

**COMMENTS BY THE LAW SOCIETY OF SOUTH AFRICA
ON THE SOUTH AFRICAN LAW REFORM COMMISSION'S ISSUE PAPER 31
FAMILY DISPUTE RESOLUTION: CARE OF AND CONTACT WITH CHILDREN**

The Law Society of South Africa (LSSA) is grateful for the opportunity to submit comment on the above mentioned Issue Paper 31, which is aimed at initiating and stimulating debate, seeking proposals for reform, and serving as a basis for further deliberation.

CHAPTER 2: POLICY

1. QUESTION 1 - PAGE 31

- a) These concepts should be defined. If there is finality in regard to a Mediation Act, the relevant Act may just be referred to. It would be difficult to define alternative dispute resolution as it is an evolving landscape at the moment. ADR also includes arbitration in family law matters in view of the recent developments.
- b) Whilst it is correct that the words 'care' and 'contact' should be entrenched, one should be careful to equate 'care' with 'custody'. One needs to move away from the old entrenched stereotypical words and definitions and be careful not to place an outmoded concept with a new tag.
- c) As there is unfortunately no dedicated Divorce Court, one would have to refer to 'court'.
- d) The word 'child' should be clarified, particularly in regard to major dependent children. We stress that major dependent children are being discriminated against in families. Children are reluctant to act against their parents and do not want to institute Maintenance Court proceedings. They are also afraid of mediating this with their parents as they see maintenance disputes as high level conflict areas with parents. They also feel guilty to ask their parents to support them beyond the age of 18 years old. This is an urgent situation which requires to be addressed and gives rise to unfairness and inequality.

A “suitably qualified person” will have to be defined. If there is a Mediation Act, then the problem should be resolved, unless the Children's Act is looking at mediation in broad terms such as family and community initiatives. If so, then the definition will have to be inserted.

- e) “Primary or principal residence” should not be legislated as is the case with “habitual residence” in respect of the Hague Convention. It should be determined on the facts of the case, free from technical issues.

Legislation could however list factors to be taken into consideration when determining whether or not a child is primarily / principally resident with a parent. Said list can however not be exhaustive.

The term “alternative or secondary residence” creates the feeling that the parent’s residence is a second option or even inferior to the “primary residence” and we are therefore not in support of its inclusion.

Preferably, the parenting plan or parental rights and responsibility agreement should provide for co-holders of parental rights and responsibilities and a recordal that the child will be primary resident with one parent and the other parent shall exercise his / her reasonably rights of contact with the child.

2. QUESTION 2 - PAGE 37

In view of the acrimony and manipulative behaviour which often exists in regard to disputes around children, it would be ideal for both parents to be present, with a mental health expert or a Family Advocate, to inform the child about the actions and decisions taken and the contents of the parenting plan. We suggest that it is crucial that children participate and be made aware of the process and the outcome of the process. In a non-acrimonious situation both parents should be present when informing the child about the actions and decisions. The manner in which this is done could be addressed in the parent training sessions referred to later in the document.

3. QUESTION 3

We are of the view that in any event there is legal recourse available if the view and wishes of the child and/or co-holder of parental responsibilities and rights have not been ascertained. If the decision has been put into effect, unfortunately application will have to be made to a court to set it aside. If the decision has not been implemented yet, one could possibly consider a provision that such a decision would be null and void until the view and wishes of the child and of the co-holder of parental responsibilities and rights have been ascertained and given due consideration.

Often parties may use the situation to manipulate each other.

How is one ever going to prove that the views and wishes have been obtained where a factual dispute arises in this regard?

It is a fraught question.

4. QUESTION 4 - PAGE 38

The mediator does have a duty and an obligation to include the child in the mediation. The mediator should note that consideration has been given to the child's wishes and that the child's wishes and views have been obtained.

This issue should be part of the mediator's training.

5. QUESTION 5

We believe that the child's views always have to be canvassed. It needs to be confirmed whether the child has a view or not.

6. QUESTION 6

Whether a child becomes a party will be a question of fact and best interest as the mediation progresses. The children may always participate, but will only become parties in certain circumstances.

One has to define what is meant by 'participation'. A mediator may wish to engage with a child who is 5, 6 or 7 years old. Older children of, say 14 years of age, may participate more actively and give their views more vociferously.

One should leave the situation fluent, but request the mediator to obtain the views of children and/or meet with children where necessary in the best interests of the children.

To over-legislate and curtail the proceedings would stifle the process and also not achieve a just outcome. It should be open and transparent with interested parties free to participate.

7. QUESTION 7- PAGE 40

Regulations 7 and 8 might be *ultra vires*, but an amendment may rectify this. As long as facilitation is not included as compulsory in the agreements it should be in order. Facilitation may be included by agreement.

8. QUESTION 8 - PAGE 44

Children should have the right to be heard and to participate in decisions affecting their best interests or at the very least, be made aware of such decisions, the process and the outcome thereof. This would be valid across all family structures. One has to draw the distinction between the nature of legal representation for a child and an expert report in regard to a child as well as in regard to a curator appointed to the child. They all have different functions, different responsibilities and different outcomes.

We would have imagined that currently an expert investigating and/or the Family Advocate would have had an obligation to obtain the views of the child through a certain process, even without further amendments.

There is also the issue of a Judge or a Magistrate perhaps wanting to hear the child's views.

There should perhaps, if representation or expert input are unaffordable, be a dedicated institution such as the Family Advocate or a social worker to obtain the child's views and give input to the court and/or the experts and/or mediators.

The Mediation in Certain Divorce Matters Act could provide, where possible, that the Family Advocate (and counsellor) consult with the child (similar to that which is prescribed in Section 62 of the Children's Act).

Furthermore, the prescribed questionnaire which is annexed to the Regulations as used by the Family Advocate should be amended to be more child-inclusive and to incorporate the views and considerations of the child. In this regard, it may be possible to have two questionnaires and two "consultations".

9. QUESTION 9 - PAGE 45

We do not think that Judges should be obliged to interview children. This should occur only in exceptional circumstances. Certain safeguards and provisions should be put into place when a child is heard by a Judge in Chambers. There should be, for example, a representative from the Family Advocate's office present, the proceedings should be recorded and transcribed, and the child should be able to have an independent person with him / her should the child so wish. Often a child requests to see a Judge.

Family assessment reports by the child psychologists / social workers and/or Family Advocates are preferential.

10. QUESTION 10 - PAGE 47

Child-inclusive mediation is a beneficial practice / principle. Children could be directly or indirectly involved in the mediation process. The mediator should clarify the structure of how the child would be involved.

It will depend on the exact circumstances of the case as to whether the child will be willing to jointly participate in the mediation session or whether he / she would prefer that his / her views are recorded and published. To absolutely strictly legislate would be limiting rather than giving a just outcome. The interests of the child and the circumstances of the case should be viewed holistically.

Children could be involved by personal interviews or interviews with a Family Advocate or social worker or legal representative who could report back.

It would be best that any meeting / interview with the child by the mediator is done without parental participation and in their absence, particularly in light of the fact that the child may feel intimidated to truly place his / her views before the mediator in front of his / her parents and for fear of disappointing one over the other.

The children should be advised of the outcome by the mediator.

11. QUESTIONS 11 - PAGE 62

A child could request a legal representative and it could be assigned through Legal Aid South Africa. Often a child telephones attorneys directly. On occasion, a Judge orders a legal representative to be appointed and often a *pro bono* representative is appointed. *Pro bono* processes would be utilised to appoint a representative for a child. However, the legal representative for the child should have certain minimum qualifications, such as a certain seniority and a certain number of years of practice in family law. It is often problematic to pay the legal representative and it has been suggested in the past that the parents should divide and equally pay the costs of the legal representative. If they are not able to do so, then it becomes an issue of legal aid, which is available in a very limited manner because of the resources test, or a *pro bono* matter. Many attorneys and advocates act as *pro bono* representatives, but this should not be an ongoing fall-back position, as often the attorneys and advocates are inundated with these matters.

12. QUESTION 12

A legal representative is assigned by the child approaching the representative by the court, by a parent and so on. If legal aid is obtained, the Legal Aid Board assigns a representative. If it is a *pro bono* representative, the relevant authority assigns the practitioner.

13. QUESTION 13

Yes. In many circumstances the High Court has ordered that an advocate or attorney act *pro bono* for a child.

14. QUESTION 14

Case law has given content to this. It would be a decision that would be contrary to the best interests of the child and that would not give effect to the child's rights in terms of the Hague Convention on the Rights of the Child, the Constitution and the relevant statutes. Would the best interests of the child not be served in the absence of representation?

15. QUESTION 15

If there are concerns in regard to the provisions of the prayers (claims) and/or consent paper in regard to the best interests of the child, then a court or the Family Advocate may request that a legal representative be appointed for the child. In practice this route is not often followed.

16. QUESTION 16

Usually it is a court that decides ultimately. In other cases it would be up to the various institutions appointing the representative to decide, which decision would be tested in a court. It would also be for the representative him/herself to decide if approached directly whether to act or not.

17. QUESTION 17

A decision will be made in terms of the principles relating to substantial injustice in terms of the Acts, the Constitution, and case law and in the best interests of the child.

18. QUESTION 18

In terms of the Hague Convention, the Constitution and legislation, a child is entitled to legal representation in any event. A child should always be entitled to legal representation, particularly if the child so wishes, for example in regard to matters of adoption. Where the parties are in high conflict situations, in disputes relating to the rights and responsibilities in regard to the child or where there are issues of domestic violence or sexual abuse, or, for example, relocation, then a child should be entitled to legal representation.

Where there is a decision that is required to be taken in regard to the child and the child wishes to intervene, then the child should also be entitled to legal representation.

19. QUESTION 19

This has been discussed above.

20. QUESTION 20

The legal representative should represent the child as the representative would represent a client. However, there would be a special duty of care on the practitioner to act in the best interests of the child. Whilst the legal representative does not have the function of an expert or a curator but that of a representative, it is however, infused with the obligation to take account of the best interests of the child.

21. QUESTION 21

See above.

22. QUESTION 22

This should be an advocate or a lawyer who specialises in family law and who has at least 5 to 10 years' experience in family law. We do not think a decision is dependent upon the child being able to direct the litigation necessarily.

The decision would be made by the person or institution appointing the curator or representative and may be upset by a court.

23. QUESTION 23

We do not consider 28(1)(h) to exclude the appointment of a legal practitioner.

24. QUESTION 24

The sections providing for the voice of the child are used reasonably in practice but still sparingly. It would be part of an overall budget.

25. QUESTIONS 25 AND 26 - PAGE 81

We are of the view that there is no need for more legislation on relocation. Current legislation sufficiently covers this, more particularly the various sections in the Children's Act, No 38 of 2005, as amended, inter alia Sections 7, 9, 18 and Chapter 17, as well as Schedule 2 (Hague Convention on the Civil Aspects of International Child Abduction) in particular has reference. This, coupled with case law, provides sufficient guidance.

Families change, the social fabric changes, the movement of people changes and the way relocation is looked at has always in law across the world evolved over the years. It will still evolve, particularly with the changing face of families. To legislate it narrowly, would be problematic.

Principles have emerged in case law and should continue to evolve in case law as the best interests of children and as society evolve. The case law that has evolved is clear from time to time and also accommodates the fluidity of modern families. Again, it would be problematic to codify law which may become stultified and outdated in 5 years' time. The nature of family law is fluid and evolves along the best interests of children. Account can be taken of international case law, instruments, agreements and articles.

As far as the proposals on pages 75 to 79 are concerned, many of the factors are already considered by our courts, due to the fact that most of the factors listed in paragraph 2.3.52 (a) to (k) are usually raised in the affidavits / papers filed by the litigants.

The points / issues listed in subparagraphs (i) to (l) are either speculative or subject to unilateral change and will thus be difficult for the court to adjudicate on.

The factors listed in paragraph 2.3.53 on page 77 are, similarly, problematic. Whilst it could be explored and the parties could address same in their court papers, paragraph (b) will amount to speculation by all concerned, including the court. It will constitute the making of a decision by the court on behalf of the parent opposing the application to move and could be open to a Constitutional challenge. In respect of paragraph (c), this proposal will no doubt in any event be made by the parent opposing the relocation in his / her opposing papers as an alternative solution.

Paragraph 2.3.54 does not take the matter any further. If a child is to relocate to a country which is not a signatory to the International Hague Convention on Private International Law, it is the relocating parent who is at risk and this point thus becomes irrelevant.

Regarding paragraph 2.3.55(a) to (c), we submit that:

- This will amount to speculation on the part of the court and is not helpful;
- If a party intentionally misleads the court, it affects his / her credibility and will have a negative impact on his / her case;
- It is a reality of relocation that the parent with whom the child is allowed to relocate or stay, will have the main share of “parenting time”.

As far as paragraph 2.3.58 is concerned, we believe that it will create an unmanageable situation if parties other than and in addition to the parents of a child be allowed to object, separately and independently, to a relocation. It will create an opportunity to “third parties” to “veto” a decision by the parents of the minor child where the parents may have reached an agreement regarding the relocation. This will cause not only uncertainty, but unnecessary legal costs for the parents. This should not be allowed.

Creation of a burden of proof essentially means to a move away from a neutral policy and will create either a presumption in favour of or against relocation, depending on where the burden of proof lies. In our view, this militates against the principle of applying the Child’s Best Standards as is envisaged in Sections 7 and 9 of the Children’s Act No 38 of 2005, as amended.

We do not believe that Parenting Plans can “pre-empt” disputes which may arise in the event of relocation. Not only will such provisions be speculative by nature, but it will also give rise to unnecessary complex Parenting Plans, which in turn may cause unnecessary problems for the parties.

With reference to the Conclusion on page 81, the difficulty with mandating a notice of a proposed move is that it could create a rebuttable presumption that, failing an objection from the parent to whom notice has been given, such parent has acquiesced to the proposed move. This flies in the face of the principle that all decisions and changes to prevailing care and contact arrangements must be based on what is in the best interest of the child.

Creating legislation directing courts as to which circumstances should be considered and which not, can easily lead to an unfair hearing and could, in fact, even border on a denial of justice to one or both parties. One has to bear in mind that each case is unique and has its own set of circumstances. It cannot be assumed (as a rigid rule) that all factors relevant in one matter will always be relevant in another and *vice a versa*. It is very possible that a factor which might not be relevant in one matter, could be extremely relevant in another.

26. QUESTION 27 - PAGE 91

Adult dependent children should be defined in the Children's Act as major children who remain financially dependent on their parents, despite having attained the age of majority.

Final divorce orders / agreements can make provision for their maintenance, whether it is payable directly to the or to the parent whom they reside with.

Notably, the Maintenance Act should provide that, for as long as they remain an adult dependent child, they may elect to approach the Maintenance Court on their own or their parent may approach the court on their behalf for assistance.

27. QUESTION 28

Support is part of parental responsibilities and rights. It is not working at the moment as the Maintenance Courts are struggling, due to the volumes and the staff turnovers. Courts are clogged, justice often does not result speedily. Major children are falling through the cracks. The maintenance proceedings are also cumbersome, drawn out and do not bring quick and sufficient finality and justice.

Furthermore, the Maintenance Courts have directed in a number of cases that adult dependent children cannot "piggyback" on their parents bringing an application on their behalf *despite* the fact that they still reside and are dependent on such a parent.

This has led to a situation where many adult dependent children do not approach the court for assistance, as they themselves do not want to commence conflict with their "paying parent".

Uniformity is required in both legislation and in practice. Settlement agreements / maintenance orders must provide that maintenance is payable until said child is “self-supporting”.

28. QUESTION 29 - PAGE 96

We do not necessarily think that there should be regulations to Section 21.

29. QUESTION 30

Usually this is determined in mediation and would then be part of the mediator's outcome certificate. If agreement is not reached in this regard, unfortunately the matter then has to proceed to court.

30. QUESTION 32

Yes, Sections 21 and 29 should be amended as proposed. Section 21 should also be reviewed as to when the unmarried biological father's acquisition of parental responsibilities and rights arise and whether the current requirements should remain or be amended.

31. QUESTION 33- PAGE 110

Child abuse allegations are not prevalent. Domestic violence allegations are far more prevalent.

32. QUESTION 33

One does encounter unfounded allegations - again there are the exceptions to the exceptions as it were.

In certain divorce matters, domestic violence allegations may become tools of manipulation by both parties. It is unfortunate, because it does affect the very real and traumatic cases of domestic violence and the credibility of these parties.

33. QUESTION 35 - PAGE 110

Child abuse allegations in our practical experience are mainly made by mothers.

34. QUESTION 36

The allegations do cause delays. If such allegations exist, one has to address them in the best interests of the child. There would often typically be an investigation by an expert, there may be criminal charges, there may be suspension of contact, there may be supervised contact, and there may be time periods within which a report must be submitted. We would suggest that, in these cases, there be a time-table within which experts report back so as to fast track these matters and obviate delays that impact traumatically on the family and the child. We further suggest that, once these allegations surface, that there should be attendance on agreed or court appointed experts to investigate in order to avoid delays and a proliferation of reports.

Criminal proceedings, if instituted, should be dealt with sensitively in the best interests of the child and as expeditiously as possible.

35. QUESTION 37

These allegations obviously affect a child traumatically. Whether the allegations are true or not, these cause divides in families and affect relationships between the child and the parents. The child may be influenced or manipulated and the child has to undergo investigations and therapy.

It really affects the whole family.

36. QUESTION 38

Although Section 43 may be well intentioned, it is problematic in view of the lack of resources, the few social workers available and the proliferation of matters. Delays ensue.

There should be a fast tracking of these investigations and it should perhaps be sourced out wider than to just social workers, if the parents can afford to appoint an expert.

37. QUESTION 39

No, there is not adequate or effective screening. Sexual abuse is of course aggravated by the fact that young children would not necessarily show injuries or be able to report properly on it or

be able to withstand investigation/proceedings.

38. QUESTION 40

Mediation is a very fraught matter in these instances. There may be fear, manipulation, old patterns which are immediately re-established. In any event, if there were to be mediation it should not happen whilst the parties sit together with a mediator. Caucus mediation might be a possibility, but we are strongly of the view that mediation in these circumstances is extremely problematic.

39. QUESTION 41 – PAGE 122

Competing reports should not be eliminated. It is very possible that two different experts will have two different views and thus submit competing reports. The experts should be cross-examined and the court be given the benefit of hearing oral evidence from the experts, whereafter the court will be able to make an informed decision as to which expert report should be favoured.

40. QUESTION 42

We submit that, in most cases, the issues to be determined by the court relating to children amount to a factual enquiry and not a mental health enquiry. The purpose of an expert report, it is submitted, is for an expert to express an expert opinion, not a finding of fact and as such it can only add value to the court process if the enquiry is a mental health one.

41. QUESTION 43

Yes, this does happen.

42. QUESTION 44

Each party should fund their own expert report and in instances where the parties are unable to fund such reports themselves, the State should provide funding.

43. QUESTION 45

Yes, these Reforms are valuable and should be considered for South Africa.

44. QUESTION 48 - PAGE 129

Section 32 may very well have to be expanded to award these parents with full or limited parental rights. The situation would have to be carefully assessed before such an award is made.

45. QUESTIONS 49 & 50- PAGE 130 & 131

Partners in a permanent life partnership who agree to have a child within the ambit of Section 40 of the Children's Act should automatically acquire parental rights and responsibilities in regard to the child born of the agreement if they meet the requirements set out in Section 21 of the Children's Act. They should not have to apply to the court in terms of Section 22 and 23, nor should they have to formally adopt the child.

CHAPTER 3: PROCESS

46. QUESTION 1 - PAGE 137

Very few family disputes end up in court as opposed divorces. We would estimate probably between 1 to 5%, if that.

47. QUESTION 2

Other than facilitation, the dispute resolution processes are not adversarial in nature. However, if arbitration is added as another dispute resolution process, it may be regarded as adversarial (although it is not necessarily adversarial). The advantages of arbitration would be that the process could be chosen by the arbitrator, the procedure could be fast tracked and amended inventively, specific issues could be heard, and stated cases could be submitted, written argument could be handed up, all of which would reduce the adversarial nature of matters. Specific issues could be arbitrated.

48. QUESTION 3 - PAGE 139

The ideal model would be (if one had the resources and the facilities) to have a dedicated Family Law Court and trained staff dealing with family law matters. These matters are crucially important to the future of family and go to the fabric of society. Family law matters are often very involved matters, not only with regard to the personal issues between the parties and the children, the best interests of the children, but also in regard to financial questions. There are often intricate structures of companies, close corporations, partnerships, trusts, off-shore structures, and assets across the world, businesses and so on. Often questions of family law also become commercial in nature and one needs to have an experienced presiding officer dealing with such matters. The courts certainly have a function in dealing with family law matters. That, however, does not mean that the alternative resolution dispute processes should not strongly be recommended and should not strongly run parallel to court processes. It is unfortunately often the experience that parties use the alternative dispute resolution processes strategically to draw out matters whilst strategic planning occurs. There has to be a balance between the proceedings continuing and alternative dispute resolution taking place. Often it is also the only way to obtain financial information through the courts by way of discovery and/or subpoenas rather than through the alternative dispute resolution process where there obviously are not long term consequences or consequences in the further hearing of the matter if documents are not given or documents are not given on affidavit. Therefore, it is often very useful to have at least completed the discovery process before financial mediation is proceeded with. The two processes are not mutually exclusive, but can complement each other. The opposite is also true in that it may hype up tensions between the parties. However, it is a matter of discretion and a responsible practitioner will judge the situation and not unnecessarily increase the acrimony.

49. QUESTION 4

ADR should absolutely complement the court system. The interim situation may be mediated, the final situation may be mediated, and questions of fact or law may be mediated. Similarly, these issues could be arbitrated. There is a very valuable role for ADR to play in family disputes.

50. QUESTION 5

Mediation will only work if there are two willing parties who participate in the mediation. Court connected mediation should have time limits within which it may take place and, failing progress,

the matter should proceed. This does not exclude future mediation thereafter. Often it takes time for a party's mind set to change and to be ready for settlement.

It is difficult to exclude the process if there is not frankness or disclosure in the mediation process.

51. QUESTION 6 - PAGE 145

No, the current case flow management arrangements are not successful. There are inordinate delays in family law matters, the process is cumbersome, the way pleadings are structured is cumbersome, certain parties exploit the process and delay the matter for an extraordinary length of time, there is a reluctance to let family law matters proceed from the judiciary who wants ADR to be implemented, but in cases where ADR has failed it is imperative that the matter proceeds within a certain time limit. The whole process in regard to family law matters should be amended. In this regard, the LSSA has made extensive proposals to the Rules Board for Courts of Law to change the procedure for family law matters. The submissions are attached as Annexure "A".

52. QUESTION 7

Courts do seem reluctant to address family law disputes. Matters are often postponed or the parties are sent away to settle or mediate or Judges are not available due to the overburdened system.

The process is also subject to manipulation by parties.

53. QUESTION 8

Certainly a time limit should be set. The time frames need to be realistic but should be within, say 6 to 10 months of the pleadings being closed.

54. QUESTION 9

We do think that the case management Judge should probably be different from the Judge who hears the matter. A case management Judge however must deal with the matter throughout the proceedings. It would be useful that, if there are children involved, the same Judge deals with all the issues in the interim relating to the children.

55. QUESTION 10

The delays have a substantial effect on a child. Often parties are, by reason of financial considerations, bound into one household. Acrimony rises, parties have new partners. It is confusing for the children. The children are hopeful that the parties may still get together. It is an unsatisfactory situation to be in limbo for a period of one to three years, if not longer. The child also gets put to choices, lives in the household with both mother and father who may both apply different forms of pressure on the child, and it is an unstable, unrealistic situation for the child. The child needs certainty, needs to settle into a new routine and structure, needs to know that the parents are definitely divorced or getting divorced or are separated, needs to have arrangements in regard to contact without having to choose between the parents on a daily basis, the parents should not let the acrimony spill over into the household and so on.

56. QUESTION 11

If the reports are ordered, for example, to be filed within a certain period (and we would submit that this would be reasonable), then it would not unnecessarily delay the pace of these matters. There should be an exploration of the appointment of joint experts, alternatively of court appointed experts.

57. QUESTION 12 - PAGE 149

A Rule 43 application is one of the most important applications in all of the divorce interim processes. As stated above, the LSSA has made submissions in this regard to the Rules Board for Courts of Law – see Annexure “A”. This is a crucial application and often leads to settlement of the matter overall. It provides interim maintenance and security for a family. It attempts to put a party in funds to run a matter.

58. QUESTION 15 - PAGE 155

Technology should be used in courts, e.g. in regard to the proliferation of paper. Skype could be used in regard to witnesses and parties and if records are computerised, there would be much easier public access to court services.

59. QUESTION 16

Mediation services should be way of personal contact but could happen via Skype.

60. QUESTION 17 – PAGE 165

Either the mother or the father is able to refer a matter for mediation in terms of Section 21(3)(a).

61. QUESTION 18

Yes

62. QUESTION 19

Legislation should provide guidelines setting out the procedural aspects of mediation. These guidelines should result from a workshop of interested parties, including experts from multi disciplines.

63. QUESTION 20

Should a party fail to attend mediation despite numerous requests by the other party to do so, an adverse costs order can be made against such person who fails to attend mediation or to participate in a meaningful way at the hearing of the matter.

64. QUESTION 21

No.

65. QUESTION 22

The status of a mediation settlement is that it is binding between the parties and on an '*ex contractu*' basis. However, Section 21 needs to be reviewed and amended so that the mediated settlement reached is made an order of court. Procedures need to be put into place to allow the mediated settlement in terms of Section 21 to easily be made an order of court

and thus enforceable. Legislation needs to be amended in order to facilitate easy access by parties to court to enforce the mediated agreement. Should a party who has reached a mediated agreement fail to observe such agreement, an adverse cost order can be made against that person on good cause.

66. QUESTION 23 - PAGE 169

The assistance referred to in Section 33 is clearly different from the mediation referred to in Section 33(5)(b). The assistance would be regarded as recommendations and/or an investigation by a Family Advocate, social worker or psychologist as opposed to mediation. Functions would be entirely different.

67. QUESTION 24

Yes, the differentiation does have a purpose.

68. QUESTION 25

With intervention, if it is mediation, then the parties may approach a court or may in any event obtain recommendations and a report by an expert.

69. QUESTION 26

The dual role of the Family Advocate is problematic. If one looks at the Family Advocate's broader duties in regard to all aspects of family law, it becomes even more difficult as there are often conflicting roles.

What often happens in practice now is that the Family Advocates mediate first and, if they can't mediate a solution, they investigate. Sometimes there is a merging of the two issues which of course is also problematic.

We would imagine that if one Family Advocate mediates, another Family Advocate should investigate and report.

It is not an ideal situation.

70. QUESTION 27

We do not think separate regulations would be necessary, particularly if the Mediation Act is finally accepted into legislation.

It also does not serve to over-regulate the mediation process. It still is a discretionary process that evolves as the discussions evolve. Obviously, there will have to be certain basic safeguards, which can be dealt with in the Mediation Act or in a mediation agreement. If the Act is promulgated, then that will cover the qualifications of mediators so that there is a uniform approach as to training, qualifications and quality of mediators.

71. QUESTIONS 28, 29 AND 30 – PAGE 172

The courts may order how this process should take place. If in practice that does not happen, then perhaps the procedure should be regulated. The suitably qualified person would be as defined in the Mediation Act, but would conceivably be a person such as a psychologist, social worker, attorney or advocate or other mediator who has qualified as a mediator in terms of one of the acknowledged mediation training courses and who has had at least a few years of mediation practical training and experience.

72. QUESTION 31 - PAGE 173

Practitioners are very aware that there should be a conciliatory and non-litigious approach to children. Sometimes, in exceptional situations, this is not possible, although it is always a first point of departure.

Parties often jointly obtain recommendations if they disagree in regard to the best interests of the children. They often attempt to reach agreement by way of mediation. Agreement should be sought in regard to experts to be appointed in the event of a dispute, the provisions of the parenting plan, the appointment of the mediator, and so on.

Agreement can be attempted to be reached by other methods of ADR, round table meetings between attorneys and so on.

73. QUESTION 32 - PAGE 176

Practitioners are usually requested to mediate solutions and endeavour to settle matters. On rare occasions, Judges have intervened in endeavouring to mediate issues between parties. The mediation process by the Judges has followed an inquisitorial/mediating approach in our experience. At the end of the day, the parties would have had to arrive at a settlement between themselves.

74. QUESTION 33 - PAGE 179

Often, co-mediators are prepared to discuss the costs. Co-mediation is often very successful, particularly if it is a lawyer and a mental health expert to address all issues. Co-mediation may also be very effective where there is a very acrimonious relationship between the parties or a psychological issue with one party, as it often breaks the log-jam and enables the mediators to deal effectively with the parties.

It is always of assistance where a multi-disciplinary approach is utilised and the parties have the benefit of both a mental health professional and a legally trained mediator. We believe that it is a justified cost as there is the added advantage of two professionals from different disciplines assisting to resolve a matter.

75. QUESTION 34

Again, one should not be too prescriptive in this regard. The team could be a lawyer and a mental health expert or even an accountant, depending on the issues in dispute. The circumstances of each case may dictate what would be best.

76. QUESTION 35 - PAGE 180

Ideally a co-mediation model should be adopted. However, this need not necessarily include two mediators being present at one time, but rather where there is a main mediator and should it be necessary for that mediator to call in a mediator from another profession, then the main mediator would be able to co-opt a mediator from another profession. The mediators need not be present simultaneously, but there would be one mediator who would be in charge of the process and the other mediator would report to them. They would work in a more collaborative

model.

It is not so that two mediators are restrictive and difficult for the parties to accept. In our experience, co-mediators have often caused a settlement of the matter. Parties have welcomed different approaches and different expertise.

77. QUESTION 36

Mediation should both be privately and publicly managed and funded. It should not be mutually exclusive.

78. QUESTION 37

Family mediators should be lawyers and/or mental health experts and/or accountants who have followed acknowledged courses and qualified as mediators and who have had at least 3 years' experience in the field of mediation.

79. QUESTION 38

Both government and private sectors should be responsible to provide mediation services to the public.

80. QUESTION 54 - PAGE 199

Mandatory mediation may have difficult outcomes in that a party who is obliged to mediate may not participate and obstruct the process. However, we are of the view that there should at least be a mandatory obligation upon parties to consider mediation and attend one meeting with a mediator. If it is clear that mediation won't be able to proceed with the parties, then a certificate of outcome could be furnished.

81. QUESTION 55

Mediation should be both privately and publicly managed and funded.

82. QUESTION 56

It is very difficult to facilitate or direct in these disputes. The practical experience has also been that sometimes facilitators are not properly qualified to make these directives and that it has negative consequences, to the detriment of children. The facilitator should be someone of great experience and preferably a lawyer, as the outcome of facilitation should be as close as possible to an eventual court order. The lawyer may call in expert advice from a mental health expert, if required. A facilitation in these situations should only take place in the extreme exceptional cases and not as a matter of course. In practice, facilitation has also developed into something of a litigious adversarial process, which has proved to be very costly. Often, both parties have lawyers advising them on the sides whilst the facilitation process is ongoing and they have to additionally pay the fees of the facilitator. The process has caused concerns amongst practitioners and has in certain circumstances had extended and damaging effects. It has also caused friction between parties, particularly where the mediator and facilitator are the same person. Bias has been experienced in these matters. It is also extremely difficult to remove a facilitator, even if that facilitator has not behaved administratively in the manner he or she should. It is very costly to launch court application to remove a facilitator. Therefore, utmost care and caution should be exercised in these matters. That is not to say that facilitation does not work in certain matters, but it should be the extreme matters.

83. QUESTION 57

Yes, a national regulatory body must be established.

84. QUESTION 58

An integrated approach taking into account the needs of the family must be used. An integrated approach specific to the needs of South Africa is to be adopted and will be achieved over time.

The model should be conciliatory with procedural fairness, a certain amount of confidentiality (other than in regard to facts exchanged or documents exchanged) and so on.

85. QUESTION 59 – PAGE 199

The fee should not be pegged.

86. QUESTION 60

Family Advocates should mediate and they are mediating at present. It does cause conflict in their respective roles.

87. QUESTION 61 – PAGE 200

No, mediation should be involved in all family/relational disputes/matters. The fact that the children are no longer minor does not mean that disputes between the parents do not impact or influence the children. By the parties participating in the mediation process they will obtain a greater understanding of the benefits of mediation and how to deal with their children and/or each other going forward in a healthier manner.

88. QUESTION 62

The parties can consider arbitration and/or court applications and/or round-table conferences through attorneys.

89. QUESTION 63

All issues could be mediated. However, issues of guardianship, relocation, change in care and residency of children should not be mediated.

90. QUESTION 64

No. It would be unreasonable to assume that the State, in its current financial situation, is able to solely fund mediation.

91. QUESTION 65

Yes.

92. QUESTION 66

This would of course be so in an ideal state but we are concerned about our lack of resources.

93. QUESTION 67

No. Mediation should be extended.

94. QUESTION 68

Vide the comments above in regard to the qualifications for mediators.

People who are suitably qualified and correctly trained should be allowed to mediate in divorce matters.

95. QUESTION 69

In certain circumstances only specific issues require to be mediated and in other circumstances the whole matter. There should always be a possibility to mediate holistically. However, it is difficult and not appropriate to mediate issues such as a change in primary care, guardianship issues, and relocation in the event of a principled dispute.

The advantages of holistic mediation are that it retains the dignity of the parties, redresses financial and/or emotional imbalances, and is more expeditious and inexpensive. Mediation not only brings about a resolution of the dispute at hand but also can assist the parties in how to relate to each other on post-dispute matters.

This is of particular importance where there are children and ongoing mutual-interest business ventures and financial enmeshments. The disadvantage of holistic mediation is that it may require more than one mediator to assist to bring about a resolution.

96. QUESTION 70

No this is able to be legislated.

97. QUESTION 71

The parties and whomever the mediator and the parties agree or the mediator is of the opinion should attend the sessions.

98. QUESTION 72

The mediators could submit a questionnaire to the parties before mediation. The replies could be regarded as confidential.

99. QUESTION 73

We refer to our responses above in this regard.

100. QUESTION 74

Ideally these should not be mediated. Confidentiality would of course be an issue, together with whatever practical and legal measures could be taken.

101. QUESTION 75

All matters arising from divorce or a family breakdown may be arbitrated. However, see our response to Question 67 above.

102. QUESTION 76

Trained and accredited Family Law arbitrators.

A great deal of work in developing Arbitration in Family Law has already been done by members of the LSSA Family Law Committee. We refer you to the draft Rules and documentation relating to arbitration, annexed hereto and marked Annexures “B” to “H”.

103. QUESTION 77

No. Arbitration is a hybrid between litigation and other forms of ADR.

104. QUESTION 78

Family arbitration should be voluntary.

105. QUESTION 79

Vide the rule. Arbitration should comply with substantive law as well as procedural law.

106. QUESTION 80

Yes, it is very useful.

107. QUESTION 81

The court’s role in the family arbitration process should be to:

- (a) confirm, correct, vacate awards (or a part thereof);
- (b) review regarding procedural and jurisdictional issues;
- (c) sit as a Court of appeal;
- (d) review on manifest errors of law which will be contrary to public policy.

108. QUESTION 82

Family law arbitration can be regulated by the Arbitration Act, but there should be a separate set of rules. Again we refer to the enclosures.

109. QUESTION 83 - PAGE 221

Yes.

110. QUESTION 84

Expert opinions would have to be obtained in this regard.

111. QUESTION 85 – PAGE 228

Vide the responses above.

112. QUESTION 86

Vide the responses above.

113. QUESTION 87

A court may eventually make an adverse costs order in these circumstances.

114. QUESTION 88

The Short Process Courts and Mediation Act ought to be reviewed in line with existing and future legislation relating to ADR.

115. QUESTION 90 - PAGE 243

No. See reply to Question 56.

116. QUESTION 91

Yes, it is problematic in many respects. It can work in certain extreme cases.

117. QUESTION 92

This should be a lawyer who is a senior practitioner and who will be able to give directives as close as possible to a court outcome.

118. QUESTION 93

It is very difficult to measure the success or failure of facilitation. Firstly, many people have costs issues in challenging the process. Secondly, it cannot be measured by facilitators who may have resigned or be removed, as many facilitators refuse to resign or to be removed and parties do not have the money to pursue a court order in this regard.

There should be a survey of participants or perhaps of practitioners who have dealt with the fallout from facilitation. In many instances, this fallout has severely affected the best interests of children.

119. QUESTION 94

The process should be fair, transparent, and open, the procedure should be clear to the parties, both parties should be heard and administrative law should apply to the process.

120. QUESTION 95

Certainly disputes relating to purely financial matters would be more amenable to facilitation. Children's issues may be facilitated, but there would most probably have to be input from an expert in this regard. Particularly if the facilitator is a lawyer, expert recommendations and/or advice may have to be obtained. Facilitation should be distinguished from arbitration. Our submission is that these issues should rather be arbitrated.

121. QUESTION 96

Yes, certain limitations should be imposed on facilitators as to exactly what their mandate is. These would be included in a court order, either by order of court or as agreed by the parties.

122. QUESTION 97

The advantage is that a matter may be speedily resolved without incurring substantial costs. The disadvantages are that this sometimes does not happen often. The procedure is often lengthy and drawn out. Parties often appoint lawyers in any event, which means that costs escalate as the facilitators fees also have to be paid. If the facilitator is not a properly qualified person or is not able to fulfil his or her duties, the procedure is very problematic and injustice can result. Parties do not have resources to overturn an incorrect decision.

123. QUESTION 98

No. Guardianship issues, issues of primary care and residency and relocation matters should not be facilitated.

124. QUESTION 99

It depends on what the parties would agree to. In certain circumstances, facilitation may work pending the outcome of a matter as well as post-divorce.

125. QUESTION 100 - PAGE 244

Yes. What should be looked at is how facilitators should be removed and how their decisions should be reviewed. Often, there are not notes kept and it is very difficult to remove them administratively. It is also an extremely costly exercise for the parties. The proceedings are not recorded. Parties have different versions of the proceedings. A court should rather hear the matter de novo and should not do purely administrative review.

126. QUESTION 101 - PAGE 246

We think that it should only be compulsory for parents who are involved in custody and access disputes. However, it would obviously be recommended for all parents to attend.

127. QUESTION 102

In an ideal world this would be state organised. It should perhaps be organised through the Family Advocate's office. However, in reality, the Family Advocates' offices are overburdened, as is the Department of Social Development. It should therefore be perhaps private practitioners who run an accredited programme and who have special rates, possibly on a sliding scale.

128. QUESTION 103

If it is not state funded, then it should take place at the private person's offices.

129. QUESTION 104

It should be constituted by expert mental health persons. Maybe a lawyer should also give presentations on the legal situation as many parents are not aware of the law, nor of its effects.

CHAPTER 4: STRUCTURE, FACILITIES AND PERSONNEL**130. QUESTION 1 - PAGE 259**

No, this is not advisable. Divorce orders and issues flowing therefrom as well as amendments in regard thereto should be dealt with only by courts which are empowered to hear divorce matters.

131. QUESTION 2 – PAGE 261

No. Applications should remain in the High Court.

132. QUESTION 3 – PAGE 262

There should be a dedicated stream for family law matters. Magistrates and/or Judges who hear these matters should be specifically trained with specific experience and interest in these matters. The procedure needs to be reworked completely. There also should be proper service delivery resourced. There should be proper training of officers of court as well as of court staff. There should be evaluation of staff, from time to time.

133. QUESTION 4 - PAGE 265

Yes, the courts, as upper guardian of children, should be tasked with this.

134. QUESTION 5

Yes, provided that the High Court jurisdiction remains and that it stretches from the High Court down to Magistrates' Courts.

135. QUESTION 6

Obviously expense is an issue in regard to enforcement through the courts. These matters however usually only end up in court after a concerted approach has been followed, using ADR as well, in order to resolve the issues. One would require the judicial officer to be trained and to be aware of the law regarding family law matters.

Further challenges are delays in getting hearing dates and sometimes a lack of specialised Judges and magistrates.

136. QUESTION 7

Absolutely. In fact, this is essential. Alternatively, Judges should rotate through a family court stream.

137. QUESTION 8

Yes, provided that the magistrates and Judges who sit in these matter are specialised and skilled in family law.

138. QUESTION 9

Yes, in our experience lawyers are also considerate of the impact of protracted proceedings on children. It is often where there is not specialisation that these issues are overlooked. However, very often the system causes delays and protracted proceedings.

139. QUESTION 10 - PAGE 282

Unfortunately the Family Advocates' office is overstretched and poorly resourced. They do a magnificent job with the resources they have available.

There should be two different arms of the Family Advocate's office, one to do mediation and one to report. There is also the issues of the central authority and other roles the Family Advocate play. As a matter of necessity, these roles are conflictual and have to be resolved. The Family Advocate's office would have to be fully resourced in order to do proper mediation.

140. QUESTION 11

They endeavour to do so. They are however restricted by their case load and a lack of resources.

141. QUESTION 12

See above.

142. QUESTION 13

Ideally there should be, but with the lack of resources this may not be possible. Again, a family justice centre may work, but one would have to look carefully at who should populate such an office, what its purpose would be, what role it would play, etc. Again, resources present a huge problem, as well as training.

143. QUESTION 17 - PAGE 299

Yes

144. QUESTION 18

There should be requirements for who should serve on such structures, how the procedure should work and how the outcome should be recorded. One would also have to give thought to the effect the outcome would have and where the parties would be bound to it.

145. QUESTION 19 – PAGE 300

Private mediation should be regulated by statute.

146. QUESTION 20

At present issues are referred to CBOs and NGOs and there is cross-pollination across the board. We do not think that this should be regulated.

147. QUESTION 21 – PAGE 302

Legal Aid South Africa could fund the resolution of family disputes, such as mediation. This is restricted.

148. QUESTION 22 – PAGE 325

There should ideally be an integrated family justice system.

149. QUESTION 23

Ideally this should take place, but in the past it has proved difficult from a resource and facility perspective.

150. QUESTION 24

No. It could be improved. If the mediation pilot projects are successful, then this situation will be improved.

Judges and/or magistrates may recommend mediation as the matter progresses and is case-managed.

151. QUESTION 25

Vide the responses above.

152. QUESTION 26

One should guard against over-regulating the family system. The options are available. In any event, with the Mediation Act, many of the issues would be resolved.

153. QUESTION 27

Care should be taken not to allow improperly qualified mediators to mediate. The damage that is done in these circumstances is often irreversible.

154. QUESTION 28

See above.

155. GENERAL – LIFE RELATIONSHIPS

Although not falling strictly within the ambit of this investigation, the LSSA believes that the South African Law Reform Commission should urgently consider the issue of life relationships in regard to draft legislation.

The LSSA had varied and extensive criticism of the Domestic Relationships Bill, which has since been taken off the table.

Presently, thousands of couples do not enter into marriage or into a civil union in terms of the Act, but live in life relationships, without any legal consequences during and after termination of these relationships.

Registration would be difficult of these relationships. In most of these cases, one of the partners refuses to have a formal registration, because consequences would flow from the relationship. This disadvantages the most poverty stricken and most disadvantaged, particularly women and children.

Consideration should perhaps be given to automatic consequences to such a relationship including, but not limited to, maintenance and proprietary claims, and an award (similar to a Section 7(3) award) in the discretion of a judicial officer.

The *Volks NO v Robinson* 2005 5 BCLR 446 CC judgment still stands, which makes it very difficult for a woman whose partner dies to claim maintenance from his estate. This is strangely enough contrary to same sex relationships and the case law which developed in this regard. However, the case law pre-dates the Civil Union Act and there may well be a similar argument to the *Volks v Robinson* argument that, where a same sex partner has elected not to get married or to enter into a civil union, maintenance claims would also not be competent because of the choice argument. Again, this is problematic in practice.

PROPOSED AMENDMENT TO RULE 43 OF THE UNIFORM RULES OF COURT AND RULE 58 OF THE MAGISTRATES' COURTS RULES

1. Although it is true that Rule 43 of the Uniform Rules of Court provides for interim relief in divorce matters, it has become one of the most important applications pending the outcome of divorce proceedings.
2. In opposed matters (in the Western Cape High Court for example) a trial date is allocated approximately two to three years after the close of pleadings. Often matters of principle remain in dispute despite every attempt to settle the matter, such as maintenance for a wife until her death or remarriage; whether a trust should be set aside; complex financial questions; issues relating to the best interests of the children. Divorces frequently now also deals with international law and international questions due to the worldwide migration of people. Attorneys often have to grapple with complex questions of international law and commercial law relating to family law matters.
3. The outcome of a Rule 43 application in these matters, has in practice often determined the eventual outcome of the case. This is so by reason of the ability of the respective spouses to function financially in the interim, pending the outcome of divorce proceedings and to litigate at the same level as the other spouse during the process. A parent's constitutional right to litigate at similar levels is established. In other words, if the Rule 43 application is not done properly, it can and will in all likelihood affect the outcome of the divorce.
4. An inappropriate Rule 43 order, or a too onerous one, or one that simply does not enable a party and the family to carry on with the proceedings in a reasonable manner, often puts an end to the matter or affects the matter inequitably, with the result that settlements are reached or orders are granted which do not serve the much needed equity nor justice. This has often caused parties to question the fairness of the process and the Rules and procedures available to them.
5. Unfortunately, Judges are often simply put in an impossible situation as they are unable to judge factual disputes which arise from the papers. Often factual versions or financial versions are diametrically opposed. In terms of the current procedure, these disputes remain untested as there is no right to reply, or the automatic right to lead oral evidence, nor a right to subpoena.
6. It is often impossible for the presiding Judge to make a balanced and informed judgment and to have a proper insight into the factual situation. Parties sometimes abuse the system by creating factual disputes on the papers which may in the long term affect their credibility, but in the short term give them results and affect the other party detrimentally. A balance has to be achieved.
7. We would however not wish to burden the court with a prolixity of papers, and are supportive of the fact that these applications should not be voluminous.

However, in view of our experience that injustice does frequently result in the finalisation of the matter due to these orders, we are strongly of the opinion that the Rules should be amended to accommodate a process for reply.

8. In view of the long delays before trial dates are allocated, injustice may result, and often does, particularly in view of the fact that no automatic Headline inflation increases are linked to the cash orders. The onus would be on a party wishing to amend the order to base this on a substantial change in circumstances.
9. There should therefore be scope within these orders to grant automatic inflation linked increases, which would apply on the anniversary date of the Rule 43 order, without parties having to approach a court in this regard. Of course it would always be open to the other party to approach a court for reduction or to prevent the application of the inflation linked increase in view of his or her changed circumstances.
10. We therefore recommend:
 - 10.1 A Rule 43 application should be brought and an opposing affidavit should be filed within 10 days of service of such application. A replying affidavit to the opposing affidavit should be filed within 5 days after receipt of opposing affidavit. The parties should be able to set the matter down for hearing in the third division of High Court on 10 days notice to the party thereafter.
 - 10.2 Other than in paragraph 10.1, the existing case law should apply to the scope and the format of these applications.
 - 10.3 The court should have the ability to, in its discretion, request further documentary information and/or affidavits to clarify issues.
 - 10.4 These applications are urgent in their nature, because they often deal with minor children and the ability to care for minor children properly in the interim, escape from an abusive relationship or a home situation that traumatizes the children pending the outcome of divorce proceedings, and generally they enable parties to be in a position where they can finalize the matter more speedily.
 - 10.5 The application should therefore be set down, so that they may be expeditiously dealt with.
 - 10.6 Kindly note the Rules should deal with interim parental rights and responsibilities and interim contact in regard to a child and not refer to custody and access.

11. COSTS

- 11.1 The current recommended costs amount to an hour of an attorneys' time be charged out on tariff.

- 11.2 However the practicality, in relation to these applications is that it often takes a number of consultations with clients to complete the application fully, particularly in the more complex matters. The clients have to complete a schedule of expenses, which often they are not properly equipped to do, or in regard to which they simply do not have the knowledge and have to do some homework. The financial position of the parties and their historical expenditure level must be explained. Documents have to be perused.
- Unfortunately, it often takes a number of hours to complete such an application. When these applications are heard, time is again spent in an effort to settle the application before it is heard and eventually argue it. In practice it is only argued when settlement fails. This means that there are a number of attendances, consultations, drafting and re-drafting, correspondence, and round table discussions and so on.
- 11.3 Often the Rule 43 application is also utilized to endeavour to settle the matter overall (the cost relating purely to overall settlement can of course be charged separately), but if this fails, the negotiations endeavouring to settle the Rule 43 application and the costs attendant thereupon, presently, cannot be charged for.
- 11.4 Unfortunately, the cost structure in regard to a Rule 43 application simply does not take into account the reality of the application, the far reaching impact it has on the lives of the parties pending the outcome of divorce proceedings in regard to all areas of their future conduct and the best interests of the children, and the parties' ability to participate in a matter on a constitutionally accepted basis.
- 11.5 Therefore, it is our strong recommendation that the ordinary tariff should apply to these applications and that the costs should not be limited. Attorneys should also be allowed to contract with their clients regarding their reasonable fees for work done.
- 11.6 It is worth mentioning that counsel is permitted to charge their normal tariff for consultations and drafting of the papers. They are however bound to charge a set tariff for the Court appearance. The reason for the discrepancy regarding the different tariff restrictions placed on counsel and on attorneys is unclear.
- 11.7 We are of the view that the true effect of the Rule, as it stands, is that it denies the parties access to justice, as attorneys can simply not afford to, or justify, spending many hours of work and appear in Court for the payment of only R300 (undefended) or R350 (defended).
12. **PLEASE NOTE THAT, WHERE REFERENCE IS MADE TO RULE 43 APPLICATIONS, IT ALSO BY IMPLICATION REFERS TO THE EQUIVALENT MAGISTRATE'S COURT RULE 58.**

BAR PROPOSAL (ADU. J. ANDERSON).

PROPOSED AMENDMENTS TO RULE 43 OF THE UNIFORM RULES OF COURT:

Introduction

1. Rule 43 provides interim relief to a spouse in divorce matters. The rule prescribes a procedure that is aimed at providing an inexpensive and expeditious hearing of typical disputes that must be resolved *pendente lite*. As such the rule directs that an applicant must file a sworn statement in the nature of a declaration and the respondent must file a sworn reply in the nature of a plea. A prolixity of papers is frowned upon and there is case law making it evident that applications can be dismissed or parties mulcted in costs where the papers are too voluminous.
2. In practise, however, this has not stopped many litigants from filing affidavits that are lengthy and filled with averments which would not be found in a declaration or plea. In addition, a practice has evolved where many annexures are used, which would not be annexed to pleadings. This is so as parties are attempting to persuade the court to make orders in his/her favour. Understandably so, as the rule 43 application has become one of the most important applications that a party in a divorce action can bring.
3. In opposed matters, particularly in the Western Cape High Court, a trial date is allocated approximately 2 years after the date of close of pleadings. Often,

matters of principle remain in dispute, despite every attempt to settle the matter, such as whether a wife is entitled to maintenance after the divorce until her death or remarriage or whether a trust should be set aside. There are often complex financial questions relating to the determination of an accrual claim and issues relating to the best interests of the children that cannot be resolved through settlement negotiations. In divorce actions our courts must also now frequently deal with international law and international questions due to the worldwide migration of people. Attorneys and advocates often have to battle with complex questions of international law and commercial law relating to family law matters.

4. The outcome of a rule 43 application in these matters, has in practice often determined the eventual outcome of the case. This is so by reason of the ability of the respective spouses to function financially in the interim pending the outcome of divorce proceedings and to litigate at the same level as the other spouse during the process. A party's constitutional right to litigate at similar levels as his/her spouse is established in our law. In addition rule 43 orders can create a status quo in respect of children's residency, care and contact arrangements.
5. An inappropriate rule 43 order or a rule 43 order which is too onerous or one that simply does not enable a party and the family to carry on with the proceedings in a reasonable manner, often puts an end to the matter or

affects the matter inequitably with the result that settlement cannot be reached or settlement is reached and orders granted which do not serve the principles of equity and justice. This has often caused parties to question the fairness of the process and the rules and procedures available to them and puts the administration of justice in question in the public eye.

No right to reply

6. Rule 43 does not allow a party the right of reply. Subrule (5) determines that the court may hear such evidence as it considers necessary and may dismiss the application or make such order as it thinks fit to ensure a just and expeditious decision. In practice our courts are loath to allow supplementary affidavits to be filed and any further affidavit containing averments in reply is not allowed. Unfortunately, in rule 43 applications judges are often put in an impossible situation as they are unable to judge factual disputes which arise from the papers. Often factual versions or financial versions are diametrically opposed. In terms of the current procedure these disputes remain untested as there is no right to reply, no automatic right to lead oral evidence and no right to subpoena. It is often impossible for the presiding judge to make a balanced and informed judgment and to have a proper insight into the factual situation. Parties sometimes abuse the system by creating artificial factual disputes on the papers, which may in the long term affect their credibility but in the short term gives them results and affects the other party detrimentally. A balance

has to be achieved.

7. Legal practitioners would not wish to burden a court with a prolixity of papers and in general are supportive of the view that the application should not be voluminous. In view, however, that injustice does frequently result in the finalisation of divorce matters due to these orders, we are strongly of the opinion that the rule should be amended to accommodate a process for reply.
8. It is thus recommended that when a rule 43 application is brought an opposing affidavit should be filed within 10 days of service of the application. A replying affidavit to the opposing affidavit should be filed within 5 days after receipt of the opposing affidavit.
9. Other than in exceptional circumstances the existing case law should apply to the scope and the format of the applications. We would suggest that the rule should reiterate that the nature of the founding application should be in the form of a sworn statement and that of the opposing affidavit should be in the nature of a plea, which must be qualified on the basis that more information may be placed before the court in exceptional circumstances. The rule should specify that any reply should only deal with new matter raised by the respondent in the opposing affidavit.
10. In addition the rule should be amended to include a mero motu right for the

court to, in its discretion, request further documentary information and/or affidavits to clarify issues, should it so wish. The rule should also allow parties to obtain information through the use of subpoenas. As rule 43 applications are often instituted and disposed of before pleadings in the divorce action are closed, parties are "blind" in that they do not have access to information they could otherwise obtain in discovery.

Set down of rule 43 applications

11. At present rule 43 applications are set down by the registrar as soon as possible after the service and filing of the sworn reply. It is done on application to the registrar by the applicant (or sometimes the respondent) and the registrar must give the parties ten days' notice, unless the respondent is in default.
12. Often the fact that the matter should be set down by the registrar causes tremendous delays in the allocation of a date and a further delay is caused as the registrar's notice of set down does not necessarily reach the parties more than 10 days before the matter has been set down. In this regard we would suggest that the rules should be amended to exclude the registrar from this process. The parties should be able to set the matter down for hearing in the third division of the High Court on 10 days' notice to the other party after expiry of the period within which the last affidavit must be filed.

13. In practice it takes between six weeks and eight weeks (In the Western Cape Division) after the rule 43 application has been launched for it to be heard. Yet these applications are urgent in its nature because it often deals with minor children and the ability to care for minor children properly in the interim. Lack of financial resources or a situation which compels children to remain in an acrimonious atmosphere in their own homes are detrimental to children. These applications are often necessary as a spouse has been left without financial resources, yet despite the urgent nature of the applications, an applicant must accept a six to eight week delay.
14. The rules should enable parties to finalise the matter more speedily. This would assist where the parties are able to set the matter down on 5 days' notice to the other party without recourse to the registrar. It is possible for the various High Courts to deal with the manner in which rule 43 applications should be set down through the Judge President's practice notes.

Variations of rule 43 orders

15. Rule 43(6) provides that the court may, on the same procedure, vary its decision in the event of a material change taking place in the circumstances of either party or a child, or the contribution towards costs proving inadequate.
16. In view of the long delays before trial dates are allocated an injustice may

result, and often does, as rule 43 orders can only be varied in the event of a material change in circumstances. This is particularly so in view of the fact that no automatic headline inflation increases are linked to the cash orders. The onus would be on a party wishing to amend the order to base this on a substantial change in circumstances. There should therefore be scope within these orders to grant automatic inflation linked increases which would apply on the anniversary date of the rule 43 order without parties having to approach a court in this regard. Of course it would always be open to the other party to approach a court for reduction or to prevent the application of the inflation linked increase in view of his or her changed circumstances. In addition there should be scope to allow a litigant who can establish that the other party has made material non-disclosures or misstated facts to revisit the order without there having to be a material change in either their circumstances. This is of particular importance as the order cannot be reviewed or appealed.

The wording of rule 43(1)(c) and (d)

17. Rule 43(1)(c) and (d) still refer to "custody" and "access", which terminology is now outdated in terms of the provisions of the Children's Act 38 of 2005. The rule should thus be amended to reflect that the disputes to be dealt with include not custody and access disputes but disputes arising from interim residency and/or interim contact disputes. As the definition of "care" in the Children's Act is very wide and the ambit of a care dispute will not necessarily

be appropriate in a rule 43 application, we suggest that the term "residency" be used.

Limitation on fees in terms of rule 43(7) and (8)

18. The current recommended costs in the tariff, even after increases, amounts to less than an hour of an attorney or counsel's time. The practicality, however, in relation to these applications are that it often takes a number of consultations with clients to complete the application, particularly in the more complex matters. In addition, the clients have to complete a schedule of expenses, which they are not equipped to do in most instances or in regard to which they simply do not have the knowledge and have to do homework. Clients must explain their financial positions as well as that of the other spouse and their historical expenditure level for applications in terms of rule 43(1)(a) and (b). Documents have to be perused and it often (unfortunately) takes a number of hours to complete such an application.
19. When these applications are heard, time is again spent in an effort to endeavour to settle the application before it is heard and eventually argued. In practice these applications are usually argued in the afternoon but may be argued as early as 11h30 (in the Western Cape Division) which may require counsel's presence in court for long periods of time, yet counsel is not able to charge for waiting time. In practice, if settlement fails, the application must be

argued. This means that there are a number of attendances, consultations, drafting and redrafting, correspondence and roundtable discussions and so on that result from a rule 43 application.

20. Often the rule 43 application is utilised to endeavour to settle the divorce action overall. Although the cost relating to overall settlement can be charged separately, if overall settlement negotiations fail and the negotiations regarding the settlement of the rule 43 application fail, then the costs attended thereupon can at present not be charged.
21. Unfortunately, the cost structure in regard to a rule 43 application simply does not take into account the reality of the situation, the far-reaching impact the application has on the lives of the parties pending the outcome of divorce proceedings. Rule 43 has an impact in regard to all areas of the parties' future conduct, the best interests of the children as well as the parties' abilities to participate in the matter on a constitutionally accepted basis.
22. In addition, litigants in the High Court are placed at a disadvantage by the rule 43 tariffs as a litigant in the Regional Court who wishes to claim interim relief is not limited as to the fees that can be charged by an attorney or counsel. Often both an attorney and counsel would be briefed in a similar application in the Regional Court. In addition it would be unfair to compel all litigants to make use of the Regional Court in circumstances where the Regional Courts do not

always have jurisdiction with regards to all the issues in the divorce action, such as whether a trust should be set aside, or is not equipped to deal with extensive litigation where trials run over many weeks in complex matters.

23. It is therefore our strong recommendation that the ordinary tariff should apply to these applications and that the costs should not be limited in terms of the rule.

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 is out of sync with demands of modern times. There is 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.
- It does not exclude mediation.

- Litigation is expensive and protracted and has cumbersome procedural requirements. I will cut costs of long and expensive trials.
 - Judges and Magistrates are usually not specialized in handling intricate and complex family law issues.
 - The courts are overcrowded and interest in family law matters is lacking.
 - Alternate dispute resolution has grown... (parties have greater autonomy, it reduces the state's intrusion in private lives of family)
- 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 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 "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

M de Jong:- Arbitration of family separation issues is a useful adjunct to mediation and the court process.

taken to introduce alternative dispute resolution mechanisms, preferably court - 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 for speedy resolution.
- Advantages –
 - o Selection of person whom they wish to Arbitrate and continuity of the Arbitrator.
 - o An adjudicator with experience in expertise in family law matters.
 - o Flexibility of the process.
 - o Control of the proceedings by deciding when, where and how issues are dealt with and pacing the proceedings.
 - o Hearings can be scheduled at any time or date or venue.
 - o Procedure can be determined.
 - o It is a private and confidential process.
 - o It can speed up the process. It can be informal.
 - o It can deal with discreet issues.
 - o Less need for interim proceedings and updating of evaluations and leakage of financial resources.
 - o Less costly in the long term.
- Should the appeal process constitute a *de novo* review or should appeal in the view only be possible on narrow issues, excessive review may jeopardise the viability and autonomy of the Arbitration process making it vulnerable to second guessing whilst laxity in the view may lead to constitutional challenges. If it were to be done *de novo*, this would mean that things would be done twice at enormous cost.

It was therefore proposed that there should be limited review in appeal procedures based on :-

- o No jurisdiction

M de Jong:- Arbitration of family separation issues is a useful adjunct to mediation and the court process.

- Serious irregularity which would relate to process violations for example.
- Legal error, contrary to public policy.

Sir James Munby, the President of the Family Division of England, stated that the Judge is a watchdog but not a bloodhound or a ferret.

- 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.
- The question has also been raised whether the Arbitration Act should be amended to allow matrimonial Arbitrations and that the Rules of such Arbitrations be incorporated in a separate Act. The special nature of family law disputes require special policy approaches.
- 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 preferred 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 family 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 of 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 the 1979 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.

References :-

M de Jong:- Arbitration of family separation issues is a useful adjunct to mediation and the court process.

FAMILY LAW ARBITRATION IN SOUTH AFRICA

1. The arbitrator will decide the substance of the dispute within the law of South Africa
2. The parties may be invited to stay the court proceedings pending the outcome of the arbitration
3. The terms of a proposed consent order will be drafted to reflect the decision and directions contained in the arbitrator's award. The parties will apply for an order to court to reflect the award by consent. It would only be in the rarest of cases that it will be appropriate for a Judge not to approve the order. The draft orders would obviously be in terms of the South African Law and the available statutory relief.
4. Privacy and confidentiality of the award may be maintained.

Scope of Family Law Arbitration Scheme

- **Financial –**
Does not cover
 - Status of the relationship
 - Insolvency
 - Third party intervention unless by agreement
- **Children -**
Does not cover
 - Abduction
 - Adoption
 - Surrogacy
 - Relocation to non-Hague countries

Applicable law

- Substantive law
- South African law
- Welfare of the child

Appointment of arbitrator

- Engagement form
 - Retainer
 - Communication with parties
 - Preliminary meeting
 - Procedure and hearing

Managing the arbitration

- Main options for arbitration
 - Documents only
- Hearing
- General form of civil litigation process
 - The alternative procedure
- Interim applications available

Short-cuts for saving time

- Openings / skeletons / closings in writing
- Witness statements

Decision Making

- Identifying issues
- Dealing with points of law
- Evaluating evidence
- Writing reasons
- The order must be logical
- Main issues before lesser issues
- Decisive issues before consequential issues

The Award

- In writing
- Signed by arbitrator
- Containing reasons
- Stating seat of arbitration
- Stating date of award

Scheme an award / determination

- Jurisdiction
- Dispute / issue
- Procedure
- Issues
- Evidence
- Analysis / reasons
- Operative award
- Formalities

Why now?

- Resolution of family disputes at crisis point
- Courts cannot cope with the volume of cases
- Government has attempted to divert suitable cases away from the court system to ARB
- Judicial support and encouragement
- Confidentiality

Judicial encouragement elsewhere of arbitration

- Sir Hugh Bennett

“In my estimation the advantages so outweigh what I said, very inaccurately, to be disadvantages, that I confidently predict that within the near future family finance arbitration will compliment the court system just as private medicine compliments the National Health Service.”

Perceived problems

- Appeals
- Grounds
 - Lack of substantive jurisdiction
 - Serious irregularity and substantial injustice as a consequence
- Appeal on point of law, not fact

Benefits for your clients

- Parties select decision maker and continuity of decision maker
- Flexibility
- Control and pacing
- Confidentiality
- Informality
- Possibility of dealing with discreet issues
- Speed

ARBITRATION RULES

1. Introduction

- 1.1 The family law arbitration scheme ("the scheme") is a scheme under which financial or property disputes with a family background may be resolved by arbitration.
- 1.2 The scheme is administered and run by the Institute of Family Law Arbitrators (South Africa) (IFLA (SA)) and assisted by the Family Law Committee of the Law Society of South Africa.
- 1.3 Disputes referred to the scheme will be arbitrated in accordance with :-
 - (a) The provisions of the Arbitration Act 42 of 1965 ("the Act"), both mandatory and non-mandatory; **[NOTE: Hopefully to be amended to include family law arbitration]**
 - (b) These rules to the extent that they exclude, replace or modify the non-mandatory provisions of the Act; and
 - (c) The agreement between the parties to the extent that that excludes, replaces or modifies the non-mandatory provisions of the Act, or these rules; except that the parties may not agree to exclude, replace or modify Section 40 of the Act (applicable law).
- 1.4 The parties will not amend or modify these rules or any procedure under them after the appointment of an arbitrator unless the arbitrator agrees to such amendment or modification; and may not amend or modify Section 40 (applicable law) in any event.
- 1.5 Expressions used in these rules which are also used in the Act have the same meaning as they do in the Act and any reference to a section number means the section of the Act so numbered, unless otherwise indicated.

2. Scope of the scheme

- 2.1 The scheme covers financial and property disputes arising from :-
 - (a) Civil marriages entered into in terms of the Marriage Act No 25 of 1961, the Matrimonial Property Act 88 of 1984 and its breakdown (including financial provision on divorce, breakdown, separation or nullity) in terms of *inter alia* but not limited to the Divorce Act 7 of 1979
 - (b) Religious marriages and its breakdown, including but not limited to financial provision, on divorce, separation, or breakdown
 - (c) Relationships in terms of the Civil Union Act 17 of 2006 as amended.
 - (d) Universal partnerships, cohabitation and the ending of cohabitation

- (e) Child maintenance
- (f) Personal maintenance
- (g) Provision for dependants from the estate of a deceased.
- (h) Whether assets and/or interests held by/in a Trust(s) in which a spouse or a partner may have a direct or indirect interest, should be taken into account in the determination of the matter being arbitrated.
- (i) A spouse or partner's direct and indirect interest in a trust
- (j) Customary law marriages
- (k) The best interests of children

2.2 The scheme covers (but is not limited to) claims which would fall within *inter alia* the ambit of the following statutes:

- (a) Children's Act 38 of 2005
- (b) Civil Union Act 17 of 2006
- (c) Divorce Act 70 of 1979
- (d) Maintenance Act 99 of 1998
- (e) Maintenance of Surviving Spouses Act 27 of 1990
- (f) Matrimonial Property Act 88 of 1984
- (g) Reciprocal Enforcement of Maintenance Orders Act 80 of 1963 and Act 6 of 1989
- (h) Recognition of Customary Marriages Act 120 of 1998
- (i) Reform of Customary Law of Succession and Regulations of Related Matters Act 11 of 2009
- (j) Arbitration Act 42 of 1965 (hereinafter called the "Arbitration Act")
- (k) Trust Property Control Act....
- (l) Marriage Act 25 of 1961

2.3 This scheme does not apply to disputes directly concerning:

- (a) The liberty of individuals
- (b) The status of individuals or of their relationships with each other and the family
- (c) The parental rights and responsibilities, care contact guardianship in regard to children
- (d) Bankruptcy or insolvency
- (e) Any person or organisation which is not a party to the arbitration

3. Applicable Law

The arbitrator will decide the substance of the dispute only in accordance with the law of South Africa. The arbitrator may have regard to and admit evidence of the law of another country insofar as and in the same way as a judge exercising the jurisdiction of the High Court would do so.

4. Commencement of arbitration

- 4.1 The parties may refer a dispute for arbitration under the scheme by concluding an agreement to arbitrate in form ARB1, signed by both parties or their legal representatives, and submitting it to IFLA (SA).
- 4.2 IFLA (SA) will set up a panel of arbitrators who are experienced family law professionals are members of IFLA (SA) and have received specific training in arbitrating family disputes ("the panel").
- 4.3 The parties may agree to nominate a particular arbitrator from the Panel (as indicated on Form ARB1); and may, if they are so agreed, approach a particular arbitrator directly. In either case, IFLA (SA) will initially offer the appointment to the agreed arbitrator. If the appointment is not accepted by their first choice of arbitrator the parties may, if they agree, make a second or subsequent choice. In all other cases IFLA (SA) will offer the appointment to a sole arbitrator from the Panel whom it considers appropriate having regard to the nature of the dispute; any expression by the parties of preferred geographical location, area of experience or expertise of the arbitrator; and any other relevant circumstances.
- 4.4 If, after considering Form ARB1 and any representations from the parties, either IFLA (SA) or the arbitrator considers that the dispute is not suitable for arbitration under the scheme, then the parties will be so advised and their reference of the matter to the scheme will be treated as withdrawn.
- 4.5 The arbitration will be regarded as having commenced when the arbitrator communicates to the parties his or her acceptance of the appointment.
- 4.6 A party to an arbitration under this scheme may be represented in the proceedings by an attorney, an advocate or such other person as may be chosen by him/her. Provided that other person is a suitable person to act in that capacity provided that the arbitrator is of the opinion that it would be efficient in administration of justice to allow the said individual to assist. The party must however, before arbitration representation begins give timeous notice of the representative to the arbitrator and to the other party.

5. Arbitrator's appointment

- 5.1 Only an individual may act as an Arbitrator.

- 5.2 An individual is ineligible to act as a IFLA (SA) Arbitrator if:
- (a) Is not on the approved panel of IFLA (SA);
 - (b) Aged under 30; or
 - (c) An incapable adult
- 5.3 Where there is no agreement as to the number of Arbitrators, the tribunal is to consist of the sole Arbitrator.
- 5.4 The tribunal is to be appointed as follows:
- (a) Where there is to be a sole Arbitrator the parties must appoint an eligible individual jointly and within a maximum of 28 days of either party requesting the other to do so.
 - (b) Where there is to be a tribunal consisting of two or more Arbitrators:-
 - (i) each party must appoint an eligible individual as an arbitrator and must do so within 28 days of the other party requesting it to do so and;
 - (ii) where more arbitrators are to be appointed, the arbitrators appointed by the parties must appoint eligible individuals as the remaining arbitrators.
- 5.5 Before accepting the appointment, or as soon as the relevant facts are known, the arbitrator will disclose to the parties any actual or potential conflict of interest, or any other matter which might give rise to justifiable doubts as to her or his impartiality.
- 5.6 In the event of such disclosure, the parties, or either of them (as appropriate), may waive any objection to the arbitrator continuing to act, in which case the arbitrator may commence or continue with the arbitration. If an objection is raised, the arbitrator will decide whether to continue to act, subject to any agreement by the parties to revoke her or his authority, or an intervention by the court.
- 5.7 After accepting an appointment, the arbitrator may not subsequently act in relation to the same dispute in a different capacity against any of the parties.
- 5.8 If the arbitrator ceases to hold office through revocation of her or his authority, removal by the court, resignation or death, or is otherwise unable, or refuses, to act, and either party or the existing arbitrator so requests, the parties may agree on a new arbitrator and/or The Law Society of South Africa may appoint a replacement arbitrator from the Panel.

- 5.9 The replacement arbitrator may determine whether and, if so, to what extent the previous proceedings should stand.

6. Failure of appointment procedure

- 6.1 This rule applies where a tribunal (or any arbitrator who is to form part of a tribunal) is not, or cannot be, appointed in accordance with –
- (a) Any appointment procedure set out in the arbitration agreement (or otherwise agreed between the parties), or
 - (b) Rule 5
- 6.2 Unless the parties otherwise agree, either party may refer the matter to an arbitral appointments referee.
- 6.3 The referring party must give notice of the reference to the other party.
- 6.4 That other party may object to the reference within 7 days of notice of reference being given by making an objection to –
- (a) The referring party, and
 - (b) The arbitral appointments referee.
- 6.5 If –
- (a) No such objection is made within that 7 day period, or
 - (b) The other party waives the right to object before the end of that period, the arbitral appointments referee may make the necessary appointment.
- 6.6 Where –
- (a) A party objects to the arbitral appointments referee making an appointment,
 - (b) An arbitral appointments referee fails to make an appointment within 21 days of the matter being referred, or
 - (c) The parties agree not to refer the matter to an arbitral appointments referee, the court may, on an application by any party, make the necessary appointment.
- 6.7 The court's decision on whom to appoint is final.
- 6.8 Before making an appointment under this rule, the arbitral appointments referee or, as the case may be, the court must have regard to –
- (a) The nature and subject matter of the dispute,

- (b) The terms of the arbitration agreement (including, in particular, any terms relating to appointment of arbitrators),
- (c) The skills, qualifications, knowledge and experience which would make an individual suitable to determine the dispute.

6.9 Where an arbitral appointments referee or the court makes an appointment under this rule, the arbitration agreement has effect as if it required that appointment.

7. Arbitrator's tenure

An arbitrator's tenure ends if –

- 7.1 The arbitrator becomes ineligible to act as an arbitrator (see Rule 5.2)
- 7.2 The tribunal revokes the arbitrator's appointment,
- 7.3 The arbitrator is removed by the parties, a third party or an appropriate court
- 7.4 An appropriate court dismissed the tribunal of which the arbitrator forms part, or
- 7.5 The arbitrator resigns or dies.

8. Removal of arbitrator by parties

- 8.1 An arbitrator may be removed –
 - (a) By the parties acting jointly, or
 - (b) By any third party to whom the parties give power to remove an arbitrator.
- 8.2 A removal is effected by notifying the arbitrator.

9. Removal of arbitrator by court

An appropriate court may remove an arbitrator if satisfied on the application by any party -

- 9.1 That the arbitrator is not impartial and independent,
- 9.2 That the arbitrator has not treated the parties fairly,

- 9.3 That the arbitrator is incapable of acting as an arbitrator in the arbitration (or that there are justifiable doubts about the arbitrator's ability to so act),
- 9.4 That the arbitrator does not have a qualification which the parties agreed (before the arbitrator's appointment) that the arbitrator must have,
- 9.5 That substantial injustice has been or will be caused to that party because the arbitrator has failed to conduct the arbitration in accordance with –
- (a) The arbitration agreement,
 - (b) These rules (in so far as they apply), or
 - (c) Any other agreement by the parties relating to conduct of the arbitration.

10. Dismissal of tribunal by court

An appropriate court may dismiss the tribunal if satisfied on the application by a party that substantial injustice has been or will be caused to that party because the tribunal has failed to conduct the arbitration in accordance with –

- 10.1 The arbitration agreement,
- 10.2 These rules (in so far as they apply), or
- 10.3 Any other agreement by the parties relating to conduct of the arbitration.

11. Removal and dismissal by court : supplementary

- 11.1 an appropriate court may remove an arbitrator, or dismiss the tribunal, only if –
- (a) The arbitrator or, as the case may be, tribunal has been –
 - (i) Notified of the application for removal or dismissal, and
 - (ii) Given the opportunity to make representations, and
 - (b) an appropriate court is satisfied that any available recourse to a third party who the parties have agreed is to have power to remove an arbitrator (or dismiss the tribunal) has been exhausted.
- 11.2 A decision of an appropriate court under rule 9 or 10 is final.
- 11.3 The tribunal may continue with the arbitration pending an appropriate court's decision under rule 9 or 10.

12. Resignation of arbitrator

- 12.1 An arbitrator may resign (by giving notice of resignation to the parties and any

other arbitrators) if –

- (a) The parties consent to the resignation,
- (b) The arbitrator has a contractual right to resign in the circumstances,
- (c) The arbitrator's appointment is challenged under rule 9,
- (d) The parties disapply or modify rule 37.1 after the arbitrator is appointed, or
- (e) An appropriate court has authorised the resignation.

12.2 An appropriate court may authorise a resignation only if satisfied, on an application by the arbitrator, that it is reasonable for the arbitrator to resign.

12.3 An appropriate court's determination of an application for resignation is final.

13. Liability etc. of arbitrator when tenure ends

13.1 Where an arbitrator's tenure ends, an appropriate court may, on an application by any party or the arbitrator concerned, make such order as it thinks fit –

- (a) About the arbitrator's entitlement (if any) to fees and expenses,
- (b) About the repaying of fees or expenses already paid to the arbitrator,
- (c) Where the arbitrator has resigned, about the arbitrator's liability in respect of acting as an arbitrator.

13.2 An appropriate court must, when considering whether to make an order in relation to an arbitrator who has resigned, have particular regard to whether the resignation was made in accordance with Rule 12.

13.3 An appropriate court's determination of an application for an order is final.

14. Reconstitution of tribunal

14.1 Where an arbitrator's tenure ends, the tribunal must be reconstituted –

- (a) In accordance with the procedure used to constitute the original tribunal, or
- (b) Where that procedure fails, in accordance with Rules 5 and 6.

14.2 It is for the reconstituted tribunal to decide the extent, if any to which previous proceedings (including any award made, appointment by or other act done by the previous tribunal) should stand.

14.3 The reconstituted tribunal's decision does not affect a party's right to object or appeal on any ground which arose before the tribunal made its decision.

15. Arbitrators nominated in arbitration agreements

Any provision in an arbitration agreement which specifies who is to be an arbitrator ceases to have effect in relation to an arbitration when the specified individual's tenure as an arbitrator for that arbitration ends.

16. Power of tribunal to rule on own jurisdiction

16.1 The tribunal may rule on –

- (a) Whether there is a valid arbitration agreement (or, in the case of a statutory arbitration, whether the enactment providing for arbitration applies to the dispute),
- (b) Whether the tribunal is properly constituted, and
- (c) What matters have been submitted to arbitration in accordance with the arbitration agreement?

17. Objections to tribunal's jurisdiction

17.1 Any party may object to the tribunal on the ground that the tribunal does not have, or has exceeded, its jurisdiction in relation to any matter.

17.2 An objection must be made –

- (a) Before, or as soon as it reasonably practicable after, the matter to which the objection relates is first raised in the arbitration, or
- (b) Where the tribunal considers that circumstances justify a later objection, by such later time as it may allow, but, in any case, an objection may not be made after the tribunal makes its last award.

17.3 If the tribunal upholds an objection it must –

- (a) End the arbitration in so far as it relates to a matter over which the tribunal has ruled it does not have jurisdiction, and
- (b) Set aside any provisional or part award already made in so far as the award relates to such a matter.

17.4 The tribunal may –

- (a) Rule on an objection independently from dealing with the subject-matter of the dispute, or
- (b) Delay ruling on an objection until it makes its award on the merits of the dispute (and include its ruling in that award), but, where the parties agree which of these courses the tribunal should take, the tribunal must proceed accordingly.

18. Appeal against tribunal's ruling on jurisdictional objection

- 18.1 A party may, no later than 14 days after the tribunal's decision on an objection under rule 17, appeal to an appropriate court against the decision.
- 18.2 The tribunal may continue with the arbitration pending determination of the appeal.
- 18.3 An appropriate court's decision on the appeal is final.

19. Referral of point of jurisdiction

- 19.1 An appropriate court's decision on an application by any party, determine any question as to the tribunal's jurisdiction.

20. Jurisdiction referral: procedure etc

- 20.1 This rule applies only where an application is made under rule 19.
- 20.2 Such an application is valid only if –
- (a) The parties have agreed that it may be made, or
 - (b) The tribunal has consented to it being made and the court is satisfied –
 - (i) That determining the question is likely to procedure substantial savings in expenses,
 - (ii) That the application was made without delay, and
 - (iii) That there is a good reason why the question should be determined by the court.
- 20.3 The tribunal may continue with the arbitration pending determination of an application.
- 20.4 An appropriate court's determination of the question is final (as is any decision by an appropriate court as to whether an application is valid).

21. Communications between Parties, the Arbitrator and IFLA (SA) :-

- 21.1 Any communication between the arbitrator and either party will be copied to the other party.

- 21.2 Unless agreed by the parties, the arbitrator will designate one party as the lead party. For the purposes of the Act, the lead party will equate to a claimant, but will be formally referred to in the arbitration as the "Applicant". The other party will equate to a respondent, and will be formally referred to in the arbitration as the "Respondent".
- 21.3 The arbitrator will not discuss any aspect of the dispute or of the arbitration with either party or their legal representatives in the absence of the other party or their legal representatives, unless such communication is solely for the purpose of making administrative arrangements.
- 21.4 IFLA (SA) will not be required to enter into any correspondence concerning the arbitration or its outcome.

22. General duty of the tribunal

- 22.1 The tribunal must –
- (a) Be impartial and independent,
 - (b) Treat the parties fairly, and
 - (c) Conduct the arbitration –
 - (i) Without unnecessary delay, and
 - (ii) Without incurring unnecessary expense.
- 22.2 Treating the parties fairly includes giving each party a reasonable opportunity to put its case and to deal with the other party's case.

23. General duty of the parties

- 23.1 The parties must ensure that the arbitration is conducted –
- (a) Without unnecessary delay, and
 - (b) Without incurring unnecessary expense.

24. Place of arbitration

The tribunal may meet, and otherwise conduct the arbitration, anywhere it chooses (in or outside South Africa).

25. Confidentiality

- 25.1 Disclosure by the tribunal, any arbitrator or a party of confidential information relating to the arbitration is to be actionable as a breach of an obligation of confidence unless the disclosure –
- (a) Is authorised, expressly or impliedly, by the parties (or can reasonably be considered as having been so authorised),

- (b) Is required by the tribunal or is otherwise made to assist or enable the tribunal to conduct the arbitration,
 - (c) Is required –
 - (i) In order to comply with any enactment or rule of law,
 - (ii) For the proper performance of the discloser's public functions, or
 - (iii) In order to enable any public body or office-holder to perform public functions properly,
 - (d) Can reasonably be considered as being needed to protect a party's lawful interests,
 - (e) Is in the public interest,
 - (f) Is necessary in the interests of justice, or
 - (g) Is made in circumstances in which the discloser would have absolute privilege had the disclosed information been defamatory.
- 25.2 The tribunal and the parties must take reasonable steps to prevent unauthorised disclosure of confidential information by any third party involved in the conduct of the arbitration.
- 25.3 The tribunal must, at the outset of the arbitration, inform the parties of the obligations which this rule imposes on them.
- 25.4 "Confidential information", in relation to an arbitration, means any information relating to –
- (a) The dispute,
 - (b) The arbitral proceedings,
 - (c) The award, or
 - (d) Any civil proceedings relating to the arbitration in respect of which an order has been granted in terms of these rules and/or an applicable statute, which is not, and has never been, in the public domain.
- 25.5 For the purposes of these rules, an arbitrator is not independent in relation to an arbitration if –
- (a) The arbitrator's relationship with any party,
 - (b) The arbitrator's financial or other commercial interests, or
 - (c) Anything else, gives rise to justifiable doubts as to the arbitrator's impartiality.
- 25.6 The general principle is that the arbitration and its outcome are confidential, except insofar as disclosure may be necessary to challenge, implement,

enforce or vary an award (see Art.13.3(c)), in relation to applications to the court or as may be compelled by law.

- 25.7 All documents, statements, information and other materials disclosed by a party will be held by any other party and their legal representatives in confidence and used solely for the purpose of the arbitration, unless otherwise agreed by the disclosing party or compelled by law.
- 25.8 Any transcript of the proceedings will be provided to all parties and to the arbitrator. It will similarly be confidential and used solely for the purpose of the arbitration, implementation or enforcement of any award or applications to the court, unless otherwise agreed by the parties or compelled by law.
- 25.9 The arbitrator will not be called as a witness by any party either to testify or to produce any documents or materials received or generated during the course of the proceedings in relation to any aspect of the arbitration, unless with the agreement of the arbitrator or compelled by law.

26. Tribunal deliberations

- 26.1 The tribunal's deliberations may be undertaken in private and accordingly need not be disclosed to the parties.
- 26.2 But, where an arbitrator fails to participate in any of the tribunal's deliberations, the tribunal must disclose that fact (and the extent of the failure) to the parties.

27. Powers of the arbitrator

- 27.1 The arbitrator will have all the powers given to an arbitrator by the Arbitration Act and these rules.
- 27.2 In relation to substantive relief of an interim or final nature, the arbitrator will have the power to make orders or awards to the same extent and in the same or similar form as would a Judge exercising the jurisdiction of the High Court. (For the avoidance of doubt, the arbitrator's power does not extend to committal; or jurisdiction over non-parties without their agreement).
- 27.3 The arbitrator will have the power to award interest whether or not it is specifically claimed.
- 27.4 If the arbitrator considers that the dispute is not suitable for arbitration under the scheme the arbitrator will have the power to terminate the proceedings.

28. Powers of the arbitrator concerning procedure

- 28.1 The arbitrator will decide all procedural and evidential matters, subject to the right of the parties to agree any matter (if necessary, with the concurrence of the arbitrator).
- 28.2 It is for the tribunal to determine –
- (a) The procedure to be followed in the arbitration,
 - (b) The admissibility, relevance, materiality and weight of any evidence,
 - (c) The extent and scope of evidence required to make a determination, and
 - (d) The scope for instruction of a single expert or experts.
- 28.3 The arbitrator may appoint experts to report on specific issues or prepare valuations.
- 28.4 The arbitrator may limit the number of expert witnesses to be called by any party or may direct that no expert be called on any issue or issues or that expert evidence may be called only with the permission of the arbitrator.
- 28.5 Further, and/or in particular, the arbitrator will have the power to:
- (a) direct a party to produce information, documents or other materials in a specified manner and/or within a specified time;
 - (b) give directions in relation to any property which is the subject of the proceedings or as to which any question arises in the proceedings, and which is owned by or is in the possession or control of a party to the proceedings for the inspection, photographing, valuation, preservation, custody or detention of the property by the tribunal, an expert or a party.
- 28.6 If, without showing sufficient cause, a party fails to comply with its obligations in terms of these Rules or with these Rules, or is in default (failure to attend a hearing or make submissions), then, after giving that party due notice, the arbitrator may continue the proceedings in the absence of that party or without any written evidence or submissions on their behalf and may make an award on the basis of the evidence before him or her.
- 28.7 The parties agree that if one of them fails to comply with a preemptory order made by the arbitrator and another party wishes to apply to the court for an order requiring compliance (enforcement of preemptory orders of tribunal), the powers of the court are available.

29. Form of procedure

- 29.1 The parties are free to agree as to the form of procedure (if necessary, with the concurrence of the arbitrator and, in particular, to adopt a documents-only

procedure or some other simplified or expedited procedure.

- 29.2 If there is no such agreement, the arbitrator will have the widest possible discretion to adopt procedures suitable to the circumstances of the particular case.

30. General procedure

- 30.1 Generally, on commencement of the arbitration, the arbitrator will invite the parties to make submissions setting out briefly their respective views as to the nature of the dispute, the issues, what form of procedure should be adopted, the timetable and any other relevant matters.
- 30.2 If appropriate, the arbitrator may convene a preliminary meeting, telephone conference or other suitable forum for exchange of views.
- 30.3 Within a reasonable time of ascertaining the parties' views, the arbitrator will give directions and set a timetable for the procedural steps in the arbitration, including (but not limited to) the following:
- (a) written statements of case;
 - (b) disclosure and production of documents as between the parties;
 - (c) the exchange of witness statements;
 - (d) the number and type of expert witnesses, exchange of their reports and meetings between them;
 - (e) arrangements for any meeting or hearing and the procedures to be adopted at these events;
 - (f) time limits to be imposed on oral submissions or the examination of witnesses, or any other procedure for controlling the length of hearings;
 - (g) the admissibility relevance materiality and weight of any evidence;
 - (h) the extent and scope of any evidence required to make a determination;
 - (i) the scope for instruction of a single expert or experts.
- 30.4 The arbitrator may at any time direct any of the following to be delivered in writing:
- (a) submissions on behalf of any party;
 - (b) questions to be put to any witness;
 - (c) answers by any witness to specific questions;
 - (d) a party to produce information, documents or other materials in a

specified manner and/or within a specified time;

31. Alternative procedure

- 31.1 In any case where it is appropriate, the parties may agree or the arbitrator may decide to adopt the procedure set out in this Rule.
- 31.2 The parties may at any stage agree (with the concurrence of the arbitrator) or the arbitrator may direct any variation or addition to the following steps and/or timetable. In particular, the arbitrator may at any stage allow time for the parties to consider their positions and pursue negotiations with a view to arriving at an amicable settlement.
- 31.3 Within 56 days of the arbitrator communicating to the parties his or her acceptance of the appointment, each party will complete and send to the arbitrator and to the other party a sworn statement as to their financial situation (in the form of the 'Form ARB2') together with such further evidence or information as the arbitrator may direct.
- 31.4 Within 28 days of receipt of the other party's financial statement, each party may send to the arbitrator and to the other party a questionnaire raising questions and/or requesting information and/or documents.
- 31.5 Within 14 days of receipt of a questionnaire, a party may send to the arbitrator and to the other party reasoned objections to answering any of the questions or meeting any of the requests, together with a submission as to whether a preliminary meeting is required.
- 31.6 Within 14 days of receipt of objections or, if there is a preliminary meeting, within a reasonable time after that meeting, the arbitrator will direct in respect of each party:
- (a) which questions are to be answered and which requests are to be met, together with the time within which these things are to be done;
 - (b) which assets are to be valued, who is to undertake the valuation, how they are to be appointed and the time within which the valuation is to be carried out; and
 - (c) any other steps for providing information, dealing with enquiries or clarifying issues as may be appropriate.
- 31.7 Within a reasonable time of receipt from both parties of replies to questionnaires, valuations and any other information as may have been required, the arbitrator may convene a further meeting to review progress,

address outstanding issues and consider what further directions are necessary.

- 31.8 The arbitrator will give detailed directions for all further procedural steps in the arbitration including (but not limited to) the following:
- (a) the drawing up of lists of issues and schedules of assets;
 - (b) written submissions;
 - (c) arrangements for any meeting or hearing and the procedures to be adopted at these events;
 - (d) time limits to be imposed on oral submissions or the examination of witnesses, or any other procedure for controlling the length of hearings.
 - (e) subpoenas

32. Court's power to order attendance of witnesses and disclosure of evidence

- 32.1 The court may, on an application by the tribunal or any party, order any person –
- (a) To attend a hearing for the purposes of giving evidence to the tribunal, or
 - (b) To disclose documents or other material evidence to the tribunal.
- 32.2 But the court may not order a person to give any evidence, or to disclose anything, which the person would be entitled to refuse to give or disclose in civil proceedings.
- 32.3 The tribunal may continue with the arbitration pending determination of an application.
- 32.4 The court's decision on whether to make an order is final.

33. Applications for directions as to procedural or evidential matters

- 33.1 The arbitrator may direct a time limit for making or responding to applications for directions as to procedural or evidential matters.
- 33.2 Any application by a party for directions as to procedural or evidential matters will be accompanied by such evidence and/or submissions as the applicant may consider appropriate or as the arbitrator may direct.
- 33.3 A party responding to such an application will, if feasible, have a reasonable

opportunity to consider and agree the order or directions proposed.

- 33.4 Any agreement will be communicated to the arbitrator promptly and will be subject to the arbitrator's concurrence, if necessary (see Rules.1.4).
- 33.5 Unless the arbitrator convenes a meeting, telephone conference or other forum for exchange of views, any response to the application will be followed by an opportunity for the party applying to comment on that response; and the arbitrator will give directions within a reasonable time after receiving the applicant's comments.

34. Tribunal decisions

- 34.1 Where the tribunal is unable to make a decision unanimously (including any decision on an award), a decision made by the majority of the arbitrators is sufficient.
- 34.2 Where there is neither unanimity nor a majority in favour of or opposed to make any decision –
- (a) The decision is to be made by the arbitrator nominated to chair the tribunal, or
 - (b) Where no person has been so nominated, the decision is to be made –
 - (i) Where the tribunal consists of 3 or more arbitrators, by the last arbitrator to be appointed, or
 - (ii) Where the tribunal consists of 2 arbitrators, by an umpire appointed by the tribunal or, where the tribunal fails to make an appointment within 14 days of being required to do so by either party or any arbitrator, by an arbitral appointments referee (at the request of a party or an arbitrator).

35. Tribunal directions

- 35.1 The tribunal may give such directions to the parties as it considers appropriate for the purposes of conducting the arbitration.
- 35.2 A party must comply with such direction by such time as the tribunal specifies.

36. Power to appoint

- 36.1 The tribunal may appoint a clerk (and such other agents, employees or other persons as it thinks fit) to assist it in conducting the arbitration.
- 36.2 But the parties' consent is required for any appointment in respect of which significant expenses are likely to arise.

37. Experts

- 37.1 The tribunal may obtain an expert opinion on any matter arising in the arbitration.
- 37.2 The parties must be given a reasonable opportunity –
- (a) To make representations about any written expert opinion, and
 - (b) To hear any oral expert opinion and to ask questions of the expert giving it.
- 37.3 The tribunal may order the parties or either of them to pay expenses of any expert opinion within such timeframe as subject to such conditions as the tribunal deems fit. Caution will be held by the tribunal on behalf of the parties. Where a party fails to pay, the tribunal may terminate the arbitration and make such order as to the expenses of the arbitration as the tribunal deems fit.

38. Powers relating to property

The tribunal may direct a party –

- 38.1 To allow the tribunal, an expert or another party –
- (a) To inspect, photograph, preserve or take custody of any property which that party owns or possesses which is the subject of the arbitration (or as to which any question arises in the arbitration), or
 - (b) To take samples from, or conduct an experiment on, any such property, or
- 38.2 To preserve any document or other evidence which the party possesses or controls.

39. Oaths or affirmations

The arbitrator shall, where a party or witnesses are to be examined, administer an oath or affirmation to that party or witness for that purpose.

40. Failure to submit claim or defence timeously

40.1 Where –

- (a) A party unnecessarily delays in submitting or in otherwise pursuing a claim,
- (b) The tribunal considers that there is no good reason for the delay, and
- (c) The tribunal is satisfied that the delay –
 - (i) Gives, or is likely to give, rise to a substantial risk that it will not be possible to resolve the issues in that claim fairly, or
 - (ii) Has caused, or is likely to cause, serious prejudice to

the other party, the tribunal must end the arbitration in so far as it relates to the subject-matter of the claim and may make such award (including an award on expenses) as it considers appropriate in consequence of the claim.

40.2 Where –

- (a) A party unnecessarily delays in submitting a defence to the tribunal, and
- (b) The tribunal considers that there is no good reason for the delay, the tribunal must proceed with the arbitration (but the delay is not, in itself, to be treated as an admission of anything).

41. Failure to attend hearing or provide evidence

Where –

41.1 A party fails –

- (a) To attend a hearing which the tribunal requested the party to attend a reasonable period in advance of the hearing, or
- (b) To produce any document or other evidence requested by the tribunal, and

41.2 The tribunal considers that there is no good reason for the failure, the tribunal may proceed with the arbitration, and make its award, on the basis of the evidence (if any) before it.

42. Failure to comply with tribunal direction or arbitration agreement

42.1 Where a party fails to comply with –

- (a) Any direction made by the tribunal, or
- (b) Any obligation imposed by –
 - (i) The arbitration agreement,
 - (ii) These rules (in so far as they apply), or
 - (iii) Any other agreement by the parties relating to conduct of the arbitration, the tribunal may order the party to so comply.

42.2 Where a party fails to comply with an order made under this rule, the tribunal may do any of the following –

- (a) Direct that the party is not entitled to rely on any allegations or material which was the subject-matter of the order,
- (b) Draw adverse inferences from the non-compliance,
 - (i) Proceed with the arbitration and make its award,
 - (ii) Make such provisional award (including an award on

expenses) as it considers appropriate in consequence of the non-compliance.

43. Consolidation of proceedings

43.1 Parties may agree –

- (a) To consolidate the arbitration with another arbitration, or
- (b) To hold concurrent hearings.

43.2 But the tribunal may not order such consolidation, or the holding of concurrent hearings, on its own initiative.

44. Referral of point of law

An appropriate court may, on an application by any party, determine any point of South African law arising in the arbitration.

45. Point of law referral: procedure etc.

45.1 This rule applies only where an application is made under Rule 44 above.

45.2 Such an application is valid only if –

- (a) The parties have agreed that it may be made, or
- (b) The tribunal has consented to it being made and the court is satisfied
 - (i) That determining the question is likely to procedure substantial savings in expenses,
 - (ii) That the application was made without delay, and
 - (iii) That there is a good reason why the question should be determined by the court.

46. Variation of time limits set by parties

The court may, on an application by the tribunal or any party, vary any time limit relating to the arbitration which is imposed –

46.1 In the arbitration agreement, or

46.2 By virtue of any other agreement between the parties.

47. Time limit variation: procedure etc.

47.1 This rule applies only where an application for variation of time limit is made under Rule 46.

- 47.2 Such a variation may be made only if the court is satisfied –
- (a) That no arbitral process for varying the time limit is available, and
 - (b) That someone would suffer a substantial injustice if no variation was made.
- 47.3 It is for the court to determine the extent of any variation.
- 47.4 The tribunal may continue with the arbitration pending determination of an application.
- 47.5 The court's decision on whether to make a variation (and, if so, on the extent of the variation) is final.

48. Court's other powers in relation to arbitration

- 48.1 The court has the same power in an arbitration as it has in civil proceedings –
- (a) To appoint a person to safeguard the interests of any party lacking capacity,
 - (b) To order the sale of any property in dispute in the arbitration,
 - (c) To make an order securing any amount in dispute in the arbitration,
 - (d) To grant interdict (or interim interdict), or
 - (e) To grant any other interim or permanent order.
- 48.2 But the court may take such action only –
- (a) On an application by any party, and
 - (b) If the arbitration has begun –
 - (i) With the consent of the tribunal, or
 - (ii) Where the court is satisfied that the case is one of urgency.
- 48.3 The tribunal may continue with the arbitration pending determination of the application.
- 48.4 This rule applies –
- (a) To arbitrations which have begun,
 - (b) Where the court is satisfied –
 - (i) That a dispute has arisen or might arise, and
 - (ii) That an arbitration agreement provides that such a

dispute is to be resolved by arbitration.

48.5 This rule does not affect –

- (a) Any other powers which the court has under any enactment or rule of law in relation to arbitrations, or
- (b) The tribunal's powers.

49. Rules applicable to the substance of the dispute

49.1 The tribunal must decide the dispute in accordance with the principles of South African law

49.2 Notwithstanding that only a court could make awards of financial provision and that only on divorce, by remitting the case to arbitration, the tribunal will have the power to make

- (a) Awards of financial provision as would be open to a court on granting decree of divorce; and
- (b) Such additional awards as the parties may agree that the tribunal should have the power to make.

49.3 The tribunal shall have the power to make awards incorporating the remedies set out in rule 52 below.

50. Awards

50.1 The arbitrator will deliver an award within a reasonable time after the conclusion of the proceedings or the relevant part of the proceedings.

50.2 Any award will be in writing, will state the seat of the arbitration, will be dated and signed by the arbitrator, and (unless the parties agree otherwise or the award is by consent) will contain sufficient reasons to show why the arbitrator has reached the decisions it contains, and whether any previous provisional or part award has been made (and the extent to which any previous provisional award is superceded or confirmed).

50.3 Once an award has been made, it will be final and binding on the parties, subject to the following:

- (a) any challenge to the award by any available arbitral process of appeal or review or in accordance with the Arbitration Act;
- (b) insofar as the subject matter of the award requires it to be embodied in a court order, any changes which the court making that order may require;

- (c) insofar as the award provides for continuing payments to be made by one party to another, or to a child or children, a subsequent award or court order reviewing and varying or revoking the provision for continuing payments, and which supersedes an existing award.

50.4 If and so far as the subject matter of the award makes it necessary, the parties will apply to an appropriate court for an order in the same or similar terms as the award or the relevant part of the award and will take all reasonably necessary steps to see that such an order is made. In this context, 'an appropriate court' means a court which has jurisdiction to make a substantive order in the same or similar terms as the award, whether on primary application or on transfer from another division of the court.

50.5 The arbitrator may refuse to deliver an award to the parties except upon full payment of his or her fees or expenses. Subject to this entitlement, the arbitrator will send a copy of the award to each party or its legal representatives.

51. Power to award payment and/or make award

51.1 The tribunal's award may order the payment of a sum of money or any such award as the tribunal is entitled to make in terms of these Rules.

51.2 If a sum of money such a sum must be specified –

- (a) In any currency agreed by the parties, or
- (b) In the absence of such agreement, in such currency as the tribunal considers appropriate.

52. Other remedies available to tribunal

The tribunal's award may –

52.1 Be of a declaratory nature,

52.2 Order a party to do or refrain from doing something (including ordering the performance of a contractual obligation), or

52.3 Order the rectification or reduction of any deed or other document (other than a decree of court) to the extent permitted by the law governing the deed or document,

52.4 Require the parties to take all steps necessary to implement any provision contained in the tribunal's award.

52.5 Require the parties to discharge succession rights including prior and legal

rights in terms of the relevant statutes,

- 52.6 Require the parties to surrender occupancy rights in any property owned or occupied by the parties or either of them or to regulate occupancy rights between the parties under the said Act as the tribunal deems appropriate,
- 52.7 Make a property transfer order in relation to any movable corporeal or incorporeal property,
- 52.8 Grant an order regulating the parties' respective liabilities of the debts of either or both of the parties.

53. Interest

- 53.1 The tribunal's award may order that interest is to be paid on –
 - (a) The whole or part of any amount which the award orders to be paid (or which is payable in consequence of a declaratory award), in respect of any period up to the date of the award,
 - (b) The whole or part of any amount which is –
 - (i) Claimed in the arbitration and outstanding when the arbitration began, but
 - (ii) Paid before the tribunal made its award, in respect of any period up to the date of payment,
 - (c) The outstanding amount of any amounts awarded (including any award of arbitration expenses or pre-award interest under paragraph (a) or (b) in respect of any period from the date of the award up to the date of payment.
- 53.2 An award ordering payment of interest may, in particular, specify –
 - (a) The interest rate,
 - (b) The period for which interest is payable (including any rests which the tribunal considers appropriate).
- 53.3 An award may make different interest provision in respect of different amounts.
- 53.4 Interest is to be calculated –
 - (a) In the manner agreed by the parties, or
 - (b) Failing such agreement, in such manner as the tribunal determines.
- 53.5 This rule does not affect any other power of the tribunal to award interest.

54. Form of award

- 54.1 The tribunal's award must be signed by all arbitrators or all those assenting to the award.
- 54.2 The tribunal's award must state –
- (a) The seat of the arbitration,
 - (b) When the award is made and when it takes effect,
 - (c) The tribunal's reasons for the award, and
 - (d) Whether any previous provisional or part award has been made (and the extent to which any previous provisional award is superseded or confirmed).
- 54.3 The tribunal's award is made by delivering it to each of the parties in accordance with the Rules.

55. Award treated as made in South Africa

An award is to be treated as having been made in South Africa even if it is signed at, or delivered to or from, a place outside South Africa.

56. Provisional awards

The tribunal may make a provisional award granting any relief on a provisional basis which it has the power to grant permanently.

57. Part awards

- 57.1 The tribunal may make more than one award at different times on different aspects of the matters to be determined.
- 57.2 A "part award" is an award which decides some (but not all) of the matters which the tribunal is to decide in the arbitration.
- 57.3 A part award must specify the matters to which it relates.

58. Interim awards

The tribunal may make any interim order which due regard to the interest of the parties may require.

59. Draft awards

Before making an award, the tribunal –

- 59.1 May send a draft of its proposed award to the parties, and
- 59.2 If it does so, must consider any representations from the parties about the draft which the tribunal receives by such time as it specifies.

60. Power to withhold award on non-payment of fees or expenses

- 60.1 The tribunal may refuse to deliver or send its award to the parties if any fees and expense for which they are liable under rule 64 have not been paid in full.
- 60.2 Where the tribunal so refuses, the court may (on an application by any party) order –
- (a) That the tribunal must deliver the award on the applicant paying into the court an amount equal to the fees and expenses demanded (or such lesser amount as may be specified in the order),
 - (b) That the amount paid into the court is to be used to pay the fees and expenses which the court determines as being properly payable, and
 - (c) That the balance (if any) of the amount paid into the court is to be repaid to the applicant.
- 60.3 The court may make such an order only if the applicant has exhausted any available arbitral process of appeal or review of the amount of the fees and expenses demanded.
- 60.4 The court's decision on an application under this rule is final.

61. Arbitration to end on last award or early settlement

- 61.1 An arbitration ends when the last award to be made in the arbitration is made (and no claim, including any claim for expenses or interest, is outstanding)
- 61.2 But this does not prevent the tribunal from ending the arbitration before then under rule 17.3 or 40.1.
- 61.3 The parties may end the arbitration at any time by notifying the tribunal that they have settled the dispute.
- 61.4 On the request of the parties, the tribunal may make an award reflecting the terms of the settlement and these rules (except for rule 54.2(c) and rules 71 to 76) apply to such an award as they apply to any other award.

61.5 The fact that the arbitration has ended does not affect the operation of these rules (in so far as they apply) in relation to the matter connected with the arbitration.

62. Correcting an award

62.1 The tribunal may correct an award so as to –

- (a) Correct a clerical, typographical or other error in the award arising by virtue of accident or omission, or
- (b) Clarify or remove any ambiguity in the award.

62.2 The tribunal may make such a correction –

- (a) On its own initiative, or
- (b) On an application by any party.

62.3 A party making an application under this rule must send a copy of the application to the other party at the same time as the application is made.

62.4 Such an application is valid only if made –

- (a) Within 28 days of the award concerned, or
- (b) By such later date as the tribunal, an appropriate court or the sheriff may, on an application by the party, specify (with any determination by an appropriate court or the sheriff being final).

62.5 The tribunal must, before deciding whether to correct an award, give

- (a) Where the tribunal proposed the correction, each of the parties,
- (b) Where a party application is made, the other party, a reasonable opportunity to make representations about the proposed correction.

62.6 A correction may be made under this rule only –

- (a) Where the tribunal proposed the correction, within 28 days of the award concerned being made, or
- (b) Where a party application is made, within 28 days of the application being made.

62.7 Where a correction affects –

- (a) Another part of the corrected award, or
- (b) Any other award made by the tribunal (relating to the substance of

the dispute, expenses, interest or any other matter), the tribunal may make such consequential correction of that other part or award as it considers appropriate.

62.8 A corrected award is to be treated as if it was made in its corrected form on the day the award was made.

63. Arbitration expenses

63.1 "Arbitration expenses" means –

- (a) The arbitrators' fees and expenses for which the parties are liable,
- (b) Any expenses incurred by the tribunal when conducting the arbitration for which the parties are liable,
- (c) The parties' legal and other expenses, and
- (d) The fees and expenses of –
 - (i) Any arbitral appointments referee, and
 - (ii) Any other third party to whom the parties give powers in relation to the arbitration, for which the parties are liable.

64. Arbitrators' fees and expenses

64.1 The parties are severally liable to pay to the arbitrators –

- (a) The arbitrators' fees and expenses, including –
 - (i) The arbitrators' fees for conducting the arbitration,
 - (ii) Expenses incurred personally by the arbitrators when conducting the arbitration, and
- (b) Expenses incurred by the tribunal when conducting the arbitration, including –
 - (i) The fees and expenses of any clerk, agent, employee or other person appointed by the tribunal to assist it in conducting the arbitration,
 - (ii) The fees and expenses of any expert from whom the tribunal obtains an opinion,
 - (iii) Any expenses in respect of meeting and hearing facilities, and
 - (iv) Any expenses incurred in determining recoverable arbitration expenses.

64.2 The parties are also severally liable to pay the fees and expenses of –

- (a) Any arbitral appointments referee, and
- (b) Any other third party to whom the parties give powers in relation to the arbitration.

- 64.3 The amount of fees and expenses payable under this rule and the payment terms are –
- (a) To be agreed by the parties and the arbitrators or, as the case may be, the arbitral appointments referee or other third party, or
 - (b) Failing such agreement, to be determined by the Taxing Master of the High Court.
- 64.4 Unless the Auditor of the Court of Session decides otherwise –
- (a) The amount of any fee is to be determined by the Taxing Master on the basis of a reasonable commercial rate of charge, and
 - (b) The amount of any expenses is to be determined by the Taxing Master on the basis that a reasonable amount is to be allowed in respect of all reasonably incurred expenses.
- 64.5 The Taxing Master may, when determining the amount of fees and expenses, order the repayment of any fees or expenses already paid which the Taxing Master considers excessive (and such an order has effect as if it was made by the court).
- 64.6 This rule does not affect –
- (a) The parties' liability as between themselves for fees and expenses covered by this rule (see rules 66 and 69), or
 - (b) An appropriate court's power to make an order under rule 13 (order relating to expenses in cases of arbitrator's resignation or removal).

65. Recoverable arbitration expenses

- 65.1 The following arbitration expenses are recoverable –
- (a) The arbitrators' fees and expenses for which the parties are liable,
 - (b) Any expenses incurred by the tribunal when conducting the arbitration for which the parties are liable, and
 - (c) The fees and expenses of any arbitral appointments referee (or any other third party to whom the parties give powers in relation to the arbitration) for which the parties are liable.
- 65.2 It is for the tribunal to –
- (a) Determine the amount of the other arbitration expenses which are recoverable, or
 - (b) Arrange for the Taxing Master of the Court of Session to determine that amount.

65.3 Unless the tribunal or, as the case may be, the Taxing Master decides otherwise –

- (a) The amount of the other arbitration expenses which are recoverable must be determined on the basis that a reasonable amount is to be allowed in respect of all reasonably incurred expenses, and
- (b) Any doubt as to whether expenses were reasonably incurred or are reasonable in amount is to be resolved in favour of the person liable to pay the expenses.

66. Liability for recoverable arbitration expenses

66.1 The tribunal may make an award allocating the parties' liability between themselves for the recoverable arbitration expenses (or any part of those expenses).

66.2 Until such an award is made (or whether the tribunal chooses not to make such an award) in respect of recoverable arbitration expenses (or any part of them), the parties are, as between themselves, each liable –

- (a) For an equal share of any such expenses for which the parties are liable under rule 64, and
- (b) For their own legal and other expenses.

66.3 This rule does not affect –

- (a) The parties' several liability for fees and expenses under rule 64, or
- (b) The liability of any party to any other third party.

67. Ban on pre-dispute agreements about liability for arbitration expenses

Any agreement allocating the parties' liability between themselves for any or all of the arbitration expenses has no effect if entered into before the dispute being arbitrated has arisen.

68. Security for expenses

68.1 The tribunal may –

- (a) Order a party making a claim to provide security for the recoverable arbitration expenses or any part of them, and
- (b) If that order is not complied with, make an award dismissing any claim made by that party.

68.2 But such an order may not be made only on the ground that the party –

- (a) Is an individual who ordinarily resides outside South Africa, or

- (b) Is a body which is –
 - (i) Incorporated or formed under the law of a country outside South Africa, or
 - (ii) Managed or controlled from outside South Africa.

69. Limitation of recoverable arbitration expenses

69.1 A provisional or part award may cap a party's liability for the recoverable arbitration expenses at an amount specified in the award.

69.2 But an award imposing such a cap must be made sufficiently in advance of the expenses to which the cap relates being incurred, or the taking of any steps in the arbitration which may be affected by the cap, for the parties to take account of it.

70. Awards on recoverable arbitration expenses

An expenses award may be made together with or separately from an award on the substance of the dispute (and these rules apply in relation to an expenses award as they apply to an award on the substance of the dispute).

71. Challenging an award : substantive jurisdiction

71.1 A party may appeal to an appropriate court against the tribunal's award on the ground that the tribunal did not have jurisdiction to make the award (a "jurisdictional appeal")

71.2 An appropriate court may decide a jurisdictional appeal by –

- (a) Confirming the award,
- (b) Varying the award (or part of it), or
- (c) Setting aside the award (or part of it).

71.3 Any variation by an appropriate court has effect as part of the tribunal's award.

71.4 An appeal may be made to the court of appeal against an appropriate court's decision on a jurisdictional appeal (but only with the leave of an appropriate court).

71.5 Leave may be given by an appropriate court only where it considers –

- (a) That the proposed appeal would raise an important point of principle or practice, or
- (b) That there is another compelling reason for the court of appeal to

consider the appeal.

71.6 An appropriate court's decision on whether to grant such leave is final.

71.7 Court of appeal's decision on such appeal is final.

72. Challenging an award : serious irregularity

72.1 A party may appeal to an appropriate court against the tribunal's award on the ground of serious irregularity (a "serious irregularity appeal")

72.2 "Serious irregularity" means an irregularity of any of the following kinds which has caused, or will cause, substantial injustice to the appellant –

- (a) The tribunal failing to conduct the arbitration in accordance with –
 - (i) The arbitration agreement,
 - (ii) These rules (in so far as they apply), or
 - (iii) Any other agreement by the parties relating to conduct of the arbitration,
- (b) The tribunal acting outside its powers (other than by exceeding its jurisdiction),
- (c) The tribunal failing to deal with all the issues that were put to it,
- (d) Any arbitral appointments referee or other third party to whom the parties give powers in relation to the arbitration acting outside powers,
- (e) Uncertainty or ambiguity as to the award's effect,
- (f) The award being –
 - (i) Contrary to public policy, or
 - (ii) Obtained by fraud or in a way which is contrary to public policy,
- (g) An arbitrator having not been impartial and independent,
- (h) An arbitrator having not treated the parties fairly,
- (i) An arbitrator having been incapable of acting as an arbitrator in the arbitration (or there being justifiable doubts about an arbitrator's ability to so act),
- (j) An arbitrator not having a qualification which the parties agreed (before the arbitrator's appointment) that the arbitrator must have, or
- (k) Any other irregularity in the conduct of the arbitration or in the award which is admitted by –
 - (i) The tribunal, or
 - (ii) Any arbitral appointments referee or other third party to

whom the parties give powers in relation to the arbitration.

- 72.3 An appropriate court may decide a serious irregularity appeal by –
- (a) Confirming the award,
 - (b) Ordering the tribunal to reconsider the award (or part of it), or
 - (c) If it considers the reconsideration inappropriate, setting aside the award (or part of it).
- 72.4 Where an appropriate court decides a serious irregularity appeal (otherwise than by confirming the award) on the ground –
- (a) That the tribunal failed to conduct the arbitration in accordance with –
 - (i) The arbitration agreement,
 - (ii) These rules (in so far as they apply), or
 - (iii) Any other agreement by the parties relating to conduct of the arbitration,
 - (b) That an arbitrator has not been impartial and independent, or
 - (c) That an arbitrator has not treated the parties fairly, it may also make such order as it thinks fit about any arbitrator's entitlement (if any) to fees and expenses (and such an order may provide for the repayment of fees or expenses already paid to the arbitrator).
- 72.5 An appeal may be made to the court of appeal against an appropriate court's decision on a serious irregularity appeal (but only with the leave of an appropriate court).
- 72.6 Leave may be given by an appropriate court only where it considers –
- (a) That the proposed appeal would raise an important point of principle or practice, or
 - (b) That there is another compelling reason for the court of appeal to consider the appeal.
- 72.7 An appropriate court's decision on whether to grant such leave is final.
- 72.8 The court of appeal's decision on such an appeal is final.

73. Challenging an award: legal error

- 73.1 A party may appeal to an appropriate court against the tribunal's award on the ground that the tribunal erred on a point of South African law (a "legal error

appeal").

73.2 An agreement between the parties to disapply rule 54.2(c) by dispensing the tribunal's duty to state its reasons for its award is to be treated as an agreement to exclude the court's jurisdiction to consider a legal error appeal.

74. Legal error appeals : procedure etc

74.1 This rule applies only where legal error appeals as set out in South African law applies.

74.2 A legal error appeal may be made only –

- (a) With the agreement of the parties, or
- (b) With the leave of an appropriate court.

74.3 Leave to make a legal error appeal may be given only if an appropriate court is satisfied –

- (a) That deciding the point will substantially affect a party's rights, that the tribunal was asked to decide the point, and
- (b) That, on the basis of the findings of fact in the award (including any facts which the tribunal treated as established for the purpose of deciding the point), the tribunal's decision on the point –
 - (i) Was obviously wrong, or
 - (ii) Where the court considers the point to be of general importance is open to serious doubt.

74.4 An application for leave is valid only if it –

- (a) Identifies the point of law concerned, and
- (b) States why the applicant considers that leave should be granted.

74.5 An appropriate court must determine an application for leave without a hearing (unless satisfied that a hearing is required).

74.6 An appropriate court's determination of an application for leave is final.

74.7 Any leave to appeal expires 7 days after it is granted (and so any legal error appeal made after then is accordingly invalid unless made with the agreement of the parties).

74.8 An appropriate court may decide a legal error appeal by –

- (a) confirming the award,
- (b) ordering the tribunal to reconsider the award (or part of it), or
- (c) if it considers reconsideration inappropriate, setting aside the award (or part of it).

74.9 An appeal may be made to an appropriate court against an appropriate court's decision on a legal error appeal (but only with the leave of an appropriate court).

74.10 Leave may be given by an appropriate court only where it considers –

- (a) That the proposed appeal would raise an important point of principle or practice, or
- (b) That there is another compelling reason for an appropriate court to consider the appeal.

74.11 An appropriate court's decision on whether to grant such leave is final.

74.12 An appropriate court's decision on such appeal is final.

75. Challenging an award : supplementary

75.1 This rule applies to –

- (a) Jurisdictional appeals,
- (b) Serious irregularity appeals, and
- (c) Legal error appeals and references to "appeal" are to be construed accordingly.

75.2 An appeal is competent only if the appellant has exhausted any available arbitral process of appeal or review.

75.3 No appeal may be made against a provisional award.

75.4 An appeal must be made no later than 28 days after the later of the following dates –

- (a) The date on which the award being appealed against is made,
- (b) If the award is subject to a process of correction under rule 62, the date on which the tribunal decides whether to correct the award, or
- (c) If there has been an arbitral process of appeal or review, the date on which the appellant was notified of the result of that process. A legal error appeal is to be treated as having been made for the purposes of this rule if an application for leave is made.

- 75.5 An application for leave to appeal against an appropriate court's decision on an appeal must be made no later than 28 days after the date on which the decision is made (and any such leave expires 7 days after it is granted).
- 75.6 An appellant must give notice of an appeal to the other party and the tribunal.
- 75.7 The tribunal may continue with the arbitration pending determination of an appeal against a part award.
- 75.8 an appropriate court may –
- (a) order the tribunal to state its reasons for the award being appealed in sufficient detail to enable an appropriate court (or court of appeal) to deal with the appeal properly, and
 - (b) make any other order it thinks fit with respect to any additional expenses arising from that order.
- 75.9 Where an appropriate court decides an appeal by setting aside the award (or any part of it), it may also order that any provision in an arbitration agreement which prevents the bringing of legal proceedings in relation to the subject-matter of the award (or that part of it) is void.
- 75.10 an appropriate court may –
- (a) order an appellant (or an applicant for leave to appeal) to provide security for the expenses of the appeal (or application), and
 - (b) dismiss the appeal (or application) if the order is not complied with.
- 75.11 But such an order may not be made only on the grounds that the appellant (or applicant) –
- (a) Is an individual who ordinarily resides outside South Africa, or
 - (b) Is a body which is –
 - (i) Incorporated or formed under the law of a country outside South Africa, or
 - (ii) Managed or controlled from outside South Africa.
- 75.12 An appropriate court may –
- (a) Order that any amount due under an award being appealed (or any associated provisional award) must be paid into court or otherwise secured pending its decision on the appeal (or the application for leave to appeal), and
 - (b) Dismiss the appeal (or application) if the order is not complied with.

75.13 An appeal to a further court in terms of this Rule (after first appeal) against any decision of such a court under this rule may be made only with the leave of an appropriate court.

75.14 An application for leave to appeal against such a decision must be made no later than 28 days after the date on which the decision is made (and any such leave expires 7 days after it is granted).

75.15 Leave may be given by an appropriate court only where it considers –

- (a) That the proposed appeal would raise an important point of principle or practice, or
- (b) That there is another compelling reason for the appropriate court of appeal to consider the appeal.

75.16 An appropriate court's decision on whether to grant such leave is final.

75.17 A decision of the competent court of appeal under this rule (including any decision on an appeal against a decision by an appropriate court) is final.

76. Reconsideration by tribunal

76.1 Where an appropriate court or, as the case may be, the appropriate court decides a serious irregularity appeal or a legal error appeal by ordering the tribunal to reconsider its award (or any part of it), the tribunal must make a new award in respect of the matter concerned (or confirm its original award) by no later than –

- (a) In the case of a decision by an appropriate court –
 - (i) Where the decision is appealed, the day falling 3 months after the appeal (or, as the case may be, the application for leave to appeal) is dismissed or abandoned,
 - (ii) Where the decision is not appealed, the day falling 3 months after the decision is made, or
 - (iii) Such other day as an appropriate court may specify,
- (b) In the case of a decision by the court of appeal –
 - (i) The day falling 3 months after the decision is made, or
 - (ii) Such other day as the court of appeal may specify.

76.2 These rules apply in relation to the new award as they apply in relation to the appealed award.

77. Immunity of tribunal etc.

- 77.1 Neither the tribunal nor any arbitrator is liable for anything done or omitted in the performance, or purported performance, of the tribunal's functions.
- 77.2 This rule does not apply –
- (a) If the act or omission is shown to have been in bad faith, or
 - (b) To any liability arising from an arbitrator's resignation (but see rule 13.1(c)).
- 77.3 This rule applies to any clerk, agent, employee or other person assisting the tribunal to perform its functions as it applies to the tribunal.

78. Immunity of appointing arbitral institution etc.

- 78.1 An arbitral appointments referee, or other third party who the parties ask to appoint or nominate an arbitrator, is not liable –
- (a) For anything done or omitted in the performance, or purported performance, of that function (unless that act or omission is shown to have been in bad faith), or
 - (b) For the acts or omissions of –
 - (i) Any arbitrator whom it nominates or appoints, or
 - (ii) The tribunal of which such an arbitrator forms part (or any clerk, agent or employee of that tribunal).
- 78.2 This rule applies to an arbitral appointments referee's, or other third parties, agents and employees as it applies to the referee or other third party.

79. Immunity of experts, witnesses and legal representatives

Every person who participates in arbitration as an expert, witness or legal representative has the same immunity in respect of acts or omissions as the person would have if the arbitration were civil proceedings.

80. Loss of right to object

- 80.1 A party who participates in an arbitration without making a timeous objection on the ground –
- (a) That an arbitrator is ineligible to act as an arbitrator,
 - (b) That an arbitrator is not impartial and independent,
 - (c) That the tribunal does not have jurisdiction,
 - (d) That the arbitration has not been conducted in accordance with –

- (i) The arbitration agreement,
 - (ii) These rules (in so far as they apply), or
 - (iii) Any other agreement by the parties relating to conduct of the arbitration,
- (e) That the arbitration has been affected by any other serious irregularity,

may not raise the objection later before the tribunal or the court.

80.2 An objection is timeous if it is made –

- (a) As soon as reasonably practicable after the circumstances giving rise to the ground for objection first arose,
- (b) By such later date as may be allowed by –
 - (i) The arbitration agreement,
 - (ii) These rules (in so far as they apply), or
 - (iii) The other party, or
- (c) Where the tribunal considers that circumstances justify a later objection, by such later date as it may allow.

80.3 This rule does not apply where the party shows that it did not object timeously because it –

- (a) Did not know of the ground for objection, and
- (b) Could not with reasonable diligence have discovered that ground.

80.4 This rule does not allow a party to raise an objection which it is barred from raising for any reason other than failure to object timeously.

81. Independence of arbitrator

For the purposes of these rules, an arbitrator is not independent in relation to an arbitration if –

81.1 The arbitrator's relationship with any party,

81.2 The arbitrator's financial or other commercial interests, or

81.3 Anything else giving rise to justifiable doubts as to the arbitrator's impartiality.

82. Consideration where arbitrator judged not to be impartial and independent

82.1 This rule applies where –

- (a) An arbitrator is removed by an appropriate court under rule 9 on the ground that the arbitrator is not impartial and independent,

- (b) The tribunal is dismissed by an appropriate court under rule 10 on the ground that it has failed to comply with its duty to be impartial and independent, or
- (c) The tribunal's award (or any part of it) is returned to the tribunal for reconsideration, or is set aside, on either of those grounds.

82.2 Where this rule applies, an appropriate court must have particular regard to whether an arbitrator has complied with rule when it is considering whether to make an order under rule 13.1 or 72.4 about –

- (a) The arbitrator's entitlement (if any) to fees or expenses,
- (b) Repaying fees or expenses already paid to the arbitrator.

83. Death of arbitrator

An arbitrator's authority is personal and ceases on death.

84. Death of party

84.1 An arbitration agreement is not discharged by the death of a party and may be enforced by or against the executor or other representatives of that party.

84.2 This rule does not affect the operation of any law by virtue of which a substantial right or obligation is extinguished by death.

85. Unfair treatment

A tribunal (or arbitrator) who treats any party unfairly is, for the purposes of these rules, to be deemed not to have treated the parties fairly.

86. Rules applicable to umpires

86.1 The following rules apply in relation to an umpire appointed under rule 34 (or otherwise with the agreement of the parties) as they apply in relation to an arbitrator or, as the case may be, the tribunal –

Rule 8 to 11

Rule 22

Rule 25

Rules 63, 64 and 65.1

Rule 72

Rule 77

Rules 80 to 83

86.2 But the parties are, in so far as those rules are not mandatory rules, free to modify or disapply the way in which those rules would otherwise apply to an umpire.

87. Formal communications

87.1 A "formal communication" means any application, award, consent, direction, notice, objection, order, reference, request, requirement or waiver made or given or any document served –

- (a) In pursuance of an arbitration agreement,
- (b) For the purpose of these rules (in so far as they apply), or
- (c) Otherwise in relation to an arbitration.

87.2 A formal communication must be in writing.

87.3 A formal communication is made, given or served if it is –

- (a) Hand delivered to the person concerned,
- (b) Sent to the person concerned by first class post in a properly addressed envelope or package –
 - (i) In the case of an individual, to the individual's principal place of business or usual or last know abode,
 - (ii) In the case of a body corporate, to the body's registered or principal office, or
 - (iii) In either case, to any postal address designated for the purpose by the intended recipient (such designation to be made by giving notice to the person giving or serving the formal communication), or
- (c) Sent to the person concerned in some other way (including by email, fax or other electronic means) which the sender reasonably considers likely to cause it to be delivered on the same or next day.

87.4 A formal communication which is sent by email, fax or other electronic means is to be treated as being in writing only if it is legible and capable of being used for subsequent reference.

87.5 A formal communication is, unless the contrary is proved, to be treated as having been made, given or served –

- (a) Where hand delivered, on the day of delivery,
- (b) Where posted, on the day on which it would be delivered in the ordinary course of post, or
- (c) Where sent in any other way described above, on the day after it is

sent.

- 87.6 The tribunal may determine that a formal communication –
- (a) Is to be delivered in such other manner as it may direct
 - (b) Need not be delivered, but it may do so only if satisfied that it is not reasonably practicable for the formal communication to be made, given or served in accordance with this rule (or, as the case may be, with any contrary agreement between the parties).
- 87.7 This rule does not apply in relation to any application, order, notice, document or other thing which is made, given or served in or for the purposes of legal proceedings.

88. Periods of time

Periods of time are to be calculated for the purposes of arbitration as follows –

- 88.1 Where any act requires to be done within a specified period after or from a specified date or event, the period begins immediately after the date or, as the case may be, the date of that event, and
- 88.2 Where the period is a period of 7 days or less, the following days are to be ignored –
- (a) Saturdays and Sundays, and
 - (b) Any public holidays in the place where the act concerned is to be done.

89. Costs

- 89.1 In this Article any reference to costs is a reference to the costs of the arbitration as defined in rule 63 (costs of the arbitration) including the fees and expenses of IFLA (SA), unless otherwise indicated.
- 89.2 The arbitrator may require the parties to pay his or her fees and expenses accrued during the course of the arbitration at such interim stages as may be agreed with the parties, and in the absence of agreement, at reasonable intervals.
- 89.3 The arbitrator may order either party to provide security for the arbitrator's fees and expenses and the fees and expenses of IFLA (SA).
- 89.4 Unless otherwise agreed by the parties, the arbitrator will make an award allocating costs as between the parties in accordance with the following general principle:
- (a) the parties will bear the arbitrator's fees and expenses and the fees and expenses of IFLA (SA) in equal shares;

- (b) there will be no order or award requiring one party to pay the legal or other costs of another party.

This principle is subject to the arbitrator's overriding discretion as set out in these Rules.

89.5 Where it is appropriate to do so because of the conduct of a party in relation to the arbitration (whether before or during it), the arbitrator may at any stage order that party:

- (a) to bear a larger than equal share, and up to the full amount, of the arbitrator's fees and expenses and the fees and expenses of IFLA (SA);
- (b) to pay the legal or other costs of another party;

and may make an award accordingly.

89.6 In deciding whether, and if so, how to exercise the discretion set out in these Rules, the arbitrator will have regard to the following:

- (a) any failure by a party to comply with these Rules or any order or directions which the arbitrator considers relevant;
- (b) any open offer to settle made by a party;
- (c) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
- (d) the manner in which a party has pursued or responded to a claim or a particular allegation or issue;
- (e) any other aspect of a party's conduct in relation to the arbitration which the arbitrator considers relevant; and
- (f) the financial effect on the parties of any costs order or award.

89.7 Unless the parties agree otherwise, no offer to settle which is not an open offer to settle shall be admissible at any stage of the arbitration.

89.8 These rules as to costs will not apply to applications made to the court where costs fall to be determined by the court.

90. Conclusion of the arbitration

90.1 The agreement to arbitrate will be discharged (and any current arbitration will terminate) if:

- (a) a party to the arbitration agreement dies; or
- (b) a party to the arbitration agreement lacks, or loses, capacity, except that:
 - (i) if the party is represented by an attorney who has the power so to act, the attorney may, in his or her discretion,

continue with the arbitration or terminate it;

- (ii) if a Curator is appointed by a Court of competent Jurisdiction in relation to that party and has the power so to act, the Curator may, in his or her discretion, continue with the arbitration or terminate it.

90.2 The arbitration will be terminated:

- (a) If the arbitrator considers that the dispute is not suitable for arbitration under the Scheme and terminates the proceedings;
- (b) If and insofar as a court entertains concurrent legal proceedings and declines to stay them in favour of arbitration;
- (c) If the parties settle the dispute and, in accordance with rule 50 (settlement), the arbitrator terminates the proceedings;
- (d) If the parties agree in writing to discontinue the arbitration and notify the arbitrator accordingly;
- (e) On the arbitrator making a final award dealing with all the issues, subject to any entitlement of the parties to challenge the award by any available arbitral process of appeal or review or in accordance with the provisions of Part 1 of the Act.

91. General

91.1 At relevant stages of the arbitration, the arbitrator may encourage the parties to consider using an alternative dispute resolution procedure other than arbitration, such as mediation, negotiation or early neutral evaluation, in relation to the dispute or a particular aspect of the dispute.

91.2 If the parties agree to use an alternative dispute resolution procedure such as mediation, negotiation or early neutral evaluation, then the arbitrator will facilitate its use and may, if appropriate, stay the arbitration or a particular aspect of the arbitration for an appropriate period of time for that purpose.

91.3 In the event that the dispute is settled (following a mediation or otherwise), the parties will inform the arbitrator promptly settlement will apply. Fees and expenses accrued due to arbitrator by that stage will remain payable.

91.4 The parties will inform the arbitrator promptly of any proposed application to the court and will provide him or her with copies of all documentation intended to be used in any such application.

91.5 IFLA (SA), their employees and agents will not be liable:

- (a) for anything done or omitted in the actual or purported appointment or nomination of an arbitrator, unless the act or omission is shown to have been in bad faith;

- (b) by reason of having appointed or nominated an arbitrator, for anything done or omitted by the arbitrator (or his employees or agents) in the discharge or purported discharge of his functions as an arbitrator;
 - (c) for any consequences if, for whatever reason, the arbitral process does not result in an award or, where necessary, a court order embodying an award by which the matters to be determined, are resolved.
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IFLA (SA)

FAMILY LAW ARBITRATION SCHEME PROSPECTUS FOR FAMILY LAW ARBITRATORS

Introduction

The Family Law Arbitration Scheme ('the Scheme') is a scheme under which disputes with a family background (currently of a financial or property nature) may be resolved by arbitration.

In order to become a member of the Scheme as an arbitrator, it is necessary that Scheme members obtain and maintain membership of IFLA (SA) as members of a panel of arbitrators which shall be managed by Resolution by IFLA (SA).

The Scheme is administered on behalf of IFLA (SA), whose members are attorneys, advocates, retired judges, academics in law and the Family Law Bar Committee of CLS.

IFLA (SA) is responsible for:

- the rules governing the Family Law Arbitration Scheme;
- eligibility, training and qualification criteria;
- application procedures;
- criteria for remaining on the panel;
- denying, suspending or revoking membership of the panel;
- development of the Scheme;
- public perceptions and requirements of the Scheme;
- pursuing legislative reform as and when appropriate;
- discipline of members.

Benefits of family law arbitration

Some of the primary advantages of family arbitration are:

- The selection of the decision maker;
- The direct continuous involvement of the decision maker;
- Flexibility and individual choice of adjudication process;
- Privacy and confidentiality;
- Avoidance of court delays and standardization;
- Use for discrete issues of a case;
- Speed;
- Saving of court resources.

Applications

Applications to train and qualify as family law arbitrators must be made on a prescribed form and accompanied by an administration fee prescribed from time to time by IFLA (SA).

Eligibility

Training and qualification as a family law arbitrator is available only to those who satisfy the criteria and conditions established by IFLA (SA). Eligibility is considered without reference to race, religion or belief, gender or gender re-assignment, sexual orientation, disability, age, pregnancy or maternity, marital status.

An applicant must:

- a. be either an attorney, advocate, academic (in law), part time or retired judge or part time or retired tribunal chairperson;
- b. support the Resolution Code of Practice;
- c. have at least 10 years post qualification experience; and
- d. have spent a minimum of 550 hours per annum carrying out family law case work relevant to the scheme during each of the 10 years immediately preceding his or her application. If an applicant has spent a minimum of 550 hours per annum carrying out family law

casework for 10 years but those 10 years are not immediately preceding his or her application the applicant must provide evidence of up to date knowledge of family law.

An applicant who is unable to satisfy the criteria set out at d) above due to parental leave, illness or other extenuating circumstances, may seek an exemption at the IFLA (SA)'s discretion.

Applicants other than part time or retired judges or part time or retired tribunal chairpersons must provide the name of two referees who are judges, tribunal chairpersons or senior advocates or senior family law attorneys of at least 15 years experience. Referees will be asked to certify that the applicant meets the following competencies:

1. Intellectual capacity

- High level of expertise in your chosen area or profession;
- Ability quickly to absorb and analyse information;
- Appropriate knowledge of the law and its underlying principles, or the ability to acquire this knowledge where necessary.

2. Personal qualities

- Integrity and independence of mind;
- Sound judgment;
- Decisiveness;
- Objectivity;
- Ability and willingness to learn and develop professionally.

3. An ability to understand and deal fairly

- Ability to treat everyone with respect and sensitivity whatever their background;
- Willingness to listen with patience and courtesy.

4. Authority and communication skills

- Ability to explain the procedure and any decisions reached clearly and succinctly to all those involved;
- Ability to inspire respect and confidence;
- Ability to maintain authority when challenged.

5. Efficiency

- Ability to work at speed and under pressure;
- Ability to organise time effectively and produce clear reasoned judgments/awards expeditiously;
- Ability to work constructively with others (including leadership and managerial skills where appropriate).

Training and qualification

Training is carried out by IFLA (SA)'s nominees ("the training panel"). The training course is usually delivered over a weekend, with a combination of private study and face-to-face tutorials. Private study includes reading course materials. Face-to-face tutorials involve candidates attending classes in South Africa 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 the arbitration stream of IFLA (SA) ("the arbitration stream").

As Members of the arbitration stream, family law arbitrators will be subject to the rules and regulations, code of ethics, complaints and disciplinary procedures of the arbitration stream. Complaints as to misconduct by an arbitrator are investigated by a Professional Conduct Committee with power to refer the matter to a Disciplinary Tribunal.

After successful completion of the training and award writing exercise the training panel will recommend the admission of candidates who apply for membership and meet the arbitration stream membership requirements and recommend to IFLA (SA) that those who have been admitted as arbitrators join the IFLA (SA) panel of family arbitrators. That will serve as the accreditation which IFLA (SA) can rely upon.

Remaining on the panel of family law arbitrators

In order to remain on the panel of family law arbitrators it is necessary to comply with all of the following:

- For attorneys and advocates to maintain their professional qualification and membership of their respective professional bodies;
- To retain membership of IFLA (SA) and the arbitration stream;

- To continue to spend a minimum of 550 hours per annum carrying out family law casework or to continue as a member of IFLA (SA) and the arbitration stream and to comply with IFLA (SA)'s requirements for continuing professional development and in particular will be required to keep up to date with family law;
- to pay an annual administration fee to IFLA (SA) as shall be prescribed by IFLA (SA) from time to time. This is to cover the costs of dealing with referrals and with administering IFLA (SA);
- To send a return (in such form as shall be required by IFLA (SA)) of arbitrations which have been commenced under the scheme.

Arbitrators are required to disclose to IFLA (SA) anything which could bring it or its constituent organisations into disrepute.

An arbitrator may take a career break from the panel, for whatever reason, for up to two years on the following basis:

- he/she may not hold him/herself out to the public as an arbitrator for the duration of the career break;
- he/she maintains 8 hours per annum in family law related topics for each year of the career break;
- at the end of the two years, he/she confirms in writing that he/she is immediately returning to at least 550 hours per annum family law practice.

An arbitrator who is unable to satisfy the criteria set out above due to parental leave, illness or other extenuating circumstances may seek an exemption at the Committee's discretion.

IFLA (SA) shall revoke or suspend membership of the panel of arbitrators if:

e.g. the arbitrator ceases for any reason to be a member of IFLA (SA) or fails to pay the Annual administration fee.

Administration of the Scheme

An IFLA (SA) appointed Administrator will be responsible for:

- administering the referrals to the Scheme;
- maintaining a panel of accredited family law arbitrators;
- collecting fees payable by applicants;
- maintaining records of arbitrations undertaken;
- acting as the interface for inquiries and questions.

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 on the prescribed form. The application is checked to confirm that it is signed and that all 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. The Administrator will make contact with the arbitrator to check that he or she can take the case and will thereafter send the parties' and their legal representatives' details to the arbitrator. Once the arbitrator has accepted the case and the parties have been informed, the arbitrator will deal directly with the parties and their legal representatives. The arbitrator's costs will be dealt with by the arbitrator.

IFLA (SA) does not guarantee that any arbitrator on the panel will be appointed.

Appraisal/feedback/monitoring

A system for obtaining feedback from users of the scheme will be organised by the Administrator. This will be based on procedures currently being developed by IFLA (SA) for use.

IFLA (SA)

IFLA (SA) recognises a general obligation in the conduct of examinations, assignments and assessments to act fairly and transparently, employing objective criteria as the basis of testing knowledge or assessing practical skills and the application of knowledge, but preserves the right of examiners, moderators and assessors to apply their academic and professional judgment in the evaluation of candidates' work and performance.

These Regulations define the basis of the registration agreement between IFLA (SA) and the candidate. They apply to all IFLA (SA) examinations, assignments and assessments including those provided by IFLA (SA) Branches.

IFLA (SA) may alter the Regulations at any time. The Regulations that apply to candidates are those that are in force at the time they register for a course or piece of assessment. Any change in Regulations will be published on the IFLA (SA) website or by e-mail to members.

1. IFLA (SA)

1.1 The IFLA (SA) Path Programme is an educational framework covering the main disciplines of Family Law arbitration.

1.2 Candidates are required to successfully complete the IFLA (SA) modules by passing the respective assessments, assignments, examinations and peer interview to attain the relevant membership grades, unless an exemption has been approved.

2. Exemptions

2.1 Candidates who have undertaken an education programme with IFLA (SA) or an education programme of equivalence to a IFLA (SA) module may be awarded a specific level of exemption in order for candidates to progress to membership, IFLA (SA) arbitration stream and panel of arbitrators.

2.2 Candidates wishing to apply for an exemption must contact the Membership Department to seek guidance on the documentation to be submitted to support their exemption application.

2.3 Candidates will be required to follow the course and assessment structure and regulations in place for the current programme. Where appropriate exemptions will be given in line with the current exemptions policy.

3. Registration for Courses

- 3.1 Candidates must complete a registration form and submit the correct fee to register on a IFLA (SA) course. Candidates are automatically registered onto the course and its associated elements of assessment.
- 3.2 All candidates accepted for entry onto a IFLA (SA) course will be deemed to have accepted the IFLA (SA) arbitrators Candidate Regulations.
- 3.3 Candidates are permitted to transfer registration for a course to a later date. A maximum of 3 postponements is permitted. Postponement charges will apply.
- 3.4 Candidates are permitted to cancel their registration on a course. Cancellation charges will apply.
- 3.5 IFLA (SA) reserves the right to cancel or change the date, venue or content of programmes and the names of speakers, lectures and tutors. Candidates will be provided with adequate notice of any change.

4. Registration of Examinations, Assignments and Assessments

- 4.1 Upon registration on a course, candidates are automatically entered for the relevant examinations, assignments and assessments.
- 4.2 Candidates wishing to register solely for an examination, assignment or assessment only must complete a registration form and submit the correct fee to register.
- 4.3 All candidates accepted for entry onto an examination, assignment or assessment will be deemed to have accepted the IFLA (SA) Candidate Regulations.
- 4.4 Candidates are permitted to transfer registration for an examination, assignment or assessment entry. Postponement charges will apply.
- 4.5 Unless stated otherwise, candidates will be examined on the law of SA. Candidates will be expected to be aware of a change in the law which has occurred up to six months preceding the examination, but will not be examined on its detail.
- 4.6 Candidates will be permitted four attempts at each examination, assignment and assessment.

- 4.7 Non-completion of a module after four attempts will result in a candidate having to begin the course of study again from the start of the module.
- 4.8 Candidates who fail to attend an examination or assessment workshop without justifiable reason will be marked absent and it will be counted as a failed attempt. Candidates will be given the opportunity to apply and take the examination or assessment workshop at a later date. Resit charges will apply.
- 4.9 Candidates who fail to submit an assignment within the stipulated deadline will invalidate that paper and the examination or assignment will be deemed a fail. Candidates will be given the opportunity to apply and take the examination or assignment at a later date. Resit charges will apply.
- 4.10 The first assignment submission will be deemed the only submission accepted and marked by IFLA (SA). Any later submissions will not be accepted.
- 4.11 Candidates must adhere to the word limits provided in assignments and assessments. Marks will not be awarded for information provided beyond the stated word limit.
- 4.12 Candidates must answer the required number of questions in an examination, assignment or assessment. Marks will not be awarded to candidates for the additional answers completed.

5. Resits

- 5.1 Candidates wishing to resit an examination, assignment or assessment must complete a resit form and submit the correct fee.
- 5.2 Candidates who pass an examination, but fail to achieve an overall module pass will be permitted to resit the relevant element of assessment or have the choice to resit the whole module.
- 5.3 Candidates who fail the assessment workshop and exam will be permitted to resit at a later date, but subject to these Rules.

6. Fees

- 6.1 The relevant fee must be submitted with all registration and resit forms. Applications will not be processed until full payment is received.

- 6.2 All fees are payable (to IFLA (SA)) in (rands) unless otherwise agreed. Bank charges will be applied where payment is made in other currencies.
- 6.3 Fees will be refunded in accordance with the regulations set in the IFLA (SA) Fee Sheet for Candidates.

7. Examination centres

- 7.1 If a course requires a candidate to complete an examination, then candidates will be automatically registered to sit examinations at IFLA (SA) nominated offices. It is possible to arrange for examinations to be sat elsewhere at the sole discretion of IFLA (SA). Candidates must specify on the registration form where they would prefer to sit their examinations.
- 7.2 Candidates who wish to sit an examination at a IFLA (SA) Branch or a special examination centre will be required to pay any additional local charges for invigilation and facilities.
- 7.3 IFLA (SA) will arrange special examination centres with an equivalent standard of invigilation and facilities.

8. Conduct of examination

Before the examination

- 8.1 The examination room will be open at least 30 minutes before the start of each examination.
- 8.2 Candidates should arrive at the examination centre at least 15 minutes before the examination is scheduled to commence.
- 8.3 Candidates should contact IFLA (SA) if an invigilator is not present at the examination centre at least 15 minutes before the commencement of the examination.

Admission into the examination

- 8.4 Candidates must place all personal belongings such as briefcases, bags, coats, mobile phones in an area in the examination room designated by the Invigilator. Candidates are advised not to bring anything valuable to the examination centre as all items are left at own risk. Mobile phones must be switched off at all times. Candidates must ensure their stationery (pens, pencils, erasers) are stored in a clear case or plastic bag.

- 8.5 Candidates are required to be in their places in the examination room at least ten minutes before the commencement of the examination in order to complete and sign an attendance form.
- 8.6 Candidates arriving late will not be permitted extra time.
- 8.7 Candidates must bring some form of photographic identification to the examination.
- 8.8 Candidates will not be admitted to the examination room after thirty minutes following the commencement of an examination.
- 8.9 Candidates will not be permitted to leave the examination room during the first thirty minutes of an examination.
- 8.10 Candidates leaving the examination room early will have their answers collected by an invigilator and will not be re-admitted to the examination room.
- 8.11 No candidate will be allowed to leave the examination room during the last 15 minutes of the examination.
- 8.12 A candidate wishing to leave the examination room temporarily must seek the permission of an invigilator before doing so and must be accompanied by an invigilator throughout his or her absence, this includes a break to the toilets.
- 8.13 Smoking and eating is not permitted in the examination room.
- 8.14 Candidates will be permitted to bring bottled water into the examination room.
- 8.15 Candidates will be issued with answer sheets at the start of the examination, and time will be given to complete the front sheet.
- 8.16 Candidates must ensure they clearly write their Candidate Number on the front answer sheet. Any other identification of the candidate on the answer sheet will invalidate that paper and the examination may be deemed a fail or treated as a nullity at the discretion of the Examination Board.

During the examination

- 8.17 Candidates are not permitted to use electronic devices and laptops for examinations. Basic calculators may be taken into the examination.

- 8.18 Candidates must follow the open and closed book examination policy for the relevant course of study. Candidates should refer to the course information sheet for guidance.
- 8.19 Examinations will be conducted and supervised by invigilators in accordance with these instructions. Candidates are required to comply with any instructions or directions given by the invigilators.
- 8.20 The invigilator will make the announcement to candidates at the start of each examination.
- 8.21 Candidates must write legibly, using black or blue pen. Correction fluid should not be used in the examination.
- 8.22 Answers to each new question must be started on a fresh page.
- 8.23 Any rough work must be written on the answer sheets. Unless a candidate clearly strikes through the rough work, this may be assessed as part of your answer.
- 8.24 Candidates may not communicate with, receive assistance from, or attempt to copy from the script of any other candidate. A breach of any part of these regulations may result in failure of the current examination.
- 8.25 An invigilator suspecting any unfair practice on the part of any candidate will, after informing the candidate of the suspicion, report the same to the Education and Training Department for consideration by the Examinations Board. The invigilator will not prevent the candidate from continuing with the examination unless the candidate's conduct also constitutes an annoyance or distraction to other candidates. Any unauthorised materials being used by a candidate will be removed and may be referred to the Examinations Board if deemed appropriate.

At the end of the examination

- 8.26 Candidates must cease writing immediately after the invigilator announces the examination is over.
- 8.27 Answer sheets should be firmly attached together using treasury tags supplied for this purpose. Any paper not used should be left on the desk for the invigilator to collect after the examinations.
- 8.28 Candidates must stay seated at their desks until the invigilator collects all the examination materials and scripts.

- 8.29 For security reasons and owing to the international nature of the examinations, candidates are not permitted to take the question paper or any unused sheets out of the examination room.
- 8.30 Candidates will not be permitted to seek copies of their examination scripts.
- 8.31 Candidates will be contacted by IFLA (SA) with the examination results.

9. Conduct of Assessments

- 9.1 The following section applies to the conduct of assessments. Assessments normally takes the form of direct observation of practical work, role-plays, oral questioning, written tests or other forms of assessment evaluation.
- 9.2 Detailed information regarding assessments is provided in the individual course information sheets.
- 9.3 Candidates are required to be in attendance at the time specified in instructions issued before the assessment.
- 9.4 Candidates are required to comply with instructions or directions given by the assessors.
- 9.5 Candidates causing annoyance or distraction to other candidates may be required by the assessor to leave the room. In this case the candidate's attempt at the relevant assessment will be treated as a failure.
- 9.6 Assessed role-plays may be recorded. All recordings will remain the property of the Chartered Institute of Arbitrators and will not be distributed to candidates.
- 9.7 Assessors will grade candidates according to the relevant published objective criteria.
- 9.8 The recorded assessment role-plays may be moderated. They may also, where required by the Institute's quality assurance policies, be scrutinised by the Examinations Board.
- 9.9 Candidates are reminded that the examiners and/or assessor's exercise of his or her judgment in determining competency is not subject to challenge or review.

- 9.10 Candidates must attend and participate in all parts of the assessment workshop to pass the module.

10. Disciplinary Matters

- 10.1 IFLA (SA) takes a serious view of academic misconduct in the written examinations, assignments or assessments. When considering a case of alleged academic misconduct, IFLA (SA) will pay due regard to extenuating circumstances, evidence of intent and the severity of the alleged offence.
- 10.2 A proven case of academic misconduct or unfair practice admitted by the candidate will be treated as a disciplinary matter. IFLA (SA) has the power to impose sanctions, including failure in the written examinations, assignments and/or assessments with or without permission to attempt the examination, assignment or assessment on the next occasion.
- 10.3 Candidates will be provided with an opportunity to make representations in writing.
- 10.4 Academic misconduct during the written examinations will include:
- 10.4.1 helping or receiving help from another candidate
 - 10.4.2 possession in the examination room of unauthorised materials. This includes permitted materials containing unauthorised annotation.
 - 10.4.3 consulting any materials or persons outside the examination room during periods of absence while the examination is in progress
 - 10.4.4 attempting to influence a script marker or other official (for instance, by writing additional notes on the examination script)
 - 10.4.5 other misconduct includes behaviour likely to disturb or distract other candidates during the examination.
- 10.5 Academic misconduct in assignments includes plagiarism. Plagiarism is the misrepresentation of the work of others as your own (including ideas, arguments, words, diagrams, images or data). It includes the explicit claim that another's work is your own and, no less seriously, the failure to acknowledge adequately the sources used. This applies whatever the source of the material (for example, a published course, the internet, oral communication, the work of another candidate or commissioning work from another person or organisation).

11. Marking Process

- 11.1 The overall module pass mark for Introductions modules is based on a clear pass or fail.
- 11.2 The overall pass mark is 70%.
- 11.3 The pass mark for assessment workshops is based on a clear pass or fail.
- 11.4 In order to ensure rigorous quality and standards are maintained, examination and assignment scripts are passed through a number of quality assurance processes prior to the release of results.
 - 11.4.1 Scripts are marked by a IFLA (SA) approved marker;
 - 11.4.2 Scripts are reviewed by a IFLA (SA) approved moderator to ensure the general standard is acceptable and the marker has adopted a consistent approach;
- 11.5 All examination and assignment scripts are marked anonymously.

12. Notification of results

- 12.1 Results are dispatched to candidates by post and email, normally eight to twelve weeks from the date of the conclusion of the examination, assignment or assessment.
- 12.2 Where appropriate, results will be distributed to the candidate's IFLA (SA) branch for postage.
- 12.3 Results will not be released over the telephone.
- 12.4 All candidates who attempt an examination, assignment or assessment will receive a feedback report. Any further correspondence should form part of the appeals process.
- 12.5 Marked assignment scripts, examination scripts, workshop exercises and problems and assessment DVDs will not be released to candidates.

13. Extenuating circumstance

- 13.1 IFLA (SA) recognises that candidates may experience circumstances which may affect their performance in the examination, assignment or assessment. Such circumstances include:
 - 13.1.1 sickness;
 - 13.1.2 bereavement;
 - 13.1.3 disruption in the examination room;

- 13.2 In the event that a candidate believes their performance in an examination, assignment or assessment has been adversely affected by extenuating circumstances, candidates must submit a request for consideration by IFLA (SA). The request must be made in writing, providing an explanation of the circumstances, supported by documentary evidence and certification.
- 13.3 Any requests must be made no later than four weeks after the examination, assessment or submission of the assignment.
- 13.4 Candidates will be permitted an extension of seven days on the submission of an assignment. Extensions will only be granted to candidates who submit extenuating circumstances with medical evidence or evidence of bereavement. No other reason will be accepted.
- 13.5 Extenuating circumstances will be reviewed by IFLA (SA). In the event of a dispute between the candidate and IFLA (SA), candidates may appeal. Appeal charges will apply.
- 13.6 If a candidate is prevented from undertaking an examination, assignment or assessment due to extenuating circumstances, candidates can apply to postpone their examination, assignment or assessment and be transferred onto the next available session. Postponement charges may apply.
- 13.7 Candidates wishing to apply for a postponement must complete a postponement form and submit the form with the correct fee to IFLA (SA) at least 14 days prior to the date of the examination, assessment or release of the assignment.
- 13.8 Candidates may only postpone their course, examination, assignment or assessment registration on two occasions. It is at IFLA (SA)'S discretion to extend this period.

14. Disability Policy

- 14.1 IFLA (SA) is willing to take into account individual needs and make reasonable adjustments where necessary in order to assure non-prejudiced treatment and practical solutions to all its candidates provided that these required adjustments have been submitted to IFLA (SA) within sufficient time in advance to of the course or assessment.
- 14.2 Candidates with any physical impairment or learning difficulty should contact IFLA (SA) in writing providing documentation to support the

application at least 4 weeks prior to the course registration or examination, assignment or assessment date.

- 14.3 Each application will be considered on an individual basis. All applications for adjustments to assessments will be considered by IFLA (SA). In the event of a dispute arising, IFLA (SA) will make the final decision.

15. Administrative Check and Appeals

- 15.1 IFLA (SA) has stringent quality assurance procedures in place to ensure all candidates are treated in a fair and equitable manner. Should a candidate feel they have been unfairly treated after receiving their results, they are permitted to apply for an administrative check or an appeal.
- 15.2 Any requests must be made in writing to IFLA (SA) within four weeks of the date of notification of the results.

Independent Check

- 15.3 A candidate may request an independent check if they feel they have been unsuccessful in an examination or assignment and there is reason to believe that there may have been a clerical or administrative error in computing or notifying the correct result.
- 15.4 Candidates must submit a request in writing, supported by an explanation of the request.
- 15.5 The candidate's result and corresponding reports will be checked as an administrative procedure and the result will be notified to the candidate within 4 weeks or receipt of the request.
- 15.6 In the event of an administrative check revealing a clerical or administrative error, the candidate's amended result will be referred to IFLA (SA) for approval.

Appeal

- 15.7 A candidate may submit an appeal if they feel they have been unfairly treated through one of the following means:
- 15.7.1 unfair consideration of the extenuating circumstances;
 - 15.7.2 unfair practice in the conduct of the examination, assignment or assessment process;
 - 15.7.3 unfair conduct by an assessor or in application of the assessment process.

- 15.8 The fact that candidates expected to pass an examination, assignment or assessment, or considered that the preparation they had carried out should have warranted a pass is not sufficient grounds for an appeal.
- 15.9 Candidates are reminded that the examiner's exercise of his or her judgment in determining a mark and/or result is not subject to challenge or review.
- 15.10 Candidates must submit an appeal to IFLA (SA) for consideration by IFLA (SA) within 6 weeks of the release of the results. The appeal must be made in writing, providing an explanation, supported by documentary evidence and be accompanied by the correct fee.
- 15.11 IFLA (SA) will consider the appeal and determine its validity based on the supporting documentation. The result will be notified to the candidate within 12 weeks of the submission.
- 15.12 In the event the appeal is upheld, IFLA (SA) will determine the level of appeal fees to be refunded to the candidate.
- 15.13 For the purpose of these regulations, SA Law will govern any dispute arising between IFLA (SA) and the candidate, irrespective of where the examination, assignment or assessment was undertaken.
- 15.14 In the event of a dispute arising from the application of these regulations, which is not resolved by the provisions of the regulations or direct negotiation between IFLA (SA) and the complainant, then IFLA (SA) will offer to participate in a mediation process with the complainant, the service to be provided by an independent mediator nomination body.

FAMILY LAW ARBITRATION SCHEME
FORM IFLA (SA)1 – 2016 EDITION
APPLICATION FOR FAMILY ARBITRATION

1. We, the parties to this application, whose details are set out below, apply to IFLA (SA) for the nomination and appointment of a sole arbitrator from the Family Arbitration Panel ('the Panel') to resolve the dispute referred to at paragraph 2 below by arbitration Rules of the IFLA (SA) Scheme ('the Scheme'):

Applicant's name	
Address	
Telephone	
Mobile	
Email	
Fax	
Represented by *	
Address	
Telephone	
Mobile	
Email	
Fax	

And:

Respondent's name	
Address	
Telephone	
Mobile	
Email	
Fax	
Represented by *	

Address	
Telephone	
Mobile	
Email	
Fax	

*Delete as applicable. Add, if necessary, the names of other parties on a separate sheet.

2. The dispute concerns the following issue(s):

(Set these out on a separate sheet if preferred, but as concisely as possible.)

.....

.....

.....

Please complete EITHER paragraph 3 OR paragraph 4 below:

3. We wish to nominate the following member of the Panel for appointment in this matter:

(This paragraph applies if the parties agree that they would like the matter to be referred to a particular arbitrator and / or have approached a particular arbitrator directly. The appointment will initially be offered to the nominated arbitrator. If the appointment is not accepted by their first choice of arbitrator the parties may, if they agree, make a second or subsequent choice. Otherwise, it will be offered to another suitable member of the Panel.)

.....

4. We wish IFLA (SA) to nominate a member of the Panel for appointment in this matter.

(This paragraph applies if the parties have not identified a particular arbitrator to whom they wish the matter to be referred. Please set out below any preferences as to the arbitrator's experience and / or expertise and as to the geographical location of the arbitration.)

.....

.....

.....

5. **If court proceedings are current, please identify the nature of the proceedings, in which court they are taking place and what stage they have reached. (Please attach copies of any relevant documents and court orders.)**

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

6. **We confirm the following:**

6.1 We have been advised about and understand the nature and implications of this agreement to arbitrate;

6.2 Once the arbitration has started, we will not commence court proceedings or continue existing court proceedings in relation to the same subject matter (and will apply for or consent to a stay of any existing court proceedings, as necessary), unless it is appropriate to make an application to the court arising out of or in connection with the arbitration, or some relief is required that would not be available in the arbitration;

6.3 We have read the current edition of the Rules of the Scheme ('the Rules') and will abide by them. In particular, we understand our obligation to comply with the decisions, directions and orders of the arbitrator and, when required, to make full and complete disclosure relating to our financial circumstances;

6.4 We understand and agree that any award of the arbitrator appointed to determine this dispute will be final and binding on us, subject to the following:

(a) any challenge to the award by any available arbitral process of appeal or review or in accordance with the provisions of Part 1 of the Act;

(b) insofar as the subject matter of the award requires it to be embodied in a court order (see 6.5 below), any changes which the court making that order may require;

(c) insofar as the award provides for continuing payments to be made by one party to another, or to a child or children, a subsequent award or court order reviewing and varying or revoking the provision for continuing payments, and which supersedes an existing award;

6.5 If and so far as the subject matter of the award makes it necessary, we will apply to an appropriate court for an order in the same or similar terms as the award or the relevant part of the award. (In this context, 'an appropriate court' means a court which has jurisdiction to make a substantive order in the same

or similar terms as the award, whether on primary application or on transfer from another division of the court.) We understand that the court has a discretion as to whether, and in what terms, to make an order and we will take all reasonably necessary steps to see that such an order is made;

6.6 We understand and agree that although the Rules provide for each party, generally, to bear an equal share of the arbitrator's fees and expenses, if any party fails to pay their share, then the arbitrator may initially require payment of the full amount from any other party, leaving it to them to recover from the defaulting party;

6.7 We agree to the arbitration of this dispute in accordance with the Rules of the Scheme.

Signed.....

(Applicant or Applicant's legal representative, for and on behalf of Applicant)

Dated.....

Signed.....

(Respondent or Respondent's legal representative, for and on behalf of Respondent)

Dated.....

[ASSESSMENT INFORMATION]

Successful completion of the course requires a combination of attendance at and participation in all sessions (this being informally and continuously assessed); Together with the completion of an Award based on a family law case study within one week of the close of the course.

The case study will be made available at the close of the course.

The criteria against which Awards will be assessed are that they must:

- Provide a realistic, practicable and reasoned resolution to the issues raised by the case study;
- Comply with any relevant law;
- Comply with the formalities required to allow the Award to be enforced;
- Be drafted in an appropriate style and to an appropriate level of presentation.

Marks are allocated broadly as follows in respect of the various elements of the assessment:

- Formalities 5
- Content 15
- Issues 50
- Award 20
- Style 10

The pass mark is 70%.

It may be useful to note the following criteria which would indicate a fail, even though the requisite mark for a pass may have been attained.

Overriding Fail Criteria

Criteria which, subject to the discretion of the examiner, will normally dictate failure, irrespective of marks in other sections:

- Award internally inconsistent
- Award reaching a conclusion that is factually or legally impossible
- Award reaching a conclusion based on arbitrator's own evidence or otherwise inadmissible material
- Award failing to deal with all issues or dealing with issues outside the dispute or remit of the arbitration
- Award not enforceable for want of essential formalities
- Award not enforceable for ambiguity
- Award would be set aside for serious irregularities
- Award illegible
- Award bearing candidate's name

Participants will be asked to self-certify that the Award is their own work.

Participants will be informed of the results as soon as marking (which will be carried out anonymously) and other necessary processes have been completed.

If any participant is considered not to have completed an Award to the required standard, they will be offered feedback and support and given an opportunity to complete another Award that meets the required standard.

The Chartered Institute's general Assessment Regulations are included as part of this course pack, for information]

[PROFESSIONAL PROGRESSION

Participants who successfully complete the course will be eligible to apply for Membership of the Chartered Institute of Arbitrators.]

USEFUL LINKS

Chartered Institute of Arbitrators <http://www.ciarb.org/>

Institute of Family Law Arbitrators <http://ifla.org.uk/>

Family Arbitrator.com <http://www.familyarbitrator.com/>

Resolution <http://www.resolution.org.uk>

SAMPLE ARBITRATION CLAUSE IN PRE-NUPTIAL AGREEMENT

Should any dispute arise relating to the terms or implementation of this agreement, or as to the provision to be made by either party to the other upon their separation and divorce, it shall be referred for resolution to Arbitration by IFLA (SA) Accredited Arbitrator in accordance with the IFLA (SA) Scheme and under the IFLA (SA) Rules in place at the time, and the following provisions shall apply:-

- (a) The place and seat of the Arbitration shall be _____*
- (b) The Arbitrator shall, in default of agreement between the parties as to his/her appointment or in the event that any such agreed Arbitrator cannot or declines to act, be nominated by IFLA (SA) from the Family Arbitration Panel;*
- (c) There shall be one arbitrator and X and Y shall be bound by the arbitral award.*