

1. Application of the Rules

1.1 Where parties have agreed that disputes or differences between them shall be referred to mediation under the AFSA Mediation Rules or words to similar effect, then such disputes or differences shall be submitted to mediation in accordance with these Rules subject to such modification as the parties may agree.

1.2 If the agreement between the parties records that the matter is referred to AFSA for mediation, conciliation, alternative dispute resolution or such similar terms, these Rules shall apply, notwithstanding the different terminology.

1.3 Notwithstanding the date of their agreement, the parties shall be deemed to have submitted to the AFSA Mediation Rules in effect on the date of commencement of the mediation, unless expressly agreed otherwise.

1.4 All references to “AFSA” refer to the AFSA Secretariat mandated to administer mediations at the Arbitration Foundation of Southern Africa.

2. Commencement of the mediation

2.1 Where there is a prior agreement to mediate in terms of these Rules:

2.1.1 any party wishing to commence mediation proceedings shall file a written request for mediation with the Foundation. The written request shall take the form of the request attached hereto marked “Annexure 1” and the referring party is required to complete Part A thereof.

2.1.2 The mediation shall commence on the date that AFSA accepts in writing the request for mediation.

2.1.3 The other party/parties to the mediation (other than the referring party) is/are required to complete and return Part B of Annexure 1 within 7 days of receipt of notice that AFSA has accepted the request for mediation.

2.2 Where there is no prior agreement to mediate in terms of the Rules –

2.2.1 a party wishing to initiate mediation proceedings shall file a written request in the form of Annexure 1 with AFSA;

2.2.2 On receipt of the request for mediation, AFSA will deliver such request to the respondent/other party identified in the request together with an invitation to participate in a mediation process in terms of these Rules;

2.2.3 If the respondent/other party wishes to participate in the mediation, it should respond to the invitation by completing and returning Part B of Annexure 1 to

AFSA.

2.2.4 the mediation process shall commence when the other party communicates its acceptance in writing of the invitation to mediate in terms of the Rules and AFSA accepts in writing the request for mediation;

2.3 If, within 15 days from the date of receipt of the request for mediation or such other period of time specifically stated in the request, AFSA does not receive a reply to the request for mediation from the other party or the latter rejects the invitation to mediate, AFSA shall inform the requesting party of this fact.

3. Appointment and replacement of the mediator

3.1 The parties may jointly designate a mediator or agree a mechanism for appointing the mediator.

3.2 If the parties do not agree on a mediator, or on the fee scale of the mediator to be appointed, or on an alternative process for the appointment of a mediator, or if the mechanism for appointing a mediator fails to appoint a mediator within 15 days from the commencement of the mediation, AFSA will appoint a mediator from the mediators listed in the AFSA Panel of Accredited Mediators.

3.3 In the event that the parties disagree on the required seniority or expertise of the mediator, AFSA shall decide and such decision shall be final.

3.4 There shall be a single mediator unless the parties expressly agree to the appointment of more than one mediator.

The parties may agree in writing at any time to replace the mediator and if a mediator resigns, is incapacitated or otherwise becomes unable to perform the mediator's functions, a new mediator shall be appointed pursuant to these Rules.

4. Impartiality and independence of the mediator

4.1 Any prospective mediator shall provide to AFSA, within 7 days of being notified of his or her nomination for appointment, with a signed statement of impartiality and independence in the form annexed as "Annexure 2". If the prospective mediator fails to deliver such statement alternatively delivers a statement which discloses circumstances which might affect or call into question his or her impartiality, independence or might be perceived to create a conflict of interest, AFSA shall promptly inform the parties of such disclosure (or failure to disclose).

4.2 If, within 7 days after being notified of such disclosure (or failure to disclose), any party objects to the appointment of the mediator, AFSA shall replace the mediator.

4.3 If during the course of the mediation, a mediator becomes aware of any facts or circumstances that might call into question the mediator's independence or impartiality in the eyes of the parties, the mediator shall disclose those facts or circumstances to the parties in writing without delay. A party may object to the continued participation of the mediator. In such a case, AFSA shall replace the mediator.

5. Representation

5.1 The parties shall attend the mediation in person. Each party may be represented by one or more persons chosen by it.

5.2 Where a person acts as a representative of a party, the mediator on his or her own initiative or at the request of any party, may at any time require proof of authority granted to the representative, in such a form as the mediator may determine.

5.3 Legal representatives may accompany a party to the mediation but, unless otherwise agreed, the representative of a party at the mediation shall not be the party's external lawyer.

6. Conduct of the mediation

6.1 The mediator will explain to the parties, as well as to their representatives how the mediation is normally conducted. The mediator may do this at the commencement of the mediation hearing or at a pre-mediation meeting.

6.2 The mediator will conduct the process with fairness to all parties and will take particular care to ensure that all parties have adequate opportunities to be heard, to be involved in the process and to have the opportunity to seek legal or other advice before finalising any resolution.

6.3 The mediator shall conduct the mediation in such a manner as he or she deems appropriate taking into account the circumstances of the case, the wishes of the parties and the need for a speedy settlement of the dispute.

6.4 The mediator does not have the authority to impose a settlement on the parties.

6.5 The parties shall cooperate with the mediator in good faith to advance the mediation as expeditiously as possible.

6.6 The mediator is authorised to conduct joint or separate meetings with the parties and/or their representatives.

6.7 The mediator may, before or during the mediation meetings, make direct contact with either party and may request parties to submit documents, case summaries and memoranda.

6.8 In the absence of specific agreement to the contrary, mediation meetings between the parties and the mediator shall take place on one day.

7. Termination of the mediation

7.1 The mediation shall terminate when:

- a party withdraws from or refuses to participate in the mediation;
- the mediator determines that an amicable settlement cannot be reached; or
- a written settlement agreement is concluded.

7.2 If a party refuses to pay its portion of the fee due to the mediator, or fails to pay such fee within ten days of AFSA requesting that such fee be paid, AFSA may, at the request of any other party to the mediation, issue a certificate confirming the termination of the mediation.

7.3 The mediator may adjourn the mediation in order to allow the parties to consider specific proposals, get further information or for any other reason that the mediator deems helpful in furthering the mediation process. The mediation will only reconvene on a different day if the parties consent thereto. In the event that the mediation adjourns and all parties do not consent to reconvene, then AFSA shall issue a certificate confirming the termination of the mediation.

7.4 In the event that a settlement of all or part of the dispute was not reached by the parties, the parties may jointly request the mediator to make oral or written recommendations concerning an appropriate resolution of the dispute. Neither party is bound to accept such recommendation and the mediator is free to decline to make any such recommendation without being required to provide reasons. The mediator will not make such recommendations unless all parties agree that he or she should do so.

8. Settlement agreement

8.1 Any settlement agreement reached in the mediation will not be legally binding until it has been reduced to writing and signed by or on behalf of the parties.

9. Confidentiality

9.1 Save where the parties expressly agree in writing to the contrary, every person involved in the mediation, including the parties and their representatives, the mediator and AFSA undertake to keep confidential all documents, information and materials as well as all proposals and terms of any settlement in connection with

the mediation, save and to the extent that a disclosure may be required by law or to enforce the settlement agreement.

9.2 Every person involved in the mediation, including the parties and their representatives, the mediator and AFSA, acknowledge that any information, materials and settlement terms passing between them are produced solely for the purposes of the mediation and may not be produced as evidence or disclosed in a court, or any other formal or informal dispute resolution process, except as otherwise required by law.

9.3 If a party discloses any information to the mediator in confidence during the mediation, the mediator shall not disclose this information to any other party or person without the specific consent of the party that disclosed it, unless the mediator is compelled to do so by law.

9.4 The restrictions in sub-paragraphs 1 to 3 above shall not apply if and to the extent that:

- the relevant party or parties consent to the disclosure;
- the mediator is required in law to make the disclosure;
- the mediator reasonably considers that there is serious risk of significant harm to the life or safety of any person if the information in question is not disclosed.

9.5 The mediator, any employee of AFSA or any other person appointed in the mediation may not act or agree to act as a witness, expert, mediator or consultant in any legal proceedings related to the dispute, following the mediation.

9.6 The parties, including their representatives, shall not call or cause to be called the mediator, any employee of AFSA or any person appointed in the mediation, as a witness in any formal or informal dispute resolution process (including court proceedings) nor require them to produce in evidence any information, materials or settlement terms relating to the mediation.

10. Exclusion of liability

The mediator, AFSA, AFSA employees and any person appointed in the mediation shall not be liable to any person (including the parties to the dispute) based on any act or omission in connection with the mediation, irrespective of whether such act is considered negligent, grossly negligent or reckless.

11. Costs and fees of the mediation

11.1 Administration costs

11.1.1 AFSA shall charge a single fee for the administration of each mediation. The administration fees charged by AFSA shall be available from AFSA's offices

and published on the AFSA website.

11.1.2 The administration fee shall be payable in full by the referring party at the time that the request for mediation is submitted. The AFSA shall not be required to accept or act on any request for mediation where payment of the administration fee has not been made.

11.2 Fees of the mediator

11.2.1 If the parties have agreed on the appointment of a mediator and the mediator has accepted that appointment on an agreed fee structure, the agreed fee structure shall apply.

11.2.2 In all cases where the mediator is appointed by AFSA, the fee structure shall be determined by the seniority of the mediator, according to the rates published by AFSA from time to time.

11.2.3 The mediator rates published by AFSA for mediations include allowance for ordinary preparation time (which may include pre-mediation engagement between the mediator and the parties) and mediation proceedings of one day.

11.2.4 If a matter involves extensive preparative reading or a mediation meeting is expected to extend beyond one day, an additional fee will be payable to the mediator. The mediator and the parties shall attempt to agree the additional fee and, in the absence of agreement, the additional fee will be set by the AFSA whose decision will be final.

11.3 Unless otherwise agreed by AFSA in writing, the mediator's fees shall be payable in full to AFSA at the time that the mediator is appointed. Unless the parties agree otherwise, each party shall be liable to pay an equivalent pro rata share of the mediator's costs. If one party does not pay its equivalent share, any other party may pay the outstanding amount and recover it from the non-paying party.

11.4 The mediator's fees will be held by AFSA and paid to the mediator after the conclusion of the mediation meeting.

11.5 In the event that the mediation meeting does not proceed, the mediator's fees will only be refundable to the parties if the notice of postponement or cancellation is received by AFSA more than 7 days before the meeting is scheduled to be held. If the mediation is cancelled or postponed by the parties within 7 days before the scheduled mediation meeting, all or part of the mediator's fee may be paid to the mediator, in the sole discretion of AFSA.

11.6 Neither the mediator nor AFSA shall be required to take any steps to further the mediation unless full payment has been received.

11.7 All payments (of administration costs and mediator fees) shall be made to AFSA by electronic funds transfer into the AFSA bank account, the details of which are available from the AFSA. Proof of payment together with the case reference shall be sent by email to the AFSA.

12. Certificate and feedback

12.1 At the end of each mediation, the mediator shall be requested to complete a certificate in the form set out in “Annexure 3” hereto. Prior to the commencement of the mediation meeting, each party must indicate whether the mediator is mandated to complete only part 1 or both parts of the certificate. The mediator will not complete Part 2 of the certificate unless all parties agree that he or she can do so.

12.2 The certificate completed by the mediator shall be submitted to AFSA and shall be available on request by any party. The content of the mediator’s certificate is not confidential.

12.3 At the end of each mediation, each party shall be requested to complete a survey form as part of the AFSA quality control process. The survey form will be available on request from AFSA and the content of each form submitted shall be kept confidential by AFSA and used only for purposes of AFSA’s internal quality control processes.