

**COURT- ANNEXED MEDIATION RULES
OF THE MAGISTRATES' COURTS**

PREAMBLE

Whereas section 34 of the Constitution of the Republic of South Africa, 1996 guarantees everyone the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum;

And whereas section 6(1) of the Rules Board for Courts Law Act 107 of 1985 empowers the Rules Board for Courts of Law (Rules Board) established under section 2 of that Act to review existing rules of court, to make rules for the Supreme Court of Appeal, the High Courts and the lower courts regulating the practice and procedure in connection with litigation and generally regulating any matter which may be necessary or useful for the proper conduct of the functions of the said courts in civil as well as criminal proceedings;

And whereas the Access to Justice Conference held in July 2011, under the leadership of the Chief Justice, towards achieving the delivery of accessible and quality justice for all, resolved that steps must be taken to introduce alternative dispute resolution, preferably court-annexed mediation or the CCMA kind of alternative dispute resolution, into the court system;

And whereas the main purposes of mediation are to:

- (a) promote access to justice;
- (b) promote restorative justice;
- (c) preserve relationships between litigants or potential litigants which may become strained or destroyed by the adversarial nature of litigation;
- (d) facilitate an expeditious and cost-effective resolution of a dispute between litigants or potential litigants;

- (e) assist litigants or potential litigants to determine at an early stage of the litigation or prior to commencement of litigation whether proceeding with a trial or an opposed application is in their best interests or not;
- (f) allow litigants or potential litigants to return to litigation should the attempt at mediation not be successful;
- (g) dispense with litigation procedure and rules of evidence; and
- (h) provide litigants or potential litigants with solutions to the dispute, which are beyond the scope and powers of judicial officers;

And whereas the Minister of Justice and Constitutional Development directed the Rules Board to make rules to regulate the procedure for voluntary referral to court-annexed mediation of civil disputes, to be implemented on a pilot basis in certain courts;

The Rules Board has therefore made the following rules to regulate the procedure for voluntary court-annexed mediation of civil disputes in the Magistrates' Courts:

1 Definitions

In these rules unless the context indicates otherwise:

'action' means litigation commenced by the issue of summons;

'alternative dispute resolution' means a process, in which an independent and impartial person assists parties to attempt to resolve the dispute between them, either before or after commencement of litigation;

'application' means litigation commenced by a notice of motion accompanied by affidavit;

'day' means a court day, which excludes Saturdays, Sundays and public holidays;

'defendant' includes any respondent and any party who would be defending a dispute if litigation was initiated;

'deliver' means to serve a document on the opposite party to litigation and to file the original with the registrar or clerk of the court;

‘dispute’ means the subject matter of actual or potential 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;

‘judicial officer’ means a Magistrate or an Additional Magistrate or an Assistant Magistrate or a Regional Magistrate.

‘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 in actual or potential litigation to resolve the dispute between them by facilitating discussions between the parties, 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, by the parties or by a dispute resolution officer from a list referred to in rule 14(2), to mediate a dispute between the parties;

‘Minister’ means the Minister for Justice and Constitutional Development;

‘potential litigation’ means litigation which may arise out of a dispute;

‘rules of court’ mean the rules of court applicable to the Magistrates’ Courts ;

‘statement of claim’ means a statement in which a party intending to claim any relief against another party sets out in clear and concise terms the material facts on which such party’s claim is based;

‘statement of defence’ means a written answer in which a defendant sets out in clear and concise terms the material facts on which such defence is based.

2 Application of these rules

(1) These rules apply to-

(a) the voluntary submission to mediation of a dispute prior to commencement of litigation in the Magistrate’s Courts; and

(b) current litigation in the Magistrates’ Courts, under the circumstances referred to in rules 6 and 7 of these Rules.

- (2) These rules do not replace any of the rules of the Magistrates' Courts.

3 Referral to mediation

- (1) A dispute may be referred to mediation-
- (a) by any party prior to the commencement of potential litigation;
 - (b) by any party after commencement of litigation but prior to judgment: Provided that where the trial has commenced the parties must obtain the authorisation of the court;
 - (c) by a judicial officer at any time after the commencement of litigation if the judicial officer believes that there is good reason for doing so.

4 Functions and duties of dispute resolution officer

- (1) The dispute resolution officer must explain to all parties—
- (a) the purpose of alternative dispute resolution, the meaning, objectives and benefits, including costs savings, of mediation; and
 - (b) the costs of mediation, based on the Annexure to these rules.
- (2) The dispute resolution officer must inform the parties that they may be assisted by legal representatives of their choice at their own cost.
- (3) The dispute resolution officer must, in consultation with the parties, execute the functions and duties in this rule and in rules 5 and 6.
- (4) Upon conclusion of an agreement to mediate, the dispute resolution officer must forward to the mediator-
- (a) a copy of the agreement to mediate;
 - (b) copies of the statement of claim and statement of defence, if mediation is to occur prior to commencement of litigation;
 - (c) copies of the summons and plea, or statement of defence if no plea has been filed, in action proceedings; and
 - (d) copies of the founding, answering and replying affidavits, or statement of defence if no answering affidavit has been filed, in application proceedings.

5 Procedure for referral to mediation prior to commencement of litigation

- (1) A party desiring to submit a dispute to mediation prior to commencement of litigation must make a request in writing in accordance with Form 1, to the dispute resolution officer of the court which would ordinarily have jurisdiction to hear the matter if litigation was instituted
- (2) The request must indicate—
 - (a) whether relief is being claimed by or against the party seeking to mediate;
 - (b) the full names of the other party or parties or name or names by which the other party or parties to the dispute are known to the party seeking mediation;
 - (c) the physical and postal addresses of the other party or parties to the dispute;
 - (d) the facsimile number or email address of the party seeking mediation, if such party has a facsimile number or email address; and
 - (e) the nature of the dispute and the material facts on which the dispute is based.
- (3) The dispute resolution officer must inform all other parties to the dispute that mediation of the dispute is being sought and must call upon the party seeking mediation and all other parties to the dispute to attend a conference within ten (10) days, for the purposes of determining whether all or some of the parties agree to submit the dispute to mediation.
- (4) If at the conference referred to in sub rule 3 some or all of the parties between whom mediation is possible, agree to submit the dispute to mediation, the dispute resolution officer must—
 - (a) in collaboration with the parties appoint a mediator or, if the parties cannot agree on a mediator, then the dispute resolution officer must appoint a mediator from the list referred to in rule 14(2);
 - (b) confer with the mediator and set the date, time and venue for mediation; and
 - (c) conclude a written mediation agreement between the parties which must contain the following particulars:
 - (i) the particulars referred to in sub rule 2(b), (c) and (d) of this rule;
 - (ii) that the parties have agreed to mediate the dispute between them;
 - (iii) the date, time and venue of the mediation;
 - (iv) the name of the mediator;

- (v) the period of time that will be allocated for each mediation session;
 - (vi) the time within which mediation will be concluded and the method by which any periods or time limits may be extended;
 - (vii) the confidentiality and privilege attaching to disclosures at the mediation; and
 - (viii) the consequences of any party not abiding by the agreement .
- (5) A party claiming relief must lodge a statement of claim with the dispute resolution officer within ten (10) days of the signature of the agreement referred to in sub rule 4(c) of this rule and forward a copy to all other parties to the mediation proceedings.
- (6) The party or parties against whom relief is being claimed must lodge a statement of defence with the dispute resolution officer within ten (10) days of receipt of the statement of claim, and forward a copy to all other parties to the mediation proceedings.

6 Referral to mediation by litigants

- (1) (a) Any party may at any stage after litigation has commenced, but before trial, request the dispute resolution officer, in writing, to refer the dispute to mediation.
- (b) The dispute resolution officer must inform all other parties to the dispute that mediation of the dispute is being sought and must call upon the party seeking mediation and all other parties to the dispute to attend a conference within ten (10) days for the purposes of determining whether all or some of the parties agree to submit to mediation.
- (2) After the commencement of trial but prior to judgment any party may apply to court to refer the dispute to mediation.
- (3) If the court grants an order referring the dispute to mediation, the provisions of rules 4(4); 5(4) and sub rule (4) of this rule must apply.
- (4) (a) In action matters, if pleadings have closed, the summons or declaration and plea, as referred to in the rules, will serve as the statement of case and statement of defence, respectively.
- (b) If a plea has not been delivered, the defendant must deliver a statement within ten (10) days of conclusion of the agreement to mediate.
- (c) In application matters, the founding affidavit will serve as the statement of claim and the answering affidavit if delivered, will serve as the statement of defence.

(d) If no answering affidavit has been delivered, the respondent must deliver a statement of defence within ten (10) days of conclusion of the agreement to mediate.

7 Referral to mediation by the court

- (1) A court may, prior to or during a trial but before judgment, direct the parties to submit to mediation and refer the dispute to the dispute resolution officer.
- (2) If during the trial the parties consent to the dispute being mediated, the parties must request the court to refer the dispute to the dispute resolution officer.
- (3) The provisions of rules 4(4) and 5(4) must apply if a dispute is referred to mediation under this rule.

8 Role and functions of mediator

- (1) At the commencement of mediation the mediator must inform the parties of the following—
 - (a) the purposes of mediation and its objective to facilitate settlement between the parties;
 - (b) the mediator's facilitative role as an impartial mediator who cannot make any decisions of fact or law and who cannot determine the credibility of any person participating in the mediation;
 - (c) the inquisitorial nature of such proceedings;
 - (d) the rules governing the mediation;
 - (e) that all discussions and disclosures, whether oral or written, made during mediation are confidential and inadmissible as evidence in any court, tribunal or other forum, unless the discussions and disclosures are recorded in a settlement agreement signed by the parties, or are otherwise discoverable in terms of the rules of court, or in terms of any other law;
 - (f) that 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) that no party may be compelled to make any disclosure, but a party may make voluntary disclosures with the same protection referred to in sub rule (1) e);

(h) that he or she will assist to draft a settlement agreement if the dispute is resolved; and

(i) if the dispute is not resolved, the mediator will refer the dispute back to the dispute resolution officer, informing him or her that the dispute could not be resolved.

- (2) In every mediation the mediator must, within five (5) days of the conclusion of the mediation process, submit a report to the dispute resolution officer informing him or her of the outcome of the mediation.
- (3) A mediator may postpone a mediation session if the parties agree.

9 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 from the time of conclusion of an agreement to mediate to the conclusion of the mediation proceedings.

10 Settlement Agreements

- (1) In the event of a settlement being reached, the mediator must assist the parties to draft the settlement agreement, which must be transmitted to the dispute resolution officer by the mediator.
- (2) If a settlement is reached at mediation proceedings in a dispute which was not the subject of litigation, the dispute resolution officer must, upon receipt of the settlement agreement from the mediator, file the settlement agreement.
- (3) If a settlement is not reached at the mediation proceedings in a dispute which was not the subject of litigation, the dispute resolution officer must, upon receipt of the report from the mediator, file the report.
- (4) If a settlement is reached at mediation proceedings in a dispute which was the subject of litigation, the dispute resolution officer must at the request of the parties and upon receipt of the settlement agreement from the mediator, place the settlement agreement before a judicial officer in chambers for noting that the dispute has been resolved or to make the agreement an order of court, upon the agreement of the parties.

- (5) If a settlement is not reached at mediation proceedings in a dispute which was the subject of litigation, the dispute resolution officer must, upon receipt of the report from the mediator, file the report and inform the registrar or clerk of the court to enable the litigation to continue.
- (6) Every settlement agreement must be reduced to writing.

11 Partially unsettled disputes

Should any aspect of a dispute between the parties remain unsettled, the unresolved issues may be litigated upon by the parties.

12 Fees payable to 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) Liability for the fees of the mediator must be borne equally between opposing parties participating in the mediation process.

13 Representation of parties at mediation proceedings

- (1) Parties to mediation proceedings must attend such proceedings in person and may be represented by legal representatives.
 - (2) Where a juristic person or a firm or a partnership is a party to mediation proceedings such entity must be represented by an official from that juristic person, firm or partnership, who must be duly authorised to represent the entity, to conclude a settlement and sign a settlement agreement on behalf of such entity.
- (3) Where the State or an organ of state is a party to mediation proceedings such entity must be represented by an official assisted by the state attorney who must be duly authorised to represent the entity.

14 Minister to determine standards of fitness and compile list of accredited 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 must periodically provide a list of accredited mediators to execute the functions and objectives in these rules.

15 Short title

These rules will be referred to as the Voluntary Court-Annexed Mediation Rules of the Magistrates' Courts.