ARBITRATION IN FAMILY LAW
PAPER TO BE PRESENTED AT THE ANNUAL GENERAL MEETING OF THE LAW SOCIETY OF SOUTH AFRICA: 2 APRIL 2016

HISTORY OF CAMPAIGNS IN RESPECT OF FAMILY LAW

The Law Society of South Africa Family Law Committee and the Family Law Committees of the Provincial Divisions of the Law Societies, have spent many years campaigning to fast - track Family Law matters, to have dedicated Family Law Judges and Courts and procedures, for Family Law matters to be prioritised, to make the procedures quicker and less expensive, and to make it less traumatic for the children and the Parties.

The Judiciary and the Government have unfortunately not shown much respect for Family Law, despite protestations to the contrary.

In 1997 the Hoexter Commission recommended separate Family Courts at all levels, but we only have separate Family Courts at the District and Regional courts in the

Magistrate's Courts, which are not adequately staffed, from the clerks to the Presiding Officers, have no career path for the professionals who serve in them, and are providing inferior access to Justice to members of the public who, for the most part, are unable to afford legal representation.

In the last two years attempts to introduce arbitration into Family Law have intensified as a consequence of the continued marginalisation of Family Law.

Recent examples, which we have probably all experienced at one time, including; one of the Senior Judges in one division once told me personally that "Family Law is not Law" three days before we were to appear before him on a full bench appeal in a Family Law matter. He called me to ask why I was "wasting the time of three Judges", and numerous other insults which I shall not disturb your genteel dispositions with!

The Law Society of South Africa, (LSSA) Family Law Committee, has held meetings with the Government at various levels, and with the Rules Board. The discussions are at a sensitive stage, where we have senior members of the Rules Board supporting the concept of Family /

Domestic Arbitration in principle as also communicated with the Deputy Minister of Justice and Constitutional Development. They are awaiting the final draft of the Arbitration Rules to be furnished to them, so that they can consider formalising the Rules and the Amendment to the Arbitration Act, to remove the prohibition against Domestic Arbitration.

The Law Society of South Africa and the Cape Provincial Law Society, Family Law Committees have also prepared drafts in respect of amended procedures to the current Rules of Court, specifically for Family Law matters, which have already been furnished to the Rules Board, and are being pursued in the interim, to fast - track Family Law matters.

There is now a consolidated and informed uniform National approach through the LSSA Family Law Committee in respect of Arbitration in Family Law.

The concept of Family Law Arbitration is being launched to the organised structures of the profession, and we addressed the Cape Law Society AGM in Kimberley on 30 and 31 October 2015, and we are conducting Workshops on training in Family Arbitration, and have

been since 2014, the most recent having been in March 2016 after the Miller du Toit University of the Western Cape Family Law Conference, where the training has been conducted by Susanne Kingston of London, England and Rachel Kelsey of Scotland, United Kingdom.

More and more members of the legal profession who are specialised in Family Law are attending the Arbitration training and will become Arbitrators in South Africa in Family Law.

We did, in fact, offer the training in Family Arbitration to the LSSA Lead division, and the response was that :-

1. There is support for the concept of Family Arbitration and the need to update members on developments;

2. It is important, however, for the Rules to be adopted and recognised for use in practice, prior to providing training;

3. Training should be provided by South African practitioners. Foreign experts could in future

participate in training, but in conjunction with our own experts and without the LSSA being responsible for international travel costs;

4. In view of the budget position of LSSA LEAD, being capped for the last 3 (three) years, it is not appropriate to consider this expenditure, whilst there are other more immediate needs to address; (the usual attitude to Family Law)

5. If the UK experts visit South Africa in any event, we should consider the recording of a presentation in the LSSA LEAD studio to be available for access by the LSSA members. (This is interactive training which revolves around role - play, so a recording would not be appropriate!)

   Quite frankly this is not supported by the organised profession.

   We would appreciate being involved with the LSSA, however, we are proceeding apace.

The more people we train, the better the prospects, and we will start with informal Arbitration until the Act is amended and the Rules approved.

FAMILY LAW ARBITRATION FORUM OF SOUTH AFRICA (FLAFSA)

The attitude of the members of the LSSA Family Law Committee is that South African Family Lawyers should form an Independent Arbitration Forum, have their own Rules and their own Training. Thus FLAFSA (as in vat hom fluffy ☺) (It is after all "Family" Law and seen as "soft law"

This is a similar position to that in Scotland.

The English Family Lawyers are affiliated to an Arbitration Association and use their facilities, but have their own Rules.

We believe that it is different in South Africa i.e. because the Arbitration scene is so fractured.

In England it was the principle of Family law Arbitration that was allowed. So we are not only open to Family

Arbitration here but it is also because we can provide our own facilities, infrastructure and training and we can arrange for external monitoring, and that is why it is appropriate to have FLAFSA.

So, what we envisage is that the Arbitration Act will be amended so as to provide for Arbitration in Family Law matters and to remove the prohibition against Domestic Arbitration.

The Rules of FLAFSA will provide for anyone who wishes to conduct Family Law Arbitration to become a member of FLAFSA and be trained by FLAFSA approved trainers. National standards and monitoring will have to be established to ensure success and continued support of an initially fragile concept, which will probably be by retired Judges.

What we propose to do, and are in the process of doing, is a two - fold procedure: one is to go the legislation route and change the Law, to formalize the FLAFSA Rules and procedure, and make formal provision for training and conducting of Family Arbitration in South African Family Law.

The second is that, because there are a number of Family Lawyers in South Africa, including Attorneys and Advocates, who have already been trained in Family Law Arbitration, there will therefore be formal agreements between FLAFSA and those Parties who have been through the training process, to conduct informal Arbitrations, and the Arbitrator's Award will then be made an Order of Court by consent.

The process is set out in the FLAFSA Rules and the arbitration will take place in terms of the FLAFSA Rules.

The parties will agree in advance that the Award will be made an Order of Court, by consent, similar to the way in which we hand in a Consent Paper or a Settlement Agreement. (Depending on which Province you practice in).

I am sure we are all aware of the Constitutional Court decision in the matter of Eke v Parsons handed down on 25 September 2015 (Eke v Parsons [2015] ZACC 30) which deals with Settlement Agreements being made an Order of Court, and persuading the Lower Courts to be creative and consider substance rather than form. (KZN has decided that it is not bound by that Judgment!)

This unilateral and creative approach is one that Family Lawyers have adopted in the past, for example, the Cape Family Lawyers, with the process of facilitation, and Gauteng and the Free State with Case Management. KwaZulu Natal is the "last outpost" and the last hold-out! And other processes relating to family law. In this manner changes to Family Law have become practice and then entrenched in our law. Arbitration in family matters will start with all of the Rules, training and monitoring processes in place.

We will already have the FLAFSA Rules in place, so there will be uniformity.

Appeals/Reviews are dealt with in the FLAFSA Rules.

During the interim process we hope to enforce the Honig Judgment (Cape) (unreported) which allowed arbitration to continue in a family law matter in relation to the Commercial / Financial issues, where there had been agreement between the parties for that to occur, in addition there is the recent judgment of Brookstein v Brookstein (20809/2014)[2016] ZASCA 40 (24 March 2016).

The possible downside of doing the informal Arbitration is that either one of the Parties could take the point, after the Arbitration, that Domestic Arbitration is not permitted by South African Law, however, we will deal with that in the formal Arbitration Agreement, before the informal Arbitration is commenced, and we will make provision therein that the Parties are aware of the fact that the Arbitration Act does not allow for Domestic Arbitration in South Africa as yet, that this is informal Arbitration, and the Parties consent to be bound by the outcome. They cannot be prevented from taking the point at a subsequent Court proceeding, but we hope, as I said, that the court will follow the Honig case.

We believe that, because both Parties are consenting to the procedure, and are wanting to finalise their matter, this point will only be taken in isolated cases.

Something that we can use to argue to the benefit of the informal Arbitration is that, to start with, we will only deal with the money side of family matters. We will not deal with children or status issues until the Act has been amended.

In that regard, we can then rely on the Honig Judgment, where, in that case, the Consent Paper made provision for Arbitration in the future, to establish their respective proprietary claims after the divorce, and the Parties ended up Arbitrating on commercial aspects only. After the Arbitrator's Award was handed down, one of the Party's took the point that Domestic Arbitration is not permitted by South African Law. The Court held that, in those circumstances, Arbitration was permitted.

In our opinion, if we manage to promote a culture of Arbitration in Family Law practice, then that will also support and assist us in the amendment of the Legislation to permit Domestic Arbitration.

We have all experienced the reluctance of the Judiciary to give Family Law matters a proper hearing in Court.

I can tell you that recently, in one of the Provincial Divisions, the Judge President refused to hear Rule 37(8) pre - trial conferences in a number of divorce matters.

He also refused to allocate a Judge, whether or not the matter was trial ready.

He sent everyone away to "*go and settle the matter*". His statement was "*if you can't settle it, come back to me and I will settle it*".

This is an age - old problem that Family Lawyers have experienced, where Judges are not happy to hear divorce matters.

Even if a matter is allocated to a Judge, often that Judge will tell you on the first day of trial to "*go and settle*" the matter. You spend the entire first day attempting to settle. If you fail to settle, the Judge is often not available for the second and third days, which means the parties incur a large amount of wasted costs, and the matter has to be postponed for yet a further period of time.

That is one of the reasons why divorce cases end up costing so much money and taking so long to finalise.

And that militates against any argument that Family Arbitration would be more expensive than going to Court, because you don’t have to pay for a Judge.

You will have to pay for an Arbitrator, but you can choose your Arbitrator, so you can choose an expert in Family

Law, who is also trained as an Arbitrator. You choose your procedure, which can be expedited and adapted for maximum practicality and quick disclosure. You set your time periods, which are extremely limited, and the matter is heard and finalised within a relatively short period of time. You don’t have the numerous adjournments and "being sent outside to go and settle". In any event, in the case of experienced, responsible practitioners, they have usually already tried to settle the matter without success, which is why they are in Court.

In Court the Parties also have issues with the rolling costs of rolling dates of valuing assets in terms of Section 7(3), or the accrual, if matters are postponed, which are also exorbitant.

CONDUCT OF ARBITRATION IN SOUTH AFRICA

One of the issues which may well need to be tabled for future discussion, is whether or not children and issues of status should be included in Arbitration, and Arbitration Awards.

At this stage, as I said, we have decided that "*discretion being the better part of valour*" and because the Courts are the Upper Guardians of minor children and are fairly conservative in their approach, it would behove us to deal only with the financial aspects to start with, which would include maintenance for children, but, we would not deal with the best interests of the children, or status issues. at the commencement stages of Family Arbitration.

We do, however, believe that, in time, it will become appropriate to deal with children and matters of status in Arbitration, as well.

The issues which we would deal with, inter alia, to start off with, would be :-

1. Civil Marriages governed by the Marriage Act No. 7 of 1979 and the Matrimonial Property Act No. 88 of 1984, and their breakdown including financial provisions on divorce in terms of the Divorce Act No. 7 of 1979.

2. Religious Marriages and Marriages in terms of the Recognition of Customary Marriages Act No. 120 of 1998, and their breakdown, including financial provisions, on divorce.

3. Civil Partnerships and their breakdown.

4. Marriages in terms of the Civil Union Act No. 17 of 2006, and their breakdown.

5. Universal Partnerships, co-habitations and the termination of such.

6. Children's maintenance in terms of the Maintenance Act No. 99 of 1998, as well the Reciprocal Enforcement of Foreign Maintenance Orders Act Nos. 80 of 1983 and Act 6 of 1989, which would significantly cut down on a lot of red tape and delays.

7. Spousal Maintenance and in terms of the Maintenance of Surviving Spouses Act No. 27 of 1990, including provision for dependents from the Estate of a Deceased.

8. Claims against Third Parties, including Trusts, Corporate and Juristic Entities, relating to family law.

The procedure to be followed will be dealt with in the FLAFSA Rules, and the Parties will be free to agree as to the form of procedure, with the concurrence of the Arbitrator. In particular, to adopt a "*documents only*" procedure or some other simplified or expedited procedure.

Once the Arbitrator has ascertained the Parties views, the Arbitrator will give directions and set time tables for the procedural steps in the Arbitration including :-

1. Written statements of case;

2. Disclosure and production of documents as between Parties, which will be done at the commencement of the matter.

3. Exchange of witness statements.

4. The number and type of expert witnesses, exchange of their reports and meetings between them.

5. Arrangements for any meetings or hearings and the procedures to be adopted at these hearings.

6. Time limits to be imposed on oral submissions or the examination of witnesses, or any other procedure for controlling the length of hearings.

Where the informal Arbitration process is being conducted, in order to enable the Parties to issue the necessary subpoenas, the Parties will institute an action, bring the pleadings to a close, swiftly, parallel to the informal Arbitration process, and thereafter be in a position to issue the necessary subpoenas.

It is possible to issue Subpoenas ***duces tecum*** without a trial date being allocated, and there are numerous Cases which support this, *inter alia* :-

Brynard v Mogwele Waste (Pty) Ltd (45/2014) (Labour Court Judgement)

1. Court a quo (Brynard v Mogwele Waste (Pty) Ltd (45/2014) (Labour Court Judgement)

2. Industrial Development Corporation of South Africa v PFE Inc (BVI) (910/10) 2011 (ZASCA) 245

3. PFE Inc and Others v Industrial Development Corporation of South Africa (129/11) Constitutional Court

Obviously the FLAFSA Arbitration Rules will deal specifically with the procedural issues.

Once the Arbitrator has delivered an Award, which will be in writing, and will be dated and signed by the Arbitrator, it will be final and binding on the Parties, subject to any challenge to the Award, by any available Arbitral process of Appeal or Review, in accordance with the FLAFSA Rules.

Some subject matter may be required to be embodied in a Court Order, which the Award may provide for.

A major advantage of Arbitration is confidentiality.

It is also the intention of FLAFSA to build up a precedent library of Arbitration Awards, maintaining confidentially, to assist with training of Arbitrators.

There will have to be monitoring and external assistance of Arbitrators and the awards and FLAFSA can also use the Peer review process in this regard.

We are fortunate to partner and share with the wealth of experience from England and Scotland, (as you will shortly hear).

The most recent arbitration training took place on 17, 18 and 19 March 2016 in Cape Town.

It was interesting to note that the Arbitrators who conducted the proceedings namely Susanne Kingston from England, and Rachel Kelsey from Scotland, in their presentation at the Miller du Toit Family Law Conference, made mention of the fact that they had analysed the Rules which the South African Family practitioners have prepared for FLAFSA, and have found issues which they have not considered, and will be including in their own Rules.

That is what happens when you have an exchange of opinions between jurisdictions.

The draft Arbitration Rules from the Family Law practitioners for FLAFSA have been circulated to the LSSA Family Law and ADR Committees, and are available to you in your information packs. They have also been widely circulated to Family Law Practitioners.

We will also be addressing the South African Law Reform Commission this coming week on Wednesday, 6 and Thursday 7 April 2016, in respect of Arbitration in Family Law, together with Charles Cohen from the LSSA ADR Committee.

SOME PROCEDURAL ASPECTS ABOUT FLAFSA

FLAFSA will be the scheme under which disputes with a family background, firstly of a financial or property nature, may be resolved by Arbitration.

FLAFSA will be responsible for :-

1. The rules governing Family Law Arbitration in South Africa;

2. Eligibility, training and qualification criteria, unless the LSSA LEAD becomes involved, then in conjunction with LSSA LEAD;

3. Application procedures;

4. Criteria for remaining on the panel;

5. Denying, suspending or revoking membership of the panel;

6. Development of Family Law Arbitration, FLAFSA;

7. Public perceptions and pro bono requirements of FLAFSA;

8. Pursuing legislative reform, as and when appropriate.

BENEFITS OF FAMILY LAW ARBITRATION

Some of the primary advantages of Family Law Arbitration are :-

1. The selection of the decision - maker;

2. The direct continuous involvement of the decision - maker;

3. Flexibility and individual choice of adjudication process;

4. Privacy and confidentiality;

5. Avoidance of Court delays and standardisation;

6. Use for discrete issues of a case;

7. Speed;

8. Saving of Court resources.

TRAINING AND QUALIFICATION

At present training is carried out by FLAFSA in association with Arbitrators from England and Scotland.

The training course is usually delivered over a weekend, with a combination of private study and face to face tutorials.

Private study includes reading and course materials.

Face to face tutorials involves candidates attending classes over a weekend, during which time they will be subject to continuous assessment.

Candidates will be fully trained in relevant aspects of the Law of Arbitration, practice and procedure, drafting and deciding, award writing and in Family Arbitration.

Successful candidates will be awarded membership of FLAFSA.

As members of FLAFSA, Family Law Arbitrators will be subject to the Rules and Regulations, Code of Ethics, Complaints and Disciplinary Procedures of FLAFSA.

After successful completion of the training and award writing exercise, which will be marked by a retired South African Judge, FLAFSA will admit candidates who apply for membership and meet FLAFSA's membership requirements, as members of FLAFSA, and recommend to FLAFSA that those who have been admitted join the panel of Family Arbitrators.

Again we would prefer to do this in conjunction with the LSSA.

It will be necessary to continue with Family Law case work and to comply with the requirements for continuing professional development and to keep up to date with Family Law.

Membership fees will be payable.

APPOINTMENT OF ARBITRATOR

Application for Family Arbitration is on the prescribed form.

If the Parties know of and agree on the Arbitrator they wish to appoint, they may contact that person direct in order to make the necessary arrangements.

If they do not know of a suitable Arbitrator or are unable to agree on an Arbitrator, they will apply to the Administrator of FLAFSA on the prescribed form.

The application is checked to confirm that it is signed and that all of the required information is provided.

Either the named Arbitrator, or an Arbitrator from the panel will be appointed, taking into account the desired area / experience and / or on a rotational basis.

Once the Arbitrator has accepted the case and the Parties have been informed, the Arbitrator will deal directly with the Parties.

The Arbitrator's costs will be dealt with by the Arbitrator.

Family Law Arbitration was approved by the High Court of Judges, Family Division in the United Kingdom in the matter of S v S Royal Courts of Justice, Strand, London, WC2A 2LL on 14 January 2014 and the neutral citation is [2014] EWHC 7 (Fam), in the judgment handed down by Sir James Munby, President of the Family Division.

A copy of this judgment will be provided to the delegates together with the updated FLAFSA Arbitration Rules.

In this matter the Learned Judge approved a Consent Order as a consequence of a Family Arbitration Award and, at the same time, approved the Scheme adopted in England, and made the Consent Order an Order of Court.

Therefore the High Court of Justice, Family Division, of the United Kingdom, has approved Family Arbitration.

It is the intention of the Family Law practitioners to launch FLAFSA this year in the Cape, Gauteng, and KwaZulu Natal.

It is also the intention of the Family Lawyers to conduct pro bono Arbitrations, in satisfaction of the pro bono requirements of their Law Societies, to assist members of the public who are unable to afford to pay for Arbitration.

In this way we will provide access to justice, as well as experience to the Arbitrators.

Thank you for your attention, we will be pleased to answer any questions.

Arbitration

- Section 2 (a) of the Arbitration's Act 42 of 1965 currently prohibits arbitration in respect of "any matrimonial cause or any matter incidental to any such cause".

- In 2001 the Law Commission recommended that the Act should be amended to permit arbitration in matrimonial property disputes, which do not affect the rights of the spouses' children.

- A draft bill was to have been presented to cabinet in early 2014. The Family Law Committee of the Law Society of South Africa commented on the bill.

- Section 2 of the Arbitration Act and Clause 5(1) of the Bill out of sync with demands of modern times. A strong public policy favouring arbitration.

- Arbitration is adjudicatory but is a flexible and private process in which the parties may designate the decision maker, determine the procedures and select the applicable laws. It identifies issues, reduces obstacles to communication, limits time periods, maximises the exploration of alternatives and assists the parties in reaching agreement, whilst giving the parties the assurance that a determination is arrived at, speedily, in the absence of agreement between the parties.

- The object – to achieve fair resolution of a dispute by an independent and impartial Arbitrator without unnecessary delay or expense.

- It creates party autonomy – parties are free to agree how the dispute should be resolved subject to safeguards in public interest.

- It provides powers balanced for the arbitration court.

- Adversarial system is not well suited to resolving family disputes.

- Arbitration in Family Law matters – the adversarial system is not well suited to resolve family law disputes.

- Litigation is expensive andprotracted and has cumbersome procedural matters.

- Judges and Magistrate's are usually not specialized in handling intricate and complex family law issues.

- The courts are overcrowded and interest in family law matters is lacking.

- Sharia law encourages arbitration.

- Section 49(c) of the Children's Act 38 of 2005 ... court may order a lay forum hearing before deciding any children's issue. Section 70(1) ... a family group conference.

- The Department of Justice and Constitutional development has recently published two documents –

1. Norms and Standards for the "Performance of Judicial Functions" of the office of the Chief Justice which states *inter alia* that these norms and standards seek to achieve the enhancement of access to quality justice for all, to affirm the dignity of all the users of the court system and to ensure the effective efficient and expeditious adjudication and resolution of all disputes through the court, where applicable.

2. The latest "Amendment of Rules regulating the Conduct of Proceedings of the Magistrate's Court of South Africa" of the Rules Board for Courts of Law, which determines that the objectives are to give effect to:-

   2.1 Section 34 of the Constitution which guarantees everyone the right to have any disputes that can be resolved by the application of the law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum, and

   2.2 The resolution of the Access to Justice Conference July 2011 towards achieving delivery of accessible and quality justice for all, that steps be taken to introduce alternative dispute resolution mechanisms, preferablycourt - annexed mediation or the Commission for Conciliation,

Mediation and the Arbitration kind of alternative dispute resolution, into the court system.

- Family disputes and relationships have expanded for example civil marriages, civil unions, customary marriages, religious marriages, domestic partnerships and these systems require the diversion of a number of cases out of the overloaded court system.

- Advantages –
    - Selection of person whom they wish to Arbitrate.
    - An adjudicator with experience in expertise in family law matters.
    - Flexibility of the process.
    - Control of the proceedings by deciding when, where and how issues are dealt with.
    - Hearings can be scheduled at any time or date or venue.
    - Procedure can be determined.
    - It is a private and confidential process.
    - It can speed up the process.
    - Less need for interim proceedings and updating of evaluations and leakage of financial resources.
    - Less costly in the long term.

- Arbitration Act 42 of 1965 – certain changes will be required to the Arbitration Act (and such other Acts as may be affected, by example the Divorce Act No 70 of 1979 and the Matrimonial Property Act No 88 of 1984), in order to accommodate arbitration in matrimonial matters however, these are not insurmountable.

- It is proposed that, initially, only financial issues be arbitrated on. Thus, the Court's position and powers as the only body to make a decision affecting a person's status and as the upper guardian of minor children, remains unaffected.

- Arbitration: An International Perspective - Arbitration is gaining momentum internationally. It is recognised as a prefered way of resolving family disputes outside of the Courts, by example :

  (a) Scotland - In 2011 Scotland welcomed an arbitration scheme which was set up by the Family Law Arbitration Group Scotland (Flags). They formulated a set of Rules which are primarily based on Schedule 1 of the Arbitration (Scotland) Act 2010. It can be used for any famly law issue, including child matters and the arbitrator's decision is binding.

  (b) In early 2012, an initiative started in England and Wales which allows divorcing couples to resolve family law disputes relating to finance and property only, by way or arbitration.

  (c) Unlike in Scotland, an arbitrator's decision would currently not be automatically enforceable under the (England & Wales) Arbitration Act 1996 in the same way as a purely civil award, however, arbitration in family matters has been endorsed by senior Judges in the Family High Courts in London. One such senior Judge, namely **Mostyn J** commented: "Where parties are agreed that their case should be afforded total privacy there is a very simple solution: they sign an arbitration agreement…….*Recently arbitration has also become available in financial remedy proceedings by virtue of the much to be welcomed scheme promoted by the Institute of Family Law Arbitrators."*.

  (d) In March 2013, in an overhaul of the1979 Family Relations Act in British Columbia, Canada, family law arbitration was codified.

- Arbitration in family matters is gaining momentum worldwide and South Africa can and should be at the forefront of a development which offers a procedure to families in dispute which is both effective and fair, outside the already overburdened Court system.