Dispute Resolution

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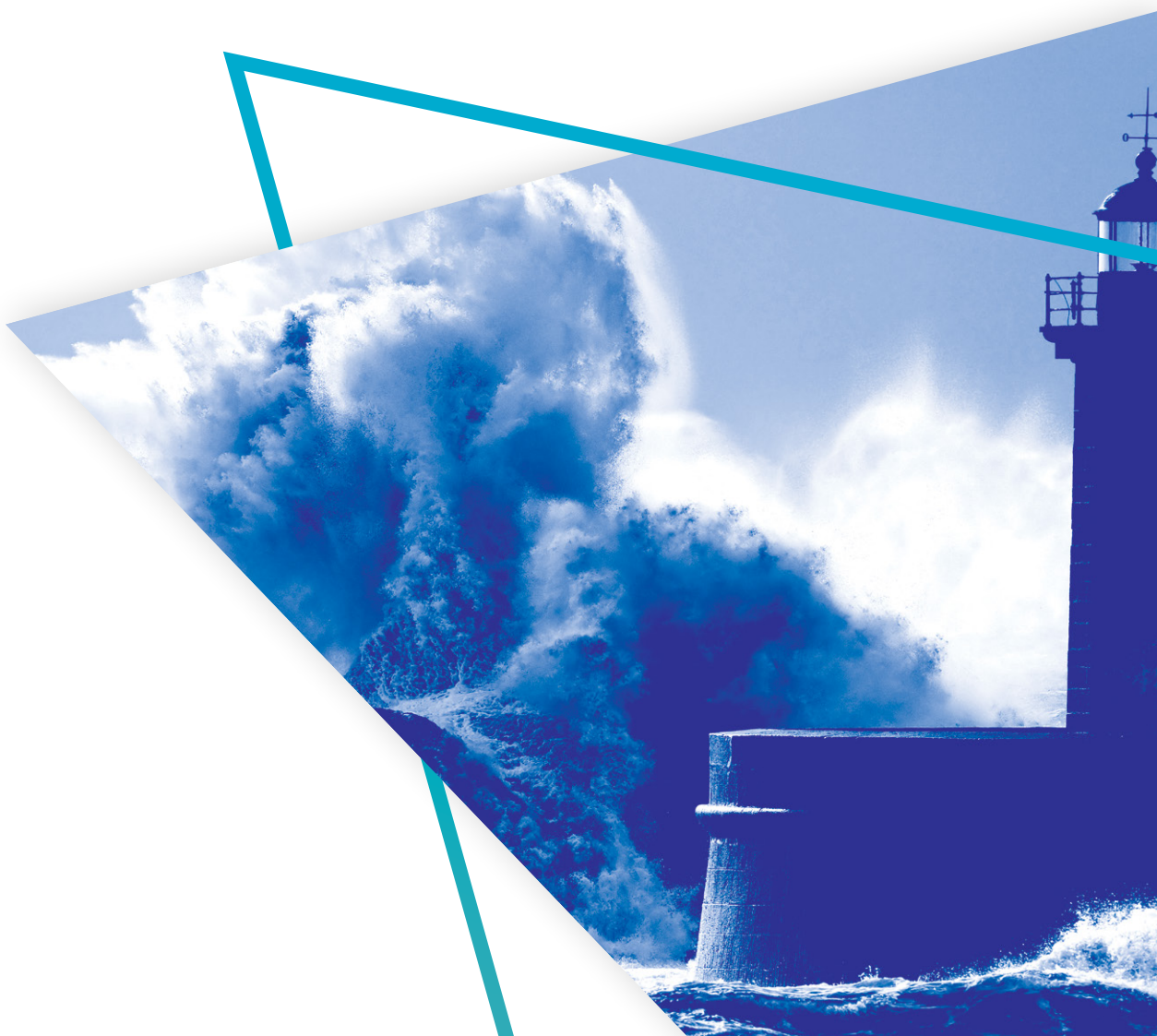
In this issue

SOUTH AFRICA

From trial to table: Mediation becomes front and centre in Gauteng



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DISPUTE RESOLUTION ALERT

From trial to table: Mediation becomes front and centre in Gauteng

The Judge President of the Gauteng Division of the High Court of South Africa has now formally introduced obligatory mediation for civil matters, effective 22 April 2025. To understand the rationale behind this move, it is necessary to assess the appropriateness of the decision and anticipate its impact on the litigation landscape.

Addressing a system under pressure

The directive outlines compelling reasons justifying the introduction of compulsory mediation. Foremost among these is the unmanageable caseload burdening the Gauteng Division. The directive highlights the alarming fact that civil trial dates are currently being issued as far ahead as 2031. This unprecedented delay is deemed "*self-evidently unacceptable and intolerable*", directly undermining the constitutional right of access to courts guaranteed in section 34 of the Constitution.

The Judge President stated that it would be "*irresponsible*" to ignore this situation and not seek appropriate solutions. The core objective of the directive is therefore to ensure access to justice and the courts and to provide an effective litigation service within reasonable timelines. The directive explicitly aims to ensure that cases genuinely requiring judicial intervention are heard timeously, while matters capable of resolution through alternative dispute resolution (ADR) methods, particularly mediation, do not contribute to the court backlog.

In a discussion with the legal fraternity on 12 April 2025, the Judge President highlighted that justice is not served if parties are only getting to courts over seven years after they have initiated proceedings, especially in Road Accident Fund (RAF) and third-party cases where affected parties are heavily reliant on being awarded damages to continue living their lives in a dignified manner.

The directive also notes that a significant proportion of cases on the civil court roll are settled on the morning of the trial, often after parties have waited years for a hearing date. This statistic shows that many disputes could potentially be resolved earlier through mediation. The Judge President views the diversion of such cases through obligatory mediation as an appropriate method to streamline court processes, ensuring that only cases genuinely requiring judicial resolution proceed to trial.

Furthermore, the directive draws support for obligatory mediation from the intrinsic common sense of the mediation process, the Report of the Law Reform Commission and its Draft Mediation Bill, and the demonstrated success of obligatory mediation in other jurisdictions. This policy shift is seen as a progressive development to safeguard the courts' capacity to adjudicate cases that truly require it.

Is compulsory mediation an appropriate response?

Given the dire state of the civil court rolls in the Gauteng Division, the implementation of measures to alleviate the backlog is undoubtedly necessary. Compulsory mediation, in principle, offers a potentially effective mechanism for early dispute resolution. By mandating mediation, the directive aims to encourage parties to engage in meaningful settlement negotiations before resorting to protracted and costly litigation.

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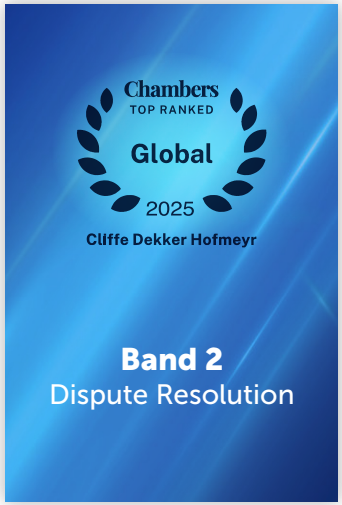


However, the appropriateness of this response hinges on several factors. The success of compulsory mediation will depend heavily on the availability of qualified and effective mediators and the willingness of parties to engage constructively in the process. Simply mandating mediation without ensuring these elements are in place might not yield the desired results and could add an additional layer of cost and delay if mediation fails.

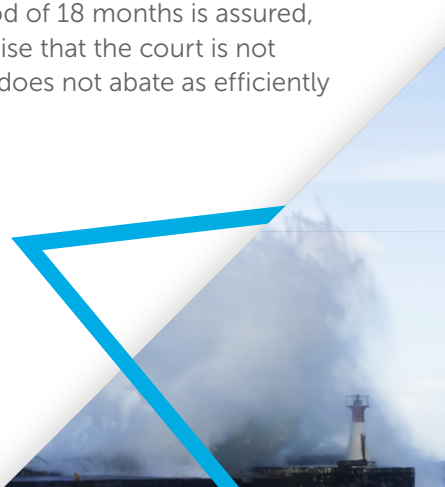
The mediation protocol accompanying the directive seeks to circumvent a mere tick-box exercise through the publication of a mediation report which may include whether the mediator considers one or both of the parties to have unreasonably failed to participate and engage in the mediation in good faith, or unreasonably failed to attempt to revolve the issue(s) in dispute. While this is an admirable attempt to make sure parties properly engage with the mediation process, it places a high burden on the mediator and also has the potential to circumvent what the directive is trying to achieve in that it could lead to a barrage of review applications scrutinising the mediator's report. It will be difficult for a mediator to defend their decision without breaching their obligation to keep the content of the **without prejudice** proceedings **confidential**. Only time will tell how the protocol, on this and other levels, will be tested.

Moreover, while the high settlement rate on the eve of trial suggests that many cases could have been resolved earlier, it is important to acknowledge that the threat of trial and the advanced stage of preparation often play a significant role in facilitating those settlements. It remains to be seen whether mandatory early mediation will achieve the same level of success in all types of disputes.

The impact on litigation and clients

The introduction of compulsory mediation will have an impact on both the litigation process and clients:

- **Potential for earlier resolution:** The primary aim is to facilitate earlier resolution of disputes, potentially saving clients significant time, legal costs, and emotional distress associated with lengthy litigation.
- **Increased upfront costs:** Clients will now need to factor in the costs associated with mediation, in addition to potential legal fees incurred in preparing for and participating in the mediation process.
- **Shift in litigation strategy:** Legal practitioners will need to adapt their strategies for mediation.
- **Impact on trial dates:** For cases set down after specific dates (1 January 2027), existing civil trial dates are cancelled, necessitating engagement in mediation before a new trial date can be requested. Although the existing dates may be some time in the future, at least the parties had a trial date they were working towards. The new directive creates uncertainty and there is no guarantee that an earlier date will be obtained in the event that the compulsory mediation proves unsuccessful. A waiting period of 18 months is assured, however, this may be a promise that the court is not able to keep if the case load does not abate as efficiently as hoped.



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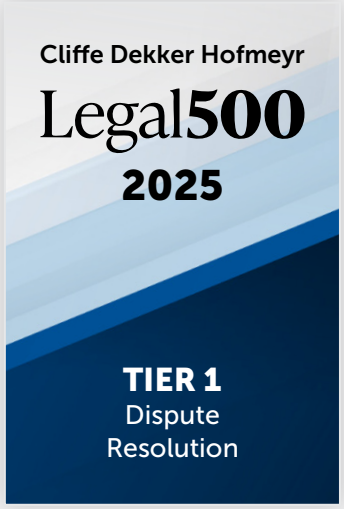

Understanding the three different procedures

The directive outlines distinct procedures depending on the type of case and the timeframe:

For all categories of litigation from 1 January 2027

- No trial date will be issued unless the request is accompanied by a mediator's report. So, for any new civil matters that clients wish to pursue after this date, they will first be required to undergo mediation and obtain a report from the mediator before a trial date can even be requested.
- Furthermore, no trial date exceeding 18 months from the date of the request will be allocated.

Transitional period for cases against the RAF in 2025–2026

- Trial dates allocated in Term 2 of 2025 remain intact.
- For trial dates allocated in Terms 3 and 4 of 2025, these dates provisionally remain on the roll. However, to ensure the case is heard, a mediator's report must be presented to the court with the civil trial practice note, seven court days before the trial date. Failure to do so will result in the case being struck from the roll with no costs order.
- All trial dates issued to cases against the RAF from 1 January 2026 have been cancelled. Clients with such dates will need to seek a fresh set-down date, which must be accompanied by a mediator's report.

Transitional period for all cases other than with the RAF in 2025–2026

- All trial dates set down in 2025 remain intact.
- For all matters with trial dates allocated in 2026, these dates provisionally remain on the roll. However, a mediator's report must be presented to the civil trial registrar 30 court days before the trial date to ensure the case is heard. Failure to do so will result in the case being struck from the roll with no costs order.
- All trial dates issued to cases from 1 January 2027 have been cancelled. Similar to new RAF matters after this date, clients will need to seek a fresh set-down date accompanied by a mediator's report, which must be filed between 30 and 15 court days before the trial date.

From trial to table: Mediation becomes front and centre in Gauteng

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Conclusion

The introduction of compulsory mediation in the Gauteng Division represents a bold attempt by the Judge President to address the critical challenges facing the civil justice system. While the rationale for this directive is understandable, and the potential benefits of early dispute resolution are significant, its successful implementation will require proper buy-in from the legal fraternity and its clients, and careful consideration of the practicalities and resources needed to support an effective mediation process. It must also be remembered that this is not a completely radical approach, as it has worked successfully in other jurisdictions (including various African jurisdictions) and, if embraced properly, should achieve the result it sets out to. Legal practitioners must proactively guide their clients through these new procedures, ensuring they understand the implications and are well-prepared to engage in mediation as a crucial step in the pursuit of justice.

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