

FAQ's

CIVIL AND COMMERCIAL MEDIATION



**CONFLICT
DYNAMICS**

TRAINING
& DISPUTE
RESOLUTION
SERVICES

FAQ QUESTIONS

When considering mediation of a civil or commercial claim parties and their lawyers typically ask a range of crucial questions to assess the suitability of their case for mediation and to prepare effectively. These questions often revolve around the process, costs, enforceability, and strategic implications.

I. Decision to mediate (suitability, costs, and requirements)

Question	Answer
1. Are there any mandatory mediation requirements or incentives that apply?	Yes, there are increasingly mandatory mediation requirements and incentives: • Uniform Rule 41A of the High Court Rules, introduced in March 2020, encourages parties to consider mediation before proceeding to trial. Parties are required to indicate whether they agree to mediation and, if not, provide reasons. • Significantly, the Gauteng Division of the High Court has made mediation mandatory for most civil matters, effective 22 April 2025. This directive requires parties to engage in mediation before a trial date will be granted. Failure to comply can result in cases being struck from the roll, punitive cost orders, or referral to the Legal Practice Council. • Other High Courts in South Africa are increasingly strongly encouraging mediation. • The Road Accident Fund (RAF), in particular, is subject to specific mandatory mediation requirements under the new Gauteng directive, with the RAF contributing up to R15,000 per mediation. • In January 2025 the Legal Reform Commission published a Mediation Bill that aims to further entrench mediation in the civil justice system. These developments clearly indicate a strong push by the South African judiciary towards promoting mediation as a primary dispute resolution mechanism.
2. Is the dispute suitable for mediation, or are there	Most civil and commercial disputes are suitable for mediation, provided there is a willingness from all parties to negotiate and compromise. This includes property disputes, contract

Question	Answer
fundamental issues that make it unlikely to settle?	disagreements, landlord-tenant issues, commercial disagreements, personal injury and family disputes. However, mediation might be less suitable if: • A party is genuinely unwilling to engage or negotiate in good faith. • The dispute requires a legal precedent to be set, which a court ruling can provide but mediation cannot. • There's a significant power imbalance between the parties that the mediator cannot adequately address. • The dispute primarily involves complex legal questions that require judicial interpretation rather than factual compromise.
3. What is the likely success rate of mediation?	While South African mediation statistics are not yet consistently published, international data, such as the 2025 CEDR Mediation Audit (often referenced in South Africa), suggests that the overall success rate of mediation is very high, with an aggregate settlement rate of 87%. This indicates a strong likelihood of settlement, either on the day of mediation (around 72%) or shortly thereafter. However, it's important to note that complex, high-stakes, multi-party disputes might have slightly lower on-the-day settlement rates. The success depends heavily on the parties' willingness to engage in good faith and compromise.
4. What are the estimated costs of mediation compared to litigation?	Mediation is generally significantly more cost-effective and efficient than litigation. Litigation can incur substantial costs, including legal fees (hourly rates, fixed fees, or contingency fees), expert witness fees, sheriff's fees, travel, accommodation, and transcript costs. A "simple" High Court matter can cost hundreds of thousands of rands. Mediation costs typically involve: • Mediator fees: These vary depending on the mediator's experience, the complexity of the case, and the duration of the mediation. They are usually shared equally between the parties unless otherwise agreed. The Road Accident Fund (RAF) currently pays up to R15 000 for their share of a mediation (no matter how long the mediation takes) and the plaintiff, who pays the full amount upfront, can claim the RAF's R15 000 contribution back during their taxation.

Question	Answer
	• Legal fees: For preparing for and attending mediation. While still incurring legal costs, these are generally much lower than for preparing and conducting a full trial. Legal fees will, of course end, if the matter is settled. Successful mediation can resolve disputes in weeks or even days, whereas litigation can take years.
5. What steps can I or my legal representative take if I want to mediate a matter but, the other party is uncooperative or unresponsive?	If a party is uncooperative or deemed a "delinquent party": • Initial compliance: your legal representative must first ensure proper compliance with uniform Rule 41a by serving the required notice. • Compelling order: under the Gauteng protocol, the aggrieved party can apply to the court (or the designated mediation judge/umpire) for a compelling order to force the uncooperative party to participate. • Adverse cost orders: the mediator is mandated to report to the court if a party unreasonably failed to participate or engage in good faith. This report can lead to the court issuing punitive cost orders against the uncooperative party or their legal representative being referred to the legal practice council.

II. Appointment and Preparation of the Mediator

Question	Answer
6. What are the qualifications and experience of potential mediators, and how will one be selected?	In South Africa, mediators are typically trained professionals who have undergone specialized mediation training. To conduct mediations under the new court-annexed mediation system (especially in Gauteng, effective April 2025), mediators must: • Be certified by a Recognised Mediation Organisation (RMO), such as Conflict Dynamics • Have completed at least 40 hours of accredited training. and have been found to be competent during this training Mediator selection usually involves the parties agreeing on a mediator from a panel provided by an RMO or chosen independently. The court's Umpire, the Mediation Judge, or a person delegated by the Mediation

Question	Answer
	Judge, can also assist in selecting a mediator from an accredited panel. Parties often consider the mediator's experience in the specific subject matter of the dispute.
7. What is the benefit of using an RMO to administer the mediation process rather than approaching a mediator directly?	An RMO (Recognised Mediation Organisation), such as Conflict Dynamics, provides a crucial framework of accountability and structure: • Quality and vetting: RMOs are responsible for assessing, verifying, and supervising their member mediators to ensure they meet the stringent standards set in the Protocol, such as having completed at least 40 hours of accredited training. • Standardisation: They administer the mediation according to professional rules ensuring a smooth and structured process that complies with the Protocol. • Dispute resolution: In the event the parties cannot agree on a mediator, the RMO can provide a list of qualified alternatives, or the matter can be referred to the court's Umpire (Mediation Judge) for selection. • Compliance documentation: They assist in ensuring all necessary documentation, particularly the Mediator's Report (or certificate), complies with the Directive for court filing. • Mediator conduct: RMOs are required to have complaints and disciplinary procedures for the management of mediator performance and conduct. • Continuous professional development: RMOs are required to provide regular professional development opportunities for their mediators to ensure that the mediators develop beyond their basic training and for reflective learning purposes.
8. Can mediation take place online?	Yes, mediation can and frequently does take place online. Virtual mediation, typically using platforms like Zoom or Microsoft Teams, is widely accepted and offers benefits such as greater flexibility, convenience, and reduced travel costs for all parties and their legal teams.
9. Who should attend the mediation process?	The following individuals should attend the mediation session?: • The parties to the dispute: the litigant(s) themselves. • Legal representatives: the parties' legal teams should ideally be present to provide advice and assist in negotiations.

Question	Answer
	• Settlement authority: a person with full authority to settle (the proper mandate) must be present for each party. For corporate or institutional clients (like the Road Accident Fund), this is a senior representative with the power to sign a final agreement without external consultation. • The mediator: the neutral third-party facilitator. • Experts: experts (e.g., medical or financial) may attend for specific issues if agreed upon by all parties.
10. What does it mean to have 'a proper mandate to mediate and/or authority to settle', and why is this required in the Protocol?	This is a critical requirement in the Gauteng Protocol because: • It ensures the process is efficient and meaningful (not a "tick-box exercise"). • It prevents wasted time and costs by eliminating the need for adjournments to obtain sign-off. • It ensures the core purpose of mediation—dispute resolution—can be achieved on the day.
11. What information does the mediator need before the mediation?	The mediator needs sufficient information to understand the dispute and prepare for the session: • Agreement to Mediate: the signed agreement detailing the process rules and confidentiality. • Mediation Statement (Position Paper): a document prepared by each party (often confidential) outlining their positions, legal issues, evidence, and settlement goals. • Key pleadings/documents: core legal documents (e.g., summons, plea, expert reports) to define the legal and factual dispute. • Mandate confirmation: assurance that the individuals attending have the proper mandate to settle.

III. The Mediation Process and Conclusion

Question	Answer
12. What is the role of lawyers during the mediation process, and how should they prepare?	Lawyers play a crucial role in mediation. Their responsibilities include: • Advising clients about the mediation process, their legal rights, and the potential outcomes. • Preparing clients for the mediation session, including discussing their interests, goals, and negotiation strategies. • Drafting the agreement to mediate and preparing a mediation statement (often a confidential position paper). • Attending the mediation with their clients to provide legal advice, speak on behalf of the client (if agreed), and assist in explaining positions. • Facilitating the exchange of information and opinions on facts, evidence, and law. • Assessing litigation risk and advising on the best alternative to a negotiated agreement (BATNA) and worst alternative (WATNA). • Drafting the final settlement agreement at the conclusion of a successful mediation, ensuring it is legally sound and accurately reflects the parties' understanding. Lawyers need to adopt a different advocacy style in mediation, focusing on problem-solving and collaboration rather than adversarial tactics.
13. Will the mediation process and any discussions remain confidential?	Yes, confidentiality is a cornerstone of mediation. Mediation proceedings are generally confidential, cannot be recorded, and nothing said or offered during mediation can be used in subsequent court proceedings if the mediation fails. This "without prejudice" principle encourages open communication and candid discussions without fear of prejudicing one's legal position later. Most Agreements to Mediate and mediation rules explicitly enforce this confidentiality, unless parties expressly agree otherwise.
14. How long will the mediation process take, and what is the typical timeline?	Mediation is designed for speedy resolution. Most mediations last a day, although considering preparation, scheduling, conducting the mediation and follow-up the total time taken might be a few a few days or weeks. This is a significant advantage over litigation, where cases can drag on for several years.

Question	Answer
	With the recent Gauteng High Court directive (effective April 22, 2025) making mediation mandatory for civil and commercial matters, there are now stricter timelines. Parties are expected to conclude mediation within 30 days once a mediator is agreed upon.
15. What happens if the mediation fails? Are there any negative consequences or prejudices to a litigation position?	If mediation fails, the matter proceeds to litigation (court or arbitration). Critically, there are generally no negative consequences or prejudices to a party's litigation position as a result of a failed mediation. • The "without prejudice" principle ensures that discussions, admissions, or offers made during mediation cannot be used against a party in subsequent court proceedings. • The court proceeding will start "from scratch" and will not begin from where the mediation left off. • The mediator will simply inform the court that mediation has failed, without disclosing the reasons or details of the discussions. However, under recent directives (like the Gauteng High Court's), failure to participate in mandatory mediation without valid reason could lead to adverse cost orders or even disciplinary action against legal practitioners by the Legal Practice Council. The key is to demonstrate good faith participation, even if a settlement isn't reached.
16. How do we get a certificate we have tried mediation?	The Mediator is responsible for providing the necessary document. • Upon the conclusion of the mediation (whether successful or not), the mediator prepares and signs a Mediator's Report (sometimes referred to as a certificate). • Under the Gauteng Protocol, this report must be completed promptly and is the essential document that must be filed with the court to demonstrate compliance with the Directive when requesting a trial date. • The parties are also required to complete a Second Joint Minute, which must be signed by the mediator, and submit it to the court along with the Mediator's Report.

Question	Answer
17. What is the enforceability of a mediated settlement agreement in South Africa?	A mediated settlement agreement in South Africa has the legal status of a binding contract. This means it is enforceable in law like any other legal agreement. For enhanced enforceability, parties can agree to have the settlement agreement made an order of court (a "consent order"). If it's made an order of court, it gains the same enforceability as a court judgment, meaning it can be executed through the Sheriff of the Court if a party defaults on its terms. This is a common and recommended practice for civil and commercial disputes.