



**THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG**

Case 2020-27641

- (1) REPORTABLE: Yes  / No   
(2) OF INTEREST TO OTHER JUDGES: Yes  / No   
(3) REVISED: Yes  / No

Date: 29 May 2026

In the matter between:

**ERNEST WILLIAM TIMMINS N.O.**

First Applicant

**MARTHINUS JACOBUS SWART N.O.**

Second Applicant

and

**EWAN CARTER SMITH**

First Respondent

**MASTER OF THE HIGH COURT,  
GAUTENG, JOHANNESBURG**

Second Respondent

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**JUDGMENT**

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DU PLESSIS J

*Introduction*

[1] This is an opposed application in the Special Interlocutory Court (“SIC”), in which the first respondent refuses to engage in the mediation process contemplated by Uniform Rule 41A, the Directive introducing Mandatory Mediation in the Gauteng Division (“the Directive”), and the Mediation Protocol applicable in the Gauteng

Division of the High Court (“the Protocol”). The first respondent refuses to engage in the process for two main reasons: first, he regards the Directive and Protocol as unlawful, and he wishes to await the outcome of the Full Court challenge to their validity; second, he considers the matter unsuitable for mediation and contends that it requires adjudication.

[2] The main action is a claim for damages brought by the co-executors of a deceased's estate against the erstwhile curator bonis (the first respondent). The dispute turns on the interpretation and legal effect of the court order appointing the first respondent as curator bonis (and any subsequent directions), and on whether, properly construed, that order authorised or permitted him to delete a beneficiary nomination on the deceased's living annuity. If it did not, the further questions are whether his undisputed deletion of the nomination constituted a breach of his duties and whether that breach caused a patrimonial loss to the estate, which he denies.

#### *Rule 41A process*

[3] In the present application, the applicants seek relief arising from the first respondent's refusal to cooperate with the mediation process. They ask that the first respondent be compelled to comply with the applicants' amplified Rule 41A notice and to engage effectively in the mediation process. In the event of non-compliance, they seek the defence to be struck and the matter to be enrolled on the Default Trial Court, together with a punitive costs order.

[4] The applicants' attorneys began engaging in mediation in July 2025, proposed mediators, and followed up repeatedly until they served an amplified Rule 41A notice on 23 March 2026. On 13 April 2026, the first respondent delivered his amplified Rule 41A reply, stating that he does not agree to the referral of the matter to mediation. He does so, first, because a pending Full Court challenge seeks to declare the Directives constitutionally invalid or ultra vires, and he awaits that outcome. He agrees with the challenge and notes that Rule 41A envisages voluntary rather than mandatory mediation. He adds that the dispute requires adjudication and that, in light of the parties involved (the first respondent being an attorney) and their legal representatives, mediation is unlikely to yield a resolution absent adjudication. He

therefore makes no proposal regarding the administration of mediation or the selection of a mediator. He persists that the issues in dispute appear from the pleadings and require adjudication, and clarifies that he intends to call three witnesses, including an expert. In that sense, mediation would be infeasible, unnecessary and a waste of costs.

[5] The first respondent's stance must be assessed against the scheme and objectives of the Mediation Protocol under which these steps were taken.

### *The Mediation Protocol Framework*

[6] The Mediation Protocol provides a structured but flexible framework for implementing court-annexed mediation in the Gauteng Division. Its purpose, set out in paragraph 2,<sup>1</sup> is to secure proper compliance with Rule 41A, to improve the efficient administration of justice while broadening access to the courts, and to encourage mediation as a cost-effective, less adversarial means of resolving civil disputes. In doing so, it seeks both to ease congestion on the trial rolls and to foster a culture of cooperation and mutual respect among litigants.

[7] The Mediation Protocol applies to all civil trials in the Gauteng Division and establishes a framework for court-annexed mediation, beginning with compliant Rule 41A notices (and, where required, Amplified Rule 41A notices), followed by the appointment of mediators, treating inadequate notices as irregular, and entitling an aggrieved party to seek a compelling order in the SIC where the other party unreasonably fails to cooperate in the appointment of a mediator or in furthering the mediation process. Amendments to the Directives<sup>2</sup> provided a further mechanism in

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<sup>1</sup> 2.1. Purpose & Aim

2.1.1. The purpose of this Protocol is to provide a structured standardised yet flexible framework for implementing court-annexed mediation in the Gauteng Division of the High Court (Gauteng Division), pursuant to the Mediation Directive.

2.1.2. This Protocol aims to:

2.1.2.1. Ensure compliance with Rule 41A of the Uniform Rules of Court (Rules).

2.1.2.2. Promote the efficient administration of justice in the Gauteng Division whilst also transforming access to justice and the availability of the courts to the litigating public.

2.1.2.3. Promote the use of mediation as an alternative dispute resolution mechanism to alleviate congestion on the court rolls.

2.1.2.4. Enhance access to justice by providing an efficient, cost-effective, and less adversarial method of resolving disputes.

2.1.2.5. Foster a culture of cooperation and mutual respect among litigants

<sup>2</sup> Effective 27 October 2025.

paragraph 7.1A<sup>3</sup> for disputes alleged not to be capable of mediation by virtue of their nature.

[8] In either case, the parties must properly engage in mediation by identifying their positions on mediation, proposing mediators where required, setting out common-cause facts and issues in dispute, addressing expert and procedural matters, and responding within the prescribed time periods. Where a party fails to reply, unreasonably refuses to cooperate in these steps, or delivers a generic and non-compliant notice (paragraph 4.7), the regime in paragraph 4.9 becomes available, as set out below.

[9] Paragraph 4.7<sup>4</sup> treats a bare, template-style Rule 41A notice that simply refuses mediation, without specific, fact-based reasons why the dispute (or at least some issues or procedural aspects) cannot be addressed in mediation, as an irregular notice. Such a generic rejection entitles the aggrieved party to invoke Rule 30A (“notice to compel”) and to proceed against the other party as a “delinquent party” under paragraph 4.9 of the Protocol.

[10] Paragraph 4.9<sup>5</sup> sets out steps for the treatment of “delinquent parties”. A party that does not timeously answer a Rule 41A notice, or unreasonably fails to cooperate

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<sup>3</sup> 7.1A Matters which are alleged cannot be mediated due to the nature of the dispute:

7.1A.1 In the event that a compliant response has been delivered to either an initial or amplified Rule 41A notice, indicating with sufficient particularity a justifiable reason why a dispute in the matter is not capable of being mediated, the parties may formulate a joint minute to record this. Such a minute must, in respect of a dispute on a point of law, contain a stated case on common cause facts or, in respect of a factual dispute, contain an exact formulation of the dispute about which a judgment is necessary.

7.1A.2 Matters in which stated cases have been formulated, may be set down on the opposed motion court roll, after the prescribed exchange of practice notes and heads of argument.

7.1A.3 In the event of a dispute between the parties as to whether a matter exhibits a justifiable reason for not being capable of being mediated, an Umpire as contemplated in par 5.2.3.3 of the Protocol, may be approached in writing whose determination on the issue, shall be final”.

<sup>4</sup> 4.7 Irregular Notices:

4.7.1 A generic Rule 41A notice delivered by a party (the delinquent party) to another party (the aggrieved party), either of its own volition or in response to the receipt of an Initial Rule 41A Notice or an Amplified Rule 41A Notice from the aggrieved party, as the case may be, which simply rejects the referral of the matter to mediation without cogent reasons (specifically and directly applicable to the unique facts of the matter) motivating why:

4.7.1.1 the matter cannot be resolved, either in full or partially; and

4.7.1.2 none of the other aspects provided for in terms of Rule 41A including:

4.7.1.2.1 the identification and classification of issues in dispute, and

4.7.1.2.2 the procedural aspects and timelines to be applicable to the further conduct of the matter can be dealt with by way of mediation, is inadequate and constitutes an irregular notice (irregular notice).

4.7.2 An aggrieved party who received such an irregular notice shall be entitled to proceed in accordance with the provisions of Rule 30A. Furthermore, the provisions that relate to delinquent parties, as set out in paragraph 4.9 below, shall be applicable and the aggrieved party shall be entitled to proceed accordingly.

<sup>5</sup> 4.9. Delinquent Parties

in appointing a mediator, is an obstacle to furtherance of the mediation, or who fails to attend a scheduled mediation without timely written cancellation, is classified as a “delinquent party”. The aggrieved party may then approach the SIC for a compelling order directing cooperation. If that order is disobeyed, the aggrieved party may be excused from mediation, may enrol the matter on the Default Judgment roll to seek contempt and striking out of the delinquent party’s claim or defence together with substantive relief, and may seek punitive costs for the steps taken to secure compliance with the Protocol.

[11] In *Brondani v Brondani*,<sup>6</sup> the court held that, having regard to the purpose and aims of the Mediation Protocol, parties should only be excused from mediation in exceptional cases, and that neither extreme acrimony nor a party’s subjective view that mediation would be a waste of time qualifies as such an exceptional circumstance. The court thus held that a litigant’s subjective view that mediation would be pointless, or that the dispute required adjudication, was not a valid basis to avoid the mediation process under the Directive and Protocol. In *Brondani*, the Court compelled the defendant to cooperate in the appointment of a mediator and to deliver a compliant amplified Rule 41A notice.

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4.9.1. If a party fails to reply to an Initial Rule 41A Notice or an Amplified Rule 41A Notice, as the case may be, timeously or at all or unreasonably fails to cooperate in the appointment of a mediator or the furtherance of the mediation process in accordance with the Mediation Directive and this Protocol, such party is classified as a delinquent party (delinquent party).

4.9.2. The other party (aggrieved party) may, when dealing with a delinquent party, seek a compelling order in the Special Interlocutory Court (SIC) directing the delinquent party to cooperate in accordance with the provisions of this Protocol within such time as the presiding judge considers appropriate in the circumstances.

4.9.3. Should the delinquent party fail to comply with the compelling order contemplated in paragraph 4.9.2 within the time provided for, the aggrieved party shall, upon production of proof of such non-compliance by way of an affidavit:

4.9.3.1. be excused from having not subjected the matter to mediation;

4.9.3.2. be entitled to enrol the matter for hearing on the Default Judgment roll and at such hearing seek an order declaring the delinquent party in contempt of the compelling order and further seek a striking out of the claim or defence, as the case may be, and immediately thereupon and in the same proceedings seek substantive relief on the merits; and

4.9.3.3. may seek an order for the costs of compliance with this Protocol, and the content of paragraph 4.9 in particular, on a punitive scale.

4.9.4. If a party fails to attend a mediation session that has been scheduled, or does not cancel a scheduled mediation session, in writing, at least 48 (forty-eight) hours before the scheduled commencement time of such mediation session, such party shall similarly be considered a delinquent party and shall be liable for the wasted costs occasioned by such failure to attend or late cancellation notice, as the case may be.

<sup>6</sup> [2025] ZAGPJHC 1157.

*In this case*

[12] Against that backdrop, the first respondent's amplified Rule 41A reply does not, in its present form, furnish cogent, case-specific reasons of the kind contemplated in paragraph 4.7: his reliance on the pending Full Court challenge is misplaced, and his assertions that the matter "requires adjudication", that witnesses and an expert will be called, and that mediation would be wasteful, are of the subjective variety that *Brondani* has already rejected.

[13] His position on the continued applicability of the Directive and Protocol is incorrect. The mere institution of proceedings challenging their validity does not suspend their operation. They remain in force. No order has stayed, suspended or set them aside. Until a competent court does so, they are operative and binding in this Division. The first respondent is therefore not entitled to decline to comply with the Protocol on the basis of his personal view that mandatory mediation is unconstitutional or ultra vires.

[14] The first respondent does not specify, with particularity, why mediation is not possible. His R41A reply merely states that the dispute requires adjudication. If he genuinely believes the matter is not capable of mediation, he should have used the mechanism in paragraph 7.1A by filing a joint minute, or, in the absence of agreement, by approaching the Umpire. The conundrum, however, is that the paragraph 7.1A route is effectively closed by his own stance that the Directive and Protocol are unlawful, which he relied on to avoid using the mechanisms they provide.

[15] The first respondent's stance, however, has become a deliberate and entrenched refusal, sustained over a lengthy period and formalised in his amplified Rule 41A reply. By denying the Protocol's legitimacy, he has made its processes unfeasible, leaving the court with the discretion to manage proceedings in that void. The parties are now litigating over mediation and the Mediation Directive rather than progressing the underlying action towards finalisation. The Special Interlocutory Court's role is to advance cases efficiently and proportionately, not to encourage additional disputes over the mediation process.

[16] Having considered the pleadings, the dispute in the main action turns on a relatively narrow, essentially legal question concerning the scope of the first respondent's duties as curator bonis and the legal effect of his undisputed deletion of a beneficiary nomination, with limited factual controversy. On the pleadings and affidavits, there is little room for a factual compromise during mediation. The crux of the dispute is of a more normative characterisation of the curator's conduct and its legal consequences. It is thus a matter of interpretation. In such a dispute, there is, in practical terms, very limited scope for a mediator to assist the parties in crafting their own solution, and little prospect that mediation will advance the aims of the Directive and Protocol.

[17] The introduction of paragraph 7.1A into the Protocol confirms that the mediation regime recognises that certain matters may not be capable of mediation by virtue of their nature and provides mechanisms for dealing with such cases. It does not, however, deprive this Court of its ordinary discretion, in a case already before it, to conclude, on the established facts, that a particular dispute is not realistically amenable to mediation and to excuse the parties accordingly. On the facts of this matter, and applying the exceptional-circumstances standard articulated in *Brondani*, this is such a case.

[18] In these circumstances, a further compelling order would serve only to add cost and delay. It would almost inevitably result in a mediator's report recording that the process could not proceed because of the first respondent's entrenched resistance and the essentially legal character of the dispute, leaving the Court in no better position than it occupies now. The better course, consistent with the purposes of the Directive and Protocol and the purpose of the SIC, is to excuse the applicants from any further obligation to subject this matter to court-annexed mediation.

#### *Costs*

[19] The first respondent's amplified Rule 41A reply constitutes an irregular notice under paragraph 4.7 of the Protocol and reflects a sustained, deliberate refusal to engage with the binding mandatory mediation regime. He persisted in that stance for many months, despite repeated invitations from the applicants, and without any

tenable legal basis for treating the Directive and Protocol as inapplicable. Even if the nature of this dispute means that mediation might not be possible, there was no justification for his attempt to stand outside the regime altogether. The first respondent ought to have engaged with the mediation process, and set out with the necessary particularity, either to an umpire or a mediator, why the dispute was inherently incapable of mediation. Had he done so, a mediator or umpire would probably have certified the dispute as unresolved, and the matter would have progressed to trial by now. The first respondent instead resisted mediation on the primary basis that he was not required to submit to the Protocol. That stance was not justified in principle and resulted in unnecessary delay and expense. This conduct warrants an attorney-and-client costs order.

*Order*

[20] The following order is made:

1. The applicants are excused, in this matter, from any further obligation to subject the dispute to court-annexed mediation in terms of the Mediation Directive and Mediation Protocol.
2. The first respondent is ordered to pay the costs of this application on an attorney-and-client scale.

  
**WJ du Plessis**

Judge of the High Court, Gauteng Division,  
Johannesburg

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| Date of hearing:    | 27 May 2026                                      |
| Date of judgment:   | 29 May 2026                                      |
| For the applicant:  | P Verster (attorney) instructed by PMV Attorneys |
| For the respondent: | B Joseph instructed by Noel Bunn Inc.            |