

Media release
IoDSA

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IoDSA HAILS GROWING TREND TO RESOLVE MATTERS OUT OF COURT

Landmark court ruling makes convincing case for Alternative Dispute Resolution

Moves towards resolving matters outside of courtrooms worldwide are gaining momentum, with the Institute of Directors in Southern Africa' (IoDSA) Centre for Alternative Dispute Resolution (ADR) also reporting an increase in the number of parties seeking advice on ways to avoid litigation.

"In fact, what we're seeing internationally is judges slamming lawyers who fail to advise clients to pursue ADR where this route would be more beneficial," said IoDSA Supervisor: Centre for Corporate Governance Natasha Bouwman, referring to a ruling in South Africa that has caused legal representatives to think twice before advising clients to go to court.

In the recent judgment in the *Brownlee v Brownlee* case, the South Gauteng High Court stressed the benefits of mediation as a better and cheaper alternative. The legal costs of both parties battling over divorce, maintenance and custody issues involving a joint estate of R3.5 million amounted to an estimated R500, 000 - R750, 000. The judge expressed disapproval of the attorneys' failure to send the matter to mediation and limited the amount of legal fees they were allowed to recover.

In the *Brownlee* case the judge quoted a lengthy part of a 2007 judgment in the English case *Egan v Motor Services (Bath)* [2007] EWCA Civ 1002 where the judge called both parties "completely cuckoo" for engaging in litigation which cost them close to £100,000 over a £6,000 claim concerning an Audi TT. The judge stressed the appropriateness of mediation, especially in commercial cases. Also, the judge added that the results of mediation are 'astonishingly good' and that parties should 'try it more often.'

The King III Code, which will become effective from 1 March 2010, acknowledges the importance of ADR and supports administered mediation, and in the event of this failing, expedited arbitration. "According to King III, ADR is an important element of good governance," added Bouwman. "And in fact, a directors' duty of care and skill requires them to attempt to resolve disputes as efficiently and effectively as possible in order to preserve business relationships."

"As our court rolls become more burdened with litigation, it is expected that parties who fail to attempt to resolve disputes by mediation, failing which arbitration, will be frowned upon by our courts. Courts may react by penalising the legal representatives or even the parties with unfavourable cost orders."

In line with international trends, South African courts may in future choose to follow the example of Delaware (US) courts in adopting rules that deal with mediation and arbitration. Our legislature recently

followed Delaware law by including a defence available to directors, called the 'business judgment rule', in the new Companies Act (71 of 2008).

The reasons why parties should explore ADR are ample. "Now they should just try it," she concluded.

The IoDSA and the Arbitration Foundation of Southern Africa have developed a template ADR clause for inclusion in contracts, which is available online in the King III Practice Notes - www.iodsa.co.za.

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