

**SPEECH BY THE HON. MR JUSTICE DAMASEB, JUDGE-PRESIDENT OF THE
HIGH COURT OF NAMIBIA AT THE ACCREDIATION CEREMONY FOR COURT-
CONNECTED ALTERNATIVE DISPUTE RESOLUTION MEDIATORS**

HIGH COURT BUILDING, A-COURT

28TH MAY 2014

My Lords

Ladies and Gentlemen

[1] Modern caseflow management theory teaches that every court that has embraced judicial case management must have a coherent and flexible caseflow management plan with the following key pillars:

- a) judicial control of cases filed at the court;
- b) leveraging technology;
- c) regular administrative reports on the court's caseload and disposal rate, which, in turn, help in identifying areas of concern, for remedial action.

[2] Another important element of a properly functioning court is the existence of diversionary strategies which ease the burden on the adjudication function of the court. It was in keeping with the latter that we introduced rules 38 and 39 of the Rules of Court that came into force on 16 April 2014. Rules 38 and 39 and PD 19 are now law. It means parties and legal practitioners must comply with them and cooperate with the court in implementing mediation at the High Court.

Ladies and gentlemen;

[3] We are assembled here today to witness the accreditation of the first crop of the High Court's accredited mediators. Rules 38 and 39 of the new rules introduced court-connected mediation in the High Court of Namibia. The amended s 39 of the High

Court Act empowers the Judge-President to make rules for the introduction of mediation at the High Court. On the authority of the Amendment Act and the Rules of Court, the Judge-President enacted Practice Direction 19 which requires referral for mediation in the following case types filed at the court:

- Insurance claim cases, i.e. insured against insurer: involve people from the industry as mediators;
- Medical negligence cases: involving people from the industry: seek involvement of the medical health professionals and ask them to get involved in training;
- Professional negligence claims cases against lawyers: a judge as mediator;
- Building contract cases;
- Disputes involving custody of, and maintenance for children and spousal support: a judge providing neutral evaluation, to last only one session of not more than 1 hour. If custody issues involved, judge to be assisted by a social welfare officer or clinical psychologist;
- Loan default cases;
- Motor vehicle accident cases;

[4] The introduction of ADR in the High Court is borne of the indisputable reality that the court system will become dysfunctional and will ultimately collapse if we do not ease the undoubted pressure on the court system.

[5] Mediation is particularly suitable in the following situations:

- Where the parties know each other and want to save or maintain their relationship. For example, parents going through a divorce need, for the sake of their children, to work with each other after divorce.
- Where there is a need to reach a quick resolution of the dispute to enable them to continue with a commercial relationship. For instance, while a legal claim may appear to be for breach of contract, there may be communication issues between the disputing parties that have to be resolved.
- Where the parties want to avoid publicity or to maintain confidentiality.¹

¹ In terms of Art 12 of the Constitution, every trial must be in public, except for reasons of national security or public morality. That means the goings-on in a trial are not immune from the media, and therefore, public interest.

- Where the law does not provide a solution that meets the parties' real interest: By way of 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.
- Where the parties want to save legal costs by avoiding protracted litigation.

[6] The scheme introduced in the Rules of Court and Practice Directions allows the court, and the parties, to refer disputes for mediation by a neutral third party who, working with the parties, will identify their underlying interests and encourage them to find ways of resolving their dispute without going to trial. That does not relieve the court of the obligation to provide an adjudication service to the public. If mediation is unsuccessful, the parties must be afforded the opportunity to have their dispute tried by a competent court as contemplated in Article 12 of the Constitution. As was so eloquently stated in a Canadian Report:

‘ [T] here is nothing more effective in the court system than a ‘day of reckoning’, the prospect of an early and “real” trial date. The most constructive thing that our trial courts can provide to assist parties in resolving their disputes is to ensure that a judge is available to try the case if it cannot be settled and that a trial date is available within as short a time as possible after the case is ready for trial. In short, a fair and just system of justice requires a courtroom, a judge and a non-adjudgment policy which in turn will produce settlements or timely adjudication, and be less costly to the litigants.’²

[7] The High Court therefore offers the public a mediation service and an adjudication service.

[8] Managing judges must be conscious that mediation is not suitable in certain circumstances. These include where:

- there is a need to establish a binding legal pronouncement. For instance, a company may need a court decision concerning how to interpret a clause in its standard contract; or a party may want an authoritative and binding interpretation of a statute or the Constitution.

² Evaluation of Case Management in the Toronto Region Region: A report on the Implementation of the Toronto Practice Direction and Rule 78; Part IV: Conclusion at 33, February 2008, The Honourable Chief Justice Warren K. Winkler, Chief Justice of Ontario.

- the key representatives or decision makers are not willing to participate in mediation.
- one or more parties may be engaged in mediation not 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)
- a party wants public attention to be drawn to the dispute, for whatever reason and not to genuinely resolve the dispute.

Ladies and Gentlemen

[9] The accredited mediators have today signed a Code of Ethics which recognizes them as officers of the court. The code of conduct is available on the Courts' official Website. You are therefore expected to act in an exemplary way and not to embarrass the court. The new office you have assumed imposes on you the obligation to act impartially, fairly and honorably towards the parties.

[10] We must devote all our creative energies towards making the ADR experiment of the High Court to succeed and to become the flagship of our judicial system. I look forward to working with the accredited mediators, the legal profession and the Registrar and her staff to realize that objective. There will be the customary birth pangs which come with any new system. But that should not discourage us.

[11] I wish to express the Court's profound gratitude to the U.S Embassy in Windhoek for its partial sponsorship of Judge Low's participation in our first ADR training. Altogether 47 people have undergone the ADR training conducted by Judge Low under the auspices of the High Court: Judges, legal practitioners, university lecturers, psychologists and architects took part in the training. They will all form the backbone of the Court's mediation service.

[12] I am immensely grateful to Judge Low, and his wife, for volunteering to assist in our ADR training. I have heard nothing but praise for the manner in which you conducted the training. You have proven that justice and access to courts are universal values shared by people across the world. Namibia's Court system has learned so

much from its American counterpart; and no doubt will continue to do so. I can only hope that your experience here in Namibia has been worthwhile and enriching.

[13] It is now my singular honour and privilege to commission the first ever accredited mediators of the High Court of Namibia.