6 Applications

(1) Save where proceedings by way of petition are prescribed by law, every application must be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief.

(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 must be addressed to both the registrar and such person, otherwise it must be addressed to the registrar only.

(3) Every petition must conclude with the form of order prayed and be verified upon oath by or on behalf of the petitioner.

(4) *(a)* Every application brought *ex parte* (whether by way of petition or upon notice to the registrar supported by an affidavit as aforesaid) must 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. If brought upon notice to the registrar, such notice must 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.

(b) 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 must set such application down for hearing at the same time as the initial application.

(c) At the hearing the court may grant or dismiss either of 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.

(5) *(a)* Every application other than one brought *ex parte* must 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, must be served upon every party to whom notice thereof is to be given.

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

(i) appoint an address within 15 kilometres of the office of the registrar, at which applicant will accept notice and service of all documents in such proceedings;

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

(iii) set forth a day, not less than five 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 must 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.]

(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 must —

(i) within the time stated in the said notice, give applicant notice, in writing, that he or she intends to oppose the application, and in such notice appoint an address within 15 kilometres of the office of the registrar, at which such person will accept notice and service of all documents, as well as such person's postal, facsimile or electronic mail addresses where available;

(ii) within fifteen days of notifying the applicant of his or her intention to oppose the application, deliver his or her answering affidavit, if any, together with any relevant documents; and

(iii) if he or she intends to raise any question of law only he or she must deliver notice of his or her intention to do so, within the time stated in the preceding sub-paragraph, setting forth such question.

(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.

(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 must be given by the applicant or respondent, as the case may be, to the opposite party within five days of notification from the registrar.

(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) The provisions of paragraphs *(c)* and *(f)* apply to petitions subject to the necessary changes.

(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, must, 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 must 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.

(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 or petition filed in support of any application under paragraph *(a)* of this subrule, the applicant must set forth explicitly the circumstances which 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.

(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*, must 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.

(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.]

Commentary

Forms. Notice of motion (to registrar), 2; Notice of motion (to registrar and respondent), 2*(a)*.

General. [1] Rule 6 makes provision for the following distinct procedures:

(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;

(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.

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. [2]

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. [3] 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. [4]

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. [5] Certain requirements in the rules relating to the form, place and manner in which applications should be brought do not apply to interlocutory applications. [6] An urgent application can be brought either on notice or *ex parte*. [7] 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. [8] 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. [9]

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.

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. [10]

It is imperative that motion court litigation should be conducted in an efficient manner. In *Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd* [11] Peter AJ observed: [12]

> '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 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. [13]

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. [14] In *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* [15] Fabricius J stated: [16]

> '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:
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> > "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 (ie a point *in limine*) be disposed of first in motion proceedings. [17] 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. [18] 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. [19] 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. [20]

The principles applicable to an application for the grant of a postponement of an application are the same as those that apply to trials. [21]

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. [22]

In *BR v TM* [23] it is pointed out [24] that, since the decision in *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*, [25] 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.

Subrule (1): 'Proceedings by way of petition.' Proceedings by way of petition were abolished 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. [26]

'Must 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; [27] and (ii) to denote one of the different ways in which civil proceedings may be initiated. [28] 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. [29]

'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. [30] 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 [31] 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. [32]

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. [33]

'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. [34] 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*. [35] In *Scott v Hanekom* [36] 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* which must be authorized. [37]

When notice of motion proceedings are brought by a legal *persona* such as a company, evidence must be placed before the court that the applicant has duly resolved to institute the proceedings and that the proceedings are instituted at its instance. [38] The best evidence that the proceedings have been properly authorized would be provided by an affidavit made by an official of the company annexing a copy of the resolution. [39] This is, however, not necessary in every case and the court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorized person on its behalf. [40]

In a case where the deponent acting on behalf of an applicant company lacks the capacity to launch application proceedings on behalf of the company, and the respondent objects thereto, want of capacity cannot later be remedied by a decision of the directors of the company that did not exist at the stage when the application was launched. [41] Such later decision will also not serve as a ratification of, and give retrospective effect to the capacity to launch such an application. [42]

A respondent who chooses to place the *locus standi* of a person to act on behalf of an applicant in dispute must do so in clear and unambiguous terms. Thus, when proper authorization is not questioned (e g bare denial of authority is raised) or where surrounding circumstances clearly confirm the existence of authority, the minimum of formal evidence is required. [43]

If the required allegations of due authorization are made in the founding affidavit, but not substantiated by documentary proof thereof, proof of such authorization and/or ratification can be annexed to the replying affidavit. [44]

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. [45] 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. [46] The fact that they were cited as parties gives them that right. [47] 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. [48]

(ii) The facts indicating that the court has jurisdiction. [49]

(iii) The cause of action on which the applicant relies. [50] The respondent is entitled to raise an objection *in limine* that the founding affidavit does not make out a prima facie case for

the relief claimed. [51] An applicant may be allowed to amend the cause of action by filing supplementary affidavits. [52] 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. [53] In other words, deponents to the affidavits are 'testifying' in the motion proceedings. [54] It follows that affidavits

must, as a general rule, contain admissible evidence. [55] 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. [56] In *Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd* [57] Peter AJ held: [58]

> '[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.
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> [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 apparent 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 affidavits, 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.'

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, as the applicant will not generally be allowed to supplement the founding affidavit by adducing supporting facts in a replying affidavit. [59] 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* [60] 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.

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, [61] but such a statement is not essential [62] nor is it conclusive. [63] Each case has to be decided on its own facts and circumstances. Thus, in *FirstRand Bank Ltd v Kruger* [64] 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 [65] 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, [66] the court concluded: [67]

> '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;
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> *(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* [68] 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; [69] 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. [70] 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. [71]

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. [72] 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. [73]

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. [74]

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. [75] 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. [76] Trial by ambush cannot be permitted. [77] 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. [78] 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. [79]

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. [80] This principle is subject to the proviso that its application should not be unfair to the respondents. [81] 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. [82]

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; [83] in applications for the winding-up of companies; [84] in applications for the winding-up of close corporations; [85] and in applications affecting deceased

estates or the property of minors or other persons under legal disability. [86] Amendments to the Insolvency Act 24 of 1936 and the Companies Act 61 of 1973 [87] 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 [88] 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. The principles relating to joinder apply in such cases. [89]

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. [90]

An *ex parte* application is used: [91]

(i) when the applicant is the only person who is interested in the relief which is being claimed; [92]

(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; [93]

(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; [94]

(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 [95] and in the KwaZulu-Natal Division of the High Court, Pietermaritzburg and Durban; [96] in the Gauteng Division of the High

Court, Pretoria, such applications, unless based upon a *nulla bona* return, are not brought *ex parte*. [97]

It has been held [98] 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. [99]

Good faith is a *sine qua non* in *ex parte* applications. [100] It extends also to legal representatives. [101]

If any material facts are not disclosed, whether they be wilfully suppressed or negligently omitted, [102] the court may on that ground alone dismiss an *ex parte* application. [103] The court

will also not hold itself bound by any order obtained under the consequent misapprehension of the true position. [104] 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: [105] the extent to which the rule has been breached; the reasons for the non-disclosure; [106] 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. [107] The test is objective. [108]

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. [109] In *Schlesinger v Schlesinger* [110] 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.* [111]

'As near as may be in accordance with Form 2 of the First Schedule.' In appropriate circumstances the use of a wrong form may be condoned. See the notes to subrule (5)*(a)* below. 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. This 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. [112] Relief under this 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. [113]

Subrule (4)*(b)*: '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. [114]

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 [115] 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. [116]

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. [117] If a matter is -sufficiently urgent complete deviation from the form may be justified. [118]

'Must 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. [119]

Subrule (5)*(b)*(iii): 'Set forth a day, not less than five days.' The period of five days applies regardless of whether the notice of motion is served within or outside the jurisdiction of the court in which it was issued. [120] The days are 'court days' and must be calculated in terms of the definition 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.

Failure to allow for the *dies* prescibed by the rules may be condoned [121] 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). [122]

'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. 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)*(ii): 'Within fifteen days of notifying the applicant of his intention to oppose the application.' Form 2*(a)* has been amended [123] and the wording has been brought into line with that of the subrule. [124]

'Deliver his 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. [125]

An affidavit is not a pleading. A respondent cannot content himself in his answering affidavit with bare or unsubstantiated denials [126] unless, of course, there is no other way open to the respondent and nothing more can be expected of him. [127] 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. [128] If the respondent in such a case requires oral evidence he can apply in terms of subrule (5)*(g)* to cross-examine witnesses. [129] 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. [130] The respondent must, however, eschew 'indignant argument and expostulation' in his answering affidavit. [131]

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. [132] 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. [133] It has been suggested [134] 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.

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. [135]

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, [136] 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. [137] 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. [138] 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. [139] 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. [140] 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. [141] In *Louis Pasteur Holdings (Pty) Ltd v Absa Bank Ltd* [142] the Supreme Court of Appeal held that rule 33(4) does not apply to applications but that the High Court may deal with seperate 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. [143]

Subrule (5)*(e)*: 'Deliver 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. [144] This is, however, not an absolute rule for the court has

a discretion to allow new matter in a replying affidavit, giving the respondent the opportunity to deal with it in a second set of answering affidavits. [145] 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. [146] 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 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. [147] 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. [148] 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. [149]

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. [150]

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. [151]

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* [152] 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* [153] 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* …'

'May in its discretion permit the filing of further affidavits.' There are normally three sets of affidavits in motion proceedings. [154] 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. [155] 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. [156] It has been held [157] 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. [158] It is only in exceptional

circumstances that a fourth set of affidavits will be received. [159] Special circumstances may exist where something unexpected or new emerged from the applicant's replying affidavit. [160]

It is essentially a question of fairness to both sides as to whether or not further sets of affidavits should be permitted. [161] 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, [162] 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*. [163]

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. [164] If the court is satisfied on these points it will generally incline towards allowing the affidavits to be filed. [165]

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. [166]

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. [167]

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. [168] 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. [169]

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. [170]

The applicant is *dominus litis* and, in selecting a date, need not consult the respondent. [171]

Subrule (5)*(g)*: 'Where an application cannot properly be decided on affidavit.' 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. [172]

If in such a case the court is satisfied as to the inherent credibility [173] 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. [174]

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. [175] 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. [176] 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. [177] It is undesirable that a court *mero motu* orders a referral to oral evidence. [178]

The ambit of the subrule is not restricted to cases where oral evidence is called for to resolve disputes of fact. [179] 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. [180] 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. [181]

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. [182] The court will, however, refuse such an application where evidence is requested to be given in circumstances which amounted to a fishing expedition. [183]

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. [184]

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. [185]

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. [186] 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. [187]

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. [188]

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. 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. [189]

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. [190]

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*: [191]

(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. [192] In every case the court must examine an alleged dispute of fact and see whether in truth there is a real [193] 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. [194] The test is a stringent one that is not easily satisfied. [195] Vague and insubstantial allegations are insufficient to raise the kind of dispute of fact that should be referred for oral evidence. [196] 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. [197] 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. [198]

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. [199] 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. [200] 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. [201]

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, [202] or that *viva voce* evidence would not disturb the balance of probabilities appearing from the affidavits. [203] 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. [204]

It has been held [205] 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: [206] 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. [207] 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. [208] 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. [209]

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. [210]

'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. [211] The three alternatives are set out in the subrule as possible courses which the court may adopt.

'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'. [212]

'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. [213] The subrule sets out three different courses which the court may adopt, [214] 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. [215] The dispute of fact must be one between the parties and not a dispute between one of the parties and his agent or representatives. [216] 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. [217]

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. [218]

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. [219]

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. [220] 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. [221] The fact that the court orders oral evidence does not enlarge the scope of the inquiry, [222] 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. [223]

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, [224] 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*. [225]

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. [226] This differs from a referral to trial. [227] 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. [228] 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. [229] 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* [230] 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. [231]

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. [232]

'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. [233] 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. [234]

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. [235]

'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. [236] In such instance it is essential that the issues be defined. [237] 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. [238]

The question whether the court has the power to order a reference 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. [239] 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. [240]

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. [241]

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. [242] 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. [243]

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. [244]

'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. [245]

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. [246] Dismissal or refusal of an application amounts to a decision in favour of the respondent. [247] 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. [248] An order of absolution is ordinarily not decisive of the issue raised; it decides nothing for or against either party. [249]

Subrule (7)*(a)*: 'Bring a counter-application.' Counter-applications are subject to the general principles applicable to applications. [250] 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. [251]

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. [252]

A counter-application need not be served by the sheriff since there is already an attorney of record for the applicant (respondent in reconvention) [253] and a notice of motion would seem to be unnecessary.

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. [254]

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. [255] See, in this regard, the *excursus* to rule 41 sv '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. [256] 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. [257] This is recognized by implication in this subrule and in subrule (13) of this rule. [258] 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. [259] The procedure must be considered in conjunction with the provisions of subrule (12). [260] 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. [261]

Procedure by way of rule *nisi* in review proceedings is considered in the notes to rule 53(1) sv '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). [262] See further the notes to rule 27(4) sv 'A rule *nisi* has been discharged by default of appearance' below.

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. [263]

Subrule (9): 'A copy of every application … must … 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. [264] The subrule does not apply to an application for relief of a temporary nature. [265]

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) sv '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. [266] 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. [267]

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, [268] *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 [269] and paragraph 37 of the Consolidated Practice Notes of the Western Cape Division of the High Court, Cape Town. [270]

'May be brought on notice.' 'Notice' in this subrule does not mean notice of motion. [271] 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. [272]

The provisions of the rules relating to the time for filing answering and replying affidavits do not apply to interlocutory applications. [273] 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). [274]

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. [275]

An application to strike out is an interlocutory application. [276]

Subrule (12)*(a)*: 'Urgent applications.' 'Urgency' in urgent applications, which are not *ex parte* applications under rule 6(4), involves mainly the abridgment of times prescribed by the rules and, secondarily, the departure from established filing and sitting times of the court. [277]

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). [278]

In urgent applications the applicant must show that he will not otherwise be afforded substantial redress at a hearing in due course. [279]

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. [280] 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. [281]

There are degrees of urgency. 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. [282] In the Western Cape Division of the High Court, Cape Town, a semi-urgent roll is operated alongside the ordinary (ie 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. [283] In the Gauteng Division of the High Court, Pretoria, and the Gauteng Local Division of the High Court, Johannesburg, the divergence arising from different degrees of urgency is dealt with by different times of set down. [284]

The degree of relaxation of the rules and of the ordinary practice of the court depends upon the degree of urgency of a case. [285] Cases of extreme urgency may be proceeded with at once, even if that be at night or during a weekend. [286] 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* [287] 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: [288]

> '[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.'

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. [289] 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. [290]

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* [291] the Supreme Court of Appeal stated: [292]

'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. [293] 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* [294] it was held [295] 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. The appropriate order under such circumstances is to strike the application from the roll. [296] That enables the applicant to set the matter down again on proper notice and compliance with the rules. [297]

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. [298]

'The court or a judge.' As to the meaning of the words 'court' and 'judge', see rule 1 above. [299]

'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. [300] 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. [301]

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. [302] The applicant must, of course, ask that his non-compliance with the rules be condoned. [303] 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. [304]

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. [305] 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. [306]

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. [307] In such cases the use of Form 2 may suffice. [308]

In appropriate circumstances a rule *nisi* may be sought by way of urgent application. [309] 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. [310]

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. [311]

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. [312]

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 sv 'Search and Seizure: Orders for the Preservation of Evidence (Anton Piller Orders)' in Part D8 below.

Subrule (12)*(b)*: 'Must set forth explicitly the circumstances ... which render the matter urgent.' 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. [313]

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. [314]

'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 [315] to mean that it does not require that the notice referred to therein should be accompanied by affidavits. 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. [316]

'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. [317]

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. [318]

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. [319] 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. [320] 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. [321]

It has been held [322] 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. [323] 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. [324]

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. [325]

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'. [326] 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. [327]

The application must be on notice in terms of subrule (11). [328] The application must clearly indicate the passages to which objection is taken and set out the grounds of objection shortly. [329]

The application should be set down for hearing at the same time as the hearing of the main application. [330] 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. [331]

The use of the word 'may' indicates that the court has a discretion in an application to strike out matter from an affidavit. [332]

'Any matter which is scandalous, vexatious or irrelevant.' The meaning of these terms has been stated as follows: [333]

(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. [334]

The subrule is not exhaustive of the grounds upon which an application to strike out matter from an affidavit may be brought. [335] The following can be struck out:

(a) Inadmissible evidence — e g privileged communications [336] and hearsay evidence, [337] 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). [338] Such an application is in essence an objection against the admission of

evidence which is only made at the hearing of the main application. [339] Hearsay statements in affidavits can, therefore, be struck out irrespective of whether or not there is prejudice. [340]

(b) Argument. [341]

(c) Attacks on credibility. [342]

(d) New matter (if the affidavit in question is a replying affidavit). [343]

'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. [344]

'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. [345] The procedure for striking out was not intended to be utilized to make technical objections which merely increase costs. [346] 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. [347] Scandalous or irrelevant matter may be defamatory of the other party and the retention of such matter will therefore be prejudicial to such party. [348]

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

1 For proposed amendments to rule 6, see Price 'Civil court rules — open to abuse?' 2013 (August) *De Rebus* 29–31.

2 See, in general, Volume 3, Parts F–N.

3 Subrule (2).

4 Subrule (4)*(a)*.

5 Subrule (11).

6 See the notes sv 'May be brought on notice' to subrule (11) below.

7 See the notes to subrule (12) below.

8 Subrule (12)*(a)*.

9 Subrule (12)*(a)*.

10 *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.

11 2016 (1) SA 78 (GJ).

12 At 85D–F.

13 *Ex parte Satbel (Edms) Bpk: In re Meyer v Satbel (Edms) Bpk* 1984 (4) SA 347 (W) at 362G.

14 *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.

15 2014 (3) SA 265 (GP).

16 At 289E–290A.

17 *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.

18 *Brian Kahn Inc v Samsudin* 2012 (3) SA 310 (GSJ) at 313B–C.

19 *Brian Kahn Inc v Samsudin* 2012 (3) SA 310 (GSJ) at 313C.

20 *Brian Kahn Inc v Samsudin* 2012 (3) SA 310 (GSJ) at 313B–C.

21 *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.

22 *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.

23 2016 (3) SA 417 (GJ).

24 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).

25 1949 (3) SA 1155 (T).

26 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).

27 Both Form 2 and Form 2*(a)* bear the heading 'Notice of Motion'.

28 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'.

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

30 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.

31 Section 194; and see *S v Thurston* 1968 (3) SA 284 (A).

32 *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.

33 *Leith NO and Heath NO v Fraser* 1952 (2) SA 33 (O) at 36B.

34 *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).

35 *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.

36 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).

37 *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; 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 (*Evelth 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)).

38 *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C) at 351H.

39 *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C) at 352A; *Pretoria City Council v Meerlust Investments (Pty) Ltd* 1962 (1) SA 321 (A) at 325E; *Poolquip Industries (Pty) Ltd v Griffin* 1978 (4) SA 353 (W) at 356E; *Congress of Traditional Leaders of South Africa v Minister of the Executive Council for Local Government and Housing, Eastern Cape Province, and Others* 1996 (2) SA 898 (TkS) at 902E–903A.

40 *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C) at 352A. See also *Geldenhuis Deep Limited v Superior Trading Company Ltd* 1934 WLD 117; *Thelma Court Flats (Pty) Ltd v McSwigin* 1954 (3) SA 457 (C) at 461A–E; *Hocken v Union Trawling Co* 1959 (2) SA 250 (N) at 252G; *Dowson & Dobson Ltd v Evans & Kerns (Pty) Ltd* 1973 (4) SA 136 (E) at 138A; *Poolquip Industries (Pty) Ltd v Griffin* 1978 (4) SA 353 (W) at 356E; *South West Africa National Union v Tjorongoro* 1985 (1) SA 376 (SWA) at 381D; *Nahrungsmittel GmbH v Otto* 1991 (4) SA 414 (C) at 418C; *Tattersall v Nedcor Bank Ltd* 1995 (3) SA 222 (A) at 228F–229C; *Graham v Park Mews Body Corporate* 2012 (1) SA 355 (WCC) at 360C–G. It has been doubted whether the doctrine of unanimous consent ought to be applied with regard to participation in legal proceedings by a company (*L Taylor & Kie (Edms) Bpk v Grabe* 1976 (3) SA 75 (T) at 77D).

41 *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 579H–I.

42 *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 580D–E.

43 *Thelma Court Flats (Pty) Ltd v McSwigin* 1954 (3) SA 457 (C); *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C); *Shell Company of SA v Vivier Motors (Pty) Ltd* 1959 (3) SA 971 (W); *Poolquip Industries (Pty) Ltd v Griffin* 1978 (4) SA 353 (W); *Tattersall v Nedcor Bank Ltd* 1995 (3) SA 222 (A) at 228F–H; *Cekeshe v Premier, Eastern Cape* 1998 (4) SA 935 (Tk) at 952A–B; *Plettenberg Bay Country Club v Bitou Municipality* [2006] 4 All SA 395 (C) at 398*f–g*; *Msunduzi Municipality v Natal Joint Municipal Pension/Provident Fund* 2007 (1) SA 142 (N) at 147F–I; *Graham v Park Mews Body Corporate* 2012 (1) SA 355 (WCC) at 360C–G.

44 *Moosa and Cassim NNO v Community Development Board* 1990 (3) SA 175 (A) at 180H–181C; *Fairways Mall v SA Commercial Catering and Allied Workers Union* 1999 (3) SA 752 (W) at 758C–H.

45 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) 399c; *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.

46 *Van Staden and Others NNO v Pro-Wiz (Pty) Ltd* (unreported, SCA case no 412/2018 dated 8 March 2019) at paragraph [13].

47 *Van Staden and Others NNO v Pro-Wiz (Pty) Ltd* (unreported, SCA case no 412/2018 dated 8 March 2019) at paragraph [13].

48 *Van Staden and Others NNO v Pro-Wiz (Pty) Ltd* (unreported, SCA case no 412/2018 dated 8 March 2019) at paragraph [13].

49 *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.

50 *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; *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).

51 See the notes to rule 6 s v 'General' above.

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

53 *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. See also *Molusi v Voges NO* [2015] 3 All SA 131 (SCA) at paragraphs [20] and [39].

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

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

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

57 2016 (1) SA 78 (GJ).

58 At 88B–89H.

59 *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. 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).

60 2013 (4) SA 519 (WCC) at 532B.

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

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

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

64 2017 (1) SA 533 (GJ).

65 At 541A–B.

66 At 538C–540B.

67 At 540B–541A (footnotes omitted).

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

69 *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.

70 *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).

71 *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 trite law 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).

72 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. 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). See also, in general, De Vos 1989 *TSAR* 231; Schutte (1991) 54 *THRHR* 495; De Vos & Van der Merwe (1993) 4 *Stell LR* 3.

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

74 *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.

75 *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. 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 …'

76 *Minister of Land Affairs and Agriculture v D&F Wevell Trust* 2008 (2) SA 184 (SCA) at 200D.

77 *Minister of Land Affairs and Agriculture v D&F Wevell Trust* 2008 (2) SA 184 (SCA) at 200E.

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

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

80 *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.

81 *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.

82 *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.

83 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)).

84 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.

85 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.

86 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.

87 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).

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

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

90 *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 *Simross Vintners (Pty) Ltd v Vermeulen* 1978 (1) SA 779 (T) at 783A, approved in *Sizwe Development v Auditor General, Transkei* 1991 (1) SA 291 (TkGD) at 292I, 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.

91 See Herbstein & Van Winsen *Civil Practice* vol 1 290; *Mynhardt v Mynhardt* 1986 (1) SA 456 (T) at 458H–I.

92 See subrule (2) above.

93 *Universal City Studios Inc v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) at 753C.

94 *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. See further the notes to subrules (8) and (12) below.

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

96 *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.

97 *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 Division of the High Court, Johannesburg (see paragraph 10.11.1 of the *Practice Manual* of that division 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.

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

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

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

101 *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.

102 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 confirmed 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.

103 *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.

104 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.

105 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.

106 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).

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

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

109 *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).

110 1979 (4) SA 342 (W). See also *Moila v Fitzgerald* [2007] 4 All SA 909 (T) at 921*f–g*.

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

112 *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.

113 *Port Nolloth Municipality v Xhalisa* 1991 (3) SA 98 (C) at 112D–F.

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

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

116 *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.

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

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

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

120 See the notes to s 24 of the Superior Courts Act 10 of 2013 s v 'Civil summons' in Volume 1, Part A2.

121 In terms of rule 27(3).

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

123 By GN R2410 of September 1991.

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

125 *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.

126 *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.

127 *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.

128 *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.

129 *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.

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

131 *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).

132 *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.

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

134 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).

135 *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.

136 *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.

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

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

139 *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.

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

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

142 2019 (3) SA 97 (SCA).

143 At 106C–J.

144 *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. See also the notes to subrule (1) s v 'The facts upon which the applicant relies for relief' above.

145 *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 Ban*k 2018 (4) SA 443 (SCA) at 448D–F. 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.

146 *Mostert v FirstRand Bank Ltd t/a RMB Private Bank* 2018 (4) SA 443 (SCA) at 448F–G.

147 *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.

148 *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.

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

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

151 *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.

152 2003 (6) SA 407 (SCA) at 439G–H.

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

154 See, *inter alia*, *Standard Bank of SA Ltd v Sewpersadh* 2005 (4) SA 148 (C) at 153G–H.

155 *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.

156 *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. See also *Waltloo Meat and Chicken SA (Pty) Ltd v Silvy Luis (Pty) Ltd* 2008 (5) SA 461 (T) at 472H–472J.

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

158 *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.

159 *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.

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

161 *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.

162 *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.

163 2009 (5) SA 629 (W) at 641G–642D.

164 *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. See also *Kootbodien v Mitchell's Plain Electrical Plumbing & Building CC* 2011 (4) SA 624 (WCC) at 627C–E.

165 *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.

166 *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. In *Pangbourne Properties Ltd v Pulse Moving CC* 2013 (3) SA 140 (GSJ) the respondents filed their answering affidavits approximatley 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.

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

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

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

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

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

172 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 (C) 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 Univerity Press Southern Africa (Pty) Ltd* 2017 (2) SA 1 (SCA) at 17I–18B.

173 *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.

174 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. 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.

175 *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.

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

177 *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].

178 *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.

179 *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.

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

181 *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.

182 *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.

183 *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.

184 *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 …'

185 *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.

186 *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.

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

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

189 *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.

190 *Moosa Bros & Sons (Pty) Ltd v Rajah* 1975 (4) SA 87 (D) at 91D.

191 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.

192 *Lombaard v Droprop CC* 2010 (5) SA 1 (SCA) at 10A–D.

193 *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; *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); '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). 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 118 (N) 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*.

194 *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).

195 *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.

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

197 *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.

198 *Prinsloo NO v Goldex 15 (Pty) Ltd* 2014 (5) SA 297 (SCA) at 304A–C.

199 *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 Company (Pty) Ltd v Northern Cape Tour & Charter Service CC* [2001] 1 All SA 118 (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. 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.

200 *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.

201 *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.

202 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 Univerity 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].

203 *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* 1991 (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 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.

204 *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.

205 *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd* 2011 (1) SA 8 (SCA) at 14D–F.

206 *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.

207 *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.

208 *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.

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

210 *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.

211 *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.

212 *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.

213 *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.

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

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

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

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

218 *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.

219 *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.

220 *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 Gwano* 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).

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

222 *Wepener v Norton* 1949 (1) SA 657 (W) at 659; *Drummond v Drummond* 1979 (1) SA 161 (A) at 170H.

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

224 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.

225 *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.

226 *Lekup Prop Co No 4 (Pty) Ltd v Wright* 2012 (5) SA 246 (SCA) at 258H–I.

227 *Lekup Prop Co No 4 (Pty) Ltd v Wright* 2012 (5) SA 246 (SCA) at 258H.

228 *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*.

229 *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*.

230 2014 (4) SA 614 (SCA) at 620C–621C.

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

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

233 *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.

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

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

236 *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.

237 *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.

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

239 *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.

240 *Lekup Prop Co No 4 (Pty) Ltd v Wright* 2012 (5) SA 246 (SCA) at 258E–I.

241 *Gray v Goodwood Municipality* 1943 CPD 78.

242 *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.

243 *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.

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

245 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.

246 *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.

247 *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; 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.

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

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

250 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).

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

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

253 Rule 4(1)*(aA)*.

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

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

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

257 The term 'rule *nisi*' is derived from the English law and practice, and the rule may be defined as an order by a court issued at the instance of the applicant and calling upon another party to show cause before the court on a particular day why the relief applied for should not be granted. 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).

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

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

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

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

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

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

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

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

266 *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'.

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

268 See Volume 3, Part F1.

269 In Volume 3, Part L1.

270 In Volume 3, Part N1.

271 *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 Lewensverseke-ringsmaatskappy Bpk v Louw NO* 1981 (4) SA 329 (O) at 332G.

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

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

274 *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.

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

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

277 *Luna Meubel Vervaardigers (Edms) Bpk v Makin (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) at 136H. See, in general, 2003 (August) *De Rebus* 32; and see the Memorandum to Practitioners re the Procedure in the Pretoria Urgent Motion Court (ie 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.

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

279 *Luna Meubel Vervaardigers (Edms) Bpk v Makin (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) at 137F; *AG v DG* 2017 (2) SA 409 (GJ) at 412A.

280 *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).

281 *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. 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).

282 *Prinsloo v RCP Media Ltd t/a Rapport* 2003 (4) SA 456 (T) at 462B–F.

283 *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.

284 *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 (ie 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 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.

285 *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. 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.

286 *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.

287 2016 (2) SA 561 (GJ).

288 At 571C–573B (footnotes omitted).

289 *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).

290 *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.

291 2016 (3) SA 143 (SCA).

292 At 150H–151D.

293 *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.

294 2016 (3) SA 143 (SCA).

295 At 152G–H.

296 *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. 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). 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).

297 *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.

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

299 Rule 1.

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

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

302 *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.

303 *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.

304 *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).

305 *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.

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

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

308 *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.

309 *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).

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

311 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. 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.

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

313 *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.

314 *ISDN Solutions (Pty) Ltd v CSDN Solutions CC* 1996 (4) SA 484 (W) at 486 (H); 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.

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

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

317 *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.

318 *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.

319 *Oosthuizen v Mijs* 2009 (6) SA 266 (W) at 267E–269I and the authorities there cited, not following *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. 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) the court, 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 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.'

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

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

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

323 *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. 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.

324 *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.

325 *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.

326 *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.

327 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.

328 *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O) at 755A; *Wiese v Joubert* 1983 (4) SA 182 (O) at 197D.

329 *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*.

330 *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.

331 *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.

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

333 *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. See also *Broode NO v Maposa* 2018 (3) SA 129 (WCC) at 140A–C.

334 On the meaning of 'irrelevant', see further *Meintjies 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. 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).

335 *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. 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.

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

337 *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.

338 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).

339 *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.

340 *Cultura 2000 v Government of the Republic of Namibia* 1993 (2) SA 12 (Nm) at 27H.

341 *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.

342 *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.

343 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.

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

345 *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 516g–h; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 308B; *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)).

346 *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.

347 *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.

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