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TECHNICAL ASSISTANCE SUPPORT IN SUSTAINABLE LAND ADMINISTRATION AND MANAGEMENT

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GUIDELINES FOR LAND DISPUTE MEDIATION

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1 Introduction

These guidelines have been prepared to help mediators help people resolve their land disputes. The application is mainly for eSwatini Nation Land (SNL) and for disputes between landholders / land users. The guidelines are less applicable in cases involving a dispute between a landholder and the *umphakatsi* (chief and/or *bandlancane*) although the mediation principles are still relevant. These principles are also relevant in disputes between chiefdoms and those with outsiders.

These guidelines are an introduction to mediation for prospective mediators and land administrators. They are not a full and comprehensive treatment of the subject. The guidelines should be used in conjunction with land dispute mediation training materials.

After a brief introduction, the guidelines place mediation in context with other forms of dispute resolution and with customary law as applied to SNL disputes. Mediation is then defined, and the role of the mediator outlined. The procedure to be followed in mediation is laid out and guidance provided on how a mediator should conduct the mediation.

Terms used in this guide include the following:

Courts	A tribunal presided over by a judge, judges, or a magistrate in civil and criminal cases.
Disputants	Persons or parties who are in dispute with each other.
Parties	People, organisations or corporate bodies who are involved in the dispute.
Tribunal	A court of justice.

These guidelines draw on, summarize, contextualise and paraphrase numerous reference texts. These are listed in Appendix A.

2 Background

Mediation is a form of alternative dispute resolution (ADR). Other forms of ADR include:

- Conciliation, which is another term for mediation.
- Arbitration is similar to mediation but more structured, rule-based and formal, and may be binding or non-binding on the parties.
- Adjudication means a formal decision on a matter, which in the context of ADR is a lawful judgement based on less stringent rules of evidence and procedure as would apply in the court system.

Alternative forms arose because of the increasing cost, complexity and time to resolve disputes in courts and tribunals of the judiciary. ADR seeks to emulate customary forms that are less formal, less costly and therefore more accessible to all.

Customary (land) dispute resolution in the Kingdom of Eswatini has been described as operating to preserve harmony between community members. The preservation of harmony is a key principle that builds cohesion and social peace in rural communities. When disputes do arise, it is the 'politics of harmony' that is used to help resolve the dispute. The method is similar in most respects to mediation.

3 Disputes for mediation

Most types of land dispute can be mediated. The most suitable are those where there is no power imbalance between the parties … such as:

- Boundaries between neighbours.
- Rights of way or access by other community members.
- Subsidiary rights, such as lending out or borrowing land, sharecropping, and resource abstraction by others.
- Intra-homestead land use and allocation.
- Unauthorised or illegal occupation.

Less suitable for mediation are disputes with power imbalance, such as between a chief or inner council and a community member, where certain matters of statutory law are involved, and where the merits of the case are skewed very much toward one of the parties. Mediation of disputes that involve fraud are often unsuccessful because a party cannot be trusted to negotiate in good faith or abide by an agreement and therefore these cases are less suitable for mediation.

Table 1: Mediation indicators (a comprehensive list by RICS)

Suitable	Unsuitable
Low or moderate level of conflict	Destructive/entrenched patterns of conflict
Party commitment to process	Matters of policy
Lawyer/advisors commitment to process	Pure question of law/precedent
Ongoing relationship	Ulterior motives for mediating
Power equality	Personal danger
Party ability to negotiate for self	Disclosure is necessary
Personal power	Emotional problems
Multiple issues	Responsibility avoidance
Clear issues	Value differences
Adequate resources	Court action needed
Privacy and confidentiality accepted	Urgency required
External pressure to settle	No ongoing relationship contemplated
Time pressure to settle	One party has no reason to negotiate
Voluntary	Single issue or values only
Right people at the table	Outside pressure to litigate
Will to settle	Mandatory
Good faith	Person with authority not available
Each side has something to give	Conflict addict

Any type of land dispute that is dealt by the chief's court may be mediated, and ideally mediation should be tried before any other form of dispute resolution, such as adjudication.

4 What is mediation?

Mediation may be defined as a voluntary, non-binding and private dispute resolution process in which a neutral person helps the parties reach a negotiated settlement. The neutral person who helps parties find a solution to their dispute is called a 'mediator'.

Mediation creates a dialogue and environment for listening, for diffusing of tension, and understanding of perspectives. It can bring together antagonists and create conditions for negotiation and agreement.

The main elements of mediation are that it is:

- **Voluntary**. Parties to the dispute must agree to try mediation, although there may be strongly encouraged to do so in some circumstances (e.g. court annexed mediation[1]).
- **Non-binding**. Because mediation is voluntary, the process and the outcome does not bind the parties to a settlement. A party is free to walk out of mediation at any time. A mediator has no authority to make a binding determination, so if the parties cannot agree, there will be no settlement and the case will proceed to another form of dispute resolution. However, if settlement is reached, the agreed terms will form part of an enforceable contract.
- **Private**. Mediation is non-prejudicial, meaning that anything said or revealed in the process cannot be used later in another forum. The facts revealed are confidential to the parties and to the mediator and cannot be revealed to others at any time. The terms of a settlement may remain confidential or not, as agreed by the parties.
- **Neutral mediator**. The role of the mediator is key to the success of any mediation, and it is essential that the mediator is acceptable to and trusted by both parties. Therefore, the mediator must be a truly neutral person having no association with either of the parties nor any interest in the outcome.
- **Negotiated settlement**. Mediation aims to achieve a "win-win" outcome. It is only successful if both parties are happy with the outcome and abide by the agreement.

Mediation often fails if:

- One or both parties is unwilling to participate and contribute to reaching agreement.
- One of the parties acts in bad faith.
- One of the parties exits the mediation process or takes the dispute to court.

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[1] Court annexed mediation is where a court, before considering a case, will direct that the parties must first try to mediation their dispute. If mediation fails, then the matter will come back to court for adjudication.

- One of the parties is unwilling to accept the others position and is uncompromising.

The characteristics of mediation are that it is:

- Relatively short
- Informal with simple procedure
- Low cost
- Voluntary
- Confidential

A successful mediation is often long-lasting because both parties were empowered by the process and they themselves contributed to and reached agreement. It is "win-win" and avoids one of the parties 'losing' the dispute.

A mediation outcome should where possible result in a respected and binding solution or agreement. A non-binding agreement is less preferable but sometimes the best that can be achieved in the circumstances. When both parties openly and willingly sign a written agreement, it is usually legally binding on them.

Mediation is appropriate for land disputes because often the disputants are neighbours or members of the same community. An acceptable and agreed solution will maintain harmony; an imposed solution will likely ferment further animosity between the disputants. Mediation is also appropriate where both parties have equally strong legal grounds.

Mediation can complement and enhance customary dispute resolution and does not replace other formal or informal systems such as National Courts or chief's courts.

As a less formal means of dispute resolution, mediation can use oral testimony as evidence; it does not rely on corroboration and documentation.

Mediation usually involves some flexibility and willingness to compromise by one or preferably both parties.

There are different types or models of mediation, which are:

- Settlement or compromise mediation. Its main objective is to encourage incremental bargaining towards ‘middle ground’ between the disputants. The mediator establishes the ‘bottom line’ or least acceptable outcome of each party and tries to move them from their opening positions to a compromise.
- Transformative mediation. The mediator aims to empower the parties to make their own decisions and take their own actions. It is often used when communities are involved.
- Narrative mediation. Parties are encouraged to talk about the dispute from their own position, attempting to convince the other side to appreciate a different perspective.
- Evaluative mediation. This is where the mediator gets more involved, advising parties on points of law, and how a court would decide on the same matter.

In practice, a mediator may draw on facets of different mediation models. Every mediation style has its benefits and drawbacks, and which make it vital that the type of dispute resolution be tailored to the situation, parties, and specific disagreement.

Finally, mediation is not:

- A substitute for final outcomes that provide legal certainty.
- An interrogation or criminal investigation.
- A rigid process that must produce a result.

5 The mediation processes

The main tool of mediation is communication. The mediation process and the role of the mediator are designed to help achieve open and constructive communication.

The mediation processes and the mediator's tasks are amongst others:

- To determine whether it is appropriate for the case to be handled through mediation and whether the disputing parties are ready to participate.
- To explain the mediation process and the role of the mediator.
- To assist the parties in exchanging information
- To gather facts and evidence by enquiry of the parties.
- To help the parties to negotiate (identify points for negotiation).
- To assist the parties to expressive and frame the agreement.

The mediation process usually starts by referral of a dispute to the mediator by the community leadership. It may also be referred directly by one or both parties, but in cases involving SNL the mediator must inform the community leadership and receive permission to attempt resolve the dispute by mediation. (If mediation fails, the dispute would then go before *bandlancane* for adjudication, and therefore they should have prior knowledge that a dispute exists).

The mediation process then usually proceeds in the following sequence:

5.1 Preparation

1 The mediator contacts each party about the proposed mediation. This initial contact should include two key outcomes:

   1.1 The party's agreement to mediation.
   1.2 The party's agreement on the mediator.

2 After securing a party's agreement to proceed, the mediator should then ask some general questions about the dispute. This is to assess the suitability of the dispute for mediation. Some disputes cannot be mediated and must be resolved by legal means, such as cases involving farm dwellers and by the Farm Dwellers Tribunal.

3 The mediator should also try to find out, before the introductory meeting, if the parties have tried to negotiate or used conciliation or if the dispute has been heard in another

forum, i.e. that it may have been to court. This may not prevent mediation, but it may have a bearing on any agreement reached.

4 If the dispute is suitable, and both parties agree to mediation, a suitable neutral venue is identified and both parties invited to a joint introductory meeting.

5.2 Introductory meeting

For the introductory meeting, arrange the seating so that one party is not or does not feel marginalised. Equidistance between mediator and parties around a circular table is ideal. Avoid if possible an arrangement with a 'high' table that would be more appropriate for a court room.

At the introductory meeting, the mediator makes an opening statement, which can set the tone for the whole process. It is important that these opening remarks put each party at ease. The statement should also have a positive tone, stressing that mediation is often successful in this type of dispute. Emphasis should also be given throughout the points listed below that the process is voluntary, confidential and privileged, and that the mediator is neutral.

The procedure for the introductory meeting is to:

1 Explain to the parties:

> What is mediation?

> The role of the mediator.

> The role and what is expected of the parties.

> That mediation will succeed only through the good intention of the parties.

> The meditation may fail if at any time the mediator considers it appropriate to terminate the mediation because it is unlikely to succeed, if one or both the parties are not acting or mediating in good faith, or if an agreement cannot be reached despite best intentions. The mediator should emphasise that if one or both parties does not mediate in good faith this may be prejudicial to their case should it go to court.

> The persons involved must have the authority to negotiate and enter into an agreement if one is possible.

2 Confirm agreement of the parties to mediate the dispute and the mediator.

3 Asking each party to explain briefly their grievance or point of view, and what they are seeking to achieve.

> The party that speaks first is decided by the mediator, explaining the reason why.

> The mediator must discourage the other side from interrupting.

> An advisor may speak on behalf of a party, but the mediator should discourage this.

- The mediator should take notes.

4 A summary of the dispute by the mediator based on the background information collected and notes from the opening statements made by both parties.

- If possible, the mediator gets the parties to agree on the main points or issue of the dispute, taking care not to be judgemental or appear biased, and being positive.
- Write the issues down and if appropriate, ask the parties to priorities them for resolving each in turn, suggesting starting with the easiest one.

5 Concluding remarks about what happens next.

The mediator must outline the process, including the holding of separate meetings followed perhaps by joint meetings, and that anything said or revealed in the separate meetings is private and confidential unless the party gives permission to divulge certain information in the course of trying to identify areas of agreement toward a settlement.

Importantly, the introductory meetings give an opportunity for the mediator to build trust and confidence with each party, and for the parties to express any concerns that they may have.

Finally, encourage each party to ask questions about anything.

Mediator's checklist

✓ Introduce self and welcome parties
✓ Confirm names, mode of address and role of each party present
✓ Congratulate parties for attending
✓ Remind parties of the success rates for mediation
✓ Ensure mediation agreement has been signed
✓ Explain own experience as a mediator
✓ Explain mediator's role to facilitate settlement
✓ Confirm that there are no conflicts and thus neutral
✓ Explain parties' role
✓ Confirm authority to negotiate and settle
✓ Where appropriate explain the roles of any lawyers or advisors and encourage the use of advisors if required
✓ Explain right to opt out as it is a voluntary process
✓ Explain what happens after the opening statement:
✓ Each party to make an opening statement
✓ Joint session for as long as required
✓ How caucus sessions work
✓ Use of notes and the white board/flip chart
✓ Settlement agreement
✓ Explain confidentiality and privilege
✓ Explain special confidentiality of caucus sessions
✓ Ground rules
✓ Time
✓ Questions

5.3 Information collection meetings

1 Meeting each of the parties in turn. This can happen immediately after the introductory meeting or later depending on the wishes of the parties. At each meeting, each party then:

- Provides the mediator with more detailed account of the dispute.
- Each party explains in more detail their points of view, interests and needs.
- Facts emerge or are clarified in relation to the nature of the dispute (e.g. boundaries, inheritance, etc.), its cause (what triggered it), duration (when it started), and any actions taken, or related issues involved.
- The mediator asks questions for clarification to be sure of all the facts and each party's opinion on the causes and possible solutions. An important question for the mediator to ask, is what has so far prevented a resolution of the dispute.
- After collecting and clarifying the facts, the mediator summarises the dispute and identifies with each party the key issues in the dispute and any points for negotiation.

The mediator must take time during this 'exploratory stage' to get a greater understanding of each party's position as well as their underlying interests and needs. Their position is how they say that the dispute should be resolved. Interests are concerns that motive their position, and needs are the underlying issues in the dispute. The skill of the mediator is to assist the parties to move away from their positions to reveal their underlying needs and interests. Where the two parties needs and interests overlap, a settlement is possible.

2 The mediator may then wish to meet with other parties, not directly involved in the dispute, who may be able to provide additional background information and facts. The parties should not be present during these fact-finding meetings.

3 In some cases, the mediator may wish to visit and inspect the land under dispute.

5.4 Negotiation meetings

4 Following any third-party meetings, the mediator meets again with both disputing parties separately to finalise and agree points for negotiation and a possible settlement. It is important that the mediator:

- Identifies the negotiating points.
- Gets agreement that the negotiating points can be shared with the other party and the order for presentation and what is expected in return from the other party in response to each negotiating point. A mediator must not reveal information said in confidence or has not be expressly authorised to be revealed by the mediator to the other party.

5 At this point, the mediator must assess how best to proceed, either by:

- Joint meeting, or

- Continuation of separate meetings.

Bringing the parties together will work only if there is no hostility and they are communicating well, as assessed from the opening introductory joint session.

A mediator must consider that separate meetings may be beneficial where there is a need to explore sensitive issues, and where parties need to vent their frustrations and 'cool off'. A further point to consider is that the number and length of separate meetings should be balanced; this avoids an impression that the mediator is giving any preference. If there is a need to spend more time with one party, keep the other informed.

6 If a joint meeting of both parties is held, then the mediator:

- Re-states the principles of mediation and that should either party wish to discontinue they may do so.
- Summarises the dispute and both parties claim and positions.
- Reveals the opening point for a negotiated settlement. This will usually be followed by a response from the other party either directly or revealed by the mediator (if agreed with the party).
- A series of 'give and take' exchanges may follow.
- If an agreement materialises from the negotiation, the mediator should impress on the parties the need to put this into writing. The mediator may help by drafting the agreement.
- If an agreement fails to materialise, the mediator shall end the mediation and re-state the options now available to the parties to resolve their dispute.

If during the joint meetings, the mediator feel tension between the parties and a breakdown in communication, it is possible to revert to separate meetings. The mediator must also guard against the parties believing that they can quickly reach a settlement, especially if the issues and needs have not been fully revealed and explored. If these needs and interest are not coming out in the joint sessions, revert to caucus (private, separate) meetings.

There is no limit to the number of caucus meetings, although three sets is typical – for information gathering, negotiation points, and settlement proposals.

5.5 The agreement

If the mediation is successful a documentary record of the settlement agreement must be prepared. If requested by the parties, the mediator can assist with the drafting of the agreement. However, it is often best that the parties write it themselves, which helps to reinforce and sustain the agreement, but this is not always practical. Do not help with or prepare a settlement agreement if both or one of the parties has legal representation.

The mediation settlement agreement must include the following components:

- The identity of the parties

- Standard clauses, if appropriate on:
  - Confidentiality,
  - relevant law or jurisdiction, i.e. customary or in some cases statutory,
  - that this is the entire agreement between the parties, and
  - a mechanism to deal with future disputes.
- The location of the land
- Brief description of the dispute, including key facts, sketch maps etc.
- The agreement commitments. These must be certain, specific, effective, practical and complete, dealing with who is to do what, when, and with what precise consequences.
- Some settlement specific clause, where appropriate on:
  - Payment if any and who pays, to who, how much, in what form (cash or kind), and what terms (once off or periodic)
  - What happened on default of payment.
  - The costs of the mediation.
  - Any special clauses dealing with enforceability
- Statement that the parties understand the agreement and that by signing they are bound by the agreement commitments.
- The date of the signing of the agreement
- When the decisions and agreement become effective.
- Signatures of the parties, including who they are and the authority they have to sign, and names and signatures of witnesses.
- Mediator name and contract details

Getting agreement on the main points of the agreement may take some toing and froing until the final version is agreed upon.

Suggest to the parties that the settlement agreement should include a clause dealing with what to do if one side fails to abide by the agreement.

When signed and dated, provide copies of the mediation agreement to:

- Both parties
- The chiefdom inner council

The mediator must also keep a copy and all notes made and documents collected during the mediation and shall use these in the event of a breach of agreement or should the dispute go to court and the mediator is summoned to given evidence.

5.6 No agreement

If the mediation is unsuccessful and a settlement agreement cannot be prepared, then:

- Explain the other options for dispute resolution, such as by taking the matter to:
  - the chief's court for adjudication;
  - the civil courts (where appropriate); or
  - mediation by another mediator.
- Record and keep with the mediation notes, any matters where agreement may have been possible. This may assist mediation or resolution of the dispute in the future.
- Encourage the parties to continue to seek an amicable solution. Suggest that they may try mediation again with another mediator.

5.7 Follow up

Ideally, the agreement between two family members must be shared with the rest of the family, and between two community members with the rest of the community. In the latter case, a community meeting may be called at the *umphakatsi* at which the agreement is read out.

In appropriate cases, such as larger disputes, the *indvuna* or *imisumphe* may follow up on agreement and the parties adherence to it.

6 Obstacles and issues in mediation

Mediators must be mindful that the mediation process may not always operate as expected. Issues that may be faced include:

- One or both parties may not enter mediation in good faith, meaning that they have no intention of finding a resolution from the mediation process. Their intent may be to go to court and seek a resolution that maximises the outcome in their favour, and they have been coerced into mediation as a precondition to court action.
- One or both parties may become emotional, creating an environment not conducive to negotiation and agreement. This can quickly lead to a breakdown in communication and a premature end to mediation. In such circumstances it may be appropriate for the mediator to hear the opening statements and accounts and to discuss and share the negotiating points separately with each party throughout the process.
- One of the parties may be "forum shopping", that is, pursing mediation because they are more likely to succeed in securing a beneficial outcome from mediation than they are in any other dispute resolution forum.
- Interference, often during mediation, third parties may seek to influence or exert pressure for a particular outcome.

- Factors relating to custom and tradition, perceived or real. Parties may press for a predetermined outcome not based on the facts, fairness or the constitution.
- Finally, one or both the parties may misunderstand the mediation process, try to influence or pressure the mediator, display intransigence or intentionally obstruct the mediation process, for example.

7 The mediator

The mediator is an impartial, neutral intermediary who helps people to resolve their dispute themselves. For this, mediators use a variety of techniques to help parties to:

- Communicate.
- Explore their underlying needs and interests.
- Develop creative solutions
- Negotiate mutually satisfactory solutions.

Usually a mediator is an individual person, who is impartial and unrelated to the parties and the dispute. The mediator is trained in the process of mediation and facilitating others to reach agreement on the resolution of their dispute. A mediator does not make decisions or impose decisions on either party; a mediator is not a judge or arbiter. A mediator does not have to be an expert in law.

The disputants must agree to who will be the mediator. If one party objects, another mediator must be found.

Before commencing any mediation, the mediator must assess his/her own neutrality. Is there any reason one of the parties might perceive the mediator to be biased, or their legitimacy could be compromised?

A mediator should ideally have all the following skills and attributes:

- Process skills
  - Fully understand the mediation process and principles
  - Display familiarity with procedure, structure, roles and responsibilities
  - Manage the process and phases of mediation, including transitions
  - Create an environment conducive of settlement
  - Retain confidentiality
  - Demonstrate neutrality
  - Be thoroughly prepared
  - Be able to manage people
  - Manage time efficiently
- Relationship skills
  - Be able to facilitate communication and interaction with and between the parties;

  - Exhibit respectful demeanour and approach;
  - Appear authoritative but relaxed, confident and alert;
  - Show ability to perform in difficult and sometimes unexpected circumstances;
  - Display integrity, confidentiality and persistence;
  - Exhibit negotiation and problem-solving skills;
  - Be able to engender trust, enthusiasm and solution-creating environments;
  - Manage parties, representatives, and others by building rapport;
  - Be attentive to parties' comforts and needs;
  - Establish common ground;
  - Help parties through crises, mourning, face saving;
  - Control emotional venting;
  - Help parties analyse risks and benefits;
  - Listen attentively and respond;
  - Adopt a responsive pace;
  - Use humour and non-judgmental language
  - Be conscious of power imbalance;
  - Be aware of cultural issues, bias and independence.
  - Convey impression of energy and enthusiasm, good manner, empathy and personal warmth.
- Content skills:
  - Apply mediation skills and techniques;
  - Appreciate commercial and legal contexts;
  - Decide when and how to apply skills and techniques
  - Make decisions about order of procedure, use of private or joint meetings, etc;
  - Make use of parties, representatives, experts and others;
  - Be alert to ethical dilemmas and handle other potential challenges;
  - Be able to manage without determining content;
  - Open the mediation with confidence;
  - Offer explanations;
  - Summarise before moving on and keeps notes;
  - Identify and probes issues;
  - Manage parties' expectations
  - Clarify authorisation to disclose information;
  - Use strategies to overcome deadlock;
  - Encourages parties to re-evaluate positions and review expectations;

- Be able to paraphrase and re-frame language;
- Identify options;
- Use silence and questions effectively;
- Explore prior settlement offers;
- Be alert to tensions and danger;
- Draw together options into a coherent settlement package;
- Analyse and test solution is workable;

The mediator must not:

- Dominate the process or the parties
- Appoint him/herself as a judge.
- Show disrespect, arrogance or bad temperament.

The mediator need not be an expert in land issues or law, but a good knowledge of these especially with respect to custom and tradition is beneficial.

8 Mediator Guidance

This part provides some additional guidance for the mediator to help facilitate a successful mediation.

8.1 The mediator

The success of a mediator relies on his/her ability to influence the parties to collaborate and reconcile their differences. This requires neutrality and gaining the trust of both parties.

A mediator must be creative and help the parties to be constructive and positive in seeking possible solutions. For example, instead of talking about the damage the other party has done ('He lets his animals come and graze on my land'), the mediator should try to get the parties to focus on possible solutions ('We could construct a fence and find another place where the animals can go'), or on expressing their needs ('My provisions for the winter depend on the crop; I therefore need to protect it').

Throughout the mediation process, the mediator must take detailed notes of what is said because reference will be needed to these during the negotiation stage.

An important skill is 'active listening', which is more two-way communication than just merely passive listening. The steps in active listening are:

- A sends a message.
- B receives a message. This involves concentrating fully on what is being said.
- B states what s(he) has understood but makes no evaluations.
- A either agrees with B's interpretation or, if not, sends the message again.

- This process is continually repeated until understanding by both parties has been achieved.

Also, message may have hidden meanings, and not listening carefully may mean they are missed. Some common phrases and their hidden meanings…

Types	Words like these…	Often mean this…
Opposites	Frankly/to be honest	Here comes a whopper
	With all due respect	Which in your case is none
	In my humble opinion	I'm arrogant
	There's nothing to worry about	You should be terrified
Throwaways	As you are aware	Here's a surprise
	Incidentally…/by the way…	Here comes some big news
Erasers	I agree, however…	I don't agree
	I'm no expert, but….	I know all about this
Preparers	I don't want to interfere…	But I will anyway!
	I don't mean to be rude	You idiot!
Testers	I haven't thought this through...	I'll live with this – but I wonder
	Off the top of my head...	if you will!

Techniques that can help active listening are summarising and reflecting. Summarising is where the factual side of the message is stated back to the speaker as the listener's understanding of the information. This paraphrasing should take place at regular intervals and has the advantage of checking understanding, opportunity for clarification, showing that you are listening and demonstrating interest.

Reflecting is like holding a mirror to the speaker, reflecting back phrases as you hear them. This increases clarity and lets the speaker know that the mediator is listening. It also helps to build empathy and trust.

As well as listening, a mediator must be a good questioner. A skilled mediator asks many open questions (questions that require more than a simple 'yes' or 'no'). By encouraging people to talk through open questions, much more can be revealed than would otherwise be the case.

Care needs to be taken when using closed questions because they can be perceived as hostile, but they are appropriate where confirmation is needed.

Examples of question types…

Types	Aim is to…	Example
Exploring (Open)	Get information Open discussions Get explanations Broaden discussion	Who, what, where, when, why, how? What other issues should be considered?
Challenging (Open)	Challenges ideas and preconceptions Understand reasoning	What makes you say that?

Types	Aim is to…	Example
Hypothetical (Open and Closed)	Develop new ideas Change course of discussion Unblock thinking	Suppose they did this, what would you do? What if….? Have you considered…?
Alternative (Closed)	Make decisions Select options	Which is preferable...? Will you do X or Y?

Another useful mediation technique is to reframe answers. That is, the mediator uses their own words to repeat or sum up what a party has said. The benefits of reframing statements or issues is that they can become more neutral and palatable, less demanding in tone, and more constructive.

Non-verbal communication is also important, such as eye contact, nodding the head where appropriate, etc. Facial expressions, as well as eye contact or lack of, can be whether people are being honest or not. Body language too can reveal a lot. Some indicators are…

Bored	Listening	Negative Evaluation	Rejection /Disapproval
Low blink rate Staring into space Slumped posture Chin in heel of hand Doodling	Head tilted Lots of eye contact High blink rate Nodding Evaluating/Deciding Sucks glasses/pencil Strokes chin Stares up or into space	Finger on cheek, thumb under chin Looking over glasses	Sitting/moving back Arms folded Legs crossed Head slightly down Shakes
Hostile/Aggressive	**Superior / Confident**	**Telling Lies**	**Ready to Agree**
Leaning forward Neck jutting Finger stabbing Glaring eye contact Fists clenched	Hands steepled Hands clasped behind head Feet on desk	Hand touches face Averts gaze Shifts in seat Swallows/licks lips	Closes papers, puts pen down

Mediators need to be good negotiators. The recommended approach for a mediator is to adopt 'principled' negotiation. However, parties in a dispute often adopt 'positional' negotiation. The differences are summarised below.

	Principled negotiation	Positional negotiation
Approach	Separate people from the problem Focus on interests not positions Options for mutual gain	Extreme opening position Focus on rights Aggression
Advantages	Maintains harmony Durable agreements Flexible	Quick outcomes Simple Less costly
Disadvantages	Takes longer Higher cost	Inflexible Damaging Poor outcomes

If one or both parties wants to or takes a positional approach to negotiation, the mediator must endeavour to move them to principled negotiation.

Positional	Principled
Wants	Reasons for wants
Rights	Needs/Interests

Positional	Principled
Polarity	Common Ground
Win/Lose	Win/Win
Predictable	Creative
Inflexible	Flexible
Blame/Distrust	Valuing/Understanding/Trust
Asserting/Pressuring	Facilitating/Co-operating
Past	Future

One way to encourage parties to move from their position to principles is through creative thinking by 'brainstorming' possible options. However, this can be difficult if one or both parties have 'invested' in their position. This can be financial but also reputational.

Another 'trap' in negotiation is devaluing a proposition not because of its merits but its source. This can be dealt with by separating the people from the problem. Encouraging parties to be creative and forward thinking are ways to get around negotiating constraints of predictability, familiarity and cautiousness.

The mediator can encourage positive negotiation by:

- Starting with clear negotiation objectives and then carefully consider if the status quo will achieve these objectives or act as barrier.
- Helping parties to be flexible to find negotiation alternatives outside the status quo.
- Evaluating every alternative, including the status quo, in terms of future and present goals.

Breaking a deadlock in negotiations can be the mediator's hardest task. It may require getting one of the parties to make an apology, or a form of apology, and the other to accept it, and graciously. Persuading a party to backtrack on a position can be difficult but not impossible.

Sometimes deadlock is reached quickly because of emotions. More objectivity is needed in these cases. If progress has been made before a stalemate remind the parties of the progress achieved and the common ground made.

Breaking a deadlock usually requires meeting in caucus and pausing for reflection then asking them to identify and consider their worst alternative to a negotiated settlement and their best alternative to a negotiated settlement to bring some reality to their thinking. This is where a mediator can when appropriate offer some advice.

A deadlock can be an emotive point for a mediator. But the mediator should not display emotion, especially anger, even if frustrated by the impasse and stubbornness of one or both parties.

However, the venting of anger can sometimes help a party to show how strongly they feel. The mediator must try and confine this to the caucus meetings and control the parties' emotions in the plenary or joint meetings. If the parties' emotions cannot be control, then the mediator must keep the negotiations in caucus. That said, a limited amount of anger

displayed in joint meetings can be useful, if it is kept in control, as demonstrates the depths of feeling. A mediator should acknowledge and normalise the anger to help diffuse it.

8.2 How to conduct the opening session

The opening introductory statement by the mediator is important to establish the rules for mediation. The following points must be included in the introduction:

- Role and responsibility of the mediator – to facilitate communication, moderate the discussions, help manage emotions.
- Mediation process – how it will be done and how it is it different from the court; mediation is about agreeing outcomes and not about imposing outcomes.
- Mediation rules – respect for each other; do not interrupt each other; stay calm; do not insult.
- Reinforce that the success of mediation depends on the parties' willingness to participate, communicate, negotiate and find a mutually agreeable resolution.
- Encourage parties to be as brief as possible and not continually to restate facts or issues.
- At key stages in the discussions and negotiations, summarise the main points for each party and re-state points of agreement or potential agreement.

8.3 How to analyse land disputes

Dispute about land are not always as straightforward as they might first appear. They may not always be the root cause of a dispute but a symptom or by-product of another type of dispute. For instance, animosity between two families may manifest in arguments their common boundary line, or contests or rivalry between family members may appear to be contests about the family land. Therefore, it is important that the mediator quickly identifies the underlying interests and needs of each party and not just their positions.

It may be helpful when resolving land disputes to:

- Inspect the land subject to the disputes with both parties, either together or separately.
- Make independent enquiries of others about the dispute, including traditional authorities, to corroborate the position of each party and to complete the background facts.

8.4 Negotiation

- Encourage the parties to identify their key position and points that they are prepared to give up.
- An important role of the mediator is to try and make the parties see the dispute from different perspectives, such as that of the other party.

- If points for agreement are failing to emerge, the mediator may suggest possible areas or points.
- To facilitate the dialogue, emphasise any positive aspects and of possible areas of agreement.
- Do not limit the number of sessions for negotiation or meetings on negotiation points where it is clear that progress is being made. Do not try and rush the parties into a premature agreement.
- Encourage parties to be constructive.
- Keep focussed on the core of the dispute; do not introduce or raise issues that are peripheral or unrelated.
- When negotiating points materialise, encourage the parties to present these as possible solutions (constructive negotiation).

8.5 Closing settlement agreements

Review the settlement agreement and check that it is:

- Clear and complete and concise, with not too much detail but neither too little.
- Workable.
- Do not introduce or impose anything.

8.6 Other points to note

- Make sure that both parties are fully informed of all the facts and have the same information.
- Mediators must not be discouraged by unsuccessful mediation – remember that most mediation efforts end in failure.

Appendix A References

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