

MEDIATION IN THE CHILDREN'S ACT 38 OF 2005

Craig Schneider

The Children's Act 38 of 2005 as promulgated on 1 July 2007 has helped rid mediation of the label as the "poor relation" and to move it to the front pages of the family album. The Act has helped to highlight the importance of resolving family disputes in a non-confrontational and appropriate rather than conflictual manner.

Prior to the promulgation of the Act, we, in FAMAC, had entered into a joint venture with the Arbitration Forum to provide mediation services on an 'outsourced basis' to the Western Cape Office of the Family Advocate headed by Advocate Shereen Ebrahim. In this venture we provide mediation services for families in dispute. We dealt with disputes regarding custody and access in divorce matters.

However, since the inception of the Act, we have broadened our services to include parental responsibilities and rights of unmarried fathers as set out in Section 21 of the Act. The majority of cases, which we are currently dealing with relate to those 'Section 21 applications'. Section 21 relates to the parental responsibilities and rights of unmarried fathers. If there is a dispute between the biological parents as to whether the parents were living together in a permanent life-partnership as the time of the birth of the child or, irrespective if they are living together in such a relationship, whether the father consents/is identified as the child's father or has paid damages in terms of customary law, whether he contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period and whether he contributes or attempts to contribute in good faith to the living expenses of the child, then the question whether the father obtains responsibilities and rights to the child must be referred to mediation in terms of Section 21(3) to a family advocate, social worker, social service professional or other suitably qualified person. This section operates retrospectively.

Section 21 has led to a lot of debate amongst mediators, legal practitioners and social workers as the ambit of this section is, with respect, impractically restricted. The Act only allows for a dispute around paternity and contributions. However, that is not where the disputes exist. Most disputes relate to the right of contact and the responsibility for the child. The parties, in the experiences of FAMAC working with the Family Advocate's Office often, accept, consent to and acknowledge the parentage and the contribution to the child and want to deal with the real practical issues of contact and the amount of maintenance to be paid. However, a strict interpretation of Section 21 does not require such a dispute (once the parentage has been resolved) to be resolved through mediation in terms of Section 21.

Therefore the following scenario arises:

Greg approaches his attorney for the right of contact to his daughter born out of a relationship (out of wedlock) with Gladys which relationship has ended (or Greg is married to someone else). The attorney may either write a letter to Gladys requesting confirmation that there is no dispute as to Greg's fatherhood and hence parental

responsibilities and rights as set out in Section 21. Should Gladys acknowledge that there is no dispute and that Greg is the father but still refuses him contact, then Greg's only route is to bring an application to court to enforce his rights. Greg may well invite Gladys to a private mediation which could then bring about an agreement but then this agreement which would be akin to a parenting plan as envisaged by Section 33, would still need to be made an Order of Court until Chapter 4 of the Act comes into operation. Once Chapter 4 comes into operation, the Children's Court will have jurisdiction to assist an unmarried father to exercise his parental rights and responsibilities.

Should Greg be unable to afford an attorney or Gladys refuse to come to mediation or give him contact responsibilities and rights, Greg could refer the matter to the local Family Advocate and bring a "Section 21 procedure". With the same facts as mentioned above, Greg would request the Office to set up a mediation. It is these mediations which we have dealt with mainly at our mediation session as the Family Advocate's Offices. (It is also argued that this dispute would fall outside of Section 21 and therefore be refused by the Family Advocate's office).

In these mediations, it becomes clear to our trained mediators that very seldom does a dispute exist as envisaged and provided for in Section 21. The dispute is over Gladys refusing Greg the responsibilities and rights which in law he has obtained in terms of the Act. Once it is determined that no dispute exists, then that is where – in terms of the Act – the matter is concluded. This cannot be in the best interests of either the children or the parents. I believe that the practical consequences hereof are in conflict with Section 6 of the Act which states that:

Section 6 (4) – In any matter concerning a child -:

- a) **an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided; and**
- b) **a delay in any action or decision to be taken must be avoided as far as possible.**

It has been proposed that Section 6 could give the Family Advocate the necessary jurisdiction to continue mediation and resolve the contact, rights and responsibilities issues. However, I disagree with this interpretation as once there is no dispute in terms of Section 21 and no application has been brought before Court, the Family Advocate's Office would have no jurisdiction to entertain mediation in their offices. Should the couple be in private mediation, I submit that no obstacle exists in continuing to mediate and to bring about a parental responsibilities and rights agreement which could then, on application by consent be made an Order of Court.

This current anomaly faced by FAMAC in Family Advocate Mediations in terms of Section 21 can have unforeseen but practical and unacceptable consequences for example:

If we go back to Gladys and Greg – they have been separated for four years, Greg has not seen his daughter for the last two and half years. They now come to the Family Advocate's Office having each traveled 150km and taken the day off work (resulting in

no income as well as costs being incurred). Since there is no dispute in terms of Section 21, they must be told that the office cannot help them. This is manifestly contrary to the intentions of the Act. Section 21 must be amended to cater for these scenarios if we are to give effect to the aim and intention of the Act and our Constitution in giving people access to Justice.

At FAMAC, we have taken a decision to deal with these disputes referred in terms of the Act as follows:

Should there be no dispute relating to responsibilities and rights, then this is recorded and we inform the parties that the dispute is resolved in terms of Section 21 and enquire from them whether they require assistance (through mediation) to reach a parental responsibilities and rights agreement which, if reached would then need to be made an Order of Court to protect them and their rights. All the couples we have worked with have agreed to this process and participated freely and voluntarily. We have reached agreements in +90% of our cases thus giving the parties access to Justice.

The observations which our mediators have made are:

the importance of the opportunity of the parties to be heard, to be able to put forward their issues, concerns and needs to a third party who is willing and able to assist them to come to a resolution. Whilst the parties may not love each other, the common denominator, being the children, is sufficient to be able to focus the parties on the best interests of the children in almost any family/child related dispute.

Section 21 is a classic example of how mediation can work to give people access to justice, provide a non –confrontational and expeditious process to bring about a result in the best interests of all concerned parties especially the children. However, It must therefore be amended to fully utilize the potential of mediation in assisting parties to resolve disputes.

There are many references to mediation in the Act – Section 29 – court proceedings, 33 – parenting plans, 45, 46 and 49 – Children’s Courts (in Chapter 4). The Act also refers to lay forum hearings (Section 49), family group conferences (Section 70), other lay forums (Section 71, 72, 150, 155).

In considering the Act and its implications for family mediation, we as mediators and practitioners (whether legal or mental health), need to be aware of both its advantages and its pitfalls. The advantages in respect of mediation are many : - it will provide people with access to justice, the ability to determine their own outcomes, to be part of their own decisions in an informed and integrated process, to be heard regarding their fears, anxieties, wishes, hopes and expectations and to get help to communicate and progress into the new structures and arrangements.

The possible pitfalls in respect of matters being referred to mediation are : further delays, possible abuse of the mediation process, failure to resolve issues and most important of all unskilled mediators meddling in matters for which they are not qualified.

It is essential that the mediator “or other suitably qualified person”, Family Advocate, Social Worker or Social Service professional is correctly trained and skilled to undertake the mediation. For, should this not be correctly monitored, the acceptance and success of mediation could easily fail notwithstanding the good intention of the mediator or the willingness of the parties. It is critical that persons who are called upon to mediate in terms of this Act are correctly and comprehensively trained to apply the Act to assist the parties and that they are accredited and monitored so as to attain and maintain the standard which our clients deserve irrespective of their intelligence, race, financial status, culture or sexual orientation.

FAMAC has provided mediation training for the entire Family Advocate’s Offices nationally including how mediation applies in the new Act. We have conducted seminars and private training programs in family mediation (utilizing the co-mediation model) and are in discussions with various Government Departments to assist, advise and become involved in mediation throughout all aspects of Family Law. We have also offered our services for specialized mediation training to other Government departments and are able to adapt our programmes to fit specific requirements.

Last year I beseeched all of you practitioners to change your attitudes to mediation and to embrace it. I called for the introduction of mandatory court appointed mediation – that trial dates should only be granted once the parties have attended a mediation process and received a certificate of outcome and I reiterate this call. I am pleased to say to all of you out there who have joined in this move, that matters are progressing, that attitudes are changing in areas that are of importance and that mediation is on the road to becoming more mainstream in its application.

I believe that, bearing in mind the discussions which are currently being held with various stakeholders, the developments which have taken place in mediation and the progress made in Family Law relating to mediation and its applicability, we are able to look wider and even to consider the possibility that we could think really big. I believe that the advent of legislation for court-mandated mediation in divorce matters is only a matter of time. We now need to look at court mandated mediation not just in divorce matters but across the Family Law spectrum –in Children’s Courts, maintenance applications, adoption issues, relocation applications and domestic violence matters.

I am not saying that in Domestic Violence matters one must mediate whether the wife has been beaten up when you are sitting with the parties outside Ward C at Groote Schuur Hospital but you can still mediate around contact with the children and financial support for the children even in a household where domestic violence has taken place. Clearly there are certain cases where the abuse is so extreme that mediation may not be possible. However, I am saying that Domestic Violence per se must not be a bar to mediation being used at first instance. Should mediation be applied in Domestic Violence matters, I

believe it would reduce the court rolls and prevent abuse of the proceedings and genuinely assist to re-build the bridges towards family unity.

The maintenance court, in particular is an appropriate forum to apply mediation processes. Similarly, in maintenance matters parties should not be allocated a hearing date if they have not first attempted to resolve the maintenance dispute through mediation.

If we are serious about assisting people to have access to justice, about upholding our Constitution and the rights of families, especially children, about allowing people to be heard and to be involved in rebuilding their lives and about acting in the best interests of humanity, then we need to treat people on a humane level to sort out their disputes and to give them their voices back.

I am firmly of the opinion that empowering people through the process of mediation by well-trained, suitably qualified mediators is a big step in assisting our country to re-build the fabric of society, improving communication between parents and teaching them skills in parenting their children more effectively.

Thank you