Appointing a mediator
Special skills and knowledge vital for dispute resolution

THE Rental Housing Act 50 of 1999 as amended together with the pending Regulations lays down rules and instructions for mediation. The provision 13(2)(c) of the RHA reads:

> "Where the Tribunal is of the view that there is a dispute contemplated in paragraph (b) and that such dispute may be resolved through mediation, appoint a mediator, which may be a member of the Tribunal, a member of staff or any person deemed fit and proper by the Tribunal, with a view to resolving the dispute;"

The words "any person deemed fit and proper by the Tribunal" is critical to the role of the Rental Housing Tribunal. The tribunal is established by the MEC who appoints members in terms of specific criteria and after consulting the human settlements portfolio committee.

The chairperson together with other members makes up the tribunal and can appoint staff to carry out the administrative functions.

Since the tribunal is neutral in carrying out its judicial or quasi-judicial mandate of resolving residential landlord-tenant disputes, neither the minister nor the MEC of human settlements can interfere with its functions. This extends to the appointment of mediators.

It would appear that at least one tribunal has support staff doing mediation. Mediation requires special skills, knowledge and experience within the tribunal environment, common law, contract law, the relevant constitutional provisions, case law and rules and procedures that govern dispute resolution and judicial proceedings.

Generally, even where members have between themselves more that 50 years of legal experience, mediation agreements and even rulings (equivalent to magistrate's court judgments and deemed to be so) are shoddy, inequitable and lack the necessary legal knowledge.

The appointment of support staff as mediators with 'training' that is hopelessly inadequate, will further prejudice tenants and landlords/landladies.

Knowledge is required about basic legal issues such as who can contract, mandate or authority to represent and *locus standi* to complex legal principles.

Who can contract?
An individual or an entity must have legal capacity to conclude a lease contract.

A minor, any person younger than 18 years, or a person who is mentally challenged or mentally ill cannot enter into a contract.

A person, who is unable to understand or reason because of a serious state of intoxication or such a state of mind brought about by alcohol or drugs does not have the capacity to conclude a contract.

The mediator must be able to establish if a lease contract exists.

Let us take another example of a dispute between an entity as the landlord and its tenant and who has the legal right to represent such an entity.

Resolution or minutes of meeting

A company or close corporation is a legal entity or a legal persona and its directors or members, respectively, must give permission (through a resolution or minutes of a meeting) to a person to enter into a lease contract, if it intends to take legal action.

A trust, on the other hand, is not a legal persona, but trustees have to follow legal procedures and one can find authority in case law, for example., in Thorpe and Others v Trittenwein and Another 2007 (2) SA 172 (SCA).

If a trust is the landlord or tenant the trust deed is central to powers of trustees and how decisions are to be made.

Steyn CJ affirms that a trust is not a legal entity: "[N]either our authorities nor our Courts have recognised it as such a persona or entity…" (in *Commissioner for Inland Revenue v Macneillie's Estate* 1961 (3) SA 833 (A) at 840).

There are instances of a municipality being the complainant or respondent at the tribunal. Sometimes, any official from the legal or housing department is subpoenaed to appear before the tribunal.

A case is either resolved or in some instances, in limbo for many years even though every complaint must be resolved within three months.

A mediator must be aware that the official in attendance was properly summonsed through the municipal manager. A municipality must pass a proper resolution for an individual to represent it at proceedings.

Patel AJ (in Kritzinger v Newcastle Local Transitional Council and Others 2000 (1) SA 345 (N) at 349) states: "It is a trite proposition of our law that artificial persons must duly authorise their employees either to institute or defend proceedings.

An authority to act on behalf of an artificial person like a company or a municipality is, according to the best evidence rule, established by a resolution of the entity concerned."

What does *locus standi* mean?

A person or party has the right to bring legal action and the right to proceedings as landlord or owner or relevant interested party to the contract (Harlequin Duck Properties 204 (Pty) Ltd v Fieldgate T/A Second Hand Rose 2006 (3) SA 456 (C)).

A resolution of the directors of a company or members of a close corporation or of trustees of a trust will set out the authority given to a person (an agent) to act on its behalf.

A person representing an entity as a party at the tribunal, whether as a tenant or landlord, is required to provide proof of its authority and extent of its mandate.

In the absence of such authorisation, the person / agent does not have the legal standing or locus standi (Yarram Trading CC t/a Tijuana Spur v Absa Bank Ltd 2006 SCA 160 (RSA)).

The question that arises is whether a party can be summonsed to voluntarily submit itself to mediation?

As for the mediator, a party can demand full disclosure of the mediator's experience, qualification and expertise. These can easily be tested during the mediation process and a party can at the outset or during the mediation ask for the case to be referred to a hearing.

Parties are welcomed to share their experiences or 'register' complaints with the Organisation of Civic Rights with Pretty Gumede or Loshni Naidoo at 031 304 6451 or via email.

Dr Sayed Iqbal Mohamed is the chairman, Organisation of Civic Rights.