing of parties to a family dispute, but that the winning party to a trial is often the party with financial capacity to afford an expensive and knowledgeable attorney who then wins their case.

It is very clear that the rules of court and law of evidence in family litigation is not geared to deal with the tense emotions and feelings of hopelessness that maintenance applicants go through. Mediation is however a perfect process to tackle the underlying issues that the parties face in their maintenance matter. The benefits of mediation will be further elaborated in the webinar material to follow, however the advantages of mediation can never be over-emphasized in family disputes.