

Seychelles

Courts Act

## Supreme Court (Mediation) Rules, 2013

Statutory Instrument 72 of 2013

Legislation as at 1 December 2014

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# Seychelles

## Courts Act

### Supreme Court (Mediation) Rules, 2013

#### Statutory Instrument 72 of 2013

Commenced on 28 October 2013

*[This is the version of this document at 1 December 2014.]*

*[Amended by [Supreme Court \(Mediation\) \(Amendment\) Rules, 2014 \(Statutory Instrument 47 of 2014\)](#) on 14 July 2014]*

*[SI 72 of 2013; SI 47 of 2014]*

#### 1. Citation

These Rules may be cited as the Supreme Court (Mediation) Rules, 2013.

#### 2. Interpretation

In these Rules—

"**attorney**" means an attorney-at-law as defined under the Legal Practitioners Act;

"**mediator**" means the person nominated as mediator under rule 4(3);

"**proceeding**" means any civil suit, action, cause or matter filed and pending in the Supreme Court except as regards rights and obligations which are not at the parties' disposal;

#### 3. Application

These Rules shall apply to all proceedings referred to mediation under rule 4.

#### 4. Reference to mediation

- (1) The trial Judge assigned to a proceeding may, on his or her own motion or at the request of a party, refer a proceeding to mediation as he or she deems appropriate.
- (2) A request for reference of a proceeding to mediation under subrule (1)—
  - (a) may be made orally or in writing; and
  - (b) shall set out the reasons for the request.
- (3) In referring a proceeding to mediation the trial Judge shall nominate a mediator, who may be—
  - (a) another Judge of the Supreme Court; or
  - (b) any other person authorised by the Chief Justice to conduct mediation under these Rules.
- (4) The person nominated as mediator shall accept the nomination in writing within 7 days of such nomination, unless—
  - (a) he or she is aware of any potential conflict of interest, whether direct or indirect, in relation to the mediation, except where all the parties to the dispute have consented in writing to his or her nomination following a written disclosure of the nature of, or the circumstances giving rise to, such potential conflict of interest;

- (b) he or she is not available to conduct the mediation within the period set out in these rules; or
- (c) his or her nomination has been objected to by any party in the mediation on the ground that the person nominated as the mediator under subrule (3)(b)—
  - (i) is not competent or does not have sufficient experience in the subject matter of the proceeding; or
  - (ii) has not reached a satisfactory prior agreement with one or more parties as to the payment of his or her professional fees as mediator.
- (5) Where any of the circumstances in subrule (4) apply, he or she shall communicate in writing of his or her refusal to accept the nomination within 7 days.
- (6) Where any of the circumstances referred to in subrule (4) arise after the nomination is accepted, the mediator shall immediately withdraw from mediation in accordance with rule 17(1)(e).
- (7) A mediator shall not preside over any proceeding or, as the case may be, provide professional service as an attorney or notary, in relation to the subject matter of any proceeding in which he or she is or has been a mediator under these rules.

*[subrules (4) to (7) inserted by [SI 47 of 2014](#) with effect from 14 July 2014]*

#### **4A. Fee to be charged by mediator**

- (1) A person nominated as mediator under rule 4(3)(b) shall not charge for his or her services as a mediator except by agreement with one or more parties to the proceeding referred for mediation prior to the commencement of the first mediation session.
- (2) Any fee agreement reached between the mediator and one or more parties to the proceeding referred for mediation shall be recorded in writing and disclosed to all the parties and to the Registry of the Supreme Court before the commencement of the first mediation session, and any subsequent change to that agreement shall be recorded and disclosed without any delay in the same manner as provided in this rule.
- (3) The fees agreed upon under this rule shall not be linked to the outcome of mediation or to the nature or content of any settlement of the dispute.
- (4) The Chief Justice may review the fee agreement under this rule for transparency and fairness and, in particular, with reference to the principles set out in rule 13 of the Legal Practitioners (Professional Conduct) Rules, 2013.

*[rule 4A inserted by [SI 47 of 2014](#) with effect from 14 July 2014]*

#### **4B. Panel of authorised persons**

- (1) The Chief Justice shall make a panel of persons authorised under rule 4(3)(b).
- (2) Any person, who—
  - (a) is admitted to practice law in Seychelles or any other country or jurisdiction in terms of the Legal Practitioners Act; or
  - (b) has completed mediation training,
 may apply to the Chief Justice for authorisation under rule 4(3)(b) and the Chief Justice shall take into account their level of experience in mediation or as a legal practitioner in considering the application.

*[rule 4B inserted by [SI 47 of 2014](#) with effect from 14 July 2014]*

## 5. Purpose of mediation

- (1) The purpose of referring a proceeding to mediation is to assist the parties to reach an agreement in all good faith on a fair and efficient resolution or partial resolution of their dispute.
- (2) In order to give effect to subrule (1), the parties to a proceeding that has been referred to mediation shall participate in the mediation in good faith, and shall—
  - (a) provide all reasonable assistance to enable the mediation to proceed and be concluded within the time allocated by the mediator;
  - (b) make all reasonable efforts to attend every mediation session in person or through an authorised representative; and
  - (c) strive to minimise the costs involved.

## 6. Role and responsibilities of mediator

- (1) The mediator shall conduct the mediation without fear or favour, ill will, bias or prejudice, and shall ensure that his or her conduct maintains and enhances the confidence of the parties in the impartial administration of justice.
- (2) The mediator shall respect and promote the right of all parties to mediation to make their own informed and voluntary decisions regarding the possible resolution of any issue in dispute.
- (3) The mediator shall endeavour to enable the parties to resolve their dispute in a fair and efficient manner.
- (4) For the purposes of subrules (2) and (3), the mediator shall have all powers necessary to facilitate mediation between the parties.
- (5) Subject to this rule, the mediator may regulate the mediation in such manner as he or she thinks fit and shall adopt an informal and flexible approach taking into account any wishes expressed by the parties.
- (6) The mediator shall, in the first mediation session, explain the substance of this rule and rules 10 and 11 to the parties, and shall strictly observe the requirements of those rules throughout and after the mediation.
- (7) The mediator shall—
  - (a) treat the parties to the mediation fairly and equally, taking into account the circumstances of the case;
  - (b) endeavour to ensure that all parties to the mediation understand the nature of the mediation process, the role of the mediator, and the consequences of reaching or not reaching a mediated settlement; and
  - (c) advise the parties, where appropriate, to obtain independent legal or other professional advice.
- (8) The mediator may, at any time, offer help or guidance to the parties, including expressing, without prejudice, his or her views on the dispute, but shall do so without giving the impression that he or she is advocating on behalf of one or more parties or applying pressure to accept any particular settlement.
- (9) The mediator may, on his or her own motion or at the request of a party, conduct private meetings with one or more parties to the exclusion of any other person, including attorneys or other authorised representatives.
- (10) Where the mediator considers that a party is unable to give informed consent to participation in mediation, or to the terms of a proposed settlement, the mediator shall take appropriate action,

which may include adjourning the process to enable the appointment of a representative, or filing a declaration terminating the mediation under rule 17(1)(d).

- (11) The mediator may, where the services of an expert are required on a technical matter, after consultation with the parties, appoint an expert whose advice shall be given in an independent and fair manner and the costs for the services of the expert shall be borne in equal proportion by all parties or otherwise as the mediator may direct.
- (12) The mediator may make a written request to any third party having an interest in the dispute to attend one or more mediation sessions where he or she considers that the participation of the third party may assist in resolving the dispute.
- (13) Where the mediator considers that the mediation process or the underlying dispute may raise significant ethical concerns (including the furtherance of any crime), the mediator shall take appropriate action, which may include filing a declaration terminating the mediation under rule 17(1)(d).

*[rule 6 repealed and substituted by [SI 47 of 2014](#) with effect from 14 July 2014]*

## **7. Notice of mediation**

- (1) The mediator shall, within 7 days from the date on which the proceeding is referred to him or her under rule 4, cause each party to be notified, in writing, of the commencement of mediation.
- (2) A notice issued under subrule (1) shall refer each party to rules 5, 8, 10, 11 and 12 and shall state the date, time and place of the first mediation session, which shall be no later than 21 days from the date of the notice.
- (3) Where a party to the dispute has elected legal domicile in the office of an attorney, the mediator may cause the notice referred to in subrule (1) to be served at the office of the attorney, and such service shall be deemed to be good service on that party.

## **8. Mediation sessions**

- (1) Each mediation session shall be conducted at such place and at such time as the mediator may direct, taking into account any wishes expressed by the parties, and the mediator may, for that purpose, allocate such time for each session as he or she considers reasonably necessary.
- (2) A party served with a notice of commencement of mediation under rule 7(1) shall—
  - (a) attend each mediation session in person, at the place and time specified by the mediator, whether or not represented by an attorney or authorised person; or
  - (b) give full, written, authority to an attorney to attend the mediation sessions and to enter into a mediated agreement on his or her behalf.

## **9. Duty to provide information**

- (1) Each party to the mediation shall, in addition to the pleadings available on the Supreme Court record in respect of the dispute, supply such information as the mediator may require within the time specified by the mediator.
- (2) Without prejudice to the generality of subrule (1), the mediator may require any party or all parties to—
  - (a) produce a statement of their interests in respect of issues which require resolution; and
  - (b) disclose any further document or produce any thing which may be material to the resolution of any issue in dispute.

## 10. Confidentiality

- (1) In the absence of a written agreement of all parties to the contrary, the mediation shall take place in private and shall be confidential.
- (2) All documents or other information disclosed and all communications made by any party specifically for the purposes of the mediation, shall be deemed to have been disclosed or made on a privileged and without prejudice basis, and no privilege or confidentiality shall be deemed to have been waived by such communication or disclosure.
- (3) Subject to these Rules, unless a party makes a written statement to the contrary, nothing said or done in the course of mediation shall be taken as the expression of an intention to affect the legal rights of the party or in any way prejudice his or her position in the mediation or any related arbitration, adjudication or litigation.
- (4) All notes and records taken by or before the mediator and all statements made by the mediator in connection with the mediation shall, unless the parties otherwise agree in writing, be confidential.

## 11. Duty of non-disclosure

- (1) Subject to subrules (2) and (3), the parties and any third party who attended one or more mediation sessions shall not disclose to any person any information disclosed, communication made or agreement reached in the course of mediation.
- (2) Any disclosure otherwise prohibited under subrule (1) may be permitted where it becomes necessary for the implementation or enforcement of a mediated agreement—
  - (a) with the prior written consent of all parties; or
  - (b) within the terms of an order made by the mediator.
- (3) Any disclosure otherwise prohibited under subrule (1) shall be permitted where—
  - (a) required by law; or
  - (b) made in confidence to law enforcement authorities for the purpose of preventing imminent serious harm to any person.
- (4) A mediator shall not disclose any information imparted to him or her in confidence in the course of a separate or private meeting to any other party or his or her attorney or authorised representative in the course of the mediation or to any other person at any other time except in the circumstances described in subrule (3).
- (5) Subrule (1) shall not affect the right of any party to make use of his or her own documents and information provided no reference is made to the mediation in connection with or related to such documents and information.

## 12. Non-admissibility of evidence

- (1) The record of mediation, statements made at any mediation session, and any information obtained during the mediation shall not be admissible as evidence in any court proceedings, except
  - (a) in proceedings instituted for the purpose of challenging a mediated agreement on the ground of fraud;
  - (b) in contempt proceedings or criminal proceedings instituted by the Attorney General; or
  - (c) in proceedings where a mediated agreement is pleaded as a bar to any subsequent action or proceedings brought between the same parties in respect of the same subject matter.

- (2) Subrule (1) shall not affect the right of any party to make use of his or her own documents and information in any court proceedings, provided no reference is made to the mediation in connection with or related to such documents and information.

### 13. Settlement proposals

- (1) Any party to mediation may, at any stage, make one or more proposals with a view to reaching a settlement or limiting the issues in dispute.
- (2) A proposal made under subrule (1) shall be
  - (a) in writing;
  - (b) communicated to the mediator and to all other parties; and
  - (c) in sufficient detail to enable the other parties and the mediator to understand the nature of the proposal.
- (3) Where it appears to the mediator that there is a possibility of a settlement acceptable to the parties, the mediator may, with the prior consent of the parties, formulate the terms of a settlement, in writing, as a proposal for consideration by the parties.
- (4) A party may, after receiving a proposal from another party or from the mediator under subrule (2) or (3), submit observations on the proposal, in writing, within the time specified by the mediator.
- (5) Where a party fails to make observations within the specified time, the mediator may proceed with the mediation as if the party has no observations.
- (6) The mediator may, after receiving the observations of the parties, reformulate a settlement proposal based on the observations made and submit the reformulated proposal to the parties.
- (7) The process described in subrules (3) to (6) may be repeated as the mediator deems appropriate.

### 14. Memoranda of settlement and issues

- (1) Where the parties agree to settle one or more issues in dispute, the mediator shall record the terms of the agreement in a memorandum of settlement.
- (2) Where the agreement reached is not in full and final resolution of all issues in dispute, the memorandum of settlement shall
  - (a) expressly state that the agreement is not in full and final resolution of all issues in dispute; and
  - (b) clearly identify the outstanding issues.
- (3) Where the parties fail to reach an agreement to settle any of the issues in dispute but agree to limit or restate the issues for the purposes of trial, the mediator shall record the terms of that agreement in a memorandum of issues.
- (4) A memorandum of settlement may include agreement for the disposal of the proceeding and of any other matter involving the same parties which is pending before any court, including agreement as to costs in the mediation, the proceeding and any other pending matter.
- (5) A memorandum of settlement may include such consequential terms as the mediator deems necessary and appropriate to give effect to the agreement.
- (6) A memorandum of settlement or memorandum of issues made under this rule, and every memorandum of referral drafted under rule 16, shall be—
  - (a) signed by the mediator and all parties to the agreement;
  - (b) filed by the mediator in the Supreme Court; and

- (c) reproduced in full in a judgment by consent delivered by a Judge of the Supreme Court on a date fixed by the court.
- (7) A memorandum of settlement, memorandum of issues or memorandum of referral that has been signed and filed in the Supreme Court in accordance with subrules (6)(a) and (b)—
  - (a) shall bind all parties who have signed it;
  - (b) shall form part of the record of the proceeding; and
  - (c) may be enforced in the same manner as a judgment by consent of the Supreme Court.

## 15. Duration of mediation

- (1) Subject to subrule (2), the mediation shall not exceed a period of 60 days from the date of the first mediation session.
- (2) The mediator may extend the period specified in subrule (1) for a single period not exceeding 30 days where he or she is satisfied that there is a reasonable prospect of reaching an agreed resolution of one or more issues in dispute within the extended period.

## 16. Referral back to trial Judge

- (1) Subject to subrules (2) to (4), where at the expiry of the period fixed for mediation, the parties have not reached a full and final mediated agreement, the mediator shall refer the proceeding back to the trial Judge to be fixed for hearing.
- (2) Where at the expiry of the period extended under rule 15(2), the mediator is satisfied that there is still a reasonable prospect of reaching an agreed resolution of the dispute, he or she may, with the agreement of the parties, refer the proceeding back to the trial Judge with a recommendation that it be stayed for a period not exceeding 60 days in order for the parties to enter into negotiations for a settlement in good faith.
- (3) Where the parties fail to reach an agreement at the expiry of the period during which the proceeding was stayed under subrule (2), the trial Judge shall, on his or her own motion or at the request of a party, fix the proceeding for hearing.
- (4) The referral of a proceeding back to the trial Judge under subrule (1) or (2) shall not affect the right of the parties to withdraw the proceeding and refer it to arbitration or any other form of alternative dispute resolution.
- (5) Where the mediator is satisfied that the issues remaining for resolution are appropriately dealt with in a jurisdiction other than the Supreme Court, he or she may, with the agreement of the parties, draft a memorandum of referral which reflects the parties' agreement to refer the dispute to the appropriate jurisdiction, to stay or dispose of the proceeding, and for any other consequential matters.
- (6) A memorandum of referral drafted under subrule (5) shall be executed, and may be enforced between the parties, in the same manner as a memorandum of settlement or memorandum of issues drafted under rule 14.

## 17. End of mediation

- (1) The mediation shall end upon—
  - (a) filing in the Supreme Court of a full and final memorandum of settlement under rule 14(1) or a referral memorandum under rule 16(5);
  - (b) referral of the proceeding back to the trial Judge under rule 16(1) or(2);

- (c) filing in the Supreme Court of a declaration signed by all parties and addressed to the mediator, to the effect that the mediation is terminated;
  - (d) filing in the Supreme Court of a declaration of the mediator, after reasonable efforts to consult with the parties, to the effect that further efforts at mediation are no longer justified; or
  - (e) filing in the Supreme Court of a declaration of the mediator that it is necessary for him or her to withdraw as mediator for personal reasons or because of a potential conflict of interest, in which case the trial Judge may refer the proceeding back to mediation by another mediator.
- (2) Where the mediator makes a declaration under subrule (1)(d)—
- (a) the mediator may make recommendations to the trial Judge with regard to the early hearing of the proceeding; and
  - (b) the trial Judge shall take the declaration, including any reasons given by the mediator for making the declaration, into account when fixing the costs of the proceeding.
- (3) If the costs of the mediation have not been settled by agreement between the parties prior to the end of mediation, they may be fixed by the trial Judge upon the end of mediation taking into account the actual costs of administration of the mediation, and such costs shall be borne in equal proportion by all parties unless the trial Judge considers it appropriate to direct otherwise.

## 18. Supervision of mediation

- (1) The Chief Justice shall—
- (a) be responsible for supervising the conduct of mediators under these rules; and
  - (b) receive and deal with complaints made against a mediator arising from the mediation process.
- (2) Where the Chief Justice, after making such inquiry as he or she considers appropriate, is satisfied that a mediator has contravened any provision of these rules, the Chief Justice may, subject to any other written law applicable to the mediator—
- (a) withdraw the mediation from the mediator or take such other action as the Chief Justice considers appropriate; or
  - (b) in case of a mediator authorised under rule 4(3)(b), suspend or revoke the authorisation granted under that rule.
- (3) The mediator shall be given a reasonable opportunity of being heard in the matter before taking any action under subrule (2).
- (4) The decision of the Chief Justice under this rule shall be communicated in writing to—
- (a) the mediator and the complainant, if any; and
  - (b) in the case of a mediator authorised under rule 4(3)(b), any professional body responsible for regulating the profession of the mediator.
- (5) The Chief Justice may, if considers appropriate, make the sanctions public.

*[rule 18 inserted by SI 47 of 2014 with effect from 14 July 2014]*

## 19. Proceedings against mediator

- (1) A mediator referred to in rule 4(3)(a) shall, while conducting a mediation under these rules, be deemed to be performing a judicial function for the purposes of article 119(3) of the Constitution.

- (2) Where an attorney-at-law or other legal practitioner is a mediator authorised under rule 4(3)(b), the attorney-at-law or legal practitioner while conducting the mediation shall—
  - (a) not be deemed to be conducting or managing a case in court for the purpose of RULEtion 19(1) of the Legal Practitioners Act;
  - (b) not have a legal practitioner-client relationship with any party to the mediation; and
  - (c) otherwise be acting as a legal practitioner for the purposes of the Legal Practitioners Act and the rules or regulations made thereunder.
- (3) No civil proceeding shall be instituted against a mediator for any act or omission in the course of mediation, unless—
  - (a) the subject matter of any civil proceeding has been considered by the Chief Justice with reference to complaint or disciplinary proceedings;
  - (b) that complaint or disciplinary proceedings has concluded; and
  - (c) the Chief Justice has granted leave to file the proceeding.
- (4) No criminal proceeding shall be instituted against a mediator for any act or omission in the course of mediation without the prior written consent of the Attorney General.

*[rule 19 inserted by [SI 47 of 2014](#) with effect from 14 July 2014]*