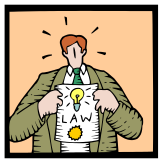
e-MANTSHI

A KZNJETCOM Newsletter

May 2025: Issue 218

Welcome to the two hundredth and eighteenth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is a search facility available on the Justice Forum website which can be used to search back issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.
"e-Mantshi" is the isiZulu equivalent of "electronic Magistrate or e-Magistrate", whereas the correct spelling "iMantshi" is isiZulu for "the Magistrate". The deliberate choice of the expression: "EMantshi", (pronounced E! Mantshi) also has the connotation of respectful acknowledgement of and salute to a person of stature, viz. iMantshi."
Any feedback and contributions in respect of the newsletter can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. The President has by notice in the Government Gazette proclaimed that sections 4,5,8(e), 11 and 12 of the Children's Amendment Act 2022 (Act 17 of 2022) come into operation on 28 May 2025. The notice to this effect was published in Government Gazette no 52742 dated 29 May 2025.

The amendments can be accessed here:
https://www.gov.za/sites/default/files/gcis_document/202505/52742-proc263.pdf

2. The Rules Board for Courts of Law has, in terms of section 6 of the Rules Board for Courts of Law Act, 1985 (Act 107 of 1985) amended the Rules regulating the conduct of the proceedings of the Magistrates Courts in South Africa. Two notices were published in Government Gazette no 52750 dated 30 May 2025 in this regard. The Rules that have been amended are Rule 24, 55 and part 1 of Table A and Table E of

annexure 2. Rule 72, 78 and 79 have also been amended. All the amendments will come into operation on 4 July 2025.

The Amendments can be accessed here:
https://www.gov.za/sites/default/files/gcis_document/202505/52750rg11838gon6231.pdf

Recent Court Cases

1. Director of Public Prosecutions (Gauteng Division) v Thato Molefe and Another (417/2024) [2025] ZASCA 67 (26 May 2025)

CRIMINAL – Evidence – *Defective search warrant* – Drug trafficking – Admissibility of improperly obtained evidence – Flagrant violations of constitutional rights and technical defects distinguished – Search warrant unearthed real evidence in form of tangible objects – Probative value unassailable – Admission of evidence would not render trial unfair or harm administration of justice – Defects in warrant were minor – Police acted in good faith – Appeal upheld – Evidence seized ruled admissible.

This Judgment can be accessed here:
https://www.saflii.org/za/cases/ZASCA/2025/67.html

2. Godfrey Alfred Ntuli v S (20730/2014) [2025] ZASCA 53 (9 May 2025)

Where the state seeks the admission of hearsay evidence, the trial court must be asked clearly and timeously to consider and rule on the admissibility of the hearsay evidence. If the hearsay evidence is presented during the state case, the trial court must rule on whether the hearsay evidence should be admitted before the state closes its case. A ruling at that stage will enable the accused to appreciate the full evidentiary ambit he or she faces. In other words, the accused must know before he or she testifies, whether he or she must also deal with the hearsay evidence in his or her own evidence. The trial

court cannot be asked for the first time at the end of the trial to admit hearsay evidence.

This judgment can be accessed here:
https://www.saflii.org/za/cases/ZASCA/2025/53.html

From The Legal Journals

Le Roux-Bouwer, J

Sentencing Rape Offenders in South Africa: Recent Case Law *Sithole v S; Masango v S; Nyathi v S*

PER / PELJ 2025(28)

Abstract
South African criminal courts are inundated with rape trials. In reaction to the high rate of serious crime, the legislature implemented sections 51 to 53 of the Criminal Law Amendment Act 105 of 1997, in terms of which minimum sentences are prescribed for various crimes. Since its passing, this so-called "minimum sentencing legislation" has been the subject of academic debate. The Gauteng high court in Sithole v S (A105/2021) [2024] ZAGPPHC 39 (18 January 2024), Masango v S (A175/2021) [2024] ZAGPPHC 64 (5 February 2024) and Nyathi v S (A133/2020) [2024] ZAGPPHC 121 (6 February 2024) has recently considered the sentence of life imprisonment where the rape involved grievous bodily harm, the complainant was 14-years old at the time of the rape. The complainant was raped by an accused and a co-perpetrator. As part of the ongoing academic debate, these recent decisions implore critical academic analysis. This contribution elucidates how the South African courts employ a sentence of life imprisonment as their most powerful weapon in the ongoing fight against the rising rape statistics. The continued high prevalence of rape cases before South African courts still cast a huge shadow over the success of prescribed minimum sentences as a deterrent to rape.

This article can be accessed here:
https://perjournal.co.za/article/view/18881/24033

Du Pokoy, C

Reconsidering the Admissibility of Expert Forensic Evidence in South African Criminal Proceedings

PER / PELJ 2025(28)

Abstract
Expert forensic evidence can be of great assistance in criminal proceedings. However, the question that must be answered is whether and to what extent there is science in any forensic science discipline. In the last twenty years there have been growing concerns about the admissibility and reliability of expert evidence in criminal trials. Many common law jurisdictions have raised concerns about traditional admissibility standards and their inability to filter out unreliable expert forensic evidence. As a result of these concerns, a number of these jurisdictions have adopted and now apply reliability criteria for the admissibility of this evidence. In South Africa, expert forensic evidence is admissible if it is relevant. The reliability of the evidence is determined at the end of the trial when the evidence is evaluated. This article examines this position and argues that the current position does not require an assessment of the reliability of expert forensic evidence at the admissibility stage, allowing expert forensic evidence of doubtful reliability to be admitted. It is argued that the admissibility of this evidence should be reconsidered by introducing a reliability standard as a precondition for admissibility

The article can be accessed here:
https://perjournal.co.za/article/view/17943/23986

(Electronic copies of any of the above articles can be requested from gvanrooyen@justice.gov.za)

Contributions from the Law School

Reasonableness and the reasonable person test

It is axiomatic that the unlawful act component of liability, the *actus reus*, is assessed objectively. The objective reasonableness test is applied for unlawfulness. Negligence, as an element of *mens rea*, is tested against the reasonable person standard, which is objective, but which can be 'subjectivised' in certain circumstances (Burchell *Principles of Criminal Law* 5ed (2016) 420). But is reasonableness equivalent to the reasonable person? This question will be assessed in the context of the justification ground of private defence.

The tests are framed differently. The objective reasonableness test asks whether the defender had acted reasonably purely on the basis of objective considerations, excluding any reference to the state of mind of the accused, but including the surrounding circumstances of the *prima facie* unlawful conduct (Labuschagne 'Noodweeroordadigheid' in Coetzee (ed) *Gedenkbundel H.L. Swanepoel* 152 165). In contrast, a reasonable person test would require an assessment of whether a reasonable person in the position of the accused would have considered the defensive conduct to be necessary and not unduly harmful. While the reasonable person test is objective in nature (Burchell 421, Hoctor *Snyman's Criminal Law* 7ed (2020) 189), it incorporates subjective aspects relating to the accused, which 'individualises' the test (*S v Ngubane* 1985 (3) SA 677 (A) 686-7), and which may include the blameworthiness of the accused (*S v Van As* 1976 (2) SA 921 (A) 927H, 928D-E, Burchell & Hunt *South African Criminal Law and Procedure Vol I: General Principles of Criminal Law* 2ed (1982) 202-203).

The presence of subjective considerations in the reasonable person test was approved by the Constitutional Court in *Savoi v NDPP* (2014 (1) SACR 545 (CC)) on the basis of the interests of justice, holding that in a purely objective test for negligence, there is the 'potential for injustice' (para 90). The court held that to temper the objective negligence criterion with a measure of subjectivity was correct and constitutionally acceptable (para 91).

The distinction between unlawfulness and fault, was expressed in *S v Goliath* (1972 (3) SA 1 (A) 11B (translation)):

'When deciding whether an act is unlawful, the act is viewed objectively and one determines whether it is justified or not in terms of the positive law, while in the case of the fault requirement one looks at the act subjectively, from the point of view of the psyche of the perpetrator.'

And so to the criminal cases which instructively demonstrate the challenges in applying the reasonableness test to unlawfulness. While some earlier judgments saw fit to incorporate subjective elements in assessing reasonableness for the purposes of unlawfulness, it was decided in *Goliath* (11B, 25H, 28H) and *S v Ntuli* 1975 (1) SA 429 (A) 436E that unlawfulness and fault cannot be tested together, and that the assessment of fault only falls to be considered where the conduct had already been found to be unlawful (28H; 436E respectively).

This clearly expressed position was not maintained. In *S v Motleleni* 1976 (1) SA 403 (A) 406-407, the Appellate Division, while confirming that unlawfulness must be 'judged by objective standards', stated that 'in applying these standards one must decide what the fictitious reasonable man, in the position of the accused and in the light of all the circumstances would have done', and in making this assessment, referred to whether the fears of the accused were justified.

The intrusion of subjective elements into the assessment is very clear. The reference to the 'fictitious reasonable man' standard flows from the *Goliath* judgment, where Rumpff JA stated, discussing the notion of unlawfulness (11F (translation)):

'In deciding what the accused should or should not have done in particular circumstances, the fictitious normal person must be placed in the position of the accused, subject to all the external circumstances to which the accused was subjected and also in the position in which the accused was placed physically'.

What is the 'fictitious normal person', later referred to as the 'average person' in the judgment? Is this not simply the reasonable person? I would submit not. After all, if Rumpff JA wished to say 'reasonable person' he could easily have done so. But there are also some important clues in the statement: that such fictitious normal person must be placed in a position subject to all the *external circumstances* to which the accused was subjected, and in the position that the accused was placed *physically.* There is no indication whatsoever of any adversion to the accused's state of mind.

Nevertheless, the court in *Motleleni* clearly misread this statement to constitute an invitation to include subjective factors into the unlawfulness inquiry, by way of the reasonable person (the court also (406F) cites *Ntuli*, where there is no mention of the reasonable man at all, only to what is 'reasonably necessary in the circumstances' (436D)). A similar approach may be found in *S v Ngomane* 1979 (3) SA 859 (A), the next Appellate Division case which dealt with reasonableness as a test for unlawfulness in private defence. Here too, the court emphasised that the inquiry was objective, before describing the test as the 'reasonable man in appellant's situation', and referring to prognostic aspects - waiting 'to ascertain what the deceased wanted' - and subjective aspects – the appellant's purpose was to effect his immediate escape, and so he could have felled the deceased rather than killing him (863F-H).

While *S v De Oliveira* 1993 (2) SACR 59 (A) is the *locus classicus* for the defence of putative private defence, unfortunately in relation to the issue of unlawfulness in private defence, it is no more helpful than *Motleleni* and *Ngomane*. *De Oliviera* confirms the test as objective, but employs the reasonable man as the measure, and cites *Ntuli* as authority for this approach (63; as does *S v Janki* 2021 JDR 2267 (KZP) para 7). As mentioned above, *Ntuli* does not say this.

Perhaps one may inquire at this point what harm is really done by employing the reasonable person notion to stand in for the notion of reasonableness in the private defence unlawfulness test? Snyman states (*Criminal Law* 6ed (2014) 113) that the courts apply the reasonable person test merely in order to determine whether the conduct in question was reasonable in the sense that it accorded with what is usually acceptable in society, that is, the reasonable person criterion is employed merely as an aid. There can be no criticism of this approach, he adds.

Is this so? In *S v Dougherty* (2003 2 SACR 36 (W) para 39), Willis J states the following: 'the test, although objective (and even taking into account the qualifications, *in particular the subjective situation in which an accused person finds himself*, expressed in cases such as *S v Motleleni*, *S v Goliath* and *S v Ntuli (supra*)), must be a high one… The objective test is, however, measured against a standard. The standard is that of a *reasonable person*… A reasonable person in the situation in which the appellant found himself would not have fired the volley of shots but *would have aimed a non-fatal shot or shots to bring his suspected attackers down* and *would have aimed with an intention to kill only if it became clear that if he, the appellant, did not shoot to kill he would probably be killed himself*.'

My difficulties with this judgment, apart from the misquoting of *Goliath* and *Ntuli*, relate to the subjectivity of the reasonable person test, which is overtly expressed (and *italicised*).

While the judgment of the Supreme Court of Appeal in *Steyn* (2010 1 SACR 411 (SCA)) is entirely sound, asking (para 23-24) whether the appellant acted reasonably in the circumstances, and applying the 'robust approach' of the court in *Ntuli* (at 437), the reasoning of the court a quo may be questioned for confusing the question of unlawfulness with negligence. The court a quo held (para 17) that a reasonable person in the appellant's position would have foreseen the possibility of the attack, and would 'therefore not have proceeded to place herself in a position of danger where she might be forced to use her pistol to defend herself', concluding that 'the appellant had acted unreasonably and that the fatal incident could have been avoided if she had telephoned for help and waited for assistance before she left her room.' The infiltration of prognostic reasoning into the test for unlawfulness is clear. Notably, it is this reasoning, based on the reasonable person, which formed the basis of the appellant's conviction before the trial court, whereas on the diagnostic objective reasonableness test in the SCA, there was an acquittal.

Where the reasonable person inquiry informs and shapes the test of reasonableness this means that effectively the reasonable person test is applied twice in the inquiry into criminal liability - for unlawfulness and negligence. The absurdity and pointlessness of such an outcome was identified in *S v Engelbrecht* (2005 (2) SACR 41 (W) para 465). Moreover, important practical problems arise, in that the result of a partly subjective criterion for unlawfulness can undermine legal certainty, and do violence to the well-established dichotomy between an objectively assessed *actus reus*, and a *mens rea* criterion which either is established entirely, or in the case of negligence, partly, on the basis of subjective criteria. There is a qualitative difference between an objective ex post facto assessment for unlawfulness, which is about the law's attitude to an act,

assessing those circumstances actually present and those consequences which actually occurred, and a prognostic inquiry into negligence, which examines the actor's state of mind, asking which consequences may occur.
The assessment of unlawfulness should certainly take into account all the relevant *external* factors which are relevant to liability. As long as unlawfulness is assessed in terms of real consequences rather than likely consequences, the test should be as inclusive as possible. However, foreseeability belongs to the inquiry into negligence, and not to the test for unlawfulness.
If it is accepted that unlawfulness and fault are two independent elements in the assessment of criminal liability, which are tested at two different stages, that is, the unlawfulness of the act and the blameworthiness of the actor, then the two tests cannot be the same. Reasonableness is not equivalent to the reasonable person, in the context of private defence, and unlawfulness generally.

Shannon Hoctor
Stellenbosch University

Matters of Interest to Magistrates

Legislating alternative dispute resolution in the criminal justice system

The South African criminal justice system is struggling with major issues, including high crime rates and slow case processing. These issues make it difficult to deliver justice effectively leading to overcrowded prisons and low conviction rates for crimes committed. Alternative dispute resolution (ADR) could help solve these issues by providing quicker and more collaborative methods to resolve disputes (DR Sahoo and K Bansal 'Building bridges, healing families: Embracing alternative dispute resolution mechanisms in a joint family business' dispute' (2025) *Humanities Journal*). However, there is currently no legislation or provision in the Criminal Procedure Act 51 of 1977 (CPA) that formally recognise ADR in criminal cases. This lack of formal recognition limits ADR's use in criminal cases, despite its potential benefits
ADR involves resolving disputes outside the courtroom, often through methods like mediation, arbitration or negotiation (E Purwantono and DA Mochtar 'Responsibilities

of prosecutors in resolving civil disputes through non-litigation mechanisms' (2025) 6 *International Journal of Research in Social Science and Humanities* 13). In criminal cases, ADR can bring victims and offenders together to discuss the harm caused and find ways to repair it. This approach is voluntary, confidential and fair ensuring all parties participate willingly. According to Mubihanti, there is a term called restorative justice, which is a key part of ADR in criminal matters. It focuses on healing the harm caused by crime rather than just punishing offenders (PI Mubihanti 'Restorative justice as an alternative form of criminal case resolution' (2025) 15 *Fox Justi: Jurnal Ilmu Hukum* 275). By formally adopting ADR in criminal law, South Africa (SA) could reduce slow case processing, involve victims more effectively and promote rehabilitation over punishment.

This article examines why it is essential for South African law to formally recognise ADR in criminal cases and explores how such regulations could benefit legal practitioners. In achieving this, it will first analyse the current legislative framework to identify gaps in addressing ADR. It will then propose new legislation to integrate ADR into criminal proceedings effectively. Following this, the article will highlight the benefits of legislating ADR in criminal cases, such as reducing court backlogs and promoting restorative justice. A comparative analysis with other countries will provide insights into successful implementations of ADR in criminal contexts. Finally, the article will conclude by summarising key findings and implications for SA's legal system.

Legislative framework addresses the gap

Currently, ADR is not formally recognised in SA's criminal justice system, but the Constitution provides a strong foundation for its inclusion. For example, s 34 guarantees everyone the right to resolve disputes through a fair public hearing before a court or, where appropriate, another independent and impartial forum. Although this has traditionally been interpreted as access to courts, it also allows ADR mechanisms to be recognised as alternative forums for resolving disputes.

Additionally, s 12(1) protects the right to freedom and security, including freedom from violence. This aligns with ADR's ability to address the root causes of crime and promote healing, which supports the protection of individual rights. Despite these constitutional provisions, diversion programmes permitted under the CPA are inconsistently applied and do not formally recognise ADR processes.

ADR is not formally used in South African criminal law cases, primarily because there is no specific legislation that recognises or mandates its use. Although ADR is not formally established in criminal law, there are instances where it is applied indirectly. For example, s 6 of the CPA allows prosecutors to withdraw charges in certain cases, often as part of informal agreements or diversion programmes. However, these practices are fragmented and lack a unified framework that formally incorporates ADR principles. Other examples include pre-trial interventions like admission of guilt fines, conditional withdrawal of prosecution and diversion programmes for children and adults (s 57). Despite their potential benefits, these are not fully recognised as ADR processes in the criminal context.

Several cases highlight the challenges caused by the absence of formal ADR legislation. In *S v Shilubane* 2008 (1) SACR 295 (T), the court emphasised restorative justice principles but lacked clear guidelines on how ADR could be applied effectively within criminal proceedings. In this case, a man named Shilubane was found guilty of stealing fowls. The court wanted to use 'restorative justice,' which is like ADR because it tries to fix the harm caused by the crime instead of just punishing the criminal. In Shilubane's case, the court thought about making him compensate the victim or do community service. However, there were no clear rules or laws on how to do this. Even though the court wanted to use restorative justice, there is no legislation in place to support it.

Similarly, *S v Maluleke* (T) (unreported case no 21/2008, 505, 8-9-2009) (Molopa J) demonstrated an attempt at reconciliation between parties but exposed the inconsistency in applying restorative justice due to legislative gaps. In this case, Maluleke was found guilty of housebreaking with intent to steal and theft. The magistrate sentenced him to three years in prison. However, on review, the High Court found the sentence too harsh. The High Court considered that Maluleke was a first-time offender, pleaded guilty, showed remorse and the stolen items were returned. The High Court reduced Maluleke's sentence. This reflects a move toward restorative justice, which shares principles with ADR. The court took into account the harm done but also looked at rehabilitating Maluleke rather than just punishing him. The reduced sentence with a suspended portion, conditional on him not re-offending, aligns with restorative justice goals of reintegrating offenders.

These cases reveal a critical problem. Although there is growing recognition of restorative justice principles in SA's criminal justice system, their application remains inconsistent due to fragmented laws and a lack of formal regulation. To formally recognise ADR into the criminal justice system, SA needs legislation that unifies these processes under one framework. This would ensure consistency in resolving criminal disputes.

Proposals for the legislation

To formally incorporate ADR in SA's criminal justice system, several changes to the legislative framework are necessary. Firstly, amendments to the CPA should include ADR processes as a recognised way to resolve disputes. This would make ADR a recognised alternative for resolving cases outside the court. It will, therefore, help to alleviate the strain on courts and improve access to justice.

Furthermore, the admission of guilt fines regime under CPA should be modified to align with pre-trial ADR principles, focusing on restorative justice rather than punishment (s 57). This involves removing penalty provisions and supporting ADR processes. As a result, plea and sentence agreements should be reviewed to ensure they are efficient and aligned with ADR goals (s 105A).

Moreover, formalising adult diversion programmes is crucial. Just as the Child Justice Act 75 of 2008 regulates diversion for children, similar legislation should apply to adults (s 51). This would promote fairness and equality, aligning with s 9 of the Constitution, which ensures equal treatment under the law. By formalising these programmes, SA

can provide consistent rehabilitation options for all offenders, regardless of age. Additionally, conditional withdrawals of prosecution and diversion programmes also need regulation to ensure fairness and consistency.

In terms of specific offences, the legislation could include certain minor offences listed in Schedule 1 of the CPA for ADR, while excluding more serious offences from Schedule 2. This distinction ensures that ADR processes are applied appropriately, particularly for minor offences where direct imprisonment is unlikely.

Encouraging accountability among offenders is also important. The legislation should promote victim involvement. This will allow the victims to express their views on the impact of the harm caused, ensuring that their needs are addressed within the ADR framework. Additionally, the legislation should facilitate restitution by encouraging compensation to victims and promoting reconciliation between offenders and victims or communities.

Finally, public awareness about ADR options is crucial and legal education should include ADR modules to prepare professionals for a system that incorporates these processes. By implementing these changes, SA can improve its justice system, reduce slows case processing and promote restorative justice.

Benefits of legislating ADR in criminal justice

Legislating ADR in the criminal justice system brings several key benefits. Firstly, using ADR can help take some of the pressure off the courts. By resolving criminal cases through ADR instead of going to court so that the courts can focus on the most serious crimes. This also means cases can be resolved faster. Secondly, ADR is often cheaper than going to court. When cases are resolved more quickly, it saves money for both the state and the accused.

Third, ADR can help resolve cases more quickly. This is especially helpful for offenders who might otherwise have to go through a long court process, which can be difficult and expensive. A legislative framework can also formalise out-of-court settlements. This means that agreements can be made that are specific to each offender and the crime they committed. The agreements can include things that are fair based on what happened, which makes the outcome more just.

Furthermore, ADR focuses on helping offenders learn from their mistakes and change their behaviour, instead of just punishing them. This can help them become productive members of society again. A legislative framework will ensure that ADR is used fairly and consistently in all cases. Finally, the legislation can also specifically address minor offenses, in a way that does not lead to offenders having a criminal record. This can help them avoid the negative long-term consequences that comes with having a criminal record.

Comparative analysis

Countries such as New Zealand, Australia and Canada have successfully integrated ADR into their criminal justice systems (Mubihanti (*op cit*)). New Zealand focuses on restorative justice, emphasising victim-offender dialogue and community involvement (A Omowon and AS Kunlere ‘Restorative justice practices: Bridging the gap between

offenders and victims effectively' (2024) 24 *World Journal of Advanced Research and Reviews* 2768). This approach can serve as a model for SA, particularly in fostering community engagement and promoting healing for both victims and offenders.

Australia's use of family group conferencing and circle sentencing, especially for Aboriginal offenders, highlights the importance of culturally relevant ADR processes (E Marchetti and K Daly 'Indigenous courts and justice practices in Australia' (2004) 277 *Australian Institute of Criminology*). South Africa can learn from this by implementing culturally sensitive ADR methods that respect and incorporate the diverse cultural backgrounds of its population.

Canada's emphasis on restorative justice and victim-offender mediation provides valuable insights into promoting rehabilitation and community reintegration (R Wilson, B Huculak and A McWhinnie 'Restorative justice innovations in Canada' (2002) 20 *Behavioral Sciences & the Law* 363). South Africa can benefit from adopting similar strategies to enhance offender rehabilitation and reduce recidivism rates.

By learning from these countries, SA can create a legislative framework that effectively integrates ADR into its criminal justice system, enhancing access to justice and promoting restorative justice.

Conclusion

In conclusion, the formal legislating of ADR into SA's criminal justice system offers a promising solution to the issues of case delay and overcrowded prisons. By amending the CPA to incorporate restorative justice principles and structured ADR processes, SA can shift from a system focused on punishment to one that emphasises reconciliation, rehabilitation and healing for all parties involved.

These changes would not only reduce the pressure on courts but also make justice more accessible, speed up case resolution and give victims a stronger voice in the justice process. Lessons from countries like New Zealand, Australia and Canada show how ADR can improve justice systems by involving communities and respecting cultural differences. To make this work in SA, it is important to have clear legislative frameworks, providing training for legal practitioners and raising public awareness about ADR's benefits.

Ultimately, legislating ADR in criminal cases would create a more restorative and inclusive justice system in SA. It would focus on the addressing the harm caused by the crime while helping the offenders reintegrate into society. It will also address the root cause of crime while promoting accountability and fairness. This approach has the potential to strengthen public trust in the justice system and build a safer society.

Gosiame Lehuco *LLB (NWU)* is an Academic Assistant at the North-West University Faculty of Law in Mahikeng.

This article was first published in *De Rebus* in 2025 (June) *DR* 56.

A Last Thought

Mediation will unclog court backlog by Judge Stuart Wilson

I am a high court judge. Every day, I help people resolve their disputes according to law. There's nothing I don't like about the work. I find every part of the law interesting. I take genuine pleasure in working out how the law applies to the hundreds of contested cases I have heard, and in giving the parties a decision that will help them on their way.

Still, the litigation process depends on litigants and their lawyers doing a lot of work to define the nature of the dispute I and other judges have to decide, and to produce the evidence that we need to hear to resolve the dispute for them.

At the moment, though, the vast majority of trial actions we are asked to hear are brought to us before they are ready to be heard, because the parties have not done the work necessary to define the dispute they want us to resolve.

As a result, the number of trials in which evidence is actually heard and for which judgment can be given, is a small fraction of the number of trials in which the parties are just not ready, and probably never will be ready, to present their case.

Inevitably, the matter settles or is postponed with nothing having been resolved. When the parties settle at the outset of the trial because they're not ready to proceed, it takes ten minutes to review and endorse the agreement. But the rest of the time allocated to hear the trial goes to waste. Sometimes it's the rest of the day. Sometimes it's the whole week. .

That time could be spent hearing other cases in which people can say exactly what it is they want decided. These are cases in which a judge can actually do their job.

This is what is meant when people say the high court's trial rolls are "clogged". There are far too many cases which are not ready to be decided. Many, if not most, of these cases will likely never need to be decided because, once the parties have defined their disputes properly, they often agree how those disputes should be resolved without the need for a judge.

The number of unprepared cases enrolled in my trial court dwarfs the number of cases that are ready to be heard before me. The result is that people who need the court's help –- some of them desperately –- must wait months or years for a hearing.

Recently, a directive was introduced in the Gauteng division to address this problem. The directive is this: before you get a trial date, you must have attempted to resolve your case through mediation. This means a trained mediator must look at your case

and engage with you and your opponent to see if an agreement on how it should be resolved can be reached.

If the matter is resolved, so much the better. If not, the mediator must write a report to the judge in which they certify the matter is not settled, and set out the issues that remain in dispute between the parties. This means when the matter comes to a judge, they will have some idea what the dispute is really about. It also increases the likelihood of the dispute being settled well before the case comes to a hearing. Litigants who know what they're really arguing about are more likely to settle their differences amicably.

The new directive has been criticised. But I think much of the criticism misses the point.

Some say that the directive breaches the right of access to court. But this misunderstands what that right protects. The right in section 34 of the Constitution is "to have any dispute that can be resolved by the application of law" heard by a court or "another independent and impartial tribunal or forum". But in order for a dispute to be "resolved by the application of law", the parties need to have defined the dispute.

Another criticism is that asking the parties to pay for a mediator will make litigation more expensive. I don't see how. Whether by a mediator or by the parties' lawyers, a dispute must be defined before it comes to court. Someone must be paid to do the work necessary to get a dispute to the state needed for a judge to resolve it. Mediators may well be able to do that more cheaply than lawyers. And if the dispute is settled, there are no further costs.

It has also been said that the directive is "judicial overreach". But section 173 of the Constitution gives the High Court the power to protect and regulate its own process. Requiring the parties before the court to define a dispute judges can actually decide is at the very heart of that power.

If the mediation directive is successful, it would speed up trial litigation in Johannesburg and Pretoria by several orders of magnitude. It would make sure people with genuinely justiciable disputes have their cases heard promptly and fairly. It would slash the cost of litigation for those whose disputes can be settled. It would also lower the cost of disputes that ultimately need a judge by more closely defining what it is the judge is required to decide. It would, in other words, expand access to justice to the benefit of thousands of people who must presently wait years longer than they should for their day in court**.**

Stuart Wilson is a judge of the Gauteng High Court.

(The above article was published on the GroundUp website on 17 May 2025)