

MEDIATION AS A MECHANISM FOR DISPUTE RESOLUTION

A GUIDE ON WHAT DIRECTORS NEED TO KNOW IN
RELATION TO MEDIATION AND
THE FUTURE OF DISPUTE RESOLUTION

**2 CPD
points**

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CONTENTS

INTRODUCTION 4

MANDATORY MEDIATION PROTOCOL FOR GAUTENG 4

A SIGN FROM THE COURTS..... 5

WHY MEDIATION MATTERS FOR ORGANISATIONS AND DIRECTORS 5

MEDIATION AND GOOD GOVERNANCE 6

THE MEDIATION PROCESS 7

WHAT BUSINESSES SHOULD EXPECT 8

THE ROLE OF MEDIATORS AND LEGAL ADVISORS 8

CONCLUSION 9

INTRODUCTION

Disputes with third parties and disputes between shareholders and/or directors are an inevitable part of doing business for any organisation. Contracts fail, commercial relationships deteriorate, and regulatory disagreements arise. The real question for boards is not whether conflict will arise, but how it will be managed. Handled poorly, disputes can drain time, increase costs, damage relationships and distract leadership from the business. Handled well, they can create space for clarity, better decisions and practical resolution.

South Africa's civil justice system is also changing. Since 2020, parties in civil litigation have been required to consider mediation before proceeding to trial. In April 2025, the Gauteng Division of the High Court went further, introducing a mandatory mediation protocol through a directive signed by Judge President Mlambo. This development is particularly significant given that approximately 60% of South Africa's civil litigation occurs in Gauteng, where the High Courts in Johannesburg and Pretoria sit.

MANDATORY MEDIATION PROTOCOL FOR GAUTENG

Under the **Gauteng mediation protocol**¹, parties to civil action proceedings must attempt to resolve their dispute in mediation before applying for a trial hearing date. This *"includes but is not limited to commercial disputes, delictual claims, and personal injury claims"*. Parties must either file at court a mediator's report confirming that mediation has taken place or formally explain why mediation would be inappropriate.

This mandatory requirement does not apply to application proceedings unless they are referred to oral evidence. In other words, matters determined solely on affidavits following the hearing of legal argument are not automatically subject to the protocol, although parties may still agree to mediate them.

For clarity, the main differences between civil action proceedings that usually lead to trial hearings, and application proceedings, where matters are generally decided on affidavits and legal arguments are set out below²:

	Facts	Institution	Evidence	Cost and Duration
Action Proceedings	Material disputes in facts	Issuing of simple summons or combined summons and particulars of claims	Presented verbally in court trial	Proceedings may be concluded several years after initiated and are more time consuming and costly
Application Proceedings (without a referral to oral evidence)	No material disputes in facts	On notice of motion supported by affidavits	Presented on affidavits that the presiding officer will read before hearing arguments on issues in court	Proceedings may be concluded several months after initiated and are generally less time consuming and costly

¹ Mediation protocol applicable in the Gauteng division of the High Court, April 2025 (as amended), Amendments-to-the-Revised-Directive-Introducing-Mandatory-Mediation-in-the-Gauteng-Division-and-to-the-Mediation-Protocol1.pdf

² Mkwibiso "Which road to choose Action or Application" 2013 *De Rebus*:
<https://www.saflii.org/za/journals/DEREBUS/2013/83.pdf>

The Gauteng mediation protocol responds to severe delays in the court system. In some instances, civil trial dates have been allocated as far ahead as six years into the future, largely due to capacity constraints. Given that the majority of South Africa's civil litigation takes place in Gauteng, the need for reform has been particularly acute.

Importantly, the Gauteng mediation protocol does not force parties to settle disputes outside of court. Rather, it requires them to participate meaningfully in the mediation process with a genuine attempt to resolve the dispute. The obligation lies in attempting mediation as a means to resolve disputes, not necessarily in reaching agreement.

While the Gauteng mediation protocol currently applies only in Gauteng, other divisions of the High Court are implementing similar protocols or observing its implementation closely. It is widely anticipated that mediation will increasingly become a standard stage in the civil trial litigation process nationally.

A SIGN FROM THE COURTS

Recent case law confirms how seriously courts are treating this development.

In *Adidas International Trading AG v SARS*³, the court rejected Adidas' attempt to move a R1.9 billion tax dispute out of Gauteng in order to avoid the mandatory mediation requirement. The judgment made it clear that even complex, high-value disputes remain subject to the mediation framework.

For businesses operating in Gauteng and increasingly across South Africa, this sends a clear signal: mediation is now an integral part of trial litigation strategy.

WHY MEDIATION MATTERS FOR ORGANISATIONS AND DIRECTORS

For directors and executives, disputes are not simply legal matters. They represent strategic risks that can affect financial performance, operational continuity and reputation. Traditional litigation can take years to resolve and often entrenches adversarial positions. Legal costs escalate, relationships deteriorate and the outcome is ultimately imposed by a judge or arbitrator.

Mediation offers a different approach.

In mediation, a neutral third party (the mediator) assists the disputing parties in negotiating a mutually acceptable resolution. The mediator does not impose a decision. Instead, the process focuses on enabling dialogue and helping the parties explore solutions that meet their underlying interests.

Offers made during mediation are on a without-prejudice basis. This means that they must not be filed with the registrar or disclosed to court before judgment. This allows parties to explore settlement options openly, without compromising their position if mediation fails and the matter proceeds to litigation.

³ *Adidas International Trading AG (Switzerland) and Another v Commissioner for the South African Revenue Service* (28878/2019) [2025] ZAGPPHC 1392 (11 December 2025)

Mediation therefore offers several practical advantages for businesses:

- Speed and cost efficiency – mediation can resolve disputes far more quickly than litigation. Court proceedings often require extensive input over several years from senior management and other employees, which is time that can be better spent on revenue generating and other, more productive, business activities.
- Confidentiality and privilege – as mentioned above, mediation discussions are private and protected from disclosure in later litigation. This helps protect commercially sensitive information and allows parties to speak freely and test possible solutions.
- Preservation of relationships – because mediation is less adversarial than litigation, it can help parties find solutions that may allow commercial relationships to continue.
- Flexibility – parties can agree to solutions that go beyond what a court could order. Provided the outcome is lawful, they can agree practical commercial solutions that meet their needs. Even where mediation does not result in a full settlement, it can significantly narrow the issues in dispute, saving time and cost later in the litigation process.

MEDIATION AND GOOD GOVERNANCE

The growing emphasis on mediation also aligns closely with corporate governance principles.

The King V Code on Corporate Governance⁴ (King V) emphasises the importance of maintaining constructive stakeholder relationships and addressing stakeholder concerns proactively. Principle 13, recommended practice 135(c) specifically refers to “the use of dispute resolution mechanisms and associated processes to preserve relationships where possible”, while recommended practice 139 highlights the importance of “proactive and constructive engagement with shareholders” and other stakeholders.

Viewed through this governance lens, mediation becomes more than a procedural step in litigation. It is a practical tool that enables organisations to:

- Manage conflict constructively,
- Engage stakeholders effectively,
- Protect organisational reputation, and
- Support long-term value creation.

Where conflicts involve differing values, interests or expectations; as many commercial disputes do, mediation provides a structured environment for dialogue. By allowing competing perspectives to be heard and explored, mediation can unlock creative solutions that traditional litigation rarely produces. In this way, conflict, when managed well, can become a source of innovation, reflection and learning, rather than merely a problem to be suppressed

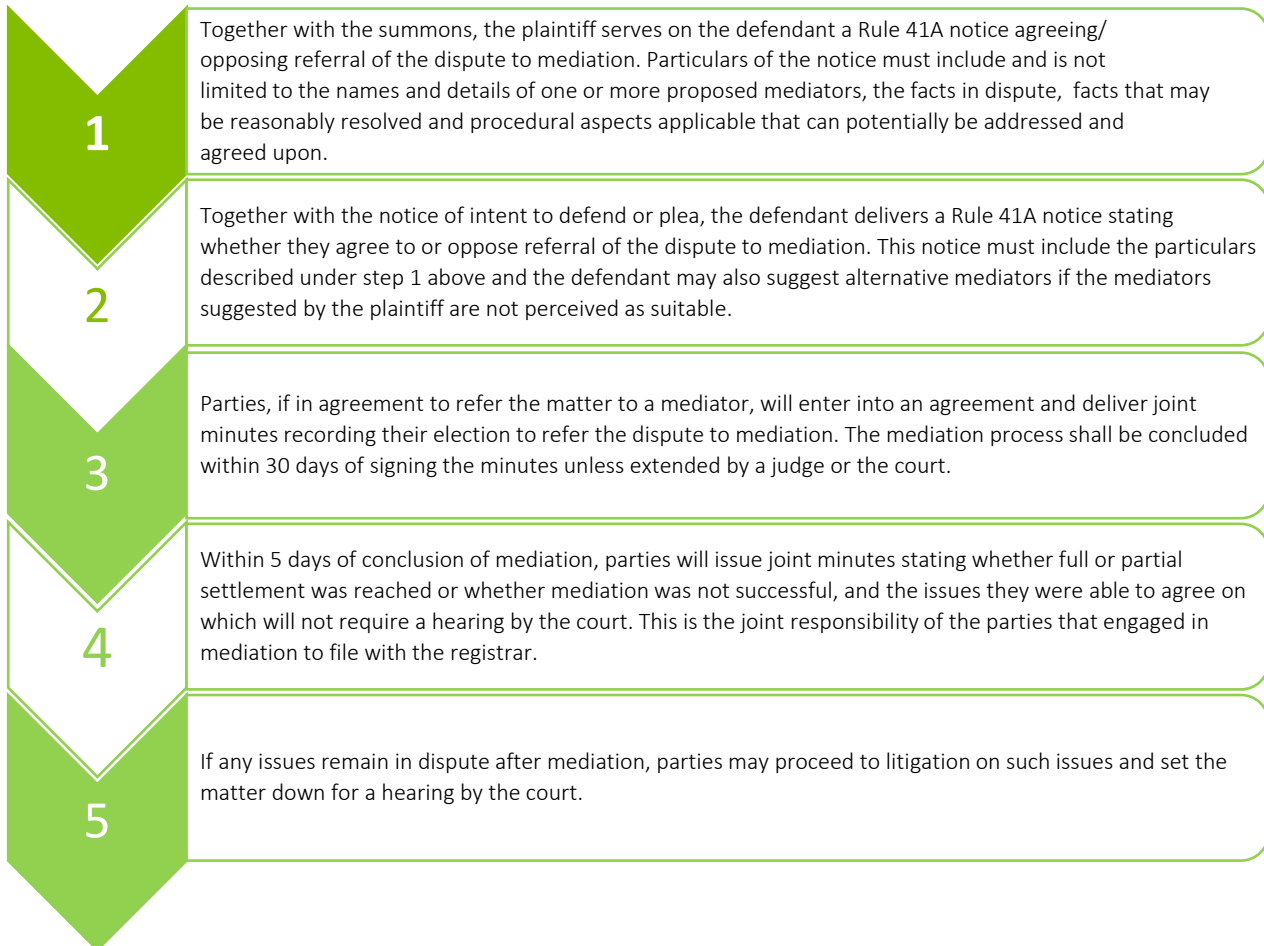
Businesses should therefore ensure that mediation is integrated into their broader risk management and litigation strategies, rather than viewed as a box-ticking exercise. A practical way to embed this approach is to include mediation as the first formal step in dispute resolution clauses in all commercial agreements.

⁴ King V Code on Corporate Governance for South Africa, 2025

THE MEDIATION PROCESS

Rule 41A⁵ of the Uniform Rules of Court sets out the process parties must follow to comply with the mediation requirement. In the Gauteng Division, Rule 41A must be read together with the Gauteng mediation protocol and any amendments⁶ to it. It is prudent to note that the process may differ between court divisions.

A summary of the process to be followed once the case is instituted is the following:



The mediator's fees are borne equally by participating parties unless otherwise agreed.

⁵ <https://www.saflii.org/images/superiorcourts/Uniform%20Rules%20of%20Court%20%5BF%5D.pdf>

⁶ [Amendments-to-the-Revised-Directive-Introducing-Mandatory-Mediation-in-the-Gauteng-Division-and-to-the-Mediation-Protocol1.pdf](#)

WHAT BUSINESSES SHOULD EXPECT

Although in its early stages, the Gauteng mediation protocol represents a significant structural reform in how civil disputes are handled. For organisations, the protocol has the following practical implications:

1. Mediation now introduces an additional stage in the trial litigation process. This requires careful planning as part of overall dispute strategy.
2. Mediation involves upfront costs, as the mediator's fees must be paid by both the parties (unless otherwise agreed). While these costs are often modest compared with prolonged litigation, organisations must budget for them.

The effectiveness of mediation depends heavily on how the parties approach the process. If mediation is treated merely as a procedural hurdle or tick-box exercise, its benefits are unlikely to be realised. When approached constructively, however, mediation frequently produces significant value, either through settlement or by clarifying the issues in dispute.

THE ROLE OF MEDIATORS AND LEGAL ADVISORS

The success of mediation depends largely on the quality of the process and the people involved.

A mediator must remain independent and impartial. Their role is not to decide the dispute, but to help the parties have a constructive conversation, understand each other's interests, reality-test proposals, and identify potential pathways to resolution.

Legal advisors also play an important role. They assist clients in assessing the legal and commercial risks of the dispute, evaluating settlement options and understanding the likely alternatives if the matter does not settle.

The mediation profession in South Africa is not yet governed by dedicated legislation. For this reason, it is important for parties to select mediators who are properly trained and accredited through recognised mediation organisations. A list of recognised mediation organisations for the purpose of the Gauteng mediation directive and protocol is available on Annexure A below.

This is particularly important in matters subject to the Gauteng mediation protocol. If the mediator does not meet the protocol's requirements, the mediator's report may not be sufficient for purposes of obtaining a trial date.

The Gauteng mediation protocol lists the minimum requirements for a mediator to be approved as a qualified mediator for court annexed mediation. These requirements are listed in Annexure A of the [protocol](#)⁷.

⁷ [Mediation protocol applicable in the Gauteng division of the High Court](#), April 2025- Annexure A

CONCLUSION

South Africa has historically operated within a highly adversarial litigation culture. The Gauteng mediation protocol represents an important shift towards a more collaborative model of dispute resolution.

While the implementation process may involve a period of adjustment, the direction of travel is clear. Mediation is increasingly becoming a core component of modern dispute resolution.

For directors and executives, this development presents an opportunity. By embracing mediation not merely as a procedural requirement but as a strategic tool, organisations can resolve disputes more efficiently, preserve valuable relationships, and manage legal and reputational risks more effectively.

In a complex and rapidly changing business environment, the ability to manage conflict constructively may prove to be one of the most valuable organisational capabilities of all.

Annexure A

LIST OF RECOGNISED MEDIATION ORGANISATIONS (RMO'S) FOR PURPOSES OF THE GAUTENG MEDIATION DIRECTIVE AND PROTOCOL

Recognised Mediations Organisations (RMOs) approved for purposed of the Gauteng Mediation Directive and Protocol as at 3 August 2026:

No.	NAME OF RMO	CONTACT INFORMATION	AFFILIATION BODIES
1.	ADR International Register	- +31 88 0038 777 - info@adr-register.com - www.adr-register.com	ADRP-SA
2.	ADR Network SA	- sheena@adr-networksa.co.za - www.adr-networksa.co.za	ADRP-SA
3.	Arbitration Foundation of Southern Africa NPC (AFSA)	- 011 320 0600 / 011 320 0533 - info@arbitration.co.za - www.arbitration.co.za	University of Pretoria
4.	Association of Arbitrators (Southern Africa) NPC	-011-884-9164 - rochelle@arbitrators.co.za - www.arbitrators.co.za	The Society of Mediator* The Chartered Institute of Arbitrators
5.	Conflict Dynamics	- 010 036 3700 - craig@conflictdynamics.co.za - www.conflictdynamics.co.za	DiSAC ADRP-SA CEDR IMI
6.	Fiar Practice Mediation and Negotiation Consultancy (Pty) Ltd	- info@fairpractice.co.za - www.fairpractice.co.za	SABPP
7.	Family Mediators' Association of the Cape (FAMAC)	- 021-801-6176 - info@famac.co.za - www.famac.co.za	NABFAM ADRP-SA
8.	KwaZulu-Natal Society of Mediators	- 073 255 9650 - admin@kznmediation.com - www.kznmediation.com	NABFAM ADRP-SA
9.	Mediation in Motion Mediators NPO (MiMM)	- 079 626 0802 - info@mimmmediators.co.za - www.mimmmediators.co.za	DiSAC ADRP-SA

10.	Mediation Pan African	-082 897 6556 -www.mediationpanafrican.com	DiSAC ADRP-SA
11.	Mediation Society of South Africa (MSSA)	- 079 640 0180 - admin@mssa.org.za - www.mssa.org.za/mediators	University of the Orange Free State
12.	Royal Institute of Chartered Surveyors (RICS)	- +44(0)20 7334 3806 - contactrics@rics.org - www.rics.org/dispute-resolution-service	DiSAC ADRP-SA
13.	Social Justice ssociation (SJA)	- 064 800 3975 - info@socialjustice.co.za - www.socialjustice.co.za	NABFAM ADRP-SA
14.	South African Association of Mediators (SAAM)	- 081 071 7000 - info@saam.org.za - www.saam.org.za	NABFAM ADRP-SA
15.	South African Medico- Legal Association	082 839 5466 - info@samla.org.za - www.medicolegal.org.za	ADRP-SA
16.	Tokiso Dispute Settlement (Pty) Ltd (Tokiso)	- 011 853 6300 - info@tokiso.com - www.tokiso.co.za	DiSAC ADRP-SA

Affiliation Bodies

The websites of the affiliated bodies listed in the table above are provided below:

- ADRP-SA is a Mediation Standards body in South Africa: <https://www.adrp-sa.co.za/>
- CEDR is the Centre for effective Dispute Resolution: <https://www.cedr.com/>
- DISAC is a Mediation and Arbitration Standards Body in South Africa: <http://disac.co.za/>
- IMI is International Mediation Institute: <https://imimmediation.org/>
- NABFAM is a national accreditation body for Family Mediation: <https://nabfam.co.za/>

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