

CD DIRECT

**HIGH COURT RULE 41A
PROCESS AND SPECIMEN
NOTICES, JOINT MINUTES AND
AGREEMENTS**



**CONFLICT
DYNAMICS**

TRAINING
& DISPUTE
RESOLUTION
SERVICES

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RULE 41A PROCESS¹

SUB RULE (2)

1. Sub rule (2)(a) compels a plaintiff or applicant to file a prescribed Rule 41A Notice indicating either its agreement or opposition to referral of the dispute for mediation. On a practical level, this notice would accompany service of the summons or application.
2. Sub rule (2)(b) also compels the defendant or respondent to file a prescribed Rule 41A Notice indicating either its agreement or opposition to referral of the dispute for mediation. This notice should be served concurrently with an intention to defend or oppose but if not then, at the least prior to delivery of its plea or opposing papers.
3. Sub rule (2)(c) requires that the above notices to be substantially in accordance with Form 27 of the First Schedule ².
4. Sub rule (2)(d) indicates that these notices shall be without prejudice and shall not filed with the Registrar.

SUB RULE (3)

1. Sub rule (3) provides that the parties may at any stage of the proceedings, notwithstanding sub rule (2), refer their dispute to mediation, provided that leave of the court is necessary if the hearing has commenced. In addition, a judge or Rule 37A case management judge may in terms of (3)(b) direct the parties to consider referring a dispute to mediation³.

SUB RULE (4)

1. Once there is agreement to refer a dispute for mediation, the parties are required to file a Joint Minute in terms of sub rule 4(a) that records their decision to mediate the dispute or any aspect of the dispute ⁴.
2. The time limits for pleadings, notices and affidavits are suspended from the date of filing the above Joint Minute to the conclusion of the mediation, provided that any party who believes the suspension is being abused may approach the court to lift the suspension.
3. Sub rule (4)(d) requires the mediation to be concluded within 30 days of the date of the signature of the Joint Minutes filed in accordance with sub rule (4)(a), provided that a court may on good cause extend the period.
4. In terms of sub-rule (4)(b) the parties must enter into an Agreement to Mediate, in which they agree on the following ⁵:

¹ These notes do not constitute legal advice and parties and their representatives should obtain legal advice before proceeding in terms of Rule 41A

² See pages 6-7 of this document

³ See page 28 of this document

⁴ See pages 8-9 of this document

⁵ See pages 10-14 of this document

- a. Appointment of a suitably qualified mediator⁶
- b. The costs of the mediation, including the costs of the mediator;
- c. When and where the mediation is to take place.

SUB RULE (6)

1. All communications and disclosures, whether oral or in writing made at mediation proceedings are confidential and inadmissible as evidence in terms of sub rule (6), except as provided by law or discoverable under the rules.

SUB RULE (7)

Upon conclusion of the mediation the following steps must be taken:

1. In terms of sub rule (7)(a) the parties and the mediator must inform the Registrar and other parties by Notice that the mediation has been completed⁷.
2. If they fail to do so, (7)(b) provides that the suspension of the time limits under this rule nevertheless lapse, unless a court decides otherwise.

SUB RULE (8)

1. Sub rule (8)(a) provides that the mediation shall be deemed to have been completed 30 days after the date of the signing of the Joint Minute referred to in sub rule (4)(a) and that the suspension of time limits shall also then lapse.
2. If the mediation concludes in less than 30 days after the date of the signing of the Joint Minute, the parties may file the Notice contemplated in sub rule (7)(a) that the mediation has been completed. This is to ensure that the 30-day suspension of time limits for court processes can be lifted earlier.
3. In terms of sub rule (8)(b) the parties and the mediator are required to file a Joint Minute within 5 days of the conclusion of the mediation, indicating⁸:
 - a. Whether a full or partial settlement was reached or the mediation was unsuccessful, and
 - b. The issues on which agreement had been reached and do not require a hearing by the court.
5. It is the joint responsibility of the parties in terms of sub rule (8)(c) to file the (8)(b) Joint Minute with the Registrar.
6. Sub rule (8)(d) provides that no offer or tender made *without prejudice* in terms of this sub rule shall be disclosed to the court at any time before judgment has been given.

⁶ A 'suitably qualified mediator' is a mediator who has been trained and accredited, and who is a member of an accredited panel of mediators such as the Conflict Dynamics panel
<https://www.conflictdynamics.co.za/Mediators>

⁷ See pages 15 of this document

⁸ See pages 16-17 of this document

7. Sub rule (8)(e) provides that Rule 41A applies mutatis mutandis if the parties reached a settlement during mediation. Rule 43(3) provides that if a settlement has been reached the attorney for the plaintiff shall inform the Registrar and Rule 41(4) provides that any party to a written settlement signed by all the parties, may apply for judgement in terms of the settlement with five days' notice⁹.

SUB RULE (9)

1. Sub rule (9)(a) provides that unless the parties agree otherwise the parties shall be jointly and equally responsible for the fees of the mediator.
2. Sub rule (9)(b) provides that when an order for costs of the action or application is considered, the court may have regard to the sub rule (2) Notices or any offer or tender referred to in sub rule (8)(d). Any party may bring the above notices or offers to the attention of the court.

⁹ See pages 18-20 or 21-23 of this document

SPECIMEN NOTICE IN TERMS OF MEDIATION RULE 41A SUB-RULE 2 OF THE HIGH COURT

This Specimen Notice is for guidance only. It should be adapted to the particular circumstances and legal requirements of the dispute to which it relates. Wherever possible any such Notice should be drafted/approved by each party’s lawyer. Although the mediator may be involved in helping the parties to draft acceptable terms, the mediator is not responsible for the drafting of the Notice and should never be a party to the notice.

FORM 27

THE HIGH COURT OF SOUTH AFRICA

(.....)

CASE NO: _____

In the matter between:

.....

Plaintiff/Applicant

and

.....

Defendant/ Respondent

NOTICE OF AGREEMENT OR OPPOSITION TO MEDIATION

TAKE NOTICE THAT the Plaintiff/Applicant/Defendant/Respondent agrees / does not agree to the referral of this matter to mediation.

The Plaintiff/Applicant/Defendant/Respondent does so for the following reasons:

.....
.....
.....
.....
.....
.....
.....
.....
.....

TAKE FURTHER NOTICE THAT in the event that there mutual agreement to refer the matter to mediation the Plaintiff/Applicant/Defendant/Respondent proposes Conflict Dynamics to facilitate the mediation.

DATED at on theday of.....

Plaintiff/Applicant/Defendant/Respondent Attorney

Address

TO: THE REGISTRAR OF THE ABOVE COURT

AND TO: Defendant/Respondent/Attorney

**SPECIMEN JOINT MINUTE IN TERMS OF MEDIATION RULE 41A
SUB-RULE 4(a) OF THE HIGH COURT**

This Specimen Joint Minute is for guidance only. It should be adapted to the particular circumstances and legal requirements of the dispute to which it relates. Wherever possible any such Joint Minute should be drafted/approved by each party’s lawyer. Although the mediator may be involved in helping the parties to draft acceptable terms, the mediator is not responsible for the drafting of the Joint Minute and should never be a party to joint minute.

JOINT MINUTE IN TERMS OF RULE 41A SUB-RULE 4(a)

COURT:FILE NO:

PARTIES:
.....Claimant

And

.....Respondent

The Claimant and Respondent in this matter confirm that they have agreed to mediate their dispute.

They will enter into an Agreement to Mediate in terms of sub-rule (4)(b).

The time limits prescribed by the Rules for the delivery of pleadings and notices and the filing of affidavits or the taking of any step shall be suspended for every party to the dispute from the date of signature of this minute to the time of conclusion of mediation.

Should any party to the to the proceedings opine that the suspension of the prescribed time limits is being abused, he/she/ it may apply to the court for the upliftment of the suspension of the prescribed time limits.

The process of mediation shall be concluded within 30 days from the date of signature of this minute provided that a Judge or the court may on good cause shown by the parties extend such time period for completion of the mediation session.

SIGNED AT ON

WITNESS:

1.....

2.....PERSONAL CAPACITY/
DULY AUTHORISED

CLAIMANT

(Attach copy of authority/resolution)

WITNESS:

1.....

2.....PERSONAL CAPACITY/
DULY AUTHORISED
(Attach copy of authority/resolution)

RESPONDENT

**SPECIMEN AGREEMENT TO MEDIATE IN TERMS OF MEDIATION
RULE 41A SUB-RULE 4(b) OF THE HIGH COURT**

AGREEMENT TO MEDIATE

BETWEEN

[PARTY A]

AND

[PARTY B]

THIS AGREEMENT is made on

BETWEEN

1 _____ “the Mediator”, (a term which incorporates a Co-Mediator or Observer Mediator in attendance at the Mediation with the Parties’ permission),

The Parties are:

2 _____ (“Party A”)

3 _____ (“Party B”)

(and together referred to as “the Parties”)

THE PARTIES AGREE TO A MEDIATION of the Issues arising between Party A and Party B relating to (the Issues) on the terms set out in this Agreement to Mediate;

AND THAT:

Mediator

1) _____ will be the Mediator.

Role of the Mediator

- 2) The Mediator will:
 - a) attend any meetings or discuss the Mediation on the telephone or any other agreed mode of communication with any or all of the Parties preceding the Mediation if requested to do so or if the Mediator decides that this is appropriate;
 - b) read before the Mediation all the documents sent to him/her;
 - c) chair and determine the procedure for the Mediation, in consultation with the Parties;
 - d) assist the Parties to settle the Issues which have arisen between them, while reserving their rights to revert to any dispute resolution option if they do not reach settlement terms in the Mediation.
- 3) The Parties understand that the Mediator is neutral, impartial and independent and does not give legal advice. They agree that they will not make any claim of any nature against the Mediator in connection with this Mediation unless the Mediator has acted dishonestly or in bad faith.
- 4) The Mediator confirms that they have no interest in the disputed Issues or their outcome and has had no undisclosed prior dealing with the Parties in relation to the disputed Issues.

Before the Mediation

- 5) The Mediator will contact the Parties to discuss their preparation for the Mediation.
- 6) Each of the Parties will prepare and send to the Mediator and all other Parties such brief summary setting out its main concerns and Issues as the Mediator deems appropriate.
- 7) The Parties agree to exchange with each other, under the Mediator's supervision, documents relevant to the disputed Issues, and also provide these documents to the Mediator.

Conduct of the Mediation

- 8) The Mediator shall decide, when possible in consultation with the Parties, how the Mediation is to be conducted.
- 9) The Parties agree to comply with all requests of the Mediator in relation to the good conduct of the Mediation.
- 10) The Parties agree to use reasonable endeavours to settle the Issues between them and act in good faith before and during the Mediation.

- 11) The Mediation will take place on a date and time to be determined by the mediator in consultation with the parties. The mediator will, in consultation with the parties, determine the manner and place in which the mediation will be conducted (in person at a specified address, or remotely online).
- 12) No transcript or recording shall be made of the Mediation, or any part of it, except with the written consent of all participants, including the Mediator. This shall not prevent the Parties or the Mediator from taking a notes. Such notes shall remain confidential and will be destroyed shortly after the conclusion of the Mediation.
- 13) Any settlement reached in the Mediation shall not be legally binding unless it has been reduced to writing and has been signed by or on behalf of the Parties.

Authority

- 14) Each of the Parties will attend the Mediation with a person who has authority to bind that Party to any agreement reached as a result of the Mediation.
- 15) Each Party will inform the other Party and the Mediator prior to the Mediation of the names of the persons attending on behalf of that Party.
- 16) The Parties must consent to the presence of persons other than the Parties and their advisers in the Mediation.

Confidentiality

- 17) During and before the Mediation, the Mediator may speak to the Parties separately in order to improve the Mediator's understanding of each Party's views and to prepare for the Mediation. Information given to the Mediator during such separate talks will be confidential unless the Party who provided that information allows the Mediator to disclose the information.
- 18) Any information, whether or not in writing, arising out of the Mediation shall be confidential and shall not be used for any collateral or ulterior purpose. This includes the terms of any settlement but does not include the fact that the Mediation is to take place or has taken place. Only the terms of settlement may be referred to in the event that a Party brings proceedings in relation to those terms.
- 19) The Mediator will maintain the confidentiality of all written and verbal communications in the Mediation unless required to disclose by a court of competent jurisdiction.
- 20) Each Party or representative who signs this Agreement to Mediate warrants that the persons attending with them and/or on its behalf at the Mediation will be bound by and will observe the agreement set out in clause 18 above.

- 21) All information, whether or not in writing, arising out of or in connection with the Mediation shall be without prejudice and privileged and not admissible as evidence or disclosable in any current or future litigation or other proceedings whatsoever. This does not apply to any information which would apart from this clause be admissible or disclosable in such proceedings. Otherwise inadmissible evidence can only be used with the written consent of both Parties.
- 22) None of the Parties shall call the Mediator as a witness, consultant, arbitrator or expert in any litigation or other proceedings whatsoever arising from or in connection with the dispute or any other matters in issue at the Mediation. In the event that a subpoena, witness summons or other request is made to require the Mediator or Assistant Mediator to testify or produce records, notes or any other information or material whatsoever in any future or continuing proceedings the Party making that request, whether or not that request is successful, hereby agrees to pay the Mediator for any time incurred in responding to such request at the daily rate plus VAT (or proportion thereof) or such other hourly rate as the Mediator may then usually charge together with any disbursements and travel expenses (including advocate's fees) that the Mediator may incur in seeking to resist being called as a witness.
- 23) In the event of the Mediation proceeding remotely online then:
- a) The Mediator and participants will not create any electronic video or audio recording of the Mediation except with the written consent of both Parties;
 - b) The Mediator and participants will not make or allow any live or deferred video or audio relay of the Mediation to others except with the written consent of both Parties;
 - c) Only the participants to the Mediation, the Mediator and anybody agreed in advance (e.g. participants' lawyers) will be present in the room used by each participant during any mediation session and all Parties present at each station shall be within camera view throughout the Mediation.

Costs

- 24) The Parties have agreed that they will each pay the following share of the mediator's fees:
- a) Party A: _____ %
 - b) Party B: _____ %

These fees will be payable immediately on signing of this agreement, and in any event before the commencement of the mediation process. The parties will bear their own

legal costs unless otherwise agreed at the Mediation. Whether or not a settlement is reached at the Mediation, each Party's legal costs of attendance will be treated as costs in the cause by the court.

Ending the Mediation

- 25) The Mediator or either of the Parties, after canvassing their intentions with the Mediator, may end the Mediation at any time without giving a reason.

Legal status and effect of the Mediation

- 26) This Agreement is governed by the law of the Republic of South Africa and the courts of the Republic of South Africa shall have exclusive jurisdiction to decide any matters arising out of or in connection with this Agreement and the Mediation.

We agree to the above terms and conditions

- (a) Party A
Address
.....
.....
Signed
Dated.....

- (b) Party B
Address
.....
.....
Signed
Dated.....

- (c) Mediator
Signed
Dated.....

SPECIMEN NOTICE IN TERMS OF MEDIATION RULE 41A SUB-RULE (7)(a) OF THE HIGH COURT

This Specimen Notice is for guidance only. It should be adapted to the particular circumstances and legal requirements of the dispute to which it relates. Wherever possible any such Notice should be drafted/approved by each party’s lawyer. Although the mediator may be involved in helping the parties to draft acceptable terms, the mediator is not responsible for the drafting of the Notice and should never be a party to the notice.

NOTICE IN TERMS OF RULE 41A SUB-RULE (7)(a)

COURT:FILE NO:

PARTIES:

.....Claimant

And

.....Respondent

The Claimant and Respondent in this matter confirm that the Mediation process that took place on has been completed.

SIGNED AT ON

WITNESS:

1.....

2.....CLAIMANT
PERSONAL CAPACITY/
DULY AUTHORISED
(Attach copy of authority/resolution)

WITNESS:

1.....

2.....RESPONDENT
PERSONAL CAPACITY/
DULY AUTHORISED
(Attach copy of authority/resolution)

**SPECIMEN JOINT MINUTE IN TERMS OF MEDIATION RULE 41A
SUB-RULE (8)(b) AND (c) OF THE HIGH COURT**

This Specimen Joint Minute is for guidance only. It should be adapted to the particular circumstances and legal requirements of the dispute to which it relates. Wherever possible any such Joint Minute should be drafted/approved by each party’s lawyer. Although the mediator may be involved in helping the parties to draft acceptable terms, the mediator is not responsible for the drafting of the Joint Minute and should never be a party to joint minute.

JOINT MINUTE IN TERMS OF RULE 41A SUB-RULE (8)(b) and (c)

COURT: FILE NO:

PARTIES:
.....Claimant
And
.....Respondent

The Claimant and Respondent in this matter confirm that the Mediation process that took place on has been completed.

They confirm that (no, full or partial) settlement was reached.

In the event of agreement, they confirm that the issues upon which agreement was reached and which do not require hearing by the court are as follows:

.....
.....
.....
.....
.....
.....

SIGNED AT ON

WITNESS:

1.....

2.....
CLAIMANT
PERSONAL CAPACITY/
DULY AUTHORISED
(Attach copy of authority/resolution)

WITNESS:

1.....

2.....RESPONDENT
PERSONAL CAPACITY/
DULY AUTHORISED
(Attach copy of authority/resolution)

**SPECIMEN SETTLEMENT AGREEMENT IN TERMS OF MEDIATION
RULE 41A SUB-RULE (8)(e) OF THE HIGH COURT**

In the event of a settlement the lawyers could use Form 14, J 628 (Rule 82) to record their settlement and submit it to the Court so that it is made an order of court. This ensures the enforceability of the agreement and confirms that the legal proceedings are settled fully and finally (if that is the case).

This Specimen Settlement Agreement is for guidance only. Any agreement based on it will need to be adapted to the particular circumstances and legal requirements of the settlement to which it relates. Wherever possible any such agreement should be drafted/approved by each party’s lawyer. Although the mediator may be involved in helping the parties to draft acceptable terms, the mediator is not responsible for the drafting of the agreement and should never be a party to the agreement.



REPUBLIC OF SOUTH AFRICA¹

FORM 14
(Rule 82)

SETTLEMENT AGREEMENT

COURT:FILE NO:

PARTIES:
.....Claimant

And
.....Respondent

Whereas the parties referred their dispute to mediation;

And whereas the parties have settled the dispute between them with the assistance of the mediator; And whereas the parties hereby record the terms and conditions of the settlement;

Now therefore it is agreed as follows:

1. TERMS OF SETTLEMENT

.....
.....
.....
.....
.....
.....
.....
.....

2. **AUTHORITY TO ENTER INTO SETTLEMENT**
Each person signing this agreement in a representative capacity warrants that he or she has full authority to bind his or her principal to this agreement.
3. **CONSENT TO JUDGMENT**
The Claimant/Respondent agrees that in the event of failure to comply with any term of this agreement, the Claimant/Respondent shall be entitled to lodge with the clerk/registrar of the court the written Consent to Judgment signed by the Claimant/Respondent and obtain judgment in accordance with the provisions of section 58 of the Magistrates' Courts Act 32/1944.
4. **NON-PAYMENT**
Should any amount payable in terms of this agreement not be paid on the due date the full amount outstanding shall immediately become due, owing and payable.
5. **CONFIDENTIALITY**
 1. It is understood between the parties and the mediator that the mediation will be strictly confidential and without prejudice.
 2. Mediation discussions, written and oral communications, any draft resolutions, and any unsigned mediated agreements shall not be admissible in any court proceeding, unless such information is discoverable in terms of the normal rules of court. Only a mediated agreement, signed by the parties may be so admissible.
 4. The parties further agree not to call the mediator to testify in court nor in any other forum, about the mediation or in relation to anything which transpired therein nor to provide any materials from the mediation.
 5. The parties understand the mediator has an ethical responsibility to break confidentiality if s/he suspects another person may be in danger of harm.
6. **ORDER OF COURT**
The parties agree that this settlement agreement is/is not forthwith to be made an order of court.
5. **BREACH**
In the event that this agreement has not been made an order of court and any party breaching the agreement, the aggrieved party will be entitled to make application to court to make this agreement an order of court and to enforce the terms of hereof.
6. **NON-VARIATION AND WAIVER**
The parties agree that any amendment, waiver or variation of any term of this agreement must be in writing and signed by all parties.

SIGNED AT ON

WITNESS:

1.....

2.....CLAIMANT
PERSONAL CAPACITY/
DULY AUTHORISED
(Attach copy of authority/resolution)

WITNESS:

1.....

2.....RESPONDENT
PERSONAL CAPACITY/
DULY AUTHORISED
(Attach copy of authority/resolution)

ALTERNATIVE SPECIMEN SETTLEMENT AGREEMENT IN TERMS OF MEDIATION RULE 41A SUB-RULE (8)(e) OF THE HIGH COURT

This specimen Settlement Agreement is for guidance only. Any agreement based on it will need to be adapted to the particular circumstances and legal requirements of the settlement to which it relates. Wherever possible any such agreement should be drafted/approved by each party's lawyer. Although the mediator may be involved in helping the parties to draft acceptable terms, the mediator is not responsible for the drafting of the agreement and should never be a party to the agreement.

SETTLEMENT AGREEMENT

Date

Parties

..... (Party A)

Address.....

.....(Party B)

Address.....

.....(Party C, etc)

(jointly '**the Parties**')

Background

- The Parties have been in a dispute in relation to [set out brief details] ('the Dispute') [as per court reference] ('the Matter')]
- The Dispute has been the subject of a mediation ('the Mediation') conducted under an agreement ('the Agreement to Mediate') between the Parties and [.....] ('the Mediator');

- The Parties have agreed to settle the Dispute on the terms set out below ('the Settlement Agreement').

Terms of the Settlement Agreement

It is agreed as follows:

1. [A will to/for B at by not later than [time] on [date]]
2. [B will pay R to A by not later than [time] on [date] by electronic bank transfer to [bank]..... [branch code]..... [account number]]
3. [Any other terms]
4.
 - a. The Matter will be stayed and the parties will consent to it being made an order of Court.
 - b. **OR** [A/B] will discontinue the Matter on [B/A]'s undertaking not to claim [B/A]'s costs of the Matter against [A/B].
 - c. **OR** Judgment will be entered for [A/B] on their [counter] claim with an order that [B/A] pay [A/B]'s costs on the standard/indemnity basis subject to detailed assessment if not agreed.
 - d. **OR** The Matter will be dismissed with no order as to costs.
5. This Agreement is in full and final settlement of any causes of action whatsoever which the Parties [and any subsidiaries of the Parties] have against each other [*it is important that such a clause is only included after a careful check has been made as to whether there are any other possible outstanding causes of action between the Parties which can safely be compromised (or ought not to be compromised) in this way*].
6. This agreement supersedes all previous agreements between the parties [in respect of all matters relevant to the Dispute] except for those terms of the Agreement to Mediate of continuing effect including the confidentiality of the mediation process, the Parties' undertaking not to call the mediator to give evidence and the liability of the Mediator.
7. If any dispute arises out of this Agreement, the Parties will attempt to settle it by mediation before resorting to any other means of dispute resolution. To initiate any such mediation a Party must give notice in writing to the Mediator. Insofar as possible the terms of the Agreement to Mediate will apply to any such further mediation. If no legally binding settlement of such a dispute is reached within [28] days from the date of the notice to the Mediator, either party may [institute court proceedings/refer the dispute to arbitration under the rules of the Arbitration Act 1965 (Act No. 42 of 1965)].

8. The Parties will keep confidential and not use for any collateral or ulterior purpose the terms of this Agreement except insofar as is necessary to implement and enforce any of its terms or as otherwise agreed in writing by the Parties.
9. The Parties acknowledged that any agreement reached in Mediation is achieved without any influence from the Mediator.
10. This Agreement shall be governed by, construed and take effect in accordance with South African law. The courts of South Africa shall have exclusive jurisdiction to decide any claim, dispute or matter of difference which may arise out of, or in connection with this agreement.

Signed

.....
for and on behalf
of.....

.....
for and on behalf
of.....

.....

HIGH COURT RULE 41A

STAATSKOERANT, 7 FEBRUARIE 2020

No. 43000 31

RULES BOARD FOR COURTS OF LAW ACT, 1985 (ACT NO. 107 OF 1985)

AMENDMENT OF THE RULES REGULATING THE CONDUCT OF THE PROCEEDINGS OF THE SEVERAL PROVINCIAL AND LOCAL DIVISIONS OF THE HIGH COURT OF SOUTH AFRICA

The Rules Board for Courts of Law has, under section 6 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), and with the approval of the Minister of Justice and Correctional Services, made the rules in the Schedule.

"41A Mediation as a dispute resolution mechanism

- (1) In this rule—
'dispute' means the subject matter of litigation between parties, or an aspect thereof.
'mediation' means a voluntary process entered into by agreement between the parties to a dispute, in which an impartial and independent person, the mediator, assists the parties to either resolve the dispute between them, or identify issues upon which agreement can be reached, or explore areas of compromise, or generate options to resolve the dispute, or clarify priorities, by facilitating discussions between the parties and assisting them in their negotiations to resolve the dispute.
- (2) (a) In every new action or application proceeding, the plaintiff or applicant shall, together with the summons or combined summons or notice of motion, serve on each defendant or respondent a notice indicating whether such plaintiff or applicant agrees to or opposes referral of the dispute to mediation.
(b) A defendant or respondent shall, when delivering a notice of intention to defend or a notice of intention to oppose, or at any time thereafter, but not later than the delivery of a plea or answering affidavit, serve on each plaintiff or applicant or the plaintiff's or applicant's attorneys, a notice indicating whether such defendant or respondent agrees to or opposes referral of the dispute to mediation.
(c) The notices referred to in paragraphs (a) and (b) shall be substantially in accordance with Form 27 of the First Schedule and shall clearly and concisely indicate the reasons for such party's belief that the dispute is or is not capable of being mediated.

- (d) Subject to the provisions of subrule 9(b) the notices referred to in this subrule shall be of a without prejudice and shall not be filed with the registrar.
- (3) (a) Notwithstanding the provisions of subrule (2), the parties may at any stage before judgment, agree to refer the dispute between them to mediation: Provided that where the trial or opposed application has commenced the parties shall obtain the leave of the court.
(b) A Judge, or a Case Management Judge referred to in rule 37A or the court may at any stage before judgment direct the parties to consider referral of a dispute to mediation, whereupon the parties may agree to refer the dispute to mediation.
- (4) Where a dispute is referred to mediation—
(a) the parties shall deliver a joint signed minute recording their election to refer the dispute to mediation;
(b) the parties shall prior to the commencement of mediation proceedings enter into an agreement to mediate;
(c) the time limits prescribed by the Rules for the delivery of pleadings and notices and the filing of affidavits or the taking of any step shall be suspended for every party to the dispute from the date of signature of the minute referred to in paragraph (a) to the time of conclusion of mediation: Provided that any party to the proceedings who considers that the suspension of the prescribed time limits is being abused, may apply to the court for the upliftment of the suspension of the prescribed time limits; and
(d) the process of mediation shall be concluded within 30 days from the date of signature of the minute referred to in paragraph (a): Provided that a Judge or the court may on good cause shown by the parties extend such time period for completion of the mediation session.
- (5) (a) In proceedings where there are multiple parties some of whom are agreeable to mediation and some of whom are not, parties who are agreeable to mediation may proceed to mediation notwithstanding any other party's refusal to mediate.
(b) The time limits prescribed for the delivery of pleadings and notices and the filing of affidavits or the taking of any step shall be suspended for every party from the date of signature of the minute referred to in subrule (4)(a) to the time of conclusion of mediation by the parties who have elected to mediate: Provided that any party to the proceedings who considers that such suspension of time limits is being abused, may apply to the court for the upliftment of such suspension.
(c) In any matter where there are multiple issues, the parties may agree that some issues be referred to mediation and that the issues remaining in dispute may proceed to litigation.
(d) If any issue remains in dispute after mediation, the parties may proceed to litigation on such issue in dispute.
- (6) Except as provided by law, or discoverable in terms of the Rules or agreed between the parties, all communications and disclosures, whether oral or written, made at mediation proceedings shall be confidential and inadmissible in evidence.
- (7) (a) Upon conclusion of mediation the parties who engaged in mediation shall inform the registrar and all other parties by notice that mediation has been completed.
(b) Notwithstanding the failure of parties who have engaged in mediation to deliver the notice referred to in paragraph (a), the suspension of the time limits referred to in subrule (4)(c) shall lapse unless a Judge or a court has extended the time limit and notice thereof has been given to all parties to the proceedings within 5 days of such order.
- (8) (a) Mediation shall be deemed to be completed within 30 days from the date of signature of the joint minute referred to in subrule (4)(a), from which date the suspension of the time limits prescribed for the delivery of pleadings and notices and the filing of affidavits or the taking of any step referred to in subrule (4)(c) shall lapse: Provided that where mediation is completed before the aforesaid period of 30 days, the parties who engaged in mediation shall deliver a notice contemplated in subrule (7) indicating that mediation has been completed.

HIGH COURT RULE 34

UNIFORM RULE 34 OFFER TO SETTLE

B34.1 Introduction The object of this rule is to limit costs and to create a possible safeguard against costs.¹ It is based upon the English practice of paying money into court in an attempt to settle a case. Initially, this rule clarified and consolidated the then existing practice.² It was substantially amended during 1987 and the practice of physical payment into court was abolished and replaced by a system of offer or tender. Offers relate to claims for payment and tenders to claims for performance. After acceptance and upon a failure to perform in terms of the offer or tender, the plaintiff is entitled to apply for judgment in terms of the settlement.

An offer or tender to settle need not be made in terms of the rule³ but does not provide any protection against costs unless it is contained in the plea, remains open to acceptance until judgment, and is unconditional.⁴ A defendant is bound to perform in terms of such a tender even if it is found that the defendant is not at all liable to the plaintiff or that he is liable for a lesser amount.⁵

Although this rule does not in its terms apply to costs on appeals, courts of appeal tend to follow its provisions.⁶

- 1 *Van Rensburg v AA Mutual Insurance Co Ltd* [1969 \(4\) SA 360](#) (E); *SA Eagle Insurance Co Ltd v Serebro* [1985 \(4\) SA 50](#) (W).
- 2 *Frankel Wise & Co Ltd v Cuthbert* 1946 CPD 735; *Turbo Prop Service Centre CC v Croock t/a Honest Air* [\[1997\] 1 All SA 181](#) (W); *Unit Inspection Co of SA (Pty) Ltd v Hall Longmore & Co (Pty) Ltd* [1995 \(2\) SA 795](#) (A) 801.
- 3 *Griffiths v Mutual & Federal Insurance Co Ltd* [1994 \(1\) SA 535](#) (A) 549. This is the only way a respondent can protect himself on appeal against the eventuality that the appeal may be partly successful.
- 4 *Naude v Kennedy* 1909 TS 799; *Foord v Lake NNO* [1968 \(4\) SA 395](#) (W); *De Beer v Rondalia Versekeringskorp van SA Bpk* [1971 \(3\) SA 614](#) (O); *Ovenstone Farmers (Pty) Ltd v Villiersdorp Moskonfyt Koöp Bpk* [1975 \(2\) SA 278](#) (C); *Unit Inspection Co of SA (Pty) Ltd v Hall Longmore & Co (Pty) Ltd* [1995 \(2\) SA 795](#) (A).
- 5 *Greer v McHarry* 1938 WLD 182; *Bouwer v Stadsraad van Johannesburg* [1979 \(3\) SA 37](#) (A); *Swanepoel v Swanepoel* [\[1996\] 3 All SA 440](#) (SE) 445.
- 6 *Naylor v Jansen* [2007 \(1\) SA 16](#) (SCA) par 24.

B34.2 Rule 34(1)

In any action in which a sum of money is claimed, either alone or with any other relief, the defendant may at any time unconditionally or without prejudice make a written offer to settle the plaintiff's claim. Such offer shall be signed either by the defendant himself or by his attorney if the latter has been authorised thereto in writing.

B34.3 Offer to settle An unconditional offer to settle is designed for the case where the defendant admits his liability in respect of the claim, in whole or in part. If he admits in part, the plaintiff may accept the offer and proceed with his claim for the balance of the claim at his peril.¹ An unconditional offer does not stay or terminate the proceedings and there is no obligation upon a plaintiff to accept it. This means that the plaintiff may reject the offer and increase his claim by amendment.²

An offer without prejudice is an offer of settlement coupled with a denial of liability. If the plaintiff accepts the offer, the claim is extinguished and he has no further recourse against the defendant.³

- 1 *Van Rensburg v AA Mutual Insurance Co Ltd* [1969 \(4\) SA 360](#) (E); *Gush v Protea Insurance Co Ltd* [1973 \(4\) SA 286](#) (E); *Reilly v Seligson & Clare Ltd* [1976 \(2\) SA 847](#) (W). See also *Zeffertt* 1972 SALJ 47. Compliance with rule 34(1) is not procedural in nature but requires, as a matter of law, that an offer be signed by the defendant or by his attorney on condition that he had been given written authority to do so: *Van Der Merwe v Firststrand Bank Ltd t/a Wesbank and Barloworld Equipment Finance* [2012 \(1\) SA 480](#) (ECG).
- 2 *Aarwater (Edms) Bpk v Venter* [1982 \(3\) SA 974](#) (T); *Molete v Union National South British Insurance Co Ltd* [1982 \(4\) SA 178](#) (W); *Hart v Nelson* [\[2000\] 2 All SA 127](#) (E), [2000 \(4\) SA 368](#) (E).
- 3 *Van Rensburg v AA Mutual Insurance Co Ltd supra*; *SentraBoer Koöp Bpk v Mphake* [1981 \(2\) SA 814](#) (O); *Erasmus v Viljoen* [1968 \(3\) SA 496](#) (G).

HIGH COURT RULE 37

UNIFORM RULE 37 PRE-TRIAL CONFERENCE

B37.1 Introduction In order to curtail the duration of trials and facilitate settlements, the pre-trial conference procedure was introduced. Because of a fairly general belief that the spirit of the original rule was not adhered to by practitioners, a special rule 37A was introduced for the Cape, first for a trial period of two years (as of 1 December 1993) and then on a more permanent basis in a somewhat amended form.¹ The Cape rule has since been repealed;² many excuses are proffered why it did not work,³ but nobody bothered to calculate the costs to the litigants. Rule 37 itself has been the subject of amendment.⁴ Clearly, those responsible have not thought this subject through.

It is known that the degree of compliance with the rule differs from court to court and judge to judge.⁵ In the Eastern Cape the conference is regarded as an ongoing process of which full record must be kept, also of questions not answered⁶ and in Transvaal condonation for a breach of rule 37 can be asked from the judge president, deputy judge president or a designated judge by either an attorney or an advocate appearing in chambers.⁷

- 1 1998 (January) *De Rebus* 27.
- 2 GN R1352 of 30 April 2001.
- 3 "Cape Rule 37A - What went wrong" 2001 (August) *De Rebus* 8.
- 4 GN R1984 of 22 December 1995. GN 1352 of 10 October 1997.
- 5 *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz* 1996 (4) SA 411 (C) 420.
- 6 Eastern Cape Rules of Practice par 1.
- 7 *Lekota v Editor, 'Tribute' Magazine* 1995 (2) SA 706 (W).

B37.2 Conference and agreement The rule is not only intended to curtail the duration of trials¹ or to narrow down the issues,² but also to curb costs³ and facilitate settlements.⁴ In order to achieve these objects, the pre-trial conference has to deal with a number of specified issues. The attempt to reach agreement must be *bona fide* because the idea is to produce agreement and not disagreement⁵ and, to enable the court to determine whether a proper meeting was held, the minutes of the conference must reflect those issues that have been canvassed.

Failure to attend a pre-trial meeting or a failure to promote the effective disposal of the litigation, may lead to an adverse order as to costs, including a special order against the party or his legal representative.⁶

A matter that should be discussed and reflected in the minutes is that every party has requested a settlement and the other party's reaction to it. It should be noted that the rule does not mean that the privilege attached to settlement negotiations has been abolished or diminished - it would otherwise be *ultra vires*.

- 1 *Bosman v AA Mutual Insurance Association Ltd* 1977 (2) SA 407 (C); *Peele (Edms) Bpk v Die Administrateur Oranje-Vrystaat* 1982 (3) SA 261 (O); *Grasso v Grasso* 1987 (1) SA 48 (C) 61. *MEC for Economic Affairs, Environment and Tourism Eastern Cape v Kruizenga* [2010] 4 All SA 23, 2010 (4) SA 122 (SCA).
- 2 *Santam Versekeringsmpy Bpk v Leibbrandt* 1969 (1) SA 604 (C).
- 3 *Lekota v Editor, "Tribute" Magazine* 1995 (2) SA 706 (W).
- 4 *Kriel v Bowels* 2012 (2) SA 45 (ECP).
- 5 *Wessels v Johannesburg Municipality* 1970 (3) SA 633 (W).
- 6 *Cf* under the repealed rule *Technipak Sales (Pty) Ltd v Hall* 1968 (3) SA 231 (W).

B37.3 Binding nature of agreement A party is not entitled to resile from an agreement deliberately reached at a pre-trial conference or during the trial unless (perhaps) special circumstances are present.¹ This principle applies to any agreement concerning a fact; an agreement relating to law (including the onus) is not binding upon the parties or the court.² The agreement of fact may amount to a stated case under rule 33(4).³ The effect of the agreement may be to settle the case since an attorney who appears on behalf of a client at a pre-trial meeting has ostensible power to agree to any matter falling within the scope of the rule.⁴

- 1 *Kerksay Investments (Pty) Ltd v Randburg Town Council* 1997 (1) SA 511 (T) 520-521; *Filta-Matix (Pty) Ltd v Freudenberg* [1998] 1 All SA 239 (SCA) 247e-g; 1998 (1) SA 606 (A) 614B-D; *F & I Advisors (Edms) Bpk v Eerste Nasionale Bank van Suidelike Afrika Bpk* [1998] 4 All SA 480 (A) 483, 1999 (1) SA 515 (SCA); *National Union of Metalworkers of South Africa v Driveline Technologies (Pty) Ltd* 2000 (4) SA 645 (LAC) 666. This can also not be done indirectly by eg amending the pleadings; *Krawa v Road Accident Fund* 2010 (6) SA 550 (ECG).
- 2 *Aegis Insurance Co Ltd v Consani* NO 1996 (4) SA 1 (A).
- 3 *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A).
- 4 *MEC for Economic Affairs, Environment and Tourism Eastern Cape v Kruizenga* 2010 (4) SA 122 (SCA).