

DRAFT MEDIATION RULES

1. Purpose these rules

The objects of mediation being:

(i) to facilitate an expeditious and cost effective resolution of a dispute between litigants;

(ii) to assist litigants to determine at an early stage of the litigation whether proceeding with a trial or an opposed application is in their best interests or not;

(iii) to allow litigants to return to conventional litigation should the attempt at mediation not be successful;

(iv) to preserve relationships between litigants which may become strained or destroyed by the adversarial nature of litigation;

(v) to provide litigants with solutions to the dispute, which are beyond the scope and powers of judicial officers;

(vi) to dispense with formalistic litigation procedure and rules of evidence; and

(vii) to promote access to justice;

the purpose of these rules is therefore to regulate the procedure for the referral of disputes to mediation and the conduct of mediation in accordance with the objects set out above.

2. Definitions

In these rules unless the context indicates otherwise:

‘action’ means litigation commenced by the issue of summons

‘alternative dispute resolution’ means a process other than formal litigation, in which an independent and impartial person assists parties to litigation to attempt to resolve the dispute between them

‘application’ means litigation commenced by a notice of motion .

‘deliver’ means to serve a document on the opposite party in litigation and to file with the clerk or registrar of the court

‘dispute’ means the subject of litigation between parties or an aspect thereof

‘dispute resolution officer means a person who administers and controls the alternative dispute resolution process and whose functions are set out in these rules

‘litigant’ means a party to litigation

‘litigation’ means court proceedings commenced by action or application proceedings

‘mediation’ means the process by which a mediator assists the parties to litigation to resolve the dispute between them by facilitating discussions between the parties, by assisting them in identifying issues, clarifying priorities, exploring areas of compromise and generating options in an attempt to solve the dispute.

‘mediator’ means a person selected from a panel as contemplated in rule 12(2), by a dispute resolution officer, to mediate a dispute between parties to litigation.

‘Minister’ means the Minister of Justice and Constitutional Development

'rules of court' means the rules of court applicable to the High Court and Magistrates' courts

3. Mandatory referral of dispute to mediation

Whenever an appearance to defend is entered in action proceedings or a notice of intention to oppose is delivered in application proceedings, the clerk or registrar of the court must refer the dispute to a dispute resolution officer to facilitate mediation of the dispute between the parties.

4. Referral of dispute to mediation by the court or litigants

(1) The court may at any stage of the litigation refer a matter to a dispute resolution officer to facilitate mediation of the dispute between the parties

(2) A litigant may at any stage of the litigation, apply to court for the referral of a dispute to mediation on such order as to costs as the court may deem appropriate.

5. Functions of dispute resolution officer

(1) The dispute resolution officer must explain to the parties the purpose of alternative dispute resolution and the meaning and objectives of mediation.

(2) The dispute resolution officer must in consultation with the parties:

(i) select a mediator to mediate the dispute between them, but should the parties disagree on the choice of the mediator, the dispute resolution officer must nominate the mediator;

(ii) fix a date for mediation; and

(iii) inform the parties in writing of the date, time and venue of the mediation session.

(3) The dispute resolution officer must in consultation with the parties allocate a time within which the mediation process must be completed, provided that the process must be completed within a reasonable time.

(4) The dispute resolution officer must forward to the mediator a copy of the summons or application by which the litigation between the parties was commenced.

(5) Upon a dispute being referred to mediation and a settlement being reached by the parties, the dispute resolution officer must, upon receipt of the settlement agreement from the mediator, place the settlement agreement before a judicial officer for noting that the dispute has been resolved.

(6) In the event of the parties not being able to resolve their dispute or conclude a settlement agreement where the dispute has been referred to mediation, the dispute resolution officer must upon receipt of a report from the mediator, refer the matter back to the clerk or registrar of the court to enable the dispute to proceed as a defended action or opposed application.

6. Refusal of litigants to submit to mediation

(1) Notwithstanding the provisions of rule (3) a litigant may refuse to submit to mediation referred to in that rule.

(2) The dispute resolution officer must explain to the litigant refusing mediation of the consequences of refusal as provided for in these rules.

(3) The dispute resolution officer must record that a litigant has refused mediation and that the consequences of refusal have been explained to that litigant.

(4) The litigant refusing mediation must sign a memorandum recording the refusal and the fact that the consequences of refusal have been explained.

(5) Upon the refusal to submit to mediation by any litigant the dispute resolution officer must refer the matter to the clerk or registrar of the court, whereupon the matter may proceed as a defended action or an opposed application.

(6) At the trial of any action or the hearing of an opposed application where mediation was refused, should the court find that the refusal was unreasonable and that mediation may have resulted in substantially the same finding as the court, the court may make such order as to costs as it considers appropriate, against the litigant that refused mediation.

7. Suspension of time limits pending mediation

The time limits prescribed by the rules of court for the delivery of pleadings and notices, the filing of affidavits or the taking of any step by any litigant are suspended during the period from the time a matter is referred to a dispute resolution officer to the time of the outcome of the mediation process.

8. Rules applicable to mediation proceedings

(1) At the commencement of any mediation session every mediator must inform the parties to the mediation of the following:

(a) the resolution of the dispute must be concluded within the time period allocated for that purpose, provided that the parties may by agreement in writing extend the time period;

(b) the role of the mediator is aimed at facilitating a settlement between the parties in their best interests;

(c) the mediator cannot make any findings of fact, credibility or law nor may the mediator make any decision for or against any of the parties;

(d) in the event of a settlement being reached, the mediator will assist the parties in drafting the settlement agreement, which the mediator must transmit to the dispute resolution officer of the court where the litigation was commenced;

(e) all discussions held and disclosures made, whether oral or written, during a mediation session, are not binding upon the parties outside of the mediation process and are inadmissible as evidence in any court, tribunal or other forum unless reduced to writing as a settlement agreement and signed by them ;

(f) the mediator may during the mediation session encourage the parties to make full disclosure if in the opinion of the mediator such disclosure may facilitate a resolution of the dispute between the parties;

(g) no party may be compelled to make any disclosure, but a party may make voluntary disclosures with the same protection referred to in sub paragraph (e) above;

(h) all discussions held and disclosures made, whether oral or written, at a mediation session are confidential and cannot be disclosed outside the mediation session

(2) No party is permitted to produce at a mediation session any evidence, provided that the mediator may in his or her discretion call for evidence that may promote a resolution of the dispute.

(3) If a dispute is resolved between the parties the mediator must assist the parties in settling the terms of the settlement and reducing the agreement to writing, which must be signed by the parties.

(4) Thereafter the mediator must transmit the original settlement agreement to the dispute resolution officer of the court from which the dispute was referred for mediation.

(5) If the dispute is not resolved, the mediator must refer the dispute back to the dispute resolution officer, informing him or her of such failure.

(6) In every mediation process the mediator must within five (5) days of the conclusion of the mediation process submit to the dispute resolution officer a report of the outcome of the mediation

(7) Upon good cause being shown the mediator may postpone a mediation session. The party seeking the postponement must pay the costs occasioned by the postponement, unless that party satisfies the mediator that the reason for the postponement was beyond his or her control.

9. Settlement Agreements

A settlement agreement concluded between parties at mediation proceedings may, by consent between them or upon the application to court by any of the parties, be made an order of the court in which the litigation commenced.

10. Fees of Mediators

(1) The fees payable to mediators are prescribed in the table in Annexure A to these rules.

(2) The parties participating in the mediation process must pay the mediator's fees.

(3) The liability of a party for the fees of the mediator must be proportionate to the number of parties participating in the mediation process.

11. Representation of parties at Mediation Proceedings

(1) Parties to mediation proceedings must attend such proceedings in person and may be accompanied by legal representatives.

(2) The parties' legal representatives cannot participate in the mediation proceedings and must not interfere with, delay or obstruct the continuity and conclusion of the proceedings.

(3) Where a juristic person or a firm or a partnership is a party to mediation proceedings such entity must be represented by an official who must be duly authorized to represent the entity and to conclude a settlement and sign a settlement agreement on behalf of such entity.

(4) Where the State or an organ of state is a party to mediation proceedings such entity must be represented by an official who must be duly authorized to represent the entity, to conclude a settlement and sign a settlement agreement on behalf of such entity.

12. Qualification and appointment of Mediators

(1) The qualification and standards of fitness of Mediators to conduct mediation referred to in these rules must be determined by the Minister.

(2) The Minister may periodically appoint mediators to serve on a Panel from which mediators may be selected to execute the functions and objectives ascribed in these rules.

13. Application of rules

(1) These rules will apply to the High Courts and the Magistrates courts.

(2) These rules do not replace any of the rules of the High Court or the Magistrates' courts, which must continue to apply either before commencement of or after the conclusion of mediation proceedings.

(3) These rules will come into operation on a date to be determined by the Minister and for such period or periods as the Minister may determine

14. Short title

These rules will be referred to as the Mediation Rules of the High Courts and the Magistrates' Courts

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