

MPUMALANGA - MEDICAL MEDIATION PILOT PROJECT

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1. INTRODUCTION

1.1. Background and need

1.1.1. The background and need for implementation of mediation for medical disputes in South Africa are set out in the SAMLA Guidelines and Protocol for Medical Mediation, to which this document refers in its entirety.

1.2. Objectives, offer and transformational goals

1.2.1. In furthering the objectives set out in the Guidelines and Protocol, SAMLA (South African Medico-Legal Association) and CD (Conflict Dynamics) have made an offer to the MEC (Mpumalanga MEC for Health), to conduct a supervised and recorded pilot project, free of charge, to mediate 20 Technical Medico-Legal Disputes which have been lodged against the Mpumalanga Department of Health, and which include allegations of clinical negligence.

1.2.2. It is further envisaged that the experiences gained during the pilot project will be incorporated into the Guidelines and Protocol for Medical Mediation, and that this will form a guideline for less experienced professionals to develop and to become able to offer their services to those in dispute. The purpose of this goal is to promote transformation and development of medico-legal practice in South Africa.

2. PROPOSED STRUCTURE AND PROCEDURES OF THE PILOT PROJECT

2.1. Appointment of a project leader

2.1.1. The MEC should appoint a leader for the pilot project. This person will co-ordinate the pilot project as described below.

2.2. Pilot Project Co-Mediators

2.2.1. A small group of committed senior members of SAMLA and CD, from the fields of law, medicine and mediation, all of whom are qualified as Technical Medico-Legal Co-Mediators (see Guidelines and Protocol), offer their services free of charge to act as co-mediators in the pilot project.

2.2.2. Co-mediators will pair up in groups of two.

2.2.2.1. One of the co-mediators will be a medical specialist who has extensive experience as an expert witness in medical negligence litigation. The medical co-mediator need not belong to the same medical field as the accused medical practitioner, and it may be preferable if the medical co-mediator belongs to a different medical field (see Guidelines and Protocol).

2.2.2.2. The other co-mediator will be a legal practitioner with extensive experience in medical negligence litigation, or alternatively a professional mediator with extensive experience in mediation.

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- 2.2.2.3. One or both of the co-mediators will have an adequate understanding of the medicolegal concepts of negligence, outcome, causation, apportionment and quantum.
- 2.2.2.4. Each co-mediator will be required to commit to mediating according to the provisions of this SAMLA-CD-Mpumalanga Medical Mediation Pilot Project Plan and the SAMLA Guidelines and Protocol for Medical Mediation.
- 2.2.2.5. Respecting the professional experience of one another, and in accordance with the spirit of mediation, each co-mediator will be receptive to learning valuable skills from the experience of the other and from the process.

2.3. Pilot Project Observer Mediators

- 2.3.1. In line with the transformational- and developmental goals of the Pilot Project, two accredited Health Sector Commercial Mediators (as defined in the SAMLA Guidelines and Protocol for Medical Mediation) will be allowed to attend each mediation as observers, for the purpose of in-service exposure to, and training in, the complexities of Technical Medico-Legal Mediations (see below).
- 2.3.2. Observer mediators will not be paid for their attendance, and will be held to the same duty of confidentiality as the co-mediators.
- 2.3.3. Observer mediators will not be entitled to speak during any mediation, but will be welcome to communicate their observations and any concerns to the co-mediators in private when the parties are not present.

2.4. Approval and Commitment

2.4.1. Final commitment to this offer by SAMLA and CD, as well as each individual co-mediator, will occur once the MEC has approved the SAMLA Guidelines and Protocol for Medical Mediation, as well as this SAMLA-CD-Mpumalanga Medical Mediation Pilot Project Plan, has authorised one or more representatives with settlement authority to participate in the mediations, and has given the go-ahead for the Pilot Project to commence.

2.5. Selection of Cases to be Referred to Mediation

2.5.1. The legal representatives of the MEC will select suitable cases from those that have already been served against the MEC with demands for compensation. Cases that are “trial ready” i.e. where expert reports have already been prepared and pleadings have been closed, would be most suitable.

2.5.2. For purposes of the pilot project suitable cases are defined as Technical Medico-Legal Disputes (as defined in the SAMLA Guidelines and Protocol for Medical Mediation), which include allegations of clinical negligence and damages brought about by the alleged negligence. Bearing and mind that cases that fit this definition occur across a broad spectrum of complexity, it is considered preferable to conduct the pilot project with less complex matters that nonetheless include allegations of clinical negligence and damages brought about by the alleged negligence. If necessary, co-mediators may assist in the selection process.

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2.5.3. In this regard it is anticipated that experience gained and lessons learned during the pilot project will provide participating mediators with the necessary skills to tackle the most complex of such cases in future.

2.5.4. The legal representatives of the MEC will invite plaintiffs, through their legal representatives, to consider submitting their dispute to mediation. In these invitations the legal representatives of the MEC will provide clear information outlining the benefits to plaintiffs of mediation rather than litigation. Parties will be assured of the voluntary, confidential and without prejudice nature of the process, which includes unfettered access to advice by their legal representatives and retention of all legal rights.

2.6. Pre-Mediation Meetings and Appointment of Co-Mediators

2.6.1. Plaintiffs who respond favourably to these invitations will be invited to attend a pre-mediation meeting, to be chaired by Judge Claassen and/or Dr Edeling, and to be conducted in accordance with the protocol.

2.6.2. At such pre-mediation meetings, the mediation process will be explained and informed consent to mediate will be sought. Properly informed consent to mediate, as well as settlement authority of each party, will be confirmed in a signed agreement to mediate.

2.6.3. The chairperson of the pre-mediation meeting will provide the parties with a standard agreement to mediate, which may be amended, only by agreement between the parties and their legal representatives, to suit the particular circumstances of the matter.

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2.6.4. Depending on the particular circumstances and nature of the dispute, the chairperson of the pre-mediation meeting will then refer the dispute for mediation to two appropriately qualified co-mediators, who will be appointed to conduct the mediations by agreement between the parties and their legal representatives.

2.6.5. If the parties so choose, the chairperson of the pre-mediation meeting may be appointed as one of the co-mediators.

2.7. Location, Costs and Practical Arrangements

2.7.1. Pilot project mediators will offer their services free of charge to chair pre-mediation meetings and to act as co-mediators for the purposes of the pilot project.

2.7.2. Practical arrangements, such as location, facilities, translators, observer mediators, dates and times will be agreed between the parties and the co-mediators.

2.7.3. Agreement will be required between the parties and their legal representatives in relation to responsibility for the payment of any costs for venues, facilities, catering and translation services, as well as any fees to be charged by legal representatives and experts. These cost- and fee agreements will remain confidential between the parties and their legal representatives, and will not be disclosed to the chairperson of the pre-mediation meeting or to the co-mediators.

2.8. Conduct of the Pilot Project Mediations

2.8.1. The pilot project mediations will be conducted in accordance with : -

2.8.1.1. the principles and procedures of mediation, in which all accredited mediators have been trained;

2.8.1.2. the supplementary provisions of the SAMLA Guidelines and Protocol for Medical Mediation; and

2.8.1.3. the practical- and any other specific agreements accepted in the agreement to mediate.

2.9. Monitoring of the Pilot Project Mediations

2.9.1. It must be respected by all participants, including observers, that information discussed in a mediation remains confidential, both inside- and outside the mediation, unless and until the party providing any information agrees to its disclosure.

2.9.2. The MEC may delegate a representative to observe and monitor the pilot project mediations. As in the case of experts and trainee medical mediators, parties to the mediations must agree to their presence and such representatives will need to sign confidentiality agreements prior to their attendance at any mediation.

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2.9.3. Such monitoring representatives will not be entitled to intervene during any mediation, and will not be entitled to be present during private sessions with the plaintiffs, but will be welcome to communicate their observations and any concerns to the co-mediators in private when the parties are not present.

2.10. Outcome of the Pilot Project

2.10.1. The legal representatives of each party will be required to provide the co-mediators with a brief post-mediation report. These post-mediation reports of the parties should indicate at least whether the party was satisfied or dissatisfied with the mediation process, as well as the reasons for such satisfaction or dissatisfaction; but may include any other comments the party wishes to make and is willing to disclose publicly.

2.10.2. The co-mediators will be required to submit a report on the process of each mediation. These co-mediator reports will outline patterns and learnings from the process, and will incorporate the disclosable reports of the parties, but will not disclose any information that is subject to confidentiality.

2.10.3. These co-mediator reports will be provided to the MEC, and will be used by SAMLA and CD for the purpose of updating and improving the SAMLA Guidelines and Protocol for Medical Mediation, as well as in the training and development of medical mediators.

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2.10.4. An offer has been extended by a postgraduate student in Medical Law, subject to approval by his university, to write up this Pilot Project as part of a PhD Thesis, naturally respecting the confidentiality of personal information.

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