



DISPUTES

Beware of boilerplate dispute resolution clauses

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Parties all too often, when negotiating agreements, agree to dispute resolution clauses without first understanding the implications of what is being agreed to in the event of a dispute arising. It has become vogue that dispute resolution clauses require that the parties mediate their disputes prior to engaging in arbitration or litigation. Indeed in April 2025 the Gauteng Division of the High Court of South Africa introduced mandatory mediation which requires that parties attempt to resolve their disputes through mediation prior to being able to apply for a trial date. Mediation is an alternative dispute resolution mechanism in terms of which parties, with the assistance of a mediator, attempt to resolve their disputes through negotiation facilitated by a mediator. Unlike a judge or an arbitrator, a mediator does not adjudicate the dispute between the parties and does not have the power to make a determination which is binding on the parties. The mediator's role is limited to facilitating discussions and negotiations between the parties with the intended result being the parties reaching a settlement. A key feature of mediation is that it is a voluntary process.

In *Superway Construction (Pty) Ltd v Cape Metal Windows Servicing CC and Another*^[1] a full bench of the Western Cape Division of the High Court of South Africa ("**High Court**") was required to determine whether mediation was a jurisdictional requirement to the adjudication process.

Superway Construction (Pty) Ltd ("**Superway**") appointed Cape Metal Windows Servicing CC ("**Cape Metal**") as a subcontractor to supply and install aluminium windows, doors and shopfronts. Clause 25.4 of the agreement ("**Agreement**") concluded between Superway and Cape Metal provided that in the first instance "*Dispute resolution is to be by means of mediation*".

A dispute arose between Superway and Cape Metal regarding alleged outstanding payments in terms of the Agreement. The Association of Arbitrators appointed Mark Wyndam Ilbury ("**Adjudicator**") to adjudicate the dispute between Superway and Cape Metal. Superway contended that the Adjudicator did not have the jurisdiction to adjudicate the dispute until such time as Superway and Cape Metal had engaged in a mediation as required by the Agreement. Despite this the Adjudicator directed that the adjudication proceed without further delay. The adjudication proceeded without Superway participating therein. The Adjudicator ultimately delivered his determination in terms of which he upheld Cape Metal's claims against Superway. Superway refused to comply with the determination. Cape Metal consequently applied to the High Court to enforce the determination. The court of first instance found in favour of Cape Metal and held that Superway was required to comply with the determination. Superway in turn noted an appeal to a full bench of the High Court.

In considering the matter the High Court considered the provisions of the draft Mediation Bill which provides, amongst other things, that parties are not compelled to submit to mediation if a court determines that participation is not in the best interests of the parties. The High Court also considered various sections of the Constitution of the Republic of South Africa including section 34 of the Constitution which provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or where appropriate, another independent and impartial tribunal or forum. Ultimately the High Court decided the matter by considering the wording of the dispute resolution clause in the Agreement.

In short the High Court found that the source of the Adjudicator's jurisdiction was the Agreement and that mediation was an "*indispensable jurisdictional gateway*" that the parties were required to comply with prior to engaging in the adjudication process. The High Court therefore upheld Superway's appeal against the decision of the court of first instance.

The key takeaway from the Superway case is that parties when negotiating agreements must understand what they are agreeing to in the event of a dispute arising. All too often parties, as an afterthought, simply insert boilerplate dispute resolution clauses which are not fit for purpose. Whilst mediation is potentially an effective dispute resolution method, it is not always appropriate particularly where there is a lack of good faith between the parties. In such circumstances mediation becomes a time consuming and expensive box ticking exercise. Parties must give careful consideration to the types of disputes that are likely to arise in the context of their agreement and tailor their dispute resolution clauses accordingly. A dispute resolution clause deserves as much attention and consideration as the operative provisions of an agreement.

[1] (Appeal) (A286/2025) [2026] ZAWCHC 407 (13 August 2026) (*Superway*)



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