6 Applications

RS 24, 2024, D1 Rule 6-1

(1) Every application shall be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief.

[Subrule (1) substituted by GN R2133 of 3 June 2022 and by GN R5124 of 16 August 2024.]

(2) When relief is claimed against any person, or where it is necessary or proper to give any person notice of such application, the notice of motion shall be addressed to both the registrar and such person, otherwise it shall be addressed to the registrar only.

[Subrule (2) substituted by GN R5124 of 16 August 2024.]

(3) . . .

[Subrule (3) repealed by GN R2133 of 3 June 2022.]

(4) *(a)* Every application brought *ex parte* shall —

(i) be upon notice to the registrar supported by an affidavit referred to in subrule (1);

(ii) be filed with the registrar and set down, before noon on the court day but one preceding the day upon which it is to be heard; and

(iii) set forth the form of order sought, specify the affidavit filed in support thereof, request the registrar to place the matter on the roll for hearing, and be as near as may be in accordance with Form 2 of the First Schedule:

Provided that where an *ex parte* application is brought as an urgent application —

(i) the applicant shall indicate the basis on which the application is deemed to be urgent, including the provisions of any law upon which the applicant relies;

(ii) the application may be brought before a judge in chambers; and

(iii) the provisions of subrule (12) may be applied in so far as is necessary.

[Paragraph *(a)* substituted by GN R2133 of 3 June 2022 and by GN R5124 of 16 August 2024.]

(b) (i) Any person having an interest which may be affected by a decision on an application being brought *ex parte*, may deliver notice of an application for leave to oppose, supported by an affidavit setting forth the nature of such interest and the ground upon which such person desires to be heard, whereupon the registrar shall set such application down for hearing at the same time as the initial application.

(ii) The court hearing the matter may grant or dismiss either or both such applications as the case may require, or may adjourn the same upon such terms as to the filing of further affidavits by either applicant or otherwise as it deems fit.

[Paragraph *(b)* substituted by GN R5124 of 16 August 2024.]

(c) . . .

[Paragraph *(c)* deleted by GN R5124 of 16 August 2024.]

(5) *(a)* Every application other than one brought *ex parte* shall be brought on notice of motion as near as may be in accordance with Form 2*(a)* of the First Schedule and true copies of the notice, and all annexures thereto, shall be served upon every party to whom notice thereof is to be given.

[Paragraph *(a)* substituted by GN R3397 of 12 May 2023.]

RS 24, 2024, D1 Rule 6-2

(b) In a notice of motion the applicant shall —

(i) appoint an address within 25 kilometres of the office of the registrar and an electronic mail address, if available to the applicant, at either of which addresses the applicant will accept notice and service of all documents in such proceedings;

(ii) state the applicant's postal or facsimile addresses where available; and

(iii) set forth a day, not less than 10 days after service thereof on the respondent, on or before which such respondent is required to notify the applicant, in writing, whether respondent intends to oppose such application, and shall further state that if no such notification is given the application will be set down for hearing on a stated day, not being less than 10 days after service on the said respondent of the said notice;

Provided that —

(aa) for the purposes of this subrule, the days between 21 December and 7 January, both inclusive, shall not be counted in the time allowed for delivery of the notice of intention to oppose or delivery of any affidavit;

(bb) the provisions of subparagraph *(aa)* shall not apply to applications brought under subrule 6(12) of this rule and applications brought under rule 43.

[Paragraph *(b)* substituted by GN R1055 of 29 September 2017 and by GN R3397 of 12 May 2023.]

(c) If the respondent does not, on or before the day mentioned for that purpose in such notice, notify the applicant of an intention to oppose, the applicant may place the matter on the roll for hearing by giving the registrar notice of set down before noon on the court day but one preceding the day upon which the same is to be heard.

(d) Any person opposing the grant of an order sought in the notice of motion shall —

(i) within the time stated in the said notice, give applicant notice, in writing that such person intends to oppose the application, and in such notice appoint an address within 25 kilometres of the office of the registrar and an electronic mail address, if available to such person, at either of which addresses such person will accept notice and service of all documents, as well as such person's postal or facsimile addresses where available;

(ii) within 15 days of notifying the applicant of intention to oppose the application, deliver such person's answering affidavit, if any, together with any relevant documents; and

(iii) if such person intends to raise any question of law only such person shall deliver notice of intention to do so, within the time stated in the preceding sub-paragraph, setting forth such question.

[Paragraph *(d)* substituted by GN R2133 of 3 June 2022 and by GN R3397 of 12 May 2023.]

(e) Within 10 days of the service upon the respondent of the affidavit and documents referred to in sub-paragraph (ii) of paragraph *(d)* of subrule (5) the applicant may deliver a replying affidavit. The court may in its discretion permit the filing of further affidavits.

RS 24, 2024, D1 Rule 6-2A

(f) (i) Where no answering affidavit, or notice in terms of sub-paragraph (iii) of paragraph *(d)*, is delivered within the period referred to in sub-paragraph (ii) of paragraph *(d)* the applicant may within five days of the expiry thereof apply to the registrar to allocate a date for the hearing of the application.

(ii) Where an answering affidavit is delivered the applicant may apply for such allocation within five days of the delivery of a replying affidavit or, if no replying affidavit is delivered, within five days of the expiry of the period referred to in paragraph *(e)* and where such notice is delivered the applicant may apply for such allocation within five days after delivery of such notice.

(iii) If the applicant fails so to apply within the appropriate period aforesaid, the respondent may do so immediately upon the expiry thereof. Notice in writing of the date allocated by the registrar shall be given by the applicant or respondent, as the case may be, to the opposite party within five days of notification from the registrar.

[Subparagraph (iii) substituted by GN R3397 of 12 May 2023.]

RS 24, 2024, D1 Rule 6-3

(g) Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the aforegoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.

(h) . . .

[Paragraph *(h)* repealed by GN R2133 of 3 June 2022.]

(6) The court, after hearing an application whether brought *ex parte* or otherwise, may make no order thereon (save as to costs if any) but grant leave to the applicant to renew the application on the same papers supplemented by such further affidavits as the case may require.

(7) *(a)* Any party to any application proceedings may bring a counter-application or may join any party to the same extent as would be

competent if the party wishing to bring such counter-application or join such party were a defendant in an action and the other parties to the application were parties to such action. In the latter event the provisions of rule 10 will apply.

(b) The periods prescribed with regard to applications apply to counter-applications: Provided that the court may on good cause shown postpone the hearing of the application.

(8) Any person against whom an order is granted *ex parte* may anticipate the return day upon delivery of not less than twenty-four hours' notice.

(9) A copy of every application to court in connection with the estate of any person deceased, or alleged to be a prodigal, or under any legal disability, mental or otherwise, shall, before such application is filed with the registrar, be submitted to the Master for consideration and report; and if any person is to be suggested to the court for appointment as curator to property, such suggestion shall likewise be submitted to the Master for report. Provided that the provisions of this subrule do not apply to any application under rule 57 except where that rule otherwise provides.

[Subrule (9) substituted by GN R5124 of 16 August 2024.]

(10) The provisions of subrule (9) further apply to all applications for the appointment of administrators and trustees under deeds or contracts relating to trust funds or to the administration of trusts set up by testamentary disposition.

(11) Notwithstanding the aforegoing subrules, interlocutory and other applications incidental to pending proceedings may be brought on notice supported by such affidavits as the case may require and set down at a time assigned by the registrar or as directed by a judge.

(12) *(a)* In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as it deems fit.

(b) In every affidavit filed in support of any application under paragraph *(a)* of this subrule, the applicant shall set forth explicitly the circumstances which it is averred render the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course.

[Paragraph *(b)* substituted by GN R2133 of 3 June 2022 and by GN R5124 of 16 August 2024.]

(c) A person against whom an order was granted in such person's absence in an urgent application may by notice set down the matter for reconsideration of the order.

(13) In any application against any Minister, Deputy Minister, Member of an Executive Council, officer or servant of the State, in such capacity, the State or the administration of any province, the respective periods referred to in paragraph *(b)* of subrule (5), or for the return of a rule *nisi*, shall be not less than 15 days after the service of the notice of motion, or the rule *nisi*, as the case may be, unless the court has specially authorized a shorter period.

[Subrule (13) substituted by GN R5124 of 16 August 2024.]

(14) The provisions of rules 10, 11, 12, 13 and 14 apply to all applications.

(15) The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted.

[Rule 6 substituted by GN R3 of 19 February 2016 and amended by GN R2133 of 3 June 2022.]

Commentary

Forms. Notice of motion (to registrar), 2; Notice of motion (to registrar and respondent), 2*(a)*; Notice of agreement or opposition to mediation, 27.

General. [1] In terms of rule 1 'application' means 'a proceeding commenced by notice of motion or other forms of applications provided for by rule 6.' Rule 6 makes provision for the following distinct applications:

(a) applications on notice and, in this regard —
  (i) unopposed applications;
  (ii) opposed applications, which may further be divided into those that can properly be decided on affidavit and those that cannot;

(b) *ex parte* applications (including applications for leave to oppose an *ex parte* application);

(c) interlocutory and other applications incidental to pending proceedings;

(d) urgent applications;

(e) application for the striking out from any affidavit matter which is scandalous, vexatious or irrelevant;

(f) counter-applications. [2]

Every application must comply with the provisions of rule 62. See further rule 62 and the notes thereto below.

Most of the divisions of the High Court have their own, sometimes very detailed, local rules of practice relating to applications. [3]

An application is brought on notice and addressed to the registrar and a particular person when relief is claimed against any such person, or where it is necessary or proper to give any such person notice of the application. [4] An application is brought *ex parte* and addressed to the registrar only, where no relief is claimed against any person and it is neither necessary nor proper to give any person notice thereof. [5]

The rules set out the requirements in relation to the form, place and manner in which applications on notice or *ex parte* applications should be brought. An interlocutory application or an application incidental to pending proceedings, as opposed to applications on notice or *ex parte* applications commencing proceedings, may be brought on notice addressed to all other parties to the pending dispute and the registrar and not on notice of motion. [6] Certain requirements in the rules relating to the form, place and manner in which applications should be brought do not apply to interlocutory applications. [7] An urgent application can be brought either on notice or *ex parte*. [8] To the extent that an application which is not *ex parte* is urgent, the court or a judge may dispense with the forms and service provided for in the rules. [9] As opposed to applications on notice or *ex parte* applications, an urgent application may be disposed of at such time and such place and in such manner and in accordance with such procedure as may be necessary or desirable to the court or a judge. [10]

For the citation of the relevant division of the High Court in the heading of the notice of motion, see Directive 3/2004 issued by the Chief Justice under GN 148 of 28 February 2014 (*GG* 37390 of 28 February 2014), which is reproduced in Volume 3, Part E1, but which is in need of an update.

It has been held that, in an application on notice of motion, the giving of notice to the respondent (where relief is claimed against such respondent) is an essential first step. Consequently, an application is not properly initiated by the mere filing of the application with the registrar of the High Court and the issue thereof by the registrar. [11]

It is imperative that motion court litigation should be conducted in an efficient manner. In *Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd* [12] Peter AJ observed: [13]

> 'The efficient conduct of litigation has as its object the judicial resolution of disputes, optimising both expedition and economy. The conduct and finalisation of litigation in a speedy and cost-efficient manner is a collaborative effort. The role of witnesses is

to testify to relevant facts of which they have personal knowledge. The role of legal representatives has two key aspects. First is the supervision, organisation and presentation of evidence of the witnesses and, secondly, the formulation and presentation of argument in support of a litigant's case. The diligent observation of those roles facilitates the role of the judicial officer, which is to arrive at a reasoned determination of the issues in dispute,

in favour of one or other of the parties. Where practitioners neglect their roles, it leads to the protracted conduct of the litigation in an ill-disciplined manner, the introduction of inadmissible evidence and the confusion of fact and argument, with the attendant increase in costs and delay in its finalisation, inimical to both expedition and economy.'

It is undesirable to dispose of an application piecemeal. [14] It is the duty of legal practitioners appearing in motion court to draw the presiding judge's attention to any deviations from the standard forms and orders in the papers and to offer an explanation therefor. [15]

Legal practitioners appearing in motion court also have a duty, in both opposed and unopposed motions, to direct the court's attention to any relevant authority. [16] In *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* [17] Fabricius J stated: [18]

'I do agree with Mr *A Bham SC*'s submission that certain general standards apply in the context of whether or not counsel are obliged to bring an authority, which precluded the granting of an order sought, to the court's attention. I agree with what Wunsh J said in *Ex parte Hay Management Consultants (Pty) Ltd* 2000 (3) SA 501 (W) ([2002] 2 All SA 592) at 506B–D:

"Had I not known of it, counsel's ignorance of its existence and failure to bring it to my attention could have misled me. While counsel and attorneys may not be expected to read the law reports as they are published and recall their contents or effect, if they have to present argument on a matter, the least that is expected of them is to consult the relevant textbooks, the consolidated indexes of and noters-up to the ordinary law reports and the indexes of and noters-up in weekly or monthly reports which have been published after the effective date of the latest consolidated index and noter-up. I do not mention the computer services that are available to retrieve material."

I could, however, add that I do expect counsel and attorneys to read the law reports as they are published, as they may have a vital impact on litigation with which they are busy. Counsel should be up to date with recent authorities in their field of practice and authority that relates to the subject matter at hand when they appear in court. Obviously, it happens every day that counsel's opponent mentions an authority of which he (or she) had either not been aware, or had not mentioned during the address or argument. Similarly the court mero motu often refers to an authority that was not mentioned by the parties. This does not per se mean that one or other counsel was negligent or acted improperly. It also does not mean that they had an improper motive per se, or acted vexatiously. Each case would depend on its own merits, and in my view no general rule should be laid down that would have the effect of limiting in any way counsel's duty to act fearlessly, but obviously honestly and ethically. As I have said, in the present instance, I do not find that either Mr Biebuyck or his counsel in the attachment application acted so irresponsibly that a special costs order would be justified against them personally.'

A court is empowered, in the exercise of its discretion, to direct that a preliminary point (i e a point *in limine*) be disposed of first in motion proceedings. [19] Such an order will be made when

the issue is one of substance that may dispose of the case as a whole, or at least of a substantial portion thereof. [20] This procedure is particularly apposite when the legal issues are crisp and far removed from any conflict of fact, much like when parties first argue a legal issue, but nevertheless request a court to refer the matter to oral evidence if the applicant should lose the legal point. [21] In the aforesaid circumstances it will normally be convenient to allow the parties first to complete argument on the preliminary issue and, depending on the outcome thereof, only then to proceed with the remainder of the case. [22]

If an issue is not raised in an application, no relief is claimed concerning it and it is not properly and fully argued, it would be imprudent and inappropriate for the court hearing the application to pronounce upon it. [23]

The principles applicable to an application for the grant of a postponement of an application are the same as those that apply to trials. [24]

As to amendments to a notice of motion or an affidavit, see the notes to rule 28 s v 'General' below.

The dismissal or refusal of an application amounts to a decision in favour of the respondent. [25]

In *BR v TM* [26] it is pointed out [27] that, since the decision in *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*, [28] our courts have consistently held, on grounds of public policy, that motion proceedings are not permissible in matrimonial causes as it is undesirable for a court to grant a divorce without hearing oral evidence of the parties, first, because not only is the status of the parties themselves involved, but also that of children, and, secondly, because of the interest of the State in the preservation of the binding nature of marriage.

In *Malema v Rawula* [29] the Supreme Court of Appeal held that a claim for defamation by way of application for an interdict was not a new phenomenon in our law. [30] The court held that damages for defamation may, however, not be claimed in motion proceedings. [31] In *NBC Holdings (Pty) Ltd v Akani Retirement Fund Administrators (Pty) Ltd* [32] the Supreme Court of Appeal held [33] that where relief for defamation in application proceedings was directed

at compensating the claimant for harm caused by publication of defamatory material, such relief, whether damages, an apology or a retraction, could not be claimed in motion proceedings where there were disputes of fact that required evidence to be led.

In *IRD Global Ltd v The Global Fund to fight AIDS, Tuberculosis and Malaria* [34] the Supreme Court of Appeal held that it was settled law that an apology or retraction might serve the same purpose as an award of damages. That relief, however, required the institution of an action. [35]

Subrule (1): 'Every application.' Pursuant to its substitution with effect from 8 July 2022, [36] the subrule no longer makes reference to proceedings instituted by way of petition. Proceedings by way of petition were abolished with effect from 1 July 1976 by the Petition Proceedings Replacement Act 35 of 1976 which provides that any reference in any law to the institution of application proceedings in any court by petition, shall be construed as a reference to the institution of such proceedings by notice of motion in terms of the rules of court. [37] In terms of rule 1 'application' means 'a proceeding commenced by notice of motion or other forms of applications provided for by rule 6.' See further the notes to rule 6 s v 'General' above.

'Shall be brought on notice of motion.' The term 'notice of motion' is used in two different senses: (i) to denote particular written notices, the form of which is prescribed in the First Schedule to the rules; [38] and (ii) to denote one of the different ways in which civil proceedings may be initiated. [39] It is not a requisite of the rules that a notice of motion must, as in the case of a summons, be issued by the registrar or delivered to him *before* it may be served upon the respondent. [40]

Notice of mediation. In every new application proceeding, the applicant must, together with the notice of motion, serve on

each respondent a notice indicating whether such applicant agrees to or opposes referral of the dispute to mediation. [41] The notice must substantially be in accordance with Form 27 of the First Schedule and must clearly and concisely indicate the reasons for the applicant's belief that the dispute is or is not capable of being mediated. [42] The notice must not be filed with the registrar. [43] If the parties agree on mediation, and a joint minute to that effect is signed, the time limits prescribed by the rules for the delivery of notices and the filing of affidavits or the taking of any step are suspended for every party to the dispute from the date of signature of the minute to the time of conclusion of mediation: Provided that any party to the proceedings who considers that the suspension of the prescribed time limits is being abused, may apply to the court for the upliftment of the suspension of the prescribed time limits. [44] See further the provisions of rule 41A below.

In *Nomandela v Nyandeni Local Municipality* [45] the applicant's urgent application for interim relief was met with the respondent's point *in limine* that the applicant failed to comply with rule 41A(2)*(a)*. At issue was whether the court should allow the application to proceed as it stood. It was held [46] that rule 41A(2)*(b)* compels a respondent to also file its notice as to whether it agrees to or opposes referral of the dispute for mediation. The rule did not suggest that the respondent's compliance was dependent on the applicant's filing of a rule 41A(2)*(a)* notice. Even if it were, nowhere in the answering affidavit was it stated that the respondent would have wished to explore or not explore the mediation process, but could not do so for reason of the applicant's non-filing. The respondent could have complied with its part of the obligation in terms of the rule or communicated its stance on mediation regardless of the applicant's failure. The rules were meant to be complied with, but they were meant for the court, and not the other way round. While it was ideal that litigants comply with rule 41A, in the interests of justice the issues raised in the application called for immediate resolution rather than removing the matter from the roll in order for the litigants to pronounce on whether they would agree to or oppose mediation. The point *in limine* was accordingly dismissed.

In *Ethypersadh v Minister of Police NO* [47] it was held that an application brought on an urgent basis would of necessity not be subject to the provisions of rule 41A. [48]

'Supported by an affidavit.' An affidavit is a statement in writing sworn to before someone who has authority to administer an oath; it is a solemn assurance of fact known to the person who states it, and sworn to as his statement before some person in authority such as a magistrate, justice of the peace, commissioner of the court or a commissioner of oaths. [49] On the attestation of affidavits, see Part D3 below. On the amendment of affidavits, see the notes to rule 28 s v 'General' below.

In terms of rule 62:

(i) every affidavit must be divided into concise paragraphs which shall be consecutively numbered (subrule (3));

(ii) every affidavit filed with the registrar by or on behalf of a respondent must, if the respondent is represented, on the first page thereof bear the name and address of the attorney filing it (subrule (5));

(iii) the registrar may reject any document which does not comply with the requirements of the rule (subrule (6)).

Who can execute an affidavit. Anyone who can lawfully be a witness can execute an affidavit. The Criminal Procedure Act 51 of 1977 [50] provides that 'no person appearing or proved to be afflicted with mental illness or to be labouring under any imbecility of mind due to intoxication or drugs or the like, and who is thereby deprived of the proper use of his reason, shall be competent to give evidence while so afflicted or disabled'. It is submitted that these statutory bars to the competency of a witness in criminal matters in principle apply equally to civil matters. A further incompetency to make an affidavit might exist in the case of a

child too young to know what it was deposing to: the competence of the child depends upon its mental development and condition. [51]

Subrule (1) requires a notice of motion to be accompanied by at least one affidavit. It is not necessary for the applicant to file an affidavit: a notice of motion can be supported by any person who is in a position to provide the necessary material to support the claim. [52] It is, in general, undesirable for an attorney to depose to an affidavit on matters that can equally or more appropriately be deposed to by his client. [53]

'The facts upon which the applicant relies for relief.' The facts must be set out simply, clearly and in chronological sequence, and without argumentative matter, in the affidavits which are filed in support of the notice of motion. [54] It is well established that 'it is . . . imperative that a litigant should make out its case in its founding affidavit, and certainly not belatedly in argument'. [55] The statement of facts must at least contain the following information:

(i) The applicant's right to apply, that is, the applicant's *locus standi*. [56] In *Scott v Hanekom* [57] it is said that it is 'trite law that appropriate allegations to establish the *locus standi* of an applicant should be made in the launching affidavits and not in the replying affidavits'.

The deponent to the affidavit need not be authorized by the party concerned to *depose* thereto. It is the *institution of the proceedings and the prosecution thereof* that must be authorized. [58]

It is submitted that authorization to institute motion proceedings should not be conflated with *locus standi in iudicio* in such proceedings. Authorization concerns proper authority to act on behalf of a party in the proceedings. *Locus standi* materially concerns the direct interest of a party in the relief sought in the proceedings. For this reason

rule 7(1) should be applied when 'the authority of anyone acting on behalf of a party' is challenged. The rule does not limit such challenge to the authority of attorneys to act on behalf of a party only but, it is submitted, includes challenges to authorizations to institute proceedings in general. Properly applied, this interpretation of rule 7(1) in motion proceedings should, in the words of Flemming DJP in *Eskom v Soweto City Council*, [59] 'lead to the elimination of the many pages of resolutions, delegations and substitutions still attached to applications by some litigants'. See further, in this regard, the notes to rule 7 s v 'General' and 'Satisfies the court that he is authorised to act' below.

The question whether or not a deficiency in the applicant's *locus standi* can be remedied retrospectively in the applicant's replying affidavit, has given rise to conflicting decisions. [60] A court will not be unduly technical and each case should be considered on its own merits.

If new allegations regarding *locus standi* are made in the applicant's replying affidavit, the respondent should be afforded an opportunity to file a further affidavit in respect thereof.

As a matter of principle, when parties are cited in legal proceedings they are entitled without more to participate in those proceedings. [61] The fact that they were cited as parties gives them that right. [62] It is not open to an applicant who has joined a respondent to contend thereafter that it was a misjoinder and on that footing to resist an adverse

order for costs. [63]

(ii) The facts indicating that the court has jurisdiction. [64]

(iii) The cause of action on which the applicant relies. [65] The respondent is entitled to raise an objection *in limine* (not an exception) that the founding affidavit does not make out a prima facie case for the relief claimed. [66] An applicant may be allowed to amend the cause of action by filing supplementary affidavits. [67] See further the notes to subrule (5)*(d)*(iii) s v 'Intends to raise any question of law only' below.

(iv) The evidence in support of the application. In application proceedings the affidavits take the place not only of the pleadings in an action, but also of the essential evidence which would be led at a trial. [68] In other words, deponents to the affidavits are 'testifying' in the

motion proceedings. [69] It follows that affidavits must, as a general rule, contain admissible evidence. [70] Inadmissible material falls to be struck out of affidavits. Disputes of fact ought not to be disguised in a mass of indignant argument, expostulation and other useless verbiage. [71]

In *Knoop NO v Gupta* [72] Wallis JA stated: [73]

> 'Before concluding it is appropriate to remark that the application papers in this matter reflect little credit on the legal practitioners responsible for their preparation. They were replete with allegations in emotive terms not borne out by any of the evidence. Ms Ragavan's allegations against the BRPs did not stand up to scrutiny and the charges of incompetence, conflict of interest, lack of independence, a failure to live up to the high professional standards expected of BRPs, and the like, were unwarranted. It should not be necessary to remind legal professionals who draft affidavits for their clients that they bear a responsibility for the contents of those documents and may not use them for the purpose of abusing their clients' opponents. Such allegations should only be made after due consideration of their relevance and whether there is a tenable factual basis for them. This aggressive tone was likewise reflected in the affidavits of Mr Knoop where he described Ms Ragavan and others as "Gupta acolytes", an expression more appropriate to a newspaper report than an affidavit. On many points, he would have been better advised to set out greater detail and less rhetoric. As to some of the correspondence between the attorneys, the less said, the better. It was marked by aggression, hostility and accusations, but little of great relevance to the case, and little that reflected well on the authors.'

In *Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd* [74] Peter AJ held: [75]

> '[15] The answering affidavit of Cleverlad amounted to 40 pages without annexures. Its contribution to the factual narrative was to introduce, into the chronology, the correspondence concerning the offer to settle the award in instalments, Cleverlad's application to make the award an order of court and interlocutory proceedings to prevent the dissipation of assets. For the rest, the common-cause facts are set out in the founding affidavit of Venmop. This amounted to 16 pages and included a repetition, in reported speech, of the contents of the relief sought in the notice of motion, under the guise of an unhelpful explanation of "the purpose of the application", as well as a number of argumentative comments on rule 53 and the case that was being made under the Act. In argument I put to Mr *Berlowitz*, who appeared for Cleverlad, that, stripped of its argumentative matter, the answering affidavit would be reduced to approximately a quarter of its size. Mr *Berlowitz* conceded the unnecessary expanse but offered his estimate of one-third of non-argumentative matter.
>
> [16] A statement appeared in the introductory paragraphs of the answering affidavit made by Cleverlad's director, that where he made legal submissions, he did so on the strength of legal advice having been obtained by him on behalf of Cleverlad from its legal representatives in the application. A statement of such nature in motion proceedings has become increasingly popular in practice in the last few years. Its

> purpose is to disclaim responsibility of the deponent for later argumentative matter which serves to inflate the papers and of which the deponent has no comprehension. However impressive this might be to a lay client in justifying a legal representative's fee for voluminous affiavits, I find this practice disturbing in at least four respects. First, by their very nature these submissions have neither evidential content nor probative value; as argumentative matter they have no place in affidavits. It is not for nothing that rule 6(1) of the Uniform Rules of Court provides for an application to be supported by an affidavit "as to the facts". Secondly, the argumentative submissions that follow are expressly admitted hearsay and, as such, inadmissible. Thirdly, the submissions amount to legal opinions on matters upon which the court is required to decide. Even expert legal opinion on matters of domestic law is neither necessary nor admissible (*South Atlantic Islands Development Corporation Ltd v Buchan* 1971 (1) SA 234 (C) at 237C–F; and *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC) (2006 (2) SACR 525; 2007 (2) BCLR 140; [2006] ZACC 17) para 43). Lastly, there is the aspect of professional legal privilege. It is well established that a communication made in confidence between a client, or an agent for that purpose, and a legal professional in such professional capacity, for the giving or receiving of legal advice, attracts professional legal privilege unless the purpose of the advice is to facilitate the commission of a crime or fraud (see generally *Three Rivers District Council and Others v Bank of England (No 6)* [2004] UKHL 48 ([2004] 3 WLR 1274; [2005] 1 AC 610); and *Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC) (2008 (2) SACR 421; 2008 (12) BCLR 1197; [2008] ZACC 13) paras 183–185). However, the privilege may be waived. In this sense, it is not only a waiver in the contractual sense of a decision to abandon a right with full knowledge thereof (*Laws v Rutherfurd* 1924 AD C 261 at 263). It is rather an imputed waiver by implication; one which arises from the element of publication of the privileged content, or part thereof, which can serve as a ground for the inference of an intention no longer to keep the content secret (*Ex parte Minister van Justisie: In re S v Wagner* 1965 (4) SA 507 (A) at 514D). A waiver by implication is concerned not so much with an ascertainment of the subjective implied intention of the party relinquishing the privilege, but fairness and consistency. It is where the conduct in disclosing part of a confidential communication touches a point that fairness and consistency require disclosure of the whole, irrespective of whether or not there was an intention to have this result (Wigmore *On Evidence* 3 ed vol 8, para 2327; *Kommissaris van Binnelandse Inkomste v Van der Heever* 1999 (3) SA 1051 (SCA) at 1061B–C). This test of imputed or implied waiver is well illustrated in the context of the litigation privilege in *Competition Commission of South Africa v Arcelormittal South Africa Ltd and Others* 2013 (5) SA 538 (SCA) ([2013] ZASCA 84) paras 33–34 and 37. Although the mere disclosure of the fact of a privileged communication, or its existence, is not sufficient to justify an imputed waiver of its contents, where its substance is disclosed to secure an advantage in proceedings, the High Court of Australia has found that this will reach the point that fairness and consistency require disclosure of the whole of the communication and a concomitant loss of privilege (*Mann v Carnell* (1999) 201 CLR 1; *Osland v Secretary to the Department of Justice* (2008) 234 CLR 275). Where parties in motion proceedings disclose the substance of otherwise privileged legal advice from their legal representatives, in the form of submissions to advance their case, it is difficult to comprehend that fairness and consistency would not permit them to "cherry pick" those parts of the advice that they received without being required to disclose the whole of the advice.'

The procedure of adducing evidence by way of hearsay evidence in the main affidavit, supported by so-called 'confirmatory affidavits' by the witnesses who should have provided the necessary details, but who merely sought to confirm what was said in the main affidavit 'insofar as reference [has been] made to me', was criticized by the Supreme Court of Appeal and described as a 'slovenly practice'. [76]

See further the notes to rule 6(15) below.

The rule is that the necessary allegations upon which the applicant relies must appear in the founding affidavit, [77] as the applicant will not generally be allowed to supplement the founding affidavit by adducing supporting facts in a replying affidavit. [78] See further the notes to subrule (5)*(e)* s v 'Deliver a replying affidavit' below.

In *Booth and Others NNO v Minister of Local Government, Environmental Affairs and Development Planning* [79] a submission made on behalf of the respondent that a contention made on behalf of the applicant was not open to him on the papers as the point had not been taken in the founding affidavit or even in the replying affidavit, was upheld, the court adding that the point was not even mentioned in the heads of argument filed on behalf of the applicant. [80]

The source of the deponent's information must be given. In the case where the application is brought personally, there is an initial assumption in most cases that the facts are within the applicant's knowledge, while the converse is true where it is brought in a representative capacity. In the latter case the affidavit usually contains a statement that the facts are within the deponent's knowledge, [81] but such a statement is not essential [82] nor is it conclusive. [83] Each case has to be decided on its own facts and circumstances. Thus, in *FirstRand Bank Ltd v Kruger* [84] the key issue in an unopposed application, brought on long-form notice of motion, by a financial institution as credit provider against a defaulting credit receiver in relation to a credit agreement entered between the parties and subject to the National Credit Act 34 of 2005 ('the NCA'), was whether the deponent to the founding affidavit had set out enough facts to demonstrate personal knowledge. The only basis upon which the deponent was claiming personal knowledge was by virtue of the position he held as commercial recoveries manager of the applicant; not that he had been involved in any attempt to recover the alleged debt or that he had accessed any of the bank's records. Information obtained from other individuals and on which he relied was not confirmed by affidavits attested to by those persons. It was found [85] that

'the deponent, while having the trappings of authority in the department, does not claim to have been personally involved in the process of recovering the debt, let alone having personally accessed the bank's records, accounts or other relevant documents . . . the deponent left it unclear as to what he personally did and what information was provided to him by others or from where they in turn might have sourced it'. After addressing the impact of s 3(1) of the Law of Evidence Amendment Act 45 of 1988 in regard to the admissibility of hearsay evidence, and finding of assistance a body of case law dealing with applications for summary judgment, [86] the court concluded: [87]

> 'Under the exceptions to the hearsay rule the inherent difficulties of producing every individual who dealt with the credit receiver and made each entry reflected in the account in question would in my view, together with the other factors already mentioned regarding probity and reliability, entitle an applicant credit grantor seeking judgment in an unopposed matter to rely on —
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> *(a)* the evidence of a person who exercises custody and control of the documents in issue to introduce them into evidence through the founding affidavit provided such allegation is made, or appears from the contents of the affidavit as a whole, and provided the agreements are attached and are alleged to be true copies. This would usually be a bank manager or an official holding the position of a recoveries manager;
>
> *(b)* the evidence of a person who has personal knowledge of the current status of the credit receiver's account by reason of having access to the account and being involved in the present management of the account or collection process, in respect of the allegations contained in the founding affidavit regarding the current outstanding balance. This would be subject to the terms of the agreement which may permit a certificate of indebtedness to constitute prima facie proof, provided it is signed by a designated official at the financial institution and provided further that the court is otherwise satisfied that such person would, in the ordinary course, have personally accessed the records, accounts and other relevant records of the respondent and provided the certificate is otherwise reliable. See generally Saldulker JA in *Rees* [88] para 14; *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 424E–F; and Wallis J (at the time) in *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another* 2010 (5) SA 112 (KZP) para 13, approving the requirement in *Standard Bank of SA Ltd v Secatsa Investments (Pty) Ltd and Others* 1999 (4) SA 229 (C) at 235A — that the deponent at least has personal knowledge of certain of the relevant facts;
>
> *(c)* the evidence of a person who positively attests that notice was properly sent to the respondent under either s 129(1) or s 86(10) of the NCA.'

If an affidavit sets out facts based on hearsay information, the deponent must state that the allegations of fact are true to the best of his information, knowledge and belief and state the basis of his knowledge or belief; [89] and failure to state the source of the information or grounds of belief in the original affidavit is an irregularity that cannot be cured by stating them in a replying affidavit. [90] It does not follow, however,

that the court is obliged to accept such hearsay evidence, even if the source and the grounds for the belief are furnished. [91]

The admission of hearsay evidence is governed by s 3 of the Law of Evidence Amendment Act 45 of 1988 which gives the court a wide discretion whether or not to admit hearsay evidence. [92] As to hearsay matter in affidavits in urgent applications, see also the notes to subrule (12)*(a)* s v 'Urgent applications' below.

Secondary evidence as to documents is inadmissible. [93]

While it is not necessary to annex the original documentary evidence to affidavits filed in the office of the registrar in motion proceedings, the originals must be available for inspection in court when the matter is called, not only at the request of the other side, but also when required by the court. [94]

It is not open to an applicant or a respondent to merely annex to his affidavit documentation and to request the court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. [95] It cannot be expected of a party

to trawl through lengthy annexures to the opponent's affidavit and to speculate on the relevance of facts contained in such annexures. [96] Trial by ambush cannot be permitted. [97] It is also improper for an applicant simply to attach a lengthy document to his affidavit and then proceed to quote therefrom without any indication as to which paragraphs are indeed being quoted. [98] It cannot be expected of the court, in preparation for the case, to struggle through what is often a quagmire of fine print to check whether the quotes are in fact correct. [99]

An inordinate delay in filing an answering affidavit, the regurgitation of statutory provisions without much attempt to explain how these impact on the case, and the annexing of documents to the affidavit without properly identifying those portions on which reliance would be placed are considerations justifying a costs order against an organ of state. [100]

The affidavits should not unnecessarily burden the record of the application proceedings. They should therefore *(a)* promote

orderly ventilation of the real issues; *(b)* not contain irrelevancies; and *(c)* not be unnecessary prolix. [101]

In *Hlazi v Buffalo City Metro Municipality* [102] the court, referring to *Patmore v Patmore* [103] and *Visser v Visser*, [104] stated:

> '[77] An affidavit containing unnecessary evidence has been held to constitute sufficient grounds to disallow costs to a successful party. Inordinate prolixity in affidavits has been met with displeasure by the courts and rightly so.'

In terms of rule 67A(2)*(c)* the court may, in considering all relevant factors when awarding costs, have regard to unnecessary or prolix drafting and unnecessary annexures.

An applicant is entitled to make any legal contention which is open to him on the facts even though it was not specifically raised or relied on in the affidavits supporting the application. [105] This principle is subject to the proviso that its application should not be unfair to the respondents. [106] This element is often subsumed under the further requirement that the principle can be applied only if all the relevant facts are before the court. [107]

Subrule (2): 'Necessary or proper to give any person notice of such application.' Notice of an application must, for example, be given to the Master where it is necessary for him to report in applications for voluntary surrender, sequestration, rehabilitation and other matters under the Insolvency Act 24 of 1936; [108] in applications for the winding-up of companies; [109] in applications for the winding-up of close corporations; [110] and in applications affecting deceased estates or the property of minors or other persons under legal disability. [111] Amendments to the Insolvency Act 24 of 1936 and the Companies Act 61 of 1973 [112] also require that notice of an application for sequestration or winding-up, as the case may be, must be given to every

registered trade union, the employees, the South African Revenue Service [113] and the debtor or the company concerned. See further subrules (9) and (10) of this rule above and the notes to subrule (9) s v 'A copy of every application . . . must . . . be submitted to the Master' below.

In addition it may be necessary or proper to give a person notice of an application, even if no relief is claimed against such person, if the relief claimed is of such a nature that the rights or interests of the person may be affected by any order the court may make pursuant to the application. [114] The principles relating to joinder apply in such cases. [115]

Subrule (4)*(a)*: 'Every application brought *ex parte*.' The phrase *ex parte* in this subrule contemplates the situation in which an application is brought without notice to anyone, either because no relief of a final nature is sought against any person, or because it is not necessary to give notice to the respondent. [116]

An *ex parte* application is used: [117]

(i) when the applicant is the only person who is interested in the relief which is being claimed; [118]

(ii) where the relief sought is a preliminary step in the proceedings, e g applications to sue by edictal citation, for substituted service, to attach to found or confirm jurisdiction;

(iii) where the nature of the relief sought is such that the giving of notice may defeat the purpose of the application, e g an Anton Piller-type order; [119]

(iv) where immediate relief, even though it may be temporary in nature, is essential because harm is imminent. In such cases the applicant will often seek a rule *nisi*, the application then being in the nature of an *ex parte* application in terms of this subrule; [120]

(v) where certain kinds of applications are customarily brought *ex parte*. In this regard the local practice of the various divisions of the High Court differ. Thus, for example, applications for provisional sequestration and winding-up are brought *ex parte* in the Free State Division of the High Court, Bloemfontein [121] and in the KwaZulu-Natal Division of the High Court, Pietermaritzburg and Durban; [122] in the Gauteng Division of the High Court, Pretoria, such applications, unless based upon a *nulla bona* return, are not brought *ex parte*. [123]

An applicant in an *ex parte* application must set forth concisely the nature and extent of the claim, the grounds upon which it is based and upon which the court has jurisdiction to entertain the claim. [124]

It has been held [125] that an *ex parte* application is not the appropriate procedure for the provisional winding-up of a body corporate established in terms of the Sectional Titles Act 95 of 1986. In such instance there are numerous interested parties who in the ordinary course would have been entitled to receive notice of the intended application. [126]

As a general principle, an interdict to restrain or forbid an intended publication by a journalist must be brought on appropriate notice to the journalist and not *ex parte*. [127]

Good faith is a *sine qua non* in *ex parte* applications. [128] It extends also to legal representatives. [129]

If any material facts are not disclosed, whether they be wilfully suppressed or negligently omitted, [130] the court may on that ground alone dismiss an *ex parte* application. [131] The court will also not hold itself bound by any order obtained under the consequent misapprehension of the true position. [132] Among the factors which the court will take into account in the exercise of its discretion to grant or deny relief to a litigant who has been remiss in his duty to disclose, are: [133] the extent to which the rule has been breached; the reasons for the non-disclosure; [134] the

extent to which the first court might have been influenced by proper disclosure; the consequences, from the point of doing justice between the parties, of denying relief to the applicant on the *ex parte* order; and the interest of innocent third parties such as minor children, for whom protection was sought in the *ex parte* application. [135] The test is objective. [136]

Even though partially successful an applicant may be ordered to pay the costs of the application if he has negligently failed to disclose material facts. [137] In *Schlesinger v Schlesinger* [138] an order obtained *ex parte* was set aside with costs on the scale as between attorney and client against the original applicant for displaying a reckless disregard of a litigant's duty to a court in making a full and frank disclosure of all known facts that might influence the court in reaching a just conclusion. If the failure to disclose is the fault of the attorney acting for a party, he may be ordered to pay the costs *de bonis propriis.* [139]

After a rule *nisi* has been discharged by default of appearance by the applicant, the court or a judge may revive the rule

and direct that the rule so revived need not be served again. [140]

On the return date of an opposed rule *nisi*, the court must decide what relief has to be granted based on the evidence adduced by the parties. Obviously, the evidence is the legally relevant evidence. It is well established that a court should not pronounce upon issues that it is not called upon to pronounce and that are not properly and fully argued. So much the more when no relief is claimed concerning such issue. It would be imprudent and inappropriate for a court do to so. [141] It is also well established that because in motion proceedings the papers stand as the pleadings and evidence, the relevance of the evidence offered is dependent on its cogent connection with the relief being sought as defined in the notice of motion. [142] According to the circumstances, the court should then either discharge the rule, confirm it, vary it or make such order thereon as shall seem just to the court. [143]

Subrule (4)*(a)*(i): 'Supported by an affidavit.' This subrule, read with subrule (1), makes it clear that every *ex parte* application must be supported by an affidavit. See further the notes to subrule (1) s v 'Supported by an affidavit' and the notes to subrule (4)*(a)* s v 'Every application brought *ex parte*' above.

Subrule (4)*(a)*(iii): 'Set forth the form of the order sought . . . as near as may be in accordance with Form 2 of the First Schedule.' The relief claimed must be adequately set out in the notice of motion. In practice a prayer for 'further and/or alternative relief' is usually included. In *Hirschowitz v Hirschowitz* [144] Vieyra J held [145] that the 'prayer for alternative relief is to my mind, in modern practice, redundant and mere verbiage. Whatever the court can validly be asked to order on papers as framed, can still be asked without its presence. It does not enlarge in any way "the terms of the express claim"'. In *Chao v Gomes* [146] Lamont J held that despite the fact that the prayer for further and/or alternative relief has been held to be

mere surplusage, 'a prayer containing the words and seeking relief in accordance with them is invariably inserted in every civil process issued as if some magic attached to the words'. [147] The effect of the prayer is not unlimited. [148] The established position is that:

(a) the prayer can be invoked to justify an order in terms other than that set out in the notice of motion where that order is clearly indicated in the founding (and other) affidavits and is established by satisfactory evidence on the papers; [149]

(b) relief under the prayer cannot be granted if it is substantially different from that specifically claimed, unless the basis therefor has been fully canvassed, and the party against whom such relief is to be granted has been fully apprised that relief in this particular form is being sought and has had the fullest opportunity of dealing with the claim for the relief being pressed. [150]

In appropriate circumstances the use of a wrong form may be condoned. See the notes to subrule (5)*(a)* below.

Subrule (4)*(a)*: Proviso.

(a) In terms of paragraph (i) of the proviso an *ex parte* application brought as an urgent application must indicate the basis on which the application is deemed to be urgent. The application must also indicate the provisions of any law relied upon by the applicant. In terms of paragraph (iii) of the proviso the provisions of rule 6(12) relating to urgent applications may be applied in so far as is necessary. Rule 6(12)*(b)* provides that, apart from setting forth explicitly the circumstances which render the application urgent, the reasons why the applicant claims that it could not be afforded substantial redress at a hearing in due course must be set forth in the affidavit supporting the application. The latter requirement is not a requirement under paragraph (i) of the proviso but, having regard to paragraph (iii) of the proviso and rule 6(12)*(b)*, should, if necessary, be dealt with by an applicant bringing an *ex parte* application as an urgent one. See also the notes to subrule (12)*(a)* s v 'May dispense with the forms and service provided for in these rules' below.

(b) In terms of paragraph (ii) of the proviso the application may be brought before a judge in chambers. This is an exception to the general principle that proceedings in any superior court have to be carried on in open court. [151] It is submitted that this provision should be applied with restraint and, as a general rule, be reserved for special cases as directed by the judge dealing with the urgent court roll.

(c) As pointed out under *(a)* above, the provisions of rule 6(12) relating to urgent applications may be applied in so far as is necessary in terms of paragraph (iii) of the proviso. Rule 6(12)*(b)* is dealt with in *(a)* above. Rule 6(12)*(a)* provides that in urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as it deems fit. Thus, the court (or judge in chambers) hearing an *ex parte* application brought as an urgent one may apply rule 6(12)*(a)* in so far as is necessary. See further the notes to subrule (12)*(a)* s v 'May dispense with the forms and service provided for in these rules' below.

Should the occasion arise, rule 6(12)*(c)*, which provides that a person against whom an order was granted in such person's absence in an urgent application may by notice set down the matter for reconsideration of the order, could be applied in so far as is necessary.

Subrule (4)*(b)*(i): 'Any person having an interest which may be affected.' There is nothing inherently wrong or contrary to public policy in an interested party opposing an *ex parte* application which has come to his notice fortuitously or by informal notice. This subrule provides for this very contingency. [152]

Subrule (4)*(b)*(ii): 'The court hearing the matter may . . . .' This subrule deals with the powers of the court hearing an *ex parte* application, including an *ex parte* application which is brought as an urgent one, under circumstances where an application to oppose the application has been made in terms of subrule (4)*(b)*(i). As to the filing of further affidavits, see the notes to subrule (5)*(e)* s v 'May in its discretion permit the filing of further affidavits' below.

Subrule (5)*(a)*: 'As near as may be in accordance with Form 2*(a)* of the First Schedule.' The provisions of this subrule are peremptory [153] but in appropriate circumstances the use of a wrong form may be condoned. The use of Form 2 in circumstances where Form 2*(a)* is appropriate, will not necessarily result in the notice of motion being a nullity which cannot be condoned. [154]

An urgent application is an application in terms of the subrule and Form 2*(a)* must be used with such adaptation as may be required by the circumstances of the case. [155] If a matter is sufficiently urgent complete deviation from the form may be justified. [156]

'Shall be served upon every party.' Service of any document initiating application proceedings must in terms of rule 4(1) be effected by the sheriff. Service by the sheriff is not necessary in interlocutory applications where there is already an attorney of record for the respondent. [157]

Subrule (5)*(b)*(i): 'An electronic mail address, if available.' If an electronic mail address is not available the only other address allowed by the subrule for acceptance of notices by and service of documents on the applicant is the one appointed by it within 25 kilometers of the office of the registrar. In addition, subrule (5)*(b)*(ii) requires the applicant to state its postal or facsimile addresses, where available. The subrule, and subrule (5)*(b)*(ii), must be read together with rule 4A above, which provides, amongst other things, that service may be effected:

(a) by hand at the physical address for service provided, or

(b) by registered post to the postal address provided, or

(c) by facsimile or electronic mail to the respective addresses provided.

Subrule (5)*(b)(iii)*: 'Set forth a day, not less than 10 days.' The period of 10 days in regard to the notification of intention to oppose the application applies regardless of whether the notice of motion is served within or outside the jurisdiction of the court in which it was issued. [158] The days are court days and must be calculated in terms of the definition of 'court day' in rule 1. Subrule (13) provides that in applications against the State, etc, the *dies* allowed must be at least 15 days unless the court has specially authorized a shorter period.

Depending on the circumstances, a failure to state a date by when the notice of intention to oppose the application has to be delivered can be condoned, even in the absence of an application for condonation. [159]

Failure to allow for the *dies* prescribed by the rules may be condoned [160] and in urgent applications the court may in terms of rule 6(12) dispense with the time periods prescribed in the rules.

The provisions regarding *dies* contained in this subrule do not apply to an application for a rule *nisi* since such an application (even on notice) is in the nature of an *ex parte* application in terms of rule 6(4). [161]

'Will be set down for hearing on a stated day.' This subrule ensures that a respondent is given notice of when the application will be heard. Requiring notice of a stated day is not a formalistic application of procedural rules. The subrule, whilst procedural in nature, protects a fundamental principle of fairness — that generally a person be afforded an opportunity to be heard before a court grants any relief against it. [162] An omission to set out a stated day is fatal to the application. [163] A subsequent notice of set down cannot cure the defect. [164] A sensible order is to postpone the application in order for the applicant to comply with the subrule. [165]

'Provided that.' In terms of the first proviso to this subrule the days between 21 December and 7 January, both inclusive, shall not be counted in the time allowed for the delivery of a notice of intention to oppose or of any affidavit. [166] In terms of the second proviso to this subrule the first proviso does not apply to urgent applications brought under rule 6(12) and applications brought under rule 43.

Subrule (5)*(d)*(i): 'An electronic mail address, if available.' If an electronic mail address is not available the only other address allowed by the subrule for acceptance of notices by and service of documents on the person who intends to oppose the application is the one appointed by such person within 25 kilometers of the office of the registrar. The subrule, however, in addition, requires the person who intends to oppose the application to state such person's postal or facsimile addresses, where available. The subrule must be read together with rule 4A above, which provides, amongst other things, that service may be effected:

(a) by hand at the physical address for service provided, or

(b) by registered post to the postal address provided, or

(c) by facsimile or electronic mail to the respective addresses provided.

Subrule (5)*(d)*(ii): 'Within fifteen days of notifying the applicant of intention to oppose the application.' Form 2*(a)* has been amended [167] and the wording has been brought into line with that of the subrule. [168]

If an answering affidavit is not delivered within the stipulated fifteen-day period, the applicant may within five days after the expiry of such period apply to the registrar, in terms of rule 6(5)*(f)*(i), to allocate a date for the hearing of the application.

As a general rule, if an answering affidavit is delivered out of time, an extension of time or condonation should be sought [169] unless there is an agreement between the parties. [170] This subrule, however, does not state that an answering affidavit which is delivered late is *pro non scripto* without an application for an extension of time or for condonation. [171] If no prejudice is caused to any party and it is in the interests of justice that the answering affidavit be taken into account, as would, for example, be the case where the applicant does not object to the answering affidavit in terms of rule 30 and delivers a replying affidavit, the court should allow the affidavit in order to decide the case unfettered by technicalities. [172]

Notice of mediation. A respondent must, when delivering a notice of intention to oppose an application, or at any time thereafter, but not later than the delivery of answering affidavit, serve on each applicant or the applicant's attorneys, a notice indicating whether such respondent agrees to or opposes referral of the dispute to mediation. [173] The notice must be substantially in accordance with Form 27 of the First Schedule and must clearly and concisely indicate the reasons for the respondent's belief that the dispute is or is not capable of being mediated. [174] The notice must not be filed with the registrar. [175] See further the provisions of rule 41A below.

'Deliver such person's answering affidavit.' In terms of rule 1 'deliver' means to 'serve copies on all parties and file the original with the registrar'.

The requirements for a respondent's answering affidavit, which deals with the allegations contained in the applicant's founding affidavit, are the same as for that of the applicant. If the respondent's affidavit in answer to the applicant's founding affidavit fails to admit or deny, or confess and avoid, allegations in the applicant's affidavit, the court will, for the purposes of the application, accept the applicant's allegations as correct. [176]

An affidavit is not a pleading. A respondent cannot content himself in his answering affidavit with bare or unsubstantiated denials [177] unless, of course, there is no other way open to the respondent and nothing more can be expected of him. [178] A statement of lack of knowledge coupled with a challenge to the applicant to prove part of his case does not amount to a denial of the averments by the applicant. [179] If the respondent in such a case requires oral evidence he can apply in terms of subrule (5)*(g)* to cross-examine witnesses. [180] It is permissible for a respondent, without advancing evidence of facts under oath, to seek to impugn the veracity of the applicant's affidavits by examining their inherent validity or probity in all the proved circumstances. [181] The respondent must, however, eschew 'indignant argument and expostulation' in his answering affidavit. [182]

Subrule (5)*(d)*(iii): 'Intends to raise any question of law only.' A respondent should, generally, file his answering affidavit on the merits at the same time as he takes a preliminary objection on a point of law. [183] Should the respondent choose not to file an answering affidavit in response to the applicant's allegations but to take a legal point only, the court is faced with two unsatisfactory alternatives should the objection fail. The first is to hear the case without giving the respondent an opportunity to file an answering affidavit on the merits, something the court would be 'most reluctant' to do. The second is to grant a postponement to enable the respondent to prepare and file an answering affidavit, a course which gives rise to an undue protraction of the proceedings and a piecemeal handling of the matter. [184] It has been suggested [185] that a respondent should be given the opportunity to file an answering affidavit where the court is satisfied that the respondent was not acting *mala fide*, where an adequate explanation for the failure to file an affidavit on the merits is given, where justice demands that the respondent should have further time for the purpose of presenting his case and where the disadvantages to the applicant of a postponement can be compensated by an appropriate order as to costs.

A notice in terms of this subrule is not a pleading and cannot be excepted to under rule 23. [186]

If the respondent relies exclusively on the notice in terms of this subrule, the allegations in the founding affidavit must be taken as established facts by the court. [187] The court should not be led astray by the arguments contained in the respondent's notice in terms of rule 6(5)*(d)*(ii), and should not accept it uncritically. The court's central role in the identification of issues is important. It is only after careful thought has been given to a matter that the true issue for determination can be properly identified. That task should never be left solely to the parties or their legal representatives. [188]

A respondent who files an affidavit on the merits is entitled to make any legal contention open to him on the facts as they appear on the affidavits, [189] and notice of such legal contention need not be given in terms of the subrule, provided that the raising of the legal contention is not, in the circumstances, unfair to the applicant. [190] There are any number of cases which recognize the right of a respondent, in spite of having filed an answering affidavit, to raise an objection *in limine* that the founding affidavit does not make out a prima facie case for the relief claimed. [191] In most cases it is suggested that the approach to be adopted by the court in determining the validity of the point *in limine* is similar to that adopted in deciding an exception to a pleading in that *(a)* the founding affidavits alone fall to be considered; and *(b)* the averments in those affidavits must be accepted as being true. [192] There is, however, one important difference: unlike pleading, an affidavit contains evidence and not only allegations of fact, and what might be sufficient in a summons may be insufficient in a founding affidavit. [193] It has accordingly been suggested that the analogy with the exception procedure may be inappropriate and that the comparison should rather be with an application for absolution from the instance in a trial action. [194] In *Louis Pasteur Holdings (Pty) Ltd v Absa Bank Ltd* [195] the Supreme Court of Appeal held that rule 33(4) does not apply to applications but that the High Court may deal with separate issues in applications *in limine* and that it may, in its inherent jurisdiction, apply to them a procedure similar to the one in rule 33(4). This must, however, be done with circumspection. [196]

Subrule (5)*(e)*: 'Within 10 days . . . deliver a replying affidavit.' For the late delivery of a replying affidavit, see the notes to rule 6(5)*(d)*(ii) s v "Within fifteen days of notifying the applicant of intention to oppose the application' above in regard to the late delivery of an answering affidavit, which apply *mutatis mutandis* to the late delivery of a replying affidavit.

In terms of rule 1 'deliver' means to 'serve copies on all parties and file the original with the registrar'.

All the necessary allegations upon which the applicant relies must appear in his founding affidavit, as he will not generally be allowed to supplement the affidavit by adducing supporting facts in a replying affidavit. [197] This is, however, not an absolute rule for the court has a discretion, which must be exercised judicially, to allow new matter in a replying affidavit in exceptional circumstances, giving the respondent the opportunity to deal with it in a second set of answering affidavits. [198] In the exercise of this discretion a court should in particular have regard to: (i) whether all the facts necessary to determine the new matter raised in the replying affidavit were placed before the court; (ii) whether the determination of the new matter will prejudice the respondent in a manner that could not be put right by orders in respect of postponement and costs; (iii) whether the new matter was known to the applicant when the application was launched; and (iv) whether the disallowance of the new matter will result in unnecessary waste of costs. [199] Thus, a distinction must be drawn between a case in which the new material is first brought to light by the applicant who knew of it at the time

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when his founding affidavit was prepared and a case in which facts alleged in the respondent's answering affidavit reveal the existence or possible existence of a further ground for relief sought by the applicant. In the latter type of case the court would obviously more readily allow an applicant in his replying affidavit to utilize and enlarge upon what has been revealed by the respondent and to set up such additional ground for relief as might arise therefrom. [200] The court will, however, not allow the introduction of new matter if the new matter sought to be introduced amounts to an abandonment of the existing claim and the substitution therefor of a fresh and completely different claim based on a different cause of action. [201] Nor will the court permit an applicant to make a case in reply when no case at all was made out in the original application. [202]

The right to personal freedom is so fundamental that a detainee should be allowed to seek in motion proceedings an order for his release based on a founding affidavit in which he alleges that he is being held by the respondent, notwithstanding (and by means of exception to) the general requirement that an applicant must disclose his complete case in the founding affidavit and the restriction on the number of sets of affidavits usually accepted in motion proceedings. [203]

An applicant is entitled to introduce further corroborating facts by means of a replying affidavit should the contents of the answering affidavit call for such facts. [204]

A replying affidavit should not be unnecessarily prolix or repetitive. Thus, in *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism v Bato Star Fishing (Pty) Ltd* [205] Schutz JA said:

> 'There is one other matter that I am compelled to mention — replying affidavits. In the great majority of cases the replying affidavit should be by far the shortest. But in practice it is very often by far the longest — and the most valueless. It was so in these reviews. The respondents, who were the applicants below, filed replying affidavits of inordinate length. Being forced to wade through their almost endless repetition when the pleading of the case is all but over brings about irritation, not persuasion. It is time that the courts declare war on unnecessarily prolix replying affidavits and upon those who inflate them.'

In *Van Zyl v Government of the Republic of South Africa* [206] Harms ADP, after quoting Schutz JA, said:

> 'A reply in this form is an abuse of the court process and instead of wasting judicial time in analysing it sentence by sentence and paragraph by paragraph such affidavits should not only give rise to adverse costs orders but should be struck out as a whole . . . *mero motu* . . .'

Rule 67A(2)*(c)* provides that in considering all relevant factors when awarding costs, the court may have regard to unnecessary or prolix drafting and unnecessary annexures.

'May in its discretion permit the filing of further affidavits.' There are normally three sets of affidavits in motion proceedings. [207] The court will exercise its discretion in permitting the filing of further affidavits against the backdrop of the fundamental consideration that a matter should be adjudicated upon all the facts relevant to the issues in dispute. [208] It is for the court to exercise the discretion. The registrar is not empowered to exercise it and a party cannot take it upon himself to simply file further affidavits without first having obtained the leave of the court to do so. [209] It has been held [210] that where further affidavits are filed without the leave of the court, the court can regard such affidavits as *pro non scripto*. While the general rules regarding the number of sets and proper sequence of affidavits should ordinarily be observed, some flexibility must necessarily also be permitted. [211] It is only in exceptional circumstances that a fourth set of affidavits will be received. [212] Special circumstances may exist where something unexpected or new emerged from the applicant's replying affidavit. [213]

It is essentially a question of fairness to both sides as to whether or not further sets of affidavits should be permitted. [214] There should in each case be a proper and satisfactory explanation, which negatives *mala fides* or culpable remissness, as to why the facts or information had not been put before the court at an earlier stage, [215] and the court must be satisfied that no prejudice is caused by the filing of the additional affidavits which cannot be remedied by an appropriate order as to costs. The tactic of holding back on evidence in the hope that the other side will first commit itself to an untruthful version which can be resoundingly demolished in further affidavits has attracted the opprobrium of the court in *Nick's Fishmonger Holdings (Pty) Ltd v Fish Diner In Bryanston CC*. [216]

The factors that the court will consider are the following:

(a) The reason why the evidence was not produced timeously.

(b) The degree of materiality of the evidence.

(c) The possibility that it may have been shaped to 'relieve the pinch of the shoe'.

(d) The balance of prejudice to the applicant if the application is refused and the prejudice to the respondent if it is granted.

(e) The stage which the particular litigation has reached. Where judgment has been reserved after all the evidence has been heard and, before judgment is delivered, an applicant applies for leave to place further evidence before the court, it may well be that he will have a greater burden because of factors such as the increased possibility of prejudice to the respondent, the need for finality, and the undesirability of a reconsideration of the whole case, and perhaps also the convenience of the court.

(f) The 'healing balm' of an appropriate order as to costs.

(g) The general need for finality in judicial proceedings.

(h) The appropriateness, or otherwise, in all the circumstances, of visiting the fault of the attorney upon the head of his client. [217] If the court is satisfied on these points it will generally incline towards allowing the affidavits to be filed. [218]

If an affidavit is tendered both late and out of its ordinary sequence, the party tendering it is seeking, not a right, but an indulgence from the court. Such party must then explain why it is out of time and satisfy the court that in all the circumstances of the case it should be received. [219]

Although it is the accepted *modus operandi* for parties formally to seek to amplify their affidavits by the filing of further affidavits, there is some indirect authority that where the parties rely on a statement of agreed issues, they may amplify those issues by way of a separate agreement instead of filing further affidavits. [220]

Subrule (5)*(f)*(i): 'Within five days of the expiry thereof apply to the registrar.' If neither an answering affidavit nor a notice referring a question of law to be raised has been filed, an applicant may in terms of this subrule apply to the registrar to allocate a date for hearing of the application. An applicant is not entitled to place a matter on the unopposed roll for hearing unless the registrar has on application to him in terms of the subrule, allocated a date for the hearing of the application. [221] An applicant's right to set the matter down is not limited to the five-day period laid down in the subrule. An applicant is entitled to apply to the registrar for a date of hearing on the unopposed roll even after expiry of the five-day period. [222]

Subrule (5)*(f)*(ii): 'Apply to the registrar to allocate a date for the hearing of the application.' A litigant is not entitled to place a matter on the opposed roll for hearing unless the registrar has on application to him in terms of the subrule, allocated a date for the hearing of the application. [223]

The applicant is *dominus litis* and, in selecting a date, need not consult the respondent. [224]

Subrule (5)*(g)*: 'Where an application cannot properly be decided on affidavit.' 'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities'. [225] It is well established that if the material facts are in dispute and there is no request for the hearing of oral evidence, a final order will only be granted on notice of motion if the facts as stated by the respondent together with the facts alleged by the applicant that are admitted by the respondent, justify such an order [226] unless, of course, the court is satisfied that the respondent's

version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is so far-fetched or so clearly untenable or so palpably implausible as to warrant its rejection merely on the papers. [227]

If in such a case the court is satisfied as to the inherent credibility [228] of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief sought. [229]

The subrule is of wide import and empowers the court, where an application cannot properly be decided on affidavit, to make such order as it deems fit with a view to ensuring a just and expeditious decision. [230] As a general rule an application for the hearing of oral evidence must be made *in limine* and not once it becomes clear that the applicant is failing to convince the court on the papers or on appeal. [231] The circumstances must be exceptional before a court will permit an applicant to apply in the alternative for the matter to be referred to evidence should the main argument fail. [232] It is undesirable that a court *mero motu* orders a referral to oral evidence. [233]

The ambit of the subrule is not restricted to cases where oral evidence is called for to resolve disputes of fact. [234] Thus, the subrule also applies in the case of unopposed motions where *ex hypothesi* there can be no dispute of fact. The court is, for example, entitled in an unopposed application for the variation of a custody order to invoke the rule and call for *viva voce* evidence. [235] A party will, however, not be allowed to lead oral evidence to make out a case which is not already made out in his affidavits. [236]

If a party to an application requires the evidence of a person who is unwilling or unavailable to make an affidavit, the court may be approached under this subrule for leave to subpoena such a person for the purpose of giving *viva voce* evidence. [237] The court will, however, refuse such an application where evidence is requested to be given in circumstances which amounted to a fishing expedition. [238]

A party who is obliged by law to bring proceedings by way of notice of motion and who seeks to discharge an onus of proof which rests upon him by asking for an opportunity to adduce oral evidence or to cross-examine deponents to answering affidavits, should not be lightly deprived of that opportunity. [239]

If the respondent in his answering affidavit states that he can lead no evidence to dispute the truth of the applicant's statements and puts the applicant to the proof thereof, the cross-examination of witnesses may properly be ordered in terms of the subrule. [240]

If a respondent made averments which, if proved, would constitute a defence to the applicant's claim, but is unable to produce an affidavit containing allegations which prima facie establish that defence, the respondent is entitled to invoke this subrule. [241] It would, however, be essential in such a situation for the deponent to the respondent's answering affidavit to:

(a) set out the import of the evidence which is proposed to be elicited (by way of cross-examination of the applicant's deponents or other witnesses);

(b) explain why the evidence is not available;

(c) most importantly, satisfy the court that there are reasonable grounds for believing that the defence would be established. [242]

The Supreme Court of Appeal has cautioned that a court should be astute to prevent an abuse of its process in such a situation by an unscrupulous litigant intent only on delay or a litigant intent on a fishing expedition to ascertain whether there might be a defence without there being any credible reason to believe that there is one. [243]

In general terms it can be said that oral evidence in terms of the subrule should be allowed if there are reasonable grounds for doubting the correctness of the allegations made by the applicant. [244] In reaching a conclusion in this regard, facts peculiarly within the knowledge of the applicant which cannot for that reason be directly contradicted or refuted by the other party are to be carefully scrutinized. [245]

The aforegoing does not, however, detract from the fact that in practice the presence of a dispute of fact in an opposed application, and the nature thereof, will often be the determining consideration in deciding whether *viva voce* evidence should be ordered. [246]

The 'principal ways' in which a dispute of fact may arise are set out as follows in *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*: [247]

(i) When the respondent denies all the material allegations made by the various deponents on the applicant's behalf, and produces or will produce, positive evidence by deponents or witnesses to the contrary. He may have witnesses who are not presently available or who, though adverse to making an affidavit, would give evidence *viva voce* if subpoenaed.

(ii) When the respondent admits the applicant's affidavit evidence but alleges other facts which the applicant disputes.

(iii) When the respondent concedes that he has no knowledge of the main facts stated by the applicant, but denies them, putting the applicant to the proof and himself gives or proposes to give evidence to show that the applicants and his deponents are biased and untruthful or otherwise unreliable, and that certain facts upon which the applicant relies to prove the main facts are untrue. The absence of any positive evidence possessed by a respondent directly contradicting the applicant's main allegations does not render the matter free of a real dispute of fact.

In resolving to refer a matter to evidence a court has a wide discretion. [248] In every case the court must examine an alleged dispute of fact and see whether in truth there is a real [249] dispute of fact which cannot be satisfactorily determined without the aid of oral evidence; if this is not done a respondent might be able to raise fictitious issues of fact and thus delay the hearing of the matter to the prejudice of the applicant. [250] The test is a stringent one that is not easily satisfied. [251] Vague and insubstantial allegations are insufficient to raise the kind of dispute of fact that should be referred for oral evidence. [252] If a respondent genuinely intends

to raise a serious matter such as corruption as an issue, it must be based on fact not rumour, innuendo or inference based only on speculation. [253] A finding of fraud should not be made on the basis of untested allegations in motion proceedings if the allegations of fraud are denied on grounds that could not be described as far-fetched or untenable. [254]

A bare denial of the applicant's allegations in his affidavits will not in general be sufficient to generate a genuine or real dispute of fact. [255] It has been said that the court must take 'a

robust, common-sense approach' to a dispute on motion and not hesitate to decide an issue on affidavit merely because it may be difficult to do so. [256] This approach must, however, be adopted with caution and the court should not be tempted to settle disputes of fact solely on the probabilities emerging from the affidavits without giving due consideration to the advantages of *viva voce* evidence. [257]

As a general rule, decisions of fact cannot properly be founded on a consideration of the probabilities unless the court is satisfied that there is no real and genuine dispute on the facts in question, or that the one party's allegations are so far-fetched or so clearly untenable or so palpably implausible as to warrant their rejection merely on the papers, [258] or that *viva voce*

evidence would not disturb the balance of probabilities appearing from the affidavits. [259] This rule applies not only to disputes

of fact, but also to cases where an applicant seeks to obtain final relief on the basis of the undisputed facts together with the facts contained in the respondent's affidavits. [260] In the latter regard it has become known as the '*Plascon Evans* rule', referred to by the Constitutional Court in *Democratic Alliance in re Electoral Commission of South Africa v Minister of Cooperative Governance* [261] as follows: [262]

> 'The *Plascon-Evans* rule is that an application for final relief must be decided on the facts stated by the respondent, together with those which the applicant states and which the respondent cannot deny, or of which its denials plainly lack credence and can be rejected outright on the papers.'

It has been held [263] that a court should, in deciding disputed facts in application proceedings, always be cautious about deciding probabilities in the face of conflicts of facts in the affidavits. This is so because affidavits are settled by legal advisers with varying degrees of experience, skill and diligence, and a litigant should not pay the price for an adviser's shortcomings.

Judgment on the credibility of the deponent, absent direct and obvious contradictions, should be left open. Nevertheless, the courts have recognized reasons to take a stronger line to avoid injustice: [264] Mere assertions of witnesses do not of themselves need to be believed and testimony which is contrary to all reasonable probabilities or conceded facts (i e testimony which no sensible man can believe) goes for nothing, while the evidence of a single witness to a fact, there being nothing to throw discredit on it, cannot be disregarded.

'The court may dismiss the application.' The court will dismiss an application if the applicant should have realized when launching his application that a serious dispute of fact, incapable of resolution on the papers, was bound to develop. [265] A party who is obliged by law to bring proceedings by way of notice of motion, in the event of a conflict of fact arising on the papers which can be resolved only by oral evidence, cannot be penalized on the basis that he should have anticipated the conflicts and proceeded in another way. [266] The court should dismiss the application where there are fundamental disputes of fact on the papers and the applicant failed to make out a case for the relief claimed. [267]

It does not necessarily follow that because a dispute of fact is reasonably foreseeable that an application will always be dismissed with costs. There may be circumstances present that will persuade a court to order the parties to go to trial together with an order that the costs of the application be costs in the cause or that the costs stand over for determination at the trial. [268]

A dismissal in terms of this subrule does not preclude a litigant from proceeding by way of action, and thus does not finally dispose of a matter. [269]

For a discussion of the question how rule 6(5)*(g)* operates in the context of a review application brought in terms of rule 53, see the notes to that rule s v 'Shall be by way of notice of motion' below.

'Or make such an order as it deems fit.' If the facts are in dispute, the court has a discretion as to the future course of the proceedings. It may dismiss the application with costs or order the parties to go to trial or order oral evidence in terms of the rules. [270] The three alternatives

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are set out in the subrule as possible courses which the court may adopt. [271]

'With a view to ensuring a just and expeditious decision.' In the exercise of its discretion under the subrule, the court should have regard to the fact that 'maklike en spoedige beslegting van 'n feitegeskil . . . gewoonlik as vereiste gestel (word) wanneer daar oorweeg word of daar gebruik gemaak moet word van mondelinge getuienis by mosie-verrigtinge'. [272]

'In particular, but without affecting the generality of the aforegoing, it may direct.' If there is a factual dispute, the function of the court is to select the most suitable method of employing *viva voce* evidence for the determination of the dispute. [273] The subrule sets out three different courses which the court may adopt, [274] but it is in explicit terms made clear that the discretion of the court is not thereby restricted.

'Oral evidence be heard on specified issues with a view to resolving any dispute of fact.' The court will adopt this course where the factual dispute is within a narrow compass and can be expeditiously disposed of. [275] The dispute of fact must be one between the parties and not a dispute between one of the parties and his agent or representatives. [276] An order to refer a matter to oral evidence presupposes a genuine dispute of fact. If an applicant chooses not to respond to the factual allegations put forward in the answering affidavit he does so at his peril and runs the risk of the application to refer the matter to oral evidence being refused. [277]

In exercising its discretion under the subrule, the court will to a large extent be guided by the prospects of *viva voce* evidence tipping the balance in favour of the applicant. If on the affidavits the probabilities are evenly balanced, the court would be more inclined to allow the hearing of oral evidence than if the balance were against the applicant. The more the scales are depressed against the applicant, the less likely the court will be to exercise its discretion in favour of the applicant. Only in rare cases will the court order the hearing of oral evidence where the preponderance of probability on the affidavits favour the respondent. [278]

If a disputed application is settled on a basis which disposes of the merits except in so far as costs is concerned, the court should not hear evidence to decide the disputed facts in order to decide who is liable for costs, but the court must, with the material at its disposal, make a proper allocation of costs. [279]

Since the hearing of oral evidence is intended to be on specified issues only, it is desirable that the court states in its order which issues will be determined by the hearing of oral evidence and defines who may or must be called as witnesses. [280] The court must be on its guard not to formulate its order in such a way that the hearing of oral evidence is, perhaps unintentionally, converted into a trial. [281] The fact that the court orders oral evidence does not enlarge the scope of the inquiry, [282] but the ambit of the inquiry may be extended by the terms of reference and, in special circumstances, also by the judge presiding at the hearing. [283]

As a general rule an application to refer a matter to evidence must be made at the outset and not after argument on the merits, [284] but the rule is not an inflexible one and a party is entitled to persist in his application without being precluded, when a dispute becomes apparent and incapable of resolution on the papers, from asking for evidence *viva voce*. [285]

At the hearing of oral evidence the affidavits stand as evidence, save to the extent that they deal with disputes of fact. Once the disputes have been resolved by oral evidence, the case is decided on the basis of that finding together with the affidavit evidence that is not in dispute. [286] If there is a dispute, the oral evidence must prevail. [287] This differs from a referral

to trial. [288] As to the latter, see the notes s v 'Refer the matter to trial' below.

If an order has been made referring an application for the hearing of oral evidence, it is open to the court, when the matter comes before it for the hearing of such oral evidence, to hold that it is unnecessary to hear oral evidence and to decide the matter on the papers. [289] The court will not lightly adopt such a course, but will do so where it is clear that the hearing of oral evidence

will not affect the outcome of the claim for substantive relief and will only lead to unnecessary delay and unnecessary costs being incurred. [290] The court to which the matter has been referred for oral evidence does not, however, have the power to require the parties to address it on a number of legal points that it had raised *mero motu*, and then decide the matter on those points without hearing oral evidence. In *Fischer v Ramahlele* [291] Theron JA stated:

> '[13] Turning then to the nature of civil litigation in our adversarial system, it is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for "(i)t is impermissible for a party to rely on a constitutional complaint that was not pleaded". There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may mero motu raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.
>
> [14] It is not for the court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it, and to insist that the parties deal with them. The parties may have their own reasons for not raising those issues. A court may sometimes suggest a line of argument or an approach to a case that has not previously occurred to the parties. However, it is then for the parties to determine whether they wish to adopt the new point. They may choose not to do so because of its implications for the further conduct of the proceedings, such as an adjournment or the need to amend pleadings or call additional evidence. They may feel that their case is sufficiently strong as it stands to require no supplementation. They may simply wish the issues already identified to be determined because they are relevant to future matters and the relationship between the parties. That is for them to decide and not the court. If they wish to stand by the issues they have formulated, the court may not raise new ones or compel them to deal with matters other than those they have formulated in the pleadings or affidavits.'

If the application is referred to oral evidence it can be justifiably expected of the respondent, if he has any confidence in his own version, to reiterate that version in oral evidence and to submit that version to be tested by cross-examination. If there is a strong prima facie case in favour of the applicant at the close of his case, the court is entitled to draw an adverse

inference against the respondent should he fail to testify in support of the allegation in his opposing affidavit that the applicant has no case whatsoever. [292]

An order referring an application for the hearing of oral evidence is not appealable under s 16 of the Superior Courts Act 10 of 2013. [293]

'Order any deponent to appear personally or grant leave for him or any other person to be subpoenaed.' The court in its order must set out who may or must be called as witnesses and the parties are not entitled at will to subpoena witnesses they wish to call. [294] If a party is desirous of calling a witness who has not made an affidavit, special leave has to be obtained from the judge and the name of the witness must be included in the order. [295]

This subrule provides the only manner in which the attendance of a witness may be secured in relation to an application. It does not permit a party to an application on his own authority to cause the registrar to subpoena a witness to appear at the hearing of an application. Such authority vests only in the court and it must grant leave for a person to be subpoenaed. [296]

'Refer the matter to trial.' The court will refer a matter to trial if the dispute of fact is incapable of resolution on the papers and too wide-ranging for resolution by way of referral to oral evidence. [297] In such instance it is essential that the issues be defined. [298] It is an alternative procedure to dismissal of the application in such circumstances, and is appropriate where the applicant when launching his application could not reasonably have foreseen that a serious dispute of fact, incapable of resolution on the papers, was bound to develop. [299]

The question whether the court has the power to order a referral to trial *mero motu* has been described as one 'not free from difficulty' by the Supreme Court of Appeal and has not yet been decided by that court. [300] At the trial a witness who gives evidence must do so in the ordinary way. The witness should not be allowed to read from his affidavit in the motion proceedings. Such affidavits may be used for cross-examination and as proof of admissions therein contained, but (save to the extent that they contain admissions) they have no probative value and, in the absence of agreement, they do not stand as the witness's evidence-in-chief, or supplement it. If, by agreement, the affidavits are to be treated as such, it is unnecessary and a waste of time and costs for them to be read into the record. In this regard a referral to trial is different to a referral to oral evidence. In the latter case the affidavits stand as evidence, save to the extent that they deal with disputes of fact. Once the disputes have been resolved by oral evidence, the case is decided on the basis of that finding together with the affidavit evidence that is not in dispute. [301]

If the court orders that a case brought to court on application should go to trial, the ordinary course is to make the costs of the application abide the result of the action: or, at least, to give the party who has been ordered to pay the costs leave to reclaim them in the action. It is only in exceptional circumstances that the court, in the exercise of its discretion, departs from this rule. [302]

An occasion where costs will not be made costs in the cause is that where the applicant should have known that the proceedings brought by him would be abortive: in such case he will be ordered to pay them himself. [303] If, on the other hand, it cannot be said that the application would clearly be abortive, he will be ordered to pay the costs, even if the application is one to obtain a final order on motion. [304]

If the respondent knows that a disputed issue of fact is involved but chooses to embark upon the merits and by so doing adds to the costs, he may well be ordered (*semble*) to bear not merely a portion of his own costs, but to pay part of the costs of the applicant, if the court were to order the matter to go to trial. [305]

'Directions as to pleadings or definition of issues, or otherwise.' In case of referral to trial the court usually orders that the notice of motion shall stand as a simple summons, the answering affidavit as a notice of intention to defend, that a declaration shall be delivered within a fixed time and that the Uniform Rules dealing with further pleadings, discovery and the conduct of trials shall thereafter apply. [306]

Subrule (6): 'Make no order . . . but grant leave . . . to renew the application on the same papers.' If no order is made on an application or leave is granted to apply again on the same papers, the order is the equivalent of an order of absolution from the instance. [307] Dismissal or refusal of an application amounts to a decision in favour of the respondent. [308] If an application is dismissed by reason of some procedural defect, such as the existence of an irresoluble factual dispute, the order does not operate as a judgment for the respondent. [309] An order of absolution is ordinarily not decisive of the issue raised; it decides nothing for or against either party. [310]

Subrule (7)*(a)*: 'Bring a counter-application.' Counter-applications are subject to the general principles applicable to applications. [311] Thus, the court will dismiss a counter-application if the respondent when launching his counter-application was aware of a then existing and irresoluble dispute of fact. [312]

There is no bar in law or in the rules to a litigant endeavouring to obtain a remedy in a counter-application that is more expansive than, or even unrelated to, relief sought in the main application. [313]

A counter-application need not be served by the sheriff since there is already an attorney of record for the applicant (respondent in reconvention) [314] and a notice of motion would seem to be unnecessary. [315]

As a general rule (but the court has a discretion to depart from the rule) an application and a counter-application should be adjudicated *pari passu* and if the application is unopposed, judgment thereon should be suspended pending finalization of an unliquidated counter-application. [316]

Subrule (7)*(b)*: 'Postpone the hearing of the application.' The principles applicable to an application for the grant of a postponement of an application are the same as those that apply to trials. [317] See, in this regard, the *excursus* to rule 41 s v 'Postponement' below.

Subrule (8): 'An order is granted *ex parte*.' The provisions of this subrule only apply where an order has been granted against a person *ex parte* and where a return day has been fixed. The subrule comes to the aid of a person who has been taken by surprise by an order granted *ex parte*. The subrule does not apply where the return day of a rule *nisi* obtained *ex parte* has been extended with the knowledge or in the presence of the persons affected thereby. [318] Subrule (12)*(c)* deals with a somewhat different situation and allows a person against whom an order was granted in his absence in an urgent application to set the matter down on notice for reconsideration of the order.

'May anticipate the return day.' The rules do not provide substantively for the granting of a rule *nisi* by the court. The practice of doing so is, nevertheless, firmly embedded in our procedural law. [319] This is recognized by implication in this subrule and in subrule (13) of this

rule. [320] The procedure of a rule *nisi* is usually resorted to in matters of urgency and where the applicant seeks interim relief in order adequately to protect his immediate interests. [321] The procedure must be considered in conjunction with the provisions of subrule (12). [322] See further the notes to subrule (12) below.

A return day may be anticipated under the subrule even if the order granted *ex parte* does not explicitly provide for the anticipation of the return day. [323]

Procedure by way of rule *nisi* in review proceedings is considered in the notes to rule 53(1) s v 'All proceedings . . . shall be by way of notice of motion' below.

Rule 27(4) provides for the revival of a rule *nisi* which has been discharged by default of appearance. A rule *nisi* which had lapsed because of the fulfilment of a resolutive condition cannot be revived in terms of rule 27(4). [324] See further the notes to rule 27(4) s v 'A rule *nisi* has been discharged by default of appearance' below.

An opposed rule *nisi* which is returnable on the first day of a continuous opposed motion court roll that endures from 10:00 am on a Monday of a particular week until 16:00 pm on the Friday of that week, and has been properly enrolled, does not lapse if it is only heard by the court, in the administration of its roll, on another day during that week. [325]

An application to anticipate the return day of a sequestration order for the purpose of discharging the order of provisional sequestration should comply with the requirements of s 11(3) of the Insolvency Act 24 of 1936. [326]

Subrule (9): 'A copy of every application . . . shall . . . be submitted to the Master.' The object of this subrule is to avoid applications being enrolled only to be postponed so that the court may have the advantage of the Master's assistance, and not to force an applicant to obtain the Master's advice in order to learn whether or not he has a case. The subrule does not operate when the Master's involvement is neither legally necessary nor of assistance to the court. The subrule strikes at the lodging and enrolment of an application and non-compliance therewith does not result in the voidness of the affidavits or of service. [327] The subrule does not apply to an application for relief of a temporary nature. [328]

An application for the appointment of a *curator ad litem* to a person, as a preliminary to the appointment of a *curator bonis*, is not submitted to the Master for report. In terms of rule 57(6) the applicant is obliged, after receipt of the report of the *curator ad litem*, to submit the report and copies of all the documents which had been filed in the application to the Master for consideration and report to the court.

See further the notes to subrule (2) s v 'Necessary or proper to give any person notice of such application' above.

Subrule (11): 'Applications incidental to pending proceedings.' An application is incidental to pending proceedings if it is subordinate or accessory to while at the same time being distinct from the main proceedings. [329] A legal issue should be decided at the interlocutory stage of proceedings only if it would result in the final disposal of either the matter as a whole or a particular aspect thereof. [330]

Matters in which an order, judgment or direction is sought from a judge sitting otherwise than in open court may, in certain divisions, be brought through the Chamber Book. For example, rule 17*(d)* of the Joint Rules of Practice for the High Courts of the Eastern Cape, [331] *inter alia*, provides that the Chamber Book may be used in matters in which an order or direction is sought from a judge and may be granted otherwise than in open court as provided in the Uniform Rules of Court. See also Practice Direction 22 of the Practice Directions of the North West Division of the High Court, Mahikeng [332] and paragraph 37 of the Consolidated Practice Notes of the Western Cape Division of the High Court, Cape Town. [333]

'May be brought on notice.' 'Notice' in this subrule does not mean notice of motion. [334] Interlocutory and other applications incidental to pending proceedings need not be served by the sheriff: service may be effected upon the attorney of record of the respondent by the party initiating the proceedings. [335]

The provisions of the rules relating to the time for filing answering and replying affidavits do not apply to interlocutory applications. [336] Further affidavits in interlocutory applications must be filed within a reasonable time; prima facie in the absence of special circumstances, this would not be longer than the times prescribed in terms of rule 6(5). [337]

A court dealing with an interlocutory proceeding, especially one involving significant issues of considerable complexity, will only decide such issues where it is strictly necessary to do so and where the issues have been fully and precisely determined in the papers between the parties. [338]

An application to strike out matter from an affidavit can be brought as an interlocutory application in terms of subrule (11). [339]

Subrule (12)*(a)*: 'Urgent applications.' 'Urgency' in urgent applications involves mainly the abridgment of times prescribed by the rules and, secondarily, the departure from established filing and sitting times of the court. [340]

The proviso to subrule (4)*(a)* deals with *ex parte* applications which are brought as urgent applications. In terms of paragraph (iii) of the proviso subrule (12) may be applied in so far as is necessary. See further the notes to subrule (4)*(a)* s v 'Proviso' above.

The first proviso to subrule (5)*(b)*(iii) of rule 6, in terms of which the days between 21 December and 7 January, both inclusive, shall not be counted in the time allowed for the delivery of a notice of intention to oppose or of any affidavit for purposes of that subrule, does not apply to applications under subrule (12). [341]

In urgent applications the applicant must show that he will not otherwise be afforded substantial redress at a hearing in due course. [342]

Urgency does not relate only to some threat to life or liberty; the urgency of commercial interests may justify the invocation of the subrule no less than any other interests. [343] It has been held, on the one hand, that a matter is urgent because of the imminence and depth of harm that the applicant will suffer if relief is not given, not because of the category of right the applicant asserts. In other words, urgency (except where a statute provides for inherent urgency) is determined not by the nature of the claim brought, but by the circumstances in which the applicant seeks its adjudication. There is, accordingly, no class of proceeding that enjoys inherent preference. [344] On the other hand, it has been held that there is an element of urgency in contempt proceedings. [345] So too in matters involving the interest of the public, especially where members of the public entrust legal practitioners with their financial matters. [346] It is submitted that whatever the correct view might be, and regardless of the nature of the relief sought, it is peremptory that an applicant set out explicitly the circumstances on which he relies to render the matter urgent and the reason why he claims that he cannot be afforded substantial relief at a hearing in due course. [347]

The application must be brought as soon as possible; cogent reasons must be advanced to the court for any delay in bringing the application. [348]

It is well established that an applicant cannot create its own urgency by simply waiting until the normal rules can no longer be applied. [349] Where an applicant first seeks compliance from the respondent before lodging the application it cannot be said that the applicant had been dilatory in bringing the application or that urgency was self-created. [350]

There are degrees of urgency and it is well established that applicants in urgent applications must give proper consideration to the degree of urgency and tailor the notice of motion to that degree of urgency. [351] In the Western Cape Division of the High Court, Cape Town, a semi-urgent roll is operated alongside the ordinary (i e continuous) roll and opposed matters which are not of extreme urgency but are nevertheless too urgent to await hearing in the ordinary course on the continuous roll are placed on the semi-urgent roll. [352] In the Gauteng Division of the High Court the divergence arising from different degrees of urgency is dealt with by different times of set down. [353]

The degree of relaxation of the rules and of the ordinary practice of the court depends upon the degree of urgency of a case. [354] Cases of extreme urgency may be proceeded with at once, even if that be at night or during a weekend. [355] Some cases are so urgent that no time is available to prepare any documents, in which case *viva voce* evidence may be heard. In such cases the evidence is normally recorded and transcribed and a copy of the transcription served on the respondent either together with the order or subsequently.

In *South African Airways Soc v BDFM Publishers (Pty) Ltd* [356] Sutherland J expressed strong views on the ineffective service of an urgent application and laid down the procedure to be followed by an attorney in an urgent application on less than 24 hours' notice: [357]

> '[22] The principle of *audi alterem partem* is sacrosanct in the South African legal system. Although, like all other constitutional values, it is not absolute and must be flexible enough to prevent inadvertent harm, the only times that a court will consider a matter behind a litigant's back are in exceptional circumstances. The phrase "exceptional circumstances" has regrettably, through overuse and the habits of hyperbole, lost much of its impact. To do that phrase justice it must mean "very rarely" — only if a countervailing interest is so compelling that a compromise is sensible, and then a compromise that is parsimonious in the deviation allowed. The law on the procedure is well established.
>
> [23] In this case the purported service was, de facto, no service at all. The order was taken ex parte, and the service was a farce. The single paragraph in the founding affidavit which stated that service had been performed by email was true only in the meanest possible way.
>
> [24] The nature of the relief sought is not such that an ex parte order could ever have been justified. Doubtless, SAA appreciated this obvious fact that service was necessary. However, what it and its legal representatives did, pursuant to a responsibility to achieve effective service in order to respect the principle of *audi alterem partem,* was not simply clumsy, but unprofessional. When a litigant contemplates any application in which it is thought necessary to truncate the times for service in the rules of court, care must be taken to use all reasonable steps to mitigate such truncation. In a matter in which less than a day's notice is thought to be justifiable, the would-be applicant's attorney must take all reasonable steps to ameliorate the effect thereof on the would-be respondent. The taking of all reasonable steps is not a collegial courtesy, it is a mandatory professional responsibility that is central to the condonation necessary to truncate the times for service. When there is the prospect of a hearing before a judge after business hours and, even more so, when there is the prospect of the hearing taking place elsewhere than in a courthouse, the duty to take reasonable steps is ever more important and imperative.

> [25] In this case, without any forewarning, on at most 30 minutes notice, the application was emailed at 22h00, a time at which it is unreasonable to have expected that the email would at once be read. The phone calls from SAA, 30 minutes later, reached

one out of the three persons to whom the papers had been sent, who was fortuitously awake to receive it. The notice omitted to state the venue for the hearing. In any event, by then it was too late to offer even token opposition. None of this could not have been appreciated by SAA.

[26] In my view it is incumbent on the attorney of any person who contemplates an urgent application on less than 24 hours' notice, to undertake the following default actions in fulfilment of the duty to ensure effective service:

[26.1] Once the respondents are properly identified, the names and contact details, ie phone, cell, email, fax and physical addresses of persons who have the authority to address the application must be ascertained. Obviously, if the issue has already been the subject of debate between the parties and an attorney has already been retained by a respondent, such attorney's contact details will top the list.

[26.2] At the earliest moment after deciding to bring an urgent application, contact must be made to demand compliance with the relief to be sought and to alert one or more of such persons of the intention to bring an application, stating where it is likely to be heard, when it is likely to be served, and the identity of the judge on urgent duty. Agreement should be reached about who should receive service on behalf of the respondent by email or fax, or other method.

[26.3] Next, the urgent judge shall be alerted, and a report made, whether or not the respondents have been alerted.

[26.4] When the papers are ready for service, direct contact shall again be made with the persons dealing with the matter on behalf of the respondent. Where delays occur, the respondents must be kept informed by interim calls to report progress.

[26.5] Sufficient time must be allowed for the respondents to read and digest the papers. It is appropriate to send a notice of motion in advance of the founding papers to give the respondents a chance to formulate a view about the relief being sought.

[26.6] When the papers are about to be served electronically or otherwise, the urgent judge should be consulted about when and where the hearing will occur, if at all, and how much notice must be given, in the context of earlier alerts to the respondents.

[26.7] Once served in any manner other than by personal physical delivery, the attorney must immediately call the respondent's representatives directly to confirm actual receipt of all the papers.'

A respondent faced with an urgent application, in order to avoid the risk of judgment being given against it by default, is obliged provisionally to accept the rules set by applicant and then, when the application is heard, make its objections thereto, if any. [358]

In *Optimum Coal Terminal (Pty) Ltd v Richards Bay Coal Terminal (Pty) Ltd* [359] it was held [360] that while access to the courts is guaranteed to all to have their disputes adjudicated, courts are not to be abused by litigants with a deluge of papers at short notice, only for the legal representatives to conclude amongst themselves that it would not be possible for the court to hear the matter on the allocated date when it was originally set down. Litigants are to be mindful

of the case load of judges, particularly where it is expected that apart from other matters on the motion court roll, attention should also be given to reading several thousand pages at short notice. Convenience to the court and the judges presiding is an important consideration when deciding to launch urgent litigation of this nature. The failure to do so, is tantamount to an abuse of the court process.

In *Economic Freedom Fighters v Chairperson of the Powers and Privileges Committee NO* [361] the application was struck from the roll by the majority of the full court under circumstances where:

(a) the timelines set by the applicant, extending over public holidays and long weekends, for answering affidavits, etc were truncated to the extreme;

(b) the parties subsequently agreed to different timelines that were confirmed in a court order;

(c) the run up to the date for hearing caused a flurry of activity, particularly with constituting a bench;

(d) the court order was not complied with in various respects, without condonation being sought;

(e) the Practice Directives of the court were not complied with without condonation being sought;

(f) the matter was, accordingly, not ripe for hearing on the date of hearing.

In striking the application from the roll with costs, the majority stated (footnote between [ ]):

'[18] The applicants are *dominus litis.* They chose to approach court on an urgent basis, which they were entitled to do. It would have been clear from the outset, given the time of year and the particular circumstances that the respondents are mostly of an institutional nature, Parliament had already risen for the year. The court was in recess on the date that they unilaterally chose, meaning there were only two judges on duty. Managing the hearing of a matter like this, launched during the court recess and set down to be heard during court recess becomes an almost impossible task. The judiciary has an obligation to perform their duties and functions for all the parties involved in litigation to have a fair hearing. This includes proper preparation and reading of all the necessary papers.

[19] An applicant who applies for the date for a matter that they foresee will be opposed, as in the instant matter, must ensure that the timelines they set are not only reasonable in the particular circumstances but that it can be accommodated on the court roll and that the matter will be ripe for hearing on the date so chosen or agreed. The agreed order of this court dated 17 January 2024 included the possibility of approaching the Acting Judge President for special allocation, which eventually happened in this matter.

[20] The applicants in this matter had the obligation to ensure that the matter was ripe for hearing. No reasons were given for the midnight filing of the heads of argument on the Friday preceding the Monday hearing which clearly left no time for the respondents to file their heads of argument. Not only were the applicants forewarned of the effect of late filing of heads of argument but also the requirement to apply for condonation for the non-compliance with a court order.

[21] I can put it no better than Gilbert AJ in *Chonqin Gingxing Industries SA (Pty) Limited v Ye and Others* [2021 (3) SA 189 (GJ)] at paras 25–27.]:

"[25] Having so applied for the opposed date, the applicant represented that the matter was ripe for hearing. As discussed above, the whole purpose of the procedures

is to ensure that as far as practically possible a matter is ripe for hearing before becoming deserving of allocation on the busy opposed motion court roll.

[26] Having made that representation, the applicant must, insofar as practically feasible, ensure that the application remains ripe for hearing. Should the application become no longer ripe for hearing, then the application should be removed from the roll. Understandably there may be instances where recalcitrant respondents may conduct themselves, with varying degrees of ingenuity, in an attempt to render an allocated matter no longer ripe for hearing and so seek to avoid a hearing. The court will be alive to these attempts, but where the applicant itself take steps that render its own matter no longer ready for hearing, it can hardly complain that its opposed application is struck from the roll.

[27] This is such an instance"

[22] The respondents were clearly prejudiced by the conduct of the applicants but more importantly, the court is prejudiced despite our best efforts and literally having to disadvantage other litigants in an attempt to accommodate the matter. All

> litigants before the courts have equal rights of access and, by accommodating this matter, other litigants had to be prejudiced. Courts must ensure that the integrity and efficient use of the judicial resources is protected. As pointed out above by allowing litigants to ignore court orders that they've agreed to without a proper explanation, will bring the administration of justice into disrepute.'

In urgent matters the court is entitled to admit hearsay evidence in an affidavit provided the source of the information and the grounds for belief in its truth are stated. [362] The type of case in which such evidence is accepted, if these prerequisites are complied with, is one in which it is necessary to restrain immediate injury and to keep matters in status quo. [363] In *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma* [364] hearsay evidence presented by the applicant consisting of a series of public statements concerning the Constitutional Court's authority purportedly made by Mr Zuma was, although being prejudicial to Mr Zuma's case, admitted as evidence in the public interest in an urgent application to declare him in contempt of court under circumstances where he did not oppose the application and made no attempt to distance himself from the statements. [365]

In an urgent application which involves large and complex issues, it would be impracticable to require each and every person with knowledge of a fact to make an affidavit. Thus, in *Lagoon Beach Hotel (Pty) Ltd v Lehane NO* [366] the Supreme Court of Appeal stated: [367]

> 'That there is a great deal of hearsay in the first respondent's papers is clear enough. In the circumstances of the matter, that is understandable. As Lehane says, he "came to Mr Dunne's affairs as a stranger", and during the course of carrying out his duties as official assignee, he came into possession of documents and records relevant to Mr Dunne's affairs which, in turn, led him to conclude inter alia that Mr Dunne had retained the true

> ownership of the shares in Mavior and that his disposition of such shares and his loan accounts to Mrs Dunne constituted an invalid stratagem to place assets beyond the reach of creditors. In his approach to court Lehane made documents in his possession available to support certain statements made by him. Some of them included judgments of the Irish courts, which relate to certain of the facts established in those proceedings, as well as financial statements of companies, correspondence and statements made by others and official records of government bodies, and the like. In a case such as this, in which the first respondent is in a position akin to that of a trustee in an insolvency in this country, the comment in *Registrar of Insurance v Johannesburg Insurance Co Ltd (1)* 1962 (4) SA 546 (W) at 547E–F, that "(i)f all the people who know about every small fact which makes up this complex case should have to make affidavits, the matter would become quite impracticable. In a case like that a court will relax its rules for the sake of facilitating litigation and in the interests of justice", becomes pertinent. It is also necessary to state that Lehane could not swear positively to the facts, but was only called on to justify his suspicions.'

It does not follow that the court is obliged to accept such hearsay evidence, even if the source and the grounds for belief are furnished. [368] Though this rule antedates the Law of Evidence Amendment Act 45 of 1988, its flexibility is in consonance with the wide discretion which s 3 of the Act gives the court in regard to the admission of hearsay evidence. See further the notes s v 'The facts upon which the applicant relies for relief' to subrule (1) above.

In *Lagoon Beach Hotel (Pty) Ltd v Lehane NO* [369] it was held [370] that in an application which is moved as one of urgency, courts are commonly sympathetic to an applicant and often allow papers to be amplified in reply, subject of course to the right of a respondent to file further answering papers.

If the application lacks the requisite element or degree of urgency, the court can, for that reason, decline to exercise its powers under this subrule. The matter is then not properly on the roll. It is well established that the appropriate order under such circumstances is to strike the application from the roll. [371] That enables the applicant to set the matter down again on proper notice and compliance with the rules. [372] Any amendment to the original notice of

motion must be done in accordance with the provisions of rule 28. [373]

If a matter has been set down for hearing on the basis that it is urgent, but the urgency thereafter falls away, and the parties only persist with the issue of costs, the matter should be postponed to a date on the normal roll. [374]

It is well established that in pronouncing on the issue of urgency, the court exercises a wide discretion. [375]

Rule 67A(4)*(a)* provides that a costs order may upon application by any party indicate which portions of the proceedings are deemed urgent. See further the notes to rule 67A(4) below.

'The court or a judge.' As to the meaning of the words 'court' and 'judge', see rule 1 above.

'May dispense with the forms and service provided for in these rules.' Although the court may in terms of this subrule dispense with the forms and service provided for in the rules, the court is enjoined by the subrule to dispose of an urgent application by procedures which are as far as practicable in terms of the rules. That obligation must be reflected in the attitude of the court about which deviations it will tolerate in a specific case. [376] It has been held that the rules of service could be relaxed in urgent cases for interim relief involving respondents who resided outside the area of jurisdiction of a court. [377]

An urgent application is an application in terms of rule 6(5) and the provisions of the subrule apply to such applications subject to the qualification that an applicant may, to the extent that is necessary in the particular circumstances, deviate from the rules without asking prior permission of the court. [378] The applicant must, of course, ask that his non-compliance with the rules be condoned. [379] If the applicant requires the operation of any other rules to be dispensed with, such as rules relating to the service of any order made, he should in his application make out a case for dispensing with them. [380]

In terms of rule 6(5)*(a)* an application must be in a form as near as may be in accordance with Form 2*(a)*. The mere existence of some urgency does not justify an applicant not using Form 2*(a)*, but the applicant may deviate from the form to the extent justified by the exigencies of the circumstances by, for example, using shortened time periods, advance nomination of a date of hearing, omitting notice to the registrar and adaptation of the wording. [381] It is not

a requisite of the rules that a notice of motion (and, *a fortiori*, an urgent application) be issued by the registrar or delivered to him *before* it may be served upon the respondent. [382]

There must be a marked degree of urgency before it will be justifiable not to use Form 2*(a)*. There may, for example, be factors present which justify dispensing with all notice to the respondent. [383] In such cases the use of Form 2 may suffice. [384]

In appropriate circumstances a rule *nisi* may be sought by way of urgent application. [385] In such cases an applicant would be entitled in one document to give two notices for the two sets of relief which are being sought: (i) a notice along *ex parte* lines (Form 2) for the immediate relief which will be sought without notice or on shorter notice than the main relief; and (ii) a

notice along the lines of Form 2*(a)* for the relief which will be sought at a later stage. The relief under (i) will be relief pending the relief to which (ii) refers, i e relief pending the main hearing. [386]

An urgent application for a rule *nisi* operating as an interim interdict against the State, any Minister, Provincial Premier or any other officer of the State or province in his capacity as such, must be served at least 72 hours, or such lesser period as the court may in all the circumstances of the case consider reasonable, before the time mentioned in the application for the hearing of the application. [387]

If a case has lost its urgency as a result of an interim arrangement between the parties, the case will not be enrolled otherwise than in accordance with the rules. [388]

In appropriate circumstances an applicant is entitled, under this subrule, to move the court, *in camera*, and without notice to the respondent, for an Anton Piller order. See further the notes s v 'Search and Seizure: Orders for the Preservation of Evidence (Anton Piller Orders)' in Part D8 below.

Subrule (12)*(b)*: 'In every affidavit.' Pursuant to its substitution with effect from 8 July 2022, [389] the subrule no longer makes reference to a petition filed in support of an application. Proceedings by way of petition were abolished with effect from 1 July 1976 by the Petition Proceedings Replacement Act 35 of 1976 which provides that any reference in any law to the institution of application proceedings in any court by petition, shall be construed as a reference to the institution of such proceedings by notice of motion in terms of the rules of court.

'Shall set forth explicitly the circumstances which it is averred render the matter urgent and the reasons why . . . applicant could not be afforded substantial redress at a hearing in due course.' The applicant must in his founding affidavit set out explicitly the circumstances on which he relies to render the matter urgent and the reason why he claims that he cannot be afforded substantial relief at a hearing in due course. [390] The applicant needs to justify why the matter is so urgent as to warrant other litigants being shifted further down the queue. [391]

Subrule (12)*(c)*: 'Against whom an order was granted in his absence.' While subrule (8) allows a person against whom an order has been granted *ex parte* to anticipate the return day upon notice, this subrule allows a person against whom an order was granted in his absence in an urgent application to set the matter down on notice for reconsideration. The absence of the aggrieved party has been termed the 'underlying pivot' to which the exercise of the power under the subrule is coupled. [392] Absence does not extend to wilful absence. [393]

'By notice.' This subrule does not provide for the words 'supported by such affidavits as the case may require' as in rule 6(11) and has been held [394] to mean that it does not require that the

notice referred to therein should be accompanied by affidavits. If, however, the aggrieved party does file an affidavit then the other party has an opportunity to file a replying affidavit which is subject to the general rules and practice about not introducing new matter illegitimately. [395]

The subrule merely provides a method for setting the matter down for reconsideration of the order as opposed to subrule 6(11) which provides for a method of notifying the opposing party of the bringing of interlocutory and other applications incidental to pending proceedings. [396]

In *The* Fonarun Naree: *Afgri Grain Marketing (Pty) Ltd v Trustees, Copenship Bulkers A/S (In Liquidation)* [397] the Supreme Court of Appeal summarized the position in regard to this subrule as follows (footnotes omitted):

> '[12] Rule 6(12)*(c)* does not prescribe how an application for reconsideration is to be pursued. The absence of prescription was intentional, and the procedure will vary, depending upon the basis on which the party applying for reconsideration seeks relief against the order granted ex parte and in its absence. A party wishing to have the order set aside on the ground that the papers did not make a case for that relief, may deliver a notice to this effect and set the matter down, for argument and reconsideration, on those papers. It may do the same if it merely wishes certain provisions in the order to be amended, or qualified, or supplemented. The matter is then argued on the original papers. It is not open to the original applicant, save possibly in the most exceptional circumstances, or where the need to do this has been foreshadowed in the original founding affidavit, to bolster its original application by filing a supplementary founding affidavit.
>
> [13] The party seeking reconsideration is not confined to this route. It may file an answering affidavit, either traversing the entire case against it, or restricted to certain issues relevant to the reconsideration. In many instances such an affidavit will be desirable. Even if an affidavit is filed, however, it does not preclude the party seeking reconsideration arguing at the outset, on the basis of the application papers alone, that the applicant has not made out a case for relief. That is a well-established entitlement in application proceedings and there is no reason why it should not be adopted in reconsideration applications.
>
> [14] If an affidavit is filed in support of the application for reconsideration, then the party that obtained the order is entitled to deliver a reply thereto, subject to the usual limitations applicable to replying affidavits. When that is done, and the party seeking reconsideration does not argue a preliminary point at the outset that the founding affidavit did not make out a case for relief, the case must be argued on all the factual material before the judge dealing with the reconsideration proceedings. That material may be significantly more extensive and the nature of the issues may have changed as a result of the execution of the original ex parte order.'

'Set the matter down for reconsideration of the order.' The dominant purpose of the subrule is to afford an aggrieved party a mechanism designed to redress imbalances in, and injustices and oppression flowing from an order granted as a matter of urgency in his absence. [398] The

rationale is to address the actual or potential prejudice because of an absence of *audi alteram partem* when the order was made. [399]

Reconsideration of the order, which may be either interim or final in its operation, may involve deletion of the order, either in whole or in part, or amendment of the order or additions thereto. [400]

A court that reconsiders any order in terms of this subrule should do so with the benefit not only of argument on behalf of the party absent during the granting of the original order but also with the benefit of the facts contained in affidavits filed by all the parties. [401] The result

of this is that the reconsideration needs to be done on the basis of a set of circumstances quite different from that under which the original *ex parte* order was obtained. [402] The consequences of this are twofold. First, the issues are to be reconsidered in the light of the fact that both sides of the story are now before the court. Secondly, the execution of the original order may have had the effect that those issues are not exactly the same as the issues the court had to deal with in

the original application. [403]

It has been held [404] that the subrule is wide enough to permit the reconsideration of an order granted *ex parte*, such as an Anton Piller order, on the basis of a set of circumstances quite different from those under which the original order had been obtained. In these circumstances the order will be reconsidered in the light of the execution of the previous order, the variation of such order and further affidavits filed by the parties.

Under the subrule, the court has a wide discretion and the factors which may determine whether an order falls to be reconsidered, include the reasons for the absence, the nature of the order granted and the period during which it has remained operative. Other factors to be taken into consideration will be whether an imbalance, oppression or injustice has resulted, and, if so, the nature and extent thereof, and whether alternative remedies are available. The convenience of the parties is another factor to be taken into consideration. [405] The aggrieved party, seeking to invoke the provisions of the subrule, ought in his affidavit to detail the form of reconsideration required and the circumstances upon which it is based. [406]

Where the court reconsiders an Anton Piller-type order in terms of this subrule and it appears that the application was an abuse of the process of court, the court may in its discretion order the applicant to pay costs on an attorney and own client scale. [407]

Subrule (15): 'May on application order to be struck out.' This subrule regulates the striking out of matter from an affidavit as opposed to an application to strike out an entire claim that is vexatious. In the latter instance, the court enjoys at common law an inherent power to strike out claims that are vexatious by which is meant 'frivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant'. [408] As a complement

to the common law, the Vexatious Proceedings Act 3 of 1956 provides the court with a mechanism for preventing the institution of vexatious legal proceedings. [409]

The application must be on notice in terms of subrule (11). [410] The application must clearly indicate the passages to which objection is taken and set out the grounds of objection shortly. [411]

The application should be set down for hearing at the same time as the hearing of the main application. [412] Since an application to strike out objectionable matter in affidavits is dealt with only at the hearing of the main application, a party must in his opposing affidavits deal with the allegations sought to be struck out. By doing so he does not waive his right to object to the offending allegations in the affidavits. [413]

The use of the word 'may' indicates that the court has a discretion in an application to strike out matter from an affidavit. [414]

'Any matter which is scandalous, vexatious or irrelevant.' The meaning of these terms has been stated as follows: [415]

(a) Scandalous matter — allegations which may or may not be relevant but which are so worded as to be abusive or defamatory.

(b) Vexatious matter — allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy.

(c) Irrelevant matter — allegations which do not apply to the matter in hand and do not contribute in one way or the other to a decision of such matter. [416]

The subrule is not exhaustive of the grounds upon which an application to strike out matter from an affidavit may be brought. [417] The following can be struck out:

(a) Inadmissible evidence — e g privileged communications [418] and hearsay evidence, [419] unless, in the latter case, supported by an affidavit or affirmation 'of information and belief'.

Inadmissible evidence appearing in affidavits may be struck out without invoking rule 6(12) and notice of such an application to strike out may be given in terms of rule 6(11). [420] Such an application is in essence an objection against the admission of evidence which is only made at the hearing of the main application. [421] Hearsay statements in affidavits can, therefore, be struck out irrespective of whether or not there is prejudice. [422]

(b) Argument. [423]

(c) Attacks on credibility. [424]

(d) New matter (if the affidavit in question is a replying affidavit). [425]

'An appropriate order as to costs including costs as between attorney and client.' The court has a wide discretion to make an appropriate costs order, including an order for costs on the basis as between attorney and client, depending on the facts and circumstances of the matter. [426]

'The applicant will be prejudiced in his case.' Two requirements must be satisfied before an application to strike out matter from any affidavit can succeed: first, the matter sought to be struck out must indeed be scandalous, vexatious or irrelevant; secondly, the court must be satisfied that if such matter is not struck out the parties seeking such relief would be prejudiced. [427] The procedure for striking out was not intended to be utilized to make technical objections which merely increase costs. [428] The word 'case' in the subrule should not be

interpreted narrowly so as to enable a party freely to make irrelevant allegations which could only be struck out upon proof of prejudice in respect of the relief sought. [429] Scandalous or irrelevant matter may be defamatory of the other party and the retention of such matter will therefore be prejudicial to such party. [430]

Costs of applications. The general rules applicable to costs apply also to awards of costs in application proceedings. See, in general, Part D5 below.

There is no principle that a costs order cannot be made against a respondent in an unopposed matter. While there might be sound policy considerations why, for example, the respondent in a review application (such as a public body, a magistrate, a master of the High Court or an arbitrator) would not be required to pay the costs of an application, save in the event of opposition, the same considerations do not apply to applications for relief against ordinary commercial entities. [431]

1 For proposed amendments to rule 6, see Price 'Civil court rules — open to abuse?' 2013 (August) *De Rebus* 29–31.
2 This paragraph was referred to with approval in *Inzalo Enterprise Management Systems (Pty) Ltd v Mantsopa Local Municipality* (unreported, FB case no 3832/2023 dated 22 November 2023) at paragraph [17].
3 See, in general, Volume 3, Parts F–N.
4 Subrule (2).
5 Subrules (2) and (4)*(a)*.
6 Subrule (11).
7 See the proviso to subrule (4)*(a)* and, further, the notes to subrule (11) s v 'May be brought on notice' below.
8 See the notes to subrule (12) below.
9 Subrule (12)*(a)*.
10 Subrule (12)*(a)*.
11 *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd* 2013 (2) SA 204 (SCA) at 211B–C, overruling *BHP Billiton Energy Coal South Africa Ltd v Minister of Mineral Resources* 2011 (2) SA 536 (GNP) at 541I–542D on this point.
12 2016 (1) SA 78 (GJ).
13 At 85D–F.
14 *Theron and Another NNO v Loubser NO* 2014 (3) SA 323 (SCA) at paragraph [26]; *Tau v Mashaba* 2020 (5) SA 135 (SCA) at paragraph [15].
15 *Ex parte Satbel (Edms) Bpk: In re Meyer v Satbel (Edms) Bpk* 1984 (4) SA 347 (W) at 362G.
16 *Ex parte Hay Management Consultants (Pty) Ltd* 2000 (3) SA 501 (W) at 506B–507B; *Ulde v Minister of Home Affairs* 2008 (6) SA 483 (W) at 495F–496H.
17 2014 (3) SA 265 (GP).
18 At 289E–290A.
19 *Reymond v Abdulnabi* 1985 (3) SA 348 (W) at 349E; *Brian Kahn Inc v Samsudin* 2012 (3) SA 310 (GSJ) at 313A–B and the cases there referred to.
20 *Brian Kahn Inc v Samsudin* 2012 (3) SA 310 (GSJ) at 313B–C.
21 *Brian Kahn Inc v Samsudin* 2012 (3) SA 310 (GSJ) at 313C.
22 *Brian Kahn Inc v Samsudin* 2012 (3) SA 310 (GSJ) at 313B–C.
23 *Afriforum NPC v Nelson Mandela Foundation Trust* 2023 (4) SA 1 (SCA) at paragraphs [70]–[71]; *Road Accident Fund v MKM obo KM* 2023 (4) SA 516 (SCA) at paragraph [55]; *Minister of Communications and Digital Technologies v South African Post Office SOC Ltd* (unreported, GP case no 2023-051134 dated 10 July 2023) at paragraph [7]; and see *Road Accident Fund v Taylor and Related Matters* 2023 (5) SA 147 (SCA) at paragraphs [30]–[31]; *Kouga Local Municipality v St Francis Bay (Ward 12) Concerned Residents Association* 2024 (4) SA 70 (SCA) at paragraph [15].
24 *Persadh v General Motors South Africa (Pty) Ltd* 2006 (1) SA 455 (SE) at 459E–G. The principles are discussed in the *excursus* to rule 41 s v 'Postponement' below.
25 *Purchase v Purchase* 1960 (3) SA 383 (N) at 385A; *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 563D–H; *Sparks v Sparks* 1998 (4) SA 714 (W) at 721F; *Bouwer v City of Johannesburg* (unreported, LAC case no JA64/06 dated 23 December 2008) at paragraphs [17]–[45]; but see *Vena v Vena* 2010 (2) SA 248 (ECP) at 253A–I where it was held that the dismissal of an application under certain cirumstances amounts to absolution from the instance.
26 2016 (3) SA 417 (GJ).
27 At 425A–B, with reference to *Ex parte Van Loggerenberg* 1951 (1) SA 771 (T) at 772A–D; *Ex parte Inkley and Inkley* 1995 (3) SA 528 (C) and *Williams v Tunstall* 1949 (3) SA 835 (T).
28 1949 (3) SA 1155 (T).
29 Unreported, SCA case no 139/2020 dated 23 June 2021.
30 At paragraph [26].
31 At paragraph [27]. See also *Koko v Tanton* (unreported, GJ case no 2021/2212 dated 7 September 2021) at paragraphs [41]–[42].
32 [2021] 4 All SA 652 (SCA).
33 At paragraph [21].
34 Unreported, SCA case no 504/2023 dated 4 July 2024.
35 The Supreme Court of Appeal disagreed with the decision of the High Court in *Ramos v Independent Media (Pty) Ltd* (unreported, GJ case no 01144/21 dated 28 May 2021) and held that motion proceedings were unsuited to deal with defamatory allegations as was done in that case (at paragraphs [24]–[26]).
36 GN R2133 in *GG* 46475 of 3 June 2022.
37 The nature of proceedings by way of petition is discussed in *Du Preez v Du Preez* 1960 (3) SA 388 (N) and the decisions referred to therein. See also *Hepker v National Gelatine & Glue (SA) (Pty) Ltd* 1966 (3) SA 591 (W) and *Open Market Bazaars (Pty) Ltd v Bolnick Bros (Pty) Ltd* 1973 (2) SA 590 (T).
38 Both Form 2 and Form 2*(a)* bear the heading 'Notice of Motion'.
39 In *Du Plessis v Tager* 1953 (2) SA 275 (O) at 277F–G 'notice of motion' is described as 'benewens dagvaarding en petisie een van die erkende maniere . . . waarop 'n geding aanhangig gemaak kan word, en as sulks is dit 'n siviele geding'.
40 *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 780C–E.
41 Rule 41A(2)*(a)*.
42 Rule 41A(2)*(c)*.
43 Rule 41A(2)*(d)*.
44 Rule 41A(4)*(c)*.
45 2021 (5) SA 619 (ECM). A similar point *in limine* was dismissed in *Tau Lekoa Gold Mining Company v Nicolar (Pty) Ltd* (unreported, GJ case no 055281/23 dated 14 August 2023) at paragraph [23].
46 At paragraphs [9]–[11].
47 Unreported, GP case no 2023-064414 dated 25 July 2023.
48 At paragraph [7]. See also *Shannin and Ulisha Investments (Pty) Limited t/a Fast Spares v Mahomed* (unreported, KZP case no 16524/2022P dated 16 November 2023) at paragraph [14].
49 See *Goodwood Municipality v Rabie* 1954 (2) SA 404 (C) at 406B–C; *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 336A–B.
50 Section 194; and see *S v Thurston* 1968 (3) SA 284 (A).
51 *S v L* 1973 (1) SA 344 (C). In *Chaimowitz v Chaimowitz (1)* 1960 (4) SA 818 (C) the 'hearsay ramblings of an infant' in an affidavit were struck out.
52 *Leith NO and Heath NO v Fraser* 1952 (2) SA 33 (O) at 36B.
53 *Mazibuko v Singer* 1979 (3) SA 258 (W) at 264F; *Samex Consulting (Pty) Ltd v Department of Roads and Public Works Northern Cape* (unreported, NCK case no 2101/2021 dated 28 October 2022) at paragraph [7].
54 *Reynolds NO v Mecklenberg (Pty) Ltd* 1996 (1) SA 75 (W) at 78I. In this case Stegmann J deprecated the disorderly presentation of facts in lengthy affidavits containing much argumentative matter. The result was that the court was 'given no clear context of facts which are common cause, and no clear guidance as to the dispute of facts which must be evaluated against the background of such a context' (at 83A–C).
55 *My Vote Counts NPC v Speaker of The National Assembly* 2016 (1) SA 132 (CC) at paragraph [177]; *WD v AD* (unreported, GJ case no 2019/41365 dated 18 October 2021) at paragraph [19]. See further the notes to subrule (5)*(e)* s v 'Deliver a replying affidavit' below.
56 *Mars Incorporated v Candy World (Pty) Ltd* 1991 (1) SA 567 (A) at 575H–I; *Kommissaris van Binnelandse Inkomste v Van der Heever* 1999 (3) SA 1051 (SCA) at 1057G–H.
57 1980 (3) SA 1182 (C) at 1188H; and see *Eagles Landing Body Corporate v Molewa NO* 2003 (1) SA 412 (T) at 423I; *Giant Concerts CC v Minister of Local Government, Housing and Traditional Affairs, KwaZulu-Natal* 2011 (4) SA 164 (KZP) at 170H–I. It has been held that where a resolution authorized a person to sign all documentation and affidavits necessary 'in connection with . . . an action', the word 'action' embraced application proceedings and the deponent accordingly had the necessary authority (*Kwik Kopy (SA) (Pty) (Ltd) v Van*

Haarlem 1999 (1) SA 472 (W) at 481E–F).

58 *Ganes v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at 624G–H; *Plettenberg Bay Country Club v Bitou Municipality* [2006] 4 All SA 395 (C) at 398*i–j*; *ANC Umvoti Council Caucus v Umvoti Municipality* 2010 (3) SA 31 (KZP) at 38B–E; *MV Andre Builder Joiner CC v Nordien* (unreported, WCC case no 19002/20 dated 6 December 2021) at paragraph [22]; *SAMWU obo Members v Mangaung Metropolitan Municipality* 44 *ILJ* 360 (LC) at paragraphs [21]–[22]; *Masako v Masako* 2022 (3) SA 403 (SCA) at paragraph [10]; and see *Eskom v Soweto City Council* 1992 (2) SA 703 (W) at 705E. Once the authority of a departmental officer to represent the State is challenged, it is encumbent upon the State to produce proof that such officer is duly delegated, directed and authorized to represent it in the proceedings. The mere say-so of a departmental officer in an affidavit is no proof of either delegation or authority without submitting acceptable evidence or documentation to substantiate the averments (*Eveleth v Minister of Home Affairs* [2004] 3 All SA 322 (T) at 326*f–h*. See also *Gerhardt v State President* 1989 (2) SA 499 (T) at 504G and *Kasiyamhuru v Minister of Home Affairs* 1999 (1) SA 643 (W)).

59 1992 (2) SA 703 (W) at 207D–E.

60 It was held that it cannot be done in *South African Milling Co (Pty) Ltd v Reddy* 1980 (3) SA 431 (SE); *Interboard SA (Pty) Ltd v Van den Berg* 1989 (4) SA 166 (O); *United Methodist Church of South Africa v Sokufundumala* 1989 (4) SA 1055 (O); *South African Allied Workers' Union v De Klerk NO* 1990 (3) SA 425 (E) (confirmed on appeal *sub nomine South African Allied Workers' Union (in liquidation) v De Klerk NO* 1992 (3) SA 1 (A) but the question of *locus standi* was not considered (at 4H)); *M & V Tractor & Implement Agencies Bk v Vennootskap D S U Cilliers & Seuns; Hoogkwartier Landgoed; Olierivier Landgoed (Edms) Bpk (Kelrn Vervoer (Edms) Bpk Tussenbeitredend)* 2000 (2) SA 571 (N). It was held that it can be done and that the court has a discretion to come to the aid of the applicant in appropriate cases in *Baeck & Co SA (Pty) Ltd v Van Zummeren* 1982 (2) SA 112 (W); *Evangelical Lutheran Church in Southern Africa (Western Diocese) v Sepeng* 1988 (3) SA 958 (B) at 966A–B; *De Polo v Dreyer* 1991 (2) SA 164 (W) at 178C–179B; *Nahrungsmittel GmbH v Otto* 1991 (4) SA 414 (C) at 418D; *National Co-op Dairies Ltd v Smith* 1996 (2) SA 717 (N) at 718J–719D; *Torgos (Pty) Ltd v Body Corporate of Anchors Aweigh* 2006 (3) SA 369 (W) at 371E–F; *Plettenberg Bay Country Club v Bitou Municipality* [2006] 4 All SA 395 (C) 399*c*; *Msunduzi Municipality v Natal Joint Municipal Pension/Provident Fund* 2007 (1) SA 142 (N) at 147G–H. In *Merlin Gerin (Pty) Ltd v All Current and Drive Centre (Pty) Ltd* 1994 (1) SA 659 (C), *Fourways Mall (Pty) Ltd v South African Commercial Catering and Allied Workers Union* 1999 (3) SA 752 (W) at 753G–H and *Cyberscene Ltd v i-Kiosk Internet and Information (Pty) Ltd* 2000 (3) SA 806 (C) at 811B–812H it was contended that this approach had in fact been approved by the Appellate Division in *Moosa and Cassim NNO v Community Development Board* 1990 (3) SA 175 (A) at 181B. In *South African Allied Workers' Union v De Klerk NO* 1990 (3) SA 425 (E) at 433C–E the view was expressed that the Appellate Division had not resolved the matter. In *Smith v Kwanonqubela Town Council* 1999 (4) SA 947 (SCA) at 954F–H it was emphasized (albeit *obiter*) that the Appellate Division in the *Moosa* case clearly adopted as correct the approach in the *Baeck & Co* case *(supra)* and that the Supreme Court of Appeal fully subscribes to that view. It was also pointed out (at 954H) that the rule against new matter in reply is not absolute and that it should be applied with a fair measure of common sense. The Supreme Court of Appeal also settled conflicting case law as to whether or not authority could be ratified, holding that it could be ratified except where the ratification would prejudice the substantive rights of a third party (at 952F–H; 953B–G and 954A–B). In *Nestlé (South Africa) (Pty) Ltd v Mars Inc* 2001 (4) SA 542 (SCA) the Supreme Court of Appeal, with reference to *Smith v Kwanonqubela Town Council (supra*), rejected a submission on behalf of the appellant that the respondent did not authorize the application that it brought in the High Court, stating (at paragraph [11]) that 'because it is abundantly clear that at the time the application was heard Mars, even if it had not authorised them at the outset, had at least ratified the commencement of the proceedings as it was entitled to do'. See also *Lynn NO v Coreejes* 2011 (6) SA 507 (SCA) at paragraphs [14]–[15].

61 *Van Staden NO v Pro-Wiz Group (Pty) Ltd* 2019 (4) SA 532 (SCA) at 538E–G.

62 *Van Staden NO v Pro-Wiz Group (Pty) Ltd* 2019 (4) SA 532 (SCA) at 538E–G.

63 *Van Staden NO v Pro-Wiz Group (Pty) Ltd* 2019 (4) SA 532 (SCA) at 538E–G.

64 *Ex parte Kaiser* 1902 TH 165. In *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd* 1974 (4) SA 362 (T) at 368H it is said that it has always been the practice in South Africa to strike out matter in replying affidavits which should have appeared in founding affidavits, 'including facts to establish . . . the jurisdiction of the court'. See also *Kritzinger v Newcastle Local Transitional Council* 2000 (1) SA 345 (N) at 352C–D; *Eagles Landing Body Corporate v Molewa NO* 2003 (1) SA 412 (T) at 423J–424A.

65 *Mauerberger v Mauerberger* 1948 (3) SA 731 (C) at 732; *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd* 1974 (4) SA 362 (T) at 369A; *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger* 1976 (2) SA 701 (D) at 704F–H; *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635H–636F; *Shepherd v Mitchell Cotts Seafreight (SA) (Pty) Ltd* 1984 (3) SA 202 (T) at 205E; *Bowman NO v De Souza Roldao* 1988 (4) SA 326 (T) at 327D–328A; *Business Partners Ltd v World Focus 754 CC* 2015 (5) SA 515 (KZP) at 528B–C; *Annex Distribution (Pty) Ltd v Bank of Baroda* 2018 (1) SA 562 (GP) at 578F; *Atlantis Property Holdings CC v Atlantis Exel Service Station CC* 2019 (5) SA 443 (GP) at 458E–G; *Philippi Horticultural Area Food and Farming Campaign v MEC for Local Government, Western Cape* 2020 (3) SA 486 (WCC) at paragraph [18]; *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) at 349A–B. In the latter case the court stated (at 349B–C):
'The applicant must set out facts to justify the relief sought and also to inform the respondent of the case he is required to meet. The appellant is precluded from making a case on appeal that was not only not pleaded on the papers but was also disavowed by the appellant in reply.'
See also *Molusi v Voges NO* [2015] 3 All SA 131 (SCA) at paragraphs [20] and [39] and the cases there referred to, reversed on appeal (but not on this point) in *Molusi v Voges NO* 2016 (3) SA 370 (CC).

66 *Lang v Wilhelmus* (unreported, GP case no 25502/2022 dated 7 February 2023), applying *WP Fresh Distributors (Pty) Ltd v Klaaste NO* (unreported, WCC case no 16473/12 dated 23 April 2013).
See also the notes to rule 6 s v 'General' above.

67 *Berg v Gossyn (1)* 1965 (3) SA 702 (O); *Nedbank Ltd v Hoare* 1988 (4) SA 541 (E) at 543H.

68 *Hart v Pinetown Drive-In Cinema (Pty) Ltd* 1972 (1) SA 464 (D) at 469C–E, cited with approval in *Pearson v Magrep Investments (Pty) Ltd* 1975 (1) SA 186 (D) at 187G; *Prok Africa (Pty) Ltd v NTH (Pty) Ltd* 1980 (3) SA 687 (W) at 692H–693A; *Triomf Kunsmis (Edms) Bpk v AE & CI Bpk* 1984 (2) SA 261 (W) at 269B–270B; *Radebe v Eastern Transvaal Development Board* 1988 (2) SA 785 (A) at 793E; *Hyperchemicals International (Pty) Ltd v Maybaker Agrichem (Pty) Ltd* 1992 (1) SA 89 (W) at 92H; *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 323F–324C; *Bezuidenhout v Otto* 1996 (3) SA 339 (W) at 344J–345D; *South Peninsula Municipality v Evans* 2001 (1) SA 271 (C) at 280I; *Choice Holdings Ltd v Yabeng Investment Holdings Co Ltd* 2001 (3) SA 1350 (W) at 1360D–E; *Union Finance Holdings Ltd v I S Mirk Office Machines II (Pty) Ltd* 2001 (4) SA 842 (W) at 847D–E; *Die Dros (Pty) Ltd v Telefon Beverages CC* 2003 (4) SA 207 (C) at 217A–B; *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA) at 600G; *Minister of Land Affairs and Agriculture v D&F Wevell Trust* 2008 (2) SA 184 (SCA) at 200D; *Absa Bank Ltd v Kernsig 17 (Pty) Ltd* 2011 (4) SA 492 (SCA) at 499A–D; *MEC for Health, Gauteng v 3P Consulting (Pty) Ltd* 2012 (2) SA 542 (SCA) at 550G–551C; *Foize Africa (Pty) Ltd v Foize Beheer BV* 2013 (3) SA 91 (SCA) at 102G–H; *Business Partners Ltd v World Focus 754 CC* 2015 (5) SA 515 (KZP) at 528B; *Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd* 2016 (1) SA 78 (GJ) at 85G–I; *Molusi v Voges NO* 2016 (3) SA 370 (CC) at 381F–H; *FirstRand Bank Ltd v Kruger* 2017 (1) SA 533 (GJ) at 537A; *Masstores (Pty) Ltd v Pick n Pay Retailers (Pty) Ltd* 2017 (1) SA 613 (CC) at 625I–J; *Mostert v FirstRand Bank Ltd t/a RMB Private Bank* 2018 (4) SA 443 (SCA) at 448D; *National Credit Regulator v Lewis Stores (Pty) Ltd* 2020 (2) SA 390 (SCA) at paragraph [29]; *Global Environmental Trust v Tendele Coal Mining (Pty) Ltd (Centre for Environmental Rights and others as amici curiae)* [2021] 2 All SA 1 (SCA) at paragraph [95]. See also *Molusi v Voges NO* [2015] 3 All SA 131 (SCA) at paragraphs [20] and [39]; *Maponya Motor City Properties (Pty) Ltd v Hamilton N.O.* (unreported, GJ case no 20/39151 dated 12 October 2021) at paragraph [23]; *Nongadla v Standard Bank (Pty) Ltd* (unreported, ECM case no 1677/2014 dated 2 February 2023) at paragraph [16]; *Skog NO v Agullus* 2024 (1) SA 72 (SCA) at paragraph [18]; *Kouga Local Municipality v St Francis Bay (Ward 12) Concerned Residents Association* 2024 (4) SA 70 (SCA) at paragraph [15]. See also *Molusi v Voges NO* [2015] 3 All SA 131 (SCA) at paragraphs [20] and [39] and the cases there referred to, reversed on appeal (but not on this point) in *Molusi v Voges NO* 2016 (3) SA 370 (CC).

69 *Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd* 2016 (1) SA 78 (GJ) at 86A.

70 See, for example, *FirstRand Bank Ltd v Kruger* 2017 (1) SA 533 (GJ) at 537B–D and the cases there referred to.

71 *Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd* 2016 (1) SA 78 (GJ) at 86C–88B.

72 2021 (3) SA 88 (SCA).

73 At paragraph [145].

74 2016 (1) SA 78 (GJ).

75 At 88B–89H.

76 *Eskom Holdings SOC Ltd v Masinda* 2019 (5) SA 386 (SCA) at 387I–388B. In *Freedom Under Law v Judicial Service Commission* [2023] 3 All SA 631 (SCA) the secretary of the Judicial Service Commission deposed to the answering affidavit in opposition to the application to review and set aside the JSC's decision made in respect of Judge Motata. Although the secretary was not a member of the JSC and could not have participated in any of the deliberations or decision making, he asserted that 'the facts . . . are within my personal knowledge and are, to the best of my knowledge and belief, both true and correct'. In its replying affidavit, FUL challenged that assertion:
'[6] . . .
"10. The JSC's answering affidavit is deposed to by Mr Chiloane. Mr Chiloane speaks widely, broadly and with alleged authority about what the JSC decided, what its reasons and reasoning were, what motivated it to act in a particular way and what factors it took into account. Mr Chiloane is not a member of the JSC or the JSC majority which took the Decision and issued the submissions which formed the basis of the

Decision. He is simply not in a position to speak with personal knowledge to any of the issues on which he professes to express a factual view. Almost the entirety of his affidavit is hearsay and falls to be disregarded."'
The majority of the Supreme Court of Appeal held as follows:
'[27] Had the JSC merely participated with a view to placing the record of its deliberations before the court to assist it in its consideration of the matter, there could hardly have been any objection to Mr Chiloane deposing to an affidavit for that purpose. Not so, once it had decided to oppose the application. As a lay witness it was simply not open to him to depose to all manner of opinion evidence. *Mr Chiloane's affidavit was not accompanied by even a single confirmatory affidavit from any of those persons with personal knowledge of the facts*. The high court approached the evidential material proffered by Mr Chiloane in his affidavit as if it constituted proof of the truth of the matter so asserted. In that, as counsel for the JSC accepted at the bar in this Court, it erred. For my part, I am willing to pass over the issue, because on the view that I take of the matter, even on the JSC's own showing, the decision of the majority does not survive scrutiny.' (Emphasis added by the author.)
The above-mentioned approach of the majority in regard to the procedure of adducing hearsay evidence appears to fly in the face of the criticism of such procedure in *Eskom Holdings*.

77 In this regard the relevance of the evidence offered is dependent on its cogent connection with the relief being sought in the notice of motion (*Kouga Local Municipality v St Francis Bay (Ward 12) Concerned Residents Association* 2024 (4) SA 70 (SCA) at paragraph [15] — a case where the Supreme Court of Appeal determined the appeal strictly with reference to the case advanced by the first respondent in its founding papers and disregarded extraneous legal issues that the first respondent's counsel sought to argue based on facts which were not supported by the founding papers (at paragraphs [17]–[18])).

78 *Mauerberger v Mauerberger* 1948 (3) SA 731 (C) at 732; *Bayat v Hansa* 1955 (3) SA 547 (N) at 553C–G; *Schreuder v Viljoen* 1965 (2) SA 88 (O); *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd* 1974 (4) SA 362 (T) at 368–9; *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger* 1976 (2) SA 701 (D) at 704–5; *Pat Hinde & Sons Motors (Brakpan) (Pty) Ltd v Carrim* 1976 (4) SA 58 (T); *Shephard v Tuckers Land and Development Corporation (Pty) Ltd (1)* 1978 (1) SA 173 (W) at 177G; *Masenya v Seleka Tribal Authority* 1981 (1) SA 522 (T) at 524G; *Wiese v Joubert* 1983 (4) SA 182 (O) at 194F; *Triomf Kunsmis (Edms) Bpk v AE & CI Bpk* 1984 (2) SA 261 (W) at 269A–H; *Shepherd v Mitchell Cotts Seafreight (SA) (Pty) Ltd* 1984 (3) SA 202 (T) at 205E; *United Methodist Church of South Africa v Sokufundumala* 1989 (4) SA 1055 (O) at 1057E–I; *Interboard SA (Pty) Ltd v Van den Berg* 1989 (4) SA 166 (O) at 168B–D; *Port Nolloth Municipality v Xhalisa; Luwalala v Port Nolloth Municipality* 1991 (3) SA 98 (C) at 111E; *Tumisi v African National Congress* 1997 (2) SA 741 (O) at 746A–C; *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 338E–F; *Ferreira v Premier, Free State* 2000 (1) SA 241 (O) at 254B–D; *M & V Tractor & Implement Agencies Bk v Vennootskap D S U Cilliers & Seuns; Hoogkwartier Landgoed; Olierivier Landgoed (Edms) Bpk (Kelrn Vervoer (Edms) Bpk Tussenbeitredend)* 2000 (2) SA 571 (N) at 580A–C; *South Peninsula Municipality v Evans* 2001 (1) SA 271 (C) at 280I–281A; *Union Finance Holdings Ltd v I S Mirk Office Machines II (Pty) Ltd* 2001 (4) SA 842 (W) at 847D–E; *Rens v Gutman NO* [2002] 4 All SA 30 (C); *Eagles Landing Body Corporate v Molewa NO* 2003 (1) SA 412 (T) at 423I; *Body Corporate Shaftesbury Sectional Title Scheme v Rippert's Estate* 2003 (5) SA 1 (C) at 6E–F; *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) at 349A–B; *Betlane v Shelly Court CC* 2011 (1) SA 388 (CC) at 396C; *Minister of Safety and Security v Jongwa* 2013 (3) SA 455 (ECG) at 462A; *York Timbers (Pty) Ltd v National Director of Public Prosecutions* 2015 (3) SA 122 (GP) at 135E–F; *Gold Fields Ltd v Motley Rice LLC* 2015 (4) SA 299 (GJ) at 325I–326A; *Business Partners Ltd v World Focus 754 CC* 2015 (5) SA 515 (KZP) at 528C–G; *Brayton Carlswald (Pty) Ltd v Brews* 2017 (5) SA 498 (SCA) at 507I–J; *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd* 2017 (6) SA 223 (GJ) at 227E–228I; *Philippi Horticultural Area Food and Farming Campaign v MEC for Local Government, Western Cape* 2020 (3) SA 486 (WCC) at paragraph [18]. Facts could be either primary or secondary. Primary facts are those capable of being used for the drawing of inferences as to the existence or non-existence of other facts. Such further facts, in relation to primary facts, are called 'secondary facts'. Secondary facts, in the absence of primary facts, are nothing more than a deponent's own conclusions and do not constitute evidential material capable of supporting a cause of action (see, for example, *Willcox v Commissioner for Inland Revenue* 1960 (4) SA 599 (A) at 602A; *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 324D–F; *Die Dros (Pty) Ltd v Telefon Beverages CC* 2003 (4) SA 207 (C) at 217B–D; *Rees v Harris* 2012 (1) SA 583 (GSJ) at 595H–596A).

79 2013 (4) SA 519 (WCC) at 532B. See also *Maponya Motor City Properties (Pty) Ltd v Hamilton N.O.* (unreported, GJ case no 20/39151 dated 12 October 2021) at paragraph [41].

80 Heads of argument are not evidence. They should contain argument based on the pleadings and evidence/affidavits in opposed applications. It is irregular to raise a potential defence for the first time in heads of argument, especially where the facts have not been fully canvassed (*Janse van Rensburg v Obiang* 2023 (3) SA 591 (WCC) at paragraphs [22]–[24]). See also *Montle and Neo Transport Service v Engen Petroleum Limited* (unreported, WCC case no 20420/2022 dated 18 August 2023) at paragraphs 41–45; *ABSA Bank Limited v 93 Quartz Street Hillbrow CC* (unreported, GJ case no 2022/5554 dated 6 December 2023) at paragraph [9].

81 *Brighton Furnishers v Viljoen* 1947 (1) SA 39 (GW); *The Master v Slomowitz* 1961 (1) SA 669 (T) at 672A–C.

82 *The Master v Slomowitz* 1961 (1) SA 669 (T) at 672C.

83 *Raphael & Co v Standard Produce Co (Pty) Ltd* 1951 (4) SA 244 (C).

84 2017 (1) SA 533 (GJ).

85 At 541A–B.

86 At 538C–540B.

87 At 540B–541A (footnotes omitted).

88 *Author's note: Rees v Investec Bank Ltd* 2014 (4) SA 220 (SCA).

89 *The Master v Slomowitz* 1961 (1) SA 669 (T) at 672B; *Galp v Tansley NO* 1966 (4) SA 555 (C) at 558H; *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd* 2017 (6) SA 223 (GJ) at 230F–G.

90 *The Master v Slomowitz* 1961 (1) SA 669 (T) at 672B. See also *Mears v African Platinum Mines Ltd (1)* 1922 WLD 48 at 55; *Grant-Dalton v Win* 1923 WLD 180 at 186; *Pountas' Trustee v Lahanas* 1924 WLD 67; *Levin v Saidman* 1930 WLD 256; *Mia's Trustee v Mia* 1944 WLD 102 at 104; *Geanotes v Geanotes* 1947 (2) SA 512 (C); *Fisher v Presiding Officers, Rosettenville Constituency* 1961 (3) SA 651 (W) at 656A; *Galp v Tansley NO* 1966 (4) SA 555 (C) at 558H–559H; *Johnstone v Wildlife Utilization Services (Pvt) Ltd* 1966 (4) SA 685 (R); *Southern Pride Foods (Pty) Ltd v Mohidien* 1982 (3) SA 1068 (C) at 1071D–1072B; *Wiese v Joubert* 1983 (4) SA 182 (O) at 195B; *Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd* 1984 (4) SA 149 (T) at 157E–H; *Syfrets Mortgage Nominees Ltd v Cape St Francis Hotels (Pty) Ltd* 1991 (3) SA 276 (SE).

91 *Chaimowitz v Chaimowitz* 1960 (4) SA 818 (C) at 819F–G; *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd* 1977 (4) SA 682 (C) at 692C; *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd* 2017 (6) SA 223 (GJ) at 230G. It is well established that our courts have consistently refused to countenance the admission of hearsay evidence (see, for example, *Galp v Tansley NO* 1966 (4) SA 555 (C) at 558 and 560; *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 336G). Notwithstanding this principle, the courts have on occasion taken cognizance of hearsay statements for limited purposes and subject to certain conditions (see, for example, *Galp v Tansley NO* 1966 (4) SA 555 (C) at 558H; *Southern Pride Foods (Pty) Ltd v Mohidien* 1982 (3) SA 1068 (C) at 1071H–1072B; *Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd* 1984 (4) SA 149 (W) at 157E–H; *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 336G–I).

92 The application of the section to evidence by affidavit in application proceedings is considered in *Hlongwane v Rector, St Francis College* 1989 (3) SA 318 (D) at 324E–F; *Mnyama v Gxalaba* 1990 (1) SA 650 (C); *Rail Commuter Action Group v Transnet Ltd t/a Metrorail (No 1)* 2003 (5) SA 518 (C) at 546E–547E; *FirstRand Bank Ltd v Kruger* 2017 (1) SA 533 (GJ) at 539D–541B; *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd* 2017 (6) SA 223 (GJ) at 230H–233A; *South African Broadcasting Corporation SOC Ltd v South African Broadcasting Corporation Pension Fund* 2019 (4) SA 608 (GJ) at 636F–637D; *Sol Plaatje University v SRC of the Sol Plaatje University* (unreported, NCK case no 1471/2023 dated 26 January 2024) at paragraphs 31–35. The application of the section in trials is considered in *S v Cekiso* 1990 (4) SA 20 (E); *Mdani v Allianz Insurance Ltd* 1991 (1) SA 184 (A); *Metedad v National Employers' General Assurance Co Ltd* 1992 (1) SA 494 (W); *Pentree v Nelson Mandela Bay Municipality* 2017 (4) SA 32 (ECP). In *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma* 2021 (5) SA 327 (CC) hearsay evidence presented by the applicant consisting of a series of public statements concerning the Constitutional Court's authority purportedly made by Mr Zuma was, although being prejudicial to Mr Zuma's case, admitted as evidence in the public interest in an urgent application to declare him in contempt of court under circumstances where he did not oppose the application and made no attempt to distance himself from the statements (at paragraphs [19]–[23]). The Constitutional Court (at paragraph [23]) affirmed the principle in *S v Ndhlovu* 2002 (6) SA 305 (SCA) at paragraph [15] that the intention behind s 3(1)*(c)* of the Law of Evidence Amendment Act 45 of 1988 is to create flexibility so that hearsay evidence may be admitted when the interests of justice, and indeed common sense, demand it. See also, in general, De Vos 1989 *TSAR* 231; Schutte (1991) 54 *THRHR* 495; De Vos & Van der Merwe (1993) 4 *Stell LR* 3.

93 *Standard Merchant Bank Ltd v Rowe* 1982 (4) SA 671 (W) at 676–7.

94 *Sugden v Beaconhurst Dairies (Pty) Ltd* 1963 (2) SA 174 (E) at 187H; *Commercial Union Assurance Co of SA Ltd v Van Zyl* 1971 (1) SA 100 (E) 104F–105D; *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 (1) SA 77 (A) at 82I–83B.

95 *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 324F–G; *Minister of Land Affairs and Agriculture v D&F Wevell Trust* 2008 (2) SA 184 (SCA) at 200C; *Van Zyl v Government of the Republic of South Africa* 2008 (3)

SA 294 (SCA) at 306D–E; *National Adoption Coalition of South Africa v Head of Department of Social Development for KwaZulu-Natal* 2020 (4) SA 284 (KZD) at paragraph [13]; *Skema Holdings Proprietary Limited v Fellner-Feldegg* (unreported, KZP case no AR32/22 dated 21 September 2022 — a decision of the full court) at paragraph [52]; *RMS Joint Venture CC t/a Radds Transport v Transnet SOC Limited, Eyamakoshi* (unreported, GP case no 038072/2022 dated 15 December 2022) at paragraph [6]. In *Executive Officer, Financial Services Board v Dynamic Wealth Ltd* 2012 (1) SA 453 (SCA) an extensive report by inspectors appointed by the Registrar of Financial Institutions, dealing with the activities of the respondent group of companies, formed part of the founding affidavit. The inspectors' report was based on annexures which were omitted from the papers but made available to the court and the respondents, and cross-referenced by way of footnotes to the report. The Supreme Court of Appeal, in rejecting the respondents' contention that the annexures were not properly before the court and that there was accordingly no admissible direct evidence of the facts relied upon by the registrar, held that the fact that the annexures were not physically attached to the founding affidavit did not disqualify them as evidence. Wallis JA stated (at 462A–C):
'Had they been attached to the founding affidavit there could have been no doubt that they were properly before the court as evidence. Counsel for the respondents conceded as much. The fact that they were not physically attached to the founding affidavit, cannot affect their status as evidence. That is to place form over substance. Solely for reasons of convenience, and to avoid the papers being unduly and possibly unnecessarily bulky, they were placed in an identified separate bundle that was served on the respondents and made available to the court. It was expressly stated that they formed an integral part of the report that was attached to the founding affidavit. They were properly placed in evidence . . .'

96 *Minister of Land Affairs and Agriculture v D&F Wevell Trust* 2008 (2) SA 184 (SCA) at 200D; *National Adoption Coalition of South Africa v Head of Department of Social Development for KwaZulu-Natal* 2020 (4) SA 284 (KZD) at paragraph [13]; *Skema Holdings Proprietary Limited v Fellner-Feldegg* (unreported, KZP case no AR32/22 dated 21 September 2022 — a decision of the full court) at paragraph [52]; *Elegant Line Trading 257 CC v Member of the Executive Council for Transport — Eastern Cape* (unreported, ECB case no 104/2022 dated 14 December 2022) at paragraph [9].

97 *Minister of Land Affairs and Agriculture v D&F Wevell Trust* 2008 (2) SA 184 (SCA) at 200E; *National Adoption Coalition of South Africa v Head of Department of Social Development for KwaZulu-Natal* 2020 (4) SA 284 (KZD) at paragraph [13].

98 *Standard Bank of South Africa Ltd v Hand* 2012 (3) SA 319 (GSJ) at 321C–D.

99 *Standard Bank of South Africa Ltd v Hand* 2012 (3) SA 319 (GSJ) at 321D.

100 *National Adoption Coalition of South Africa v Head of Department of Social Development for KwaZulu-Natal* 2020 (4) SA 284 (KZD) at paragraph [77].

101 *Philippi Horticultural Area Food and Farming Campaign v MEC for Local Government, Western Cape* 2020 (3) SA 486 (WCC) at paragraph [18] and the cases there referred to.

102 2023 (6) SA 464 (ECEL).

103 1997 (4) SA 785 (W) at 787H–788H.

104 1992 (4) SA 530 (SE) at 531.

105 *Minister van Wet en Orde v Matshoba* 1990 (1) SA 280 (A) at 285; *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 324H–I; *McDonald t/a Sport Helicopter v Huey Extreme Club* 2008 (4) SA 20 (C) at 26B–C; *MEC for Health, Gauteng v 3P Consulting (Pty) Ltd* 2012 (2) SA 542 (SCA) at 551C–D.

106 *Minister van Wet en Orde v Matshoba* 1990 (1) SA 280 (A) at 285F–G; *McDonald t/a Sport Helicopter v Huey Extreme Club* 2008 (4) SA 20 (C) at 26D; *MEC for Health, Gauteng v 3P Consulting (Pty) Ltd* 2012 (2) SA 542 (SCA) at 551C–D.

107 *Allen v Van der Merwe* 1942 WLD 39 at 47; *Heckroodt NO v Gamiet* 1959 (4) SA 244 (T) at 246A–C; *Van Rensburg v Van Rensburg* 1963 (1) SA 505 (A) 509E–510B; *Sentrale Kunsmis Korporasie (Edms) Bpk v NKP Kunsmisverspreiders (Edms) Bpk* 1970 (3) SA 367 (A) at 404D–G; *Minister of Justice v Nationwide Truck Hire (Pty) Ltd* 1981 (4) SA 826 (A) at 833G; *Cabinet for the Territory of South West Africa v Chikane* 1989 (1) SA 349 (A) at 360F–G; *Minister van Wet en Orde v Matshoba* 1990 (1) SA 280 (A) at 285E–I; *Angus v Kosviner* 1996 (3) SA 215 (W) at 222G–I; *Minister of Land Affairs and Agriculture v D&F Wevell Trust* 2008 (2) SA 184 (SCA) at 200B–E; *Seale v Van Rooyen NO; Provincial Government, North West Province v Van Rooyen NO* 2008 (4) SA 43 (SCA) at 48E; *Municipal Manager: Qaukeni Local Municipality v FV General Trading CC* 2010 (1) SA 356 (SCA) at 363C–D; *MEC for Health, Gauteng v 3P Consulting (Pty) Ltd* 2012 (2) SA 542 (SCA) at 551C–D. The relevance of the evidence offered is dependent on its cogent connection with the relief being sought in the notice of motion (*Kouga Local Municipality v St Francis Bay (Ward 12) Concerned Residents Association* 2024 (4) SA 70 (SCA) at paragraph [15] — a case where the Supreme Court of Appeal determined the appeal strictly with reference to the case advanced by the first respondent in its founding papers and disregarded extraneous legal issues that the first respondent's counsel sought to argue based on facts which were not supported by the founding papers (at paragraphs [17]–[18])).

108 Sections 9(4) and 124 of the Insolvency Act 24 of 1936. The practice in the Western Cape Division of the High Court, Cape Town, in applications for provisional orders of sequestration is that the Master's report (incorporating his certificate that sufficient security as required by s 9(3) of the Insolvency Act has been given) need not be served on the respondent and is to be lodged with the court prior to the application being set down for hearing (see *Standard Bank of SA Ltd v Court* 1993 (3) SA 286 (C) and paragraph 31(3) of the Consolidated Practice Notes of that High Court in Volume 3, Part N1). The same practice prevails in KwaZulu-Natal (*RSA Factors Ltd v Hansen* 1983 (4) SA 873 (D)) and in the Northern Cape (*Mafeking Creamery Bpk v Mamba Boerdery (Edms) Bpk* 1980 (2) SA 776 (NC)). In the Gauteng Division of the High Court, Pretoria, service on the respondent is required (*Arnawil Investments (Pty) Ltd v Stamelman* 1972 (2) SA 13 (W); *Rennies Consolidated (Transvaal) (Pty) Ltd v Cooper* 1975 (1) SA 165 (T); *A Holman Trading Co (Pty) Ltd v Pipeweld Construction & Erection (Pty) Ltd* 1977 (4) SA 360 (T); *De Wet NO v Mandelie (Edms) Bpk* 1983 (1) SA 544 (T)).

109 Section 346(4) of the Companies Act 61 of 1973, which continues to apply until a date to be determined by the Minister by virtue of the provisions of item 9 of Schedule 5 of the Companies Act 71 of 2008.

110 Section 66(1) of the Close Corporations Act 69 of 1984 read with s 346(4) of the Companies Act 61 of 1973 and read, further, with item 9 of Schedule 5 of the Companies Act 71 of 2008.

111 Section 4(2) and s 9 of the Insolvency Act 24 of 1936; and s 346(4A) of the Companies Act 61 of 1973, which continues to apply until a date to be determined by the Minister by virtue of item 9 of Schedule 5 of the Companies Act 71 of 2008.

112 The provisions of Act 61 of 1973 continue to apply to the winding-up and liquidation of companies until a date to be determined by the Minister (item 9 of Schedule 5 of the Companies Act 71 of 2008).

113 See, in this regard, *EB Steam Co (Pty) Ltd v Eskom Holdings Soc Ltd* 2015 (2) SA 526 (SCA).

114 In *Van Zyl v Boat Lodge Investments CC* (unreported, KZP case no 9417/2019P dated 31 May 2021) the court, in a liquidation application of a close corporation where the members of the close corporation sought to intervene, referred to this paragraph and held (at paragraph [36]) that although there was no specific provision in the Companies Act 71 of 2008 or in rule 6(2) that required service of the application on individual members of a close corporation, the applicant recognized that the intervening parties were members and consequently, the applicant, at the very least, ought to have served the application on them.

115 As to joinder, see the notes to rule 10 s v 'General' below.

116 *Collective Investments (Pty) Ltd v Brink* 1978 (2) SA 252 (N) at 255G, approved in *Enslin v Slabbert, Verster & Malherbe (Noord-Oos Kaap) (Edms) Bpk* 1979 (2) SA 983 (O) at 985C and in *Turquoise River Incorporated v McMenamin* 1992 (3) SA 653 (D) at 657D. In *National Director of Public Prosecutions v Mohamed NO* 2003 (4) SA 1 (CC) at paragraphs [28]–[30] the Constitutional Court provides a useful exposition of the historical development of *ex parte* applications, the granting of rules *nisi* and the making of interim orders pending the return day of a rule *nisi*. See also *Kgetlengrivier Concerned Residents v Kgetlengrivier Local Municipality* [2023] 2 All SA 452 (NWM) (a decision of the full court) at paragraphs [23]–[26]; *Moshe v Minister of Agriculture, Land Reform and Rural Development* [2023] 2 All SA 776 (NWM) (a decision of the full court) at paragraph [20]. In *Simross Vintners (Pty) Ltd v Vermeulen* 1978 (1) SA 779 (T) at 783A, approved in, for example, *Sizwe Development v Auditor General, Transkei* 1991 (1) SA 291 (TkGD) at 292I; *National Director of Public Prosecutions v Mohamed NO* 2003 (4) SA 1 (CC) at paragraphs [28]; *Kgetlengrivier Concerned Residents v Kgetlengrivier Local Municipality* [2023] 2 All SA 452 (NWM) (a decision of the full court) at paragraph [24] and *Moshe v Minister of Agriculture, Land Reform and Rural Development* [2023] 2 All SA 776 (NWM) (a decision of the full court) at paragraph [20], it was stated that an *ex parte* application is 'simply an application of which notice was *as a fact* not given to the person against whom some relief is claimed in his absence'. See also *Ghomeshi-Bozorg v Yousefi* 1998 (1) SA 692 (W) at 696D; *Investec Employee Benefits Ltd v Electrical Industry KwaZulu-Natal Pension Fund* 2010 (1) SA 446 (W) at 473F–G; *Engen Petroleum Ltd v Multi Waste (Pty) Ltd* 2012 (5) SA 596 (GSJ) at 599E–G.

117 *Mynhardt v Mynhardt* 1986 (1) SA 456 (T) at 458H–I.

118 See subrule (2) above.

119 *Universal City Studios Inc v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) at 753C; *Mazetti Management Services (Pty) Ltd v AmaBhungane Centre for Investigative Journalism NPC* 2023 (6) SA 578 (GJ) at paragraph [1]. The facts of this case demonstrate 'an egregious example of the abuse of the ex parte procedure' (at paragraphs [7]–[13]).

120 *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A) at 674H–675A; *Turquoise River Incorporated v McMenamin* 1992 (3) SA 653 (D) at 657D; *Minister of Environmental Affairs v Recycling and Economic Development Initiative of South Africa NPC* 2018 (3) SA 604 (WCC) at 654G–H; *National Director of Public Prosecutions v Mohamed NO* 2003 (4) SA 1 (CC) at paragraphs [29]–[30]; *Kgetlengrivier Concerned Residents v Kgetlengrivier Local Municipality* [2023] 2 All SA 452 (NWM) (a decision of the

full court) at paragraph [24]; *Moshe v Minister of Agriculture, Land Reform and Rural Development* [2023] 2 All SA 776 (NWM) (a decision of the full court) at paragraph [20]. See further the notes to subrule (8) s v 'May anticipate the return date' below.

121 *Enslin v Slabbert, Verster & Malherbe (Noord-Oos Kaap) (Edms) Bpk* 1979 (2) SA 983 (O) at 985A–B.

122 *Collective Investments (Pty) Ltd v Brink* 1978 (2) SA 252 (N). See also paragraph 8.1.1 of the *Practice Manual* of the KwaZulu-Natal Division of the High Court in Volume 3, Part I2.

123 *Bhyat v Khurishi* 1929 TPD 896; *Ellis v Stuart* 1942 WLD 10; *Simross Vintners (Pty) Ltd v Vermeulen* 1978 (1) SA 779 (T). In the Gauteng Division of the High Court, Pretoria, paragraph 1 of Appendix I to the *Practice Manual* requires that the notice of motion should seek final liquidation (see Volume 3, Part H2). This is also the position in the Gauteng local seat of the High Court, Johannesburg (see paragraph 10.11.1 of the *Practice Manual* of that seat of the High Court in Volume 3, Part H3). As to the effect of the use in such applications of Form 2 in circumstances where Form 2*(a)* is appropriate, see the notes to subrule (5)*(a)* s v 'As near as may be in accordance with Form 2*(a)* of the First Schedule' below.

124 *Sheriff African Board of Sheriff v Cibe* (unreported, GJ case no 30169/2021 dated 17 March 2022) at paragraph [19].

125 *In re: Body Corporate of Caroline Court* [2002] 1 All SA 49 (A).

126 *In re: Body Corporate of Caroline Court* [2002] 1 All SA 49 (A).

127 *Mazetti Management Services (Pty) Ltd v AmaBhungane Centre for Investigative Journalism NPC* 2023 (6) SA 578 (GJ) at paragraph [45].

128 *In re The Leydsdorp & Pietersburg (Transvaal) Estates Ltd* 1903 TS 254 at 257, cited with approval in *Spilg v Walker* 1947 (3) SA 495 (E) at 499. See also *Estate Logie v Priest* 1926 AD 312 at 323; *Barclays Bank v Giles* 1931 TPD 9 at 11; *De Jager v Heilbron* 1947 (2) SA 415 (W) at 419–20; *Mauerberger v Mauerberger* 1948 (3) SA 562 (C); *Du Plessis v Gunn* 1962 (4) SA 7 (O) at 17H; *Lusernvallei (Edms) Bpk v Turner* 1964 (4) SA 104 (O) at 107A–E; *Adjust Investments (Pty) Ltd v Wiid* 1968 (3) SA 29 (O) at 34D; *J W Jagger & Co (Rhodesia) (Wholesaling) (Pvt) Ltd v Mubika* 1972 (4) SA 100 (R); *United Watch & Diamond Co (Pty) Ltd v Disa Hotels Ltd* 1972 (4) SA 409 (C) at 413D; *Godlonton NO v Ryan Scholtz & Co (Pty) Ltd* 1978 (4) SA 84 (E) at 87A–E; *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 348D–350B; *Cometal-Mometal SARL v Corlana Enterprises (Pty) Ltd* 1981 (2) SA 412 (W) at 414C–H; *Reilly v Benigno* 1982 (4) SA 365 (C) at 370D–H; *H R Holfeld (Africa) Ltd v Karl Walter & Co GmbH (1)* 1987 (4) SA 850 (W); *Rosenberg v Mbanga (Azaminle Liquor (Pty) Ltd intervening)* 1992 (4) SA 331 (E) at 336H; *MV Rizcun Trader (4); MV Rizcun Trader v Manley Appledore Shipping Ltd* 2000 (3) SA 776 (C) at 793I–794E; *Cubitt v Stannic* [2000] 3 All SA 16 (E) at 18*f–g*; *National Director of Public Prosecutions v Basson* 2002 (1) SA 419 (SCA) at 428H–I; *Moila v Fitzgerald* [2007] 4 All SA 909 (T) at 917*a–c*; *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2009 (1) SA 1 (CC) at 115A–E; *Berrange NO v Hassan* 2009 (2) SA 339 (N) at 354A–G, confirmed on appeal *sub nomine Hassan v Berrange NO* 2012 (6) SA 329 (SCA) at 335G–H; *Fesi v Absa Bank Ltd* 2000 (1) SA 499 (C) at 502H–I; *Ex parte Bouwer and Similar Applications* 2009 (6) SA 382 (GNP) at 385B–E; *Investec Employee Benefits Ltd v Electrical Industry KwaZulu-Natal Pension Fund* 2010 (1) SA 446 (W) at 473E–I; *South African Airways Soc v BDFM Publishers (Pty) Ltd* 2016 (2) SA 561 (GJ) at 573D and 573I–J, and the cases there referred to; *Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA) at 267C–H; *Sheriff African Board of Sheriff v Cibe* (unreported, GJ case no 30169/2021 dated 17 March 2022) at paragraph [19]; *National Director of Public Prosecutions v Wood* [2022] 3 All SA 179 (GJ) (a decision of the full court) at paragraph [102].

129 *Cubitt v Stannic* [2000] 3 All SA 16 (E) at 18*g*; *Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA) at 268A.

130 It was made clear in *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 349 and *Cometal-Mometal SARL v Corlana Enterprises (Pty) Ltd* 1981 (2) SA 412 (W) at 414E that the non-disclosure or suppression of facts need not be wilful or *mala fide* to incur the penalty of rescission of an order made *ex parte*. This position was affirmed in *National Director of Public Prosecutions v Basson* 2002 (1) SA 419 (SCA) at 428H–I and *Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA) at 267C–D.

131 *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 348E–350B, cited with approval in *Cometal-Mometal SARL v Corlana Enterprises (Pty) Ltd* 1981 (2) SA 412 (W) at 414C–E; *Trakman NO v Livshitz* 1995 (1) SA 282 (A) at 288E–F; *Phillips v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA) at 455A–B; *Absa Bank Ltd v Ntsane* 2007 (3) SA 554 (T) at 562I–563A; *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2009 (1) SA 1 (CC) at 115D; *Berrange NO v Hassan* 2009 (2) SA 339 (N) at 354A–G, confirmed on appeal *sub nomine Hassan v Berrange NO* 2012 (6) SA 329 (SCA) at 335G–H; *Investec Employee Benefits Ltd v Electrical Industry KwaZulu-Natal Pension Fund* 2010 (1) SA 446 (W) at 473E–I; *South African Airways Soc v BDFM Publishers (Pty) Ltd* 2016 (2) SA 561 (GJ) at 573D and 573I–J, and the cases there referred to; *Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA) at 267C–268G. In the *Trakman* case (*supra*) it is stressed (at 288F–G) that the principle does not extend to motion proceedings: material non-disclosure, *mala fides*, dishonesty and the like in motion proceedings can be dealt with by making an adverse or punitive order as to costs but cannot serve to deny a litigant substantive relief to which he would otherwise have been entitled.

132 See, for example, *In re The Leydsdorp & Pietersburg (Transvaal) Estates Ltd* 1903 TS 254; *African Realty Trust v Sherman* 1907 TH 34; *Barclays Bank v Giles* 1931 TPD 9.

133 These factors are listed in *Phillips v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA) at 455B–C. See also *Berrange NO v Hassan* 2009 (2) SA 339 (N) at 354G and *Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA) at 268F–H.

134 The absence of acceptable reasons for the failure to disclose a material fact is one of the factors which the court will take into account in exercising its discretion whether to grant or deny the relief sought (*Ex parte Madikiza et uxor* 1995 (4) SA 433 (TSC) at 437A).

135 *Cometal-Mometal SARL v Corlana Enterprises (Pty) Ltd* 1981 (2) SA 412 (W) at 414H.

136 *Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA) at 267F–H.

137 *Vernall v Naested* 1924 SR 103; *Wilkies Continental Circus v De Raedts Circus* 1958 (2) SA 598 (SWA) at 604A–605B; *J W Jagger & Co (Rhodesia) (Wholesaling) (Pvt) Ltd v Mubika* 1972 (4) SA 100 (R).

138 1979 (4) SA 342 (W). See also *Moila v Fitzgerald* [2007] 4 All SA 909 (T) at 921*f–g*.

139 *Dana v Byron* 1935 (1) PH F8 (N).

140 Rule 27(4).

141 *Afriforum NPC v Nelson Mandela Foundation Trust* 2023 (4) SA 1 (SCA) at paragraphs [70]–[71].

142 *Kouga Local Municipality v St Francis Bay (Ward 12) Concerned Residents Association* 2024 (4) SA 70 (SCA) at paragraph [15].

143 Van Zyl *Judicial Practice* at 367.

144 1965 (3) SA 407 (W).

145 At 409. In *Johannesburg City Council v Bruma Thirty-Two (Pty) Ltd* 1984 (4) SA 87 (T) Coetzee J also stated that, in modern practice, the prayer for alternative relief is 'redundant and mere verbiage' (at 93F).

146 Unreported, GJ case no 2010/16410 dated 21 May 2012.

147 At paragraph [14]. See also *Maleho 740822 (Pty) Ltd v Maboho* (unreported, NWM case no M336/2022 dated 15 February 2024).

148 *Queensland Insurance Co Ltd v Banque Commerciale Africaine* 1946 AD 272 at 286; and see *Johannesburg City Council v Bruma Thirty-Two (Pty) Ltd* 1984 (4) SA 87 (T).

149 *Port Nolloth Municipality v Xhalisa* 1991 (3) SA 98 (C) at 112D–G; *Combustion Technology (Pty) Ltd v Technoburn (Pty) Ltd* 2003 (1) SA 265 (C) at 268B–J. See also *Luzon Investments (Pty) Ltd v Strand Municipality* 1990 (1) SA 215 (C) at 229H; *Mgoqi v City of Cape Town; City of Cape Town v Mgoqi* 2006 (4) SA 355 (C) at 362F–363B; *MN v FN* 2020 (2) SA 410 (SCA) at paragraph [26]; *Somali Association of South Africa v Refugee Appeal Board* 2022 (3) SA 166 (SCA) at paragraph [97] (a case in which substantive relief not foreshadowed in the notice of motion in the court *a quo*, was sought on appeal, and refused).

150 *Port Nolloth Municipality v Xhalisa* 1991 (3) SA 98 (C) at 112D–F; and see *Somali Association of South Africa v Refugee Appeal Board* 2022 (3) SA 166 (SCA) at paragraph [97] (a case in which substantive relief not foreshadowed in the notice of motion in the court *a quo*, was sought on appeal, and refused).

151 See s 32 of the Superior Courts Act 10 of 2013.

152 *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 347F; *Trakman NO v Livshitz* 1995 (1) SA 282 (A) at 288E.

153 *Gallagher v Norman's Transport Lines (Pty) Ltd* 1992 (3) SA 500 (W) at 502E.

154 *Mynhardt v Mynhardt* 1986 (1) SA 456 (T); *Gouws v Scholtz* 1989 (4) SA 315 (NC) at 320I; a contrary view was taken in *Simross Vintners (Pty) Ltd v Vermeulen* 1978 (1) SA 779 (T). See also *Patcor Quarries CC v Issroff* 1998 (4) SA 1069 (SE) 1075A–B.

155 *Gallagher v Norman's Transport Lines (Pty) Ltd* 1992 (3) SA 500 (W) at 502E–503C.

156 *Nelson Mandela Metropolitan Municipality v Greyvenouw CC* 2004 (2) SA 81 (SE) at 94H–96C.

157 Rule 4(1)*(aA)*; *Willies v Willies* 1973 (3) SA 257 (D). See also rule 6(11) and (12).

158 See the notes to s 24 of the Superior Courts Act 10 of 2013 s v 'Civil summons' in Volume 1 third edition, Part D.

159 *SB Guarantee Company (Pty) Ltd v TS Tshantsha Attorneys (Pty) Ltd* (unreported, GJ case no 04586/2022 dated 10 July 2023). An important feature in this case was that the respondent, notwithstanding the absence of a date by when the notice of intention to oppose the appllication had to be delivered in the notice of motion, delivered its notice of intention to oppose the application as well as its answering affidavit prior to the hearing of the application on the unopposed motion court roll. The respondent did not avail itself of the remedies under rule 30 (at paragraph [12]).

160 In terms of rule 27(3).

161 *Turquoise River Incorporated v McMenamin* 1992 (3) SA 653 (D) at 657D.

162 *Mashaba v The Judicial Commission of Inquiry Into Allegations of State Capture, Corruption and Fraud In The Public Sector, Including Organs of State* (unreported, GP case no 14261/21 dated 16 August 2022) at paragraph [15].

163 *Meme-Akpta v Unlawful Occupiers at 44 Nugget Street* 2023 (3) SA 649 (GJ) at paragraph [13]; *Mashaba v The Judicial Commission of Inquiry Into Allegations of State Capture, Corruption and Fraud In The Public Sector, Including Organs of State* (unreported, GP case no 14261/21 dated 16 August 2022) at paragraph [12].

164 *Meme-Akpta v Unlawful Occupiers at 44 Nugget Street* 2023 (3) SA 649 (GJ) at paragraph [18]; *Mashaba v The Judicial Commission of Inquiry Into Allegations of State Capture, Corruption and Fraud In The Public Sector, Including Organs of State* (unreported, GP case no 14261/21 dated 16 August 2022) at paragraphs [12] and [14].

165 *Mashaba v The Judicial Commission of Inquiry Into Allegations of State Capture, Corruption and Fraud In The Public Sector, Including Organs of State* (unreported, GP case no 14261/21 dated 16 August 2022) at paragraph [21].

166 In *Mobile Telephone Networks (Pty) Ltd v Sugarberry Trading 239 CC* (unreported, NWM case no 1503/2021 dated 19 January 2023) it was held (at paragraphs [21]–[30]) that the *dies non* period provided for in the first proviso is applicable to the period within which a plaintiff must deliver its application for summary judgment under rule 32(2)*(a)*. It is submitted that, having regard to the specific purpose of the first proviso, its clear and unambiguous wording, and the proper interpretation thereof, the judgment is wrong. Condonation/an extension of time under rule 27 can be applied for by a plaintiff who has delivered its application for summary judgment out of time.

167 By GN R2410 of September 1991.

168 The decision in *Frölich v Flaschner* 1980 (4) SA 17 (W) is, therefore, no longer applicable.

169 On application in terms of rule 27.

170 See, for example, *Grootboom v National Prosecuting Authority* 2014 (2) SA 68 (CC) at 75H–76A.

171 *Ferreiras (Pty) Ltd v Naidoo* 2022 (1) SA 201 (GJ) at paragraph [18].

172 In *Pangbourne Properties Ltd v Pulse Moving CC* 2013 (3) SA 140 (GSJ) the respondents filed their answering affidavits approximately nine days late. The applicant filed its replying affidavit some ten months later. Neither party brought an application for condonation for the late filing of its affidavit, nor availed itself of the remedies pertaining to irregular steps contained in rule 30. The respondents argued that the replying affidavit fell to be disregarded. Wepener J held (at 147G–148I) that it was unnecessary for either of the parties to have brought a substantive application for condonation. All the papers were before court and the matter was ready to be dealt with. To uphold the argument that the replying affidavit (and, consequently, also the answering affidavit) fell to be disregarded because they were filed out of time, was too formalistic and an exercise in futility, and would have left the parties to commence the same proceedings on the same facts *de novo*. There was no allegation of prejudice to any party nor was the court referred to any such prejudice were the matter to be disposed of on its merits, despite the late filing of the respective affidavits. It was in the interests of justice that the affidavits were taken into account and that the case was finalized and unnecessary additional costs avoided. See also *Ardnamurchan Estates (Pty) Limited v Renewables Cookhouse Wind Farms 1 (RF) (Pty) Ltd* [2021] 1 All SA 829 (ECG) at paragraphs 50-59.

173 Rule 41A(2)*(b)*.

174 Rule 41A(2)*(c)*.

175 Rule 41A(2)*(d)*.

176 *Moosa v Knox* 1949 (3) SA 327 (N) at 331. See, for example, *United Methodist Church of South Africa v Sokufundumala* 1989 (4) SA 1055 (O) at 1059A; *Ebrahim v Georgoulas* 1992 (2) SA 151 (B) at 153D.

177 *Peterson v Cuthbert & Co Ltd* 1945 AD 420 at 428–9; *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163 and 1165; *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154F; *Engar v Omar Salem Essa Trust* 1970 (1) SA 77 (N) at 83E; *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634I–635A; *Tsenoli v State President of the Republic of South Africa* 1992 (3) SA 37 (D) at 41E–F.

178 *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) at 375G; *National Scrap Metal (Cape Town) (Pty) Ltd v Murray & Roberts Ltd* 2012 (5) SA 300 (SCA) at 305E; *Grancy Property Ltd v Manala* 2015 (3) SA 321 (SCA) at 320C–321A; *Centaur Mining South Africa (Pty) Ltd v Cloete Murray NO* 2023 (1) SA 499 (GJ) at paragraph [15].

179 *Gemeenskapontwikkelingsraad v Williams (2)* 1977 (3) SA 955 (W) at 957E. See also *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163 *in fin*; *Saflec Security Systems (Pty) Ltd v Group Five Building (East Cape) (Pty) Ltd* 1990 (4) SA 626 (E) at 631D.

180 *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1164; *Klep Valves (Pty) Ltd v Saunders Valve Co Ltd* 1987 (2) SA 1 (A) at 24B–C.

181 *Kelleher v Minister of Defence* 1983 (1) SA 71 (E) at 75C.

182 *Reynolds NO v Mecklenberg (Pty) Ltd* 1996 (1) SA 75 (W) at 79A–F. In *Retrofit (Pvt) Ltd v Posts and Telecommunications Corporation* 1996 (1) SA 847 (ZSC) the Zimbabwe Supreme Court disallowed half of the costs in respect of the preparation of a 'voluminous answering affidavit which contained much irrelevant, unnecessarily disparaging and argumentative matter' (at 867H).

183 *Randfontein Extension Ltd v South Randfontein Mines Ltd* 1936 WLD 1 at 4–5; *Du Toit v Fourie* 1965 (4) SA 122 (O) at 128G–129C; *Bader v Weston* 1967 (1) SA 134 (C) at 136E–137C; *Lipschitz & Schwartz NNO v Markowitz* 1976 (3) SA 772 (W) at 776A–C; *Moskovitz v Meteor Records (Pty) Ltd* 1978 (3) SA 996 (C); *Standard Bank of South Africa Ltd v RTS Techniques and Planning (Pty) Ltd* 1992 (1) SA 432 (T) at 441F–442J; *Ebrahim v Georgoulas* 1992 (2) SA 151 (B) at 154D–G.

184 *Bader v Weston* 1967 (1) SA 134 (C) at 136H–137A.

185 By De Villiers J in his dissenting judgment in *Standard Bank of South Africa Ltd v RTS Techniques and Planning (Pty) Ltd* 1992 (1) SA 432 (T) which is reported *sub nomine Standard Bank of South Africa Ltd v RTS Techniques and Planning (Pty) Ltd* 1992 (2) SA 532 (T).

186 *Minister of Finance v Public Protector* 2022 (1) SA 244 (GP) at paragraphs [6]–[15].

187 *Boxer Superstores Mthatha and Another v Mbenya* 2007 (5) SA 450 (SCA) at 452F–G; *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 (2) SA 512 (D) at 514I–J.

188 *De Wet v Khammissa* (unreported, SCA case no 358/2020 dated 4 June 2021) at paragraph [14].

189 *Simmons NO v Gilbert Hamer & Co Ltd* 1963 (1) SA 897 (N) at 903C. See further the notes to subrule (1) s v 'The facts upon which the applicant relies for relief' above.

190 *Angus v Kosviner* 1996 (3) SA 215 (W) at 222G–I.

191 See *Valentino Globe BV v Phillips* 1998 (3) SA 775 (SCA) at 779F.

192 *Taylor v Welkom Theatres (Pty) Ltd* 1954 (3) SA 339 (O) at 345A; *Aspek Pipe Co (Pty) Ltd v Mauerberger* 1968 (1) SA 517 (C) at 519F–H; *Hart v Pinetown Drive-In Cinema (Pty) Ltd* 1972 (1) SA 464 (D) at 465F; *Pearson v Magrep Investments (Pty) Ltd* 1975 (1) SA 186 (D) at 187D–F; *Poseidon Ships Agencies (Pty) Ltd v African Coaling and Exporting Co (Durban) (Pty) Ltd* 1980 (1) SA 313 (D) at 315C; *Erasmus v Pentamed Investments (Pty) Ltd* 1982 (1) SA 178 (W) at 181A; *Switchboard Manufacturers (Natal) (Pty) Ltd v Anmor Electrical Contractors (Pty) Ltd* 1982 (2) SA 244 (D) at 245F; *Bowman NO v De Souza Roldao* 1988 (4) SA 326 (T) at 327I–328A; *Hubby's Investments (Pty) Ltd v Lifetime Properties (Pty) Ltd* 1998 (1) SA 295 (W) at 297A–E.

193 *Valentino Globe BV v Phillips* 1998 (3) SA 775 (SCA) at 779G.

194 *Valentino Globe BV v Phillips* 1998 (3) SA 775 (SCA) at 779G–780A.

195 2019 (3) SA 97 (SCA).

196 At 106C–J.

197 *Mauerberger v Mauerberger* 1948 (3) SA 731 (C) at 732; *Schreuder v Viljoen* 1965 (2) SA 88 (O); *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd* 1974 (4) SA 362 (T) at 368H–369B; *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger* 1976 (2) SA 701 (D) at 704F–H; *Pat Hinde & Sons Motors (Brakpan) (Pty) Ltd v Carrim* 1976 (4) SA 58 (T) at 63A; *Shephard v Tuckers Land and Development Corporation (Pty) Ltd (1)* 1978 (1) SA 173 (W) at 177G; *Masenya v Seleka Tribal Authority* 1981 (1) SA 522 (T) at 524G; *Wiese v Joubert* 1983 (4) SA 182 (O) at 194F; *Shepherd v Mitchell Cotts Seafreight (SA) (Pty) Ltd* 1984 (3) SA 202 (T) at 205E; *Port Nolloth Municipality v Xhalisa* 1991 (3) SA 98 (C) at 111E; *Tumisi v African National Congress* 1997 (2) SA 741 (O) at 746A–C; *Ferreira v Premier, Free State* 2000 (1) SA 241 (O) at 254A; *M & V Tractor & Implement Agencies Bk v Vennootskap D S U Cilliers & Seuns; Hoogkwartier Landgoed; Olierivier Landgoed (Edms) Bpk (Kelrn Vervoer (Edms) Bpk Tussenbeitredend)* 2000 (2) SA 571 (N) at 580A–C; *South Peninsula Municipality v Evans* 2001 (1) SA 271 (C) at 280I–281A; *Union Finance Holdings Ltd v I S Mirk Office Machines II (Pty) Ltd* 2001 (4) SA 842 (W) at 847D–E; *Rens v Gutman NO* [2002] 4 All SA 30 (C); *Eagles Landing Body Corporate v Molewa NO* 2003 (1) SA 412 (T) at 423I;

National Council of Societies for the Prevention of Cruelty to Animals v Openshaw 2008 (5) SA 339 (SCA) at 349A–B; *Minister of Safety and Security v Jongwa* 2013 (3) SA 455 (ECG) at 462A–B; *York Timbers (Pty) Ltd v National Director of Public Prosecutions* 2015 (3) SA 122 (GP) at 135E–F; *Gold Fields Ltd v Motley Rice LLC* 2015 (4) SA 299 (GJ) at 325I–326A; *Brayton Carlswald (Pty) Ltd v Brews* 2017 (5) SA 498 (SCA) at 507I–J; *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd* 2017 (6) SA 223 (GJ) at 227E–228I; *Mostert v FirstRand Bank Ltd t/a RMB Private Bank* 2018 (4) SA 443 (SCA) at 448D–E; *Global Environmental Trust v Tendele Coal Mining (Pty) Ltd (Centre for Environmental Rights and others as amici curiae)* [2021] 2 All SA 1 (SCA) at paragraph [96]; *Trustees, Bymyam Trust v Butcher Shop & Grill CC* 2022 (2) SA 99 (WCC) at paragraph [54]. See also the notes to subrule (1) s v 'The facts upon which the applicant relies for relief' above.

198 *Bayat v Hansa* 1955 (3) SA 547 (N) at 553C–G; *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger* 1976 (2) SA 701 (D) at 704G–H; *Shephard v Tuckers Land and Development Corporation (Pty) Ltd (1)* 1978 (1) SA 173 (W) at 178A; *Dawood v Mahomed* 1979 (2) SA 361 (D) at 364E; *Baeck & Co SA (Pty) Ltd v Van Zummeren* 1982 (2) SA 112 (W) at 116A–E; *Skjelbreds Rederi A/S v Hartless (Pty) Ltd* 1982 (2) SA 739 (W) at 742D; *Bowman NO v De Souza Roldao* 1988 (4) SA 326 (T) at 327H; *Djama v Government of the Republic of Namibia* 1993 (1) SA 387 (Nm) at 391F; *Body Corporate, Shaftesbury Sectional Title Scheme v Rippert's Estate* 2003 (5) SA 1 (C) at 6D–E; *South African Heritage Resources Agency v Arniston Hotel (Pty) Ltd* 2007 (2) SA 461 (C) at 477F–478F; *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd* 2013 (2) SA 204 (SCA) at 212B–C; *Mostert v FirstRand Bank Ltd t/a RMB Private Bank* 2018 (4) SA 443 (SCA) at 448D–F; *Trustees, Bymyam Trust v Butcher Shop & Grill CC* 2022 (2) SA 99 (WCC) at paragraphs [54]–[55]. See also *Lagoon Beach Hotel (Pty) Ltd v Lehane NO* 2016 (3) SA 143 (SCA) in which it was held (at 152G–H) that in an application which is moved as one of urgency, courts are commonly sympathetic to an applicant and often allow papers to be amplified in reply, subject of course to the right of a respondent to file further answering papers.

199 *Mostert v FirstRand Bank Ltd t/a RMB Private Bank* 2018 (4) SA 443 (SCA) at 448F–G; *Kwadukuza Municipality v Stangvest Investments (Pty) Ltd* (unreported, KZP case no AR134/22 dated 16 October 2023) at paragraph [33], where the text to this footnote is referred to with approval by the full court. In *Trustees, Bymyam Trust v Butcher Shop & Grill CC* 2022 (2) SA 99 (WCC) it was held (at paragraph [56]) that the court, in the exercise of its discretion, must also have regard to the procedural history of the particular matter.

200 *Driefontein Consolidated GM Ltd v Schlochauer* 1902 TS 33 at 38; *Registrar of Insurance v Johannesburg Insurance Co Ltd (1)* 1962 (4) SA 546 (W); *Kleynhans v Van der Westhuizen NO* 1970 (1) SA 565 (O) at 568F; *Cohen NO v Nel* 1975 (3) SA 963 (W) at 966F; *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger* 1976 (2) SA 701 (D) at 705A–B; *Cowburn v Nasopie (Edms) Bpk* 1980 (2) SA 547 (NC) at 565B–D; *Shepherd v Mitchell Cotts Seafreight (SA) (Pty) Ltd* 1984 (3) SA 202 (T) at 205F; *Pienaar v Thusano Foundation* 1992 (2) SA 552 (B) at 578C–D; *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd* 2013 (2) SA 204 (SCA) at 212C–D. See also *Masstores (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd* 2016 (2) SA 586 (SCA) at 591C–F.

201 *Triomf Kunsmis (Edms) Bpk v AE & CI Bpk* 1984 (2) SA 261 (W) at 270A; *Johannesburg City Council v Bruma Thirty-Two (Pty) Ltd* 1984 (4) SA 87 (T) at 91F–92F; *Kwinana v Ngonyama* (unreported, SCA case no 103/2021 dated 8 April 2022) at paragraph [12].

202 *Poseidon Ships Agencies (Pty) Ltd v African Coaling and Exporting Co (Durban) (Pty) Ltd* 1980 (1) SA 313 (D) at 316A.

203 *Minister van Wet en Orde v Matshoba* 1990 (1) SA 280 (A) at 286C.

204 *eBotswana (Pty) Ltd v Sentech (Pty) Ltd* 2013 (6) SA 327 (GSJ) at 336G–H. It was held (at 336H–I) that a common-sense approach based on want of prejudice should be applied in deciding to allow the further corroborating facts to be set out in the replying affidavit. See also *Bousaada (Pty) Limited v FCB Africa (Pty) Limited* (unreported, GJ case nos 16949/2021; 29891/2021 dated 14 June 2023) at paragraph [16].

205 2003 (6) SA 407 (SCA) at 439G–H.

206 2008 (3) SA 294 (SCA) at 307G–H. See also *Wingaardt v Grobler* 2010 (6) SA 148 (ECG) at 152G–153A.

207 See, *inter alia*, *Standard Bank of SA Ltd v Sewpersadh* 2005 (4) SA 148 (C) at 153G–H; *Amedee v Fidele* (unreported, GJ case no 20/9529 dated 20 December 2021) at paragraph [74].

208 *Bader v Weston* 1967 (1) SA 134 (C) at 138D; *Dickinson v South African General Electric Co (Pty) Ltd* 1973 (2) SA 620 (A) at 628F; *Cohen NO v Nel* 1975 (3) SA 963 (W) at 970B; *Dawood v Mahomed* 1979 (2) SA 361 (D) at 365H; *Nampesca (SA) Products (Pty) Ltd v Zaderer* 1999 (1) SA 886 (C) at 892J–893A; *Dhladhla v Erasmus* 1999 (1) SA 1065 (LCC) at 1072D; *South Peninsula Municipality v Evans* 2001 (1) SA 271 (C) at 283A–H; *Amedee v Fidele* (unreported, GJ case no 20/9529 dated 20 December 2021) at paragraph [74].

209 *Standard Bank of SA Ltd v Sewpersadh* 2005 (4) SA 148 (C) at 153H; *Sealed Africa (Pty) Ltd v Kelly* 2006 (3) SA 65 (W) at 67B–E; *Hano Trading CC v JR 209 Investments (Pty) Ltd* 2013 (1) SA 161 (SCA) at 165A–C; *Du Toit v Human N.O.* (unreported, WCC case no 3063/2023 dated 2 November 2023 — a decision of the full bench) at paragraphs 363–371. See also *Waltloo Meat and Chicken SA (Pty) Ltd v Silvy Luis (Pty) Ltd* 2008 (5) SA 461 (T) at 472H–472J.

210 *Standard Bank of SA Ltd v Sewpersadh* 2005 (4) SA 148 (C) at 153H–154J.

211 *James Brown & Hamer (Pty) Ltd* (previously named *Gilbert Hamer & Co Ltd) v Simmons NO* 1963 (4) SA 656 (A) at 660E; *Dawood v Mahomed* 1979 (2) SA 361 (D) at 364G–H; *Nampesca (SA) Products (Pty) Ltd v Zaderer* 1999 (1) SA 886 (C) at 892J–893A; *Dhladhla v Erasmus* 1999 (1) SA 1065 (LCC) at 1072D; *South Peninsula Municipality v Evans* 2001 (1) SA 271 (C) at 283A–H; *Hano Trading CC v JR 209 Investments (Pty) Ltd* 2013 (1) SA 161 (SCA) at 164E–G; *M&G Media Ltd v President of the Republic of South Africa* 2013 (3) SA 591 (GNP) at 600B–D; *Amedee v Fidele* (unreported, GJ case no 20/9529 dated 20 December 2021) at paragraphs [78] and [79].

212 *Transvaal Racing Club v Jockey Club of South Africa* 1958 (3) SA 599 (W) at 604A–E; *Kasiyamhuru v Minister of Home Affairs* 1999 (1) SA 643 (W) at 649H–650D; *Nampesca (SA) Products (Pty) Ltd v Zaderer* 1999 (1) SA 886 (C) at 892J–893A; *Dhladhla v Erasmus* 1999 (1) SA 1065 (LCC) at 1072D; *South Peninsula Municipality v Evans* 2001 (1) SA 271 (C) at 283A–H. See also *Rhoode v De Kock* 2013 (3) SA 123 (SCA) at 129C–D; *M&G Media Ltd v President of the Republic of South Africa* 2013 (3) SA 591 (GNP) at 600A; *Gold Fields Ltd v Motley Rice LLC* 2015 (4) SA 299 (GJ) at 326C–G (where the court condemned the laxity and non-adherence to the rules relating to three sets of affidavits); *Amedee v Fidele* (unreported, GJ case no 20/9529 dated 20 December 2021) at paragraphs [75] and [79].

213 *Afric Oil (Pty) Ltd v Ramadaan Investments CC* 2004 (1) SA 35 (N) at 38J–39A.

214 *Milne NO v Fabric House (Pty) Ltd* 1957 (3) SA 63 (N) at 65A; *Broode NO v Maposa* 2018 (3) SA 129 (WCC) at 137G; *Amedee v Fidele* (unreported, GJ case no 20/9529 dated 20 December 2021) at paragraph [79].

215 *Transvaal Racing Club v Jockey Club of South Africa* 1958 (3) SA 599 (W) at 604A–E; *Broode NO v Maposa* 2018 (3) SA 129 (WCC) at 137G–138A; *Amedee v Fidele* (unreported, GJ case no 20/9529 dated 20 December 2021) at paragraph [79].

216 2009 (5) SA 629 (W) at 641G–642D.

217 *Porterstraat 69 Eiendomme (Pty) Ltd v PA Venter Worcester (Pty) Ltd* 2000 (4) SA 598 (C) at 617A–E, where Davis J summarized the considerations laid down in *Mkwanazi v Van der Merwe* 1970 (1) SA 609 (A) at 626A–G and *Barclays Western Bank Ltd v Gunas* 1981 (3) SA 91 (D) at 95C–95E; *Hano Trading CC v JR 209 Investments (Pty) Ltd* 2013 (1) SA 161 (SCA) at 164E–165A; *National Credit Regulator v National Consumer Tribunal* [2024] 1 All SA 67 (SCA) at paragraphs [53]–[54]. See also *Kootbodien v Mitchell's Plain Electrical Plumbing & Building CC* 2011 (4) SA 624 (WCC) at 627C–E.

218 *Transvaal Racing Club v Jockey Club of South Africa* 1958 (3) SA 599 (W) at 604A–F; *Zarug v Parvathie NO* 1962 (3) SA 872 (D) at 874A–B; *Parow Municipality v Joyce & McGregor Ltd* 1973 (1) SA 937 (C) at 939A–C; *Cohen NO v Nel* 1975 (3) SA 963 (W) at 966A–B; *Dawood v Mahomed* 1979 (2) SA 361 (D) at 365A–C; *Kasiyamhuru v Minister of Home Affairs* 1999 (1) SA 643 (W) at 650D; *Standard Bank of SA Ltd v Sewpersadh* 2005 (4) SA 148 (C) at 154 D–F; *Hano Trading CC v JR 209 Investments (Pty) Ltd* 2013 (1) SA 161 (SCA) at 164G–165A. See also *Waltloo Meat and Chicken SA (Pty) Ltd v Silvy Luis (Pty) Ltd* 2008 (5) SA 461 (T) at 473A–B; *M&G Media Ltd v President of the Republic of South Africa* 2013 (3) SA 591 (GNP) at 599I–600E.

219 *James Brown & Hamer (Pty) Ltd (previously named Gilbert Hamer & Co Ltd) v Simmons NO* 1963 (4) SA 656 (A) at 660F; *M&G Media Ltd v President of the Republic of South Africa* 2013 (3) SA 591 (GNP) at 600B–E; and see *Dhladhla v Erasmus* 1999 (1) SA 1065 (LCC) for the procedure in the Land Claims Court.

220 *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A); *South Peninsula Municipality v Evans* 2001 (1) SA 271 (C) at 284D.

221 *Staufen Investments (Pty) Ltd v Minister of Public Works* 2019 (2) SA 295 (ECP) at 316G–317A.

222 *Anthony Johnson Contractors (Pty) Ltd v D'Oliveira* 1999 (4) SA 728 (C) at 731E–H.

223 *Nordberg Inc v AQTN Services CC* 1998 (3) SA 531 (T).

224 Cf *Davids v Van Straaten* 2005 (4) SA 468 (C) at 479D–F.

225 *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 290D–E. See also *Cooper and Another NNO v Curro Heights Properties (Pty) Ltd* 2023 (5) SA 402 (SCA) at paragraph [13].

226 The general rule as stated in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235 has been followed and applied on numerous occasions; see, for example, *Lubbe v Die Administrateur, Oranje-Vrystaat* 1968 (1) SA 111 (O) at 113; *Cape Tex Engineering Works (Pty) Ltd v SAB Lines (Pty) Ltd* 1968 (2) SA 528 (C) at 529; *Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Green Point) (Pty) Ltd* 1976 (2) SA 930 (A) at 938; *John Craig (Pty) Ltd v Dupa Clothing Industries (Pty) Ltd* 1977 (3) SA 144 (T) at 149; *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd* 1982 (1) SA 398 (A) at 430–1; *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäkereien (Pty) Ltd* 1982 (3) SA 893 (A) at 923–4; *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634; *Kemp, Sacs & Nell Real Estate (Edms) Bpk v Soll* 1986 (1) SA 673 (O) at 685; *FW Knowles (Pty) Ltd v Cash-In (Pty) Ltd* 1986 (4) SA 641 (C) at 658; *The Free Press of Namibia (Pty) Ltd v Cabinet for the Interim Government of South West Africa* 1987 (1) SA 614 (SWA) at 622;

Vena v George Municipality 1987 (4) SA 29 (C) at 43; *W v S (1)* 1988 (1) SA 475 (N) at 479–80; *Miele et Cie GmbH & Co v Euro Electrical (Pty) Ltd* 1988 (2) SA 583 (A) at 595; *Townsend Productions (Pty) Ltd v Leech* 2001 (4) SA 33 (C) at 40E–H; *Hudson v The Master* 2002 (1) SA 862 (T) at 870A–C; *Die Dros (Pty) Ltd v Telefon Beverages CC* 2003 (4) SA 207 (C) at 214A–E; *Ripoll-Dausa v Middleton NO* 2005 (3) SA 141 (C) at 151G–H; *Wormald NO v Kambule* 2006 (3) SA 562 (SCA) at 566H–I; *Transnet Ltd v Nyawuza* 2006 (5) SA 100 (D) at 107H–I; *Lifeguards Africa (Pty) Ltd v Raubenheimer* 2006 (5) SA 364 (D) at 379D; *Mahala v Nkombombini* 2006 (5) SA 524 (SE) at 527I–528A; *Yunnan Engineering CC v Chater* 2006 (5) SA 571 (T) at 580D–J; *Roeloffze NO v Bothma NO* 2007 (2) SA 257 (C) at 264J–265A; *De Villiers v Potgieter and Others NNO* 2007 (2) SA 311 (SCA) at 317D–E; *University of Pretoria v South Africans for the Abolition of Vivisection* 2007 (3) SA 395 (O) at 400A; *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) at 375D–F; *Gounder v Top Spec Investments (Pty) Ltd* 2008 (5) SA 151 (SCA) at 154C–D; *Chopper Worx (Pty) Ltd v WRC Consultation Services (Pty) Ltd* 2008 (6) SA 497 (C) at 502A; *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2009 (1) SA 1 (CC) at 19A; *Malan v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA) at 222A–B; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 290D–E; *Berrange NO v Hassan* 2009 (2) SA 339 (N) at 359B–D; *Thebe ya Bophelo Healthcare v NBC for the Road Freight Industry* 2009 (3) SA 187 (W) at 197G–198A; *Nick's Fishmonger Holdings (Pty) Ltd v Fish Diner In Bryanston CC* 2009 (5) SA 629 (W) at 652C–D; *Pinzon Traders 8 (Pty) Ltd v Clublink (Pty) Ltd* 2010 (1) SA 506 (ECG) at 510H; *Microsure (Pty) Ltd v Net 1 Applied Technologies South Africa Ltd* 2010 (2) SA 59 (N) at 61F–G; *Hassan v Berrange NO* 2012 (6) SA 329 (SCA) at 343A–C; *Minister of Safety and Security v Jongwa* 2013 (3) SA 455 (ECG) at 461F–H; *Knipe v Kameelhoek (Pty) Ltd* 2014 (1) SA 52 (FB) at 59E–60D; *Cape Town City v South African National Roads Agency Ltd* 2015 (6) SA 535 (WCC) at 608C–D; *Comair Ltd v Minister of Public Enterprises* 2016 (1) SA 1 (GP) at 15H–I; *Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd* 2017 (2) SA 1 (SCA) at 17I–18B; *Mouton v Park 2000 Development 11 (Pty) Ltd* 2019 (6) SA 105 (WCC) at 128D–E; *Gelyke Kanse v Chairperson of the Senate of the University of Stellenbosch* 2020 (1) SA 368 (CC) at paragraph [16]; *Global Environmental Trust v Tendele Coal Mining (Pty) Ltd* [2021] 2 All SA 1 (SCA) at paragraph [94]; *South African Reserve Bank v Leathern NO* 2021 (5) SA 543 (SCA) at paragraph [24] footnote 12; *Democratic Alliance in re Electoral Commission of South Africa v Minister of Cooperative Governance* 2022 (1) BCLR 1 (CC) at paragraph [40] footnote [15]; *Ayres v Minister of Justice and Correctional Services* 2022 (5) BCLR 523 (CC) at paragraph [15] footnote [12]; *Minister of Social Development v SA Childcare (Pty) Ltd; MEC, Social Development, Eastern Cape v SA Childcare (Pty) Ltd* (unreported, SCA case no 71/2021 dated 29 August 2022) at paragraph [18]; *Nyamukamadi Mukumela Denga (Mabirimisa) v Mabirimisa Tshililo Arnold NNO* (unreported, SCA case no 1296/2021 dated 31 October 2022) at paragraph [16]; *Modikwa Platinum Mine, an unincorporated joint venture between Rustenburg Platinum Mines Limited and Arm Mining Consortium Limited v Nkwe Platinum Limited* (unreported, SCA case no 1333/2021 date 6 February 2023) at paragraph [9].

227 *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 635C; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at paragraph [26]; *South African Reserve Bank v Leathern NO* 2021 (5) SA 543 (SCA) at paragraph [24] footnote 12; *Mtolo v Lombard* 2022 (9) BCLR 1148 (CC) at paragraph [38]; *Minister of Social Development v SA Childcare (Pty) Ltd; MEC, Social Development, Eastern Cape v SA Childcare (Pty) Ltd* (unreported, SCA case no 71/2021 dated 29 August 2022) at paragraph [19]; *African National Congress v Ezulweni Investments (Pty) Ltd* (unreported, SCA case no 979/2022 dated 24 November 2023) at paragraph [20].

228 *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd* 2011 (1) SA 8 (SCA) at 14E–H, referring to *Da Mata v Otto NO* 1972 (3) SA 858 (A) at 869D–E.

229 See, for example, *Peterson v Cuthbert & Co Ltd* 1945 AD 420 at 428–9; *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163 and 1165; *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154F; *Engar v Omar Salem Essa Trust* 1970 (1) SA 77 (N) at 83E; *Van der Merwe v Meyer* 1971 (3) SA 22 (A) at 26G; *Von Steen v Von Steen* 1984 (2) SA 203 (T) at 205B; *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634–5; *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd* 1982 (3) SA 893 (A) at 923G–924B; *Soofie v Hajee Shah Goolam Mahomed Trust* 1985 (3) SA 322 (N) at 329; *Steenkamp v Mienies* 1987 (4) SA 186 (NC) at 191; *Khumalo v Director-General of Co-operation and Development* 1991 (1) SA 158 (A) at 168A; *Administrator, Transvaal v Theletsane* 1991 (2) SA 192 (A) at 197A–D; *Nampesca (SA) Products (Pty) Ltd v Zaderer* 1999 (1) SA 886 (C) at 892H–893B; *South African Veterinary Council v Szymanski* 2003 (4) SA 42 (SCA) at 51A–C; *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) at 392C–G; *Minister of Social Development v SA Childcare (Pty) Ltd; MEC, Social Development, Eastern Cape v SA Childcare (Pty) Ltd* (unreported, SCA case no 71/2021 dated 29 August 2022) at paragraphs [19]–[20]. See also *South Peninsula Municipality v Evans* 2001 (1) SA 271 (C) at 283B–E; *Townsend Productions (Pty) Ltd v Leech* 2001 (4) SA 33 (C) at 40H; *Terblanche NO v Damji* 2003 (5) SA 489 (C) at 501I–502D; *Ripoll-Dausa v Middleton NO* 2005 (3) SA 141 (C) at 151I–152I; *Rajah v Chairperson: North West Gambling Board* [2006] 3 All SA 172 (T) at 190*f–g*; *Berrange NO v Hassan* 2009 (2) SA 339 (N) at 359D–F; *Bester NO v Pieters* 2023 (1) SA 398 (WCC) at paragraph [35]; *Skog NO v Agullus* 2024 (1) SA 72 (SCA) at paragraph [24].

230 *Moosa Bros & Sons (Pty) Ltd v Rajah* 1975 (4) SA 87 (D) at 91A; *Nkwentsha v Minister of Law and Order* 1988 (3) SA 99 (A) at 117C; *Ploughman NO v Pauw* 2006 (6) SA 334 (C) at 340H–I; *Madia v B.M.R* (unreported, LP case no HCA33/2022 dated 26 May 2023 — a decision of the full bench) at paragraph [10]; *Phalane N.O. v Department of Co-operative Governance, Human Settlements and Traditional Affairs of the Limpopo Provincial Governance* (unreported, LP case no 1971/2018 dated 21 September 2023) at paragraph [25], where the text to this footnote is referred to with approval.

231 *Law Society, Northern Provinces v Mogami* 2010 (1) SA 186 (SCA) at 195C.

232 *De Reszke v Maras* 2006 (1) SA 401 (C) at 412J–413H; *Law Society, Northern Provinces v Mogami* 2010 (1) SA 186 (SCA) at 195C–D; *Nel v Ramwell t/a Ramwell Attorneys* (unreported, GJ case no 18171/2018 dated 1 March 2019) at paragraph [13].

233 *Joh-Air (Pty) Ltd v Rudman* 1980 (2) SA 420 (T) at 428–9; *Santino Publishers CC v Waylite Marketing CC* 2010 (2) SA 53 (GSJ) at 56F–57B.

234 *Moosa Bros & Sons (Pty) Ltd v Rajah* 1975 (4) SA 87 (D) at 91A and 93F; *Khumalo v Director-General of Co-operation and Development* 1991 (1) SA 158 (A) at 167G.

235 *Moosa Bros & Sons (Pty) Ltd v Rajah* 1975 (4) SA 87 (D) at 91A–C.

236 *Dodo v Dodo* 1990 (2) SA 77 (W) 91I. See also *Carr v Uzent* 1948 (4) SA 383 (W) at 390; *Liss Shoe Co (Pty) Ltd v Moffett Building and Contracting (Pty) Ltd* 1952 (3) SA 484 (O) at 487H; *Hymie Tucker Finance Co (Pty) Ltd v Alloyex (Pty) Ltd* 1981 (4) SA 175 (N) at 179F–H; *Minister of Land Affairs and Agriculture v D&F Wevell Trust* 2008 (2) SA 184 (SCA) at 205D–206B.

237 *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163; *Nkwentsha v Minister of Law and Order* 1988 (3) SA 99 (A) at 117B–F; *Apleni v Minister of Law and Order* 1989 (1) SA 195 (A) at 199C–E.

238 *Seton Co v Silveroak Industries Ltd* 2000 (2) SA 215 (T); and see *Minister of Land Affairs and Agriculture v D&F Wevell Trust* 2008 (2) SA 184 (SCA) at 206D–207C where this case was distinguished.

239 *AECI Ltd v Strand Municipality* 1991 (4) SA 688 (C) at 698J–699A. In *Freedom Under Law v Acting Chairperson: Judicial Service Commission* 2011 (3) SA 549 (SCA) at 564F–H Streicher JA, in a different context, stated:
'Courts frequently have to decide where the truth lies between two conflicting versions. They often do so where there is only the word of one witness against another, and neither of the witnesses concedes the version of the other. Civil cases are decided on a balance of probabilities, but where there is a dispute of fact it is rarely possible to do so without subjecting the parties to cross-examination, and without allowing them to test what are alleged to be probabilities in the other party's favour. A court may of course after cross-examination still be unable to decide where the truth lies. That possibility does not entitle a court to decide the matter without allowing cross-examination . . .'

240 *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1164; *Moosa Bros & Sons (Pty) Ltd v Rajah* 1975 (4) SA 87 (D) at 90F–H; *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 635A; *Klep Valves (Pty) Ltd v Saunders Valve Co Ltd* 1987 (2) SA 1 (A) at 24B–C; *Minister of Environmental Affairs and Tourism v Scenematic Fourteen (Pty) Ltd* 2005 (6) SA 182 (SCA) at 202E–H. See also *Freedom Under Law v Acting Chairperson: Judicial Service Commission* 2011 (3) SA 549 (SCA) at 564F–H referred to in the preceding footnote.

241 *Minister of Land Affairs and Agriculture v D&F Wevell Trust* 2008 (2) SA 184 (SCA), distinguishing (at 204E–207C) the following cases: *Peterson v Cuthbert & Co Ltd* 1945 AD 420 at 428–9; *Hopf v Pretoria City Council* 1947 (2) SA 752 (T) at 767–8; *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163–4, *Carr v Uzent* 1948 (4) SA 383 (W) at 390; *Dodo v Dodo* 1990 (2) SA 77 (W) at 91H–I; *Seton Co v Silveroak Industries Ltd* 2000 (2) SA 215 (T) at 231A–B.

242 *Minister of Land Affairs and Agriculture v D&F Wevell Trust* 2008 (2) SA 184 (SCA) at 205A–B.

243 *Minister of Land Affairs and Agriculture v D&F Wevell Trust* 2008 (2) SA 184 (SCA) at 205B–C; *4 Africa Exchange (Pty) Ltd v Financial Sector Conduct Authority* 2020 (6) SA 428 (GJ) at paragraph [10].

244 See also *Red Coral Investments 117 (Pty) Ltd v Bayas Logistics (Pty) Ltd* (unreported, KZD case no D6596/201 dated 5 November 2020) at paragraph [21].

245 *Moosa Bros & Sons (Pty) Ltd v Rajah* 1975 (4) SA 87 (D) at 93D; *Bloem v Minister of Law and Order* 1987 (2) SA 436 (O) at 440A–F; *Gumede v Minister of Law and Order* 1987 (3) SA 155 (D) at 160E; *Khumalo v Director-General of Co-operation and Development* 1991 (1) SA 158 (A) at 167G–J; *Secfin Bank Ltd v Mercantile Bank Ltd* 1993 (2) SA 34 (W) at 37F; *Ripoll-Dausa v Middleton NO* 2005 (3) SA 141 (C); *Minister of Environmental Affairs and Tourism v Scenematic Fourteen (Pty) Ltd* 2005 (6) SA 182 (SCA) at 202E–H.

246 *Moosa Bros & Sons (Pty) Ltd v Rajah* 1975 (4) SA 87 (D) at 91D. If a court finds that allegations made by a party in its affidavit are erroneous or false, the court may order *viva voce* evidence to be presented by that party, and the witness to be cross-examined, even in the

absence of a dispute of fact (*Manuel v Sahara Computers (Pty) Ltd* 2020 (2) SA 269 (GP) at paragraphs [88], [97] and [100]).

247 1949 (3) SA 1155 (T) at 1163. In *Moosa Bros & Sons (Pty) Ltd v Rajah* 1975 (4) SA 87 (D) at 90D it is stressed (i) that the *Room Hire* case does not purport to be an exhaustive exposition on how disputes of fact may arise; and (ii) that in the case the only issue was whether the application should be dismissed with costs and the applicant left to proceed by trial action if so minded. See also *Khumalo v Director-General of Co-operation and Development* 1991 (1) SA 158 (A) at 167G.

248 *Lombaard v Droprop CC* 2010 (5) SA 1 (SCA) at 10A–D; *Red Coral Investments 117 (Pty) Ltd v Bayas Logistics (Pty) Ltd* (unreported, KZD case no D6596/201 dated 5 November 2020) at paragraph [22]. As to the approach to be adopted in a defamatory claim brought on notice of motion to be referred to trial, see, for example, *Herbal Zone (Pty) Ltd v Infitech Technologies (Pty) Ltd* [2017] 2 All SA 347 (SCA) at 361D–362A; *ENX Group Limited v Spilkin* (unreported, ECGq case no 2296/2022 dated 8 November 2022) at paragraphs 31–42 and the authorities there referred to; *Phalane N.O. v Department of Co-operative Governance, Human Settlements and Traditional Affairs of the Limpopo Provincial Governance* (unreported, LP case no 1971/2018 dated 21 September 2023) at paragraph [30].

249 *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634I. Other terms used include 'genuine' (*Peterson v Cuthbert & Co Ltd* 1945 AD 420 at 429; *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634I; *Khumalo v Director-General of Co-operation and Development* 1991 (1) SA 158 (A) at 168A; *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) at paragraph [235]; *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) at 375E; *Lombaard v Droprop CC* 2010 (5) SA 1 (SCA) at 10D; *Cape Town City v South African National Roads Agency Ltd* 2015 (6) SA 535 (WCC) at 608C; *MAN Financial Services SA (Pty) Ltd v Phaphoakane Transport* 2017 (5) SA 526 (GJ) at 528G–529A; *Mouton v Park 2000 Development 11 (Pty) Ltd* 2019 (6) SA 105 (WCC) at 128E; *4 Africa Exchange (Pty) Ltd v Financial Sector Conduct Authority* 2020 (6) SA 428 (GJ) at paragraph [9]); 'genuine, and not merely illusory' (*Parker v W G B Kinsey & Co (Pvt) Ltd* 1988 (1) SA 42 (ZS) at 51E); 'werklike of direkte' (*Van der Merwe v Meyer* 1971 (3) SA 22 (A) at 26G); ' bona fide' (*Von Steen v Von Steen* 1984 (2) SA 203 (T) at 205B; *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634I; *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) at 375E; *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at 347E–I; *Hassan v Berrange NO* 2012 (6) SA 329 (SCA) at 343A–C; *Cape Town City v South African National Roads Agency Ltd* 2015 (6) SA 535 (WCC) at 608C; *MAN Financial Services SA (Pty) Ltd v Phaphoakane Transport* 2017 (5) SA 526 (GJ) at 528G–529A; *Mouton v Park 2000 Development 11 (Pty) Ltd* 2019 (6) SA 105 (WCC) at 128E; *ENX Group Limited v Spilkin* (unreported, ECGq case no 2296/2022 dated 8 November 2022) at paragraphs 20 and 23). See also *Nampesca (SA) Products (Pty) Ltd v Zaderer* 1999 (1) SA 886 (C) at 892H–893B; *Dorbyl Vehicle Trading & Finance Co (Pty) Ltd v Northern Cape Tour & Charter Service CC* [2001] 1 All SA 112 (NC) at 123*b*–124*c*; *South Peninsula Municipality v Evans* 2001 (1) SA 271 (C) at 283F–G; *First Rand Bank of Southern Africa Ltd v Pretorius* 2002 (3) SA 489 (C) at 497D–E; *Rajah v Chairperson: North West Gambling Board* [2006] 3 All SA 172 (T) at 190*h*–*i*; *Red Coral Investments 117 (Pty) Ltd v Bayas Logistics (Pty) Ltd* (unreported, KZD case no D6596/201 dated 5 November 2020) at paragraph [21]; *Centaur Mining South Africa (Pty) Ltd v Cloete Murray NO* 2023 (1) SA 499 (GJ) at paragraph [15].

250 *Peterson v Cuthbert & Co Ltd* 1945 AD 420 at 428. See also *Von Steen v Von Steen* 1984 (2) SA 203 (T) at 205C; *Standard Credit Corporation Ltd v Smyth* 1991 (3) SA 179 (W) at 181H; *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at 347G–H; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 290F; *Wishart v Blieden NO* 2013 (6) SA 59 (KZP) at 84G–85E. A court is not required to deal with a challenge to a referee's report delivered under s 38 of the Superior Courts Act 10 of 2013 in the way that it would decide factual disputes in motion proceedings (*Wright v Wright* 2015 (1) SA 262 (SCA) at 268C).

251 *National Scrap Metal (Cape Town) (Pty) Ltd v Murray & Roberts Ltd* 2012 (5) SA 300 (SCA) at 307F. In this case it was held (at 308A–F) that if the dispute involved the conduct of businessmen, it was also necessary to guard against approaching the case on the assumption that businessmen would act in a businesslike manner or with meticulous concern for the keeping of accurate records; all too often they did not. This was all the more so if there had been not only a close and symbiotic relationship between the parties, but one party in addition had representation on the other party's board of directors and was therefore a party to its business plans and strategies. The closeness of the relationship between the opposing parties might readily explain why the respective parties had not conducted their business relationship with greater formality. See also *Cape Town City v South African National Roads Agency Ltd* 2015 (6) SA 535 (WCC) at 608D–E.

252 *King William's Town Transitional Local Council v Border Alliance Taxi Association (BATA)* 2002 (4) SA 152 (E) at 156I–J.

253 *King William's Town Transitional Local Council v Border Alliance Taxi Association (BATA)* 2002 (4) SA 152 (E) at 157A–B; *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) at 375F–G; *National Scrap Metal (Cape Town) (Pty) Ltd v Murray & Roberts Ltd* 2012 (5) SA 300 (SCA) at 305D–E.

254 *Prinsloo NO v Goldex 15 (Pty) Ltd* 2014 (5) SA 297 (SCA) at 304A–C. See also *N v N* (unreported, ECMk case no 2283/2021 dated 17 May 2022) at paragraph [31] and the authorities there referred to.

255 *Peterson v Cuthbert & Co Ltd* 1945 AD 420 at 428–9; *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163 and 1165; *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154F; *Engar v Omar Salem Essa Trust* 1970 (1) SA 77 (N) at 83E; *Associated South African Bakeries (Pty) Ltd v Oryx Vereinigte Bäckereien (Pty) Ltd* 1982 (3) SA 893 (A) at 923G–924B; *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634I–635A; *Ngqumba/Damons NO/Jooste v Staatspresident* 1988 (4) SA 224 (A) at 261G–262B; *Ndara v Umtata Presbytery, Nederduitse Gereformeerde Kerk in Afrika (Transkei)* 1990 (4) SA 22 (Tk) at 28E; *Minister of Health v Drums and Pails Reconditioning CC* 1997 (3) SA 867 (N) at 873A–G; *Dorbyl Vehicle Trading & Finance Co (Pty) Ltd v Northern Cape Tour & Charter Service CC* [2001] 1 All SA 112 (NC); *King William's Town Transitional Local Council v Border Alliance Taxi Association (BATA)* 2002 (4) SA 152 (E) at 156I–J; *South African Veterinary Council v Szymanski* 2003 (4) SA 42 (SCA) at 51A–C; *Terblanche NO v Damji* 2003 (5) SA 489 (C) at 501I–502D; *Rajah v Chairperson: North West Gambling Board* [2006] 3 All SA 172 (T) at 190*g*–*h*; *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at 347G–H; *Tecmed (Pty) Ltd v Hunter* 2008 (6) SA 210 (W) at 217D–H; *Malan v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA) at 222C; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 290F; *Feni v Gxothiwe* 2014 (1) SA 594 (ECG) at 596G; *Minister of Environmental Affairs v Recycling and Economic Development Initiative of South Africa NPC* 2018 (3) SA 604 (WCC) at 632F; *Red Coral Investments 117 (Pty) Ltd v Bayas Logistics (Pty) Ltd* (unreported, KZD case no D6596/201 dated 5 November 2020) at paragraph [22]; *ENX Group Limited v Spilkin* (unreported, ECGq case no 2296/2022 dated 8 November 2022) at paragraph 22. In *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) at 375F–376B it is stated:

'A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say "generally" because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.'

See also *Malan v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA) at 222C; *National Scrap Metal (Cape Town) (Pty) Ltd v Murray & Roberts Ltd* 2012 (5) SA 300 (SCA) at 305D; *Cape Town City v South African National Roads Agency Ltd* 2015 (6) SA 535 (WCC) at 609A–H; *Smith v Stellenbosch Municipality* (unreported, WCC case no 18381/2022 dated 11 July 2022) at paragraph [82]; *Minister of Social Development v SA Childcare (Pty) Ltd; MEC, Social Development, Eastern Cape v SA Childcare (Pty) Ltd* (unreported, SCA case no 71/2021 dated 29 August 2022) at paragraph [20]; *Centaur Mining South Africa (Pty) Ltd v Cloete Murray NO* 2023 (1) SA 499 (GJ) at paragraph [15]; *Mashisane v Mhlauli* (unreported, SCA case no 903/2022 dated 14 December 2023) at paragraph [15] (an appeal in which the Supreme Court of Appeal held (at paragraph [13]) that courts should be slow to decide disputes concerning the conclusion of customary marriages on affidavits alone). In *Masango v Sunset Bay Trading 156 (Pty) Ltd* (unreported, GJ case no 17272/20 dated 1 October 2020) it was held (at paragraph [31]) that, should a respondent possess no more facts to counter an allegation save to deny same, it cannot be expected of the respondent to say more. For instance, if a respondent is accused of demolishing a structure but knows nothing about it, it cannot be expected of such a respondent to place further facts before the court, save to deny the allegation. It was accordingly found (at paragraph [32]) that the bare denial of the respondents created a real factual dispute which was then decided on the basis of the *Plascon Evans* principle due to the urgency of the matter.

256 *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154G–H. See also *Reed v Witrup* 1962 (4) SA 437 (D) at 443G; *Western Bank Bpk v Trust Bank van Afrika Bpk* 1977 (2) SA 1008 (O) at 1017E–H; *Gemeenskapontwikkelingsraad v Williams (2)* 1977 (3) SA 955 (W) at 962F–G; *Jonker v Ackerman* 1979 (3) SA 575 (O) at 599D–E; *Wiese v Joubert* 1983 (4) SA 182 (O) at 202F; *The Free Press of Namibia (Pty) Ltd v Cabinet for the Interim Government of South West Africa* 1987 (1) SA 614 (SWA) at 621C–E; *Rössing Stone Crushers (Pty) Ltd v Commercial Bank of Namibia* 1994 (2) SA 622 (NmHC) at 627H–628A; *Minister of Health v Drums and Pails Reconditioning CC* 1997 (3) SA 867 (N) at 872C–J; *Truth Verification Testing Centre v PSE Truth Detection CC* 1998 (2) SA 689 (W) at 698H–I; *Rosen v Ekon* 2001 (1) SA 199 (W) at 215B–D; *Tecmed (Pty) Ltd v Hunter* 2008 (6) SA 210 (W) at 217I–218B; *Minister of Environmental Affairs v Recycling and Economic Development Initiative of South Africa NPC* 2018 (3) SA 604 (WCC) at 632F–G; *Mouton v Park 2000 Development 11 (Pty) Ltd* 2019 (6) SA

105 (WCC) at 128F; *Red Coral Investments 117 (Pty) Ltd v Bayas Logistics (Pty) Ltd* (unreported, KZD case no D6596/201 dated 5 November 2020) at paragraph [22]; *Canton Trading 17 (Pty) Ltd t/a Cube Architects v Hattingh NO* 2022 (4) SA 420 (SCA) at paragraph [78]; *Bester NO v Pieters* 2023 (1) SA 398 (WCC) at paragraph [35].

257 *Sewmungal and Another NNO v Regent Cinema* 1977 (1) SA 814 (N) at 820F. See also *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) at 390B–G; *Carrara & Lecuona (Pty) Ltd v Van der Heever Investments Ltd* 1973 (3) SA 716 (T) at 719G; *Wiese v Joubert* 1983 (4) SA 182 (O) at 202F–203C; *Administrator, Transvaal v Theletsane* 1991 (2) SA 192 (A) at 196I–197A; *Grobbelaar v Freund* 1993 (4) SA 124 (O) at 127A–D and 129D–G; *Minister of Environmental Affairs v Recycling and Economic Development Initiative of South Africa NPC* 2018 (3) SA 604 (WCC) at 632G.

258 In *Cape Town City v South African National Roads Agency Ltd* 2015 (6) SA 535 (WCC) Binns-Ward J and Boqwana J observed (at 608F–I):

'In *South African Veterinary Council and Another v Szymanski* 2003 (4) SA 42 (SCA) (2003 (4) BCLR 378) para 24 it was suggested in passing that "denials that are 'so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers' constitute a separate category of 'uncreditworthy denials' from those which do not raise 'a real, genuine or *bona fide* dispute of fact'." With respect, we doubt whether there is in fact a basis for such a distinction: a denial that is so far-fetched or clearly untenable as to be rejected on the papers cannot provide the evidential basis for a genuine dispute of fact. We read the distinction drawn by Corbett JA in *Plascon-Evans* supra at 634I–635C as having been made on a different basis, viz as between the effect of the failure by the respondent who makes a bald denial to an inherently credible allegation by the applicant and fails to apply to cross-examine the applicant, as being insufficient, *within the ambit of the general rule*, to raise a genuine dispute of fact and, *by way of an exception to the general rule*, the rejection of the respondent's evidence where its allegations or denials of the respondent are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers. In both of the posited situations, whether within the general rule, or by way of an exception to it, the effect will be the same — the respondent's averments will not be sufficient to bar the applicant from obtaining final relief on the papers. In the current matter the City needed to persuade us to disregard Sanral's denial in terms of the exception to the *Plascon-Evans* rule.'

In *Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd* 2017 (2) SA 1 (SCA) Wallis JA observed (at 18A–B) that a finding to the effect that facts deposed to by a respondent constituted bald or uncreditworthy denials or were palpably implausible, far-fetched or so clearly untenable that they could safely be rejected on the papers 'occurs infrequently because courts are always alive to the potential for evidence and cross-examination to alter its view of the facts and the plausibility of evidence'.

See also *Nel v Ramwell t/a Ramwell Attorneys* (unreported, GJ case no 18171/2018 dated 1 March 2019) at paragraphs [11]–[12]; *Mouton v Park 2000 Development 11 (Pty) Ltd* 2019 (6) SA 105 (WCC) at 128F.

259 *Administrator, Transvaal v Theletsane* 1991 (2) SA 192 (A) at 197A–B. See also *Mahomed v Malik* 1930 TPD 615 at 619; *Hilleke v Levy* 1946 AD 214 at 219; *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162; *Da Mata v Otto NO* 1972 (3) SA 858 (A) at 882F; *Sewmungal and Another NNO v Regent Cinema* 1977 (1) SA 814 (N) at 819D–820F; *Trust Bank van Afrika Bpk v Western Bank Bpk* 1978 (4) SA 281 (A) at 294D; *Elco Steel Dealers v Blackwood Hodge (South Africa) (Pty) Ltd* 1979 (3) SA 1312 (T) at 1318G; *Wiese v Joubert* 1983 (4) SA 182 (O) at 201D–202D; *Ramakulukusha v Kruger* 1984 (1) SA 218 (V) at 221H; *National Union of Textile Workers v Ndlovu* 1987 (3) SA 149 (D) at 152G; *Nampesca (SA) Products (Pty) Ltd v Zaderer* 1999 (1) SA 886 (C) at 892H–893B; *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) at 392C–G; *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at 347H–348A; *University of Pretoria v South Africans for the Abolition of Vivisection* 2007 (3) SA 395 (O) at 400E–F; *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) at 375E; *Malan v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA) at 222B; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 290F; *Berrange NO v Hassan* 2009 (2) SA 339 (N) at 359F–G; *Point 2 Point Same Day Express CC v Stewart* 2009 (2) SA 414 (W) at 420F; *Els v Weideman* 2011 (2) SA 126 (SCA) at 138F–H; *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* 2012 (3) SA 273 (GSJ) at 275A–C; *South Coast Furnishers CC v Secprop 30 Investments (Pty) Ltd* 2012 (3) SA 431 (KZP) at 439D–G; *National Scrap Metal (Cape Town) (Pty) Ltd v Murray & Roberts Ltd* 2012 (5) SA 300 (SCA) at 307D–E; *Wishart v Blieden NO* 2013 (6) SA 59 (KZP) at 84G–85E; *Afzal v Kalim* 2013 (6) SA 176 (ECP) at 180D–181F; *SH v GF* 2013 (6) SA 621 (SCA) at 626G–H; *Cape Town City v South African National Roads Agency Ltd* 2015 (6) SA 535 (WCC) at 608D–609A; *Hartog v Daly* [2023] 2 All SA 156 (GJ) (a decision of the full court) at paragraphs [49]–[73]. In *Smith v Stellenbosch Municipality* (unreported, WCC case no 18381/2022 dated 11 July 2022) it is reiterated, with reference to *National Scrap Metal (Cape Town) (Pty) Ltd v Murray & Roberts Ltd* 2012 (5) SA 300 (SCA) at paragraphs [21]–[22] and *Mathewson v Van Niekerk* (unreported, SCA case no 260/11 dated 16 March 2012) at paragraph [7], that the test for rejecting a respondent's evidence on the papers, without the benefit of oral evidence, is 'a stringent one not easily satisfied' (at paragraph [82]).

260 *Administrator, Transvaal v Theletsane* 1991 (2) SA 192 (A) at 197C. See also *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd* 1982 (1) SA 398 (A) at 430H–431A; *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H–635C; *Ngqumba/Damons NO/Jooste v Staatspresident* 1988 (4) SA 224 (A) at 261B–263A; *Rössing Stone Crushers (Pty) Ltd v Commercial Bank of Namibia* 1994 (2) SA 622 (NmHC) at 626H–627D; *Ocean Diamond Mining Southern Africa v Louw* [2001] All SA 241 (C); *Ripoll-Dausa v Middleton NO* 2005 (3) SA 141 (C) at 151G–154F; *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) at 392C–G; *Yunnan Engineering CC v Chater* 2006 (5) SA 571 (T) at 580E–J; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 290D–F; *Airports Company South Africa Ltd v Airport Bookshops (Pty) Ltd t/a Exclusive Books* 2017 (3) SA 128 (SCA) at 131E–F.; *Gelyke Kanse v Chairperson of the Senate of the University of Stellenbosch* 2020 (1) SA 368 (CC) at paragraph [16].

261 2022 (1) BCLR 1 (CC).

262 At paragraph [40] footnote [15]. See also *Ayres v Minister of Justice and Correctional Services* 2022 (5) BCLR 523 (CC) at paragraph [15] footnote [12].

263 *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd* 2011 (1) SA 8 (SCA) at 14D–F; and see *Naturally Australian Meat and Game (Pty) Ltd v JH Meat CC* (unreported, GP case no 57166/20 dated 17 June 2022).

264 *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd* 2011 (1) SA 8 (SCA) at 14E–H, referring to *Da Mata v Otto NO* 1972 (3) SA 858 (A) at 869D–E.

265 *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162 and 1168; *Adbro Investment Co Ltd v Minister of the Interior* 1956 (3) SA 345 (A) at 350A; *Hattingh v Ngake* 1966 (1) SA 64 (O) at 66D; *Carrara & Lecuona (Pty) Ltd v Van der Heever Investments Ltd* 1973 (3) SA 716 (T) at 720C; *Campbell v First Consolidated Holdings (Pty) Ltd* 1977 (3) SA 924 (W) at 932B; *Elco Steel Dealers v Blackwood Hodge (South Africa) (Pty) Ltd* 1979 (3) SA 1312 (T) at 1319F; *Standard Bank of SA Ltd v Neugarten* 1987 (3) SA 695 (W) at 699A; *H R Holfeld (Africa) Ltd v Karl Walter & Co GmbH (1)* 1987 (4) SA 850 (W) at 860B; *Cullen v Haupt* 1988 (4) SA 39 (C) at 40E–41B; *Willowvale Estates CC v Bryanmore Estates Ltd* 1990 (3) SA 954 (W) at 961H–J; *Seloadi v Sun International (Bophuthatswana) Ltd* 1993 (2) SA 174 (BGD) at 191C–192C. See also *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd* 1982 (1) SA 398 (A) at 430G–431A; *Gounder v Top Spec Investments (Pty) Ltd* 2008 (5) SA 151 (SCA) at 154B–C.

266 *Deputy Minister of Tribal Authorities v Kekana* 1983 (3) SA 492 (B) at 497E–G; *AECI Ltd v Strand Municipality* 1991 (4) SA 688 (C) at 698I; *Chief Motlegi v President of Bophuthatswana* 1992 (2) SA 480 (B) at 488D.

267 *Transnet Ltd t/a Metrorail v Rail Commuters Action Group* 2003 (6) SA 349 (A) at 368C–D and 368G–H.

268 *Van Aswegen v Drotskie* 1964 (2) SA 391 (O) at 395C–D. See also *Nel v Abrams & Sloot* 1911 TPD 24; *Pithey v McQuirk* 1923 WLD 41; *Ngqumba/Damons NO/Jooste v Staatspresident* 1988 (4) SA 224 (A) at 262E–263A; *Pressma Services (Pty) Ltd v Schuttler* 1990 (2) SA 411 (C) at 419D–H; *Naturally Australian Meat and Game (Pty) Ltd v JH Meat CC* (unreported, GP case no 57166/20 dated 17 June 2022).

269 *Lombaard v Droprop CC* 2010 (5) SA 1 (SCA) at paragraph [26] footnote 7; *Mamadi v Premier of Limpopo Province* 2024 (1) SA 1 (CC) at paragraph [22].

270 *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162 and 1168; *Conradie v Kleingeld* 1950 (2) SA 594 (O) at 597; *Adbro Investment Co Ltd v Minister of the Interior* 1956 (3) SA 345 (A) at 350A; *Standard Bank of SA Ltd v Neugarten* 1987 (3) SA 695 (W) at 699A–E; *Seloadi v Sun International (Bophuthatswana) Ltd* 1993 (2) SA 174 (BGD) at 191D.

271 In *Repas v Repas* (unreported, WCC case no A151/2022 dated 13 February 2023) the majority of the full court refrained from making any conclusive determination one way or the other as to whether the discretion exercised by the court under rule 6(5)*(g)* is a 'loose' or 'true' one (at paragraphs [38]–[43]) but did, however express the view that it would seem as if the decision that a court had to make under rule 6(5)*(g)* involved a determination made in the light of all relevant considerations. Hence, if the dispute of fact were not reasonably foreseeable and the issue in dispute could be conveniently determined on a reference to oral evidence, dismissing the application on the papers instead of referring the dispute for the hearing of oral evidence would not be an available choice (at paragraphs [41]–[42]).

272 *Cresto Machines (Edms) Bpk v Die Afdeling Speuroffisier SA Polisie, Noord-Transvaal* 1970 (4) SA 350 (T) at 365D; *Wiese v Joubert* 1983 (4) SA 182 (O) at 202D. See also *Visser v Vorster* 1986 (2) SA 598 (NC) at 608B.

273 *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162; *Standard Bank of SA Ltd v Neugarten* 1987 (3) SA 695 (W) at 699D; *Red Coral Investments 117 (Pty) Ltd v Bayas Logistics (Pty) Ltd* (unreported, KZD case no D6596/201 dated 5 November 2020) at paragraph [24]; *Le Mottee NO v Mkhwanazi* (unreported, GP case nos A306/2021; A307/2021 dated 8 December 2022 — a decision of the full court) at paragraph [22].

274 See the notes s v 'Or make such an order as it deems fit' above.

275 *Standard Bank of SA Ltd v Neugarten* 1987 (3) SA 695 (W) at 699C.

276 *Khaile v Administration Board, Western Cape* 1983 (1) SA 473 (C) at 478H.

277 *Lombaard v Droprop CC* 2010 (5) SA 1 (SCA) at 10D–E and the cases there referred to.

278 *Kalil v Decotex (Pty) Ltd* 1988 (1) SA 943 (A) at 979H; *Bocimar NV v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (A) at 587D–G. See also *Wishart v Blieden NO* 2013 (6) SA 59 (KZP) at 85E; *Knipe v Kameelhoek (Pty) Ltd* 2014 (1) SA 52 (FB) at 60D–E; *Hansa Silver (Pty) Ltd v Obifon (Pty) Ltd t/a The High Street Auction Co* 2015 (4) SA 17 (SCA) at 26D–F.

279 *Jenkins v SA Boilermakers, Iron & Steel Workers & Ship Builders Society* 1946 WLD 15 at 17–18; *Gamlan Investments (Pty) Ltd v Trilion Cape (Pty) Ltd* 1996 (3) SA 692 (C) at 700G–701G.

280 *Standard Bank of SA Ltd v Neugarten* 1987 (3) SA 695 (W) at 699F; and see the orders made in this case (at 708G–709E) and in *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) at 396G–397B; *Mbilase v Dimbaza Foundries (Pty) Ltd* 1990 (1) SA 812 (Ck) at 815H–816D and *Kambule v The Master* 2007 (3) SA 403 (E) at 414G–415E. See also *Atlas Organic Fertilisers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1978 (4) SA 696 (T) at 698G; *Combrink v Rautenbach* 1951 (4) SA 357 (T) at 359F–H. In *Chief Pilane v Chief Linchwe* 1995 (4) SA 686 (BPD) the matter was referred to oral evidence and it was agreed to by counsel that they would submit a memorandum to the presiding judge within a reasonable time, dealing with the issues that they consider should be dealt with, and that the judge would then give a directive as to precisely what issues should be canvassed at the hearing of oral evidence (at 697E).

281 *Standard Bank of SA Ltd v Neugarten* 1987 (3) SA 695 (W) at 699F.

282 *Wepener v Norton* 1949 (1) SA 657 (W) at 659; *Drummond v Drummond* 1979 (1) SA 161 (A) at 170H; *Antonsson v Jackson* 2020 (3) SA 113 (WCC) at paragraph [76]; *4 Africa Exchange (Pty) Ltd v Financial Sector Conduct Authority* 2020 (6) SA 428 (GJ) at paragraph [9].

283 *Drummond v Drummond* 1979 (1) SA 161 (A) at 170H.

284 See *Di Meo v Capri Restaurant* 1961 (4) SA 614 (N) at 615H–616A; *De Beers Industrial Diamond Division (Pty) Ltd v Ishzuka* 1980 (2) SA 191 (T) at 204C–206D; *Spie Batignolles Société Anonyme v Van Niekerk: In re Van Niekerk v SA Yster en Staal Industriële Korporasie Bpk* 1980 (2) SA 441 (NC) at 448E–G; *Erasmus v Pentamed Investments (Pty) Ltd* 1982 (1) SA 178 (W) at 180H; *IClear Payments (Pty) Ltd v Honeywell* (unreported, KZP case no D7512/2021 dated 13 February 2023) at paragraphs [17]–[18].

285 *Hymie Tucker Finance Co (Pty) Ltd v Alloyex (Pty) Ltd* 1981 (4) SA 175 (N) at 179B–E; *Klep Valves (Pty) Ltd v Saunders Valve Co Ltd* 1987 (2) SA 1 (A) at 24I–25D; *Kalil v Decotex (Pty) Ltd* 1988 (1) SA 943 (A) at 981D–G; *Marques v Trust Bank of Africa Ltd* 1988 (2) SA 526 (W) at 530J–531F; *Fax Directories (Pty) Ltd v SA Fax Listings CC* 1990 (2) SA 164 (D) at 167C–G; *Administrator, Transvaal v Theletsane* 1991 (2) SA 192 (A) at 200B–E; *Abaany Property Investments Ltd v Fatima Ayob & Sons Ltd* 1994 (2) SA 342 (T) at 345G–346E.

286 *Lekup Prop Co No 4 (Pty) Ltd v Wright* 2012 (5) SA 246 (SCA) at 258H–I; *Antonsson v Jackson* 2020 (3) SA 113 (WCC) at paragraph [77]; *Murray NO v Humansdorp Co-Operative* 2023 (3) SA 66 (SCA) at paragraphs [21]–[22].

287 *Murray NO v Humansdorp Co-Operative* 2023 (3) SA 66 (SCA) at paragraphs [21]–[22].

288 *Lekup Prop Co No 4 (Pty) Ltd v Wright* 2012 (5) SA 246 (SCA) at 258H; *Antonsson v Jackson* 2020 (3) SA 113 (WCC) at paragraph [77].

289 *Wallach v Lew Geffen Estates CC* 1993 (3) SA 258 (A) at 263H. See also *Shoprite Holdings Ltd v Oblowitz* [2006] 3 All SA 491 (C) at 500*f*–501*b*.

290 *Wallach v Lew Geffen Estates CC* 1993 (3) SA 258 (A) at 262I and 263H. See also *Shoprite Holdings Ltd v Oblowitz* [2006] 3 All SA 491 (C) at 500*f*–501*b*.

291 2014 (4) SA 614 (SCA) at 620C–621C, affirmed by the Constitutional Court in *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at paragraph [234] and in *Damons v City of Cape Town* 2022 (10) BCLR 1202 (CC) at paragraph [117]. See also, for example, *Maswanganyi v Road Accident Fund* 2019 (5) SA 407 (SCA) at 411H–412A; *Atlantis Property Holdings CC v Atlantis Exel Service Station CC* 2019 (5) SA 443 (GP) at 458G–459A; *eThekwini Municipality v Westwood Insurance Brokers Proprietary Limited* (unreported, KZP case no AR230/2018 dated 31 January 2020 — a decision of the full court) at paragraphs [28]–[29]; *National Commissioner of Police v Gun Owners South Africa* 2020 (6) SA 69 (SCA) at paragraphs [26]–[29]; *Philander v Makiet* (unreported, WCC case no A61/2020 dated 18 September 2020) at paragraphs [40]–[41]; *Q4 Fuel (Pty) Ltd v Ellisras Brandstof En Olie Verspreiders (Pty) Ltd* (unreported, LP case no HCAA 08/2021 dated 11 November 2021 — a decision of the full court) at paragraphs [20]–[22]; *Loskop Landgoed Boerdery (Pty) Ltd v Petrus Moeleso* (unreported, SCA case no 390/2021 dated 12 April 2022) at paragraph [18]; *Advertising Regulatory Board NPC v Bliss Brands (Pty) Ltd* 2022 (4) SA 57 (SCA) at paragraphs [9]–[10]; *Discovery Insure Limited v Masindi* (unreported, SCA case no 534/2022 dated 14 June 2023) at paragraph [35]; *De Nysschen v Government Employees' Pension Fund* [2024] 4 BLLR 349 (SCA) at paragraph [17].

292 *Humphrys v Lazer Transport Holdings Ltd* 1994 (4) SA 388 (C) at 400B–F.

293 Cf *Wallach v Lew Geffen Estates CC* 1993 (3) SA 258 (A) at 262J–263G.

294 *Combrink v Rautenbach* 1951 (4) SA 357 (T) at 359C; *Standard Bank of SA Ltd v Neugarten* 1987 (3) SA 695 (W) at 699G; *B v S* 1995 (3) SA 571 (A) at 586H–I and 588B–H.

295 *Combrink v Rautenbach* 1951 (4) SA 357 (T) at 359G.

296 *Campbell v Kwapa* 2002 (6) SA 379 (W) at 382B.

297 *Less v Bornstein* 1948 (4) SA 333 (C); *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162; *Conradie v Kleingeld* 1950 (2) SA 594 (O) at 597 and 599; *Oblowitz v Oblowitz* 1953 (4) SA 426 (C) at 434G.

298 *Less v Bornstein* 1948 (4) SA 333 (C); *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162; *Conradie v Kleingeld* 1950 (2) SA 594 (O) at 597 and 599; *Oblowitz v Oblowitz* 1953 (4) SA 426 (C) at 434G.

299 *Standard Bank of SA Ltd v Neugarten* 1987 (3) SA 695 (W) at 699A.

300 *Minister of Land Affairs and Agriculture v D&F Wevell Trust* 2008 (2) SA 184 (SCA) at 207E; *Miloc Financial Solutions (Pty) Ltd v Logistic Technologies (Pty) Ltd* 2008 (4) SA 325 (SCA) at 340D–E.

301 *Lekup Prop Co No 4 (Pty) Ltd v Wright* 2012 (5) SA 246 (SCA) at 258E–I; *Murray NO v Humansdorp Co-Operative* 2023 (3) SA 66 (SCA) at paragraphs [21]–[22].

302 *Gray v Goodwood Municipality* 1943 CPD 78.

303 *Brown v Cloete* 1914 CPD 757; *Rieseberg v Rieseberg* 1926 WLD 59; *Gray v Goodwood Municipality* 1943 CPD 78; *Remley v Lupton* 1946 WLD 353; *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162; *Conradie v Kleingeld* 1950 (2) SA 594 (O) at 597; *Winsor v Dove* 1951 (4) SA 42 (N); *Adbro Investment Co Ltd v Minister of the Interior* 1956 (3) SA 345 (A) at 350; *Porter v Cape Town City Council* 1961 (4) SA 278 (C) at 285; *Joubert v Stemmet* 1965 (3) SA 215 (O) at 218–19; *Wiese v Joubert* 1983 (4) SA 182 (O) at 194.

304 *United Bioscope Cafés Ltd v Moseley Buildings Ltd* 1924 AD 60 at 69; *Johannesburg Municipality v Davies* 1925 AD 395 at 408–9; *Hilleke v Levy* 1946 AD 214 at 221.

305 *Clinical Centre (Pty) Ltd v Holdgates Motor Co (Pty) Ltd* 1948 (4) SA 480 (W) at 491.

306 See the order referred to in *Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd* 2006 (4) SA 458 (SCA) at 469I–J; and see the alternative order of the court in *Standard Bank of SA Ltd v Neugarten* 1987 (3) SA 695 (W) at 709E. See also the order in *Le Mottee NO v Mkhwanazi* (unreported, GP case nos A306/2021; A307/2021 dated 8 December 2022 — a decision of the full court) at paragraph [29].

307 *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 563F; *Sparks v Sparks* 1998 (4) SA 714 (W) at 721F; *Liberty Group Ltd t/a Liberty Life v K&D Telemarketing CC* (unreported, SCA case no 1290/18 dated 20 April 2020) at paragraph [13].

308 *Purchase v Purchase* 1960 (3) SA 383 (N) at 385A; *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 563E; *Sparks v Sparks* 1998 (4) SA 714 (W) at 721F; *Bouwer v City of Johannesburg* (unreported, LAC case no JA64/06 dated 23 December 2008) at paragraphs [17]–[45]; *Liberty Group Ltd t/a Liberty Life v K&D Telemarketing CC* (unreported, SCA case no 1290/18 dated 20 April 2020) at paragraph [13]; but see *Vena v Vena* 2010 (2) SA 248 (ECP) at 253A–I where it was held that the dismissal of an application amounts to absolution from the instance.

309 See *Vleissentraal v Dittmar* 1980 (1) SA 918 (O); *Venmei Belegging (Edms) Bpk v Bue* 1980 (3) SA 372 (T) at 377B–F.

310 *Sparks v Sparks* 1998 (4) SA 714 (W) at 721F.

311 See, *inter alia*, *Livanos NO v Oates* 2013 (5) SA 165 (GSJ) at 166F–H. In *Graham v Law Society, Northern Provinces* 2016 (1) SA 279 (GP) Murphy J held (at 189F–290D) that rule 6(7)*(a)* applies to all applications and rejected arguments that, on the one hand, it applies only to interlocutory applications under rule 6(11) and, on the other hand, only to applications initiated under rule 6(1).

312 *Willowvale Estates CC v Bryanmore Estates Ltd* 1990 (3) SA 954 (W) at 961H–J.

313 *Graham v Law Society, Northern Provinces* 2016 (1) SA 279 (GP) at 291I–292A.

314 Rule 4(1)*(a*A).

315 In *Commissioner, South African Revenue Service v Public Protector* 2020 (4) SA 133 (GP), reversed on appeal only in respect of the personal costs order against the Public Protector in *Public Protector v Commissioner for the South African Revenue Service* 2022 (1) SA 340 (CC), it was, however, held (at paragraphs [42] and [43]) that if there are more parties than one to the main application, a counter-application should be brought on notice of motion and served on all the other parties.

316 *Truter v Degenaar* 1990 (1) SA 206 (T) at 211D–G.

317 *Persadh v General Motors South Africa (Pty) Ltd* 2006 (1) SA 455 (SE) at 459E–G.

318 *Peacock Television Co (Pty) Ltd v Transkei Development Corporation* 1998 (2) SA 259 (Tk) at 262F.

319 The term 'rule *nisi*' is derived from the English law and practice. The term may be defined as an order of court to which a fixed period of validity has been assigned, and once that period has expired the rule lapses and cannot be revived (*Fisher v Fisher* 1965 (4) SA 644 (W); and see *VLG Accounting CC v Koloni Consulting Enterprise CC* (unreported, EL case no 95/2021 dated 7 September 2021) at paragraph [23]; *Central University of Technology v Free State Provincial Commissioner of the South African Police Services* (unreported, FB case no 3278/2022 dated 14 December 2022) at paragraph [7]). In *Sokomani v African National Congress* (unreported, ECEL case no EL531/2020 dated 3 February 2023) the court gave the following description of the nature and effect of a rule *nisi* (at paragraph [16]) (footnotes omitted):

'The rule has been defined as a court order issued at the instance of an applicant calling upon another party to show cause before the court on a particular day why the relief applied for should not be granted. The decree, rule or order does not take effect unless the person affected fails within the stated time to appear and show cause why it should not take effect. If cause is shown on the return day, the court must decide on the evidence adduced, and according to the circumstances, either discharge the rule, or make it absolute, or vary it, or make such order thereon as seems just.'

If a case is postponed or removed from the roll on the return day of a rule *nisi*, with no extension of the rule and no date for the matter to be heard in the future, the rule must automatically lapse (*National Director of Public Prosecutions v Walsh* 2009 (1) SACR 603 (T) at paragraphs [24] and [25]; *VLG Accounting CC v Koloni Consulting Enterprise CC* (unreported, EL case no 95/2021 dated 7 September 2021) at paragraph [234]; *Kgetlengrivier Concerned Residents v Kgetlengrivier Local Municipality* [2023] 2 All SA 452 (NWM) (a decision of the full court) at paragraph [25].

Once a rule *nisi* is contested, the applicant is in no better position in other respects than he was when the order was first sought (*Banco de Moçambique v Inter-Science Research and Development Services (Pty) Ltd* 1982 (3) SA 330 (T) at 332B–D; *Ghomesi-Bozorg v Yousefi* 1998 (1) SA 692 (W) at 696C–D)).

Our common law knew the temporary interdict and, as Van Zyl points out, a 'curious mixture of our practice with the practice of England' took place and the practice arose of asking the court for a rule returnable on a certain day, but in the meantime to operate as a temporary interdict (Van Zyl *Judicial Practice* vol II 450 et seq; and see *Tollman v Tollman* 1963 (4) SA 44 (C) at 46H; *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg* 1995 (4) SA 1 (A) at 18J–19B).

It follows axiomatically that when a rule *nisi* is coupled with an interim order, the order will have interim effect until the return day, when same is either confirmed or discharged. Once the return day of a rule *nisi* coupled with an interim order passes without being extended, both the rule *nisi* and the interim order lapse/expire (*Kgetlengrivier Concerned Residents v Kgetlengrivier Local Municipality* [2023] 2 All SA 452 (NWM) (a decision of the full court) at paragraph [26]; *Moshe v Minister of Agriculture, Land Reform and Rural Development* [2023] 2 All SA 776 (NWM) (a decision of the full court) at paragraph [20]).

If a rule *nisi* operating as an interim interdict is discharged on the return day, the interim relief comes to an end and the interim interdict is not revived or perpetuated by the noting of an appeal (*SAB Lines (Pty) Ltd v Cape Tex Engineering Works (Pty) Ltd* 1968 (2) SA 535 (C); and see *Ismail v Keshavjee* 1957 (1) SA 684 (T)).

320 *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A) at 674G–H.

321 *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A) at 674H. In *National Director of Public Prosecutions v Mohamed NO* 2003 (4) SA 1 (CC) at paragraphs [28]–[30] the Constitutional Court provided a useful exposition of the historical development of *ex parte* applications, the granting of rules *nisi* and the making of interim orders pending the return day of a rule *nisi*. See also *Kgetlengrivier Concerned Residents v Kgetlengrivier Local Municipality* [2023] 2 All SA 452 (NWM) (a decision of the full court) at paragraphs [23]–[26].

322 *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A) at 675A–B.

323 *Lourenco v Ferela (Pty) Ltd (No 1)* 1998 (3) SA 281 (T) at 290B.

324 *Williams v Landmark Properties SA* 1998 (2) SA 582 (W).

325 *Murray NO v Ramphele* (unreported, GP case no 25067/2020 dated 27 September 2021) at paragraphs [7]–[13].

326 *Regular Investments (Pty) Ltd v Du Plessis* 1972 (2) SA 493 (O).

327 *Manton v Croucamp NO* 2001 (4) SA 374 (W) at 379B and 379E–H.

328 *Manton v Croucamp NO* 2001 (4) SA 374 (W) at 379G.

329 *Massey-Ferguson (South Africa) Ltd v Ermelo Motors (Pty) Ltd* 1973 (4) SA 206 (T) at 214G; *Antares (Pty) Ltd v Hammond* 1977 (4) SA 29 (W) at 30D. In *Graham v Law Society, Northern Provinces* 2016 (1) SA 279 (GP) at 289E–F an interlocutory application was described as 'an incidental application for an order at an intermediate stage in the course of litigation, aimed at settling or giving directions with regard to some preliminary or procedural question that has arisen in the dispute between the parties'.

330 *Geyser v Nedbank Ltd: In re Nedbank Ltd v Geyser* 2006 (5) SA 355 (W) at 360A–C.

331 See Volume 3, Part F1.

332 In Volume 3, Part L1.

333 In Volume 3, Part N1.

334 *Yorkshire Insurance Co Ltd v Reuben* 1967 (2) SA 263 (E) at 265E–H; *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O) at 755A–756C; *Hendricks v Santam Insurance Co Ltd* 1973 (1) SA 45 (C) at 46D–47C; *Muller v Paulsen* 1977 (3) SA 206 (E) at 208E–G; *SA Metropolitan Lewensversekeringsmaatskappy Bpk v Louw NO* 1981 (4) SA 329 (O) at 332G; *4 Africa Exchange (Pty) Ltd v Financial Sector Conduct Authority* 2020 (6) SA 428 (GJ) at paragraph [8].

335 Rule 4(1)*(aA)*. See *Reuben v Yorkshire Insurance Co Ltd* 1967 (3) SA 166 (E) at 167E–F.

336 *Gisman Mining and Engineering Co (Pty) Ltd (in liquidation) v LTA Earthworks (Pty) Ltd* 1977 (4) SA 25 (W) at 25F–H.

337 *Gisman Mining and Engineering Co (Pty) Ltd (in liquidation) v LTA Earthworks (Pty) Ltd* 1977 (4) SA 25 (W) at 25H–26A; *SA Metropolitan Lewensversekeringsmaatskappy Bpk v Louw NO* 1981 (4) SA 329 (O) at 333C; *Isaacs v Mangera Attorneys* (unreported, GJ case no 2021/51099 dated 12 July 2023) at paragraph 15.

338 *Saharawi Arab Democratic Republic v Owners and Charterers of the Cherry Blossom* 2017 (5) SA 105 (ECP) at 129D.

339 See *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 335C.

340 *Luna Meubel Vervaardigers (Edms) Bpk v Makin (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) at 136H; and see *Mamahule Traditional Authority v Mabyane* (unreported, LP case no 2449/2021 dated 14 May 2021) at paragraph [6]. See, in general, 2003 (August) *De Rebus* 32; Ingrid Opperman, J 'Urgent Applications, the do's and dont's' October 2021 *The Judiciary* 6; and see the Memorandum to Practitioners re the Procedure in the Pretoria Urgent Motion Court (i e Annexure 'A' 13.24 to the *Practice Manual* of the Gauteng Division of the High Court, Pretoria) which is reproduced in Volume 3, Part H2.

341 Rule 6(5)*(b)*(iii)*(bb)*.

342 *Luna Meubel Vervaardigers (Edms) Bpk v Makin (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) at 137F; *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd* (unreported, GJ case no 11/33767 dated 23 September 2011) at paragraphs [6]–[9]; *Mogalakwena Municipality v Provincial Executive, Limpopo* [2014] 4 All SA 67 (GP) at paragraph [64]; *AG v DG* 2017 (2) SA 409 (GJ) at 412A; *Masicebise Business Solutions v The MEC: Cooperative Governance Human Settlement & Traditional Affairs NC Province* (unreported, NCK case no 992/2022 dated 31 May 2022) at paragraph [13]; *Kopano Uitkyk Farming Enterprise (Pty) Ltd v National Government of the Republic of South Africa* (unreported, FB case no 3805/2022) dated 16 March 2023) at paragraph [48]; *Dladla v Ethekwini Municipality* (unreported, KZD case no 2799/2023 dated 4 April 2023) at paragraph [37]; *Abadiga v Minister of Defence and Military Veterans* (unreported, GJ case no 2023/018570 dated 20 April 2023) at paragraph [21]; *Kgentlengrivier Local Municipality v Bertorbrite (Pty) Ltd* (unreported, NWM case no UM118/2023 dated 26 June 2023) at paragraph [12]; *Mokrane v Bornman* (unreported, GJ case no 2023–062766 dated 6 July 2023) at paragraph [13]; *Munsoft (Pty) Ltd v Musina Local Municipality* (unreported, LP case no 5922/2023 dated 31 July 2023) at paragraphs [8]–[9]; *Lucietto N.O. v Wellman* (unreported, ECMk case no 1697/2023 dated 26 September 2023) at paragraphs [22]–[23]; *MM v NM* (unreported, KZP case no 15133/23P dated 18 October 2023) at paragraphs [6]–[8]; *Arcfyre International (Pty) Ltd v Govender* (unreported, GJ case no 2023-098452 dated 31 October 2023) at paragraph [22]; *Chung-Fung (Pty) Ltd v Mayfair Residents Association* (unreported, GJ case no 2023/080436 dated 13 October 2023) at paragraph [18]; and see V de Wit 'The correct approach to determining urgency' (2021) 21(2) *Without Prejudice* 1.

343 *Twentieth Century Fox Film Corporation v Anthony Black Films (Pty) Ltd* 1982 (3) SA 582 (W) at 586G. This is borne out by many reported cases that deal with urgent applications in which commercial interests are at stake. See also *Bandle Investments (Pty) Ltd v Registrar of Deeds* 2001 (2) SA 203 (SE); *Avis Southern Africa (Pty) Limited v Porteous* 2024 (2) SA 386 (GJ) at paragraphs [17]–[21].

344 *Volvo Financial Services Southern Africa (Pty) Ltd v Adamas Tkolose Trading CC* (unreported, GJ case no 2023/067290 dated 1 August 2023) at paragraphs 4, 6 and 8; and see the discussion of this case in *Avis Southern Africa (Pty) Limited v Porteous* 2024 (2) SA 386 (GJ) at paragraphs [17]–[21].

345 *Victoria Park Ratepayers' Association v Greyvenouw CC* (unreported, EC case no 511/03 dated 11 April 2003) at paragraph [5]; *Khepeng v Maseko* (unreported, FB case no 4777/2022 dated 13 March 2023) at paragraph [20].

In *Volvo Financial Services Southern Africa (Pty) Ltd v Adamas Tkolose Trading CC* (unreported, GJ case no 2023/067290 dated 1 August

2023) Wilson J in an *obiter dictum,* however, stated:
'7 It is sometimes said that contempt of court proceedings are inherently urgent (see, for example, *Rustenburg Platinum Mines Limited v Lesojane* (UM44/2022) [2022] ZANWHC 36 (21 June 2022) at paragraph 7 and *Gauteng Boxing Promotors Association v Wysoke* (22/6726) [2022] ZAGPJHC 18 (28 April 2022) paragraph 14). I do not think that can be true as a general proposition. I accept that the enforcement of a court order may well qualify as urgent, in situations where time is of the essence, but it seems to me that contempt proceedings entail the exercise of powers which often demand the kind of careful and lengthy consideration which is generally incompatible with urgent proceedings. For example, it cannot be sound judicial policy to commit someone to prison, even where the committal is suspended, or to impose a fine, on an urgent basis, simply because that might be the only way to enforce a court order. There must, in addition, be some other feature of the case that renders it essential that the court order be instantly enforced, such that the penalties associated with contempt require immediate imposition.'
See also *Chung-Fung (Pty) Ltd v Mayfair Residents Association* (unreported, GJ case no 2023/080436 dated 13 October 2023) at paragraphs [30]–[31].
In *Board of Healthcare Funders NPC v Council for Medical Schemes* (unreported, GP case no 2022–012058 dated 10 August 2023) Van der Schyff J cautioned that to regard a contempt application as inherently urgent did not mean that applicants could indiscriminately approach the urgent court on the basis of extreme urgency without having regard to the context and facts of each individual application (at paragraph [8]). Persistent contemptuous conduct would render a matter urgent because it risks denigrating the rule of law and the authority of the judiciary (*Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma* 2021 (5) SA 1 (CC) at paragraph [35]).

346 *South African Legal Practice Council v Mokhele* (unreported, FB case no 5511/2022 dated 27 March 2023) at paragraph [5]; *South African Legal Practice Council v Van Rensburg* (unreported, MM case no 3938/2023 dated 3 April 2024) at paragraph [2].

347 Thus, for example, the fact that the *mandament van spolie* is a speedy remedy does not in itself justify an applicant to the enrolment of the application on the urgent court's roll. A proper case for urgency must still be made out by the applicant. As in every other urgent application, the issue of urgency must be evaluated in the context of the specific facts of the matter (*Siyakhulisa Trading Enterprise (Pty) Ltd v Glencore Operations South Africa (Pty) Ltd* (unreported, GJ case no 2023-038568 dated 2 October 2023) at paragraphs [4]–[12]).

348 *Dladla v Ethekwini Municipality* (unreported, KZD case no 2799/2023 dated 4 April 2023) at paragraph [37].

349 See, for example, *ENX Group Limited v Spilkin* (unreported, ECGq case no 2296/2022 dated 8 November 2022) at paragraph 15 and the authorities there referred to; *Pacinamix (Pty) Ltd v Patina (Pty) Ltd* (unreported, GJ case no 2022/045786 dated 25 November 2022) at paragraphs [9]–[10]; *Janse van Rensburg v WAD Holdings (Pty) Ltd* (unreported, GP case no 29458/2022 dated 5 December 2022) at paragraphs [40]–[43]; *Christ the King Primary School CC v Vallabh NO* (unreported, ECMk case no 3922/2022 dated 13 December 2022) at paragraphs [39]–[42]; *Sabelo Cele t/a Amahle Building and Renovations v Umzumbe Local Municipality* (unreported, KZP case no 407/2023P dated 6 February 2023) at paragraph [12]; *Defenders of the People v Municipal Manager: The City of Tshwane Metropolitan University* (unreported, GP case no B2057/2023 dated 26 April 2023) at paragraph [9]; *Kgentlengrivier Local Municipality v Bertorbrite (Pty) Ltd* (unreported, NWM case no UM118/2023 dated 26 June 2023) at paragraphs [18]–[19]; *Van Der Merwe v Nel NO* (unreported, ECMk case no 2483/2023 dated 11 August 2023) at paragraph [30] (where it was held that 'the rationale is that the more immediate the reaction by the litigant to remedy the situation by way of instituting proceedings the better it is for establishing urgency'); *Dynamic Sisters Trading (Pty) Limited v Nedbank Limited* (unreported, GP case no 081473/2023 dated 21 August 2023) at paragraph [18]; *Lucietto N.O. v Wellman* (unreported, ECMk case no 1697/2023 dated 26 September 2023) at paragraph [24]; *Chung-Fung (Pty) Ltd v Mayfair Residents Association* (unreported, GJ case no 2023/080436 dated 13 October 2023) at paragraphs [25]–[27]; *MM v NM* (unreported, KZP case no 15133/23P dated 18 October 2023) at paragraphs [6]–[8]; *Arcfyre International (Pty) Ltd v Govender* (unreported, GJ case no 2023-098452 dated 31 October 2023) at paragraph [24]; *Shivambu v Chairpersons of the Joint Committee on Ethics and Members Interests* (unreported, WCC case no 22223/23 dated 1 February 2024) at paragraph [33].

350 *Nelson Mandela Metropolitan Municipality v Greyvenouw CC* 2004 (2) SA 81 (SE) at 94C–D; *Stock v Minister of Housing* 2007 (2) SA 9 (C) 12I–13A; *Mfuniselwa v Mfuniselwa* (unreported, ECGq case no 2818/2022 dated 13 December 2022) at paragraph [13]. See also *Kumah v Minister of Home Affairs* 2018 (2) SA 510 (GJ) at 511D–E (a case dealing with urgent applications by illegal foreigners who were detained pending deportation, for release in order that they might apply for asylum).

351 *Nelson Mandela Metropolitan Municipality v Greyvenouw CC* 2004 (2) SA 81 (SE) at paragraphs [37], [38] and [40]; *ENX Group Limited v Spilkin* (unreported, ECGq case no 2296/2022 dated 8 November 2022) at paragraphs 13–14; *Kgentlengrivier Local Municipality v Bertorbrite (Pty) Ltd* (unreported, NWM case no UM118/2023 dated 26 June 2023) at paragraph [16].

352 *I L & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd* 1981 (4) SA 108 (C) at 110C–D; and see paragraph 34(3) of the Consolidated Practice Notes of the Western Cape Division of the High Court, Cape Town, in Volume 3, Part N1. Although contempt of court proceedings are inherently urgent, contempt on its own is not sufficient to entitle an applicant to jump the queue and have its application heard and determined in the urgent court (*Fraser Solar GMBH v Trans-Caledon Tunnel Authority In re: Trans-Caledon Tunnel Authority v Fraser Solar GMBH* (unreported, WCC case nos 2020/33700; 2021/35990 dated 29 December 2021) at paragraph [22]).

353 *Luna Meubel Vervaardigers (Edms) Bpk v Makin (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) at 137A–E. See also the Memorandum to Practitioners re the Procedure in the Pretoria Urgent Motion Court (i e Annexure 'A' 13.24 to the *Practice Manual* of the Gauteng Division of the High Court, Pretoria, which is reproduced in Volume 3, Part H2) and paragraph 9.23 of the *Practice Manual* of the Gauteng Local Division (i e local seat) of the High Court, Johannesburg (in Volume 3, Part H3). As to the practice in other divisions of the High Court, see Volume 3, Parts F2, I2 and L1.

354 *Luna Meubel Vervaardigers (Edms) Bpk v Makin (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) at 137F; and see *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* 2006 (5) SA 333 (W) at 339E–H; *Harvey v Niland* 2016 (2) SA 436 (ECG) at 443C–E; *Dladla v Ethekwini Municipality* (unreported, KZD case no 2799/2023 dated 4 April 2023) at paragraph [37]; *Mokrane v Bornman* (unreported, GJ case no 2023-062766 dated 6 July 2023) at paragraph [14]. In *Davy v Douglas* 1999 (1) SA 1043 (N) at 1060D the court condoned non-compliance with the provisions of s 27*(a)* of the (now repealed) Supreme Court Act 59 of 1959 in relation to service of the application where the matter was inherently sufficiently urgent. The violation of a person's privacy and dignity in such manner that he could not be expected to endure the anxiety and embarrassment of a continued violation, created a degree of urgency which justified the hearing of the application not in the ordinary course (*Prinsloo v RCP Media Ltd t/a Rapport* 2003 (4) SA 456 (T) at 462B–F).

355 *Luna Meubel Vervaardigers (Edms) Bpk v Makin (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) at 137E; *I L & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd* 1981 (4) SA 108 (C) at 110B.

356 2016 (2) SA 561 (GJ).

357 At 571C–573B (footnotes omitted).

358 *ENX Group Limited v Spilkin* (unreported, ECGq case no 2296/2022 dated 8 November 2022) at paragraph 12 and the authorities there referred to.

359 Unreported, KZD case no D531/2023 dated 1 March 2023.

360 At paragraph [2].

361 Unreported, WCC case no 23230/2023 dated 30 January 2024.

362 *Galp v Tansley NO* 1966 (4) SA 555 (C) at 558H–559A; *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd* 1977 (4) SA 682 (C) at 692B; *Southern Pride Foods (Pty) Ltd v Mohidien* 1982 (3) SA 1068 (C); *Syfrets Mortgage Nominees Ltd v Cape St Francis Hotels (Pty) Ltd* 1991 (3) SA 276 (SE); *Lehani NO v Lagoon Beach Hotel (Pty) Ltd* 2015 (4) SA 72 (WCC) at 79F–G, partially overturned on appeal, but not on this point, in *Lagoon Beach Hotel (Pty) Ltd v Lehane NO* 2016 (3) SA 143 (SCA); *JC Administrative Services (Pty) Ltd v Sekheleli* (unreported, GJ case no 2023/006391 dated 22 September 2023) at paragraph [15].

363 *Mears v African Platinum Mines Ltd (1)* 1922 WLD 48 at 55; *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd* 1977 (4) SA 682 (C) at 692B.

364 2021 (5) SA 327 (CC).

365 At paragraphs [19]–[23].

366 2016 (3) SA 143 (SCA).

367 At 150H–151D.

368 *Chaimowitz v Chaimowitz (1)* 1960 (4) SA 818 (C) at 819F–G; *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd* 1977 (4) SA 682 (C) at 692C.

369 2016 (3) SA 143 (SCA).

370 At 152G–H.

371 *Luna Meubel Vervaardigers (Edms) Bpk v Makin (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) at 139F–140A; *Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd; Commissioner, South African Revenue Service v Hawker Aviation Partnership* 2006 (4) SA 292 (SCA) at 299H–300A; *Njokweni v Qina* (unreported, ECM case no 3839/2022 dated 23 March 2023) at paragraph [16]. In *Vena v Vena* 2010 (2) SA 248 (ECP) the court remarked (at 252I–253B), first, that the judgment in the latter case did not place any restriction on the discretion of a trial court to *dismiss* a claim as a mark of its displeasure at an abuse of the process of the court, whether it is an abuse of the procedure of urgency or any other procedure; and, secondly, that the judgment suggested that an order

striking the application from the roll was an appropriate order because, in that event, the matter could be set down again on proper notice. The court held that a dismissal of the claim under the prevailing circumstances was generally equivalent to an order for absolution from the instance, in which event it was open for the applicant to set the matter down again (at 253A–I). See also *PT Operational Services (Pty) Ltd v Rawu on behalf of Ngwetsana* 2013 (34) *ILJ* 1138 (LAC) at paragraphs [31]–[36] and *Inzalo Enterprise Management Systems (Pty) Ltd v Mantsopa Local Municipality* (unreported, FB case no 3832/2023 dated 22 November 2023) at paragraphs [11]–[12], [18]–[20], [47] and [55]. On the contrary, it has been held that the dismissal or refusal of an application amounts to a decision in favour of the respondent (*Purchase v Purchase* 1960 (3) SA 383 (N) at 385A; *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 563E; *Sparks v Sparks* 1998 (4) SA 714 (W) at 721F).

372 *Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd; Commissioner, South African Revenue Service v Hawker Aviation Partnership* 2006 (4) SA 292 (SCA) at 300A. In *Inzalo Enterprise Management Systems (Pty) Ltd v Mantsopa Local Municipality* (unreported, FB case no 3832/2023 dated 22 November 2023) it was held that 'the enrollment [*sic*] must be in accordance with the nature of the application and the rules applicable thereto'. Thus, if it is an opposed application, rule 6(5)*(a)* finds application (at paragraph [22]).

373 *Inzalo Enterprise Management Systems (Pty) Ltd v Mantsopa Local Municipality* (unreported, FB case no 3832/2023 dated 22 November 2023) at paragraphs [23]–[24].

374 *Laggar v Shell Auto Care (Pty) Ltd* 2001 (2) SA 136 (C) at 138F–H.

375 *Cornerstone Logistics (Pty) Ltd v Zacpak Cape Town Depot (Pty) Ltd* [2022] 2 All SA 13 (SCA) at paragraph [30].

376 *Gallagher v Norman's Transport Lines (Pty) Ltd* 1992 (3) SA 500 (W) at 502H.

377 *Scott v Hough* 2007 (3) SA 425 (O) at 431B–C.

378 *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 782B; *I L & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd* 1981 (4) SA 108 (C) at 110E; *Gallagher v Norman's Transport Lines (Pty) Ltd* 1992 (3) SA 500 (W) at 502F–G.

379 *I L & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd* 1981 (4) SA 108 (C) at 110G; *Kyamandi Town Committee v Mkhwaso* 1991 (2) SA 630 (C) at 633I.

380 *Eniram (Pty) Ltd v New Woodholme Hotel (Pty) Ltd* 1967 (2) SA 491 (E) at 493B; *Luna Meubel Vervaardigers (Edms) Bpk v Makin (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) at 137F; *Kyamandi Town Committee v Mkhwaso* 1991 (2) SA 630 (C) at 633I–634A; *Salt v Smith* 1991 (2) SA 186 (Nm).

381 *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 782A–G; *I L & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd* 1981 (4) SA 108 (C) at 110E; *Gallagher v Norman's Transport Lines (Pty) Ltd* 1992 (3) SA 500 (W) at 502I–503C.

In *Nomandela v Nyandeni Local Municipality* 2021 (5) SA 619 (ECM) the applicant's urgent application for interim relief was met with the respondent's point *in limine* that the applicant failed to comply with rule 41A(2)*(a)*. At issue was whether the court should allow the application to proceed as it stood. It was held (at paragraphs [9]–[11]) that rule 41A(2)*(b)* compels a respondent to also file its notice as to whether it agrees to or opposes referral of the dispute for mediation. The rule did not suggest that the respondent's compliance was dependent on the applicant's filing of a rule 41A(2)*(a)* notice. Even if it were, nowhere in the answering affidavit was it stated that the respondent would have wished to explore or not explore the mediation process, but could not do so for reason of the applicant's non-filing. The respondent could have complied with its part of the obligation in terms of the rule or communicated its stance on mediation regardless of the applicant's failure. The rules were meant to be complied with, but they were meant for the court, and not the other way round. While it was ideal that litigants comply with rule 41A, in the interests of justice the issues raised in the application called for immediate resolution rather than removing the matter from the roll in order for the litigants to pronounce on whether they would agree to or oppose mediation. The point *in limine* was accordingly dismissed.

In *Tlang Ka Phulo Farming Project v Minister of Agriculture, Land Reform and Rural Development* (unreported, NWM case no UM 82/23 dated 7 June 2023) an urgent application was struck from the roll for, amongst other reasons, the applicant's failure to comply with rule 41A(2)*(a)*. In *Ethypersadh v Minister of Police NO* (unreported, GP case no 2023-064414 dated 25 July 2023) it was, however, held that an application brought on an urgent basis would of necessity not be subject to the provisions of rule 41A; to require an applicant to state that there could be no compliance with the provisions of that rule would be stating the obvious (at paragraph [7]). See also *Shannin and Ulisha Investments (Pty) Limited t/a Fast Spares v Mahomed* (unreported, KZP case no 16524/2022P dated 16 November 2023) at paragraph [14].

If an applicant acts in terms of rule 6(12)*(a)* and informs the respondent that he regards the application as urgent, it follows that the respondent is obliged to provisionally accept the rules that the applicant has adopted. At the commencement of the hearing, the respondent can object or, if necessary, apply for the late filing of his papers. In the meantime, the respondent dares not disregard the rules that the applicant has adopted (*Mamahule Traditional Authority v Mabyane* (unreported, LP case no 2449/2021 dated 14 May 2021) at paragraph [8]).

382 *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 780C–E.

383 *Gallagher v Norman's Transport Lines (Pty) Ltd* 1992 (3) SA 500 (W) at 503B.

384 *Gouws v Scholtz* 1989 (4) SA 315 (NC) at 322H; *Gallagher v Norman's Transport Lines (Pty) Ltd* 1992 (3) SA 500 (W) at 503B.

385 *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A) at 674G–675B; *Turquoise River Incorporated v McMenamin* 1992 (3) SA 653 (D) at 657D–658D. See also *Kyamandi Town Committee v Mkhwaso* 1991 (2) SA 630 (C); *Scott v Hough* 2007 (3) SA 425 (O).

386 *Gallagher v Norman's Transport Lines (Pty) Ltd* 1992 (3) SA 500 (W) at 503D–E.

387 Section 35 of the General Law Amendment Act 62 of 1955. The section was considered in *Cassim v The Master* 1960 (2) SA 347 (N); *Freinkel v Scheepers* 1961 (1) SA 271 (W); *Maharaj Brothers v Pieterse Bros Construction (Pty) Ltd and Another* 1961 (2) SA 232 (N); *Mkhize v Swemmer* 1967 (1) SA 186 (D); *Allie v De Vries NO* 1982 (1) SA 774 (T); *Jafta v Minister of Law and Order* 1991 (2) SA 286 (A) at 294G–295H; *Breukel v Department of Home Affairs* 2023 (4) SA 583 (WCC) at paragraphs [47] and [48.2]. An Anton Piller order is not 'a rule *nisi* operating as an interim interdict' and an applicant seeking an Anton Piller order against the State need not comply with the provisions of s 35 of the General Law Amendment Act 62 of 1955 (*Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg* 1995 (4) SA 1 (A) at 19C–H). See further Part D8 below.

388 *Venture Capital Ltd v Mauerberger* 1991 (1) SA 96 (W).

389 GN R2133 in *GG* 46475 of 3 June 2022.

390 *Mangala v Mangala* 1967 (2) SA 415 (E); *Eniram (Pty) Ltd v New Woodholme Hotel (Pty) Ltd* 1967 (2) SA 491 (E) at 493A–B; *Sikwe v SA Mutual Fire & General Insurance Co Ltd* 1977 (3) SA 438 (W) at 440H; *Luna Meubel Vervaardigers (Edms) Bpk v Makin (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) at 137F; *I L & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd* 1981 (4) SA 108 (C) at 110H–111A; *Makhuvha v Lukoto Bus Service (Pty) Ltd* 1987 (3) SA 376 (V) at 388I–389D; *Salt v Smith* 1991 (2) SA 186 (Nm); *Cekeshe v Premier, Eastern Cape* 1998 (4) SA 935 (Tk) at 948F; *Heathrow Property Holdings No 3 CC v Manhattan Place Body Corporate* 2022 (1) SA 211 (WCC) at paragraphs [20]–[27]; *Scientific Group (Pty) Limited v South African National Blood Services* (unreported, GJ case no 5495/2022 dated 18 March 2022) at paragraph [9]; *Arcfyre International (Pty) Ltd v Govender* (unreported, GJ case no 2023-098452 dated 31 October 2023) at paragraph [24]; *Jonker v De Wee* (unreported, NCK case no 1859/2023 dated 3 November 2023) at paragraph 13.

391 *Mlezana v South African Civic Organisation* (unreported, ECG case no 3208/18 dated 12 November 2018) at paragraph [5]; *Arcfyre International (Pty) Ltd v Govender* (unreported, GJ case no 2023-098452 dated 31 October 2023) at paragraph [23].

392 *ISDN Solutions (Pty) Ltd v CSDN Solutions CC* 1996 (4) SA 484 (W) at 486H; and see *Sheriff Pretoria North-East v Flink* [2005] 3 All SA 492 (T); *National Director of Public Prosecutions v Braun* 2007 (1) SA 189 (C) at 193I–194B; *Competition Commission v Wilmar Continental Edible Oils & Fats (Pty) Ltd* 2020 (4) SA 527 (KZP) at paragraph [17]; *Kirpal v Peters In Re: Peters v Kirpal* (unreported, GP case no 32823/2021 dated 23 June 2022) at paragraph [11].

393 *Magqabi S.Z Attorneys v Ntantiso* (unreported, ECEL case no EL1685/2023 dated 23 February 2024) at paragraphs [20]–[25].

394 *Siegwart v Fey* (unreported, case no 12252/99 dated 25 November 1998); *Industrial Development Corporation of South Africa v Sooliman* 2013 (5) SA 603 (GSJ) at paragraphs [9] and [12]; *Farmers Trust v Competition Commission* 2020 (4) SA 541 (GP) at paragraph [14]; *Nemavhola v Rambauli* (unreported, LP case nos HCAA23/2023; 5602/2023 dated 11 August 2023 — a decision of the full court) at paragraph [29].

395 *Industrial Development Corporation of South Africa v Sooliman* 2013 (5) SA 603 (GSJ) at paragraphs [9] and [12]; *Farmers Trust v Competition Commission* 2020 (4) SA 541 (GP) at paragraphs [15]–[20].

396 *Siegwart v Fey* (unreported, case no 12252/99 dated 25 November 1998).

397 2024 (1) SA 373 (SCA). See also *Breukel v Department of Home Affairs* 2023 (4) SA 583 (WCC) at paragraphs [41]–[43]; *Nemavhola v Rambauli* (unreported, LP case nos HCAA23/2023; 5602/2023 dated 11 August 2023 — a decision of the full court) at paragraphs [32]–[33].

398 *ISDN Solutions (Pty) Ltd v CSDN Solutions CC* 1996 (4) SA 484 (W) at 486H–I; *Lourenco v Ferela (Pty) Ltd (No 1)* 1998 (3) SA 281 (T) at 290E–H; *National Director of Public Prosecutions v Braun* 2007 (1) SA 189 (C) at 194B and 197C–D; *Oosthuizen v Mijs* 2009 (6) SA 266

(W) at 267E–268C; *Industrial Development Corporation of South Africa v Sooliman* 2013 (5) SA 603 (GSJ) at paragraph [10]; *Farmers Trust v Competition Commission* 2020 (4) SA 541 (GP) at paragraphs [22]–[24]; *Kirpal v Peters In Re: Peters v Kirpal* (unreported, GP case no 32823/2021 dated 23 June 2022) at paragraph [12]; *TFM Customising Centre (Pty) Ltd v Firstrand Bank Ltd t/a First National Bank* (unreported, GJ case no 048154/2022 dated 15 December 2022) at paragraph [5]; *Bester NO v Mirror Trading International (Pty) Ltd t/a MTI (in Liquidation)* 2024 (1) SA 112 (WCC) at paragraph [14]; *Mazetti Management Services (Pty) Ltd v AmaBhungane Centre for Investigative Journalism NPC* 2023 (6) SA 578 (GJ) at paragraph [14].

399 *Industrial Development Corporation of South Africa v Sooliman* 2013 (5) SA 603 (GSJ) at paragraph [10]; *Farmers Trust v Competition Commission* 2020 (4) SA 541 (GP) at paragraph [23].

400 *ISDN Solutions (Pty) Ltd v CSDN Solutions CC* 1996 (4) SA 484 (W) at 486I–487A; *Lourenco v Ferela (Pty) Ltd (No 1)* 1998 (3) SA 281 (T) at 290C–H; *National Director of Public Prosecutions v Braun* 2007 (1) SA 189 (C) at 194C; *Kirpal v Peters In Re: Peters v Kirpal* (unreported, GP case no 32823/2021 dated 23 June 2022) at paragraph [13].

401 *Oosthuizen v Mijs* 2009 (6) SA 266 (W) at 267E–269I and the authorities there referred to; *Ultimate Sports Nutrition (Pty) Ltd v Bezuidenhout* (unreported, GP case no 62515/20 dated 8 December 2020) at paragraphs [6]–[13]; *Kirpal v Peters In Re: Peters v Kirpal* (unreported, GP case no 32823/2021 dated 23 June 2022) at paragraph [17], all of which did not follow *Rhino Hotel & Resort (Pty) Ltd v Forbes* 2000 (1) SA 1180 (W) at 1182E where it was held that the original application is to be reconsidered on its own without reference to anything else. The *Oosthuizen* case was followed in *Elmasdal Boerdery (Pty) Ltd v Erasmus* (unreported, FB case no 5196/2022 dated 15 February 2023) at paragraph [5]. See also *Bester NO v Mirror Trading International (Pty) Ltd t/a MTI (in Liquidation)* 2024 (1) SA 112 (WCC) at paragraphs [11]–[13]. In *South African Airways Soc v BDFM Publishers (Pty) Ltd* 2016 (2) SA 561 (GJ) it was stated (at 565I) that the 'approach by the court is a comprehensive revisit of the circumstances as they present at the time of the reconsideration'. In *Basil Read (Pty) Ltd v Nedbank Ltd* 2012 (6) SA 514 (GSJ) the *Oosthuizen* case was distinguished and it was held (at 520C) that the *Rhino* case remains authority for the proposition that a party who seeks reconsideration of an order under rule 6(12)*(c)* is entitled to seek such reconsideration on the original application without reference to anything else, in other words, that the applicant in the original application may not supplement its original founding affidavit with additional matter when faced with an application for reconsideration. In *Industrial Development Corporation of South Africa v Sooliman* 2013 (5) SA 603 (GSJ) Sutherland J, having considered the various judicial pronouncements on rule 6(12)*(c)* regarding the filing of affidavits in applications for reconsideration (at 604F–606I), held (at 606I–607A):
'[12] Accordingly, in my view:
[12.1] If a respondent who invokes rule 6(12)*(c)* chooses not to put up an answering affidavit, then the respondent [*Author's note:* Evidently the applicant.] likewise has no need nor an opportunity to put up a reply.
[12.2] If a respondent who invokes rule 6(12)*(c)* chooses to file an answer, then the applicant may file a reply, which is, obviously, subject to the general rules and practice about not introducing new matter illegitimately.'
In *Mazetti Management Services (Pty) Ltd v AmaBhungane Centre for Investigative Journalism NPC* 2023 (6) SA 578 (GJ) Sutherland DJP described the position as follows:
'[14] Rule 6(12)*(c)* confers a wide discretion on the court hearing the reconsideration application. The scheme of the rules of court, as a whole, and, no less, of rule 6 itself, is to facilitate orderly and fair proceedings. Rule 6(12)*(c)* exists to remedy an injustice if one was done when the ex parte order was granted. What it creates is the opportunity for the respondent to rebut the case for the order. To that end a respondent may either argue that the order was unjustified on its own terms or provide additional facts on affidavit to support an argument that, on an enlarged factual matrix, the order should be set aside. If a respondent introduces additional evidence, an applicant has a right of reply, but it is not open to an applicant to seek fresh relief or introduce, itself, new allegations of fact. The scheme of the rule takes as its point of departure that the applicant has got its order and the reconsideration is about whether it can keep its order. To belabour the point, an applicant cannot make out a better case for the ex parte order than the case it put before the court when the order was granted. It was for this reason that an attempt by the applicants to bring a counterclaim to seek further relief was dismissed by me out of hand. It was irregular, and yet another abuse of the process.'

402 *The Reclamation Group (Pty) Ltd v Smit* 2004 (1) SA 215 (SE) at 218D–F; *Bester NO v Mirror Trading International (Pty) Ltd t/a MTI (in Liquidation)* 2024 (1) SA 112 (WCC) at paragraphs [11]–[13]; *Fantom Operations Ltd v Avenant* (unreported, WCC case nos 13632/2023; 11479/2023 dated 15 November 2023) at paragraph [35].

403 *The Reclamation Group (Pty) Ltd v Smit* 2004 (1) SA 215 (SE) at 218D–F; *Bester NO v Mirror Trading International (Pty) Ltd t/a MTI (in Liquidation)* 2024 (1) SA 112 (WCC) at paragraphs [11]–[13].

404 *The Reclamation Group (Pty) Ltd v Smit* 2004 (1) SA 215 (SE) at 218D–G.

405 *ISDN Solutions (Pty) Ltd v CSDN Solutions CC* 1996 (4) SA 484 (W) at 487D–C; *National Director of Public Prosecutions v Braun* 2007 (1) SA 189 (C) at 194E; *Kirpal v Peters In Re: Peters v Kirpal* (unreported, GP case no 32823/2021 dated 23 June 2022) at paragraphs [14]–[15]; *Molebush Investments CC v City Of Johannesburg* (unreported, GJ case nos 2023/082305; 2023/083488 dated 11 September 2023) at paragraphs [24]–[25]; *Fetakgomo Tubatse Local Municipality v Mapale Distributors and Enterprise CC* (unreported, LP case no 6175/2023 dated 2 October 2023) at paragraph [15]. See also *Sheriff Pretoria North-East v Flink* [2005] 3 All SA 492 (T) at 498*f*–499*f*; *Oosthuizen v Mijs* 2009 (6) SA 266 (W) at 268C–269D.

406 *ISDN Solutions (Pty) Ltd v CSDN Solutions CC* 1996 (4) SA 484 (W) at 487D; *National Director of Public Prosecutions v Braun* 2007 (1) SA 189 (C) at 194D–E.

407 *Rhino Hotel & Resort (Pty) Ltd v Forbes* 2000 (1) SA 1180 (W) at 1185A–B; *Audio Vehicle Systems v Whitfield* 2007 (1) SA 434 (C) at 443C–D; *MEC for Co-operative Governance and Traditional Affairs v Maphanga* 2018 (3) SA 246 (KZP) at 251A–252H and 253A.

408 *Fisheries Development Corporation of SA Ltd v Jorgensen* 1979 (3) SA 1331 (W) at 1339E–F; *Bisset v Boland Bank Ltd* 1991 (4) SA 603 (D) at 608B–E; *Cohen v Cohen* 2003 (1) SA 103 (C) at 108D–H. Under s 173 of the Constitution of the Republic of South Africa, 1996, the superior courts have the inherent power to protect and regulate their own process and, for example, prevent an abuse of their process.

409 *MEC, Department of Co-Operative Governance and Traditional Affairs v Maphanga* 2021 (4) SA 131 (SCA) at paragraphs [25] and [27] and the cases there referred to. The purpose of the Vexatious Proceedings Act 3 of 1956 was discussed in *Beinash v Ernst & Young* 1999 (2) SA 116 (CC) at 112F–H where the following was held:
'This purpose is "to put a stop to persistent and ungrounded institution of legal proceedings". The Act does so by allowing a court to screen (as opposed to absolutely bar) a "person (who) has persistently and without any reasonable ground instituted legal proceedings in any Court or inferior court". This screening mechanism is necessary to protect at least two important interests. These are the interests of the victims of the vexatious litigant who have repeatedly been subjected to the costs, harassment and embarrassment of unmeritorious litigation; and the public interest that the functioning of the court and the administration of justice proceed unimpeded by the clog of groundless proceedings.'
See also, for example, *ABSA Bank Ltd v Dlamini* 2008 (2) SA 262 (T); *MEC for Co-operative Governance and Traditional Affairs v Maphanga* 2018 (3) SA 246 (KZP) at 249E and 252H–253A; *Gouws v Taxing Mistress (Port Elizabeth)* (unreported, ECPE case nos 3300/2018 and 525/2018 dated 5 November 2020) at paragraphs [27]–[39]; *Pricewaterhouse Coopers Inc v Pienaar* (unreported, WCC case no 1845/2021 dated 10 September 2021); *Emam v Carlson* (unreported, WCC case no 20740/2022 dated 11 April 2023); *Gcora v Nelson Mandela Bay Municipality* (unreported, ECGq case nos 1414/2016; 992/2016 dated 16 May 2023) at paragraphs [40]–[52]; *Minister of Police v Chauke* (unreported, GP case no 59344/2021 dated 23 August 2023); *Jiyana v Hardisty* (unreported, WCC case no 22862/2023 dated 19 January 2024).

410 *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O) at 755A; *Wiese v Joubert* 1983 (4) SA 182 (O) at 197D; *Optimum Coal Terminal (Pty) Limited v Richards Bay Coal Terminal (Pty) Limited* (unreported, KZD case no D531/2023 dated 31 May 2023) at paragraphs [129]–[130].

411 *Ehler (Pty) Ltd v Silver* 1947 (4) SA 173 (W) at 178; *Abromowitz v Jacquet (1)* 1950 (2) SA 247 (W); *Western Bank Ltd v Thorne NO* 1973 (3) SA 661 (C) at 664D; *The Free Press of Namibia (Pty) Ltd v Cabinet for the Interim Government of South West Africa* 1987 (1) SA 614 (SWA) at 621H–I; *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 335E–F; *Securefin Ltd v KNA Insurance and Investment Brokers (Pty) Ltd* [2001] 3 All SA 15 (T) at 30*g–h*.

412 *Elher (Pty) Ltd v Silver* 1947 (4) SA 173 (W); *Molebatsi v Magasela* 1953 (4) SA 484 (W); *Meinert (Pty) Ltd v Administrator of South West Africa in Executive Committee* 1959 (2) SA 498 (SWA); *Shephard v Tuckers Land and Development Corporation (Pty) Ltd (1)* 1978 (1) SA 173 (W) at 177D–E; *Club Mykonos Langebaan Ltd v Langebaan Country Estate Joint Venture* 2009 (3) SA 546 (C) at paragraph [65]; *LA Group (Pty) Ltd v Stable Brands (Pty) Ltd* 2022 (4) SA 448 (SCA) (minority judgment) at paragraph [28]; *Premier FMCG (Pty) Ltd v Baker* 2023 (5) SA 279 (GP) at paragraph [24], following *Wiese v Joubert* 1983 (4) SA 182 (O).

413 *Dennis v Garment Workers' Union, Cape Peninsula* 1955 (3) SA 232 (C) at 239H; *Gore v Amalgamated Mining Holdings* 1985 (1) SA 294 (C) at 295H–296B; and see *Langham and Another NNO v Milne NO* 1961 (1) SA 811 (N) at 816D–F; *LA Group (Pty) Ltd v Stable Brands (Pty) Ltd* 2022 (4) SA 448 (SCA) (minority judgment) at paragraph [29].

414 *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd* 1974 (4) SA 362 (T) at 368G.

415 *Vaatz v Law Society of Namibia* 1991 (3) SA 563 (Nm) at 566C–E; *Tshabalala-Msimang v Makhanya* [2008] 1 All SA 509 (W) at 516*e-f*; *Breedenkamp v Standard Bank of South Africa Ltd* 2009 (5) SA 304 (GSJ) at 321C–E; *Helen Suzman Foundation v President of the Republic of South Africa* 2015 (2) SA 1 (CC) at paragraph [28]; *Scott v Scott* 2021 (2) SA 274 (KZD) at paragraph [54]. See also *Broode NO v Maposa* 2018 (3) SA 129 (WCC) at 140A–C. In *Gordhan v The Public Protector* [2021] 1 All SA 428 (GP) (a decision of the full court) the Public Protector contended that minister Gordhan, in his founding affidavit, described her as corrupt, illiterate, rogue, incompetent, irrational, and unreasonable and unfit to occupy the position of Public Protector. She successfully applied for the matter to be struck out as scandalous, vexatious and irrelevant (at paragraphs [265]–[269] and [305]).

416 *Helen Suzman Foundation v President of the Republic of South Africa* 2015 (2) SA 1 (CC) at paragraph [28], where it was also held that the test for relevance is whether the evidence objected to is relevant to an issue in the litigation; *Scott v Scott* 2021 (2) SA 274 (KZD) at paragraph [54]. On the meaning of 'irrelevant', see further *Meintjes v Wallachs Ltd* 1913 TPD 278 at 285–8; *Steyn v Schabort* 1979 (1) SA 694 (O) at 698A; *Vaatz v Law Society of Namibia* 1991 (3) SA 563 (Nm) at 566E; *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 732A–734B; *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 336J–337B; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 289F–G and 308A–B; *Power Guarantees (Pty) Ltd v Fusion Guarantees (Pty) Ltd* (unreported, GJ case no A5015/2021 dated 6 May 2022 — a decision of the full court) at paragraph [19]; *Ndebele v Industrial Development Corporation of South Africa* (unreported, GJ case no 21687/2021 dated 25 July 2023) at paragraph [68]. Matter which may be struck out as irrelevant includes argumentative matter (*SA Railways and Harbours v Hermanus Municipality* 1931 CPD 184; *John Craig (Pty) Ltd v Dupa Clothing Industries (Pty) Ltd* 1977 (3) SA 144 (T) at 148H); matter which is repetitive (*Lotzoff v Connel* 1968 (2) SA 127 (W) at 131H–132A); attacks on the credibility of an opponent (*Duchen v Flax* 1938 WLD 119; *Morgendaal v Ferreira* 1956 (4) SA 625 (T) at 628B; *Jones v John Barr & Co (Pty) Ltd* 1967 (3) SA 292 (W) at 296C); and inadmissible evidence (*Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 336F–G; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 289G).

417 *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd* 1974 (4) SA 362 (T) at 368G; *Tshabalala-Msimang v Makhanya* [2008] 1 All SA 509 (W) at 516e; *Breedenkamp v Standard Bank of South Africa Ltd* 2009 (5) SA 304 (GSJ) at 321B; *LF v TF* 2020 (2) SA 546 (GJ) at paragraph [25]. In *Clairison's CC v MEC for Local Government, Environmental Affairs and Development Planning* 2012 (3) SA 128 (WCC) the applicant delivered its founding papers and the second respondent delivered a notice of its intention to abide by the court's decision. Thereafter the first respondent delivered his answering affidavit and the applicant its replying affidavit. Then the second respondent delivered an affidavit. The first respondent applied to strike it out on the ground that it supported the applicant's case. The first respondent asserted, *inter alia*, that the second respondent had chosen to abide and given notice of that, and it could not now, by virtue of the doctrine of election, deliver an affidavit supporting the applicant. The court, in dismissing the application to strike out, held (at 129E–130A, 130I–131D, 133F–I and 134E–F) that, as a party, the second respondent was entitled to set out its position on the main application and to explain it, and to abide by the court's decision.

418 *Millward v Glaser* 1950 (3) SA 547 (W).

419 *Premier Produce Co v Mavros* 1931 WLD 91; *Cash Wholesalers Ltd v Cash Meat Wholesalers* 1933 (1) PH A24; *Jay's Properties v Turgin* 1950 (2) SA 694 (W); *Flange Engineering Co (Pty) Ltd v Elands Steel Mills (Pty) Ltd* 1963 (2) SA 303 (W); *Dublin v Diner* 1964 (2) SA 304 (D); *Wronsky v Prokureur-Generaal* 1971 (3) SA 292 (SWA); *Parow Municipality v Joyce & McGregor (Pty) Ltd* 1973 (1) SA 937 (C); *Wiese v Joubert* 1983 (4) SA 182 (O); *Rail Commuter Action Group v Transnet Ltd t/a Metrorail (No 1)* 2003 (5) SA 518 (C) at 546E–547E; *Broode NO v Maposa* 2018 (3) SA 129 (WCC) at 140A–C; *LF v TF* 2020 (2) SA 546 (GJ) at paragraph [26].

420 In *Jeebhai v Minister of Home Affairs* 2007 (4) SA 294 (T) at 306E–307H the court struck out matter, the publication whereof had been prohibited by a previous court order. In addition the applicant, who deposed to the founding affidavit in which the matter appeared, his attorney and the attorney's professional assistant, all of whom had knowledge of the court order, were found guilty of contempt of court for having included the matter in the founding affidavit (at 309G–312G).

421 *Wiese v Joubert* 1983 (4) SA 182 (O) at 196F–197E. See also *Cyril Smiedt (Pty) Ltd v Lourens* 1966 (1) SA 150 (O) at 152E–G. In *Van Wyk v Protea Assurance Co Ltd* 1974 (3) SA 499 (SWA) inadmissible hearsay was struck out on formal notice of application to strike out.

422 *Cultura 2000 v Government of the Republic of Namibia* 1993 (2) SA 12 (Nm) at 27H; *Madikizela v Public Protector; Mabuyane v Public Protector; Speaker: Winnie Madikizela Mandela Local Municipality v Public Protector* (unreported, ECB case nos 800/2021; 802/2021; 818/2021 dated 10 February 2023) at paragraph [25].

423 *SA Railways and Harbours v Hermanus Municipality* 1931 CPD 184; *Parow Municipality v Joyce & McGregor (Pty) Ltd* 1973 (1) SA 937 (C); *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 337B.

424 *Duchen v Flax* 1938 WLD 119; and see *Morgendaal v Ferreira* 1956 (4) SA 625 (T) at 628; *Jones v John Barr & Co (Pty) Ltd* 1967 (3) SA 292 (W) at 296.

425 See, *inter alia*, *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd* 1974 (4) SA 362 (T) at 368H; *John Craig (Pty) Ltd v Dupa Clothing Industries (Pty) Ltd* 1977 (3) SA 144 (T) at 148G; *Pienaar v Thusano Foundation* 1992 (2) SA 552 (B) at 577C; *Rail Commuter Action Group v Transnet Ltd t/a Metrorail (No 1)* 2003 (5) SA 518 (C) at 549D–553C.

426 *Rail Commuter Action Group v Transnet Ltd t/a Metrorail (No 1)* 2003 (5) SA 518 (C) at 589F–G.

427 *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 733B; *Securefin Ltd v KNA Insurance and Investment Brokers (Pty) Ltd* [2001] 3 All SA 15 (T); *Tshabalala-Msimang v Makhanya* [2008] 1 All SA 509 (W) at 516*g–h*; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 308B; *Helen Suzman Foundation v President of the Republic of South Africa* 2015 (2) SA 1 (CC) at paragraph [27]; *Gold Fields Ltd v Motley Rice LLC* 2015 (4) SA 299 (GP) at 325D–328D; *University of the Free State v Afriforum* 2017 (4) SA 283 (SCA) at 296E (where the court, in footnote 22, incorrectly refers to rule 23(2) instead of rule 6(15)); *South African Broadcasting Corporation SOC Ltd v South African Broadcasting Corporation Pension Fund* 2019 (4) SA 608 (GJ) at 632C–D; *Scott v Scott* 2021 (2) SA 274 (KZD) at paragraph [54]; *Breukel v Department of Home Affairs* 2023 (4) SA 583 (WCC) at paragraph [88]; *Power Guarantees (Pty) Ltd v Fusion Guarantees (Pty) Ltd* (unreported, GJ case no A5015/2021 dated 6 May 2022 — a decision of the full court) at paragraph [20].

428 *Anderson v Port Elizabeth Municipality* 1954 (2) SA 299 (E) at 309B; *Msunduzi Municipality v Natal Joint Municipal Pension/Provident Fund* 2007 (1) SA 142 (N) at 150A–C.

429 *Weber v Vermaak* 1974 (3) SA 207 (O) at 216A–D; *Steyn v Schabort* 1979 (1) SA 694 (O) at 697F–H; *Vaatz v Law Society of Namibia* 1991 (3) SA 563 (Nm) at 566J–567A; *Bekker v De Agrela* (unreported, GJ case nos A5096/2019; 42125/2018 dated 25 November 2022) at paragraph [19].

430 *Vaatz v Law Society of Namibia* 1991 (3) SA 563 (Nm) at 567B.

431 *Glencore Africa Oil Investments (Pty) Ltd v Ramano* 2020 (3) SA 419 (GJ).