



# **Supplement No. 1 to Gazette No. 48 of 27th May, 2011**

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LEGAL NOTICE NO. 61 OF 2011

**The High Court (Mediation) Rules, 2011**

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## LEGAL NOTICE NO. 61 OF 2011

**The High Court (Mediation) Rules, 2011**

Pursuant to section 16 of the High Court Act, 1978<sup>1</sup>, I,

**MAHAPELA LEBOHANG LEHOHLA**

Chief Justice, make the following rules -

**Citation and commencement**

1. These rules may be cited as the High Court (Mediation) Rules, 2011 and shall come into operation on the date of publication in the Gazette.

**Application**

2. (1) These rules shall apply to all civil actions and applications filed or pending in the High Court that are identified for referral to the mediation program.

(2) These rules does not preclude the parties from agreeing to seek mediation or services outside the mediation program.

**Interpretation**

3. In these rules unless the context otherwise requires -

“court-annexed mediation” means the mediation proceedings conducted by mediators designated by court in accordance with the provisions of these rules;

“court” means High Court of Lesotho and the Commercial Court Division of the High Court;

“legal person” shall be body corporate, government, parastatals, local government council, municipalities, associations registered in terms of Friendly Association Act, 1966<sup>2</sup> and shall include any entity in which in the determination of the court constitutes a legal person;

“mediation” means the process by which an impartial third party (the mediator) will facilitate communication between parties and assist them in their negotiation as they attempt to reach an agreed settlement of their dispute;

“mediation administrator” means the mediation administrator designated under rule 5;

“mediator” means a trained, competent and certified officer of the court who shall be designated by court to serve as a neutral and impartial presiding officer in mediation proceedings;

“mediators’ standards of conduct” means the standard of conduct for mediators established under these rules;

“party” means any matter before the court which has not been withdrawn, discontinued or dismissed and in which judgement has not yet been entered or given.

### **Court annexed mediation programme**

4. (1) There shall be established court annexed mediation programme.

### **Assessment and evaluation working committee**

5. (1) There shall be established an assessment and evaluation working committee.

(2) The court annexed mediation (in these rules referred to as “CAM”) program shall be assessed and evaluated by a working committee comprising -

- (a) the Chief Justice;
- (b) a Chief Magistrate;
- (c) the Registrar;
- (d) the Mediation Administrator; and

- (e) one representative each from -
  - (i) the office of the Attorney-General;
  - (ii) the court users committee; and
  - (iii) the bar-bench committee.

(3) The responsibility of the working committee is to assess the ongoing effectiveness of the CAM and to recommend any appropriate adjustments and support the transition of the program.

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### **Mediation Administrator**

6. (1) There shall be established a mediation administrator.

(2) The mediation administrator shall be responsible for implementing, administering, overseeing and evaluating the CAM program and procedures covered by these rules.

(3) The responsibilities set out in sub-rule (2) shall extend to educating litigants, lawyers, judges and court staff about the CAM program and rules.

(4) The mediation administrator shall ensure that appropriate systems are maintained for recruiting, screening and training mediators as well as for maintaining, on an ongoing basis, the mediators' ability to provide services to the parties.

### **Mediation referral order**

7. (1) For all cases pending in the High Court, the presiding Judge may at any time after issuance of the initial case allocation and before entry of final judgment, issue an order of reference to mediation under the CAM program.

(2) In every new action or application commenced in the High Court after commencement of these rules, each party shall include a brief statement in the pleadings, indicating whether it consents to or opposes referral of the matter to mediation under the CAM program.

(3) In the absence of any indication or objection in the pleadings relating to referral of the matter to the program, it shall be presumed that the parties have waived any objection to a referral of the matter to CAM under these rules.

(4) Where a matter is referred to mediation under the CAM program, all litigation activities (e.g. pre-trial discovery, etc) and time limits set out in the High Court rules shall cease to run from the date of the referral order until after the mediator's report has been issued and filed into record upon completion of the CAM process.

### **Objection to a referral**

8. (1) Where a party has expressed objection in the pleading to a referral to the CAM program, the court shall cause a notice to be issued to the parties within 15 days after the filing of the first defence, inviting the parties to attend a hearing where the objection has been raised before the mediation administrator.

(2) At the hearing and upon notice under sub-rule (1), the mediation administrator shall issue directions as to -

- (a) the issue to be mediated;
- (b) the time within which the CAM session are to be completed;
- (c) the party required to attend the mediation sessions in person; and
- (d) any other matter necessary or desirable to facilitate the CAM process.

### **Exemption from application of rules**

9. Upon proper cause being shown by a party opposed to CAM, the mediation administrator may make a recommendation on that party's motion for the exemption of the matter from these rules.

**Mediation session**

10. (1) Promptly after the CAM referral order has been made, the mediation administrator shall assign the mediator to conduct the first mediation session that must take place not later than 14 days from the date of receipt of the referral.

(2) Except when otherwise directed by the mediation administrator, each case referred to mediation under CAM shall be conducted in sessions of not more than (2) days except where the parties do not reach a settlement within that period, they may subject to direction of the mediation administrator, extend the process up to a minimum of thirty days.

(3) Unless otherwise directed by the mediation administrator under compelling reasons, all mediation session shall be completed within 30 days of the mediator's receipt of the case referral order.

**Pre-existing settlement**

11. (1) All parties and their lead counsel, having authority to settle and to adjust pre-existing settlement authority, if necessary, shall attend the CAM sessions in person unless excused under sub-rule (2).

(2) A legal person shall attend the CAM sessions in person, unless excused, if their agreement would be necessary to achieve a settlement.

(3) A legal person or other non-governmental entity shall attend the session if represented by a person other than outside legal counsel who has authority to settle, under sub-rule (1) and who is knowledgeable about the facts of the case.

(4) A government agency or unit of government shall attend the CAM session if represented by a person who has, to the greatest extent feasible, authority to settle, and who is knowledgeable about the facts of the case, the Government or Government unit's position and the procedure and policies under which the Government unit decides whether to accept proposed settlements.

## **Requests to be relieved of the duty to appear in person**

12. (1) No person may ask either the mediation administrator or mediator assigned to the case to be relieved of the duty to attend a mediation session in person, unless that person has first conferred about the matter with the other party who would be participating in the session.

(2) A person may be excused from attending a mediation session in person only on showing that personal attendance would impose a serious and unjustifiable hardship.

(3) A party seeking to be relieved of the duty to attend in person shall, submit a letter to the mediation administrator and make copies to all other parties that sets forth all considerations that support the request and indicates whether or not the other parties and the assigned mediator support or oppose the request.

(4) A person who is excused from attending a CAM session in person shall be available to participate by electronic medium, unless otherwise directed by the mediation administrator or the mediator.

## **Where Government is a party to mediation**

13. (1) When the Government or an entity of government is a party to the mediation, a person other than the government's litigation counsel who has authority to settle and enter into stipulations on behalf of the government party must attend the mediation sessions.

(2) The mediation administrator shall extract assurances from the government litigation counsel that a person with full settlement authority will be at least available by electronic medium during the mediation sessions.

## **Submission of case summary**

14. (1) A party to CAM shall submit to the mediator the following -

(a) a short statement of not more than 10 pages of the case summary which shall include -

(i) the facts of the case;



- (ii) a written explanation of the interests and positions of the party;
- (iii) an explanation of the legal or factual issues in dispute;
- (iv) a list of witnesses and important exhibits;
- (v) a list of expert witnesses.

(2) The parties shall, at least five days before the mediation, exchange their case summaries and exhibits.

(3) The parties' case summaries shall not be filed with the court or given to the allocated judge, and the presiding judge shall not have access to them.

(4) Each party may submit directly to the mediator, for the mediator's eyes only, a separate *ex parte* confidential written statement describing any additional interest, considerations, or matters that the party would like the mediator to understand before the mediation session begins.

(5) Any such additional *ex parte* written statement shall be delivered to the mediator at the same time the party delivers the written statement required under sub-rule (1).

### **Scheduled mediation session**

15. (1) If it is not practical to conduct a scheduled mediation session because a party fails to attend, the mediator may adjourn the session to another date.

(2) A party that fails to attend the mediation session without good cause shall be liable to pay the adjournment costs specified in the First Schedule of these rules.

### **Confidentiality of proceedings**

16. (1) Except as provided by these rules and except as otherwise

required by law, or as stipulated by all parties and the mediator, all communications made in connection with the CAM proceedings shall be confidential.

(2) A person shall not disclose to the assigned judge a communication made, position taken, or opinion formed by another party or mediator in connection with the CAM proceedings except as otherwise -

- (a) stipulated in writing by all parties and the mediator;
- (b) provided in these rules;
- (c) ordered by the court in connection with proceedings to determine -
  - (i) whether, a record or a signed document is produced that appears to constitute a binding agreement or the parties entered into an enforceable settlement contract at the end of the CAM session; or
  - (ii) whether a person violated a legal norm, rule, court order or ethical duty during or in connection with the CAM session.

(3) Nothing in these rules shall be construed as preventing any participant or mediator in proceedings under the CAM program from responding to an appropriate request for information duly made by officials authorised by the court to monitor or evaluate any aspect of the Court's CAM program.

### **Notice of Recusal**

17. A mediator who discovers a circumstance requiring disqualification shall immediately submit to the parties and to the mediation administrator a written notice of recusal.

### **Immunity to mediators**

18. A mediator serving as such under the CAM program is, pursuant to these rules deemed to be performing quasi-judicial functions and is entitled to

the immunities and protections that law accords to a person serving in such capacity.

### **Settlement agreement**

19. Where the parties arrive at a settlement, they shall jointly sign a settlement agreement in that regard.

### **Report of a settlement**

20. The mediator shall, not later than five days after completion of the CAM proceedings, and not later than the deadline for completion of mediation as fixed in the referral, file and provide copies to the parties of a form that reports to the assigned judge -

- (a) whether CAM proceedings resulted in settlement of all or part of the case; and
- (b) any proposal in which all the parties meet with a view to discussing any further efficient case development and/or exploration or settlement.

**DATED:**

**MAHAPELA LEBOHANG LEHOHLA  
CHIEF JUSTICE**

### **NOTE**

- 1. Act No. 5 of 1978
- 2. Act No. 10 of 1966