

## ● Hon. Mr. Justice Nigel Kalonde Mutuna



Hon. Mr. Justice Nigel Kalonde Mutuna CIArb obtained his LLB degree from the University of Zambia in 1984 and was admitted to the Bar as a practitioner in 1985. From 1999 to 2009, he served as President for Zambia Association of Arbitrators.

Hon. Mr. Justice Mutuna completed a Special Member course, CIArb in 2002 and was admitted to membership, he also took the first step to Fellowship CIArb, Amsterdam in 2004 and is an accredited tutor CIArb, London. He served as Judge of the High Court Commercial List from 2009 until 2016 when he was appointed Judge of the Supreme Court of Zambia.

Hon. Mr. Justice Mutuna is the Chairperson of the Advisory Committee on Court Annexed Mediation and Delay Reduction.

This and other Judicial conference papers will be made available at [www.judiciarzambia.com](http://www.judiciarzambia.com)



**THE ANNUAL JUDICIAL CONFERENCE – 15<sup>TH</sup> TO 18<sup>TH</sup> NOVEMBER 2016 AT AVANI  
VICTORIA**

**THE SALIENT FEATURES OF THE HIGH COURT MEDIATION RULES -  
DEFINING THE ROLE OF A JUDGE**

**PRESENTED BY NIGEL K. MUTUNA JS**

**"Strengthening the capacity of Judiciary to Respond to the needs of the Public"**



# *Introduction*



- **Order 31 and 53 (7) and (8) of the High Court Rules and High Court (Amendment) Rules, 2012 SI No.27 of 2012**
- **These are the Court Annexed Mediation rules**
- **Applicable to both the General and Commercial Lists**

# *Rationale*

- ▶ Resensitize ourselves to the rules
- ▶ Remind ourselves of matters appropriate for referral to mediation
- ▶ Remind ourselves of our role in the mediation process
- ▶ Compliance with Constitutional provisions (speedy dispensation of justice in accordance with our Constitutional mandate – Article 118(2)(b) of Act No.2 of 2016)  
backlog can be reduced using mediation
- ▶ Fulfilling our Constitutional obligation by resorting to ADR mechanisms (Article 118(2)(d) of Act No.2 of 2016)
- ▶ The will of the people of Zambia will thus be fulfilled

# Features of the Rules / Role of a Judge

Reference to mediation: Order 31(4) General List/order 53(8)

Commercial List

- ▶ All matters amenable to reference
- ▶ Exceptions – Matters involving constitutional issues; liberty of an individual; injunctions; or where judge considers matter is not suitable for reference

# Features of the Rules *Cont....*

- ▶ Stage of referral – Amendment to Order 19: Amendment Rules 2012 Rule 19(2)
- ▶ At the scheduling conference both on the general and commercial lists

## **Criteria for selection of matters for referral**

- ▶ Referrals should be as often as possible/ at settlement weeks
- ▶ The parties may consent and request the court to refer matter to mediation
- ▶ Employment matters, mortgage matters, property settlement following divorce, custody ,
- ▶ Matters ready for trial where parties indicate willingness to go to mediation before the trial date appropriate for referral
- ▶ Matters that have been pending before a Judge for a long time, matters pending an interlocutory ruling should not be referred to mediation

# Features of the Rules

- ▶ Referral order is in form 28A First schedule
- ▶ Prior to referral Judge must explain; why he/she feels matters is suited to mediation;
  - ✓ explain what mediation is;

*“A method of non-binding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution” (Black’s Law Dictionary )*

*“A method of BINDING dispute resolution provided by the High Court involving a neutral third party known as a mediator who tries to help the disputing parties reach a mutually agreeable solution ”*

BINDING because parties are compelled to attend and settlement is BINDING upon them.

# Features of the Rules



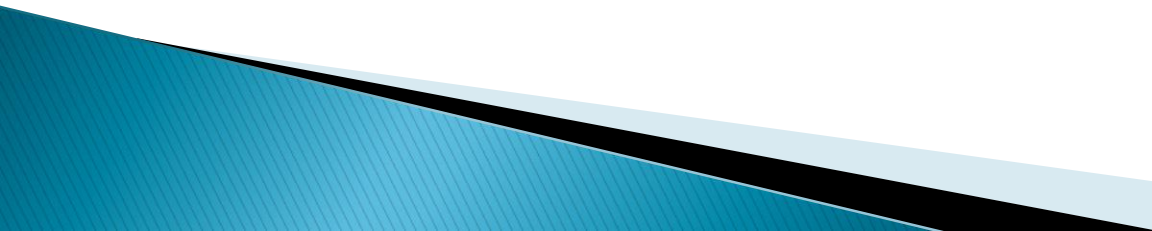
**explain the advantages of mediation; the benefits to be derived by the parties from the process:**



- **Informal:** it encourages the parties relax during the proceedings as such assists them to reason better/ not bound by any strict rules of practice or law
- **The process is confidential:** away from the glare of the press; helps preserve parties continuing relationships
- **Without prejudice:** this encourages the parties to explore as many settlement options as possible without prejudicing their respective positions



# Features of the Rules

- Structured : the process has three main stages; introduction and first joint session, separate session and second joint session and conclusion.
  - Final and Binding : no appeal lies against settlement order as such; the parties have closure and enjoy the fruits of the settlement
  - The process is party driven as such the parties structure the settlement and find it easy to live by it
  - The process is a great saving on cost
- 

# Features of the Rules

## ***List of mediators: order 31(5)***

- ▶ Mediation officer custodian of list of mediators which indicates field of bias
- ▶ Qualifications of mediators
  - Trained and certificated by the courts
  - Not less than seven years experience in field of bias

## ***Collection of record by mediators: order 31(6)***

- ▶ Mediator will collect and sign for record referred to mediation
- ▶ Collection is from mediation officer

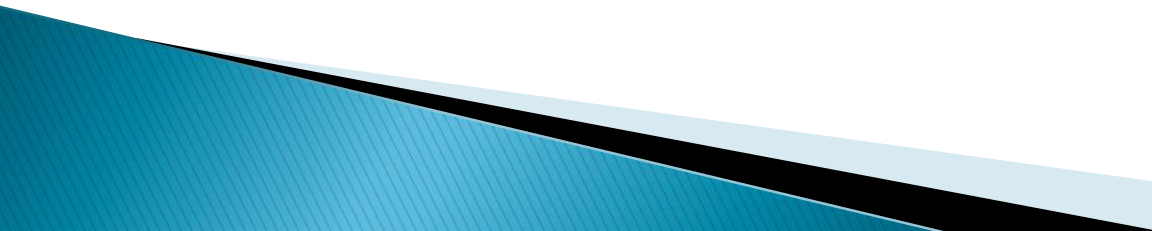
## ***Conduct of the mediation by mediator: order 31(7)***

# Features of the Rules *Cont....*

- ▶ Mediator contacts parties
- Giving them time, date and venue of mediation
- Conclude mediation within 45 days of collecting record on general list (see Amendment Rules of 2012, Order 19 rule 3(2): 30 days in respect of Commercial List matter (See Amendment Rules 2012, Order 53 rule 8(2))
- Judge to maintain an effective BU system

# Features of the Rules *Cont....*

## ***Appearance before mediator: order 31(8)***

- ▶ Personal appearance of parties
  - May appear with counsel if represented
  - Companies partnership, or government departments person with authority to settle must attend
  - ▶ Where a party causes the failure to mediate, court may order defaulting party to be liable to all costs whatever the outcome
- 

## *Features of the Rules cont...*

- ▶ Judges to ensure that this is strictly adhered to

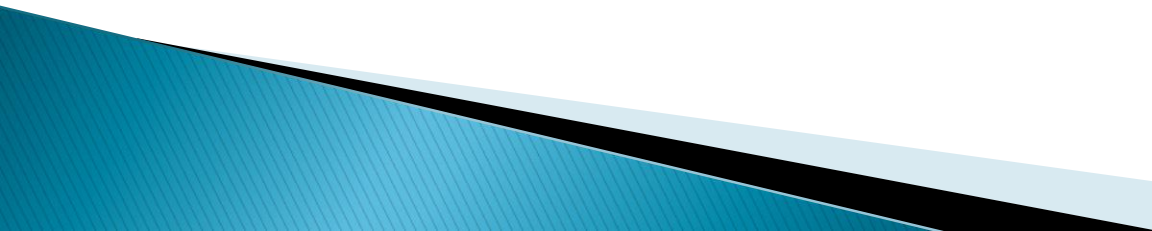
### ***Statement of understanding on rules of mediator: order***

#### ***31 (9)***

- ▶ A statement by mediator explaining his role
- ▶ Confirms that mediation process is confidential
- ▶ Statement is in form 28B to the First Schedule
- ▶ Parties are required to sign the statement

## *Features of the Rules Cont....*

### ***Record of the mediation: order 31(10)***

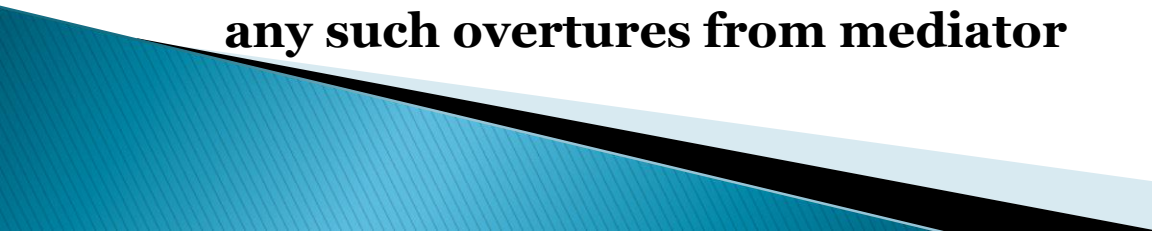
- ▶ Mediator shall not keep record of the proceedings
  - ▶ Documents prepared by mediator to be destroyed where mediation fails
  - ▶ Destruction of documents done in the presence of the parties
- 

## *Features of the Rules Cont....*

### *Return of records to mediation office: order 31(11)*

- ▶ Where mediation fails
  - Mediator to return record to mediation officer within 10 days
- ▶ Mediation officer to transmit record to Judge within 7 days of receipt of record
  - Report on mediation attached to record in form 28 (c)

## *Features of the Rules Cont....*

- ▶ **If settlement reached court has no further role in the proceedings**
  - ▶ **If no settlement reached upon receipt of the record Judge to summon the parties within 14 days of receipt of record**
  - ▶ **Statements made during mediation by parties are confidential and privileged**
  - ▶ **Such statements not to be used in evidence at trial/Judge to ensure that record is devoid of such statements**
  - ▶ **Mediator barred from communicating with trial judge on mediation/ Judge must decline any such overtures from mediator**
- 



## *Features of the Rules Cont....*

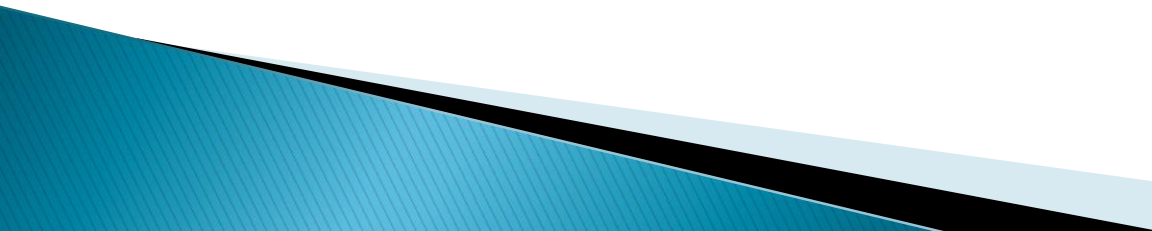
### ***Registration of mediation settlement: order 31(12)***

- ▶ If settlement is reached
- Parties will sign the settlement in form 28D
- Mediator also signs the settlement
- The settlement is registered in court and has the same effect as a judgment of the court

## *Features of the Rules Cont....*

- Enforcement in like manner as a judgment

### ***Mediation fees: order 31(13)***

- ▶ The Chief Justice determines mediation fees
  - ▶ Currently it is K500.00
  - ▶ The fees are paid on a 50/50 basis by the parties
- 

## *Features of the Rules Cont....*


- Enforcement in like manner as a judgment

### ***No appeal against settlement***

- ▶ A settlement is final and no appeal lies against it
- ▶ There can be no stay of execution against settlement
- ▶ A settlement cannot be set aside or reviewed
- ▶ A judge must not entertain such applications (See the case of ***Charles Mambwe and Others Vs Mulungunshi Investments Limited and Mpelembe Properties Limited*** Selected judgment No. 36 of 2016)

# *Features of the Rules Cont....*

## *Mediation fees: order 31(13)*

- ▶ The Chief Justice determines mediation fees
  - ▶ Currently it is K500.00
  - ▶ The fees are paid on a 50/50 basis by the parties
- 

## *Conclusion*

Need to harmonize rules

Need to amend rules/ this is in progress

Need to introduce mediation in Subordinate Court

***THANK YOU !!!***

