

PART THREE: COURT-ANNEXED MEDIATION IN LESOTHO

Attending Mediation Sessions in Person

This is the third in the series of articles on the Court-Annexed Mediation (CAM) Programme for Lesotho, one of the initiatives funded by the Millennium Challenge Corporation through its local counterpart, the Millennium Challenge Account – Lesotho (MCA-Lesotho). The last article discussed in detail the proceedings at the first hearing session between the parties to a dispute. This present article examines the attendance at the hearings of a mediation session.

The Mediation Rules vest various responsibilities in the Mediation Administrator to implement, administer and oversee the CAM Programme and its procedures. In particular, it is the Mediation Administrator who assigns each dispute to a particular substantive mediator. It is also the same Administrator who presides at the first hearing of the matter – at which directions are given regarding the issues to be mediated, the time within which the mediation sessions are to be completed, and (more importantly for this stage), the Parties that will be required to attend the mediation sessions in person.

The requirement for personal attendance is significant, because the genius of mediation is about dialogue and flexible person-to-person negotiations. It is not, as with litigation, a mechanism for these Parties' surrogates (the Advocates) to do the talking. On the contrary, Mediation is the empowerment of the Parties themselves to solve their own dispute strictly on their own terms and conditions. It therefore requires the Principals themselves to be present at the hearing sessions.

Accordingly, the following are required to attend in person:

- (a) All the parties and their lead counsel (all those who have the authority to settle and if necessary to adjust the matter);
- (b) All other persons whose agreement will be necessary to achieve a settlement;
- (c) Legal persons or other non-governmental entities as represented by a person, other than the outside counsel, who has authority to settle the matter and who is knowledgeable about the facts of the particular dispute;
- (d) For the Government or its agencies and units, a representative who has the greatest authority to settle the matter, and who is knowledgeable about the facts of the particular dispute and of the Government policies and procedures under which that agency or unit may decide to accept a proposed settlement of the dispute. Here, a person other than the Government's litigation counsel is preferred in order to ensure that the person attending the sessions has full authority to commit the Government in whatever settlement and stipulations are entered into at the mediation sessions. For this purpose, it is the duty of the Mediation Administrator to extract assurances from the Government litigation

counsel that the representative of the Government attending the Mediation sessions has settlement authority.

Notwithstanding the strictness of the above requirements, Mediation being the flexible mechanism that it is, recognizes that not everybody can at all times attend the sessions in person. Accordingly, the Rules provide for appropriate exemption in compelling cases. A person may request to be relieved of the duty of personal attendance (a) if he confers with the opposite party to the dispute; (b) upon showing that personal attendance would impose a serious and unjustifiable hardship; and (c) after submitting an explanatory letter to the Mediation Administrator (copied to all other parties) setting forth the reasons to support his request. If excused from personal attendance, the person should still be available to participate by electronic media during the mediation sessions.

This rather elaborate requirement is significant. It underscores at least two important philosophies of mediation. First, the personal touch in Mediation that is critical for a heart-to-heart dialogue. Second, the importance of expedition, efficiency and effectiveness of the Process, which are key for resolving the dispute quickly, fairly, inexpensively and effectively. These two require that the principals to the mediation be personally present at the negotiating table. Only then would the prescribed target for mediations to last a maximum of two sessions of two days each be achievable. This rule is fortified by the complementary rule requiring mediation sessions to proceed without adjournments. To ensure all these, the rules have established a consequence for non-attendance. A party who without good cause fails to attend the mediation session is liable to pay the adjournment costs of that session.

It is quite evident that the CAM Programme, by insisting on these simple rules, does bring a new and refreshing sense of speed and seriousness into the dispute resolution mechanism of Lesotho, which aims to tear down the wall of sluggishness and inordinate expense inherent in the traditional litigation mechanism.

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