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On 25 August 2009 the South Gauteng High Court in Johannesburg in the case of *Brownlee v Brownlee* held that the failure by attorneys to send a matter to mediation at an early stage should be visited by the court's displeasure. The court limited the costs that the attorneys could recover from their clients to those that they could tax on the party and party scale and thereby deprived them of their full attorney and client fees.

The case concerned the dissolution of a marriage, parental rights, maintenance and the division of the joint estate. The evidence indicated that the cumulative legal costs of the litigation would be between R500 000 ($100,000) and R750 000 ($150,000) when the joint estate was worth just more than R3 million ($600,000).

The Court noted that in terms of the Rules of Court one of the matters that must be considered at a pre-trial conference is whether the dispute should be referred for possible settlement by mediation. In the case, the legal representatives had no hesitation in answering the question in the negative.

Brassey AJ, however, said the following about mediation:

> Mediation can produce remarkable results in the most unpropitious of circumstances, especially when conducted by one of the several hundred people in this country who have been trained in the process. The success of the process lies in its very nature. Unlike settlement negotiations between legal advisors, in themselves frequently fruitful, the process is conducted by an independent expert who can, under conditions of the strictest confidentiality, isolate underlying interests, use the information to identify common ground and, by drawing on his or her own legal and other knowledge, sensitively encourage an evaluation of the prospects of success in the litigation and an appreciation of the costs and practical consequences of continued litigation, particularly if the case is a loser.

The judge quoted at length from the English case of *Egan v Motor Services (Bath)* [2007] EWCA CIV 1002 in which that court pointed out that it is sheer commercial folly not to mediate when the costs of mediation would be paltry in comparison with the costs of litigation. He then went on to say:

> I am given to understand that in England the all but obligatory recourse to mediation has profoundly improved the process of dispute resolution. Parties resolve their problems so much more cheaply as a result and the burden on the Court roles has been considerably lightened. Informed estimates put the success rate of mediation at between 80% and 90%.

The Court held that,

> In the process of mediation, the parties would have had ample scope for an informed but informal debate on the levels of their estates, the amount of their incomes and the extent of their living costs. Nudged by a facilitative intermediary, I have little doubt that they would have been able to solve most of the monetary disputes that stood between them. The saving in time and legal costs would have been significant and, once a few breakthroughs had been made, I have every reason to believe that an overall solution would have been reached. Everyone would, in the process, have been spared the burden of two wasted days trying to settle in Judge's chambers and four further days in which the minutia of assets and liabilities and income and expenses were interrogated.

Accordingly the Court deprived the attorneys of their attorney and client costs for failing to recommend mediation.

While only the attorneys were deprived of their costs, the risk now exists in South Africa law that parties who unreasonably refuse to mediate will also be deprived of their costs. This risk and the inherent merits of mediation will no doubt drive South African attorneys and their clients into the process and mediation will in time become an integral part of our civil justice system. ●

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