

Ending the “Tactical Shortcut”: How the *Malebane* Judgment Safeguards the Integrity of Mandatory Mediation

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INTRODUCTION TO MEDIATION AND RULE 41A

Mediation is a voluntary, alternative dispute resolution process where an impartial and independent person, “the mediator”, facilitates discussions between litigating parties to help them resolve their dispute or at least identify areas of compromise¹. Traditionally, while encouraged, this process remained optional. However, the introduction of **Rule 41A** into the Uniform Rules of Court², marked a significant shift by requiring parties to formally declare, at the very start of an action or application, whether they agree to or oppose referring their dispute to mediation³.

In the Gauteng Division of the High Court, this “voluntary” framework has transitioned into a **mandatory protocol**. Due to an “unacceptable and intolerable” civil trial backlog where trial dates were being issued as far ahead as 2031, the Judge President of the Gauteng Local Division, Johannesburg, issued a Directive effective April 2025⁴. This Directive mandates that **no case will be issued a trial date** unless the request is accompanied by a **mediator’s report**⁵. This effectively institutionalizes mediation as a compulsory hurdle that must be cleared before a matter can proceed to trial in the Johannesburg High Court⁶.

THE GAUTENG MANDATORY MEDIATION PROTOCOL AND PARAGRAPH 4.6.2

To provide structure to this mandatory system, the Gauteng Division utilises a specific **Mediation Protocol**⁷. Under this protocol, parties are often required to deliver an **Amplified Rule 41A Notice**, which is a more detailed version of the standard notice.

Paragraph 4.6.2 of the Protocol is critical, as it sets the substantive criteria that these notices must meet to be considered correct and compliant. A notice cannot simply be a generic rejection of mediation; it must stipulate:

- The party’s preference for how the mediation should be administered;
- The names and details of one or more **proposed mediators**;
- A clear breakdown of facts that are **common cause** versus those **in dispute**;
- Identification of disputed facts that could reasonably be resolved through **admissions**;
- The status of **expert evidence**, including whether a single joint expert might be appointed;
- Proposed **procedural timelines** for the further conduct of the matter;
- A specific **time period** (between 5 and 15 court days) for the adversary to respond; and
- Any other issue of material relevance to the mediation engagement.

A notice that simply rejects mediation without “cogent reasons” directly applicable to the unique facts of the case is considered an **irregular notice**⁸.

THE MALEBANE JUDGMENT: EXPOSING SYSTEMIC EXPLOITATION

In *Malebane v Road Accident Fund*⁹, the court scrutinised the growing trend of “Delinquency Applications” being heard before the Special Interlocutory Court (“**SIC**”) based on respondents failing to reply to **Amplified Rule 41A Notices**¹⁰.

The Honourable Judge Farrell AJ noted that numerous legal practitioners were submitting superficial, and standardised notices that lacked the substantive details required by Paragraph 4.6.2 of the Mediation Protocol¹¹.

The Court identified a specific form of exploitation whereby legal practitioners were using Rule 41A not to settle cases, but as a “tactical shortcut” to the default judgment roll thereby bypassing traditional litigation¹². By serving a defective notice and then pouncing on a lack of response, practitioners sought to move straight to delinquency proceedings.

In the *Malebane* case itself, the practitioner had even included boilerplate language about mediating “liability,” despite the fact that liability had been settled by Court Order five years prior¹³. The learned Judge emphasised that the requirements of Paragraph 4.6.2 are not “optional embellishments” but are conditions precedent¹⁴; only a compliant notice can trigger the countdown to delinquency¹⁵.

WHEN CAN THE DELINQUENCY AND THE SIC ROUTE BE INITIATED?

The *Malebane* judgment clarifies that the delinquency route authorised by Paragraph 4.9 of the Protocol is reserved for genuine non-cooperation¹⁶. If a party (the delinquent party) fails to respond to a compliant notice or fails to cooperate in appointing a mediator, the aggrieved party may approach the SIC for a compelling Order¹⁷.

The Court further noted that the use of non-compliant notices to expedite access to the default judgment court amounted to an abuse of the Court’s processes which is contrary to what the process is for as it leveraged procedural advantages rather than to vindicate rights¹⁸.

The Applicants attempted to argue that judicial scrutiny of the Amplified Rule 41A Notice would constitute violation of Rule 41A(2)(d) of the Uniform Rules¹⁹. In this regard the court held that while Rule 41A(2)(d) protects the *content* of settlement communications, it does not shield **procedural facts**²⁰. By attaching these notices to public delinquency applications, practitioners effectively waive privilege, allowing the court to scrutinise the notice for compliance²¹.

CONCLUSION

The Court highlighted a severe consequence for the persistent abuse of the process, as same amounts to professional misconduct. Legal practitioners found to be deliberately frustrating the process or using defective notices to leverage procedural advantages may be found in breach of their duties as officers of the Court²². This can result in costs orders *de bonis propriis* (payable by the legal practitioner personally) and referral to the Legal Practice Council for disciplinary action²³.

Ultimately, the Court in *Malebane* ruled that a defective initiating notice cannot trigger the delinquency regime.

This judgment underscores that legal practitioners who seek to exploit procedurally deficient notices risk having their cases dismissed with an adverse costs order.

¹ Gladwin-Wood, Mvelase and Kupa “Mediation in South African Courts: Understanding Rule 41A and its Impact” 2025, HBGSchindlers Attorneys, (<https://hbgschindlers.com/mediation-in-south-african-courts-understanding-rule-41a-and-its-impact/>)(09-03-2026)).

² Rule 41A of the Uniform Rules of Court, updated as of January 2026.

³ Supra note 1

⁴ The High Court of South Africa, Gauteng Division, Johannesburg, Directive Introducing Mandatory Mediation In The Gauteng Division of 22 April 2025.

⁵ Ibid at para 13.

⁶ Ibid at para 6.

⁷ The Mediation Protocol Applicable in the Gauteng Division of the High Court as of April 2025.

⁸ Ibid at para 4.7.

⁹ *Malebane v Road Accident Fund and Related Matters* [2025] ZAGPJHC 471.

¹⁰ Ibid at para 1.

¹¹ Ibid

¹² Ibid at para 1-2.

¹³ Ibid at para 27-30.

¹⁴ Ibid at para 8.

¹⁵ Ibid at para's 5 & 8.

¹⁶ Ibid at para 1 read with para 4.

¹⁷ Ibid at para 20 – 21.

¹⁸ Ibid at para's 14 & 24.

¹⁹ Ibid at para 10.4.

²⁰ Ibid at para 16.

²¹ Ibid at para 20.

²² Ibid at para's 22- 24.

²³ Supra note 4 at para 4.10.2.3.



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