

## MEMORANDUM TO PRACTITIONERS

### RE: PROCEDURE IN THE PRETORIA URGENT MOTION COURT

- [1] Urgent applications must be brought in accordance with Rule 6 and the guidelines set out in cases such as *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk 1972 (1) SA 773 (A)* at 782A-G, *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makins Furniture Manufacturers) 1977 (4) SA 135 (W)* and *Sikwe v SA Mutual Fire & General Insurance 1977 (3) SA 438 (W)* at 440G-441A. The majority of practitioners launch urgent applications without taking account of the Rule or the guidelines. Apparently many practitioners feel entitled to select any day of the week and any time of the day (or night) to demand a hearing. The result is that procedures are followed which do not accord remotely with 'the good order which is necessary for the dignified functioning of the Court' – *Luna Meubel Vervaardigers* at 136G-H.
- [2] The purpose of this memorandum is to inform practitioners how Rule 6(12) must be applied and the manner in which the urgent court will be managed to ensure that there is an orderly and dignified adjudication of applications in that court. This means ensuring that the papers are filed timeously and ready for adjudication. In general this means that they must be complete when filed by 12h00 on the Thursday ready for roll call at 10h00 the following Tuesday.
- [3] The attention of practitioners is drawn to the following:
- (1) Urgent applications must as far as practicable be in terms of the rules: i.e. the deviation from the rules must be commensurate with the urgency of the case;
  - (2) Urgency mainly involves the abridgment of times prescribed by the rules and secondarily the departure from established filing and sitting times;

- (3) In ***Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk 1972 (1) SA 773 (A)*** at 782A-G the court considered the effect of Rule 6(12) (what follows is a translation) –

‘It is of importance to state what the effect of this rule is. In the case of an urgent application an applicant is permitted to act by way of notice of motion without taking into account the rules which are usually applicable. The applicant is, in a certain sense, taking into account the circumstances of the case permitted to make his own rules but “as far as practicable” in accordance with the existing rules. Rule 6(12) therefore makes provision for a process subject to rules different from the usual and when an applicant appears before a judge in such a procedural manner he must ask the judge to disregard the rules applicable to ordinary adjudication. He is not obliged to go to the judge first to ask permission to act by means of extraordinary adjudication because Rule 6(12) expressly provides that the judge may deal with such a matter when and where he deems fit. If an applicant acts in terms of this rule and informs the respondent that he regards the application as urgent it follows, in my view, that the respondent is obliged, in the sense that he runs the risk of an order against him by default, and entitled to provisionally accept the rules which the applicant has adopted. When the matter comes before the judge he can object, but in the meantime, he dares not disregard the rules which the applicant has made for himself. Even if the rules of court with regard to ordinary adjudication are deemed to determine that an action is instituted when the notice of motion is handed to the registrar in the case of an urgent application the applicant in the absence of the registrar may launch the matter directly to the judge and the judge can disregard the rules of ordinary adjudication in this connection. Rule 6(12)(a) provides that in the case of urgent applications a judge can disregard the “forms and service” prescribed by the rules. Delivery of a notice of motion to the registrar is no “service” but because in the case of an opposed motion the applicable form 2(a) in the first Schedule requires express notice to the registrar and respondent a judge in an urgent case when the registrar is not available can disregard the requirement that form 2(a) be directed to the registrar.’

(Emphasis added.)

- (4) Judges sit in the urgent motion court on a weekly basis and matters should be set down bearing that in mind. Whether unopposed or opposed the papers must be filed (bound, indexed and paginated) by 12h00 the previous Thursday, unless the matter is so urgent that relief must be granted sooner. In ***Luna Meubel Vervaardigers*** at 137A-E the ascending order of urgency is set out:

- '(1) The question is whether there must be a departure at all from the times prescribed in Rule 6(5)(b). Usually this involves a departure from the time of 7 (now 10) days which must elapse from the date of service of the papers until the stated day for hearing. Once that is so, this requirement may be ignored and the application may be set down for hearing on the first available motion day but regard must still be had to the necessity of filing papers with the Registrar by the preceding Thursday so that it can come onto the following week's motion roll which will be prepared by the Motion Court Judge on duty for that week.
- (2) Only if the matter is so urgent that the applicant cannot wait for the next motion day, from the point of view of the obligation to file the papers by the preceding Thursday, can he consider placing it on the roll for the next Tuesday, without having filed papers by the previous Thursday.
- (3) Only if the urgency be such that the applicant dare not wait even for the next Tuesday, may he set the matter down for hearing on the next *Court* day at the normal time of 10:00 am or for the same day if the court has not yet adjourned.
- (4) Once the court has dealt with the causes for that day and has adjourned, only if the applicant cannot

possibly wait for the hearing until the next court day at the normal time that the court sits, may he set the matter down forthwith for hearing at any reasonably convenient time, in consultation with the Registrar, even that be at night, or during the weekend.

Practitioners should carefully analyse the facts of each case to determine, for the purposes of setting the case down for hearing, whether a greater or lesser degree of relaxation of the rules under the ordinary practice of the Court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith. Mere lip service to the requirements of Rule 6(12)(b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter is set down.'

(Emphasis added.)

- (5) Normally a respondent has not less than five days after service to give notice of his/her intention to oppose the application (Rule 6(5)(b)) and if no notice of intention to oppose is given, a period of not less than ten days must elapse between the date of service and the date of the hearing stipulated in the notice of motion (Rule 6(5)(b)). If the respondent gives notice of intention to oppose the respondent has 15 days from the date of service of the notice within which to file the answering affidavit or a notice of his/her intention to raise a question of law (Rule 6(5)(d)). Thereafter the applicant has 10 days from the date of service of the answering affidavit to file a replying affidavit (Rule 6(5)(e)). After that the applicant may within five days apply for the allocation of a date for the hearing, failing which the respondent may do so (Rule 6(5)(f)). It is clear from these times

that the respondent is normally given ample time to consider whether to oppose (5 days); to file an answering affidavit (15 days); and to consider the replying affidavit before the matter is enrolled (5 days);

- (6) The rule ensures an orderly flow of applications through the court and their expeditious adjudication. Rule 6(12) allows an applicant who requires relief urgently to have his case decided without the delays necessitated by the ordinary procedure. However the normal times will be abridged and the deviation from Rule 6 will be permitted only when the matter is urgent. The degree of abridgement and deviation must be commensurate with the case and must be justified in the founding affidavit. It is also required that the applicant satisfy the court that the circumstances of the case are such that the applicant will not be afforded substantial redress at a hearing in due course. Rule 6(12)(b) provides that –

‘In every affidavit or petition filed in support of any application under sub-paragraph (a) of this sub-rule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.’

- (7) Too many practitioners are over-optimistic or reckless in their assessment of the requirements set out in Rule 6(12)(b) and attempt to use Rule 6(12) to jump the queue to their client’s advantage. Many applications are struck off the roll because the court has found them not to be urgent. It is clear that the rule continues to be the most abused rule in the Division;
- (8) In accordance with the *Republikeinse Publikasies* judgment an applicant may choose to set the matter down on any Tuesday (or other day, in accordance with the degrees of urgency referred to in *Luna Meubel Vervaardigers*) but if the

applicant does not wish to have the matter heard on that day at the time indicated it is wrongly enrolled and the procedure abused. If an applicant anticipates that the application will be opposed it is essential that the respondent and the applicant be allowed reasonable times for the filing of answering and replying affidavits before the roll closes at 12h00 on Thursday. If these affidavits are not able to be filed in time and the matter cannot be heard at the time indicated in the notice of motion the procedure is abused. In every case the court will decide whether reasonable time has been allowed in the light of the circumstances revealed in the affidavits. If reasonable times have been allowed the respondent will not be allowed to delay the process;

- (9) Where the urgent motion court judge has found that the application is not urgent and strikes it off the roll the applicant is not prevented from re-enrolling the application duly amplified in a later week.

[4] In the light of the foregoing practitioners can expect the following approach in the urgent motion court –

- (1) Strict application of the **Republikeinse Publikasies** and **Luna Meubel Vervaardigers** judgments: all urgent applications must be enrolled by 12h00 on the previous Thursday for hearing at 10h00 on Tuesday unless they are covered by the other three degrees of ascending urgency referred to in **Luna Meubel Vervaardigers**;
- (2) Insistence by the urgent court judge that the judge be satisfied that –
  - (i) the abridgement of times and the deviation from the rule is justified by the circumstances of the case; and

- (ii) if the matter is not heard immediately the applicant will not be afforded substantial redress at a hearing in due course;

These matters must be pertinently dealt with in the affidavits filed in support of the application;

- (3) If an application is not filed (bound, indexed and paginated) by 12h00 on the previous Thursday (subject to the remaining degrees of ascending urgency in ***Luna Meubel Vervaardigers***) the application will not be heard and will be struck off the roll. The object of timeous filing of the papers is to enable the court to prepare and adjudicate upon the matter expeditiously;
- (4) If the judge is not satisfied that the application must be heard in the week in which it is enrolled for hearing it will be struck from the roll;
- (5) If the application is enrolled for hearing outside normal court hours (i.e. 10h00 – 16h00) without satisfactory explanation, it will be struck from the roll;
- (6) If an application, whether unopposed or opposed, is not ready to be adjudicated upon at the time indicated in the notice of motion it will be struck off the roll. If this occurs in an opposed application because the affidavits have not been filed timeously before 12h00 the previous Thursday (subject to the application falling under the remaining three degrees of ascending urgency referred to in ***Luna Meubel Vervaardigers***) this will mean that the applicant has not complied with the ***Republikeinse Publikasies*** guidelines. The judge in the urgent motion court will not permit the application to stand down so that further affidavits can be filed;

- (7) If a matter is not ready for hearing in the week in which it is enrolled for hearing, for whatever reason, in the absence of exceptional circumstances, which must appear from an affidavit, it will not be postponed to a later week. It will be struck off the roll;
- (8) If the circumstances of a case are exceptional and the judge postpones the matter to a later week the judge will order –
  - (i) that the remaining affidavits be filed (bound, indexed and paginated) by specific times;
  - (ii) that the papers be taken immediately to the judge who will sit in the later court;
  - (iii) that the applicant immediately deliver to the judge who will sit in the later week a letter summarising the issues in the matter and the nature of the urgency.
- (9) The return day of a *rule nisi* will be heard in the ordinary motion court unless the *rule nisi* expressly orders that the return day be heard in the urgent motion court. If parties agree that interim relief be granted and the respondent contends that the final adjudication of the matter is urgent, this must be dealt with in an affidavit so that the judge in the urgent motion court can make the appropriate order;
- (10) No matter involving more than 500 pages will be considered by the judge in the urgent court (subject to the remaining three degrees of ascending urgency) unless the papers are delivered to the judge who will hear the matter at least 48 hours before the time of the hearing in the notice of motion;

- (11) Any semi-urgent application which involves bulky affidavits in excess of 500 pages and/or argument in excess of three hours will be referred to the Deputy Judge President to allocate a date and judge for the hearing. Where practitioners anticipate that a dispute is of such importance that it must be resolved urgently by the court, for whatever reason, they should approach the Deputy Judge President to allocate a date for the hearing and determine dates for the filing of affidavits and heads of argument and the indexing and pagination of the affidavits.

Dated at **Pretoria** on the **15<sup>th</sup> of February 2007**.

**B.M. NGOEPE**

**JUDGE PRESIDENT**