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Going Beyond Accounting, Taking Your Business Forward



THIS MONTH'S FOCUS

CROUCHING LAWYER, HIDDEN COSTS: The Art of Resolving Disputes Quickly and Cost Effectively

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When caught up in a legal dispute, deciding on the right process to resolve the dispute can be as daunting as the dispute itself. This article is intended to demystify the various options available to you should you find yourself in a situation that calls for a legal process to be followed. Make sure that your attorney considers all the options available to you when considering the resolution of disputes.

Negotiation:

Negotiation is the first option when it comes to dispute resolution. Its biggest attribute is the fact that it is free, as you do it yourself. Skilled negotiators are often able to circumvent large disputes, and thus don't have to enter into mediation, arbitration or litigation processes. For this reason, it is a good idea to up-skill yourself with some negotiation tools.

Planning is the first tool. Before entering into a negotiation, do comprehensive research. Ensure your data is current. Prepare a goal sheet for yourself listing and ranking your priorities and those you are willing to forfeit to enable the negotiation. Find out the other sides' priorities. Know your bottom line, and be prepared to walk away when you reach it.

Secondly, know the practical constraints to the process. Where possible, send the other party an agenda for the meeting, and be clear about the amount of time to be spent on the matter.

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The third tool is clarity. Be clear about what you want, and ask for it. So often, negotiations are thwarted by poor communication where neither party communicates what they hope to achieve, and neither party obtains their optimal result.

Fourthly, it is critically important to study the other party. If you are able to step into their shoes and experience their potential biases, you are far more likely to speak to them in a language that they are able to receive.

The fifth tool is called positive framing. Using this skill, you invite the other party to see the matter through your eyes, and you paint it in a positive light.

The sixth tool acts as a handbrake. When negotiating, don't give in too quickly. Everyone loves a bargain.

The seventh and last tool is to be professional about the outcome, however it turns out.

Mediation:

Mediation follows as your second option. Essentially, mediation is a process through which agreements are reached with the assistance of a third party, whose role is a neutral, facilitative one and where the mediator creates a space within which the parties to the dispute can resolve the dispute themselves. Already used extensively in divorce cases in South Africa, mediation's value in the commercial arena is beginning to be recognised in SA

Mediation is only effective in circumstances where both parties are committed to the process and to reaching a positive outcome.

It is especially effective in circumstances where the parties have to work together in the future and wish to resolve the dispute in such a way as to preserve their future relationship. When properly used, mediation allows parties to buy into the resolution of the dispute. Where a dispute is financial, the mediator will call for complete and accurate financials.

A successful mediation usually ends with a settlement agreement in terms of which the resolution of the

dispute is set out and the parties commit to their agreed obligations in terms of the agreement.

The mediation process is normally quicker and more affordable as the mediator can assist the parties to set a time frame for the process.

Arbitration:

Arbitration is essentially a privatised trial. The parties involved in the dispute appoint an arbitrator (usually a senior advocate) to hear the matter. Arbitration is often the preferred course of action where the subject matter of the dispute is very technical and requires someone with specialised knowledge to adjudicate a matter. Arbitration is expensive because, in addition to paying legal fees, the parties have to pay the arbitrator's fees as well as the costs of venue hire and transcription. Usually the unsuccessful party to the dispute has to repay the successful party. This makes arbitration fairly risky and usually only an option for large litigation matters.

Litigation:

Litigation is the process by which the courts adjudicate a dispute. Here a judge is appointed to hear a matter and the parties to the matter are bound by the rules of court in how the matter is conducted. Unlike arbitration, the parties to the litigation don't need to pay for a judge's time. The reality is, however, that our courts are very full and being heard can take many months or, in some cases, years. There are certain matters which can only be heard by a court such as divorce proceedings, liquidation applications and sequestration applications. As in the case of arbitration, the unsuccessful party to the litigation is usually subject to a cost order in terms of which he is liable for the successful party's legal fees.



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