Fundamental procedural rights of civil litigants in Australia and South Africa: is there cause for concern? (part 2)*

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4 *Position regarding fundamental civil procedural rights in South Africa*

4.1 Constitutional recognition of fundamental rights

Before the constitutional dispensation, South African civil procedural law followed essentially the same approach as the English model, to which it owes its origin. This meant that the fundamental rights or guarantees of civil litigants were not constitutionally protected or even embodied in legislation.[198] However, when the South African interim constitution of 1993 came into operation in 1994, it constituted a dramatic break with the past.[199] As observed before, "it marked the birth of a new constitutional dispensation based on the supremacy of the constitution and equality for all".[200] The interim constitution contained a chapter on fundamental rights[201] and it recognised a few civil procedural guarantees, including the right of "access to court"[202] and the right to "equality before the law".[203] The Constitution of the Republic of South Africa, 1996, amplified the protection accorded to civil litigants by specifically entrenching more fundamental civil procedural rights.[204] The constitution broke new ground by giving recognition not only to the traditional basic human rights and freedoms but also to fundamental procedural rights in both criminal and civil proceedings. In addition the constitution provides for the judicial review of legislation, meaning that the courts are empowered to test if legislation is consistent with the constitution and to invalidate provisions failing to pass muster.[205] The South African civil procedural system is therefore clearly aligned with the third approach to the recognition of fundamental rights discussed in paragraph 2.1.3 of part 1 of this article.

Section 34 of the constitution lays the foundation for the constitutional protection of civil litigants' fundamental procedural rights. It provides that "[e]veryone has the right to have any dispute that can be resolved by the application of law decided

* See 2019 TSAR 425 for part 1.

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198 De Vos "Civil procedural law and the constitution of 1996: an appraisal of procedural guarantees in civil proceedings" 1997 *TSAR* 444.
199 Constitution of the Republic of South Africa 200 of 1993; De Vos (n 198) 444.
200 De Vos (n 198) 444.
201 ch 3 of the interim constitution.
202 s 22 of the interim constitution.
203 s 8(I) of the interim constitution.
204 De Vos (n 198) 445.
205 s 172 of the constitution; De Vos (n 198) 444 and 446.

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in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum". This provision thus gives recognition to four fundamental rights, *viz* the right of access to justice, the right to a determination by an independent and impartial judge, the right to a public trial and, finally, the right to a fair trial.[206]

In *Road Accident Fund v Mdeyide*[207] the constitutional court emphasised the importance of the right of access to a court entrenched in section 34 by stating:

> "The fundamental right of access to courts is essential for constitutional democracy under the rule of law. In order to enforce one's rights under the Constitution, legislation and the common law, everyone must be able to have a dispute that can be resolved by the application of law, decided by a court. The right of access to courts is thus protected in the Constitution."[208]

The meaning of the right to access to justice and the other core rights contained in section 34 has been considered before.[209] Suffice therefore to say that, in the authors' view, the rights referred to above constitute the foundation of the entire civil process. The right to a fair trial is especially important because it "constitutes the very core of procedural justice in civil litigation and provides the basis for other more specific guarantees".[210] Rights that are encapsulated under a fair trial include the right to be heard (*audi alteram partem*), the right to equality, the right to legal representation and the right to a reasoned decision.[211] In the authors' view the fundamental rights entrenched in section 34 of the constitution and other related constitutional rights, such as the right to freedom and security of the person[212] and the right to equality,[213] have by now become embedded in the South African civil justice system. Case law bears testimony to this phenomenon.[214]

The issue that begs consideration is whether South Africa is on a good path regarding the protection of civil litigants' fundamental rights or whether there is reason for concern. More specifically, the question is what impact the exercise of judicial case management powers and the pursuance of alternative dispute resolution have on the fundamental procedural rights of civil litigants. After noting that South Africa had been slow to transition to judicial case management and to embrace alternative dispute resolution, especially when compared to the Australian approach,[215] the authors concluded in 2018:

> "[T]here are marked differences in respect of these jurisdictions' judicial approaches to case management and alternative dispute resolution. In Australia, the courts' case management powers are regulated by legislation and court rules. In South Africa, judicial case management remains largely unregulated and dependent upon the exercise of the South African superior courts' inherent

[206] See De Vos (n 198) 451-461.
[207] 2011 2 SA 26 (CC).
[208] par 1.
[209] De Vos (n 198) 451-461.
[210] De Vos (n 198) 454.
[211] De Vos (n 198) 451-461.
[212] s 12 of the constitution.
[213] s 9 of the constitution.
[214] The earlier cases of the 1990's dealt with corresponding provisions of the interim constitution, while the others dealt with provisions of the constitution. See *eg Mohlomi v Minister of Defence* 1996 12 BCLR 1559 (CC); *Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison* 1995 10 BCLR 1382 (CC); *Bid Industrial Holdings (Pty) Ltd v Strang* 2008 2 All SA 373 (SCA); *Malachi v Cape Dance Academy International (Pty) Ltd* 2011 3 BCLR 276 (CC); *Nedcor Bank Ltd v Hennop* 2003 3 SA 622 (T).
[215] De Vos and Broodryk (n 5) 2018 *TSAR* 18 25.

> jurisdiction. There is no statute or court rule that deals specifically with judicial case management in the superior courts. Further, Australian courts are generally afforded the power to minimise the adjudication of civil cases by diverting them to a process of alternative dispute resolution, especially mediation. Conversely, South African superior courts do not possess the power to compel parties to engage in alternative dispute resolution, including mediation."[216]

However, if recent proposed amendments to the rules regulating proceedings in the high court of South Africa are anything to go by, then a sea change in South African civil procedural law seems imminent. The proposed amendments, which are considered in more detail below, entail the introduction of mediation and comprehensive case management in civil proceedings in the high court through an amendment of the uniform rules. Indeed, there are big changes afoot. Could these changes have the effect of adversely impacting on the fundamental rights of civil litigants? The following part of this paper will accordingly consider the nature of the proposed mediation and case management provisions and the extent to which they could impact upon civil litigants' fundamental rights. In concluding this part of the article an opinion will be expressed on whether there should be cause for concern regarding the protection afforded to such rights in South Africa.

4.2 Mediation

In recent times there has been a noticeable shift in South Africa from courtroom adjudication to embracing alternative modes of dispute resolution, specifically mediation. The department of justice and correctional services published court-annexed mediation rules and launched court-annexed mediation pilot court sites across the country from 1 December 2014.[217] The mediation rules provide the procedure for the voluntary submission of civil disputes to mediation in selected magistrates' courts.[218] The mediation rules were introduced in the form of amendments to the rules regulating the conduct of proceedings of South African magistrates' courts.[219] The primary objectives of the mediation rules are to assist case-flow management in the reduction of disputes appearing before court and to promote access to justice.[220]

Parties to litigation instituted in a South African superior court can generally agree to submit the dispute to private mediation. There is no form of institutionalised mediation that provides for voluntary or mandatory mediation of disputes in our superior courts, as is the case with court-annexed mediation in our lower courts. Currently, rule 37(6)(*d*) of the uniform rules provides that the minutes of the pre-trial conference must reflect "whether any issue has been referred by the parties for mediation, arbitration or decision by a third party and on what basis it has been so referred".[221] As mentioned, the position is about to change.

The Rules Board for Courts of Law proposes to introduce a new rule into the uniform rules – rule 41A – to regulate the procedure for referral to mediation of cases in the high court. According to the rules board, unlike the above-mentioned mediation rules in the magistrates' courts, the mediation contemplated for cases in

[216] De Vos and Broodryk (n 5) 33.
[217] *GG* 38164 (31-10-2014).
[218] r 72.
[219] *GG* 37448 (18-03-2014).
[220] r 71.
[221] *GG* 999 (12-01-1965): Uniform Rules of Court: Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa.

the high court is not intended to be court-annexed. According to the rules board, "[t]he proposed new rule is intended to facilitate mediation contemplated by the parties, or recommended by the court and to provide the procedure for referral to mediation in terms of rule 37(6)(*d*) (pre-trial conference) and rule 37A(10) (judicial case management)".[222]

The proposed rule 41A requires parties, when issuing a summons or an application or delivering a plea or an answering affidavit, to indicate whether they consider mediation to be possible. The parties must also provide reasons for whether or not they consider the dispute capable of being mediated.[223] Rule 41A(3)(*b*) further provides that "[a] Judge, or a Case Management Judge referred to in rule 37A or the court may at any stage before judgment direct the parties to consider referral of a dispute to mediation, whereupon the parties may agree to refer the dispute or any aspect thereof to mediation".[224]

The authors support the idea of voluntary mediation as a dispute resolution method supplementary to courtroom adjudication. Mediation is a valuable case management tool, even when it fails to lead to immediate settlement of the dispute.[225] Where it does not result in settlement of the dispute, mediation may nevertheless have value in the sense that it may, for example, result in a partial settlement of the dispute or provide a party with valuable information of the other party's case.[226] Mediating disputes may also have the effect of relieving our superior courts' high caseload, as well as shielding the parties and the courts from the high costs and delays generally involved in civil litigation.[227]

At the same time, the important role of the high court of South Africa as an institution of governance should not be diminished in order to pursue alternative dispute resolution methods, such as mediation, at all costs. It may negatively affect the evolution of South African law.[228] Our courts should also not dilute the constitutional right of the parties to present their cases to a court for a judicial determination. In other words, the right of the parties to their day in court should not become a hollow guarantee.[229] For these reasons, and other reasons mentioned before, a relentless drive to replace trials with mediation cannot be supported.[230]

The authors' primary concern regarding the implementation of proposed rule 41A relates to sub-rule (9), which currently provides as follows:

[222] Daya "Proposed uniform rule 41A: mediation as a dispute resolution mechanism" (https://www.lssa.org.za/upload/files/General/Rules%20Board%20letter%20Uniform%20Rule%2041A%20December%202018.pdf (02-04-2019)). The document provides a request for comments and proposals to be delivered by 28 Feb 2019. R 37A has not yet been implemented. The proposed r 37A is discussed in paragraph 4.3 below.

[223] r 41A(2).

[224] A supplementary note to rule 41A(4) states that "[a]lthough a Judge or Case Management Judge or court may direct the parties to consider mediation, the decision to mediate remains voluntary …".

[225] The ultimate goal of any alternative dispute resolution mechanism is to foster settlement. See Ray, Sherman and Peppet *Processes of Dispute Resolution The Role of Lawyers* (2006) 305-308; Greer *Practitioner's Guide to Class Actions* (2010) 688; Kuhner "Court-connected mediation compared: the cases of Argentina and the United States" 2005 *ILSA J Int'l & Comp L* 2; Kratz "Alternative dispute resolution in complex litigation" 1988-1989 *UMKC L Rev* 841.

[226] Melnick "The mediation of securities class action suits: a panel discussion hosted by the Benjamin N. Cardozo School of Law" 2007-2008 *Cardozo J Conflict Resol* 400.

[227] Kuhner (n 225) 10-18.

[228] See De Vos and Broodryk (n 4) 2017 *TSAR* 683 703.

[229] De Vos and Broodryk (n 5) 24.

[230] See De Vos and Broodryk (n 5) 33-35.

"(a) The parties may agree amongst them how the costs of the mediation proceedings are to be borne: Provided that any party may, prior to an agreement to mediate, offer or undertake to pay the mediation costs in full or the portion due by the other party;
(b) The court may, at the trial or hearing of a matter which has been referred to mediation and where the parties have not been able to reach agreement on the liability for the costs of the mediation proceedings, make an appropriate order for such costs;
(c) In considering an appropriate order for costs the court may have regard to the notices referred to in subrule (2) and any party shall be entitled to bring such notices to the attention of the court."

In terms of proposed rule 41A, a civil litigant who barely has sufficient means to access the South African superior court system must, in the absence of an undertaking by the opposing party to bear full responsibility for the payment of mediation costs, also assume this additional payment obligation. This adds to the already prohibitory costs associated with superior court litigation and potentially limits the fundamental right that a civil litigant possesses to approach a court to settle a justiciable dispute.

The provision in the proposed rule 41A that allows a party to refuse to agree to pay the costs of mediation and for the court to make an appropriate cost order may lead to an increased reluctance of civil litigants to approach the high court.[231] Sub-rule 9(c) refers to "notices" referred to in sub-rule 2. These notices are the parties' respective written indications of their willingness to engage in mediation. Such a notice must also indicate the reasons for the party's belief that the dispute is or is not capable of being mediated.[232] The without prejudice nature of the notice is subject to sub-rule 9(c).

In the recent case of *Gore v Naheed and Ahmed*,[233] the England and Wales court of appeal held that it has "some difficulty in accepting that the desire of a party to have his rights determined by a court of law in preference to mediation can be said to be unreasonable conduct particularly when, as here, those rights are ultimately vindicated". In similar vein Giles states aptly: "[T]here are many cases where a party should never be asked to mediate. The fact is that some litigants have a valid claim. Some have a valid defence. There is no reason why the matter should be compromised in either case."[234]

In other words, the prospect of potential liability by a party for mediation costs may have an exclusionary effect on those persons who already find it difficult to access the South African superior court system. As noted before: "It is cold comfort to assure a party with limited financial resources that he or she could proceed to trial if mediation fails. One process may be all the party can afford, causing him or her to accept an unfavourable settlement".[235] According to Bamford and Rankin many litigants may only have sufficient funds to pursue one method of dispute resolution and serious injustice could occur where in such cases a party is compelled to mediate.[236]

Although the proposed rule 41A does not mandate mediation, the potential liability of a party for the costs of mediation or an adverse costs order where the said party refused to engage in mediation, in the authors' view, effectively renders the provision *quasi*-mandatory. Or stated differently, the proposed rule 41A has the

[231] r 41A(9)(*c*).
[232] proposed r 41A(2).
[233] 2017 EWCA Civ 369 par 49.
[234] Giles "The compulsory mediator" 2004 *Advocate Vancouver* 537.
[235] De Vos and Broodryk (n 5) 24.
[236] Bamford and Rankin (n 2) 227.

effect of indirectly compelling mediation. The same could be said about the effect of a case management judge, in terms of the proposed rule 37A, *directing* the parties to consider mediation. Although consideration implies voluntariness, it is submitted that it is unlikely that a party would refuse to engage in mediation where a judge has specifically directed the parties to consider mediation.

The authors argue that the proposed rule 41A should be amended before it is implemented. For example, an amended version of the rule could provide that the court bears the costs of mediation. Alternatively, the rule should expressly provide that, where a party has a valid reason, or reasons, not to engage in mediation, such as an inability to finance the fees associated with it, the refusal to mediate would not be taken into account by the court when it makes an appropriate cost order in terms of sub-rule 9(c).

However, of further concern to the authors is that there does not appear to be clarity about the nature of the mediation process which is to be pursued in the South African superior courts. On 23 November 2018 Mogoeng CJ conducted a judicial accountability session during which he commented *inter alia* as follows:

> "In order to ensure that the courts remain efficient, the Judiciary will be introducing win-win court annexed mediation. In July of this year Judicial Officers from all courts were trained on the practical implementation and benefits of court-annexed mediation as part of a broader judicial case flow management strategy… A pilot project will be started in due course in the jurisdictions that Mlambo JP presides over before proper mediation is rolled out to the entire court system, where it does not already exist."[237]

The proposed rule 41A and accompanying notes and the explanatory memorandum clearly state that the mediation envisaged by the rule is not court-annexed. It is unclear what the nature of the envisaged court-annexed mediation will be and what its effect on civil litigants' fundamental rights will be. What Mogoeng CJ envisages is clearly something different from what is encapsulated in rule 41A. The chief justice's comments also provide a further stimulus for the perceived relentless drive towards mediation as an alternative dispute resolution method. In the authors' view current developments in South Africa conceivably render the fundamental rights of civil litigants at their most vulnerable since the introduction of the interim constitution.

4.3 Case management

A judicial case flow management committee was established to overhaul the rules of the high court and magistrates' courts with a view to doing away with archaic rules, injecting flexibility, facilitating the implementation of e-filing and judicial case management and harmonising and streamlining court rules.[238] The Case-Flow

[237] Mogoeng "Judicial accountability session" 23 Nov 2018 9. Mlambo JP is the judge president of the Gauteng division of the high court of South Africa.

[238] See the discussion on case management (r 37 and the former r 37A) in De Vos and Broodryk (n 5) 26-32.

Management Pilot Project was launched in 2012 in five pilot court sites of the high court.[239] The results were promising.[240]

The success of the pilot project resulted in the proposed introduction of a new judicial case management rule into the uniform rules, *viz* rule 37A. The introduction of the rule was proposed early in 2017, but it has not yet been implemented.[241] However, the proposed rule 41A discussed above refers to rule 37A as if it has been implemented. Further, in the words of judge president Legodi of the Mpumalanga division of the high court, referring to the proposed amendments including rule 37A, "any suggestion that case flow management is not part of our Rules will soon be a thing of the past".[242] It therefore appears safe to assume that rule 37A is intended to be introduced in the near future.

The proposed rule 37A(1) states that the purpose of the rule "is to establish and regulate a judicial case management system to apply at any stage after a notice of intention to defend or to oppose is filed". Furthermore, sub-rule 3 of the proposed rule provides that "[t]he objectives of case management through judicial intervention in the interests of justice are to alleviate congested trial rolls and to address problems which cause delays in the finalisation of cases". The explanatory memorandum that accompanies the proposed rule 37A states that the rule is "to be applied by the courts with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of these rules".[243] It is in the authors' view regrettable that the proposed rule seems to place little emphasis on achieving individual justice between the parties.

The rule applies specifically to such categories of defended actions and opposed applications as the judge president of any division of the high court may determine in a practice note or directive. It also applies to any proceeding in which judicial case management is determined to be appropriate by the judge president, *mero motu* or upon the request of a party.[244] The nature and extent of judicial case management as provided in terms of this rule must be complemented by the relevant directives or practices of the division in which the proceedings are pending.[245]

It is of course conceivable that the different divisions of the high court could issue directives or adopt practices relating to case management, using its inherent jurisdiction. However, it is concerning that the approaches to case management may vary, perhaps even significantly, depending on which division is seized of the dispute. This could arguably result in a differential impact on parties' fundamental rights in different divisions. For example, a strict exercise of case management powers may adversely impact on civil litigants' fundamental rights, whereas a more flexible approach could be more tolerant of such rights. Where a party is refused

[239] According to Daya "Proposed amendments to certain uniform rules and new rules submitted by the judicial case flow management committee of the office of the chief justice" (http://lawpracticeassist.co.za/Pdfs/proposed_Case_%20Management_%20rule_amendments.pdf (02-04-2019)) a "pilot project to test the feasibility of the proposed expedited system has been running for the past 3 years in all Divisions of the High Court" and "[t]he success of the pilot project has culminated in the proposed draft rules, which have been circulated to Judges in all Divisions of the High Court".

[240] De Vos and Broodryk (n 5) 29-30.

[241] Daya (n 239). Comments were invited by 31 May 2017. In Dec 1997, a limited form of case management was introduced in the Cape high court in the form of rule 37A, but the rule has since been repealed and its introduction was labelled as a failed experiment. See De Vos and Broodryk (n 5) 27.

[242] Legodi "Snail pace of litigation" 2018 *The Judiciary* 27.

[243] Daya (n 239) and the attached "Explanatory Memorandum of Objectives and Motivation Underlying the Draft Rules" submitted by the judicial case flow management committee.

[244] proposed r 37A(1).

[245] proposed r 37A(2). Judicial case management is largely dependent on the exercise of the superior courts' inherent jurisdiction. See De Vos and Broodryk (n 5) 29.

leave to amend a pleading or to call a witness, due to some procedural failure, it may adversely impact upon a litigant's right to be heard. And where a case management judge in a particular division directs parties to consider engaging in mediation it could effectively amount to a denial of their right to access to court to obtain a judicial determination on the merits of the case. This would be in violation of the right to access to justice entrenched in section 34 of the constitution.[246]

It therefore appears from the proposed rules and explanatory memorandum that scope exists for a case management judge to adopt a strict approach to the exercise of case management powers. This is especially the case where a case management judge directs the parties to consider mediation. The authors have submitted above that the provision in rule 41A effectively renders mediation *quasi*-mandatory. The explanatory memorandum to the rules also provides that

> "provision must be made for a court to impose appropriate sanctions if a party does not comply with these rules, time-lines or an order of the court. Through engaging the litigants at pre-trial phase, the case management Judge can encourage settlement where appropriate in an effort to finalise the dispute between the parties in a speedy, efficient and cost-effective manner."[247]

Extensive provision is made for circumstances where there have been non-compliance with the case management process. Daya explains:

> "The draft rules establish a system to facilitate the just and timely disposition of proceedings, with the minimum necessary commitment of resources by the court and litigants, by monitoring the progress of individual proceedings against predetermined timelines, *and intervening when a proceeding is not progressing satisfactorily*".[248]

Any failure by a party to adhere to the principles set out in rule 37A may result in that party being penalised by way of an adverse costs order.[249] Sub-rule 9(a) provides that,

> "[a]t the hearing of the matter, the court shall consider whether or not it is appropriate to make a special order as to costs against a party or his attorney, because he or his attorney- (i) did not attend a pre-trial conference or (ii) failed to a material degree to promote the effective disposal of litigation".

The rule also provides that a date shall not be allocated for the hearing of any case that is subject to judicial case management unless the case has been certified trial-ready by a case management judge after a case management conference has been held.[250]

A proposed amendment to rule 30A(1) provides that an aggrieved party may apply to court to force the defaulting party to comply with "an order or direction made in a judicial case management process".[251] Sub-rule 12(h) further provides that the case management judge may "make any order as to costs, including an order *de bonis propriis* against the parties' legal representatives or any other person whose conduct has conduced unreasonably to frustrate the objectives of the judicial case management process".

Of particular concern is sub-rule 12(d) which provides that the case management judge may "strike the matter from the case management roll and direct that it be

[246] See De Vos and Broodryk (n 5) 34.
[247] Daya (n 239) and the attached "Explanatory Memorandum" (n 243).
[248] (n 239) own emphasis. See the "Explanatory Memorandum" (n 243).
[249] r 37A(3).
[250] r 37A(4).
[251] Daya (n 239) and the attached "Explanatory memorandum" (n 243) which provides that "[r]ule 30A has been amended to include court orders and directions related to judicial case flow management in its ambit".

re-enrolled only after any non-compliance with the rules or case management directions has been purged". In other words, a procedural error could conceivably result in the imposition of a judicial sanction causing an arguable claim to fail. Substantive justice may therefore, as a result of a procedural error, not be achieved. Individual justice between the parties could thus be exiled in favour of a strict exercise of a court's case management powers, which could adversely impact upon a civil litigant's fundamental right to present his or her case to court. As mentioned previously herein, what about a party's right to present his or her case fully and obtain a judicial determination on the merits? Surely, rule compliance should not become an end in itself. It should instead be a means to an end, *viz* to achieve justice on the merits in a given dispute between parties.

4.4 A call for caution

As mentioned above, mediation has many potential benefits. McGuire states the following regarding the success rate of mediation and the benefits that it could provide:

> "Mediation enjoys a high success rate. Most cases settle during or shortly after mediation, regardless at what point in the litigation life cycle mediation is used. It is generally acknowledged that in many cases, even if the mediation is not successful in settling the entire case, the process may help the parties to focus on the issues that are truly in dispute and narrow the scope of needed discovery, saving significant legal expenses."[252]

Case management similarly has many potential benefits. It is aimed at facilitating the achievement of justice in a speedy and cost-effective manner. This aim is not facilitated by unfettered party control because the legal representatives generally act in the interests of their own clients. For example, in some cases it may be in a party's interests to delay the proceedings or to engage in procedural disputes.[253] As remarked before:

> "It is ... in the interest of effective access to justice to restrict the principle of party control by providing for a certain degree of judicial control … [P]erhaps the exigencies of the present day South African society demand that the principle of case management be fully accepted as a necessary feature of civil litigation."[254]

This philosophy has clearly now taken firm root in South Africa and this development is to be welcomed. However, in the authors' view case management powers should always be exercised within certain limits, which give due recognition to the fundamental procedural rights of the parties.

The aim of mediation is settlement. However, one can assume that the South African civil justice system, in line with civil justice systems internationally, is aimed at achieving justice between the parties to a suit. Although in certain cases mediation may achieve a just outcome, it is less likely for mediation to produce such a result where it is directly or indirectly mandated. This paper argues that rule 41A in its current form indirectly compels mediation. Furthermore, when a dispute remains unresolved following engagement in mediation, Vettori is to the point in stating that the mediation process "is nothing more than an extra step exacerbating the traditional obstacles to access to justice associated with a judicial system.

[252] McGuire "Mediation mandate: refusing to mediate becoming more difficult on both sides of Atlantic" 2002-2003 *Disp Resol Mag* 17 18.

[253] Morabito "Judicial supervision of individual settlements with class members in Australia, Canada and the United States 2003 *Texas International Law Journal* 663 672.

[254] De Vos (n 198) 458-459.

In the event that unwilling participants in a mandatory mediation process reach settlement, there is no guarantee that the settlement is fair or just. This cannot be access to justice."[255] Vettori also states that "where settlement is indirectly compelled by allowing a subsequent court to impose costs on a party whom it believes was unreasonable in its unwillingness to settle, the process of mediation cannot be said to improve access to justice".[256] The authors fully endorse these sentiments.

In *Thint Holdings* (*Southern Africa*) (*Pty*) *Ltd v National Director of Public Prosecutions*; *Zuma v National Director of Public Prosecutions*[257] it was held that the right of access to courts exists to ensure that litigants who have suffered violation of their rights are not barred by procedural, legal or other obstacles from obtaining just and equitable relief from the courts. An over-zealous exercise by a judge of his or her case management powers could also result in an infringement of the right of access to courts. Too much unrestrainable power in the context of case management should be a cause for concern for various reasons. The managerial judge may, for example, through decisions taken during the pre-trial phase of civil litigation, "effectively fix both the character and outcome of the case" and those decisions may be immune from appeal or review.[258] Even if they are appealable or reviewable, the costs that may be incurred in pursuing such an appeal or review are likely to deter parties from challenging the decisions taken by a managerial judge.[259] Similarly, the proposed implementation of a *quasi*-mandatory mediation regime in the South African superior court system could conceivably be perceived by civil litigants to constitute an unreasonable obstacle to obtaining access to a court.

Compelling grounds would need to exist to justify a limitation of a civil litigant's fundamental rights, including the right of access to court. In *Lesapo v North West Agricultural Bank* the constitutional court held that:

> "The right of access to court was foundational to the stability of an orderly society. It ensured the peaceful, regulated and institutionalised resolution of disputes, without resort being had to self help. The access to court guarantee was of cardinal importance. It was a bulwark against vigilantism, and the chaos and anarchy which it caused. Very powerful considerations would be required before a limitation of it could be found to be reasonable and justifiable."[260]

It is against the above background that one should also take account of the overall context within which the right of access to court operates. Genn explains aptly:

> "[T]he civil justice system is a public good that serves more than private interests. The civil courts contribute quietly and significantly to social and economic well-being. They play a part in the sense that we live in an orderly society where there are rights and protections, and that these rights and protections can be made good. In societies governed by the rule of law, the courts provide the community's defence against arbitrary government action. They promote social order and facilitate the peaceful resolution of disputes."[261]

She further states that "[t]he public courts and judiciary may not be a public service like health or transport systems, but the judicial system serves the public and the rule of law in a way that transcends private interests".[262]

[255] "Mandatory mediation: an obstacle to access to justice" 2015 *Afr Hum Rts LJ* 356 360-361.
[256] (n 255) 377.
[257] 2009 3 BCLR 309 (CC) par 62.
[258] Brazil "Case management: the panacea has its side effects" 1985 *Judges J* 33 50.
[259] Brazil (n 258) 50.
[260] 1999 12 BCLR 1420 (CC) 1422.
[261] Genn (n 82) 397.
[262] Genn (n 82) 398.

The proposed introduction into the uniform rules of rules regulating mediation and case management throughout the various divisions of the high court of South Africa serves commendable aims, as mentioned above. However, it may be prudent to issue a word of caution. The pursuance of alternative dispute resolution and case management is encouraged, but within bounds that do not encroach unreasonably on the fundamental rights of parties, such as their right of access to a court, their right to be heard and their right to a fair and public hearing. Such an encroachment would also adversely affect the South African civil justice system generally, especially the public perception that rights and protections afforded to civil litigants "can be made good". Although it is conceivable that circumstances may arise where fundamental procedural rights of civil litigants may be justifiably limited or even denied, the introduction of a *quasi*-mandatory mediation regime and an overly strict approach by the high court in exercising its case management powers, at the expense of the parties' fundamental rights, cannot be supported.

5 *Conclusion*

This article[263] is aimed at examining and assessing the ways in which the fundamental procedural rights of civil litigants are recognised in Australia and South Africa and the extent to which modern reforms of civil procedure affect these rights. The aforementioned modern reforms relate to an increased demand in modern-day common-law systems for procedures that assist in resolving civil disputes in a manner that is cheaper, faster and more efficient. The article accordingly considers whether the Australian and South African civil justice systems continue adequately to protect fundamental rights of parties or whether there is cause for concern.

It is apparent from what has been argued above[264] that there is cause for concern regarding the current state of civil litigation in Australia and South Africa, insofar as the protection afforded to civil litigants' fundamental rights is concerned. In both jurisdictions there have been increased attempts to regulate civil litigation in more detailed and meticulous terms, which result in numerous procedural requirements that must be complied with to get a case ready for trial. Australian case law illustrates that a procedural error committed during the pre-trial phase may result in a party being denied the right to present its case the way it sees fit. Thus, procedural error may prevent substantive justice being achieved. This trend has occurred at a slower pace on the South African civil procedural landscape. However, the introduction of proposed amendments to the uniform rules, including the imminent introduction of a comprehensive case management rule, should remove any complacency that may have existed about the pace at which modern reforms are being effected to the South African civil justice system. Civil litigants' fundamental rights, especially the right to a fair trial, appear to be becoming increasingly threatened. Specifically, the wide powers of case managers and even trial judges to make procedural rulings may have an adverse effect on the way a party wishes to plead and present its case. Admittedly, however, the South African constitutional court has held that the uniform court rules are designed to ensure a fair hearing and should be interpreted in such a way as to advance, and not reduce, the scope of the entrenched fair trial right.[265]

[263] See also De Vos and Broodryk "Fundamental procedural rights of civil litigants in Australia and South Africa: is there cause for concern?" (part 1) 2019 *TSAR* 425.

[264] See also De Vos and Broodryk (n 263).

[265] *De Beer NO v North-Central Local Council and South-Central Local Council (Umhlatuzana Civic Association Intervening)* 2002 1 SA 429 (CC) 439.

In both jurisdictions, case management has become an increasingly important feature of litigation, with the result that case managers' powers continue to expand. There is also an increasingly relentless drive away from trial adjudication to alternative dispute resolution, especially mediation, to resolve civil disputes. Indeed, civil litigation in South Africa is not yet characterised by engagement in a preceding overtly obligatory mediation process, but the introduction of rule 41A is effectively *quasi*-mandatory. The effect of the aforementioned reforms could for various reasons, including cost considerations, result in denying a party his or her day in court. It could also diminish the important constitutional role of the courts in the resolution of civil disputes and development of the law.[266]

In England and Scotland, for example, it is not compulsory to partake in mediation before parties may engage in civil litigation. In England, as is currently proposed in South Africa through an amendment of the uniform rules,[267] the courts cannot order parties to mediate, but they can penalise parties in costs if they refuse to accept an offer to mediate.[268] In a review of the Scottish court system in 2009, Lord Justice Clerk rejected the idea of penalising parties as it would impede access to the courts. In the Report of the Scottish Civil Courts Review, Lord Justice Clerk stated that "[w]e do not consider that the court should have power to compel parties to enter into ADR. That is entirely contrary, in our view, to the constitutional right of the citizen to take a dispute to the courts of law."[269] The report further elaborates as follows:

> "Access to the courts is a constitutional matter. The work of the civil courts is the practical manifestation of the rule of law. The courts exist to vindicate parties' rights and to enforce their obligations. In our view, every citizen should have the right to take his case to the courts of law. So we do not accept the idea that access to the courts should be impeded by a requirement that parties should resort to ADR as a first stage or by indirectly coercive measures, such as rules of expenses, that are directed to the same purpose."[270]

The authors share the view held by Lord Justice Clerk in the abovementioned report. It is also in line with various other concerns relating to the modern-day Australian and South African civil justice systems which the authors have raised in this article. In this regard, for example, the costs associated in engaging in litigation and mediation have become prohibitively high. Also of concern is the lack of empirical research which precedes reform measures aimed at transforming the civil litigation landscape.

In concluding, the authors are of the view that now, more than ever before, Cappelletti and Garth's warning of forty years ago should be heeded: unless checked, the desire for efficient and streamlined court procedures may result in an abandonment of the parties' fundamental civil procedural guarantees.[271] An overly strict exercise of case management powers by judges and an embracing of alternative dispute resolution methods, such as mediation, at the cost of trial adjudication may have an adverse impact on civil litigants' fundamental rights, specifically the right to be heard and the right of access to courts.

[266] See also De Vos and Broodryk (n 263).
[267] proposed r 41A.
[268] See, *eg*, *Halsey v Milton Keynes General NHS Trust* 2004 EWCA Civ 576; *PGF II SA v OMFS Company 1 Limited* 2013 EWCA Civ 1288; *Gore v Naheed* 2017 EWCA Civ 369; *Parker Lloyd Capital Ltd v Edwardian Group Limited* 2017 EWHC 2421 (QB).
[269] The Report of the Scottish Civil Courts Review (Sep2009, vol 1) 171.
[270] The Report of the Scottish Civil Courts Review (n 269) vii-viii.
[271] See De Vos and Broodryk (n 263).

SAMEVATTING

FUNDAMENTELE PROSEDURELE REGTE VAN SIVIELE LITIGANTE IN AUSTRALIË EN SUID-AFRIKA: IS DAAR REDE TOT KOMMER?

Die artikel oorweeg die verskillende wyses waarop fundamentele prosedurele regte van siviele litigante in beide Australië en Suid-Afrika erken word. Die artikel oorweeg verder die mate waartoe moderne hervormings wat tot die siviele prosesregsisteme van voorafgaande jurisdiksies aangebring is hierdie regte beïnvloed. Die moderne hervormings wat in die artikel bespreek word hou primêr verband met die toenemende behoefte in hedendaagse gemeenregtelike sisteme aan prosedures wat daarop gemik is om siviele dispute op 'n goedkoper, vinniger en meer effektiewe wyse op te los. Die artikel oorweeg gevolglik of die Australiese- en Suid-Afrikaanse prosesregtelike sisteme op die regte pad is betreffende die beskerming van partye se fundamentele regte en of daar rede tot kommer behoort te wees.

In beide Australië en Suid-Afrika speel geregtelike saakbestuur 'n toenemende belangrike rol gedurende litigasie, met die gevolg dat geregtelike saakbestuurders se magte voortdurend aan die uitbrei is. Daar bestaan ook voortdurende meedoënlose druk om weg te beweeg van verhore en om van alternatiewe geskilbeslegting, veral bemiddeling, gebruik te maak om siviele dispute op te los. In die artikel argumenteer die outeurs dat hierdie hervormings om verskeie redes 'n ontkenning van siviele litigante se fundamentele regte tot gevolg kan hê.

Die breë spektrum van magte wat aan geregtelike saakbestuurders verleen word om prosedurele beslissings te maak kan 'n nadelige effek hê op die wyse waarop 'n party sy of haar saak pleit en voorlê vir geskilbeslegting. In die artikel argumenteer die outeurs dat dit 'n onregverdigbare beperking op 'n party se reg om gehoor te word tot gevolg kan hê. Die outeurs argumenteer verder dat die toenemende beweging weg van verhore en meer na alternatiewe geskilbeslegting die belangrike grondwetlike rol van die howe in siviele geskilbeslegting en die ontwikkeling van die reg kan benadeel. Dit maak verder ook inbreuk op 'n persoon se reg op toegang tot die howe.