2014

THE MEDIATION PROGRAMME OF THE HIGH COURT OF NAMIBIA

Outreach Paper No 1

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Foreword

On 16 April 2014, the new rules of the High Court came into force. An important feature of the new rules is the introduction, for the first time in our legal system, of court-connected mediation. Simply put, mediation is a process which the court requires (or the litigants choose) to allow the parties to try and settle a dispute pending before court without going to trial. The High Court's mediation programme is an adjunct to the adjudicatory function of the court. The first mediation under the new Rules was conducted on 6 June 2014. During the period 6 June – 30 September 2014 a total number of 187 mediations have taken place. The mediation reports in respect of 35 of those mediations are still pending, but of the 152 reports received, 88 (58%) resulted in settlement. This is a phenomenal success. A remarkable feature of our mediation programme, of which I am justly proud, is that the majority of our mediators are private persons who are not court employees. That demonstrates public buy-in to the Court's mediation programme. I wish to thank the litigants, the legal fraternity and the mediators for their co-operation in making mediation the success it promises to become. As the adage goes: A negotiated settlement is by far better than a judgment which, invariably, even if a party is successful, does not guarantee everything it came to court for.

Sincerely,

Petrus T Damaseb
Judge President

Acknowledgement

The mediation programme is possible due in large measure to the unwavering financial support of the Ministry of Justice. The USA government, through its Embassy in Namibia, also provided the High Court financial assistance by partly sponsoring retired USA Judge Hon. Gordon Low, to conduct the training for the mediators who today form the backbone of our mediation programme. The contribution by Judge Gordon Low and his wife, Stephanie, is greatly appreciated.

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Legal basis of mediation

Under the rules of the High Court of Namibia, the managing judge may at any time either of his or her own initiative or at the request of a party, refer the proceedings or any issue to mediation in an attempt to resolve that issue or part of the proceeding or issue by way of alternative dispute resolution. The Judge President of the High Court has designated certain case types in respect of which the court will require the parties to undergo compulsory mediation, should they not themselves seek mediation of their dispute.

Case types designated for mandatory mediation

In the following case types the court will more likely order compulsory mediation:

- Insurance claims;
- Medical negligence claims;
- Professional negligence claims;
- Building contract claims;
- Divorce and disputes involving custody of children and maintenance for children and a spouse;
- Loan default claims;
- Motor vehicle accident claims;
- Defamation.

What is mediation?

Mediation is a form of alternative dispute resolution (ADR) which is aimed at resolving disputes without going to court. The process involves a neutral third party, the mediator, assisting the parties in negotiating a possible settlement to their disputes without going to trial. Unlike a trial judge, the mediator does not determine who is at fault in the dispute. In fact, a mediator proceeds on the premise that no fault is to be ascribed to any party. Instead, the focus in mediation is on moving forward in a way that meets the disputing parties' underlying concerns. The mediation process is also much more flexible and informal than the trial process.

Rationale of ADR

The court system cannot deal with all disputes. Experience shows that the majority of cases commenced by way of combined summons are settled closer to trial. That being the case, why not explore settlement earlier and save costs? Litigation is a zero sum game: there is a winner and a loser. A negotiated settlement is better than an unfavorable judgment. Therefore, there is a public policy rationale and a legitimate governmental objective in the rules of court requiring disputes to be mediated before

judges can hear them. That said, if mediation fails, the parties have a constitutional right to have their dispute heard and determined by a competent court. No one, not even the most experienced lawyer with many years of trial experience can guarantee the outcome of a court case. Each person involved in a lawsuit has the right to be heard. Even a case that looks weak may in the end prevail because a lot of factors influence the outcome of a case: e.g. witnesses may die in the meantime or may perform poorly under cross examination or an important document may just disappear. Besides, well over 70 per cent of trial actions commenced in the High Court settle at the door of the Court. What that means is that if parties start talking early in the life of a case, they may, through settling the case, avoid incurring legal costs.

How is mediation different from a trial?

Mediation is a form of ADR: it is an alternative to having a trial in court. The table below sets out the main differences between trial and mediation[1]:

FACTORS	MEDIATION	TRIAL
Control over outcome	Parties have **full control** over the outcome of mediation as they make their own decisions, with the help of the mediator.	Parties **give up control** to a judge who will listen to the evidence and make a decision that binds the parties.
Focus on the past or present	The past is considered only in so far as it explains the present in order to shape a solution for **the future**. There is little emphasis on determining who is at fault in the past. The main focus is on resolving the dispute through finding a solution for the future.	The main focus is on **the past** to allocate blame.
Cost	Court–connected Mediation in the High Court is **free of charge**. When a case is settled at mediation, the parties save legal costs that would be incurred in going for trial.	The **court hearing fees** after the first day of trial are at least N$1200 per day per practitioner. Apart from court hearing fees, parties have to incur legal fees in hiring lawyers to go for a trial.
Flexibility	There is **more flexibility** in the outcome of mediation. The mediator and the parties are not bound by formal legal rules or procedure	A court trial by comparison is **more formal.** There has to be strict adherence to court

[1] Adapted from the Singapore Subordinate Court's Flyer on ADR.

	so that the process cannot be delayed by raising technical arguments. The parties are therefore free to reach creative solutions without constraints.	procedures and existing legal principles in reaching a decision.
Confidentiality	Mediation proceedings are **fully private and confidential.** Discussions are not revealed in court in the event that mediation is unsuccessful and the dispute is heard in court.	Court hearings are **open to the public**.
Time	**Usually short.** Most disputes are resolved within one session.	Usually **longer by comparison**. Trials can be long due to the tedious processes of fact-finding, and cross-examination to verify the accuracy of the facts.

What are the benefits of mediation?

(a) Saves legal costs

Early settlement means fewer legal procedures have to be carried out with the resultant saving in legal costs.

(b) Free of charge

No court fees are payable for mediation sessions unless the parties choose private mediation.

(c) It's on parties' terms

Parties are able to decide for themselves the terms of settlement.

(d) Peace of mind

There can be no appeal on an agreement that all parties arrive at by mutual give-and-take.

(e) Confidentiality

All matters discussed for settlement purposes are kept in strict confidence.

When is mediation appropriate?

Experience has shown that mediation is effective in situations where:

- The parties know each other and want to save or maintain their relationship (e.g. for the benefit of their children);
- There is a need to reach a quick end to the dispute;
- The parties want to avoid publicity and to maintain confidentiality;
- The law does not provide a solution that meets the parties' real interest. For instance, while a suit may appear to be for breach of contract, there may be communication issues between the disputing parties that have to be resolved. In another illustration, a party may file a suit for defamation, but he or she may really be seeking an apology which is not a normal legal remedy given by the courts.

However, there are certain disputes in which mediation may not be appropriate. These include where:

- There is a need to establish a legal precedent in court. For instance, a company may need a court decision concerning the interpretation of a clause in its standard contract; or a party may want an authoritative and binding interpretation of a statute or the Constitution;
- One or more parties may not be attempting mediation in good faith (e.g. to gather more information to its advantage and to the prejudice of the opponent without any intention of exploring a settlement);
- One or more parties want(s) public attention to be drawn to the dispute.

Abuse of mediation not allowed

Mediation is not intended to become a long-drawn-out process. It is expected of mediators to finalise mediation in not more than two sessions. Once mediation fails, the mediator files a report with the registrar for the attention of the managing judge stating that the mediation has failed. In the event of parties failing to attend the scheduled mediation, a report recording absence of the party or practitioner as the reason should be filed, and the managing judge will not allow any further court-connected mediation. Private mediation however remains an option, subject to the managing judge's approval.

How mediation commences

Mediation commences with the initial referral order by the managing judge with a two-week return date. Once the order is made the parties' lawyers are required to visit the ADR office to arrange a date for mediation and to confirm the availability of the chosen mediator. The parties choose a mediator from the list of accredited mediators and confirm his or her availability and the date for the mediation. On the return date they ask the court to make a mediation referral order which confirms the mediator and the date of the mediation. That order also gives deadlines for the filing of the parties' respective settlement proposals. The mediation referral order also sets the deadline by which the mediator's report is to be received and postpones the matter to a specific date for status hearing. If a party wishes to have an interpreter at the mediation, it is that party's duty to bring that to the attention of the managing judge.

Obligations of parties where matter referred for mediation

Where a matter has been referred for mediation, the parties are required to exchange settlement proposals in writing.

The first step is a:

- letter of the plaintiff's legal practitioner setting out:

  (i) a brief summary of the evidence and legal principles that the plaintiff relies on to establish his or her claim;

  (ii) a brief explanation of why, in the opinion of the plaintiff, the relief claimed would succeed at the trial;

  (iii) an itemisation of the damages and other relief the plaintiff believes can be established at the trial and a brief summary of the evidence and legal principles supporting the damages or other relief; and

(iv) a concise settlement proposal; and

The second step is:

- The letter of the defendant's legal practitioner in response to the plaintiff's letter. That letter of the defendant must set out:

  (i) any points in the plaintiff's letter with which the defendant agrees;

  (ii) any points in the plaintiff's letter with which the defendant disagrees; and

  (iii) a concise settlement offer.

Contents of settlement proposals are privileged

There is an absolute prohibition against either disclosing the contents of settlement proposals to the judge or attempting to use it in the court case in which the parties are involved or in any other case in future. The purpose of this prohibition is to encourage the parties to exchange proposals freely and in good faith by way of mutual give-and-take.

The settlement conference

The rules of court require that the parties, assisted by their legal practitioners, must hold a meeting with the mediator within 7 days of the defendant's settlement proposal letter. It is important to take note that a person attending a settlement conference must have the necessary authority to settle the matter.[2] In that respect, a party that is -

(a) a natural person, must be represented by that natural person or if that natural person is under a disability by his or her legal representative;

(b) a juristic person, must be represented by a person duly authorised in writing by that juristic person, other than the legal practitioner of record;

(c) a regional or local authority council, must be represented by the chief executive officer of that council or his or her duly authorised representative who is not the legal practitioner of record;

(d) insured and will in the cause or matter claim immunity from an insurer

[2] But this requirement does not apply where the Government is a party or where the managing judge or the court issues a contrary order.

under an insurance policy, must be represented by a duly authorised representative of the insurer with settlement authority, together with the person representing the insured party.

The rules stipulate that a person attending a settlement conference must have the authority, without reference to any other person not present at the settlement conference, to make a final and binding settlement regarding any offer or demand.

If an unauthorised person attends a settlement conference and the conference fails for that reason, the mediator is required to report that fact to the managing judge who may impose sanctions against the party who allowed the settlement conference to fail. To avoid the possible argument of an unfair settlement on the ground of inequality of arms, the court only encourages mediation where both parties are represented by a legal practitioner.

The litigants should be aware that the rules of court obligate a legal practitioner to disclose to the client the settlement proposals made by the opposing side. That disclosure must take place before the settlement conference with the mediator. Full implications of the settlement proposed by the opponent must be shared with the client.

Choosing a mediator

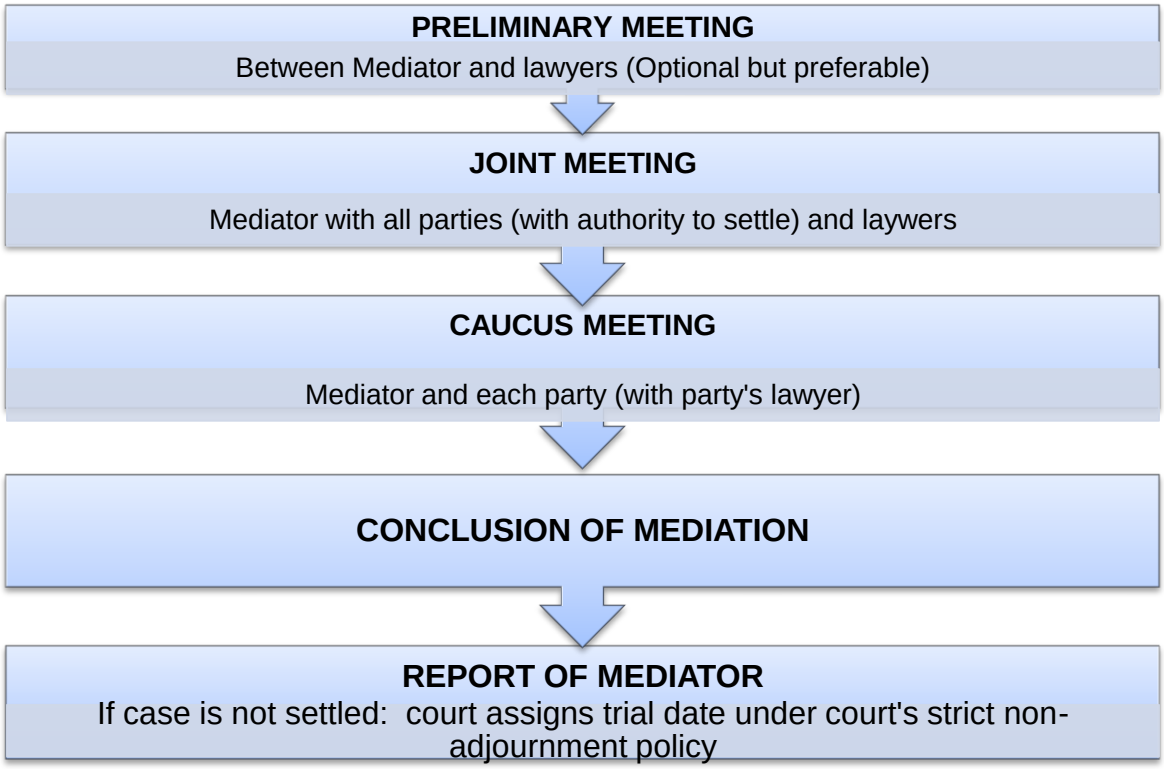
Given that mediation is a court-run service, the High Court has the obligation to ensure that the parties are assisted by a mediator paid for by the court. Several mediators have been trained and accredited by the court. Their names and availability can be obtained from the ADR office at both the Main Division (Windhoek) and the Northern Local Division (Oshakati). Parties may however choose to retain their own mediator but in that case they must make private arrangements with the mediator for his or her fees. Even where the parties choose private mediation, they may only select a mediator from amongst the court accredited mediators.

Preparing for a mediation session

It is useful for the legal practitioner and the client to discuss the case prior to the mediation. Mediation is meaningless unless both parties participate in it in the spirit of give-and take. The lawyer, including instructed counsel if one is briefed, and the client must discuss the case before the settlement conference and agree on how to deal with the opponents' counter proposals. The aim must be to try and give something in return for something. Mediation is meaningless if a party participates in it on the basis that his/her case must prevail.

What happens during a mediation session?

A typical mediation has the following stages:



How many mediation sessions will there be?

In general, there should not be more than two sessions. Often a settlement occurs within a single session. However, the actual time taken and the number of sessions required depend on each case, such as the nature and level of complexity of the case, as well as the attitude of the parties.

All information exchanged during mediation will be kept strictly confidential and will not be revealed to the judge in the event that no settlement is reached during the mediation session. The Mediator may also call for a private session where he or she will speak to each party separately. Confidential information revealed during caucuses will not be revealed to the opposing party unless the party consulted wants the opponent to be informed.

What happens when there is no agreement reached at mediation?

When a case cannot be settled through Mediation, the matter will be referred to the managing judge and the parties will be directed to take the necessary steps within certain time frames, for the matter to proceed to trial. The information discussed during the mediation process will remain confidential and will not be revealed to the trial judge.

If the mediation fails, the managing judge must assign a trial date immediately. Litigants must take note that trial dates assigned by the court are strictly observed and the court operates a strict non-adjournment policy. That means the trial must proceed on the dates assigned by the judge. Lack of preparation or inconvenience because of a persons' travel or other arrangements will not be easily entertained by the court. The court will only grant postponement in real emergencies such as illness or an unforeseen event.

The ADR office is managed by:

Mr. Jackson Kahiuoua

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Court-Accredited Mediators of the High Court of Namibia

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SCHICKERLING	ELSIE	MD	CHIEF REGISTRAR(ADMITTED LEGAL PRACTITIONER)	PRIVATE BAG 13179WINDHOEK	292 1351	221686	
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SCHIMMING-CHASE	ESI	MD	LEGAL PRACTITIONER	P O BOX 888 WINDHOEK	235949		echase@iway.na
SHIFOTOKA	EVA SHIWALONGO	MD	LEGAL PRACITIONER	PO BOX 2607 WINDHOEK	061224415 0813278626	61222396	eva@condam.com.na
SHIPOPYENI	NDAPEWA-OMAGARUO KUUTUMBEUI FRIEDA	MD	LEGAL PRACTITIONER	PO BOX 1187 WINDHOEK	061221737 0816531504	61221738	ndapewa@shipopyeniassociates.com
SHIVUTE	NAOMI	NAHC MD	JUDGE OF THE HIGH COURT	PRIVATE BAG 13179 WINDHOEK	CONTACT DELINE AUKHOMES: 292 1238		
SIBOLEKA	ALFRED	NAHC MD	JUDGE OF THE HIGH COURT	PRIVATE BAG 13179 WINDHOEK	CONTACT BENITA SWIEGERS: 292 1293		
SIKONGO	NUNCIA	MD	COURT ASSISTANT (ADMITTED LEGAL PRACTITIONER)	PRIVATE BAG 13179 WINDHOEK	292 1274	221686	nunciasikongo@gmail.com
SMUTS	DAVID	NAHC MD	JUDGE OF THE HIGH COURT	PRIVATE BAG 13179 WINDHOEK	CONTACT AUNE VICTOR 292 1331		

STEYN	ESTA	MD	LEGAL PRACITIONER	PO BOX 81289, OLYMPIA, WINDHOEK	061222771 0813389772	61222826	esta@drdlaw.pro
TJAHIKIKA	NELI	MD	DEPUTY CHIEF REGISTRAR (ADMITTED LEGAL PRACTITIONER)	PRIVATE BAG 13179 WINDHOEK	292 1255	221686	
TOMMASI	MARLENE	NAHCNLD	JUDGE OF THE HIGH COURT	PRIVATE BAG 5527 OSHAKATI	CONTACT MS THERON 065-2236500		
TOTEMEYER	REINHARD	MD	LEGAL PRACTITIONER	PO BOX 1989 WINDHOEK	232161 0811281715	243595	rtnamlex@ifrica.com.na
UANIVI	UAATJO	MD	MAGISTRATE	PRIVATE BAG 13181 WINDHOEK	3201308 081272686		
UEITELE	SHAFIMANE	NAHCMD	JUDGE OF THE HIGH COURT	PRIVATE BAG 13179 WINDHOEK	CONTACT NUNCIA SIKONGO 292 1274/7		
UNENGU	PETRUS	NAHCMD	ACTING JUDGE OF THE HIGH COURT	PRIVATE BAG 13179WINDHOEK	CONTACT KATHY JOD 292 1332		
VAATZ	ANDREAS	MD	LEGAL PRACTITIONER	P.O.BOX 23019 WINDHOEK	225575 0811297646	234758	vaatz@iafrica.com.na
VAN DEN HEEVER	GERT	MD	LEGAL PRACTITIONER	PO BOX 38 KEETMANS-HOOP	63223281	63223793	vdheever@mweb.com.na
VAN NIEKERK	KATO	NAHCMD	JUDGE OF THE HIGH COURT	PRIVATE BAG 13179 WINDHOEK	CONTACT KATHY JOD: TEL: 292 1332		
VAN SITTERT	WESSEL CORNELIUS (CHRIS)	NLD	LEGAL PRACTITIONER	PO BOX 52 TSUMEB	067221145 0811249610	67221471	chrisvansittert@iway.na
VAN ZYL	CHRISTIAAN JACOBUS	MD	LEGAL PRACTITIONER	P.O. BOX 80154 WINDHOEK	404515 0812865479	401515	cvanyzyl.legalpractitioner@gmail.com
VISSER	IRENE	MD	LEGAL PRACTITIONER	PO BOX 1134 WINDHOEK	307110 0811220305		ivi@iway.na
VLIEGHE	STEPHEN	MD	LEGAL PRACITIONER	PO BOX 86141 EROS	061382800 0812229978	61382888	stephen@koep.com.na
WANDA	BOYCE PHILIP	MD	PROFESSOR OF LAW	PO BOX 13301 WINDHOEK	0612063701 0817930025	612063703	bwanda@unam.na

WILLIAMS	CAROL ROSHETA	MD	LEGAL PRACTITIONER	PO BOX 23019 WINDHOEK	061225575 0811275886	612347 58	vaatz@iafrica.com.na
WYLIE	THOMAS	MD	LEGAL PRACTITIONER	PO BOX 27353 WINDHOEK	226385 0812775131	227514	advtmwylie@iway.na