

AGREEMENT TO MEDIATE

The above parties in the abovementioned matter (“the participants”) have agreed to enter into mediation and they together with their attorneys of record and the mediator, appointed in terms of this Agreement to Mediate, agree as follows:

1. Nature of mediation

1.1 The parties will participate in *facilitative mediation*. This means that the mediator will facilitate negotiations between the parties to enable them to reach an agreement through joint problem solving.

1.2 The mediation will include *joint sessions* when all of the parties will be present and *private sessions* when the mediator will meet with the parties separately.

1.2.1 Everything said or done at joint meetings is *confidential* and may not be disclosed to anyone outside the mediation;

1.2.2 To encourage discussion, the mediator will not disclose to the other participant any information that has been conveyed to her in a private session, *unless* the participant gives her express permission to disclose such information.

1.2.2.1 This means that everything which a party says to the mediator during *private sessions* will remain *confidential* as between the mediator and the person with whom the private session is held.

1.2.2.2 The mediator agrees that she will not disclose such information to anybody, including the other party to the mediation, unless she has a mandate to do so (“the mandated confidential information”).

1.2.2.3 The mediator is given a discretion to decide if, and when, she will impart the mandated confidential information to the other party or parties.

1.3 No recording is allowed, and all notes made during the mediation will be destroyed at the end of the mediation.

1.4 The parties acknowledge that for statistical recording and reporting to the Recognised Mediation Organisation (‘**RMO**’), the parties’ names and outcome (successful or unsuccessful) shall be reported, save for in the instance that the contrary is specifically recorded herein.

1.5 Mediation is **voluntary** and any party may at any stage decide not to continue with the mediation.

1.5.1 Neither party will however abandon the mediation without first affording the mediator a reasonable opportunity to establish the reasons for a party wanting to terminate the mediation.

1.5.2 The mediator will then be afforded an opportunity to address these in a private session with the party in question.

- 1.6 Mediation is ***non-binding*** until everything is agreed, reduced to writing and signed by all participants. Once signed such an agreement is binding on the parties.
- 1.7 Mediation takes place ***without prejudice*** and the participants will retain all of their rights and legal remedies if the mediation is not successful, including the right to proceed with litigation or arbitration. Nothing that is said or done at the mediation can be used at any such arbitration or litigation.
- 1.8 The mediator may assist the participants to generate settlement options but does not impose her views or solutions on them.
- 1.9 The parties are encouraged to engage with their legal representatives in respect of any settlement discussions and the ultimate agreement reached.
- 1.10 The mediator's function is to create a safe space for dialogue between the parties so that they can themselves seek a solution to the dispute that they both find acceptable.
- 1.11 The mediator has an ethical obligation to be ***independent*** and ***impartial*** and to work equally hard on behalf of both participants during the mediation and undertakes to do so.
- 1.11.1 The parties confirm that they have had no prior dealings with the mediator and that they do not know her.
- 1.12 The participants agree that they will not interrupt each other during the mediation and that they will respect the process and the mediator.

2. **Settlement Authority**

- 2.1 The parties confirm that they have ***settlement authority*** within the reasonably anticipated range of a settlement or have a person with such settlement authority on standby, telephonically during the mediation.

3. **Litigation**

- 3.1 The participants agree to refrain from pre-emptive maneuvers and adversarial legal proceedings (except in the case of an emergency necessitating such action), while actively engaged in the mediation process.
- 3.2 The participants agree that, in the absence of an express agreement concluded during the course of the mediation, nothing that happens during the mediation will have any effect on the running of prescription in the event of the mediation not producing an outcome that is acceptable to the parties.
- 3.3 The parties' attention is drawn to the time limits which are prescribed in Rule 41A and specifically Rule 41A(4)(c).

4. **Indemnity**

- 4.1 The participants agree that the mediator will not be liable for any act or omission directly or indirectly connected to the mediation, save for in the instance of fraud, willful misconduct or gross negligence.
- 4.2 This clause is valid in terms of the provisions of the Consumer Protection Act as both parties have agreed to the mediation, have an equal interest in the

speedy resolution of their dispute and have consented to this mediation without undue influence or duress.

- 4.3 The mediator can also not be called upon to testify or to participate in any way in further legal or other process that may ensue should the mediation not produce an outcome that is acceptable to the parties.

5. **Commencement of mediation:**

- 5.1 The mediation will commence at Circle Chambers on a date to be determined between the parties and will proceed from 10:00 to 16:00 and if needs be - thereafter as agreed upon between the parties.

- 5.2 The mediation shall not proceed unless all of the mediators have made payment in full of the invoices issued by the mediator.

6. **Continuation of the mediation**

- 6.1 The parties accept that mediation is an organic process and the mediator cannot guarantee that the mediation will be completed within a particular time frame.

- 6.2 The parties acknowledge that if the mediation does not conclude within the time allocated by agreement, as per paragraph 5 hereinabove, and should one or more of the parties' for any reason elect not to continue with the mediation thereafter, this will be reflected in the mediator's report.

- 6.3 The parties acknowledge that should the mediation exceed the time period agreed to in paragraph 5 hereinabove, the parties shall be invoiced for any further time spent / documentation prepared by the mediator.
- 6.4 The parties shall make payment of the mediators invoices within 48 hours of receipt of the invoice.
- 6.5 Should the parties cancel or terminate the mediation after date of invoice, the invoice shall remain due and payable in full.
- 6.6 If the mediation date is rescheduled by agreement between the parties and the mediator, no later than 10 full work days before the mediation, the mediator shall defer the mediation fee to the next agreed mediation date.
- 6.6.1 If the mediation is thereafter cancelled / terminated, regardless of when notice of the cancellation / termination is given to the mediator, the parties shall remain responsible for the invoices rendered by the mediator, and work done to date which may not yet have been invoiced, including time spent on perusal and correspondence of documentation and correspondence.

7. **Termination of mediation:**

- 7.1 The mediation will terminate when:
- 7.1.1 the parties conclude a written agreement between themselves in which the parties set out the terms upon which the parties settle the dispute or any part thereof, provided that the parties and the mediator may agree in writing to continue the mediation in respect of any part

of the dispute that remains unsettled after the conclusion of the settlement agreement.

7.1.2 the parties receive written notice from the mediator stating that in the mediator's opinion there is no reasonable prospect of a settlement and therefore the mediator terminates the mediation.

7.1.3 the mediator receives written notice from a party stating that such party withdraws from the mediation even after having a private session with the mediator to address the party's concerns.

7.2 If the mediators' fees are not paid as called for and the mediation, as a result, does not proceed, the parties are in agreement that the mediator may mark the mediation as unsuccessful and record the reason for this in the mediator's report. This clause does not detract from clause 5.2 or the mediators right of retention which are addressed in clause 13 hereunder.

8. **Appointment of the mediator**

8.1 The participants hereby appoint: Calyn D'Alton as their mediator at the rate indicated in the mediator's fee structure which is attached hereto as **Annexure "A"**.

8.2 Although it is the mediator(s) preference that any fee for the mediation should be carried equally by both parties, the parties are free to share the costs associated with the mediation in any proportion agreed between themselves.

8.3 In the event of the fees not being shared equally, a separate written agreement should be concluded between the parties, save for in the instance that the parties are in agreement that the matter falls within the realm of either

paragraph 8.4 or 8.5 hereunder, in which instance the parties are required to indicate confirmation of such agreement hereunder.

RAF:

8.4 The dispute pertains to a Road Accident Fund matter and as such:

8.4.1 The plaintiff shall pay the mediators fees in advance and upon further invoice as provided for in this agreement;

8.4.2 the parties have already at the time of signing this agreement, concluded that the defendant shall in terms of paragraph 8.3.5 of the mediation protocol for the Gauteng division be liable for no more than R15,000 towards the mediation fee; and

8.4.3 that the plaintiff shall be responsible for the balance in the event that the mediation exceeds this amount as per paragraph 8.3.5.2;

8.4.4 that as the mediator's fees are required in advance, the plaintiff shall make payment thereof in order to expedite the furtherance and finalization of the mediation process, and

8.4.5 the plaintiff shall be entitled to claim reimbursement of the funds so disbursed, up to the limit of the RAF's liability provided for in paragraph 8.3.5 of the protocol, from the RAF at such time as the RAF's payment of their contribution becomes due in accordance with paragraph 8.3.5 of the protocol and shall be paid as provided for in paragraph 8.3.5.4 of the protocol.

<u>X</u>	<u>X</u>	<u>X</u>
<u>X</u>	<u>X</u>	<u>X</u>

9. **Attorney's indemnity for payment of fees:**

9.1 The undersigned attorneys undertake liability to ensure that they hold sufficient funds on trust for their client's portion of the mediator's fees and any administration fees administered for and / or on behalf of or by the parties' nominated Recognised Mediation Organisation.

9.2 The undersigned attorneys undertake the aforementioned liability on the basis that the mediator is jointly instructed by the attorneys to undertake the services provided for in the content of this agreement.

9.3 The undersigned attorneys remain liable to the mediator for the mediator's fees rendered in terms of this agreement and Annexure "A".

10. **Changes to this agreement:**

10.1 The parties agree to by way of track changes made to this document, specifically draw to the attention of the other parties any changes made to the content of this agreement.

11. **Recognised Mediation Organisation:**

11.1 The mediator is affiliated with the following Recognised Mediation Organisations “RMO”):

11.1.1 Mediation in Motion Mediators;

11.1.2 Arbitration Foundation South Africa; and

11.1.3 ADR Network.

11.2 The directive provides that mediations must be administered by an RMO. The RMO’s charge an administration fee.

11.2.1 The mediator takes no share of this fee and does not form part of the Mediators Fees as are addressed in Annexure “A”.

11.2.2 The mediator shall invoice the parties’ an “RMO administration fee” as required by the RMO.

11.2.3 The particulars of the RMO administration fees are addressed in Annexures “B1” and “B2” attached hereto.

11.2.4 The mediator endeavours to furnish the parties with most recent information, but cannot be held liable for any changes not addressed in Annexures “B1” and “B2” attached hereto.

11.3 It remains the responsibility of the parties to ensure that they are aware of the fees charged by the RMO and the protocols applicable to paying the administration fee to the RMO for those service.

12. **Complaints:**

12.1 If any party is dissatisfied with the conduct of the mediator, he/she agrees to first raise this informally with the mediator.

12.2 If it cannot be resolved to the party's satisfaction, he/she may formally lodge a complaint with the mediator's RMO which the parties have elected to administer this mediation.

12.3 The mediator is registered with Mediation in Motion Mediators (MiMM) NPO, Arbitration Foundation South Africa (AFSA) and ADR Network NPO.

12.4 The parties agree that this mediation shall be carried out under _____ (*insert RMO*) to whom any complaints shall be directed to.

Please initial / sign the manuscript election made in 12.4 above and identify the detail of the party for whom the initial is reflected:

X _____ X _____ X _____

X _____ X _____ X _____

X X X

X X X

13. **Preparation for mediation:**

- 13.1 The parties and their legal representative shall be well prepared for and ready to engage in the full scope of the dispute which has been referred to mediation.

14. **Retention**

- 14.1 The mediator strictly reserves the right of retention over any documentation (including by not limited to the mediators report and joint minute prepared in terms of Rule 41A(8)) which is prepared by the mediator until such time as the mediator's invoices are paid in full.

- 14.2 The mediator shall retain the signed mediation agreement, pending full payment of the mediator's invoices.

15. **Co-Mediators:**

- 15.1 The parties are in agreement that a co-mediator may participate in the mediation at no additional cost to the parties. Under such circumstances:

15.1.1 Calyn D'Alton shall act as lead mediator; and

15.1.2 The co-mediator (if any) shall be a signatory to this agreement.

16. **Legal status and effect on the mediation:**

16.1 This agreement is governed by the law of the Republic of South Africa and the courts of the Republic of South Africa shall have exclusive jurisdiction to decide any matters arising out of or in connection with this Agreement and the mediation.

17. **Conclusion of agreement:**

17.1 This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one and the same instrument, read together with the annexure hereto.

17.2 The agreement shall not be varied, save for in writing and by agreement between all signatories hereto.

17.3 The mediation agreement cover page (completed in manuscript by the parties), the mediation agreement, and **Annexures “A”, “B1” and “B2”** hereto constitute the whole document.

Signed at on this day of 202_

Mediator name: Calyn D’Alton

Co-Mediator (if any):

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Legal representative: Initiating party

name: _____

firm: _____

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Capacity:

Legal representative: Responding party

name: _____

firm: _____

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Capacity:

Legal representative: Initiating party

name: _____

firm: _____

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Capacity:

Party representative: Initiating party

name: _____

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Capacity:

Party representative: Responding party

name: _____

firm: _____

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Capacity:

ADV CALYN D’ALTON

MEDIATOR

A. Fee Tariff:

1.	Hourly rate	R1,800 + VAT
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1.1 An hourly fee is charged for perusal, meetings, preparation and drawing of documentation (eg mediators reports, documentation referred to in the agreement above, correspondence including correspondence required to facilitate the administration of and conduct of the mediation and surrounding processes, joint minutes) etc.

1.2 Fees in respect of perusal and consideration may be guided by approximately forty (40) pages per hour.

1.3 Fees in respect of drawing of documentation can be guided by approximately four (4) pages per hour.

2.	Day fee	R18,000 + VAT
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3.1 A full day fee is charged for any reserved mediation days, being 10:00 to 16:00 on the nominated date.

- 3.2 An hourly rate of R1,800 + VAT is charged for any further time spent after the aforementioned hours.

3. Online pre-mediation meeting: No fee charged

- 4.1 These meetings are held in advance of the mediation being convened.
- 4.2 This meeting is convened with all parties and representatives.
- 4.3 These meetings do not exceed 30 minutes.

B. Payment:

1. Fees are payable on 50/50 basis between the parties. Invoices shall be issued to the respective instructing attorneys.
2. The first day (or anticipated hours) is payable within 48 hours of invoice, unless specifically agreed to otherwise.
3. The balance is payable within 7 (seven) business days of date of invoice.
4. The instructing attorneys undertake to indemnify the mediator for the payment of their respective clients' invoiced fees.

C. RMO ADMINISTRATION FEE

1. The RMO administration fees are addressed in Annexure "B1" and "B2" as attached hereto and do not form part of the Mediators Fee, although they will be invoiced for as provided hereunder.

1. If **Mediation in Motion Mediators** has been selected by the parties to administer the mediation, one of the following scenarios are likely to apply:

Scenario 1: Appointment of a Qualified Mediator by MiMM:

- 1.1 Plaintiff/Applicant or Legal Representative contacts MiMM.
- 1.2 MiMM issues a request for information form, process explanation, and cost estimate (where possible) to the parties.
- 1.3 The requested information is returned to MiMM.
- 1.4 MiMM suggests three Qualified Mediators to the parties and informs the Qualified Mediator of their nomination.
- 1.5 The Plaintiff/Applicant or Legal Representative notifies MiMM of their preferred Qualified Mediator to be appointed.
- 1.6 MiMM confirms the appointment with the Qualified Mediator.
- 1.7 The Qualified Mediator engages with the parties, whilst keeping MiMM administrative staff cc'd in correspondence and attends to, inter alia:
 - 1.7.1 Scheduling of the free virtual pre-mediation information session.
 - 1.7.2 Secures parties' permissions for MiMM observers/co-mediator to attend the mediation proper;

- 1.7.3 Correspond with MiMM administration to appoint co-mediator and/or observers;
- 1.7.4 Attend to general arrangements for the mediation proper; and
- 1.7.5 **Collects their professional fees as well as the MiMM administration fee.**
- 1.8 MiMM issues an administration fee invoice to the Qualified Mediator.
- 1.9 On conclusion of the mediation, the Qualified Mediator submits the following to MiMM:
 - 1.9.1 The signed Agreement to Mediate;
 - 1.9.2 The mediator's report;
 - 1.9.3 The signed Joint Minutes in terms of Rule 41A(8)(b) & (c).
 - 1.9.4 MiMM issues anonymised feedback forms to the parties.
 - 1.9.5 MiMM compiles and submits its report to the JP.
 - 1.9.6 Cost: R500.00 (MiMM administration fee).

Scenario 2: Private Appointment of a Mediator

- 1.10 MiMM member informs MiMM of their private appointment as mediator (as per paragraphs 3.6 and 8.3.3.4 of the Mandatory Mediation Directive's Protocol).
- 1.11 MiMM verifies that the MiMM member holds valid accreditation and a full Certificate of Competence to act as a Qualified Mediator on MiMM's panel.
- 1.12 MiMM confirms the final mediator team with the MiMM member in order to proceed with the mediation under its auspices.
- 1.13 The appointed mediator team then engages with the parties, whilst keeping MiMM administrative staff cc'd in correspondence and attends to, inter alia:
 - 1.13.1 Scheduling of the free virtual pre-mediation information session;
 - 1.13.2 Secures parties' permissions for MiMM observers/*co-mediator to attend the mediation proper;
 - 1.13.3 Correspond with MiMM administration to appoint co-mediator and/or observers;
 - 1.13.4 Attend to general arrangements for the mediation proper; and
 - 1.13.5 **Collects their professional fees as well as the MiMM administration fee.**
- 1.14 MiMM issues an administration fee invoice to the Qualified Mediator.

- 1.15 On conclusion of the mediation, the Qualified Mediator submits the following to MiMM:
- 1.15.1 The signed Agreement to Mediate to MiMM;
- 1.15.2 The mediator's report;
- 1.15.3 The signed Joint Minutes in terms of Rule 41A(8)(b) & (c).
- 1.16 MiMM issues anonymised feedback forms to the parties.
- 1.17 MiMM compiles and submits its report to the JP
- 1.18 Cost: R500.00 (MiMM administration fee).

Scenario 3: Appointment via ADR-TG Platform

- 1.19 MiMM member is appointed by the parties through the ADR-TG platform.
- 1.20 ADR-TG handles all administration and reporting on the mediation in terms of the Mandatory Mediation Directive.
- 1.21 The MiMM member must notify MiMM of the appointment, as ADR-TG is not a recognised RMO (as per requirements in 3.6 and 8.3.3.4 of the directive).
- 1.22 MiMM verifies that the MiMM member holds valid accreditation and a full Certificate of Competence to act as a Qualified Mediator on MiMM's panel.

- 1.23 MiMM confirms the final mediator team with the MiMM member in order to proceed with the mediation under its auspices.
- 1.24 MiMM member is still required to secure the parties' permission for the appointment of a co-mediator or observers in line with MiMM's policy and organisational goals. Thereafter, the MiMM member must correspond with MiMM administration to secure the appointment of a suitable co-mediator and/or observers.
- 1.25 Costs: as per direct agreement with ADR-TG Platform

Annexure “B2” Election of ADR Network as RMO

1. If ADR Network is selected by the parties as the RMO for administrative purposes, please note that R1,500 is payable to ADR Network by the parties on a shared basis (R750 each).
2. The parties shall pay an administration fee of R 1500 in equal shares;
3. The RMO shall be provided with a signed copy of the agreement to mediate, any pre-mediation minute, as well as the mediator’s report and the joint minute in terms of the directive, as revised. These are to be emailed to panel@adr-networksa.co.za
4. The parties and/ or the mediator are to advise the RMO of any difficulties experienced and during the process and may approach the RMO for any support reasonably required;
5. The RMO may appoint up to two observer mediators to the process (*this may be deleted if the parties are not comfortable with this)
6. The RMO will invoice the parties directly.