PRACTICE MANUAL OF THE KWAZULU-NATAL DIVISION OF THE HIGH COURT

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PRACTICE MANUAL OF THE KWAZULU-NATAL DIVISION OF THE HIGH COURT

1. Introduction

This is an attempt to consolidate into one document the rules of practice of this Division. Much of it will be repetition of what has gone before. Judges President in the past have issued practice directives and where they are still applicable these will simply be incorporated herein. Where we have felt it necessary to modify or even change a rule of practice we have indicated this in the text. Changes have taken place since some of these past directives. One that comes to mind is the Rule of Court which permits the registrar to grant default judgment in respect of liquidated claims.[1] That has significantly reduced the number of cases on the daily motion court rolls. However, the previous directives are still of application in regard to issues such as, for example, the sufficiency of allegations in a simple summons.

What is meant by the practice of the Court? This deals essentially with the daily functioning of the courts. It sets forth how we in KZN do things. Obviously it does not seek to override the Rules of Court which of course have the force of law. Practice directions supplement the Rules. They are intended to act as a ruling in advance, as it were, by all the judges of the Division as to how they expect things to be done and what is expected of practitioners.

Judges are however not bound by practice directives. While we obviously strive to achieve uniformity it must clearly be understood that these directives cannot fetter the exercise of a judge's discretion and in an appropriate case he/she may be persuaded to relax or change a practice of the Court. We envisage that this will only arise in exceptional circumstances. If a judge does depart from a particular practice this will not be regarded as a modification of the practice. Changes can only come about if this is done with the **authority of the Judge President in consultation with the other judges of the Division**.

[1] See Rule 31(5) of the Uniform Rules.

2. Service of Process[2]

2.1. On Company or Corporation[3]

Where service is effected by affixing the process to the principal door at the registered office of a company the Sheriff must state in his return that he ascertained that there was a board at the office indicating that this was indeed the registered office of the company. In the absence of such indication practitioners must present to the court or the registrar the form CM22 issued by the registrar of companies to prove the efficacy of the service.[4]

2.2 Service at *domicilium citandi et executandi*[5]

Apart from making the allegation that the address in question is the chosen *domicilium* practitioners are required to produce to the court or the registrar when service is proved a copy of the document wherein the defendant chose such *domicilium*. In many instances this document will probably form part of the application or action but there will be cases where a simple summons makes the bare allegation.[6]

Rule 4(10) makes it clear that the court has a discretion whether to accept service at a *domicilium* as good service. Whether such service will be accepted as good service will depend on the particular facts of each case. There is, however, no rule of practice to suggest that such service is ordinarily not good or effective service. In most case it will be regarded as good service.[7]

2.3 Where an application for default judgment is made six months after the date of service of the summons, it is both the practice of the registrar's office and the Court to require that a notice of set down be served on the defendant informing him/her that such default judgment will be sought on a given date and time,[8] such date and time being not less than five days from the date of the notice.

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[2] Rule 4.
[3] Rule 4(1)*(a)*(vii).
[4] This is a change to the existing practice.
[5] Rule 4(1)*(a)*(iv) of the Uniform Rules.
[6] This is a change to the existing practice.
[7] Judge President's memorandum 14 July 1982.
[8] New practice.

3. Filing of Returns[9]

Returns of service must be filed timeously. It is the duty of the attorney to ensure that the Sheriff's return of service (or where informal service has been effected, proof of such service) is in the judge's papers before they are sent to the judge's chambers. This also applies to newspaper tearsheets in cases where, for example, service has been effected by substituted service and where publication has been ordered in winding up proceedings. If for some reason, the return or other proof of service cannot be filed timeously then an explanation must be included in the judge's papers. In future, the papers will not be read in the absence of the return of proof of service or a satisfactory explanation for the absence of such documents.

4. The Short Form of Summons

Rule 17(2)*(b)* provides that where a claim is for a debt or liquidated demand the summons shall be as near as may be in accordance with form 9 of the first schedule. The following rules of practice apply in relation to the sufficiency of allegations in the summons.

- The court cannot have regard to returns of service to determine whether it has jurisdiction. The averments necessary to establish jurisdiction must be made in the summons. Adjournments will however be granted to effect the necessary amendments,[10] subject, of course, to questions of wasted costs which may arise.
- An allegation in a summons that a natural person is “of” a certain address, will be regarded as a sufficient allegation that that is his place of residence, but an allegation that a person is “care of” a certain residence will not.
- An allegation that an artificial person is “of” a certain address will not be regarded as an allegation that that is its registered office or principal place of business.
- Where in actions other than divorce actions, the summons states that “the whole cause of action arose within the area of jurisdiction of this honourable court”, that will be regarded as a sufficient allegation.
- The summons must make it clear whether the claim is for a debt or liquidated demand or a claim for damages and contains the allegations that the cases have established as being necessary.

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[9] Judge President’s memorandum 14 July 1982.
[10] Judge President’s memorandum 14 July 1982.

- An allegation that a claim is for "the price of goods sold and delivered" will be regarded as a sufficient description of the cause of action. Likewise an allegation that the amount claimed is "in respect of goods sold and delivered" is sufficient.[11]
- Where the cause of action is founded on a deed of suretyship it is necessary to set out the cause of action giving rise to the original debt. (It is not necessary to annex the suretyship agreement to a simple summons. In summary judgment proceedings it will be necessary to do so if the document is in fact a liquid document.

5. *Mora* Interest

A court making an order for the payment of interest can only decide if the rate is lawful at the date of judgment and make an order accordingly. Furthermore, interest at the rate laid down in Act No. 55 of 1975 can only be ordered if there is no agreement as to the rate of interest.[12]

When *mora* interest is claimed on a dishonoured cheque, the date of presentment must be alleged in the summons; if this is not done, interest will run only from the date of service of the summons.

6. Bank Overdraft Interest

Where the agreement between banker and customer provides that interest will be paid at the "current overdraft rate" and there has been a change in the rate of interest since the date of issue of the summons an employee of the bank is required to put up a certificate setting out all relevant changes in the overdraft rate since the date of issue of summons as well as dates upon which such changes occurred.[13]

7. Confession to Judgment[14]

Where application is made through the registrar for the entry of judgment in terms of a confession, the party submitting same is required to depose to an affidavit which shall set forth all payments made subsequent to the execution of the confession and demonstrate how the

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[11] Judge President's memorandum 15 December 1986.
[12] Judge President's memorandum 15 December 1986.
[13] Judge President's memorandum 15 December 1986.
[14] Rule 31(1)*(c)* of the Uniform Rules.

capital and interest claimed is calculated. In addition such affidavit shall also very briefly set out the nature of the default that gave rise to the plaintiff's entitlement to lodge the confession[15] and any reason for the delay in submitting the confession.

8. Application Procedure[16]

8.1 Introduction

There are fundamentally three categories of Applications:

8.1.1 *Ex parte* applications, which are catered for in Rule 6(4)*(a)*, read with Form 2 of the first schedule. Here the applicant gives notice to the Registrar in what is termed “a short form of notice of motion”. In sequestration and winding up proceedings where the applicant relies on an act of insolvency or inability to pay debts and is able to produce documentary evidence of such inability e.g. a letter or balance sheet, the application may be brought ex parte without notice. This is a practice of long standing in this division.[17] In winding up proceedings an amendment to the Companies Act and the Insolvency Act[18] requires inter alia that the applicant “must furnish the company or the debtor, whatever the case may be, with a copy of the application unless the court in the exercise of its discretion dispenses with this after being satisfied that it would be in the interests of the creditors and the debtor to do so.” We do not consider that this amendment detracts from the aforesaid practice. The furnishing of the copy of the application is intended to take place informally.[19] It is envisaged that in the majority of cases the applicant will make out a case to dispense with the provision.

8.1.1.1 This Division adheres to the practice laid down in *Ex parte Three Sisters (Pty) Ltd*[20] which is set forth as follows:[21]

“Whatever a company's reason may be for wanting to be wound up in terms of s 344*(a)* of the Companies Act 61 of 1973, and irrespective of whether or not its liabilities exceed the

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[15] This is a new practice directive although we are aware that some judges in the past have followed this procedure.
[16] Rule 6 of the Uniform Rules.
[17] See *Collective Investments (Pty) Ltd v Brink and another* 1978 (2) SA 252 (N), especially at 254 and 255. See also Judge President’s memorandum dated 15 December 1986.
[18] Sub-section (4A) inserted into both Acts by Act No 69 of 2002.
[19] See sub-section (4A)*(b)* of Act 69 of 2002.
[20] *Ex parte Three Sisters (Pty) Ltd* 1986 (1) SA 592 (D).
[21] Headnote *Ex parte Three Sisters* supra.

> value of its assets, creditors of the company have a very real interest in its continued existence or demise, and the Court should ensure, in so far as it is able to, that they are not prejudiced. The most effective way of doing this is to require that creditors be given notice of the application, and at a stage which would afford them the opportunity of voicing their objection to the grant of a provisional winding-up order, since even the grant of such an order has the potential of prejudicing them. Creditors need only be given informal notice (eg by pre-paid registered post) of the nature of the application and of the date of hearing, together with an intimation that the papers are available for inspection at the offices of the plaintiff's attorneys."

8.1.2 Interlocutory applications and other applications incidental to pending proceedings can be brought on notice supported by such affidavits as the case may require.[22] Here the KZN practice is that a short form of notice of motion is also used.

8.1.3 Every application other than the above must be brought in terms of Rule 6(5)*(a)* using a notice of motion in accordance with Form 2*(a)* of the first schedule. KZN practitioners have over the years not adhered strictly to this rule and the judges of this Division encounter numerous instances where the short form of notice of motion is incorrectly used and applications are set down for hearing on short notice. The time periods and format of the long form of notice of motion can only be abridged or dispensed with altogether where the application is one of urgency and a proper case is made out therefor in the founding affidavit.[23] This also includes service of process. Service is effected by the sheriff.[24] So-called "informal service": by fax, post and the like will only be condoned in extremely urgent applications where a case is made out therefore in the founding affidavit. A failure to comply with the above may result in the application being struck off the roll.

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[22] Rule 6(11) of the Uniform Rules.
[23] Rule 6(12)*(a)* and *(b)* of the Uniform Rules; see *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 782.
[24] See Rule 4(1)*(a)* of the Uniform Rules: "Service of any process of the court directed to the sheriff and subject to the provisions of paragraph *(aA)* any document initiating application proceedings shall be effected by the sheriff. . .".

9. Opposed Applications

Apart from opposed applications that are governed by Rule 6(5) insofar as the time periods for delivery of affidavits and the like are concerned, judges presiding in the motion court are very often asked to adjourn applications which have become opposed and to issue directions in regard to the filing of further affidavits. Generally speaking these would be applications brought before the court as a matter of urgency. Many judges of this Division have expressed concern about the frequent adjournments that are sought during process of exchanging affidavits prior to the application being placed on the opposed roll. The practice that will be followed henceforth is as follows:[25]

9.1 Where the parties agree to the dates for exchanging of affidavits, the judge shall issue such directions and then adjourn the case to a date to be arranged with the registrar. If a rule nisi is in force the rule will be extended to the date when the application is finally disposed of.

Where the parties do not agree the judge after hearing both parties shall issue the necessary directions.

If the judge is satisfied that the application ought to receive preference, he may direct the registrar to accord the matter such preference as she/he is able. If the applicant wishes to seek interim relief pending the opposed hearing, and the matter cannot be accommodated or placed (with due regard to the delivery of a Certificate of Urgency) on the ordinary motion court roll, representations shall be made to the senior civil judge on duty to give the necessary directions for an urgent hearing. Those representations shall, where possible, include the recommendations of the judge seized with the matter in motion court.

9.2 The registrar will not allocate a date for hearing on the opposed roll unless the applicant or his attorney certifies in writing that the application is ripe for hearing, that is to say, that all the affidavits have been delivered. A matter shall be deemed to be ripe for hearing where the applicant has not delivered a replying affidavit within the time specified in Rule 6(5) or on the date agreed or directed by the court as the case may be.

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[25] New Practice.

9.3 Where the respondent fails to deliver an answering affidavit the applicant may reinstate the matter on the unopposed roll to move for the relief claimed on notice given to the registrar and the respondent before noon on the court day but one preceding the day upon which the same is to be heard.

9.4 The following practice direction is in force in regard to opposed motions both in Pietermaritzburg and Durban:[26]

9.4.1 The applicant, excipient or plaintiff in opposed motions, exceptions and provisional sentence proceedings shall not less than ten clear court days before the day of the hearing deliver concise heads of argument (which shall be no longer than five pages ("the short heads")) and not less than seven clear court days before the hearing the respondent or defendant shall do likewise. The heads should indicate the issues, the essence of the party's contention on each point and the authorities sought to be relied upon. The parties may deliver fuller, more comprehensive heads of argument provided these are delivered simultaneously with the short heads. Except in exceptional circumstances, and on good cause shown, the parties will not be permitted to deliver additional heads of argument.

The heads of argument shall be delivered under cover of a typed note indicating:

(a) the name and number of the matter;
(b) the nature of the relief sought;
(c) the issue or issues that require determination;
(d) the incidence of the onus of proof;
(e) a brief summary (not more than 100 words) of the facts that are common cause or not in dispute;
(f) whether any material dispute of fact exists and list of such disputed facts;
(g) a list reflecting those parts of the papers, in the opinion of counsel, are necessary for the determination of the matter;
(h) a brief summary (not more than 100 words) of the argument;
(i) a list of those authorities to which particular reference will be made;

[26] Practice Directive 9.4 amendment came into effect on 1 March 2017.

(j) in appropriate cases the applicant, excipient or plaintiff must annex to the note a chronology table, duly cross-referenced, without argument;

(k) if the respondent or defendant disputes the correctness of the chronology table in a material respect, the respondent's or defendant's heads of argument must have annexed thereto the respondent's or defendant's version of the chronology table.

9.4.2 By no later than noon three court days before the day of hearing the applicant, excipient or plaintiff shall notify the registrar in writing whether the matter will be argued, and if not what alternative relief (for example postponement, referral to evidence, etc.) will be sought, in which case the notification shall be accompanied by a draft setting out the Order to be sought.

9.4.3 Unless condonation is granted on good cause shown by way of written application, failure on the part of the applicant, excipient or plaintiff to comply with the provisions of paras 9.4.1. and 9.4.2. hereof will result in the matter being struck from the roll with an appropriate order as to costs; and failure on the part of the respondent or defendant to comply with the said provisions will result in the court making such order as it deems fit, including an appropriate order as to costs.

9.4.4 If any of the aforesaid matters is of such a nature by reason of the volume of the record or the research involved or otherwise that the judge allocated to hear the matter would, in order to prepare for the hearing, reasonably need to receive the papers earlier than he or she would normally do, the applicant, excipient or plaintiff (as the case may be) shall notify the Registrar in writing to that effect not less than ten clear court days before the day of the hearing. Failure to do so could result in the matter not being heard on the allocated day. Practitioners are advised to use their own discretion in interpreting this sub-rule but in the ordinary course it ought to apply to all matters where the record exceeds approximately 200 pages (including annexures).

9.4.5 The papers in all opposed motions shall be secured in separate conveniently sized and clearly identified volumes of approximately 100 pages each. Each volume shall

be secured at the top left-hand corner in a manner that shall ensure that the volume will remain securely bound upon repeated opening and closing and that it will remain open without any manual or other restraint. Ring binders and lever-arch files are to be avoided if at all possible.

9.4.6 Counsel are reminded of the *dicta* in *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd and another* 1998 (3) SA 938 (SCA) at 955B-F. Harms JA said:

"[37] There also appears to be a misconception about the function and form of heads of argument. The Rules of this Court require the filing of main heads of argument. The operative words are "main", "heads" and "argument". "Main" refers to the most important part of the argument. "Heads" means "points", not a dissertation. Lastly, "argument" involves a process of reasoning which must be set out in the heads. A recital of the facts and quotations from authorities do not amount to argument. By way of a reminder I wish to quote from *Van der Westhuizen NO v United Democratic Front* 1989 (2) SA 242 (A) at 252B--G:

> "There is a growing tendency in this Court for counsel to incorporate quotations from the evidence, from the Court a quo's judgment and from the authorities on which they rely, in their heads of argument. I have no doubt that these quotations are intended for the convenience of the Court but they seldom serve that purpose and usually only add to the Court's burden. What is more important is the effect which this practice has on the costs in civil cases. . . . Superfluous matter should therefore be omitted and, although all quotations can obviously not be eliminated, they should be kept within reasonable bounds. Counsel will be well advised to bear in mind that Rule 8 of the Rules of this Court requires no more that the main heads of argument. . . . The heads abound with unnecessary quotations from the record and from the authorities. They reveal, moreover, another disturbing feature which is that the typing on many pages does not cover the full page. . . . Had the heads been properly drawn and typed I do not think more than 20 pages would have been required. The costs cannot be permitted to be increased in this manner and an order will therefore be made to ensure that the respondent does not become liable for more than what was reasonably necessary."

[38] Practitioners should note that a failure to give proper attention to the requirements of the practice note and the heads might result in the disallowance of part of their fees."

9.4.7 Counsel's names and contact details, including cell phone numbers, must appear on the heads of argument.

9.5 This direction does not apply to Rule 43 proceedings.

10. Urgent Applications

10.1 Apart from a certificate of urgency (which practitioners are reminded is not a mere formality: in appropriate cases the signatories of such certificates may be ordered to pay costs *de bonis propriis*) which in specific terms records that the matter is of such a nature that relief has to be obtained forthwith and cannot await the ordinary motion court the following day, the following administrative requirements should be followed:

(a) As soon as an urgent application is in the pipeline, the registrar should be notified and an indication given as to when it is contemplated the application will be moved.

(b) This should be followed by a call every hour to keep the registrar and the duty judge apprised of the current position.

(c) If the urgent application falls away, the registrar should be told forthwith.

(d) If practitioners, in the absence of a duty registrar, go before a judge and do not obtain an order, they should immediately report this fact to the registrar.

10.2 In every urgent application (including the ordinary motion court) a draft order must be presented to the judge. If the draft is amended in chambers, practitioners must come to the assistance of the registrar's typist in order to ensure that the order is in a form where it can be issued forthwith.[27]

10.3 Where a rule nisi together with an interim interdict or other interim relief is sought as a matter of urgency the rule of practice in force is stated as follows:

[27] Judge President's memorandum 29 January 2003.

"It is not permissible to grant interim interdicts without notice to the respondent unless there is a real danger that the giving of notice will defeat the object of the interdict or it is wholly impracticable to give such notice. (It is not the practice of this Division to grant orders over the telephone save in very exceptional circumstances)".[28]

11. Practice in regard to so-called "Friendly" Sequestrations

Practitioners are reminded that the judges of this Division adhere to the practice directive laid down by P.C. Combrinck J in *Mthimkhulu v Rampersad and Another (BOE Bank Ltd. Intervening Creditor)*.[29] The judgment requires that such "friendly" sequestrations should at least comply with the following minimum requirements which are quoted in full from the judgment:[30]

"1. There must be sufficient proof of the applicant's *locus standi*. There must be facts establishing the relationship between the parties giving rise to the debt relied upon by the applicant. There must be sufficient proof of the debt in the form of a paid cheque, documentation evidencing withdrawal from a savings account or a deposit into the respondent's account at or about the time the respondent is said to have received the money. If the indebtedness arises from a written or partly written contract, a copy of the contract or the written portion must be put up, if from sale copies of invoices must be annexed.

2. Reasons must be given for the fact that the applicant has no security for the debt. A court is naturally suspicious of an unsecured loan being made to a debtor at a time when he was obviously in dire financial straits.

3. Care must be taken to put a full and complete list of the respondent's assets and in particular and more importantly, to put up acceptable evidence upon which the court can determine not what their market value is prior to sequestration but what they will realise post-sequestration at a forced sale (see in this regard the remarks of Leveson J in *Ex parte: Steenkamp and related cases (supra)*).[31] Very often a value is put to household furniture and effects and secondhand motor vehicles which bear no relationship to their true value.

4. In the case of immovable property, I consider that it is insufficient to merely put up an affidavit by a valuer who expresses an opinion as to the value of the property. The valuer

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[28] Judge President's memorandum 15 December 1986.
[29] *Mthimkhulu v Rampersad and another (BOE Bank Ltd, Intervening Creditor)* [2000] 3 All SA 512 (N).
[30] *Mthimkhulu v Rampersad and another supra* at 517.
[31] *Ex parte Steenkamp and related cases* 1996 (3) SA 822 (W).

should state why he is qualified to make the valuation, what experience he has in valuing houses in the area and give details of comparable sales on which he relies for his value. In addition he must state what he considers the house will fetch on a sale by public auction.

5. In the case of urgent applications to stay the sale-in-execution of an immovable property, full reasons must be given why the application is brought at the last moment. In addition details must be given of attempts the debtor has made to sell the property by way of private treaty.
6. Where there is a bondholder, notice of the application must be given to it.
7. Any application for the extension of a provisional order must be supported by an affidavit in which full and acceptable reasons for the extension are set out."

12. Service of and Extension of the Rule *Nisi* in Provincial Sequestration and Liquidation Applications

12.1 The general rule is that provisional sequestration orders are served personally on the respondent(s). Where the respondent happened to be present in court when the order was pronounced, it should nonetheless still be served on her/him because of the consequences which flow from such service as set out in the Insolvency Act.

12.2 Generally speaking the practice followed has been to allow one extension of the rule *nisi* in both sequestration and winding-up orders without furnishing any reason therefor. Where a subsequent extension is sought the party seeking same must lodge an affidavit to motivate the application.

13. Divorce Custody and Other Matrimonial Cases

13.1 Service of Summons:

Divorce being a matter of status personal service is required. This of course is always subject to the court's power to direct a form of substituted service.

A defendant is not permitted to waive service on the basis that he/she consents to the divorce. A judge does however have the power in his/her discretion to abridge the *dies induciae* which run after service has been effected and to allow an early set-down of the undefended action.

This of course is on the footing that the defendant is aware that the matter is to be heard and consents thereto.

13.2 Where it appears at the hearing of an undefended divorce that service was effected more than five (5) months before the date of the hearing it is the practice to require that the notice of set down be served on the defendant alternatively that the plaintiff satisfy the court by other means that the defendant is aware that the case is to be heard on that day.[32]

14. Marriage Certificates

No hard and fast practice can be laid down in regard to whether a copy of a marriage certificate is acceptable. Some judges require production of the certificates while others are prepared to receive a copy which the plaintiff swears is a true copy of the original.[33]

15. Divorce Settlement Agreements

Unlike some other Divisions it is an established and longstanding practice that the entire agreement of settlement cannot be made an order of court. The principle has been clearly enunciated by Broome JP in *Mansell v Mansell*[34] as follows:

> "For many years this Court has set its face against the making of agreements orders of Court merely on consent. We have frequently pointed out that the Court is not a registry of obligations. Where persons enter into an agreement, the obligee's remedy is to sue on it, obtain judgment and execute. If the agreement is made an order of Court, the obligee's remedy is to execute merely. The only merit in making such an agreement an order of Court is to cut out the necessity for instituting action and to enable the obligee to proceed direct to execution. When, therefore, the Court is asked to make an agreement an order of Court it must, in my opinion, look at the agreement and ask itself the question: 'Is this the sort of agreement upon which the obligee (normally the plaintiff) can proceed direct to execution?' If it is, it may well be proper for the Court to make it an order. If it is not, the Court would be stultifying itself in doing so. It is surely an elementary principle that every Court should refrain from making orders which cannot be enforced. If the plaintiff asks the Court for an order which cannot be enforced, that is a very good

[32] This is an old practice; however the 5 month provision is new.
[33] See Judge President's memorandum 14 July 1982.
[34] *Mansell v Mansell* 1953 (3) SA 716 (N) at 712B.

> reason for refusing to grant his prayer. This principle appears to me to be so obvious that it is unnecessary to cite authority for it or to give examples of its operation."

Unconditional undertakings to pay maintenance, educational, medical costs and the like as well as custody and access provisions are made orders of court in terms of the practice. An undertaking to pay the costs of the action is also included. Mere contractual obligations are not. Where a defendant has undertaken to pay a sum of money (other than maintenance) by a future date it is undesirable to enter judgment for payment of that amount against such a defendant unless he/she specifically consents in the agreement to judgment being entered against him/her. Otherwise the plaintiff should be limited to the remedy in Rule 41(4).

Where a party to a divorce agrees that the other party shall be entitled to receive a share of his pension interest when that accrues and that the fund concerned makes an endorsement in its record to that effect, the court will only make the said agreement an order of court if it is satisfied that due and timeous notice has been given to the fund in question indicating that such order will be sought. The order of court must clearly and unambiguously identify the fund in question.

16. Variation of Custody Orders

Proceeding for the variation of a custody order are to be by way of action and not by way of application save where the variation is by consent or to give legal recognition to an existing de facto variation of long standing.[35]

17. Application for a Change in the Matrimonial Regime

This Division follows the Cape practice laid down in *Ex parte Lourens et Uxor and Four Others*[36] which obviates the necessity of issuing a rule.[37]

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[35] Judge President's memorandum 15 December 1986.
[36] *Ex parte Lourens et Uxor and Four Other Similar Cases* 1986 (2) SA 291 (C).
[37] Judge President's memorandum 15 December 1986.

18. *Curators ad Litem*

Where a *curator ad litem* is to be appointed to represent the interests of minors in a dependants' claim the practice laid down in *Ex parte Bloy*[38] and *Ex parte Padachy*[39] is to be followed. This practice does not apply to applications under Rule 57 or applications where a *curator ad litem* is to be appointed to represent the interests of minor children in cases involving the interpretation of a will or trust.[40]

19. Applications to Compel Delivery of Further Particulars[41]

Only those particulars will be ordered which the court is satisfied are justified in terms of the Rules. It will no longer be permissible to avoid the question as to whether each request is so justified by arguing that all that is required is that the respondent "respond" to the request. If an order is granted for the furnishing of further particulars, the form of the order will still be that the respondent "respond" to the request (or, if only some of the particulars are justifiably sought, that the respondent respond to the questions asked in certain specified paragraphs). This form is considered correct since the defendant may, in some cases, conceivably turn out to be unable to furnish such particulars. The court must, however, be satisfied that each question is justified in terms of the Rules before ordering that the respondent respond to such question.

20. Service on the Registrar of Deeds in Applications for the Removal of Title Deed Restrictions

It is a requirement in these matters that the report of the registrar of deeds be placed before the court at the stage when an *ex parte* application for a rule *nisi* is moved in order that the court can be satisfied that the immovable properties concerned have been correctly described and that the title deed restrictions accord with the registrar's records.[42]

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[38] *Ex parte Bloy* 1984 (2) SA 410 (D).
[39] *Ex parte Padachy* 1984 (4) SA 325 (D).
[40] Judge President's memorandum dated 15 December 1986. The provision in regard to wills and trusts is set forth in a practice note issued by the society of advocates Natal.
[41] Judge President's memorandum 14 July 1982.
[42] This is a new practice.

21. Expedited Hearing

21.1 The registrar shall maintain a separate roll of cases, which shall be called 'The Expedited Roll', for hearing on an expedited basis.

21.2 The registrar shall enrol matters on the expedited roll only when directed to do so by order of court or by a judge in chambers.

21.3 In all matters to which the provisions of:

21.3.1 Uniform Rule 6(5)*(d)*(iii), or

21.3.2 Uniform Rule 6(5)*(g)*, or

21.3.3 Uniform Rule 8, or

21.3.4 Uniform Rule 32

apply and it appears to the court or the judge, as the case may be, that no substantial point of law will require determination, and/or that the whole or a substantial portion of the matter will be disposed of by evidence not lasting longer than one day, and that it is in the interests of justice to do so, the court or the judge may *mero motu*, or on the application of any of the parties on notice to the others, after considering the submissions of all the parties, direct that (referred to hereafter as "a direction" or "the direction"), subject to the provisions of this Rule, the matter be placed on the expedited roll.

21.4 In matters to which the provisions of sub-rule 3.4 of this rule apply, and unless the court or judge otherwise directs:

21.4.1 in matters requiring the filing of a declaration, the plaintiff shall file a declaration within five days of the direction being made, failing which he shall be ipso facto barred;

21.4.2 the defendant shall file a plea within five days of the direction being made or the declaration being filed, as the case may be, failing which he shall be ipso facto barred;

21.4.3 the plaintiff shall comply with the provisions of Uniform Rule 35(1), mutatis mutandis, within five days thereafter and shall simultaneously index and paginate the court file and shall serve a copy of the index on the defendant;

21.4.4 the defendant shall comply with the provisions of Uniform Rule 35(1), mutatis mutandis, within five days thereafter, save that the defendant shall not be entitled to rely upon any document at trial, which has not been so discovered, without the leave of the court;

21.4.5 the parties shall hold a pre-trial conference and shall comply with the provisions of Uniform Rule 37, mutatis mutandis, not less than five days before the hearing of the matter.

21.5 In all other matters the plaintiff or applicant, as the case may be, shall within five days of the direction being made, index and paginate the court file and shall serve a copy of the index on the other party.

21.6 Upon receipt of a notice requesting that the matter be placed on the expedited roll, which notice shall be served on the other party and which shall contain a certificate signed by a party or his attorney to the effect that the matters set out in sub-rule 4 (excluding sub-rules 4.4 and 4.5) or sub-rule 5 and that any additional directions made by the court or the judge have been complied with and/or attended to, the registrar shall place the matter on the expedited roll. Where any additional directions have been made by the court or the judge these shall be set out with sufficient particularity in the certificate.

21.7 Where a party upon whose request a direction has been made fails to comply with any of the requirements of sub-rules 4 or 5, as the case may be, the direction shall lapse.

21.8 A direction may be obtained on application, which shall not be supported by an affidavit, on five days' notice to the other party. Such application shall only in exceptional or urgent circumstances be brought before a judge in chambers.

21.9 The matters placed on the expedited roll shall be set down for hearing by the registrar, on twenty days' notice to the plaintiff or applicant or party upon whose application the direction was obtained:

21.9.1 on a weekly roster of cases which shall be called on a Monday or first working day of a week as the case may be;

21.9.2 on a continuous roll for each such weekly roster;

and shall be heard, unless the presiding judge orders otherwise, in the order in which they were first placed on the expedited roll.

21.10 The registrar shall advise the plaintiff or applicant or party upon whose application the direction was obtained of the date of set down by tele-facsimile transmission to a number specified in the notice referred to in sub-rule 6.

21.11 It shall be the responsibility of the plaintiff or applicant or party upon whose application the direction was obtained to serve a notice of set-down on the other party not less than ten days prior to the date of set-down and to file proof of such service not less than five days prior to the date of set-down.

21.12 Any matter struck-off or removed from the expedited roll or the weekly roster shall not, except on good cause shown on application, be re-enrolled on the expedited roll or the weekly roster. Nothing contained in this sub-rule 12 shall prevent a party, after such striking-off or removal, from enrolling the matter on the ordinary trial or motion roll.

21.13 Where any matter set down on a weekly roster has not been disposed of during that week, such matter shall enjoy such preference on a subsequent weekly roster as the presiding judge may direct.

21.14 Unless otherwise directed by the senior presiding judge from time to time, the registrar shall set down not more than fifteen matters on any weekly roster.

21.15 The senior presiding judge shall, from time to time, make available one or more judges to preside over the matters set down on the weekly roster.

22. Separation of Issues in terms of Rule 33(4)

Where a judge has given a ruling on an issue separated in terms of Rule 33(4), e.g. liability in a damages action, the matter will be regarded as partly heard before that judge. Should, however, the said judge for any reason not be available at the resumed hearing of the trial, and where the parties agree in writing, another judge shall be allocated to try the remaining issues in the action provided, however, that the second mentioned judge is satisfied that his/her decision does not depend on the credibility of any witness whose credibility was also in issue at the first hearing.[43]

23. Bail Appeals

These are heard by a single judge both in Pietermaritzburg and Durban.[44] While the judges of this Division recognise that these matters are inherently urgent, it is nonetheless necessary that appeals be put before the court in an orderly and structured manner. The following practice will henceforth be followed:[45]

23.1 When an appeal is ripe for hearing, that is to say, that the record of the proceedings has been transcribed and certified as correct, the magistrate's reply to the notice of appeal has been obtained and the record has been paginated and indexed the appellant shall be entitled to lodge such record with the registrar and at the same time apply for a date of hearing.

23.2 The registrar shall allocate a date which is not less than five (5) court days from the date of the application. The registrar shall then place the matter before the senior civil judge who generally speaking, will allocate it to the judge presiding in the motion court on that day. Where however the record of the proceedings before the magistrate is voluminous and in the opinion of the registrar will require extensive reading and preparation, the registrar shall allocate a date not less than 10 court days from the date of the application.

23.3 The parties shall lodge brief and concise heads of argument at least two court days before the hearing of the appeal.

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[43] Judge President's direction 10 December 2002.
[44] Section 65(1)*(b)* of the Criminal Procedure Act 51 of 1977.
[45] New Practice.

24. Applications for Striking-off of Practitioners in Pietermaritzburg

The practice in applications to strike the names of practitioners from the roll is for a single judge to grant the rule *nisi* even if it involves interim relief such as suspension from practice and the appointment of a *curator bonis*. On the return day the matter is dealt with by two judges opposed or unopposed.[46]

25. Applications for Default Judgment in Actions for Damages

This Division will henceforth follow the practice laid down in *Havenga v Parker*[47] which is to the following effect.

It is permissible in an application for default judgment in an action for damages to place before the Court the evidence of experts, such as for example medical practitioners, mechanics, valuers and others by way of affidavits, subject to the Court always retaining the power to require viva voce evidence, where it considers it necessary to call for further information or elucidation. The affidavits shall set out the qualifications of the experts and fully traverse his/her findings and opinions as well as the reasons therefor.

26. Claims in which immovable property should be declared executable

The summons initiating action in which a plaintiff claims relief that embraces an order declaring immovable property executable shall, with effect from 15 December 2005, inform the defendant as follows:

> "The defendant's attention is drawn to section 26(1) of the Constitution of the Republic of South Africa which accords to everyone the right to have access to adequate housing. Should the defendant claim that the order for execution will infringe that right it is incumbent on the defendant to place information supporting that claim before the court."

27. Admiralty arrest warrants in terms of Rule 4(3)

The attention of practitioners is drawn to the fact that Rule 2(1)*(a)* provides for a clear and concise statement of the nature of the claim. The certificate with regard to the warrant in terms

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[46] Judge President's memorandum 15 February 1991.
[47] *Havenga v Parker* 1993 (3) SA 724 (T).

of Rule 4(3) provides for a statement by the giver of the certificate that the contents of the certificate are true and correct to the best of the knowledge, information and belief of the signatory. The source of any such knowledge and information must be given.

As the matters to be certified include a statement that the claim is a maritime claim and that the property sought to be arrested is the property in respect of which the claim lies or, if the arrest is an associated ship arrest, that the ship is an associated ship which may be arrested, it is inherent in the nature of the certificate that the signatory should believe on proper grounds that there is a claim and also that it is enforceable by the arrest of the property to be arrested. It follows therefore, in the case of an associated ship arrest, that the certifier believes that the ship is an associated ship. It is therefore necessary that the summons should contain a statement of the **facts** upon which the claim is based and a statement of the **facts** on the basis of which it is stated that the ship is an associated ship.

It is desirable that the certificate should be signed by an attorney practising in the Court out of which the warrant is issued. In order to deal with cases of difficulty Rule 4(2)*(b)* provides that the Registrar may refer to a judge the question whether a warrant should be issued. In the vast majority of cases this is neither necessary, practicable nor desirable. It should be done in any case of difficulty either in regard to the claim or in regard to a question of association. In order to assist the Registrar the responsibility for identifying cases that should be referred to a judge will in the first instance rest on the attorney providing the certificate. When requesting a warrant, therefore, the attorney should submit in addition to the certificate required by Rule 4(3) a statement that the attorney knows of no circumstances making it desirable to refer the issue of the warrant to a judge. In the absence of such a statement, the Registrar will refer the matter to a judge under Rule 4(2)*(b)*.

28. Action in terms of National Credit Act No. 34 of 2005

With effect from 1 August 2007, in any action brought in terms of the National Credit Act No. 34 of 2005, the summons must allege that there has been compliance with section 129 of the Act and a certificate must be attached to the summons indicating compliance therewith.

29. Urgent appointments of provisional liquidators in winding-up applications

A court hearing an application for the winding-up of a company or close corporation shall not make an order directing the Master to forthwith appoint a provisional liquidator unless there are sufficient factual allegations demonstrating that such a course is urgently required. An example would be allegations that there is an imminent danger that the assets of the company will be dissipated. Thus it is a matter of extreme urgency that a provisional liquidator should take charge immediately.

In future a failure to make the appropriate allegations in this regard will result in the Judge declining to make such orders.

30. Social Assistance Grants

I hereby direct that the following revised practice directive which forms part of the judgment of Wallis J in ***P. N. Cele v The South African Social Security Agency and Others***, Case No. 7940/2007, delivered on 28 May 2009,[48] be substituted in place of the previous directive:

(a) Before there is any contemplation of litigation an appropriate letter of demand should be addressed either to SASSA or to the Minister of Social Development depending upon the nature of the claim. That letter of demand must set out the identity of the claimant and the basis of the claim and provide sufficient information to enable the claim to be investigated and dealt with appropriately.

(b) If no satisfactory response follows from the letter of demand so that there is a need to contemplate litigation, before an applicant may issue application papers out of the Registrar's office in an application seeking relief relating to or arising from an application for a social assistance grant in terms of the Social Assistance Act 13 of 2004 or its predecessor they shall be obliged to deliver a notice to the State Attorney's office in KwaZulu-Natal marked for the attention of the officer appointed by the State Attorney for that purpose and containing the following details:

(i) the name and identify number of the applicant for relief;

(ii) the type of grant to which it relates;

[48] Reported as *Cele v South African Social Security Agency and 22 related cases* 2009 (5) SA 105 (D).

(iii) where the grant relates to a person other than the applicant, as in the case of a child support grant, the name of that other person and their identity number and where a child support grant is sought in respect of a child who is not the child of the applicant a brief description of the relationship between the applicant and the child and the reason why the applicant claims a child support grant in respect of that child;

(iv) where the applicant is seeking a disability grant the nature and anticipated duration of the disability;

(v) the administrative centre where the application for the grant was lodged and where possible the date of the application as well as proof of that application in the form of the receipt issued to the applicant in terms of Regulation 8(3)(b) of the Regulations in GN R.418 or failing that other information that will enable the State Attorney to identify the application in the records of SASSA;

(vi) where the complaint is that an appeal has been lodged and no appeal convened or conducted a copy of the notice of appeal must be furnished;

(vii) the nature of the applicant's complaint, such as that an application has been made and not processed; an application has been refused and the grounds of the refusal or an appeal (or both) are sought; or that a grant originally made has been withdrawn and the applicant seeks reasons for the withdrawal or the reinstatement of the grant (or both) or any other complaints;

(viii) a copy of the letter of demand addressed to SASSA or the Minister of Social Development as the case may be, with proof of delivery and a copy of any response;

(ix) the name and fax number of the attorney representing the applicant.

(c) A copy of this notice must at the same time be delivered to SASSA or the Minister of Social Development whichever is appropriate. In the case of claims regarding appeals both the initial letter of demand and the notice contemplated in paragraph (b) of this practice directive must be sent to the:

Pilot Regional Tribunal Office

20 Intersite Avenue

Springfield Park
Umgeni Business Park;

or to:

Private Bag X901
Pretoria 0001

and marked for the attention of the Independent Tribunal.

In the case of other applications concerning grants the initial letter of demand and the notice contemplated by paragraph (b) should be sent to SASSA at one of the following addresses:

Private Bag X14
Ashwood 3601;

or

3 Clubhouse Place
Hillclimb Road
Westmead 3601.

(d) On receipt of the notice the State Attorney shall enter it into a register and allocate a reference number to it and thereafter in liaison with SASSA, or the Independent Tribunal in the case of complaints about appeals, endeavour to respond to and resolve the complaint. If no response is forthcoming within one month of receipt of the notice in the case of a complaint against SASSA or two months in the case of a complaint against the Minister of Social Development in regard to an appeal, or the response is unsatisfactory the applicant may then commence legal proceedings. The notice and the response (if any) shall form part of the application papers and the Registrar will only issue the application papers if they are accompanied by a certificate signed by the applicant's attorney recording that there has been proper compliance with the practice directive and that there has either been no response or an inadequate response to the notice. Unless the application papers are accompanied by such a certificate, or a certificate of urgency in the case of an urgent application, the Registrar will not accept or issue the application.

(e) In terms of the revised practice directive are to be circulated by the State Attorney to the interested parties identified in paragraph [37] of the judgment in Cele.

(f) The State Attorney is required to furnish a report concerning the implementation of this practice directive to the Deputy Judge President in the first week of December 2009. That report must be accompanied by Mr Diplall's comments on the contents of the report. The report should deal specifically with the question whether the functioning of the Pilot Regional Tribunal Office is such that the need to furnish pre-litigation notices to the State Attorney can fall away. It shall also deal with the extent of any continuing backlog in the disposal of appeals. To this end it would be helpful for the report to incorporate the type of information that was embodied in Ms Maloka's affidavits concerning the functioning of the Independent Tribunal.

31. Effort to reduce the backlog in all trials including RAF matters

In an effort to reduce the backlog in all trials, including RAF matters, it is directed:

1. That Uniform Rule 37(7), requiring minutes of the Rule 37 Conference to be filed with the Registrar not later than 5 weeks prior to the trial date, shall be strictly enforced and noncompliance shall automatically result in the matter being struck off the trial roll.

2. In all RAF trial matters the following shall apply:

   (a) Every matter will be the subject of a Rule 37(8) conference and the matter shall be considered ripe for allocation of a date for the holding of such a conference upon receipt by the Registrar of a notice applying for a date of trial.

   (b) A date for trial shall be allocated only upon the certification by a Judge that there has been compliance with 2(a) above.

   (c) The senior civil Judge shall allocate such Judges as may from time to time become available for the purpose of hearing conferences called under this practice directive.

(d) A party called to a conference under this directive will receive not less than six weeks' notice of the fact that the conference will be held, and a list of the dates for the holding of all such conferences will be included in the published trial rolls.

(e) Where quantum will be an issue during the trial of the matter:

(i) A notice in terms of Rule 36(9)(a) shall be delivered not later than fifteen days before the date allocated for the conference (the date) and the summary contemplated in Rule 36(9)(b) shall be delivered not later than ten days prior to the date.

(ii) The parties will thereafter deliver a further summary clearly and concisely setting out areas in which their respective experts agree as well as areas in which they disagree. Such a summary shall be delivered not later than two days prior to the date.

(f) The provisions of Rules 37(4), 37(5), 37(6) and 37(7) shall apply *mutatis mutandis*.

(g) At the Rule 37(8) conference the presiding Judge shall note on the court file whether the preparation and conduct of each of the parties is considered satisfactory or unsatisfactory, giving such reasons as the presiding Judge may in his or her sole discretion deem fit.

(h) If the conduct of any party is marked as unsatisfactory then, should the matter ultimately come before the court, the party or parties against whose name an unsatisfactory note has been placed will be obliged to make submissions:

(i) as to why the provisions of Rule 37(9)(a) should not be invoked against that party or that party's legal representatives in respect of a special order as to costs.

(ii) in particular, as to why an order should not be made denying the party or the party's representatives the right to claim costs, and ordering the party or party's representatives to pay the wasted costs of the opposing party.

(i) Where attorneys place themselves on record subsequent to such conference as may be convened under this directive, then that attorney shall, if that attorney wishes to be disassociated from an unsatisfactory mark, request reallocation for the purposes of an additional conference.

32. . . . . .

33. Appeals to the Full Court:[49]

Civil Appeals:

In addition to and subject to Rule 49, the following shall apply to all civil appeals to the Full Court:

33.1 Once a date has been allocated for the hearing of any civil appeal, the parties may not agree to postpone the appeal without the leave of the Judge President, the Deputy Judge President (in those instances where the appeal has not as yet been allocated to the judges concerned) or where the appeal has been allocated, the Judges to whom the appeal has been allocated for hearing.

33.2 In all civil appeals, the appellant's heads of argument must be delivered not later than 30 days before the appeal is heard and the respondent's heads of argument must be delivered not later than 15 days before the appeal is heard. Supplementary heads of argument will only be accepted with the leave of the judges presiding.

33.3 If counsel intend to rely on authority not referred to in their heads of argument, copies thereof should be available for the judges hearing the appeal and counsel for each other party.

33.4 In regard to the content of their heads of argument, counsel are reminded of the dicta in *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd and Another* 1998 (3) SA 938 (SCA) at 955BF:

[49] Practice Directive 33 was deleted and replaced with a practice directive in respect of civil and criminal appeals to the Full Court on 11 February 2015.

‘[37] There also appears to be a misconception about the function and form of heads of argument. The Rules of this Court require the filing of main heads of argument. The operative words are “main”, “heads” and “argument”. “Main” refers to the most important part of the argument. “Heads” means “points”, not a dissertation. Lastly, “argument” involves a process of reasoning which must be set out in the heads. A recital of the facts and quotations from authorities do not amount to argument. By way of a reminder I wish to quote from Van der Westhuizen NO v United Democratic Front 1989 (2) SA 242 (A) at 252B--G:

> “There is a growing tendency in this Court for counsel to incorporate quotations from the evidence, from the Court a quo's judgment and from the authorities on which they rely, in their heads of argument. I have no doubt that these quotations are intended for the convenience of the Court but they seldom serve that purpose and usually only add to the Court's burden. What is more important is the effect which this practice has on the costs in civil cases. . . . Superfluous matter should therefore be omitted and, although all quotations can obviously not be eliminated, they should be kept within reasonable bounds. Counsel will be well advised to bear in mind that Rule 8 of the Rules of this Court requires no more that the main heads of argument. . . . The heads abound with unnecessary quotations from the record and from the authorities. They reveal, moreover, another disturbing feature which is that the typing on many pages does not cover the full page. . . . Had the heads been properly drawn and typed I do not think more than 20 pages would have been required. The costs cannot be permitted to be increased in this manner and an order will therefore be made to ensure that the respondent does not become liable for more than what was reasonably necessary.”

[38] Practitioners should note that a failure to give proper attention to the requirements of the practice note and the heads might result in the disallowance of part of their fees.’

33.5 Counsel's names and contact details, including cell phone numbers, must appear on the heads of argument.

33.6 When allocating a date for the hearing of an appeal, the Judge President or the Deputy Judge President may direct that the parties deliver heads of argument earlier than provided for in paragraph 2 above.

33.7 Simultaneously with the filing of their heads of argument counsel shall file a practice note. The practice note shall set out:

33.7.1 each issue that has to be determined in the appeal;

33.7.2 an extremely brief submission in respect of each such issue;

33.7.3 what portion of the record must be read.

33.8.1 In all civil appeals the record shall be securely bound in volumes of approximately 100 pages each. Each volume shall be so bound that upon being eased open it will lie open without any manual or other restraint and upon being so opened and repeatedly closed the binding shall not fail. Each volume shall be consecutively paginated, contain a volume specific index, and have a cover sheet reflecting:

33.8.1.1 the case number;

33.8.1.2 the names of the parties;

33.8.1.3 the total number of volumes in the record;

33.8.1.4 the volume number of the particular volume;

33.8.1.5 the court of appeal from;

33.8.1.6 the names, addresses and telephone numbers of the parties' legal representatives.

33.8.2 The first volume of the record shall also contain a consolidated index of the evidence, documents and exhibits. The index must identify descriptively each document and exhibit.

33.8.3 Unless it is essential for the determination of the appeal, and the parties agree thereto in writing, the record shall not contain

33.8.3.1 the opening address to the court a quo;

33.8.3.2 argument at the conclusion of the application or trial;

33.8.3.3 discovery affidavits and notices in respect thereof;

33.8.3.4 identical duplicates of any document contained in the record;

33.8.3.5 documents that were not proved or admitted in the court a quo.

33.8.4 If it will facilitate the hearing of the appeal, or if requested by the presiding judge in the appeal, the parties shall prepare a core bundle of documents relevant to the determination of the appeal. This bundle should be prepared in chronological sequence and must be paginated and indexed.

33.8.5 The pages in the record shall be numbered clearly and consecutively, and every tenth line on each page shall be numbered and the pagination used in the court a quo shall be retained where possible. All references in the record to exhibits, annexures evidence etc. shall be annotated to reflect the corresponding page number in the appeal record.

33.8.6 In the event of a party failing to comply with any of the aforegoing, the court may, *mero motu*, or on application of any party to the appeal, make a punitive costs order.

33.9. If the appellant decides to abandon or not to proceed with the appeal or the respondent decides not to oppose the appeal any longer, the registrar must be notified thereof immediately. The legal representative of the party who fails to notify the registrar as aforesaid may be called upon by the judges presiding to explain his/her failure. The judges presiding may take such steps against the legal representative as they regard appropriate.

33.10. Failure to file the heads of argument timeously will, as a general rule, only be condoned in exceptional circumstances. Error or oversight by counsel and legal representatives or the latter's employees will rarely be regarded as exceptional circumstances.

Criminal Appeals:

In addition to and subject to Rule 49A, the following shall apply to all criminal appeals to the Full Court:

33.11. The current practice with regard to the setting down of criminal appeals shall continue to apply.

33.12. In all criminal appeals, the appellant's heads of argument must be delivered not later than 30 days before the appeal is heard and the respondent's heads of argument must be delivered not later than 15 days before the appeal is heard. Supplementary heads of argument will only be accepted with the leave of the judges presiding.

33.13. Items 3, 4, 5, 6, 8.1 (the introductory paragraph), 8.5 and 10 above shall, mutatis mutandis, apply in criminal appeals.

34. Preparation of Court Papers in All Matters[50]

34.1 Subject to the provisions of Rule 62 of the Uniform Rules, in all matters the documents prepared for Court shall be:

34.1.1 printed on one side of white A4 sized paper with a weight of not less than 80g/m2;

34.1.2 printed using a uniform regular (i.e. not italics) 12 point font in Arial, or Times Roman or Times New Roman with the main body of any paragraph thereof being double line-spaced;

34.2 All such documents shall be appropriately bound (by a staple or such other suitable device (papers clips or spring-clamps are not suitable devices)) at the top left-hand corner thereof (and in no other place) with an appropriate protective covering. Papers not bound in this manner may result in the matter not being heard on the allocated date. Attorneys are reminded of their duty to inspect all Court files before the rolls close to ensure that the papers are in order and that they comply with this and all other relevant Rules and Practice Directives.

34.3 When matters are enrolled for hearing (whether in chambers, for trial or for Motion (Chamber) Court) practitioners are to ensure that the original process (i.e. not photostat or telefaxed copies) are placed in the Court file in good time. All surplus or additional copies, unless strictly necessary, are to be removed from the Court file. When preparing the Court Rolls for any Court the Registrar may not place any matter on the printed Roll in the absence of the original process. Exceptions shall be allowed for urgent matters and for exceptional cases.

34.4 If a document or documents attached to any affidavit or pleading, or included in a bundle of documents, is or are in manuscript or not readily legible, the party filing such document(s) shall ensure that legible typed copies of the document(s) are also attached to such affidavit or pleading or included in such bundle.

34.5 When preparing an Index care must be taken to provide an accurate description of each document appearing on such Index. It is unacceptable in an Index to describe a document, for example, simply as "Annexure A". The document itself MUST be described, eg: "Annexure B:

[50] Judge President's Practice Directive dated 16 October 2013.

Letter from X to Y dated xx July xxxx" or "Annexure C: Agreement of Lease dated xx June xxxx" and so forth.

35. A Single High Court for the entire Country[51]

The Superior Courts Act, 10 of 2013 ("the Act") was promulgated on 12 August 2013. It came into operation on 23 August 2013 as proclaimed by Proclamation R.36 of 2013 dated 22 August 2013.

A single High Court has been constituted for the entire country, thereby necessitating a change to all court documents. In that regard the following practice directive shall issue:

In Pietermaritzburg all Court processes, etc., shall be headed:

"IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG"

In Durban all Court processes, etc., shall be headed:

"IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN"

36. General Practice Directive – Miscellaneous Matters

Effective immediately unless otherwise stated

36.1 In all matters (including applications for summary judgment), where, in addition to a claim sounding in money, an order is sought declaring immovable property to be specially executable, a judgment for the claim sounding in money will no longer be granted separately from a consideration of the claim to declare such property specially executable.

36.2 With effect from 1 December 2018 the Registrars will no longer issue any process where the claim falls within the monetary jurisdiction of the Magistrates' Court. The Registrars will be entitled to depart from this directive, on a case by case basis, only upon the written authority of

[51] Judge President's Practice Directive dated 13 October 2013.

the Judge President or the Deputy Judge President who may grant such authority on good cause shown after written application has been made for such departure.

36.3 With effect from 1 December 2018 the Registrar at the Provincial Division in Pietermaritzburg will no longer issue any process containing a claim declaring immovable property specially executable where such property is situate within the area of jurisdiction of the Local Division.

36.4 Practitioners are reminded of the provisions of Practice Directive 8 relating to applications. In this regard Applications commenced under Form 2(a) (i.e. the long form Notice of Motion) will not be enrolled on the Motion Court Rolls until after the expiry of the time specified and allowed for the delivery of a Notice of Opposition and only on the issue of a Notice of Set Down delivered to the Registrar after that specified time and date has elapsed and no Notice of Opposition has been delivered. It is not proper to include the words ". . . *kindly place the matter on the roll for hearing* . . ." (or words having a similar effect) in Form 2(a), unless special circumstances exist.

36.5 In all matters in Motion Court, where an order will be sought in terms not precisely in accordance with what is set out in the papers, practitioners will be required to hand up a typewritten draft order containing the terms of the Order that will be sought. Manuscript drafts will only be accepted in exceptional circumstances.

37. Practice Directive in terms of Rule 37A (Active Judicial Case Management)[52]

INTRODUCTION:

1. Rule 37A came into effect from 1 July 2019 and envisages active judicial case management (JCM) of all defended civil matters by all Judges. In this Division its application will commence with effect from the beginning of the Fourth Term on **Monday 7 October 2019** (the commencement date).

[52] Judge President's Practice Directive dated 17 September 2019.

THE APPROACH TO JCM:

2. At the outset the following matters will become subject to JCM in terms of Rule 37A in the KZN Division, namely:

(a) Such *ad hoc* trial matters as the JP (which includes his delegate, the DJP, the Senior duty Judge, or such other Judge as may be specially tasked thereto) may direct.

(b) Such matters as practitioners may request to be considered for JCM;

(i) In this regard written requests are to be submitted to the JP;

(ii) either by consent of the parties, or upon notice to the opposing party; and

(iii) should be concisely motivated indicating the desirability of JCM in relation to the particular matter.

(c) All new matters in the categories specified below and which become defended after the commencement date will automatically and routinely to be subject to JCM (the routine matters). The initial categories of routine matters which will be subject to JCM are claims for damages against:

(i) the Road Accident Fund (the RAF);

(ii) the SA Police Services; and

(iii) the Provincial MEC for Health or his Department.

(d) All allocations, or reallocations where necessary of matters earlier allocated would, however, be subject to the discretion of the JP.

3. The present Case Flow Hearings where matters are certified trial ready will correspondingly cease. Where practitioners contend that particular matters are trial ready and they wish to apply for trial dates, the following procedure will apply with effect from the commencement date:

(a) The applicant for a date for hearing will approach the Registrar requesting trial readiness certification, without which no matter will be enrolled for hearing.

(b) The Registrar will consider the matter and if of the opinion that it is not trial ready, advise the applicant accordingly indicating the deficiencies.

(c) If the Registrar is satisfied that a *prima facie* case for the certification of a matter exists, it will be referred to the JP for consideration for certification in his discretion.

ALLOCATION PROCEDURES:

4. All Judges within the Division will participate, broadly equally on an equitable basis, in the JCM process.

5. Allocations of matters for JCM and to particular Judges will be made by the JP with the assistance of the Registrar in each centre.

6. Once allocated, the parties will deal directly with the relevant Judge through the Judge's Registrar, in advancing the JCM process.

7. Judges will likely differ as to the procedures to be followed in the process of JCM. They may direct that their JCM meetings are held in open Court and require the attendance of the practitioners actually in charge of the matter on behalf of their respective clients. The time, venue and size of the roll will be controlled by the Judges concerned.

8. Alternatively Judges may find it convenient or prefer to deal with JCM matters, or some of them, informally in chambers, subject to a record of decisions and/or directions being kept on or in the court file.

9. In particular matters or circumstances a Judge may decide to deal with the matter as a whole, or only with particular aspects or issues during the course of the management of a matter, formally in open court where the proceedings are recorded and may later be transcribed if the need were to arise.

10. It may also be convenient, for instance in matters where the legal representatives of the parties are based far from the seat of the court, to conduct the JCM telephonically or by way of correspondence.

11. Ultimately the procedural course of case management to be followed should, in each instance, be determined by the Judge conducting the case management, subject to an accurate

record of the JCM proceedings and decisions or directions being recorded and kept in the court file.

ADMINISTRATIVE SUPPORT BY THE REGISTRARS:

12. In order to manage the JCM system:

(a) The Registrar will separate all matters subject to JCM from the general filing system.

(b) In the case of routine JCM matters this will occur SIXTY (60) DAYS after the filing of the appearance to defend.

(c) These matters will then be allocated to the Judges for JCM.

(d) The initial and early referral to JCM would allow Judges to immediately control the process for example by ordering a separation of the issues in terms of Rule 33(4) with a view, inter alia, of saving costs and bringing matters to trial more speedily on defined issues.

13. The Registrar in each centre will keep custody of files subject to JCM in a separate dedicated filing system comprising of individual sections where the files case managed by each Judge are kept separately and can be made available to the Judge concerned upon request and with minimum delay.

14. Once a case has been certified for trial, its case management ceases, the file is removed from the dedicated JCM filing system and the file can then be dealt with by the Registrar in the ordinary manner.

15. The Registrar will keep a dedicated record of JCM files recording:

(a) Which are allocated, or reallocated, to individual Judges for JCM;

(b) When the matter is certified as trial ready; and

(c) Where it is then transferred to.

16. During the process of JCM the Registrar will also:

(a) Keep abreast of JCM orders made or directions given by the relevant JCM Judge;

(b) Note and diarise for attention dates upon which parties are to deliver documents, perform specified actions as directed by the JCM Judge, or act in terms of any applicable rules of court;

(c) In the event of non-compliance by a party and as appropriate;

(i) send a reminder or demand to the offending party, copying in the process the other parties in the matter; and/or

(ii) advise the JCM Judge, who may then issue directions; and

(iii) keep a record of such steps so taken in the court file.

RULE 37A(15) CONSENT:

17. This sub-rule disentitles the case management Judge from also being appointed as the trial Judge, unless the parties in writing consent thereto. The parties may, however, consent to the allocation of the trial to the JCM Judge, provided all the parties consent in writing thereto. Such consent need not be given during the JCM process and may be given at any time thereafter.

38. Practice Directives for Matters against the Road Accident Fund in both Defended and Undefended Matters[53]

THE RAF TRIAL ROLL

1. An RAF trial roll is created for the hearing of matters against the Road Accident Fund where an appearance to defend has not been entered.

2. The RAF trial roll shall be called on a Wednesday and shall be a continuous roll, with matters being allocated to a Trial Judge at the direction of the Senior Civil Judge during that week.

3. There shall be no more than 10 matters placed on the RAF trial roll during any one given week. Matters shall last no longer than one day.

[53] With effect from 6 September 2021.

ENROLMENT OF MATTERS ON THE RAF TRIAL ROLL

4. The Plaintiff's attorney of record shall certify that the matter is ready for trial and shall state whether the issue of liability has been settled.

5. In instances where the issue of liability has been settled, such certification shall include written confirmation of that fact.

6. In all other instances the matter shall proceed upon a determination of both liability and quantum.

7. In order to certify the matter ready for trial, the Plaintiff's attorney shall ensure that the following are placed in the court file:

(a) a photo schedule depicting the scene of the collision, reflecting all points that are relevant to the occurrence of the collision;

(b) a sketch plan depicting the scene of the collision, reflecting all relevant dimensions;

(c) a copy of the Motor Vehicle Accident Report compiled by the South African Police Services, if available;

(d) an affidavit deposed to by the Plaintiff, and/or an eyewitness to the collision setting out, in detail, the circumstances in which the collision occurred with reference to the relevant points and dimensions depicted on the photo schedule and sketch plan;

(e) a paginated and indexed bundle of the medicolegal reports, which shall at least contain:

(i) a medicolegal report from a suitably qualified medical practitioner setting out the nature and extent of the injuries suffered by the Plaintiff;

(ii) in instances where past and future loss of earnings are claimed, a medicolegal report from a suitably qualified expert setting out the extent to which such injuries have precluded, or will in the future preclude, the Plaintiff from engaging in his or her premorbid mode of employment and setting out an opinion on what mode of employment the Plaintiff is most probably able to engage in having regard to his or her injuries;

(iii) in instances where future medical expenses are claimed, a medicolegal report from a suitably qualified expert setting out the nature, extent and cost of such medical treatment;

(iv) the report of an actuary setting out a calculation of the Plaintiff's claim based upon the opinions expressed in the aforesaid medicolegal reports;

(f) a paginated and indexed bundle of affidavits deposed to by the aforesaid experts upon whose reports reliance will be placed, confirming the contents of such reports and the opinions expressed therein;

(g) proof that a serious injury assessment report has been submitted to the Road Accident Fund pursuant to the provisions of the Road Accident Fund Act, No. 56 of 1996 and the Regulations;

8. Upon compliance with the provisions of paragraph (7) hereof, the Registrar shall set the matter down on the next available date on the RAF trial roll.

9. In instances where there is uncertainty as to whether the matter is trial ready, the matter shall be referred to a Judge in Chambers, who shall either certify the matter ready for trial, or give directions in respect of the future conduct of the matter.

SET DOWN OF MATTERS ON THE RAF TRIAL ROLL

10. At least 10 days prior to the date upon which the matter is to be heard on the RAF trial roll, the Plaintiff's attorney shall serve a Notice of Set Down, via the sheriff, upon the Chief Executive Officer, Chief Operations Officer, Regional Manager and Claims Handler of the Road Accident Fund at its regional office in Durban (whichever is the office from which the claim is being administered) which notice shall:

(a) state the time and date upon which the matter is set down on the RAF trial roll;

(b) invite the Road Accident Fund to tender an undertaking for future medical expenses pursuant to the provisions of section 17(4)*(a)* of the Road Accident Fund Act, No. 56 of 1996; and

(c) invite the Road Accident Fund to admit that the injury sustained by the Plaintiff is a "serious injury" for the purposes of determining general damages;

11. At least 5 days prior to the date upon which the matter is to be heard on the RAF trial roll, the Plaintiff's attorney shall file Heads of Argument, which shall at least:

(a) indicate the nature and extent of the relief to be sought by the Plaintiff;

(b) make submissions as to why it is contended that the insured driver was negligent in the cause of the collision forming the subject of the proceedings;

(c) make reference to those portions of the medicolegal reports relied upon by the Plaintiff in substantiation of the relief sought;

(d) in instances where loss of earnings are claimed, make submissions as to the appropriate contingency deduction to be applied to both past and future earning capacity;

(e) make submissions, with reference to comparative cases and awards, as to the extent of an appropriate award of general damages;

12. A failure to comply with the aforesaid procedures will result in the matter being automatically removed from the RAF trial roll and the Plaintiff's attorney will have to reapply to have the matter placed on the roll.

HEARING OF MATTERS ON THE RAF TRIAL ROLL

13. Upon the matter being allocated to the Trial Judge, such Judge shall indicate whether the leading of viva voce evidence will be dispensed with in respect of any witnesses, pursuant to the provisions of Rule 38(2).

14. On the day upon which the matter is to be heard, the Plaintiff's attorney shall ensure that:

(a) the Plaintiff is present at Court; and

(b) all expert witnesses are able to attend court within 30 minutes of the Trial Judge indicating that such expert is required to be examined viva voce.

15. In the event of the Road Accident Fund not tendering an undertaking, pursuant to the provisions of section 17 (4) (a) of the Road Accident Fund Act, No. 56 of 1996, for future medical expenses, such expenses shall be determined by the Court at the hearing of the matter.

16. In the event of the Road Accident Fund not admitting that the injury sustained by the Plaintiff is a "serious injury", the Court shall:

(a) issue an order directing the Road Accident Fund to either admit or reject the "RAF 4 form"

submitted to it by the Plaintiff, and give its reasons for such decision; and thereafter

(b) adjourn the issue of general damages sine die for a determination upon the Road Accident Fund either admitting that the injury constitutes a "serious injury" or the appeal procedure prescribed in the Regulations having been exhausted.

This practice directive must be read together with practice directive 25 and *Venter v Nel* 1997 (4) SA 1014 (N) at 1016A.

DEFENDED MATTERS

17. In all matters where the Road Accident Fund has entered an appearance to defend:

(a) the current case flow management directives shall remain applicable;

(b) the Case Flow Management Clerk shall ascertain whether all prior directives have been complied with and that the file is ready to be certified ready for trial; and

(c) the Case Flow Management Registrar shall then forward the file to a Judge to certify that the matter is trial ready.

38A. When matters are defended, and the Road Accident Fund fails to participate further in the matter:[54]

DIRECTIONS FOR ROAD ACCIDENT FUND MATTERS

1. The Plaintiff's attorneys are to certify that the file is trial ready either for liability or quantum or both;

2. The Case Flow Management Clerk is to check the file to ascertain whether all prior directives have been complied with and that the file is indeed ready to be certified for trial;

[54] With effect from 20 September 2021.

3. The Case Flow Management Clerk will then forward the file to the Judge to certify that the file is trial ready;

4. Once a trial date has been allocated (no more than 1 day) the Plaintiff's attorneys are to immediately serve a Notice of Set Down, by the Sheriff, on the Chief Executive Officer, Chief Operations Officer, Regional Manager and Claims Handler of the Road Accident Fund;

5. No later than 10 days prior to the date of hearing, the Plaintiff's attorneys are to file the following:

(a) a brief summary of all the relevant expert reports;

(b) an Affidavit by the relevant experts confirming their reports as well as the summaries;

(c) brief written submissions by the Plaintiff's legal representative on the issues which the court has to decide. In this regard should there be a claim for general damages, comparative cases and awards are to be included in the submission to assist the Judge in reaching a conclusion.

6. The matters may then be disposed of on the trial dates without the need to call expert witnesses.

The above procedure will assist in reducing the backlog as well as the crowding of the Court rolls with Road Accident Fund matters.

Failure to comply with the aforesaid, particularly paragraph 5 hereof, will result in the matter being automatically removed from the roll and the Attorneys will have to reapply to have the matter certified for trial once again.

PROPOSED ORDER TO BE GRANTED BY THE JUDGE WHEN A RAF MATTER IS REFERRED FOR CASE MANAGEMENT

1. The matter is certified ready for trial on the issue of liability or quantum or liability and quantum (insert whatever is applicable);

2. The trial is enrolled for hearing on the (date) (this will be provided for by the Registrar);

3. The Notice of Set Down is to be served, immediately, by the Sheriff, on the Chief Executive Officer, Chief Operations Officer, Regional Manager and Claims Handler of the Road Accident Fund;

4. No later than 10 days prior to the trial date, the Plaintiff's attorneys are to file the following:
   (a) a summary of the expert evidence;
   (b) Affidavits by the relevant experts confirming their reports as well as the summaries;
   (c) written submissions on the issues to be determined by the Courts. In respect of general damages, comparative cases and awards are to be included in the summary.

39. Appeals in terms of s 57 of the CSOS Act[55]

Based on the judgment of the Full Court of this Division in the matter of *Ian Christian Ellis v Trustees of Palm Grove Body Corporate* (Case No 2293/2020P),[56] the following practice directives will henceforth apply in order to regulate the procedure to be followed in appeals brought in terms of s 57 of the Community Schemes Ombud Service Act 9 of 2011 (the CSOS Act):

1. Such an appeal will be brought on notice of motion supported by affidavit(s) which should be served on the respondent parties by the Sheriff.

2. The founding affidavit, which shall not exceed ten (10) pages, will succinctly set out the grounds upon which it is alleged that the Adjudicator erred on a point of law.

3. The answering affidavit shall not exceed ten (10) pages.

4. The replying affidavit, if any, shall not exceed six (6) pages.

5. The Adjudicator may wish to file a brief report, not exceeding five (5) pages, on any aspect of fact or law not dealt with in his/her statement of reasons.

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[55] Dated 12 April 2022 (with effect from 13 May 2022).
[56] *Ellis v Trustees of Palm Grove Body Corporate and others* [2021] ZAKZPHC 97.

6. The time-frames for the filing of all affidavits shall be governed by the provisions of Rule 6(5) of the Uniform Rules.

7. Once all affidavits have been filed the appeal will follow the practice directives provided for opposed motions including the filing of a practice note and heads of argument.

8. The Registrar shall thereafter set the matter down for hearing before a single Judge.

40. Managing court processes post lockdown[57]

Notwithstanding the end of the (frequently extended) State of Disaster, we are all too well aware of the fact that the Covid 19 pandemic is far from over and that we, for some time to come, will have to adjust to a longer period of living with the pandemic. To that end the following Practice Directive is an attempt to manage court processes in the long term. These directives recognise that our courtrooms in both Pietermaritzburg and Durban are confined spaces, and that, although at times the air-conditioning would appear to be functioning, whether the courtrooms are adequately ventilated spaces is uncertain. These directives will take immediate effect.

40.1. In all matters, both civil and criminal, the presiding judge, in her or his sole discretion, shall manage how, and in what manner, the proceedings before him or her are to be conducted.

40.2. Given that courtrooms are indoor public spaces:

(a) Everyone in the courtroom, shall be required to wear a mask or other appropriate face covering, ensuring that it covers both the nose and the mouth. The presiding judge shall ensure that this requirement is observed and maintained throughout the proceedings.

(b) The presiding judge shall determine the number of persons (which includes the number of legal representatives) to be accommodated in the particular courtroom, having regard to the space and facilities available in such courtroom, provided that, in ideally ventilated courtrooms the total number of persons shall not exceed 50% of the ordinary capacity of such courtroom.

(c) Appropriate social distancing shall be enforced.

[57] With effect from 10 June 2022.

40.3. In all appeals, while an in person oral hearing remains the preferred method of hearing:

(a) The judges constituting the appeal panel may, in terms of section 19 of the Superior Courts Act, make a determination that the appeal be disposed of without an oral hearing, but before finally doing so, the views of the parties shall first be solicited.

(b) The judges constituting the appeal panel may, in their sole discretion, but after soliciting the views of the parties, convene a hearing via video conferencing or by any other appropriate electronic means.

40.4. In all opposed motions:

(a) Parties are to ensure that Practice Directive 9.4 is strictly complied with.

(b) In all opposed motions, including applications in terms of Uniform Rule 43, the parties shall, not later than three clear days prior to the hearing, deliver a joint statement setting out in clear and concise terms the issues in dispute and the issues that the presiding judge will be required to rule on.

(c) Although an oral hearing remains the preferred method of hearing, the presiding judge may, if the parties agree, elect to have the matter decided on the papers without the need for an oral hearing, and in such circumstances may call for additional written submissions.

(d) While an in person oral hearing remains the preferred method of hearing the presiding judge may, in his or her sole discretion, but after soliciting the views of the parties, convene a hearing via video conferencing or by any other appropriate electronic means.

40.5. In all unopposed divorces conducted in the motion court, not less than three clear days prior to the hearing a separate indexed bundle of documents (in addition to the indexed pleadings and without a filing notice) shall be delivered, with the first document to be an affidavit deposed to by the intended witness (who will ordinarily be the plaintiff) in which he or she identifies and confirms the correctness of the following documents (including identifying signatures where relevant) which are to be annexed to that affidavit:

(a) The original marriage certificate or the original certificate of union; and

(b) The original settlement agreement (or other agreement), if it is requirement that such be lodged with the court.

41. Pre-Trial Procedures[58]

1. Systematic delays in the setting of trial dates, the finalization of cases and the delivering of judgments undermines the right of access to courts. Some legal representatives exploit the inherently contentious aspects of the adversarial system to their private advantage at the public's expense. This results in trial cases not finishing in their allotted time and becoming part-heard matters. Experience has shown that part-heards are now a norm rather than an exception, to the detriment of the proper functioning of the courts and the expeditious finalization of cases.

2. In ensuring that the cases do not linger on the roll, the court should promote firm trial dates, early court interventions, and virtual proceedings. Delays in bringing a matter to trial should be avoided. This can be achieved by considering alternative dispute resolution mechanisms (mediation, arbitration etc) before the matter is set down for trial.

3. Both civil and criminal proceedings should be preceded by pre-trial conferences and before a matter is set down for hearing it must be certified trial ready. For both civil and criminal proceedings, trial readiness questionnaires have been prepared and made available. A matter is considered ripe for trial if, on the appointed day, it will be ready to commence immediately and to run continuously until its conclusion. The holding of pre-trial conferences and the certification of matters as being trial ready are intended to assist in ensuring that all important and relevant issues in the prospective trial proceedings, be it civil or criminal, are covered and to minute the outcome of the trial conference, and directions given, or determinations made by the presiding officer, as well as whatever agreements the parties may have reached during the course of the pre-trial conference.

4. The objects of pre-trial conferences and the certification of criminal cases as being trial ready are to identify and narrow the issues between the parties and to more accurately determine the trial date and the expected duration of the trial and thus to ensure that cases will proceed

[58] With effect from 9 November 2022.

and finish within their allotted time. The narrowing of issues helps to eliminate irrelevancies and thereby curtails the proceedings. The process is aimed at the optimal utilisation of court hours.

5. The pro forma documents drafted for civil and criminal pre-trial conferences are intended to facilitate uniformity in the approaches of various courts in the Division when conducting pre-trial conferences. Pro forma minutes also serve as a record that civil or criminal matters, as the case may be, are trial ready before they are enrolled for hearing. This should assist in enhancing levels of performance and expedite outcomes in the delivery of quality justice to all within the Division.

6. In order to avoid delays in the finalization of cases and unnecessary part-heards, the parties and legal representatives are required to comply with the following procedure before or during the hearing of a particular case:

(a) Agreements reached between the parties at the pre-trial conferences should strictly be adhered to;

(b) In both civil and criminal matters, parties or their legal representatives must take practical steps to determine the exact time required for the trial of their matters, and to ensure that a case is completed within the allotted time. In civil cases, the estimate of the number of days required for a case is the ultimate responsibility of the plaintiff, but the task should be undertaken in conjunction with other parties to the litigation. What is required is a genuine estimate of the time required for the presentation of all evidence, argument and, in a case where it is reasonably anticipated that a judge would or might deliver an ex-tempore judgment, a short period for the preparation by the judge of some notes and the delivery of the judgment should be allowed.

(c) To avoid miscalculations of the time required for a particular trial or hearing, the judge to whom a trial is allocated should, before its commencement, interrogate the assessment of the time required in conjunction with the counsel to make sure that there is a genuine expectation that the proceedings will terminate within the allocated time. The judge must take active and primary responsibility for the

progress of cases from initiation to conclusion to ensure that cases are concluded without unnecessary delay.

(d) Time limits should be established in advance through consultation with counsel during a trial management conference. However, it may be necessary to impose time limits during a trial to deal with irrelevant issues or problems with witness credibility. A judicial officer is required to ensure that there is compliance with all applicable time limits.

(e) The duty to grant a party a fair hearing does not preclude a judge from keeping a firm hand on proceedings. Reasonable time limits may be laid down for argument which may be cut short when the judge is satisfied that more time would not be of material assistance. The examination and cross-examination of witnesses may be curtailed if it exceeds reasonable bounds. Time limits should be reasonable and related to the circumstances of each case. However, they should be adjusted, if necessary, during a trial if the need arises, but counsel must have adequate time to present their clients' case.

Civil cases

Preparing for trial

7. One of the significant ways to ensure the effective use of trial time is a pre-trial management conference to be held approximately two weeks before the scheduled trial commencement date, and more than one conference may be appropriate for a complex case. The following subjects can be addressed in pre-trial management conferences:

(a) The resolution of any remaining discovery issues;

(b) The determination of issues of law and facts that are obviously in dispute;

(c) The exchanging of exhibits;

(d) The exchanging of witness lists, the scheduling of witnesses, and avoidance of the unnecessary duplications of testimony;

(e) Agreement with counsel on time limits for different segments of the trial;

(f) The addressing of any special needs, such as the use of interpreters and audio-visual materials or video technology; and

(g) The consideration of the possibility of settlement.

Scheduling to start trials on time and to provide adequate time for them

8. There may be many reasons why a trial does not start at the scheduled time, such as problems relating to the presence of particular witnesses, the necessity of bringing the accused to the court from a correctional centre, load-shedding, last minute problems for the judge to work out with counsel or demands from other cases on the judge's time. Any problems that can be reasonably anticipated should be resolved so that case participants will not be frustrated by any delay and so that the court can give as much time as possible to the trial on its first day.

Maintaining of momentum by a judge

9. A judge should allow instructing counsel who are questioning witnesses to proceed to a conclusion without excessive interruption. The judge must allow counsel to consult with parties or another counsel. The judge must require counsel to state objections succinctly and in appropriate legal terms to permit the court to rule succinctly. The judge must periodically review the progress of the case with counsel to help ensure its reasonable movement to a conclusion.

Criminal case readiness for trial

10. A criminal case must only be set down for trial when both the prosecution and the defence have confirmed the readiness of the matter for trial. The matter is ready for trial if:

(a) The defence has received full disclosure of the charge against the accused, i.e., the indictment has been received by the defence;

(b) Consultations necessary for trial purposes by both the defence and the State have taken place;

(c) The defence has been placed in sufficient funds for the dates of the trial;

(d) The dates upon which the trial is proposed to run are suitable to both the prosecution and the defence; and

(e) The parties have satisfied the presiding judge that they have exhausted all possibilities to enter into a plea arrangement.

Part-heards

11. Courts should work on the basis that, accidents aside, cases must finish in the time allotted and should not commence if the legal representatives have concluded that the case is unlikely to be completed in the designated time. Save in exceptional circumstances, a trial should not be permitted to commence if the risk of it not finishing in the allotted time is too high. Should such circumstances exist, then the parties must file a joint memorandum setting out the reasons why there is a risk that the trial will not be finalised within the allotted time period.

12. Part-heards may only be permitted to occur under exceptional circumstances, for example, where the illness of a necessary participant has occurred or the trial has taken an unpredictable course, which requires a premature halt to proceedings. But experience shows that a substantial number of part-heard trials occur simply because the parties, and the court, pay far too little attention to optimally utilising court hours, and because of the granting of unnecessary adjournments and the permitting of time-consuming frivolous point-taking. A judge should not be too flexible in the management of time during a trial or in controlling the inclination of some legal practitioners to enter into irrelevancies and issues which do not advance a case.

13. Counsel/legal representatives must be advised that a trial cannot simply run over the time allotted as the judge would have been allocated other duties for the days that follow the trial.

14. In criminal proceedings, the prosecution must in a session make enough backup cases of different possible durations available to ensure that if a backup trial is commenced the appropriate length trial will be commenced to ensure that it will finish within the time remaining in the session. There must be proper communication between the prosecution and the defence in the various enrolled cases on this subject, both prior to the commencement of the session and, whenever the need arises, during the course of the session. All this is directed at ensuring that wasted time is minimised without taking risks with regard to the generation of the part-heards. Judges must also play their part in ensuring that matters are expeditiously heard, and that part-heards are avoided.

15. Save in exceptional cases which require more than one session for their disposal, it is an absolute rule that judges do not start trials which, on a reasonable assessment, are likely to become part-heard.

Postponements

16. The current statistics show that the majority of criminal matters, for instance, are being postponed. In an application for postponement, the applicant must show good and sufficient cause, i.e., the applicant must furnish a full and satisfactory explanation of the circumstances that give rise to the application. An application for a postponement must be made timeously as soon as the circumstances which might justify such an application become known to the applicant. If illness is a ground for a postponement, proper medical evidence must be produced directly and positively to the effect that the witness or party cannot attend and disclosing the nature of the illness and the date when the person will probably be able to appear. In the absence of these particulars the party may have to proceed without the witness. The unavailability of a specific legal representative is not a good ground for allowing a postponement.

Ways and means of ensuring the hearing and finalization of matters without delay

17. The following should be considered:

(a) The optimal use of court times;

(b) Start the matter to finish it;

(c) Legal practitioners should not be double booked;

(d) State witnesses are to remain at court until they are excused from further attendance by the court;

(e) In appeals, the legal practitioners should submit heads of argument in time (Legal Aid South Africa and Judicare included) as per the notice issued by the Registrar.

(f) If the appeal record is somehow defective, the legal representatives concerned must bring that to the notice of the Registrar or appeals clerk within 10 court days of receipt of the appeal record for the purpose of remedying it as soon as possible before that appeal is set down for hearing. If the parties agree that such appeal record should be reconstructed, the parties must return the appeal record to the

Registrar together with the draft consent order, signed and dated by both parties. The draft consent order must simultaneously be emailed to the appeals section.

(g) The holding of meaningful pre-trial conferences and the adherence to the agreements reached thereat, the identification of issues and the narrowing of issues, which help to eliminate irrelevancies and thereby curtail the proceedings;

(h) The strict observance of court time after a short break and lunch; and

(i) The use of pro bono presiding officers to reduce backlogs.

Managing a high-profile case

18. This is a case which draws intense attention from the public and from the media. A high publicity case should be specially assigned to a judge with the requisite training, experience and temperament to manage the case from its inception through to its conclusion. The judge should determine how the trial will proceed in the court room with regard to news media arrangements, seating, security, and media access to exhibits.

19. The court must establish an effective communication method with the media about procedural and legal aspects of the case. There should be a single reliable source of information for media representatives. The court must plan for all foreseeable contingencies in dealing with the media and public. Before the trial begins, the trial judge should establish the ground rules for the media regarding the trial procedures and access to proceedings and trial participants. The judge, security personnel and court manager, should plan in advance to respond to the level of the security risk presented by the trial by reviewing the adequacy of current security measures, determining the security needs of assessors, judges and parties, and assessing the location and size of the courtroom in terms of security requirements. Public and media access to the court should be reviewed about matters such as seating arrangements, courtroom entry screening, times when the media and the public may enter and leave the courtroom, and the possibility of making available different periods of access to the courtroom for the media and the public. If it is necessary to deal with security issues beyond the courthouse itself, there should be collaboration with law enforcement agencies, private security staff, adjacent buildings, and other security personnel. Court staff and media liaison personnel should know about security

arrangements to avoid inadvertent interference with them. However, the security plan should be sufficiently flexible to accommodate unexpected developments.

Media coverage of the proceedings

20. To standardize the procedure when requests for permission to film or record court proceedings are received, the following guidelines are provided:

(a) Any party who wishes to film or record proceedings must notify the Registrar of its intention at least 5 days before hand. The Registrar will then establish from the presiding judge whether there is any objection to the request;

(b) Any party who wishes to object to any filming or recording must raise its objection in writing;

(c) The court may on good cause withdraw permission to film or record or change the conditions under which such permission was granted.

Equipment limitations

21. The following equipment limitations shall apply:

(a) Video: only one camera may be used at a time and the location of the camera is not to change while the court is in session.

(b) Audio: the media may install their own audio recording system provided this is unobtrusive and does not interfere with proceedings or the official recording of the proceedings. Individual journalists may bring tape recorders into the court room for the purposes of recording the proceedings but the changing of cassettes in the court room is not permitted while the court is in session.

(c) Still cameras: only one photographer will be allowed, and the location of the camera is not to change, and no changing of lenses or film is permitted in the court while the court is in session.

(d) All cameras, video and audio equipment must be in position at least 15 minutes before the start of proceedings and may be moved or removed only when the court is not in session. Cameras, cables and the like are not to interfere with the free movement within the court.

(e) Lighting: no movie lights, flash attachments or artificial lighting devices are permitted during court proceedings.

(f) Operating signals: no visible or audible light or signal may be used on any equipment.

Pooling arrangements

22. The following pooling arrangements shall apply:

(a) Only one media representative may conduct each of the audio, video and still photography activities.

(b) This media representative is to be determined by the media themselves and is to operate an open and impartial distribution scheme, in terms of which the footage, sound, or photographs are to be distributed in a 'clean' form, that is, with no visible logos etc to any other media organization requesting same and must be archived in such a manner that it remains freely available to other media.

(c) If no agreement can be reached on these arrangements, no expanded media coverage may take place.

Rules regarding behaviour of media representatives

23. Media representatives shall be subject to the following rules:

(a) Conduct must always be consistent with the decorum and dignity of the court.

(b) No identifying names, marks, logos or symbols should be used on any equipment or clothing worn by media representatives.

(c) All representatives (including camera crew) must be appropriately dressed.

(d) Equipment must be positioned and operated to minimize any distraction while the court is in session.

Absolute bar

24. There shall be an absolute bar on:

(a) Audio recordings or close up photography of bench discussions;

(b) Audio recordings or close up photography of communications between legal representatives or between clients and their legal representatives;

(c) Close-up photographs or filming of judges, lawyers, or parties in court;

(d) Recordings (whether video or audio) being used for commercial or political advertising purposes thereafter;

(e) Use of sound bites without the prior consent of the presiding judge (this does not apply to extracts from judgments or order).

25. Failure to comply with these instructions may lead to contempt of court proceedings.