

# Alternative Dispute Resolution Guidelines of the Companies Tribunal

In terms of REG 4 (2) of the Companies Act, 71 of 2008



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## FOREWORD BY THE CHAIRPERSON

The Companies Tribunal presents and publishes these ADR guidelines which are aimed at simplifying the process of application for ADR with the Companies Tribunal.

It is hoped that these guidelines will contribute towards economic growth as disputes will be resolved speedily and cost-effective; finally businesses and companies will focus on what they are established for i.e. employment creation and contribute to the country's growth domestic products.

Through these guidelines, the Companies Tribunal will exercise its functions in accordance with the Act and perform its functions impartially, without fear, favour or prejudice and in a transparent manner.

I take the opportunity to thank the team that developed these guidelines, Mr Curtis Mbhalati, Mr Douglas Mokaba, Ms Lydia Mabele, Mr Simukele Khoza, Ms Tebogo Mputle, Ms Agnes Tsele-Maseloanyane and Ms Lucia Glass.

ADV S.M. Lebala SC  
Chairperson of the Companies Tribunal  
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# GUIDELINES FOR ALTERNATIVE DISPUTE RESOLUTION

(In terms of section 166, Companies Act 71 2008)

## 1. MEANING

Alternative dispute resolution “ADR” is the process of resolving disputes through mediation, conciliation or arbitration. A person may apply to the Companies Tribunal “the Tribunal” for ADR as an alternative to applying for relief to a court, or filing a complaint with the Companies and Intellectual Property Commission “CIPC”.

## 2. PREAMBLE

- 2.1 The Tribunal was established in terms of section 193 of the Companies Act 71 of 2008 “the Act” as a legal entity and the tribunal members are empowered to mediate, conciliate and arbitrate in terms of section 166 of the Act.
- 2.2 The Tribunal is further guided by Section 34 of the Constitution of the Republic of South Africa, 1996, which guarantees everyone the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court or, where appropriate, another independent and impartial Tribunal or forum.
- 2.3 The Tribunal has jurisdiction throughout the Republic, is independent and subject only to the Constitution and the law. It is required to exercise its functions in accordance with the Act and perform its functions impartially, without fear, favour or prejudice and in a transparent manner.

### **3. PURPOSE OF “ADR” is inter alia:**

- 3.1 Promote access to justice;
- 3.2 Promote restorative justice;
- 3.3 Preserve relationships between parties which may become strained or destroyed by the adversarial nature of court proceedings;
- 3.4 Facilitate an expeditious and cost-effective resolution of a dispute between parties;
- 3.5 Assist parties to determine at an early stage of the dispute whether proceeding with litigation, is in their best interests or not; and
- 3.6 Provide parties with solutions to the dispute.

### **4. SCOPE AND APPLICATION of ADR**

Any person may apply for ADR in respect of:

#### **4.1 Application of ADR:**

- 4.1.1 Any matter that may be referred to court for relief in terms of the Act.
- 4.1.2 Any complaint that may be referred to CIPC under Part D.
- 4.1.3 The Commission or Panel may refer a complaint to the Tribunal for resolution by ADR as contemplated in section 169 (1) (b) and regulation 132.

#### **4.2 Exclusions**

The following may not be referred for ADR under the Act:

- 4.2.1 Any matter that may be referred for adjudication to the Tribunal in terms of the Act, inter alia, name disputes, directorship disputes (where there are less than 3 directors).
- 4.2.2 Any matter that falls under the jurisdiction of the Takeover Regulation Panel that has not been referred by the Panel to the Tribunal.

## 5. PROCEDURE FOR FILING OF APPLICATIONS FOR ADR

A person may apply for ADR in terms of any provisions of the Act except those matters identified in paragraph 4.2.

- 5.1 A CTR 132.1 form is to be completed together with statement of claim by a person who wishes to apply to the Tribunal for ADR.
- 5.2 A CTR 132.2 form is to be completed when the Commission or the Takeover Regulation Panel wishes to refer a matter to the Tribunal for ADR.
- 5.3 The statement of claim should state how the dispute arose, the conduct, which is the subject of dispute, actions or facts, circumstances and the particulars of the request. The applicant must indicate whether he/ she wishes to apply for Mediation and or Conciliation or Arbitration. In case of arbitration the statement of claim must be in a form of an affidavit.
- 5.4 The application must be filed with the Tribunal and served on each respondent within 5 business days after it is filed. The applicant must provide proof of service to the Registrar within five (5) business days after serving.
- 5.5 The parties have a choice to be assisted by their own representatives at their own cost.
- 5.6 The Registrar “recording officer” will issue Notice to both parties setting the matter down for hearing, indicating the date, time and venue of mediation or conciliation or arbitration as well as the name of Tribunal member(s).
- 5.7 A party can choose to arbitrate without first engaging in mediation and / or conciliation.

- 5.8 In cases of arbitration, the High Court rules will apply, Tribunal member may allow deviation from the formalities of the High court rules depending on the nature and circumstances of the matter before the Tribunal.
- 5.9 However after mediation and/or conciliation has failed, and upon receipt of the Certificate of the failed mediation and/or conciliation, any party may refer the matter for arbitration within ten (10) business days.
- 5.10 The arbitration award by the Tribunal is final and binding, subject to review by the court.
- 5.11 The parties may call witnesses in arbitration proceedings.

## **6. DUTIES OF THE TRIBUNAL MEMBER(S) AND PROCESSES**

The Tribunal member(s) who are to mediate and/or conciliate over the matter must at the commencement of the proceeding inform the parties of the following:

- 6.1 The facilitative role of the Tribunal member.
- 6.2 The inquisitorial and voluntary nature of the proceedings.
- 6.3 All discussions and disclosures made during mediation or conciliation are confidential and inadmissible as evidence in any court or other forum; unless the discussions and disclosures are recorded in a consent order signed by parties and the Tribunal member.
- 6.4 No party may be compelled to make any disclosure of information.

- 6.5 The parties may state in their mediation/conciliation agreement that they agree to an order being made and that the order may be submitted to court to be made an order of court.
- 6.6 Any matter that has not been resolved through mediation or conciliation may be referred for arbitration.
- 6.7 The nature and implication of the arbitration proceedings and the award which is final and binding.
- 6.8 Tribunal Member(s) may subpoena witnesses on request by parties or where necessary.
- 6.9 If an agreement is reached at mediation or conciliation, the agreement must be reduced to writing and signed by the parties. The Tribunal member(s) will assist the parties in drafting the agreement.
- 6.10 The Tribunal member(s) may postpone mediation/conciliation proceedings if parties agree.
- 6.11 If the dispute is not resolved, the Tribunal member(s) is to issue to the parties a Certificate in terms of CTR 132.3 that the process has failed.
- 6.12 The Tribunal member(s) is to submit a report to the Registrar together with a consent order or a Certificate in terms of CTR 132.3 within 10 business days of issuing of the order or certificate, informing the Registrar of the mediation or conciliation outcome.

## **7. MULTIPLE DISPUTES**

- 7.1 Where there are multiple aspects to a dispute, the parties may agree that some aspects be mediated or conciliated upon and other aspects be proceeded with to arbitration.

- 7.2 Where any aspect of a dispute remains unsettled after mediation or conciliation, parties may proceed by way of arbitration proceedings.

## 8. WITHDRAWAL OF REPRESENTATION IN ADR PROCEEDINGS

(In terms of Regulation 157 of the Companies Act)

- 8.1 A representative in any proceedings who ceases to act for a party must deliver a notice to that effect to the Tribunal and every other party concerned.
- 8.2 A notice delivered in terms of sub-regulation (1) must state the names and addresses of each party who is being notified.
- 8.3 After receiving a notice referred to in sub-regulation (1), the address of the party formerly represented becomes the address for notices to, and for service on, that party of all documents in the proceedings, unless a new address is furnished for that purpose.

## 9. SERVING OF NOTICE

Section 220 of the Act, stipulates that a notice, order or other document must be served on a person and will have been properly served when it has been either-

- 9.1. Delivered to that person's physical address; or  
9.2. Sent by registered mail, fax or email.