Civil Procedure

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1. INTRODUCTION

During the past year, various amendments to the Rules of the Supreme Court of Appeal, the Uniform Rules of Court and the magistrates' courts rules came into operation.

The COVID-19 situation continued to require the publication of various practice directives dealing with court operations during the pandemic by heads of court.

The superior courts delivered judgments regarding various aspects of civil procedure. In some judgments trite principles were reiterated; in others new principles in respect of, among others, the application of rules of court were laid down.

During this period, a number of articles dealing with different aspects of civil procedure were published.

2. LEGISLATION

2.1 RATIONALISATION OF AREAS UNDER THE JURISDICTION OF THE HIGH COURT

The Minister of Justice and Correctional Services has appointed a committee on the rationalisation of areas under the jurisdiction and the judicial establishments of the divisions of the High Court.[1] The committee must submit its interim report on or before 15 October 2021 and its final report on 31 December 2021.

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1 GN 491, *GG* 44688 of 10 June 2021.

2.2 AMENDMENTS TO THE RULES OF THE SUPREME COURT OF APPEAL

On 11 September 2020, rule 18 of the Rules of the Supreme Court of Appeal, dealing with attorneys' fees, was substituted.[2]

On 1 December 2020, further amendments to the Rules of the Supreme Court of Appeal came into operation.[3] The amendments entailed the following:

- the substitution of rule 11(1) (powers of the President of the Court);
- the amendment of rule 13(1) and (2) (notification by registrar of date of hearing); and
- the substitution of various subrules of rule 17 (taxation of costs).

During August 2018, the Superior Courts Committee of the Rules Board for Courts of Law considered whether the Supreme Court of Appeal (SCA) should give reasons for granting or refusing leave to appeal. After considering comments received on the proposed amendments, the Rules Board resolved that it should not proceed with the proposed amendment. It announced its decision in a letter to stakeholders on 3 June 2021.

2.3 AMENDMENTS TO THE UNIFORM RULES OF COURT

On 11 September 2020, amendments to the Uniform Rules of Court came into operation.[4] The amendments entailed the following:

- the substitution of the Tariff for Sheriffs under rule 68; and
- the substitution of the Tariff of Fees of Attorneys under rule 70.

On 1 December 2020, further amendments to the Uniform Rules of Court came into operation.[5] The amendments entailed the following:

- the substitution of rule 35 (discovery, inspection and production of documents);
- the substitution of rule 45A (suspension of orders by the court);
- the substitution of rule 65 (commissioners of the court);
- the substitution of rule 67 (tariff of court fees);
- the amendment of the Tariff for Sheriffs under rule 68;
- the amendment of rule 69 (tariff of maximum fees for advocates on party and party basis in certain civil matters); and
- the amendment of the Tariff of Fees of Attorneys under rule 70.

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2 GN R858, *GG* 43592 of 7 August 2020.
3 GN R1158, *GG* 43856 of 30 October 2020.
4 GN R858, *GG* 43592 of 7 August 2020.
5 GN R1157, *GG* 43856 of 30 October 2020.

2.4 AMENDMENTS TO THE MAGISTRATES' COURTS RULES

On 11 September 2020, amendments to the magistrates' courts rules came into operation.[6] The amendments entailed the following:

- the amendment of Tables A and B (costs); and
- the amendment of Table C (tariff of fees of sheriffs who are not officers of the public service).

On 1 December 2020, further amendments to the magistrates' courts rules came into operation.[7] The amendments entailed the following:

- the substitution of rule 5(2) and (7) (summons);
- the amendment of rule 33(5A) (scale of fees by advocates), (6) (scale of fees by attorneys as between party and party) and (10) (disallowance of fee payable to attorney or advocate);
- the substitution of rule 76(2)*(c)* (functions and duties of clerks and registrars);
- the substitution of rule 84(2) (fees of mediators);
- the repeal of rule 86 (accreditation of mediators);
- the substitution of Form MED-6 (agreement to mediate); and
- the deletion of Form MED-7 (notice to cash hall to receive payment of mediator's fees).

2.5 PRESCRIBED RATE OF INTEREST UNDER THE PRESCRIBED RATE OF INTEREST ACT 55 OF 1975

On 11 September 2020, a rate of 7.75% per annum as from 1 June 2020 for the purposes of s 1(1) of the Prescribed Rate of Interest Act was published.[8]

On 1 July 2020, the rate of interest for purposes of s 1(1) of the Prescribed Rate of Interest Act was changed to 7.25% per annum.[9]

3. PRACTICE DIRECTIVES

During the period 2 June 2020 to 30 June 2021, various court directives dealing with the COVID-19 situation were issued.[10]

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6 GN R858, *GG* 43592 of 7 August 2020.
7 GN R1156, *GG* 43856 of 30 October 2020.
8 GN R987, *GG* 43703 of 11 September 2020.
9 GN R1067, *GG* 43781 of 9 October 2020.
10 The directives can be accessed at www.juta.co.za/covid-19-legislation-update/.

4. CASES

4.1 ABUSE OF PROCESS

An allegation of an abuse of process is not lightly upheld by a court, especially given the constitutionally protected right of access to courts in s 34 of the Constitution of the Republic of South Africa, 1996.[11]

4.2 *AMICUS CURIAE*

An *amicus curiae* appears not as a party, but as a friend of the court, and it is trite that it is not entitled to costs.[12]

In *SJ v SE*[13] the parties were in agreement that an *amicus curiae* should be admitted. However, neither of the parties had raised a constitutional issue in which the *amicus curiae* had an interest, as contemplated in rule 16A of the Uniform Rules of Court. The *amicus* had raised a constitutional issue *mero motu*. That was contrary to the unambiguous language of rule 16A and, consequently, the admission was refused by the court.

4.3 APPEAL

It is trite that the powers of an appeal court to overturn factual findings by a trial court are restricted. However, in situations where the findings of a trial court are based on false premises or where relevant facts have been ignored, or where the factual findings are clearly wrong, the appeal court is bound to reverse them.[14]

The conflation of grounds of review with grounds of appeal gives rise to difficulties which are compounded by the inherent problems that may arise in distinguishing between review and appeal proceedings.[15]

If an appellant has failed to lodge the record timeously in accordance with the Rules of the SCA, an application for condonation under rule 12 is required to revive and reinstate the appeal that has lapsed. Application for condonation must be made as soon as possible after the appellant has realised that it has not complied with the rules pertaining to the record. A full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the court to understand clearly the reasons and to assess the responsibility. It should not be assumed that,

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[11] *MT Pretty Scene: Galsworthy Ltd v Pretty Scene Shipping SA* [2021] 3 All SA 115 (SCA).

[12] *Eskom Holdings SOC Ltd v Resilient Properties (Pty) Ltd and Other Cases* (unreported, [2020] ZASCA 185, 29 December 2020, available online at http://www.saflii.org/za/cases/ZASCA/2020/185.html).

[13] 2021 (1) SA 563 (GJ).

[14] *Beukes v Smith* 2020 (4) SA 51 (SCA).

[15] *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs, KwaZulu-Natal Provincial Government* 2020 (4) SA 453 (SCA).

if the cause of the delay can be laid at the door of the appellant's attorney, condonation will be granted.[16]

In *National Commissioner of Police v Gun Owners South Africa*,[17] the SCA, once again, pointed out that the traditional requirements that render an order appealable, namely that it is final in effect or dispositive of a substantial part of the case, have now been subsumed under the broader constitutional 'interests of justice' standard.

In *MEC, Western Cape Department of Social Development v BE obo JE*,[18] the issues on appeal were crystallised. The SCA was, however, faced with a 900-page record and all the parties in their practice notes informed the court that counsel were of the opinion that it would be necessary to read the entire record. Very few references to the evidence were contained in the heads of argument and there was no dispute about what the witnesses had said. The court, in disapproving of the conduct of the parties on appeal, stated:

> The continued disregard by counsel of their obligation in terms of the practice directive to identify the portions of the record that in their opinion are necessary to be read is unacceptable.

A court of appeal should, in general, exercise its powers to allow further evidence on appeal sparingly. In *Afribusiness NPC v Minister of Finance*,[19] the SCA did not allow an *amicus curiae* to lead further evidence consisting of 'practical examples' under circumstances where the evidence was not common cause or otherwise incontrovertible and the respondent had no opportunity to respond thereto. The admission of the further evidence would have been prejudicial to the respondent.

In *Altech Radio Holdings (Pty) Ltd v Tshwane City*,[20] the SCA expressed its dismay at the fact that the parties made no real attempt to comply with the rules relating to the preparation of the appeal record, but refrained from making a punitive costs order because not one party could be singled out and all the parties were at fault in respect of the preparation of the record.

In terms of s 18(4)(iv) of the Superior Courts Act,[21] the operation of an execution order is suspended pending an urgent appeal under s 18(4). Consequently, a court is not empowered to order that such suspension would not operate.[22]

It is trite that an appeal court is reluctant to disturb findings of credibility by a trial judge who was steeped in the atmosphere of the trial and had

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16 *SA Express Ltd v Bagport (Pty) Ltd* 2020 (5) SA 404 (SCA).
17 2020 (6) SA 69 (SCA).
18 2021 (1) SA 75 (SCA).
19 2021 (1) SA 325 (SCA).
20 2021 (3) SA 25 (SCA).
21 10 of 2013.
22 *Knoop NO v Gupta (Execution)* 2021 (3) SA 135 (SCA).

the advantage of seeing and hearing the witness. Such findings are only overturned if there was a clear misdirection or the trial court's findings are clearly erroneous.[23]

4.4 APPLICATIONS

In *National Adoption Coalition of South Africa v Head of Department of Social Development for KwaZulu-Natal*,[24] it was reiterated that, having regard to the function of affidavits, it is not open to an applicant or a respondent to merely annex a number of documents to its affidavit without properly identifying those portions on which reliance would be placed.

Rule 6(12)*(c)* of the Uniform Rules of Court does not require of a party who seeks the reconsideration of an order to file an affidavit. If, however, such party does file an affidavit then the other party has an opportunity to file a replying affidavit.[25]

It is trite that the High Court has a discretion to allow a new matter in a replying affidavit in certain rare instances, for example, where the new matter was not available when the papers were initially filed. If the court allows such a matter, the other party is entitled to an opportunity to deal therewith.[26] It is undesirable to dispose of an application piecemeal.[27]

In *Masango v Sunset Bay Trading 156 (Pty) Ltd*,[28] it was held that, should a respondent possess no more facts to counter an allegation save to deny same, it cannot be expected of the respondent to say more. For instance, if a respondent is accused of demolishing a structure but knows nothing about it, it cannot be expected of such a respondent to place further facts before the court, save to deny the allegation.

Legal professionals who draft affidavits for their clients bear a responsibility for the contents thereof. They may not use the affidavits for the purpose of abusing their clients' opponents. Emotive and aggressive terms not borne out by any evidence should not find their way into affidavits.[29]

In *Gordhan v Public Protector*,[30] the Public Protector contended that Minister Gordhan, in his founding affidavit, described her as corrupt, illiterate,

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[23] *AM v MEC for Health, Western Cape* 2021 (3) SA 337 (SCA).

[24] 2020 (4) SA 284 (KZD).

[25] *Farmers Trust v Competition Commission* 2020 (4) SA 541 (GP).

[26] *Farmers Trust v Competition Commission* 2020 (4) SA 541 (GP).

[27] *Tau v Mashaba* 2020 (5) SA 135 (SCA).

[28] Unreported, [2020] ZAGPJHC 240, 1 October 2020, available online at http://www.saflii.org/za/cases/ZAGPJHC/2020/240.html.

[29] *Knoop and Another NNO v Gupta (Tayob Intervening)* (unreported, [2020] ZASCA 149, 19 December 2020, available online at http://www.saflii.org/za/cases/ZASCA/2020/149.html).

[30] Unreported, [2020] ZAGPPHC 777, 17 December 2020, available online at http://www.saflii.org/za/cases/ZAGPPHC/2020/777.html.

rogue, incompetent, irrational and unreasonable and unfit to occupy the position of Public Protector. She successfully applied for the matter to be struck out as scandalous, vexatious and irrelevant.

As a general rule, a counter-application need not be served by the sheriff since there is already an attorney of record for the applicant and a notice of motion would seem to be unnecessary. However, in *Commissioner, South African Revenue Service v Public Protector*,[31] reversed on appeal only in respect of the personal costs order against the Public Protector in *Public Protector v Commissioner for the South African Revenue Service*,[32] it was held that if there are more parties than one to the main application, a counter-application should be brought on notice of motion and served on all the other parties.

There exists an established procedure in claims for unliquidated damages to be brought by action and not on application. Any development of that procedure to allow such a claim to be brought on application must be properly motivated.[33] In this case, the issue of quantum of damages was referred to oral evidence in the High Court.

4.5 APPLICATION FOR LEAVE TO APPEAL

In *Ramakatsa v African National Congress*,[34] it was held that the test of reasonable prospects of success under s 17(1)*(a)*(i) of the Superior Courts Act[35] postulates a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. These prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown by an applicant who applies for leave to appeal.

In *MEC, Western Cape Department of Social Development v BE obo JE*[36] the appellant was sued for damages arising from injuries sustained by a child on a playground at the Babbel & Krabbel Kleuterskool. The case involved a consideration of the legal duties imposed upon the appellant and the Director-General of the Department of Social Development in their capacity as the regulators having oversight of all places of care and like institutions in the Western Cape. Leave to appeal to the SCA was granted on the basis that the matter was one of general importance and, further, that conflicting judgments existed.

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31 2020 (4) SA 133 (GP).

32 2021 (5) BCLR 522 (CC).

33 *Economic Freedom Fighters v Manuel* 2021 (3) SA 425 (SCA).

34 Unreported, [2021] ZASCA 31, 31 March 2021, available online at http://www.saflii.org/za/cases/ZASCA/2021/31.html.

35 10 of 2013.

36 2021 (1) SA 75 (SCA).

The refusal of an application for leave to appeal by the SCA is a final determination of such application and revives the operation and execution of the order of the court *a quo*. An application for reconsideration of such refusal in terms of s 17(2)*(f)* of the Superior Courts Act does not suspend the original order of the court *a quo*.[37]

4.6 APPLICATION TO DECLARE PROPERTY SPECIALLY EXECUTABLE

In *Changing Tides 17 (Pty) Ltd v Miekle*,[38] the applicant, after service of a summons in an action on a mortgage bond over a residential property, and a confession to judgment by the defendants in terms of rule 31(1) of the Uniform Rules of Court, applied for judgment in terms of rule 31(1) together with an application to declare the immovable property executable in terms of rule 46A. It was held that it is undesirable, impractical and contrary to the interests of justice to combine a judgment by confession with an application to declare an immovable residential property executable in compliance with the requirements of rule 46A. This is so because service of the application for judgment by confession would not inform the defendants, as laypersons, how they should go about placing before the judge in chambers any facts or representations regarding the fate of the residential property. In this instance, the High Court proceeded to grant, in chambers, the money judgment by confession but postponed the declaration of the immovable property as executable *sine die* pending an application in open court in compliance with the legal requirements for such relief.

4.7 CONSENT TO JUDGMENT BY AN ATTORNEY

In *Denby v Ekurhuleni Metropolitan Municipality*,[39] the merits and quantum were separated in an action for damages arising from bodily injuries to the plaintiff. After the merits were settled and made an order of court, the parties' legal representatives agreed upon a joint memorandum asking the court to make an order for payment in terms of a draft order to which the parties' legal representatives had agreed, but the defendant itself did not. The court, in making the order, held that the defendant had left it in the hands of its legal practitioners to deal with the matter and, in the absence of something to the contrary, that would include making such admissions and confessions at a pre-trial conference as were appropriate and, ultimately,

[37] *MEC for Co-Operative Governance and Traditional Affairs, KZN v Nqukhu Municipality* 2021 (1) SA 432 (KZP).

[38] 2020 (5) SA 146 (KZP).

[39] 2021 (1) SA 190 (GJ).

agreeing that an order be granted if that was the outcome of the pre-trial engagement. There was no suggestion that what the defendant's legal representative had agreed to was anything but *bona fide*.

4.8 COSTS

The Public Protector is a public litigant. It is expected of her never to act *mala fide* or in bad faith or exhibit any gross negligence in her conduct. If she acts recklessly by issuing a subpoena, she is liable to a costs order *de bonis propriis*.[40]

An inordinate delay in filing an answering affidavit, the regurgitation of statutory provisions without much attempt to explain how these impact on the case, and the annexing of documents to the affidavit without properly identifying those portions on which reliance would be placed are considerations justifying a costs order against an organ of state.[41]

A court of appeal is entitled to interfere with the exercise of the discretion by the court *a quo* in regard to costs if such exercise resulted in an 'unjustifiable conclusion'.[42]

Costs orders *de bonis propriis* were made in *Huysamen v Absa Bank Limited*[43] and *Gordhan v Public Protector*.[44]

A costs order on an attorney and client basis for conduct which was vexatious was made in *Zuma v Office of the Public Protector*.[45]

In *Moropa v Chemical Industries National Provident Fund*,[46] the court, after an analysis of certain cases, concluded that an attorney and own client scale of costs is not part of our law. *Sed quaere*.

In *Gouws v Taxing Mistress (Port Elizabeth)*,[47] the court declined to make a punitive costs order against the party who was declared a vexatious litigant under the Vexatious Proceedings Act.[48]

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[40] *Commissioner, South African Revenue Service v Public Protector* 2020 (4) SA 133 (GP).

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

[42] *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs, KwaZulu-Natal Provincial Government* 2020 (4) SA 453 (SCA).

[43] Unreported, [2020] ZASCA 127, 12 October 2020, available online at http://www.saflii.org/za/cases/ZASCA/2020/127.html.

[44] Note 30.

[45] Unreported, [2020] ZASCA 138, 30 October 2020, available online at http://www.saflii.org/za/cases/ZASCA/2020/138.html.

[46] [2020] 4 All SA 197 (GJ).

[47] Unreported, [2020] ZAECPEHC 41, 5 November 2020, available online at http://www.saflii.org/za/cases/ZAECPEHC/2020/41.html.

[48] 3 of 1959.

In *CB v HB*,[49] it was stated that it is settled law that, generally, a court could grant a costs order *de bonis propriis* against an attorney only in cases that involve gross incompetence or gross disregard of professional responsibilities, dishonesty, wilfulness or negligence of a serious degree.

A costs order *de bonis propriis* must be supported by facts and cannot be granted in the abstract. A court would be derelict in its duties if it imposed such an order where the facts did not justify it. Similarly, a court would be derelict in its duties if it failed to furnish its reasons for imposing the order.[50]

In *Public Protector v Commissioner for the South African Revenue Service*,[51] the Constitutional Court set aside a personal costs order that was made against the Public Protector and issued a stern warning to the High Court to grant personal costs orders against the Public Protector only when it was warranted and supported by evidence.

In *Zuma v Democratic Alliance and Economic Freedom Fighters*,[52] the court was scandalised by allegations made by the appellant which were without any factual foundation. As a mark of the court's displeasure, and to vindicate the integrity of the High Court and the judiciary, the SCA penalised the appellant with a punitive costs order.

In *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma*,[53] the Constitutional Court held that a costs order against the respondent was justified by the reprehensible conduct of the respondent towards the Commission.

It is well established that courts are not bound by extra-curial agreements to pay costs on a particular scale, and that costs remain in the discretion of the court hearing the matter. While a court will normally give effect to a contract to pay costs freely entered into, it may, in the exercise of its discretion, and having regard to the nature of the litigation before it, decide to award costs on a different scale, or no costs at all.[54]

4.9 *CURATOR AD LITEM*

In *Scott v Scott*,[55] the requirements of rule 57 of the Uniform Rules of Court for the appointment of a *curator ad litem* were considered and applied.

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[49] Unreported, [2020] ZASCA 178, 18 December 2020, available online at http://www.saflii.org/za/cases/ZASCA/2020/178.html.

[50] *Economic Freedom Fighters v Gordhan* 2020 (6) SA 325 (CC).

[51] Note 32.

[52] [2021] 3 All SA 149 (SCA).

[53] 2021 (5) SA 1 (CC).

[54] *Mashele v BMW Financial Services (Pty) Ltd* 2021 (2) SA 519 (GP).

[55] 2021 (2) SA 274 (KZD).

4.10 DECLARATORY ORDER

In *Baleni v Regional Manager, Eastern Cape Department of Mineral Resources*,[56] the process and powers of a court to issue a declaratory order in terms of s 21(1)*(c)* of the Superior Courts Act were reiterated.

4.11 DISCOVERY AND INSPECTION

For purposes of rule 35(12) of the Uniform Rules of Court, documents to which 'reference is made' in pleadings or affidavits include documents directly or indirectly referred to in annexures, but exclude documents referred to by a process of inference. The ambit of such documents is limited by relevance.[57]

4.12 EXCEPTION

It is an invariable practice of the courts, in cases where an exception has successfully been taken to an initial pleading that it discloses no cause of action, to order that the pleading be set aside and that the plaintiff be given leave, if so advised, to file an amended pleading within a certain period of time.[58]

4.13 EXECUTION

An application for the rescission of a final winding-up or sequestration order does not automatically suspend its operation and execution. An affected party may, however, approach the High Court under rule 45A of the Uniform Rules of Court to suspend execution pending the finalisation of the application for rescission.[59]

4.14 EXECUTION AGAINST RESIDENTIAL IMMOVABLE PROPERTY

Rule 46A of the Uniform Rules of Court requires judicial oversight whenever an execution creditor seeks to execute against the 'residential immovable property' of a judgment debtor. It would seem that if the immovable property concerned is merely nominally registered in the name of a legal person or trust, but used as a dwelling by the shareholder(s) or the trustees/trust beneficiaries, as the case may be, the property falls within the ambit of rule 46A in the event that the legal person or the trustees in their official

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56 2021 (1) SA 110 (GP).

57 *Democratic Alliance v Mkhwebane* 2021 (3) SA 403 (SCA).

58 *Thipe v City of Tshwane Metropolitan Municipality* (unreported, [2021] ZASCA 92, 25 June 2021, available online at http://www.saflii.org/za/cases/ZASCA/2021/92.html).

59 *Hlumisa Technologies v Nedbank Ltd* 2020 (4) SA 553 (ECG).

capacity are the judgment debtors and the judgment creditor wants to execute against the property.[60] In *Investec Bank Ltd v Fraser NO*,[61] the court, however, expressed a different view.

4.15 EXPERT WITNESSES

In *AM v MEC for Health, Western Cape*,[62] it was held that the functions of expert witnesses are threefold. First, they have themselves observed relevant facts that will be evidence of fact and admissible as such. Secondly, they provide the court with abstract or general knowledge concerning their discipline that is necessary to enable the court to understand the issues arising in the litigation. This includes evidence of the current state of knowledge and generally accepted practice in the field in question. Although such evidence can only be given by an expert qualified in the relevant field, it remains, at the end of the day, essentially evidence of fact on which the court will have to make factual findings. It is necessary to enable the court to assess the validity of opinions that they express. Thirdly, they give evidence concerning their own inferences and opinions on the issues in the case and the grounds for drawing those inferences and expressing those conclusions. It was held, further, that the opinions of expert witnesses involve the drawing of inferences from facts. The inferences must be reasonably capable of being drawn from those facts. If they are tenuous, or far-fetched, they cannot form the foundation for the court to make any finding of fact. Furthermore, in any process of reasoning the drawing of inferences from the facts must be based on admitted or proven facts and not matters of speculation.

4.16 INTERDICT

The reputation of organs of state is not capable of being defamed and therefore they do not have standing to apply for an interdict prohibiting defamatory statements about them.[63]

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[60] *Nedbank v Trustees for the time being of The Mthunzi Mdwaba Family Trust* (unreported, [2019] ZAGPPHC 336, 9 July 2019, available online at http://www.saflii.org/za/cases/ZAGPPHC/2019/336.html) and *Nedbank Ltd v Bestbier (Scholtz Intervening)* (unreported, [2020] ZAWCHC 107, 17 September 2020, available online at http://www.saflii.org/za/cases/ZAWCHC/2020/107.html).

[61] 2020 (6) SA 211 (GJ).

[62] 2021 (3) SA 337 (SCA).

[63] *Minister of Police v Silvermoon Investments 145 CC* 2020 (6) SA 586 (KZD).

4.17 INTEREST

In *Rand West City Local Municipality v Quill Associates (Pty) Ltd*,[64] the court, in applying the provisions of s 2A of the Prescribed Rate of Interest Act and the relevant case law, held that if interest is stipulated in a court order in action proceedings to be calculated *'a tempore morae'*, it meant that the interest ran from the date of service of summons.

4.18 INTERIM PAYMENT UNDER RULE 34A OF THE UNIFORM RULES OF COURT

Rule 34A of the Uniform Rules of Court relates only to claims for medical expenses and loss of income and does not provide for claims for general damages or loss of earning capacity.[65]

4.19 JOINDER

The test for joinder of necessity was restated by the SCA in *South African History Archive Trust v South African Reserve Bank*:[66]

> The substantial test is whether the party that is alleged to be a necessary party for purposes of joinder has a legal interest in the subject-matter of the litigation, which may be affected prejudicially by the judgment of the Court in the proceedings concerned …

4.20 JUDGMENT

The High Court should deliver judgment without inordinate delay.[67] For example, the court in *National Commissioner of Police v Gun Owners South Africa*[68] reiterated that judicial officers have an ethical duty to give judgment in a case promptly and without undue delay. If there are compelling reasons for a delay, an explanation should be given in the judgment.[69]

The High Court ordinarily bears a constitutional duty to provide reasons for its decisions and a failure to do so is an abdication of that duty.[70]

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[64] 2020 (5) SA 626 (GP).

[65] *PH obo SH v MEC for Health, KZN* 2021 (1) SA 530 (KZD).

[66] 2020 (6) SA 127 (SCA), with reference to *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA).

[67] *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs, KwaZulu-Natal Provincial Government* 2020 (4) SA 453 (SCA).

[68] 2020 (6) SA 69 (SCA).

[69] *National Union of Metal Workers of South Africa v Dunlop Mixing and Technical Services (Pty) Ltd* (2021) 42 *ILJ* 475 (SCA).

[70] *Mahlangu v Minister of Labour* 2021 (2) SA 54 (CC).

4.21 JUDGMENT DEBT (PRESCRIPTION)

A maintenance order forming part of a consent paper that was made an order of court should be construed as a judgment of the court.[71] Consequently, it constitutes a judgment debt which prescribes after 30 years as contemplated in the Prescription Act.[72]

4.22 JUDICIAL CASE MANAGEMENT

In *Chongqing Qingxing Industry SA (Pty) Ltd v YE*,[73] an application was struck off the roll for non-compliance with various provisions of the Judge President's consolidated directive dated 18 September 2021 pertaining to court operations in the Gauteng High Court during the extended COVID-19 national state of disaster relating to digital case management and the litigation system.

4.23 JUDICIAL CASE MANAGEMENT AND SET DOWN OF UNOPPOSED APPLICATIONS (GRAHAMSTOWN)

Judicial case management as contemplated in rule 37A(1)*(b)* and (2)*(a)* of the Uniform Rules of Court also applies to motion proceedings. Unopposed urgent matters should be set down on Thursdays only if so allocated by the registrar.[74]

4.24 JURISDICTION

The High Court has jurisdiction to compel a foreign company to produce the record of disciplinary proceedings conducted abroad if there is an adequate connection between the suit and its area of jurisdiction. Such connection is measured by suitability and convenience. The following factors are relevant:[75]

(a) the fact that the respondent has a business address and trades through an entity in the area of jurisdiction of the court;
(b) the fact that the respondent employs a manager, who carries on the South African operations of the foreign company, within the area of jurisdiction of the court;
(c) the fact that summons was served in South Africa;
(d) the fact that the effect of the disciplinary tribunal's decision was felt in South Africa; and

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71 *SA v JHA* 2021 (1) SA 541 (WCC).
72 68 of 1969.
73 2021 (3) SA 189 (GJ).
74 *Bobotyana v Dyantyi* 2021 (1) SA 386 (ECG).
75 *Holloway v Padi Emea Ltd* 2020 (5) SA 172 (GJ).

(e) the fact that the respondent has a bank account in South Africa and generates considerable turnover here.

In *FirstRand Bank Ltd v Mostert*,[76] the court, dealing with the provisions of the Magistrates' Courts Act[77] and the National Credit Act (NCA)[78] through the prism of the Constitution, came to the conclusion that if matters falling under the NCA are brought in the High Court, the right of access to justice enshrined in s 34 of the Constitution and the right to equality enshrined in s 9 of the Constitution are defeated. The court stated:

> The legislature created specific methods and processes to afford the previously disadvantaged and financially deprived and distressed people with specific means of access to the magistrates' courts as the appropriate forum. Not only is it a cheaper forum to litigate in, but, as stated earlier, almost every town in Mpumalanga has its own magistrates' [*sic*] court / office.[79]

The following order was made, among others:

> 1. To promote access to justice in the context of the Magistrates' Courts Act and the NCA, as read with ss 9 and 34 of the Constitution, and as from 1 August 2020, civil actions and/or applications arising within the ambit of the NCA (and thus falling within the magistrates' [*sic*] court's jurisdiction) should be instituted in the magistrates' [*sic*] court having jurisdiction.
> 2. All existing applications and actions, including those in this matter, must be finalised in the High Court as if it were properly instituted in that court.

See now, however, the subsequent judgment of the SCA in *Standard Bank of SA Ltd v Thobejane; Standard Bank of SA Ltd v Gqirana NO*[80] referred to below.

In *Mfwethu Investments CC v Citiq Meter Solutions (Pty) Ltd*,[81] it was held, in the context of a delictual claim (where it is trite that the court will have authority over a defendant who is resident in its area of jurisdiction), that the Companies Act[82] abolished dual corporate residence and that the registered address of a company was dispositive of the company's place of residence.

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[76] 2020 (6) SA 543 (ML).
[77] 32 of 1944.
[78] 34 of 2005.
[79] Para 52.
[80] Unreported, [2021] ZASCA 92, 25 June 2021, available online at http://www.saflii.org/za/cases/ZASCA/2021/92.html.
[81] 2020 (6) SA 578 (WCC).
[82] 71 of 2008.

The inherent jurisdiction of the High Court under s 173 of the Constitution to regulate its own process cannot be used to override the provisions of the Uniform Rules of Court directly making provision for relief.[83]

In *Eksteen v Road Accident Fund*[84] the appellant instituted an action against the respondent in the Bloemfontein magistrate's court on 17 January 2008. Without withdrawing that action, and on 19 October 2016, the appellant instituted another action against the respondent in the Free State Division of the High Court for damages he suffered as a result of a motor vehicle collision, which occurred on 18 June 2003. The respondent raised, among others, a special plea of *lis pendens*. One of the questions that had to be answered on appeal was whether, in terms of the provisions of s 2(1)*(e)*(ii) of the Road Accident (Transitional Provisions) Act,[85] a claimant was required to withdraw his claim in the magistrate's court prior to instituting an action in the High Court in the light of conflicting judgments in the various divisions of the High Court on the issue. The SCA was unanimous in answering the question in the affirmative and in upholding the special plea of *lis pendens*.

In *FirstRand Bank Ltd t/a Wesbank v Prins and a Similar Case*,[86] it was held that the plaintiff was entitled to institute proceedings in the High Court for a claim for relief arising out of a cancelled instalment sale agreement even though the value of the contract might fall within the monetary jurisdiction of the magistrate's court.

In *Standard Bank of SA Ltd v Thobejane; Standard Bank of SA Ltd v Gqirana NO*,[87] the SCA held that a court is obliged by law to hear any matter that falls within its jurisdiction and has no power to exercise a discretion to decline to hear such a matter on the ground that another court (for example, a magistrate's court) has concurrent jurisdiction.

4.25 *MANDAMENT VAN SPOLIE*

Quasi-possession of a right to electricity is protected by the *mandament van spolie*, even if there is only part-deprivation of possession.[88] In *Makeshift 1190 (Pty) Ltd v Cilliers*,[89] the respondent and the family occupied a building on a farm owned by the appellant. Under the agreement, the respondent was entitled to use electricity supplied to the farm by Eskom for as long as her

[83] *Botha t/a Tax Consulting SA v Renwick* (unreported, [2021] ZAGPJHC 37, 13 April 2021, available online at http://www.saflii.org/za/cases/ZAGPJHC/2021/37.html).

[84] [2021] 3 All SA 46 (SCA).

[85] 15 of 2012.

[86] Unreported, [2021] ZAWCHC 42, 26 February 2021, available online at http://www.saflii.org/za/cases/ZAWCHC/2021/42.html.

[87] Note 80.

[88] *Niehaus v High Meadow Grove Body Corporate* 2020 (5) SA 197 (GJ).

[89] 2020 (5) SA 538 (WCC).

husband paid the monthly bills. In an attempt to force the respondent and the family off the farm, the appellant cancelled its electricity contract with Eskom. The respondent successfully brought spoliation proceedings in the magistrate's court. On appeal, the issue was whether the respondent's right to the electricity supply was purely personal, in which case she had no spoliatory protection, or whether it was an incident of the possession or occupation of the property, thus qualifying for such protection. It was held that her right fell into the second category and the appeal was accordingly dismissed.

A spoliation order will be available if a homeowners' association deactivated a member's biometric access to the estate, and disallowed his builders access to the estate, under circumstances where the member became liable for certain monetary penalties levelled on him which he disputed.[90]

An order requiring restoration of possession under the *mandament van spolie* must be capable of being carried into effect. If the property is no longer in the hands of the spoliator and it is impossible for the spoliator to restore possession, the *mandament van spolie* cannot be granted.[91]

4.26 MOOTNESS

The well-known factors to be taken into account by a court exercising its discretion in regard to the question whether a matter which is moot should still be heard were applied in *Bwanya v Master of the High Court, Cape Town*.[92] These factors are:

(a) the nature and extent of the practical effect that any possible order might have;
(b) the importance of the issue;
(c) the complexity of the issue;
(d) the fullness or otherwise of the argument advanced; and
(e) resolving disputes between different courts.

4.27 NATURE OF CIVIL LITIGATION

In *National Commissioner of Police v Gun Owners South Africa*,[93] the intervention by the judge hearing an application was on appeal held to be inappropriate because it effectively resulted in a new case for the applicant in the High Court. The SCA held that the judicial intervention of the kind in question posed a real risk of rendering the court susceptible to an accusation of bias and, secondly, that in our adversarial system of litigation a court is

[90] *Bill v Waterfall Estate Homeowners Association NPC* 2020 (6) SA 145 (GJ).
[91] *Monteiro v Diedricks* 2021 (3) SA 482 (SCA).
[92] 2021 (1) SA 138 (WCC).
[93] 2020 (6) SA 69 (SCA).

required to determine a dispute as set out in the affidavits of the parties to the litigation. It is a core principle of this system that the judge must remain neutral and aloof from the fray.

4.28 POSTPONEMENT

Whether the unavailability of counsel previously engaged in a matter might afford a reasonable basis for a postponement at the instance of the affected party will depend on the facts of the given case. Fairness and the interests of justice are the principal determining criteria in all contested applications for postponement. Appropriate regard must be had not only to the position of the applicant but also to the legitimate interests of the other parties to the litigation and the needs of the effective administration of justice. Ordinarily, when there is sufficient time for another advocate to prepare, alternative counsel should be instructed when counsel of first choice is not available on the date allocated for the hearing of the matter. To avoid doing so is, in effect, a delaying tactic.[94]

4.29 POWER OF ATTORNEY

The remedy of a respondent who wishes to challenge the authority of a person allegedly acting on behalf of a purported applicant is provided for in rule 7(1) of the Uniform Rules of Court.[95]

4.30 PRACTICE

The absence of the registrar's signature on a summons, as required by Uniform Rule of Court 17(3)*(c)*, may be condoned by the High Court under rule 27(3) of the Uniform Rules of Court.[96]

An interim payment under rule 43A of the Uniform Rules of Court for future medical treatment and school fees before the hearing on quantum takes place in the High Court is precluded by s 17(6) of the Road Accident Fund Act.[97]

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[94] *Investec Bank Ltd v O'Shea NO* (unreported, [2020] ZAWCHC 71, 31 July 2020, available online at http://www.saflii.org/za/cases/ZAWCHC/2020/71.html).

[95] *Van der Walt v Van der Walt NO* (unreported, [2020] ZAWCHC 120, 20 October 2020, available online at http://www.saflii.org/za/cases/ZAWCHC/2020/120.html), referring to *Ganes v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) and *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA).

[96] *Motloung v Sheriff, Pretoria East* 2020 (5) SA 123 (SCA).

[97] 56 of 1996. See also *Road Accident Fund v Manqina* 2020 (5) SA 202 (ECB).

4.31 RECUSAL

In *Bennett v The State*,[98] the court, in dismissing an application for recusal, remarked that more and more recusal applications were being brought as strategic or tactical tools, or simply because a litigant did not like the outcome of an interim order made during the course of the trial. The seeming alacrity with which legal practitioners brought or threatened to bring recusal applications was cause for concern. The recusal of a presiding officer, whether a magistrate or judge, should not become standard equipment in a litigant's arsenal but should be exercised for its true intended objective, namely to secure a fair trial in the interests of justice in order to maintain both the integrity of the courts and the position they ought to hold in the minds of the people whom they served. The court observed that judges were expected to be stoic and thick-skinned. What was expected of presiding judges was clear, as was the right of litigants to raise improper conduct by judges and, without fear, to seek recusal. But litigants and their legal representatives at the same time bear a responsibility not to seek recusal as a tool. The ongoing unfounded aspersions passed on judges could bring about a loss of faith in the judiciary and bring it into disrepute.

4.32 REFERRAL OF MATTER TO FULL COURT OF THE HIGH COURT

In terms of s 14(1)*(b)* of the Superior Courts Act, a single judge of a division of the High Court may, in consultation with the Judge President or, in the absence of both the Judge President and the Deputy Judge President, the senior available judge, at any time discontinue the hearing of any civil matter which is being heard before him or her and refer it for hearing to the full court of that division. In *SJ v SE*,[99] the single judge, after consideration of the matter in consultation with the Judge President, rejected a request for referral to a full court on, among others, the grounds that the request had been late and no cogent reason for the delay had been advanced; that, although the matter was of importance to the Islamic community (the respondent having issued a *Talaq* against the applicant a week before the hearing of an application in terms of rule 43 of the Uniform Rules of Court), the matter was not *res nova*; and that judgments by other divisions of the High Court were not conflicting.

[98] 2021 (2) SA 439 (GJ).
[99] 2021 (1) SA 563 (GJ).

4.33 RULE 43 PROCEEDINGS

In an application under rule 43 of the Uniform Rules of Court the respondent raised a point *in limine* to the effect that he had issued a *Talaq* against the applicant, to whom he had been married in terms of Islamic law, thereby divorcing her. The court held that the parties owed each other the reciprocal duty of support arising from the Islamic marriage and that the question of the legal effect of the *Talaq* was an issue for determination in the pending divorce action. Until that issue was resolved, there was a matrimonial dispute between the parties that served as a jurisdictional factor for the rule 43 application and, accordingly, the point *in limine* stood to be dismissed.[100]

4.34 SERVICE

If service of process is to be effected at a chosen *domicilium citandi*, strict compliance with the rules governing proper and effective service is required. If service is done by means of leaving a copy of the summons on the grass of an unfenced 7,3767 hectare piece of land on which the defendant resides, such service is not proper and effective.[101]

4.35 SUMMARY JUDGMENT

Rule 32 of the Uniform Rules of Court, after its amendment by GN R842 of 31 May 2019 with effect from 1 July 2019, is not a model of clarity. It increases the workload of judges as well as the costs for parties. It delays the ability of deserving plaintiffs to obtain summary judgment, etc.[102]

A defendant is not required to set out its defence in an affidavit opposing summary judgment with the same degree of exactitude as would be required in a pleading. The defendant is required to merely set out the character or nature of the defence which it intends to raise at the trial.[103]

In *Nedbank Limited v Braganza Pretorius Beleggings (Pty) Ltd*,[104] it was held that rule 32(3) of the Uniform Rules of Court entitles a court, in its discretion, to allow a defendant to lead oral evidence in addition to an opposing affidavit. *Sed quaere*.

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[100] *SJ v SE* 2021 (1) SA 563 (GJ).

[101] *Absa Bank Ltd v Mare* 2021 (2) SA 151 (GP).

[102] *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) and *Propell Specialised Finance (Pty) Ltd v Point Bay Body Corporate SS 493/2008* (unreported, [2020] ZAWCHC 45, 26 May 2020, available online at http://www.saflii.org/za/cases/ZAWCHC/2020/45.html).

[103] *Eclipse Systems v He & She Investments (Pty) Ltd and a Related Matter* 2020 (6) SA 497 (WCC).

[104] Unreported, [2020] ZAWCHC 170, 1 December 2020, available online at http://www.saflii.org/za/cases/ZAWCHC/2020/170.html.

The legal principles relating to summary judgment were restated in *Saglo Auto (Pty) Ltd v Black Shades Investments (Pty) Ltd*.[105]

In *Belrex 95 CC v Barday*,[106] it was held that in terms of rule 28(1) of the Uniform Rules of Court, the High Court could, at any stage before judgment, grant leave to a party to amend any pleading or document. The provisions of the amended rule 32 relating to summary judgment consequently did not prevent a defendant from amending its plea. The rule did not state so, and any interpretation that a defendant could not do so was in conflict with the provisions of rule 28(10). The court, however, stated that a *lacuna* existed in rule 32 which could be used as a stratagem by a defendant wishing to frustrate the plaintiff in proceeding with summary judgment.

4.36 TRIAL

In *MEC, Western Cape Department of Social Development v BE obo JE*,[107] a legal issue that could properly be dealt with on exception or as a separate issue in terms of rule 33(4) of the Uniform Rules of Court arose. However, the plaintiff called witnesses, none of whom could address the relevant legal issue. On appeal, it was remarked that had it been thought that greater detail was required in order to highlight the policy issues relevant to the determination of the legal issue, a properly formulated request for particulars for trial and request for admissions at the pre-trial conference would have achieved that purpose. Either course would, consequently, have led to the avoidance of a lengthy and costly trial.

In *Union-Swiss (Pty) Ltd v Govender*,[108] the plaintiff applied for an order that the trial set down for a period of 10 days be conducted remotely via the electronic platform of Microsoft Teams because of the lockdown imposed as a result of the COVID-19 pandemic. The plaintiff proposed that the following measures be introduced during the trial:

> 23.1 When not speaking all participants will be required to mute their devices (so as to prohibit background noise);
>
> 23.2 When a participant is introduced or wishes to interrupt a speaker, he/she shall raise his/her hand;
>
> 23.3 Headsets should not be allowed;
>
> 23.4 The presiding Judge, the witness giving evidence and lead counsel for both parties shall remain visible on video at all times;
>
> 23.5 Each witness, at the outset of their testimony, will be asked to identify anyone who is in the room with them and to give a display

[105] 2021 (2) SA 587 (GP).
[106] 2021 (3) SA 178 (WCC).
[107] 2021 (1) SA 75 (SCA).
[108] 2021 (1) SA 578 (KZD).

> on their device of the room from where they are testifying to verify that fact;
>
> 23.6 During their testimony, witnesses must not communicate with anyone other than the examiner and the Judge and must not refer to documents other than those in the agreed trial bundle without the Judge's knowledge and permission;
>
> 23.7 Each witness shall give his/her evidence sitting at an empty desk or table and the witness's face shall be clearly visible throughout the hearing;
>
> 23.8 Each witness shall at all times during his/her testimony and as far as possible: (i) maintain eye contact with the camera of the relevant device that the witness is using and (ii) maintain a reasonable distance from the camera to ensure that the witness's head and upper body are visible.

The first defendant opposed the plaintiff's application on the basis, among others, that he had the right to challenge the plaintiff's evidence and witnesses in an open court and to present his evidence in the same forum, that there were issues of internet connectivity, and that it was difficult to assess a witness's demeanour on a video screen. The court was not much swayed by these objections. However, the critical issue which the plaintiff could not get past was to demonstrate why its trial, and the outcome thereof, was of such urgency that the practice directive of the Judge President of 1 May 2020 should have recognised it as sufficiently urgent to warrant it forging ahead, albeit by electronic means. The court did not suggest that it was inconceivable for civil trials to take place in the midst of the pandemic. It held that it was entirely dependent on the nature of the action and the potential prejudice that would be suffered if the matter had to wait for the allocation of a new date, several months or years ahead. Urgency would be the determining factor in all cases. The plaintiff's application was accordingly dismissed.

4.37 TRIAL INTERLOCUTORY COURT (GAUTENG)

In *Munyai v Road Accident Fund and Related Matters*,[109] the court was concerned, having regard to the Judge President's directive 2 of 2019, at:

(a) the lackadaisical manner in which affidavits were being drafted and presented to court for consideration; and
(b) the nature of relief sought in various instances.

It was held that the interlocutory court was intended to be an easily approachable court, its purpose being to assist parties to obtain procedural

[109] 2021 (1) SA 258 (GJ).

relief against recalcitrant litigants who were preventing matters from becoming trial-ready. While the court would assist litigants by ensuring that their cases were trial-ready and by calling to order recalcitrant litigants that were preventing this, legal procedure and protocol had to be followed nevertheless. Practitioners were urged to comply with the directive.

4.38 WITHDRAWAL AS ATTORNEY OF RECORD

An attorney, should he wish to cease to act on behalf of a party in any proceedings, has a duty to formally withdraw from the proceedings by delivering a notice of withdrawal of attorney of record in terms of rule 16(4) of the Uniform Rules of Court. Such a duty is one that an attorney owes not only to his client, but also to the court, as well as to his opponent and clients.[110]

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