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LEGAL NOTICE NO. 159 OF 2011

The High Court (Commercial Court) Rules, 2011

In exercise of the powers conferred on me by section 16 of the High Court Act 1978, I,

MAHAPELA LEBOHANG LEHOHLA

Chief Justice of Lesotho, make the following rules -

PART 1 – PRELIMINARY

Citation and commencement

1. These Rules may be cited as the High Court (Commercial Court) Rules 2011, and shall come into operation on the date of publication in the Gazette.

Interpretation

2. Rule 1 of the High Court Rules 1980² (in these Rules referred to as “the Principal Rules”) is amended by inserting the following definitions in their appropriate alphabetical positions -

“action” includes application and petition;

“Chief Justice” means the Chief Justice of Lesotho;

“commercial action” means an action or application of a commercial nature as defined under these rules or as may be designated as such by the Chief Justice in terms of rule 10;

“defendant” includes respondent;

“head of the commercial court” means a judge designated as such by the Chief Justice;

“designated judge” means a Judge appointed by the Chief Justice to hear a commercial action;

“plaintiff” includes an applicant and a petitioner.

PART II – APPLICATION, OBJECTIVES AND PRINCIPLES

General application

3. (1) These rules shall apply to commercial actions.

(2) The procedure in and the progress of a commercial action shall be under the direct control of a designated judge who shall, to the extent possible, be proactive.

(3) The proceedings shall be as continuous as possible and unnecessary postponements shall be avoided.

Objectives

4. The objectives of these rules are the following -

- (a) to establish a commercial court within the High Court of Lesotho capable of delivering to the commercial community, an efficient, expeditious and cost-effective mode of adjudicating disputes that affect the economic, commercial and financial life of Lesotho directly and significantly; and
- (b) to put in place effective measures for designing the machinery for judicial resolution of commercial disputes and an accessible judicial and suitable case management system.

Principles

5. The judicial system for commercial actions shall be based on the following principles and the purpose of which shall be to -

- (a) deal with cases with reasonable speed;
- (b) be just in the result that it delivers;

- (c) be fair in the way it treats its litigants;
- (d) offer appropriate procedures at reasonable costs;
- (e) be simple, transparent and understandable to those who use it;
- (f) be responsive to the needs of those who use it;
- (g) ensure as much certainty as possible;
- (h) be effective, resourced and organised.

Rights and powers of judges

6. Under this judicial system, priority shall be given to the importance of the rights and powers of judges and of the registrar and the following shall be rights and powers of commercial court judges -

- (a) to fast-track commercial cases despite the stage of the pleadings;
- (b) to fix a date of hearing for the speedy finality of the case;
- (c) to direct that a case be sent for alternative dispute resolution failing which to finally resolve the matter;
- (d) to direct that a question of fact or law be decided separately with a view to curtailing of the duration of proceedings.

Rights and powers of registrar

7. A registrar shall have the following rights and powers -

- (a) to create a separate register and rolls for commercial cases.

-
- (b) to allocate cases to judges regardless of any stage of the pleadings.

PART III – ADMINISTRATION

Administrative management of the court

8. (1) Head of Commercial Court shall be responsible for the day-to-day administration and management of the business of the commercial court, and shall be assisted by a registrar.

(2) The commercial court shall be composed of a minimum of two judges.

(3) A judge of the commercial court may be assisted by a part-time judge and all judges, in these rules referred to as “commercial court judges” shall be supervised by the head of the commercial court.

(4) A commercial court judge shall be assisted by a judge’s clerk.

PART IV – LOCATION AND BUSINESS OF COURT

Location of the commercial court

9. The commercial court shall be located in Maseru or sit at any place as may be determined by the Chief Justice or by a designated judge.

Business of the commercial court

10. (1) The business of the commercial court shall comprise all actions arising out of or connected with any relationship of a commercial or business nature, whether contractual or not, and shall include, among other things -

- (a) banking, negotiable instruments, international credit and similar financial services;
- (b) insurance, re-insurance;
- (c) agency and partnership;

- (d) suretyship and security over movable and immovable property;
- (e) building and engineering construction;
- (f) intellectual property;
- (g) restraint of trade and licencing;
- (h) unfair competition;
- (i) a business contract;
- (j) the export or import of goods;
- (k) the carriage of goods by land, sea, air or pipeline;
- (l) the exploitation of minerals, hydro-electricity and water resources or other natural resources;
- (m) a matter involving a business trust;
- (n) a matter arising from the application of the Companies Act 2011³;
- (o) arbitration;
- (p) insolvency;
- (q) winding up or liquidations; or
- (r) delicts committed in a commercial context.

(2) Despite the provisions of subrule (1), a matter may be designated as a commercial action in terms of rule 11 below.

PART V – DESIGNATION AND
REGISTRATION OF CASES

Designation of cases as commercial actions

11. (1) A party to an action may, after the close of pleadings, request the head of commercial court to designate the action as a commercial action.

(2) The party making the request shall notify other parties to the action of the request.

(3) The request shall be in writing and need not be supported by an affidavit.

(4) If a party wishes to oppose the request -

(a) he or she shall do so by notice in writing and that notice need not be supported by an affidavit; and

(b) the head of commercial court shall hear the parties in chambers before giving a direction.

(5) The head of commercial court may on his or her own accord give notice to the parties to an action in which the pleadings have closed to the effect that the action should be designated a commercial action.

(6) The notice made in terms of subrule (5) shall be in writing.

(7) If a party to an action opposes the designation of an action as a commercial action, the head of commercial court shall hear the parties in chambers before giving a direction.

(8) If the head of commercial court decides to designate an action as a commercial action he shall allocate the action to a judge designated by him.

(9) If the head of commercial court thinks that it is necessary or convenient to do so, he may designate another judge to replace such judge, or for a limited period or purpose, to act as a judge to whom a commercial action

has been allocated.

(10) Where the head of commercial court has designated an action as a commercial action, the registrar shall, in writing, notify all parties to the action or their legal representatives of the designation and the name of the designated judge.

(11) Unless the head of commercial court or the designated judge directs otherwise -

- (a) an application ancillary, preliminary or incidental to a commercial action, shall be brought before the designated judge who shall hear and determine it in such a manner as he thinks appropriate; and
- (b) the designated judge shall thereafter preside at the trial of main commercial action.

Referral to the registrar

12. (1) For the purposes of referring a matter to the head of commercial court for consideration under rule 10, the referral shall first be made by the registrar or by a designated judge.

(2) A judge not being a designated commercial court judge who has a cause or matter in his or her court list that the judge considers or reasonably considers it a commercial matter as defined in rule 11, shall refer that cause or matter to the head of commercial court for consideration under rule 10 of these rules.

Registration of commercial actions

13. (1) In all commercial actions the plaintiff shall file with the registrar all pleadings commencing action and the registrar shall cause the pleadings to be registered in terms of rule 7.

(2) Upon the designation of an action as a commercial action, in terms of rule 11 the plaintiff shall cause the court file to be delivered to the registrar for registration and shall further ensure that the court file is indexed and

paginated in accordance with directions as to the preparation and pagination of bundles.

(3) A registered case shall be allocated a commercial case number and that number shall appear on all subsequent documents concerning the case lodged with the registrar and with the commercial court judge.

(4) After the registration of the action as a commercial action, the plaintiff shall deliver to the commercial judge a separate set of indexed and paginated pleadings and serve a copy of the index on the defendant.

(5) Pleadings in the final form shall comprise the indexed and paginated record of pleadings and any amending notices, old pages of only historic significance shall be excluded.

PART V – PROCEDURE

Preliminary hearing in a commercial action

14. (1) Upon designation as a commercial action in compliance with rule 11 hereof, a preliminary hearing may be held at the discretion of the commercial court judge.

(2) The preliminary hearing shall aim at achieving a discussion of the issues in the action, and the steps necessary to resolve them.

(3) Legal representative appearing at the hearing shall be required to study all the issues and the principal submissions of either side and also to be in a position to submit to the court appropriately and the court may direct that no further pleading is required.

(4) The court shall set time-limits for the hearing and once set time-limits shall be adhered to by the parties to the case and an extension shall only be granted in special circumstances.

(5) A commercial court judge shall at the preliminary hearing stage, deal with all interlocutory matters and make all necessary directions in respect thereof.

(6) A preliminary hearing shall be heard in chambers unless cir-

cumstances otherwise warrant.

Failure to comply with a court order

15. If a party fails to comply with a court order the judge may at his own discretion -

- (a) extent the deadline for compliance;
- (c) dismiss the claim or counterclaim in whole or in part;
or
- (c) award costs.

Appearance during commercial action

16. (1) The registrar shall, to the greatest extent possible, make arrangements to ensure that the same judge presides at all appearances at the commercial action brought before him.

(2) The parties to the action shall arrange for their legal representative or other authorised representative to be available and to appear at the court hearings.

(3) Non-observance of subrule (2) may result in the loss of the action incurring of costs by a party who failed to comply with subrule (2).

Expert summaries - preparation bundles - heads of argument

17. The principal rules are amended by inserting after rule 34 the following new rules -

“Preparation of expert summaries

- 34A. (1) A party to a commercial action involving expert evidence shall prepare, serve and file expert summaries with the registrar within seven days before trial or within such period as the judge may determine.

-
- (2) The expert summaries shall -
- (a) contain only those portions of expert's reports that reflect the opinions and reasons for such opinions; and
 - (b) be paginated and indexed;

Preparations of court bundles

- 34B. In all commercial actions, the following procedure shall be adopted with regard to the preparation of court bundles:
- (a) the plaintiff shall, in consultation with the defendant's attorney, prepare a court bundles;
 - (b) all documents included in a court bundle shall be fully legible and complete;
 - (c) a court bundle shall contain only documents strictly relevant to the issues to be dealt with in evidence and shall be separately paginated and indexed according to the issues;
 - (d) all documents in a court bundle shall be arranged in a chronological order;
 - (e) each court bundle shall contain an index which shall indicate the status of the documents and whether the documents have been admitted or are subject to proof;
 - (f) the status of the documents in a court bundle shall be agreed upon by the parties at the pre-trial conference; and
 - (g) where photocopying has been used, the party filing photocopies shall ensure that documents so filed are legible.

Heads of argument

- 34C. (1) The plaintiff in an action shall, prior to the date set for the hearing and at a time set by these rules, serve and deliver to the judge's clerk or designated judge, two copies of its heads of arguments, at least five days before the date.
- (2) The defendant shall in response to the plaintiff's heads of argument serve and deliver to the judge's clerk two copies of its heads of argument at least three days before the date.
- (3) In the instance of an interlocutory hearing, delivery of the heads of argument shall be three clear days before the date set for the hearing.
- (4) All heads of argument shall contain concise submissions on fact and on law.”.

PART VI – TRIAL**Trial**

18. (1) At the commencement of the trial, the designated judge shall rule on whether a statement by a witness shall stand as evidence-in-chief of such witness or whether the witness in question must give oral evidence in the usual way.
- (2) The designated judge shall, after hearing the parties, make a ruling in regard to the further conduct of the case and shall, in particular, rule on what preliminary requirements have to be complied with before the matter may be set down for trial.
- (3) A ruling given at the pre-trial conference may, on good cause shown, be varied by the presiding judge at a subsequent hearing.
- (4) Where a party fails to comply within ten days with an order in terms of this rule, a party requiring compliance may notify the defaulting party

that he intends to apply to court for an order that the order in question be complied with or that the claim or defence, as the case may be, be struck out and the court may make an appropriate order including costs.

(5) Where it appears to the designated judge that failure to comply with a ruling of the court at the pre-trial conference is imputable to counsel or attorney and where the designated judge is of the opinion that that failure is either reprehensible or merits censure, the judge may order such counsel or attorney to pay costs on his own after due notice.”

Pre-trial conference

19. Rule 36 of the High Court 1980 is amended by inserting after subrule (7) the following new subrules:

“(8) The designated judge shall preside at the pre-trial conference and supervise the pre-trial to ensure, through such appropriate directions as he may think necessary, compliance of the rule by the litigants and in particular to ensure expeditious and fair disposal of the action.

(9) In complying with rule 19(8), the parties shall obtain the date of the hearing of the pre-trial conference from the designated judge in consultation with the registrar.

(10) The plaintiff shall file a notice of set down of the pre-trial conference and serve a copy of the notice to the defendant.

(11) Unless otherwise directed by the allocated judge, the pre-trial conference shall be held in open court.

(12) Parties may be represented by counsel or the attorneys retained for the trial at the pre-trial conference.

(13) The parties shall exchange and file statements of witnesses not less than seven days before the holding of the pre-trial conference.

(14) A statement of a witness shall -

(a) represent the material evidence of the witness and shall

not contain irrelevant or inadmissible evidence;

- (b) be expressed in the words of the witness; and
- (c) be signed by the witness.

(15) It shall be the duty of the designated judge at the pre-trial conference to assist the parties in arriving at an amicable settlement of their dispute whenever possible.

(16) A party who has turned down a reasonable offer of settlement which is substantially upheld by the judge at the trial, shall be liable to pay costs on such scale as the presiding judge may think necessary.”

Repeal

20. The High Court (Amendment) Rules 2000⁴, the High Court (Amendment) Rules 2003⁵ and the High Court (commercial division) Rules 2009⁶, are repealed.

DATED:.

**MAHAPELA LEBOHANG LEHOHLA
CHIEF JUSTICE OF LESOTHO**

NOTE

- 1. High Court Act 1978
- 2. High Court Rules 1980
- 3. Act No. 18 of 2011
- 4. L.N. No. 24 of 2000
- 5. L.N. No. 30 of 2003
- 6. L.N. No. 91 of 2009