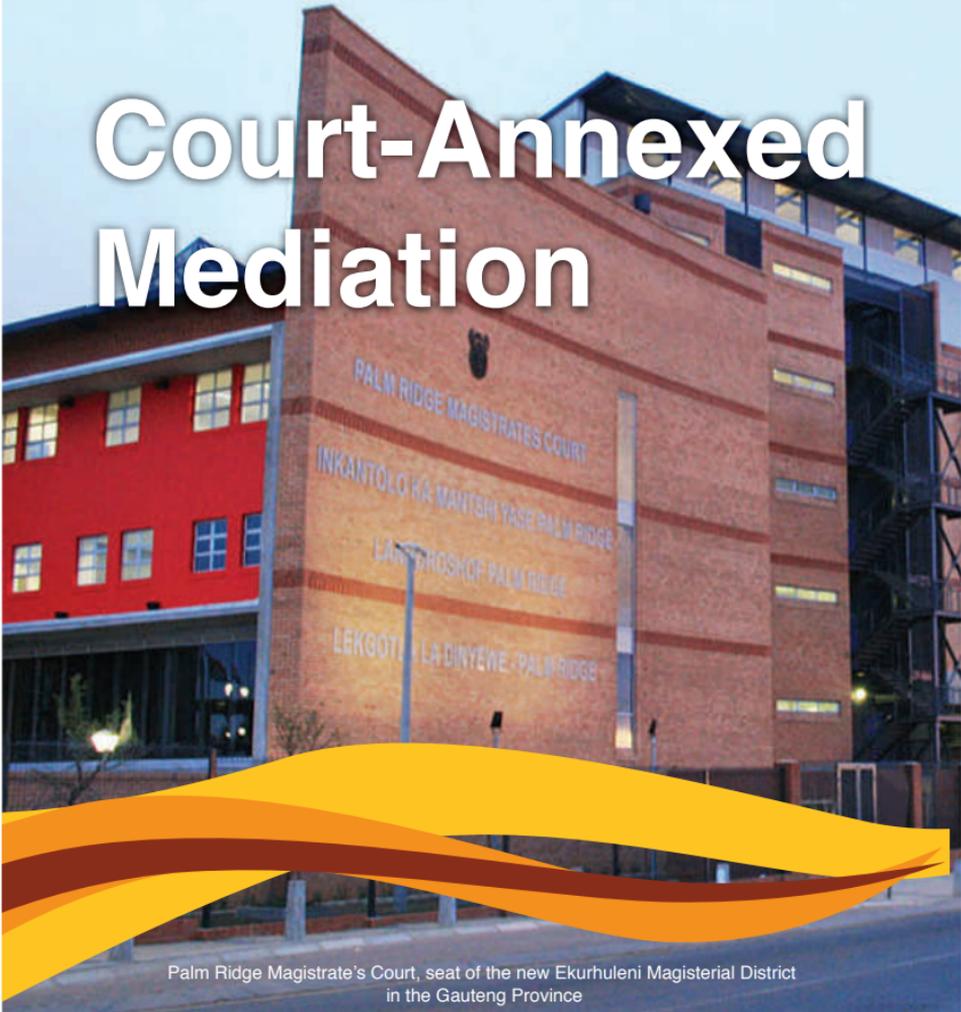


Court-Annexed Mediation



Palm Ridge Magistrate's Court, seat of the new Ekurhuleni Magisterial District
in the Gauteng Province



the doj & cd

Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA





FOREWORD BY MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT, MR J T RADEBE, MP

The court-annexed mediation rules which will be implemented in the District and Regional Courts, form part of the Government's concerted effort to transform the civil justice system and are geared to enhance access to justice. They were drafted as part of the Civil Justice Reform Project (CJRP) which was approved by Cabinet in 2010.

The rules will be implemented incrementally, informed by the capacity that will be built gradually at our courts to render this important service. A schedule of the courts where the rules will be applicable will be published in the Gazette periodically in line with the roll-out plan.

The rules are voluntary in nature. I take cognisance of the fact that compulsory court-annexed mediation will require enabling legislation. I have asked the Department to investigate the desirability of such legislation and prepare a draft Bill accordingly. There are precedents in other comparable jurisdictions from which we can draw lessons and best practices in developing such legislation.

It has been proven that mediation facilitates early settlement of any dispute which has arisen or is likely to arise and thereby save huge costs in legal and court fees. I have no doubt that the implementation of these rules will open a new chapter in our judicial landscape and will go a long way in demystifying our adversarial legal system which is still steeped in foreign legal precedents. With the implementation of these rules, civil cases that would clog our court rolls may be referred to mediation where they will be settled speedily and to the satisfaction of parties to a dispute. Mediation adopts a flexible approach compared to the rigid and tedious legal processes which most often require services of a lawyer to present before the court. Language used in mediation is the language of the parties and the dispute is usually resolved in a reconciliatory manner. Mediation therefore promotes restorative justice. I have asked the Rules Board for Courts of Law to consider developing rules that will facilitate diversion of criminal cases to mediation in appropriate instances.

I will soon appoint an Advisory Committee which will advise me regarding the setting of norms and standards for mediators and for the accreditation of mediators for enlistment to the panel as required by the rules. In addition to the development of the desired norms and standards and the accreditation of eligible mediators, the Advisory Committee will also be responsible for the following tasks which are necessary for the successful implementation of the rules:-

- (a) liaise with universities, training institutes including Justice College and the South African Judicial Education Institute for purposes of designing appropriate training programmes for mediators, mediation clerks and other users of the system;
- (b) assist the department in investigating the desirability of legislation on compulsory mediation; and
- (c) advise on any aspect pertaining to the implementation of the Mediation Rules and Alternative Dispute Resolution (ADR) broadly.

The Advisory Committee, once it has been appointed, will consult with institutions of Higher Learning and our social partners amongst other stakeholders, in exercising its mandate in accordance with the above terms of reference.

I would like to thank the Rules Board for Courts of Law for its remarkable contribution in preparing this set of rules. These rules signal an important turning point in our legal system and an important footprint in our endeavour to enhance access to justice for all people in South Africa.



Jeff Radebe
Minister of Justice and Constitutional Development

EXPLANATORY NOTE:

These rules, made by the Rules Board for Courts of Law and approved by the Minister of Justice and Constitutional Development in terms of the Rules Board for Courts of Law Act 107 of 1985, amend the Rules regulating the conduct of the proceedings of the Magistrates' Courts of South Africa by inserting Chapter 2 hereunder to the said rules.

The rules are applicable in courts in a schedule published by the Minister of Justice and Constitutional Development.

Forms which are part of the mediation rules are published separately on the Department of Justice and Constitutional Development website www.justice.gov.za as well as in the Government Gazette.

CHAPTER 2 OBJECTIVES

70. The objectives of this Chapter are to give effect to-
- (1) section 34 of the Constitution of the Republic of South Africa, 1996, which 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
 - (2) the resolution of the Access to Justice Conference held in July 2011, under the leadership of the Chief Justice, towards achieving delivery of accessible and quality justice for all, that steps be taken to introduce alternative dispute resolution mechanisms, preferably court-annexed mediation or the Commission for Conciliation, Mediation and Arbitration kind of alternative dispute resolution, into the court system.

PURPOSES OF MEDIATION

71. 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; and
 - (f) provide litigants or potential litigants with solutions to the dispute, which are beyond the scope and powers of judicial officers.

PURPOSE OF RULES

72. The purpose of the rules in this Chapter is to provide the procedure for the voluntary submission of civil disputes to mediation in selected courts.

DEFINITIONS

73. **For the purposes of this Chapter —**

‘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 notice of motion;

‘defendant’ includes any respondent and any party who would be defending a dispute if litigation were initiated;

‘dispute’ means the subject matter of actual or potential litigation between parties or an aspect thereof;

‘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 resolve the dispute;

‘mediation session’ means the period that a mediator and the parties are engaged in mediation of the dispute;

‘mediator’ means a person selected by parties or by the clerk of the court or registrar of the court from the schedule referred to in rule 86(2), to mediate a dispute between the parties;

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

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

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

Application of rules

74. (1) The rules in this Chapter apply to the voluntary submission by parties to mediation of—
- (a) disputes prior to commencement of litigation; and
 - (b) disputes in litigation which has already commenced and as contemplated in rules 78 and 79.
- (2) These rules apply to courts to be designated by the Minister by publication in the Gazette.

- (3) The application of these rules is subject to the provisions of any other law and the procedure provided for in any other law, for the mediation of disputes between parties to litigation.

Referral to mediation

75. (1) Parties may refer a dispute to mediation—
- (a) prior to the commencement of litigation; or
 - (b) after commencement of litigation but prior to judgment; Provided that where the trial has commenced the parties must obtain the authorisation of the court.
- (2) A judicial officer may at any time after the commencement of litigation, but before judgment, enquire into the possibility of mediation of a dispute and accord the parties an opportunity to refer the dispute to mediation.

Functions and duties of clerks and registrars

76. (1) A clerk or registrar of the court must explain to all parties—
- (a) the purpose of alternative dispute resolution, the meaning, objectives and benefits, including costs saving, of mediation; and
 - (b) their liability for the fees of the mediator.
- (2) A clerk or registrar of the court must—
- (a) inform the parties that they may be assisted by practitioners of their choice, at their own cost;
 - (b) in consultation with the parties, execute the duties in rules 77 and 78;
 - (c) if the parties agree to mediation, assist them to conclude a written agreement to mediate, which must be signed by the parties; and
 - (d) upon conclusion of an agreement to mediate, forward to the mediator—



- (i) a copy of the agreement to mediate;
- (ii) copies of the statement of claim and statement of defence, if mediation is to occur prior to commencement of litigation;
- (iii) in action proceedings, copies of the summons and plea, or statement of defence if no plea has been filed; and
- (iv) in application proceedings, copies of the founding, answering and replying affidavits, or statement of defence, if no answering affidavit has been filed.

Referral to mediation prior to commencement of litigation

77. (1) A party desiring to submit a dispute to mediation prior to commencement of litigation must make a request in writing to the clerk or registrar of the court, which would ordinarily have jurisdiction to hear the matter, if litigation were commenced.
- (2) The request referred to in subrule (1) 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 electronic mail 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 clerk or registrar of the court 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 10 days, for the purposes of determining whether all or some of the parties to submit the dispute to mediation.
- (4) If at the conference referred to in subrule (3), some or all of the parties between whom mediation is possible, agree to submit the dispute to mediation, the clerk or registrar of the court must—
- (a) in collaboration with the parties appoint a mediator or, if the parties cannot agree on a mediator, the clerk or registrar of the court must appoint a mediator;
 - (b) confer with the mediator and set the date, time and venue for mediation; and
 - (c) assist the parties to conclude a written mediation agreement between the parties, which must be signed by them and contain the following particulars:
 - (i) The particulars referred to in subrule 2(b), (c) and (d);
 - (ii) a statement 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;

- (viii) the consequences of any party not abiding by the agreement; and
 - (ix) where there are multiple parties to the dispute, the terms of any settlement agreement are not binding on any party who has not participated in mediation.
- (5) A party claiming relief must lodge a statement of claim with the clerk or registrar of the court within 10 days of the signature of the agreement referred to in subrule 4(c), and forward a copy of the statement of claim 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 clerk or registrar of the court within 10 days of receipt of the statement of claim, and forward a copy of the statement of defence to all other parties to the mediation proceedings.

Referral to mediation by litigants

78. (1) (a) Any party may at any stage after litigation has commenced, but before trial, request the clerk or registrar of the court, in writing, to refer the dispute to mediation.
- (b) The clerk or registrar of the court 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 10 days for the purposes of determining whether all or some of the parties agree 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 refers the dispute to mediation, the provisions of subrule (4) and rules 76(2) and 77(4) 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 claim and statement of defence, respectively.

- (b) If a plea has not been delivered, the defendant must deliver a statement of defence within 10 days of the 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 10 days of the conclusion of the agreement to mediate.

Referral to mediation by court

79. (1) A court may, prior to or during a trial but before judgment, enquire into the possibility of mediation and accord the parties an opportunity to refer the dispute to the clerk or registrar of the court to facilitate mediation.
- (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 clerk or registrar of the court to facilitate mediation.
- (3) The provisions of rules 76(2), 77(4) and 78(4) apply if a dispute is referred to mediation under this rule.

Role and functions of mediator

80. (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 facilitative role of the mediator as an impartial mediator who may not make any decisions of fact or law and who may not determine the credibility of any person participating in the mediation;

(c) the inquisitorial nature of mediation proceedings;

(d) the rules applicable to the mediation session;

(e) 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) 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 subrule (1)(e);

(h) the mediator 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 clerk or registrar of the court, informing him or her that the dispute could not be resolved.

(2) A mediator must, within 5 days of the conclusion of mediation, submit a report to the clerk or registrar of the court informing him or her of the outcome of the mediation.



- (3) A mediator may postpone a mediation session if the parties agree.

Suspension of time limits

81. The time limits prescribed by the rules in Chapter I 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.

Settlement agreements

82.
 - (1) In the event that the parties reach settlement, the mediator must assist the parties to draft the settlement agreement, which must be transmitted by the mediator to the clerk or registrar of the court.
 - (2) If a settlement is reached at mediation in a dispute which is not the subject of litigation, the clerk or registrar of the court must, upon receipt of the settlement agreement from the mediator, file the settlement agreement.
 - (3) If a settlement is not reached at mediation in a dispute which is not the subject of litigation, the clerk or registrar of the court must, upon receipt of the report from the mediator, file the report.
 - (4) If a settlement is reached at mediation in a dispute which is the subject of litigation, the clerk or registrar of the court 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 in a dispute which is the subject of litigation, the clerk or registrar of the court must, upon receipt of the report from the mediator, file the report to enable the litigation to continue, from which time all suspended time periods will resume.

- (6) Settlement agreements must be reduced to writing and signed by the parties.

Multiple parties and multiple disputes

83. (1) Where there are multiple parties to a dispute, parties who are agreeable to mediate may proceed to do so and parties who do not agree to mediate may proceed to litigation.
- (2) Where there are multiple aspects to a dispute, the parties may agree that some aspects be mediated upon and other aspects be proceeded with to litigation.
- (3) Where any aspect of a dispute remains unsettled after mediation, the parties may proceed to litigation on the unsettled aspect.

Fees of mediators

84. (1) Parties participating in mediation are liable for the fees of the mediator, except where the services of a mediator are provided free of charge.
- (2) Liability for the fees of a mediator must be borne equally between opposing parties participating in mediation: Provided that any party may offer or undertake to pay in full the fees of a mediator.
- (3) The tariffs of fees chargeable by mediators will be published by the Minister together with the schedule of accredited mediators referred to in rule 86(2).

Representation of parties at mediation proceedings

85. (1) Subject to subrules (2) and (3), parties to mediation must attend mediation sessions in person.
- (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.

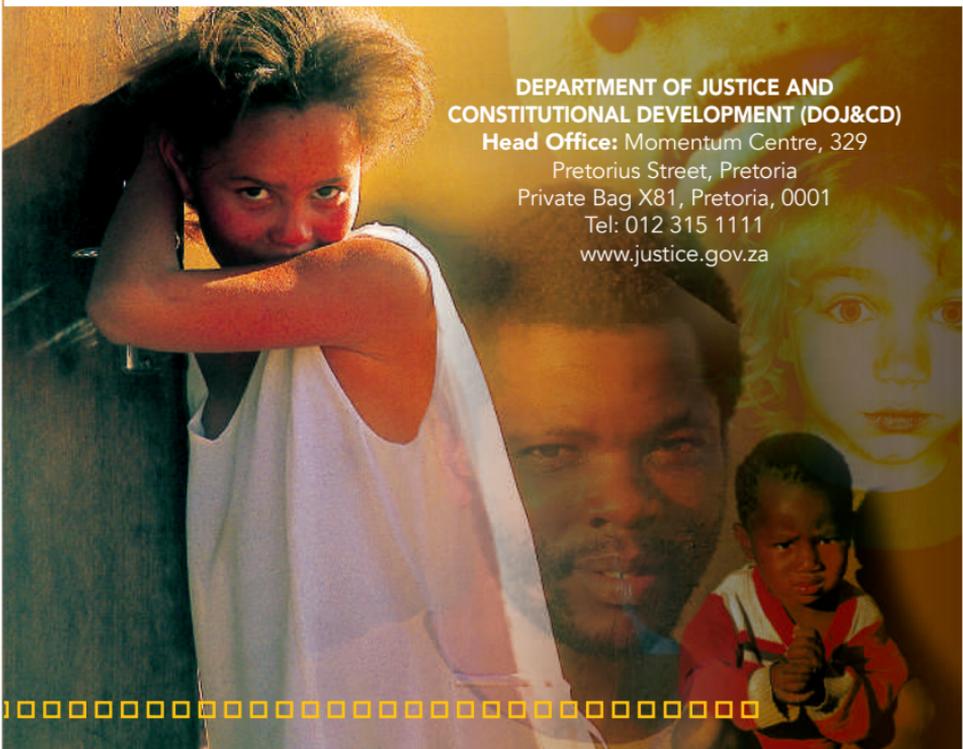
- (3) Where the state or an organ of state is a party to mediation proceedings the state or such organ must be represented by an official, duly authorised to represent the state or such organ to conclude a settlement and sign a settlement agreement on behalf of the state or organ of state, and be assisted by the State Attorney.
- (4) Any party to mediation proceedings may be assisted by a practitioner or practitioners.

Accreditation of mediators

86. (1) The qualification, standards and levels of mediators who will conduct mediation under these rules, will be determined by the Minister.
- (2) A schedule of accredited mediators, from which mediators for the purposes of this Chapter must be selected, will be published by the Minister.

Forms and guidelines

87. Forms and guidelines for assistance to parties, clerks of the court, registrars of the court, judicial officers and mediators in mediation proceedings will be published together with the promulgation of these rules.



**DEPARTMENT OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT (DOJ&CD)**

Head Office: Momentum Centre, 329

Pretorius Street, Pretoria

Private Bag X81, Pretoria, 0001

Tel: 012 315 1111

www.justice.gov.za



the doj & cd

Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

