

LET'S MEDIATE

The official newsletter of Mediation in Motion NPO



MEDIATION

IN

MOTION

Not for Profit Organization

Inside this issue:

What's New?

Your Letters

Patrick's Ponderings

**Continuing Professional
Development**

On the Wall

Rule 41A

WELCOME

**Welcome to the first issue of our Newsletter
- Let's Mediate.**

Our hope is that the newsletter will become a forum for you to make yourself and your services known, ask questions and voice your opinion.

We hope it will become a source of relevant information and the vehicle to break news and keep you updated on new developments and innovations.

This issue contains important and exciting news and your opportunity to Get Involved!

What's New?

Mediation in Motion NPO -
proposed name change to
Mediation in Motion Mediators NPO.



MEDIATION IN MOTION MEDIATORS

General Meeting

Keep an eye out for an
invitation to our next
and very important
General Meeting to
take place on:

14 April 2021!





As part of some major changes to revamp and to take our Association to the next level, the current Board of Directors have unanimously decided to propose a change to the name of our Association from 'Mediation in Motion NPO' to '[Mediation in Motion Mediators NPO](#)'.

The idea of a name change was first mooted by Adv Alan Nelson SC, the newly elected vice chair, who explains the reasons for the proposal as follows:

The name Mediation in Motion was adopted when a private company was registered by my son Daniel and me in 2012. The primary function of that company was to train mediators under the auspices of the University of Cape Town's UCT@Law's advanced legal training program.

A few years after training commenced, we recognized the need to create a mechanism for trained mediators to promote themselves and their services via an electronic platform which the training company both ran and financed. Out of this the NPO was born. Over time it has become far more than just a website and the need has arisen for it to become self-sustainable and to function independently from the training company.

It has become necessary for the two entities to be distinguishable from one another. The name of the training company has already been changed to Mediation in Motion Training (Pty) Limited and it makes good sense to also change the name of the NPO to Mediation in Motion Mediators NPO.'

This gives both entities the right to use the by now very well established 'Mediation in Motion' brand whilst at the same time making it clear that they are different entities as regards their legal status, composition and functions. An independent legal expert has advised that the proposed changes are in accordance with all statutory requirements."

Clause 10 of the constitution stipulates that the name of the Association may be changed by a resolution of sixty-six per cent (66%) of the members present at a General Meeting; provided that proper notice of the meeting is given not less than twenty-eight (28) days prior to the date of the Meeting and such notice states the nature of the resolution to be proposed.

Members will soon receive a formal notice of a General Meeting at which the proposed name change of the Association will be considered and decided upon.

YOUR LETTERS

Dear MiM Member,

On behalf of the MiM EXCO allow me to wish you and your loved ones everything of the best for the year 2021. While we still find ourselves amidst this almost surreal pandemic, let us remain hopeful that the worst has passed and that the recent advancements made in the fields of medicine and virology help us to bring this virus under control soon. Firstly, our sincere condolences to any of our members who have lost members of their family or friends during this unfortunate time and we wish a speedy recovery to anyone that has taken ill from this disease. Life has certainly changed, and I believe that now more than ever, the world needs healing especially from conflict.

The COVID-19 pandemic is undoubtedly going to leave an overwhelming mass of disputes in its wake and given the sheer volume of the matters that will inevitably rise, coupled with the restrictions on time and financial resources, mediation is certainly going to grow into the preferred mechanism of conflict resolution, not only in South Africa but across the globe. We believe that the demand for mediators is going to increase and we want to ensure that the "Mediation in Motion" panel of mediators is at the forefront of selection in these matters.

Congratulations and thank you to all those who have subscribed to our premium membership. Our website is now live and you will all have the opportunity to edit and maintain your individual profiles on the new page and have access to your very own personal email address. Your membership fees have allowed us to invest in search engine optimization meaning that our website will certainly be favoured on various search engines. We are also currently in the process of appointing a digital marketing agency to promote mediation in general and our panel of mediators across various platforms.

We further continue to engage with Government on envisaged mediation projects and with the steering committee for the establishment of a national regulatory body for mediators. Finally, we have novel and very relevant mediation workshops planned for during the course of the year, which will be presented by both local and international speakers, thus keeping us abreast of the latest trends and advancements in mediation. The MiM NPO EXCO remains committed to engaging with you throughout the course of the year on all these developments, as well as continuously promoting our organization to the benefit of our members and our clients. We look forward to an exciting year ahead. Life as we knew it has undoubtedly changed so let us rise as mediators and help to heal the world.

Best wishes

Dr. Shamal Vinesh Ramesar



Chairman – MiM NPO



Patrick's Ponderings

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 and practises as a mediator in Scotland and South Africa (remotely).

The Enigmatic Concept of Mediation Confidentiality

Confidentiality is regarded as one of the cornerstones of mediation. We all know what confidentiality is. Or do we?

As mediators, we advise the parties that mediation is confidential and there is a confidentiality clause in the Agreement to Mediate.

At the commencement of the mediation, we remind the parties that anything discussed or disclosed at the mediation is confidential. In court-annexed mediation, we tell the parties that, if the matter doesn't settle, and is referred back to court, the content of the mediation cannot be disclosed to the court.

Does this sufficiently explain what is meant by confidentiality to the parties and, more importantly, do they understand this? I never had cause to ponder this question until recently, when I asked a party to send me a copy of the contract upon which her claim was based. Her response was that she would like to but could not, as that would mean that she could not use the contract in court, in the event that the matter didn't settle. The Agreement to Mediate, which I had sent to her to sign, provided that "The entire process of mediation, including all communications prior to and during the mediation, is and will be kept confidential. Nothing said, nor any document produced, during the process of negotiation (including, without prejudice to that generality, preparation before, or discussions after, the mediation session) shall be founded upon in any proceedings.

"Produced" can be a bit ambiguous, particularly if you are not a lawyer. I assured her that the facts of the case and any documentation relevant to it, could be used at the mediation and in court, and explained in more detail about what was in fact covered by confidentiality. Did that mean that the facts of the case were not covered by confidentiality? Well, not entirely because the mediator cannot disclose those facts to a third party.

This brings out the enigmatic nature of confidentiality. You know what it is, but it is difficult to define it.

Here are some useful points to ponder:

1. The fact that parties have participated in a mediation is confidential, although certain third parties may be privy to this (such as in court-annexed mediation, where the court refers the parties to mediation).
2. The mediator is bound by strict confidentiality and may not disclose any of the facts of a case, details of the parties or any other information unless compelled by law to do so.
3. This confidentiality extends to the content of private meetings or caucuses with the parties during the mediation. Any information disclosed by one party may not be shared with the other party without the first party's consent.

4. Parties may share confidential information and documentation with each other during a mediation, which may not be disclosed outside the mediation.

5. A party who is protected by confidentiality may always waive that protection provided it does not compromise the other party. However, a party may not disclose that a settlement offer was made as that would infringe the other party's confidentiality of refusing the offer.

6. Without prejudice settlement discussions are protected by confidentiality, as is the disclosure of information that does not relate specifically to the facts of the case being mediated. For example, if a party discloses their ill-health or precarious financial position.

As mediators, we know and understand all of the above.

But do the parties understand when we tell them that mediations are confidential? We need to be sure of this before proceeding with a mediation.

Patrick

Continuing Professional Development

Planned topics for inclusion in ongoing training of MiM- members during 2021-2022

- Confidentiality in Mediation – How confidential is a mediation and what impact does this have on the parties?
- The importance of an apology in mediation.
- The Activist Mediator!
- Does mandatory mediation have an effect on the parties' satisfaction with the process.
- The role of the lawyer at a mediation – is this a positive or negative contribution?
- The importance of reflective practice for a mediator.
- Building a mediation practice
- The new High Court Rule 41A
- Qualities of a good mediator
- Finding High Value, Low Cost Solutions
- Dealing with dignity violations
- Importance for mediators to earn trust
- How to deal with difficult participants and attorneys
- Mediation requiring special skills -
RAF matters; Family law; Tax; Intellectual Property; Medical Matters; Insurance; Pension Schemes



DO YOU HAVE A
LITTLE NOTE YOU WANT
TO SHARE? PLEASE SEND
IT TO US ON:
Info@mediationinmotion.org

Is Covid-19 an Act of God? In accordance with the common law this typically should be the case, but thanks to precedent set in our case law a set of specific conditions apply. These conditions remain the same, but their application differs from situation to situation. To individuals and businesses in need of mediation services to help resolve disputes emanating from the Covid-19 pandemic, whether due to contract breaches, looming service level agreement disputes or otherwise, Mediation in Motion offers access to qualified and experienced mediators ready to serve.

Save the Date -
General
Meeting - **14
April 2021.**



Please send us your letters and
thoughts:
Info@mediationinmotion.org

Consider visiting our new
webpage at
www.mediationinmotion.org
for more information.

How do you
promote
mediation? -
Share with us.

**You involved
in training?
Let us know!**

*Looking for
a mediator
- ask here!*

*Want to let us
know of something
interesting
happening in
mediation? - send
us a little note*

*Any advice for
new mediators - let
them know here..*

On the wall

Nailed to the wall today is :

Send us a photo of yourself and a short description of you and your services in less than 250 words and we will gladly share it with your colleagues. You can promote yourself and/or your services and include your contact details and aspects such as your webpage link.



Rule 41A

Thoughts from Adv Alan Nelson

This new High Court Rule is set to change the litigation landscape.

Ignorance regarding mediation has until recently been the single most important reason why people in conflict have resorted to costly, time-consuming, and traumatic litigation instead of mediation. This unsatisfactory state of affairs is set to change.

In March 2020 a new High Court Rule 41A introduced an extremely important new rule regarding mediation. The purpose of the rule is to ensure that no litigant institutes or defends High Court applications or actions without applying their minds to mediation and advising the other side whether or not the matter can be mediated. The new rule requires litigants to file a prescribed notice on their opponents at the commencement of litigation indicating whether or not the matter can be mediated and giving reasons for their answer.

It is anticipated that when fully implemented, this rule will result in many more matters being mediated. This is because an unreasonable refusal to mediate could in terms of the new rule result in an adverse costs order being made against a party that unreasonably refuses to mediate.

MiM NPO, as part of its continuing education program, will this year be hosting a seminar on this topic. Members are encouraged to attend.

