

The World of Dispute Resolution after COVID-19



Siphokazi Kayana
Partner, South Africa
Head of Dispute Resolution
T +27 72 482 4721
E siphokazi.kayana@cms-rm.com



Charlene Ferns
Candidate Attorney, South Africa
T +27 71 877 0893
E charlene.ferns@cms-rm.com

In December 2019, COVID-19 made its life altering world debut.

The global spread of the virus came soon thereafter with South Africa reporting its first positive COVID-19 case on 5 March 2020. As a result, on 26 March 2020 the South African government implemented a nationwide lockdown in an attempt to limit infections. With the movement of millions of people restricted, many businesses and organisations had to rethink how the world would function during a pandemic.

This article aims to highlight the major steps South Africa has taken to address the impact and effects of the COVID-19 pandemic from a litigation perspective.

CaseLines

Prior to the COVID-19 pandemic, South Africa, following the lead of the United Kingdom, United Arab Emirates, and the Common Market for Eastern and Southern Africa, implemented what is known as the CaseLines Systems. CaseLines effectively allow legal practitioners to enrol new civil matters, file relevant court documents and present evidence electronically with the Gauteng High Court and more recently with the Western Cape High Court. This electronic judicial platform has shifted us away from the previously archaic and problem-ridden paper-based system, toward a more effective digital platform, which is readily available to millions of individuals within the country. Judges and other judicial employees are now able to access fully digital court

bundles and provide options for all parties involved in a matter before the Court to interact and collaborate in pre-trial preparation and procedures. By removing the additional infrastructural barriers of the paper-based court system, CaseLines ensures the increased efficiency of civil litigation within South Africa.

Virtual hearings/online court

Prior to the COVID-19 pandemic, it often took a year for courts to hear litigant action proceedings and at least six months for individuals to have an ordinary application heard. One of the biggest steps taken by the South African judiciary has been the implementation of virtual hearings. Through the use of platforms such as Zoom, Skype and Microsoft teams, individuals are now able to

attend and hold hearings virtually. Courts, such as the Constitutional Court and the Supreme Court of Appeal, in hopes of upholding the constitutionally enshrined values of public access and judicial transparency, now ensure that individuals are granted access to the court system in order to have their matters heard through a video-conferencing platform. The judiciary sought to ensure that the restriction of movement and the banning of gatherings would not bring the already-crippled judicial system to a sudden halt.

Cost-saving approach/litigation avoidance

It is no secret that solving conflict through court litigation has historically been time-consuming, costly and stressful. The severe effects of COVID-19 further emphasised these problems, which compelled South Africans to adopt a 'cost conscious' approach to litigious matters. Clients who previously had massive financial turnovers could no longer afford lengthy and unwarranted litigation. As a result, many legal practitioners were forced to implement a business-conscious strategy of litigation avoidance. The effects were two-fold: clients no longer spent substantial amounts of money on lengthy and onerous litigation proceedings, and legal practitioners still earned an income by maintaining client relationships, albeit through a different *modus operandi*. Instead of taking on a matter at the dispute stage, an approach was implemented to curb the risk of potential litigation for clients. Legal practitioners could now, based on an evaluation of certain aspects of a client's business (e.g. *force majeure* events, payment delays, insolvency risks, and claims arising from rights and obligations), pre-determine the potential matters that might give rise to legal disputes. These matters would then be communicated to the client, and the client would be advised to implement an effective strategy to avoid litigation. When it appeared that litigation could not be avoided, practitioners advised their clients on how best to 'project manage' the litigation process in order to ensure the limitation and management of legal costs. Such 'project management' of the litigation process includes a document-management system in relation to potential risk. Such a system also helps identify the documentary evidence that could potentially assist a client with a claim. This process allows adequate preparation of evidence if a matter ever becomes litigious.

Arbitration and Mediation:

Arbitrations and Mediations in South Africa, similar to other court procedures, followed the digital platform approach during the COVID-19 pandemic. As a result, arbitrations were held virtually, with both local and international bodies responsible for the administration of arbitrations passing various rules and regulations to maintain the operation and continuity of all proceedings. Certain laws were developed, including the introduction of Rule 41A of the Uniform Court Rules, which states that every new action or application

must be accompanied by a notice to the defendant / respondent indicating whether the parties agree to refer the matter to mediation. Rule 41A effectively encourages parties to a dispute to make use of the mediation process prior to instituting lengthy and potentially cost-incurring litigation proceedings. This rule also aimed to further relieve the pressure on courts by removing litigious matters deemed resolvable through mediation.

Conclusion

South Africa has adopted measures to ensure that life from a litigation and alternative dispute-resolution perspective has continued despite the COVID-19 pandemic. The move to an online digitised judicial platform is a welcome alternative from what we consider to be South Africa's previous outdated legal system. In the early stages, the effectiveness of this move was questionable. Now, however, the online digitised platform promotes greater judicial transparency and access to justice. Although still inundated with cases, the courts have now received a slight reprieve in hearing litigious matters, which were resolved using mediation through the enactment of Rule 41A of the Uniform Court Rules. One could not argue there is a cost-saving benefit to virtual hearings due to the elimination of travel to and from court to file documents and the end of the printing of physical hard copies of bundles for court hearings. In addition, legal practitioners have adopted a more client-centric approach, which is more proactive than reactive.



