

WESTERN CAPE HIGH COURT CAPE TOWN

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Practice Notes 2009

By direction of the Judge President the following Consolidated Practice Notes are operative with effect from 1 July 2012.

1. **Introduction.**-All existing Court Notices, Practice Notes and Old Cape Rules currently in force in this Division are hereby repealed and replaced with these Consolidated Practice Notes (*Practice Notes*).
2. In these Practice Notes, unless the context otherwise indicates-
 - (a) "**day**" means court day;
 - (b) "**Judge President**" includes the Deputy Judge President or Acting Judge President, as the case may be;
 - (c) "**rules**" means the Uniform Rules of Court and any word or expression defined in the rules bears the same meaning herein.
 - (d) "**case managing judge**" means the judge presiding at the final Rule 37(8) Conference.

A. COURT TERMS AND TIMES OF SITTING

3. There shall be four terms in the year during such periods as the Judge President may determine from year to year.1
4. Subject to the discretion of any individual judge to order differently, all the courts of this Division will ordinarily commence at 10h00.2
5. Subject to Practice Note 6 below, Fridays during term are reserved for the hearing of appeals, reviews, other matters to be heard by more than one judge and such other matters as the Judge President may permit to be enrolled.3
6. **Admissions.**4-
 - (1) During term all applications for admission and enrolment as an advocate, attorney, notary and conveyancer will be heard by two judges on the first Friday of every month, unless the Judge President, on prior request and for good reason, orders otherwise.5
 - (2) The presiding judge will deliver a short address at the commencement of proceedings.
 - (3) In order to minimise disruptions and to enhance the dignity of the occasion, all persons attending the proceedings (including practitioners appearing for applicants) will be requested to remain in court until the roll has been completed.
 - (4) Whenever the number of applications set down for a particular day justify doing so, the roll will be split and will be dealt with separately during a morning and afternoon session.
7. All other matters shall be heard on any other day during term unless otherwise directed by the Judge President;6 provided that no new opposed matters are to be set down for hearing in the last week of any term without leave of the Judge President.7
8. Once the hearing of any matter has commenced and the presiding judge is available, such matter shall, save in exceptional circumstances, continue until it is concluded; provided that matters that are not completed during the second last week of any term shall not automatically continue during the last week of term without the leave of the presiding judge.8 In this regard, the convenience of counsel shall not be regarded as an exceptional circumstance.9
9. **During court recesses-**
 - (1) all unopposed matters (except divorce actions) shall be heard on TUESDAYS in Third Division;
 - (2) all unopposed divorce actions, as well as applications in terms of Rule 43 (opposed and unopposed), shall be heard on WEDNESDAYS in the Third Division;
 - (3) all Notices of Set Down for matters in Third Division shall be filed before 12h00 on the preceding FRIDAY;
 - (4) urgent and/or opposed matters shall be heard at such times as the senior duty judge may determine;

- (5) in special circumstances, any other matters may be heard on such dates as the Judge President may direct:

Provided that during the period between Christmas and New Year no court shall sit, save where circumstances otherwise require.

10. Circuit courts shall be held on the dates and at the venues determined by the Judge President from time to time.[10](#)

B. DOCUMENTS AND PLEADINGS

11. All documents filed with the Registrar-

- (1) shall be typed and printed in black ink on white paper of A4 size in double spacing on one side of the paper only with a font size not less than 12 point; provided that the court may, in its discretion, relax these requirements where a litigant appears in person or where circumstances require;[11](#)
- (2) shall have a margin of at least 35mm, which serves as a binding space and shall not be used for notes, signature, initials, stamps, etc; provided that where a document which is to be used as an exhibit, is not of A4 size or does not have a margin of 35mm or more, it should, where possible, be gummed to paper of A4 size;[12](#)
- (3) shall bear in the left-hand lower corner of the first page of such document the name, telephone number and (where available) the e-mail address of the legal representative filing such documents.[13](#) Where a litigant acts in person, the relevant details of such litigant shall likewise appear.

12. The Registrar's office may refuse to accept any document which does not comply with these requirements.[14](#)

13. Whenever due to urgency it is not possible timeously to file an original document with the Registrar or to hand it in from the Bar, a copy thereof (including a facsimile copy) may be filed or handed in provided that-

- (1) such a copy shall be clear, clean, fully legible, on paper of good quality and of A4 standard size;
- (2) the original document shall be placed in the relevant file as soon thereafter as possible.[15](#)

C. MOTION COURT AND 'FAST LANE'

14. The Judge President will allocate two duty judges to Motion Court (*Third Division*) each week of the year, starting at 17h00 on each Friday, including court recesses.[16](#)

15. Enquiries as to which judge is on duty after court hours each day and during weekends must be directed only to the registrar on duty.[17](#)

16. One of the judges will hear all unopposed matters as well as opposed Rule 43 applications in Third Division.[18](#)

17. The other duty judge, presiding in what is known as the '*Fast Lane*' Court, will deal with the following matters:[19](#)

- (1) all unopposed urgent applications brought under Rule 6 (12) not on the ordinary Third Division roll;
- (2) all opposed matters (and all matters becoming opposed) on the Third Division roll;
- (3) all matters which, even if unopposed, are in the opinion of the senior duty judge such as to warrant a hearing in a separate court, either by reason of the complexity of the matter or the volume of papers;
- (4) all chamber book applications;[20](#)
- (5) all matters referred to the '*Fast Lane*' Court by the Judge President.

18. In all matters to be heard in the Third Division a notice of set down must be filed with the Registrar by no later than noon on the day but one prior to the date of hearing.[21](#)

19. Save where the court is prepared to condone the defect, matters in which the set-down has preceded the expiry of the *dies induciae* may be struck from the roll with an appropriate order as to costs.[22](#)

20. In all **opposed matters** in Third Division (including Fast Lane)-

- (1) the applicant's attorney must file a practice note when setting the matter down, indicating-
 - (a) whether or not the matter is likely to proceed on the allocated date;
 - (b) where applicable, the grounds of urgency;
 - (c) if the matter is to be postponed, the reason(s) for the postponement;
 - (d) full details, including contact numbers, of the legal representatives of all the parties;[23](#)
- (2) where the matter is likely to proceed on the allocated date, the papers in the court file must be collated, indexed and paginated before the matter is set down;[24](#)
- (3) where it is anticipated that argument is likely to last for more than half a day, the parties must approach the Judge President for directions regarding the hearing of the matter.[25](#)

21. The judge hearing opposed matters in Third Division (including Fast Lane) may, after hearing the legal representative(s), make an order but need not furnish reasons therefor unless reasons are requested in terms of Rule 49 (1) (c).[26](#)
22. Whenever reasons for a court's order are required (whether in terms of Rule 49 (1) (c) or otherwise), the legal representative concerned shall deliver such application or request for reasons to the judge from whom the reasons are required.[27](#)
23. The papers in the court file must likewise be collated, indexed and paginated-
 - (1) in all return days; and
 - (2) in all matters where the papers exceed 50 pages, whether the matters are opposed or unopposed.
24. It is the responsibility of the applicant's (or plaintiff's) attorney in all matters to ensure that the court file is in order when filing the notice of set down.[28](#)
25. **Matrimonial Matters.**-In all divorce actions-
 - (1) there shall be personal service of the summons on the defendant unless service other than personal service has been authorised;[29](#)
 - (2) where more than six months have elapsed between the date of service of the summons and the date of set-down, notice of set-down shall be given to the defendant, unless the court in the exercise of its discretion dispenses with this requirement;[30](#)
 - (3) the original or a copy of the marriage certificate of the parties shall be handed in at the hearing;[31](#)
 - (4) failure to comply with the requirements set out above may result in the matter being postponed or struck from the roll with an appropriate order as to costs.[32](#)
26. Save where the court in its discretion and on good cause shown dispenses therewith, all applications in terms of [section 21 \(1\)](#) of the Matrimonial Property [Act 88 of 1984](#), and all applications under [section 88](#) of the Deeds Registries Act, [47 of 1937](#), shall, in addition to the requirements of those Acts, also follow the guidelines laid down in *Ex parte Lourens et uxor* [1986 \(2\) SA 291 \(C\)](#).[33](#)
27. **Service and Publication of Orders.**-
 - (1) Whenever a rule *nisi* or a provisional order has to be served (whether by delivery and/or publication and/or posting), such service shall be effected not later than 10 days prior to the return date of the said rule *nisi* or provisional order.[34](#)
 - (2) Whenever an order of court has to be published in a newspaper or in any other publication, such order shall be published only in the language of the relevant newspaper or publication, irrespective of the language in which the order is issued, unless an order is specifically made that the order of court be published in another language. Where, however, a newspaper or publication is published in more than one language, priority shall be given to the language in which the order of court is issued.[35](#)
 - (3) In all return days an affidavit must be filed by the applicant's attorney of record, setting out in what respects there has been compliance with the court order and attaching the relevant supporting documents (eg court order, sheriff's return and/or other proof of service, publication or posting).[36](#)
 - (4) Where an order of court has been published in the *Gazette* or a newspaper, the full sheet with the heading and the date of a *Gazette* or newspaper containing the relevant publication should be attached to the affidavit referred to in the preceding paragraph. This page must be folded to A4 size in such a way as to show the order and the date of publication.[37](#) Alternatively, and if only a cutting of the order is filed, the date and newspaper in which it was published shall be proved by way of the affidavit referred to in the preceding paragraph, which shall explain, *inter alia*, why the full page is not filed.[38](#)
 - (5) These directions shall apply *mutatis mutandis* where service is effected by way of edictal citation or substituted service.
28. **Default Judgments.**-Applications for default judgment in terms of Rule of Court 31 (5) must be made substantially in accordance with **Form "A"** in the Schedule hereto and all such applications must be accompanied by a draft order substantially in accordance with **Form "B"**.[39](#)
29. **Postponements.**-
 - (1) As soon as possible after applicants' legal representatives become aware that a matter on the Third Division roll is to be postponed or removed from the roll, they shall without delay notify the registrar of the duty judge concerned.[40](#)
 - (2) Where a matter has previously been postponed, an affidavit must be filed motivating an application for any further postponement.[41](#)
30. **Notice of Applications for Sequestration/Liquidation.**-
 - (1) Save where the court in its discretion and on good cause shown dispenses therewith, notice of intention to apply for a provisional order of sequestration shall be given to the debtor and, if married, to the debtor's spouse (whether married in our (*sic*) out of community of property), who shall be joined as a respondent.[42](#)

- (2) Save as provided in sub-paragraph (3) below, notice of intention to apply for a provisional order of liquidation shall be given to the company concerned prior to the filing of the application.[43](#)
- (3) The court may in its discretion dispense with the requirements of the preceding subparagraph where the court is satisfied that it would be in the interests of the company or of the creditors to do so, or that the company has knowledge that such application is to be made.
- (4) In the case of so-called, 'friendly sequestrations' or, in the case of applications for winding-up, where the applicant is the company itself or an insider, notice of the provisional order shall also be given to creditors with claims in excess of R5 000, unless the court orders otherwise. (With regard to 'friendly sequestrations' in general, the attention of practitioners is drawn to the judgment in *Craggs v Dedekind and three similar matters* [1996 \(1\) SA 935](#) (C).)

31. Reports by the Master and other Government Officials.-

- (1) In all applications requiring a Master's report (including those brought as matters of urgency) the attorney of record for the applicant shall first lodge his/her application with the Registrar who will in the normal course issue an appropriate case number.
- (2) Thereafter a copy of all the papers filed of record shall be submitted to the Master under cover of a letter requesting a report and the Registrar's case number should appear from the documents thus served upon the Master.
- (3) The onus will thereafter be on the attorney to lodge the Master's report in the appropriate court file and shall not enrol the matter until he or she has done so.[44](#)
- (4) The provisions of paras (1) to (3) above shall apply equally to all applications for **Voluntary Surrender**.[45](#)
- (5) Applications for the court's sanction where it is required under the Companies Act should first be submitted to the Registrar of Companies for a report, and such report is to be included in the papers placed before the court.[46](#)
- (6) The procedure set out in the preceding subparagraph shall, subject to the provisions of [section 97 \(1\)](#) of the Deeds Registries Act, [47 of 1937](#), apply *mutatis mutandis* in all cases requiring a report by the Registrar of Deeds.[47](#)

32. Removal of Restrictions from Title Deeds[48](#).-In applications for the removal of restrictions from title deeds imposed in terms of a Town Planning Scheme, the order to be issued should, as far as possible, follow the form as approved in *Ex parte Kilian; Ex parte Wiehahn* [1963 \(2\) SA 576](#) (T).

33. National Credit Act 34 of 2005.[49](#)-

- (1) In any proceedings instituted in terms of the National Credit [Act 34 of 2005](#) (*the Act*) in respect of any claim to which the provisions of sections 127, 129 or 131 of the Act apply, the summons or particulars of claim, or, in motion proceedings, the founding papers, must contain sufficient allegations or averments to enable the court to be satisfied that the procedures required by those sections, read with section 130 (1) and (2) of the Act, as may be applicable to the claim had been complied with before the institution of the proceedings. (The attention of practitioners are drawn to the judgment in *Rossouw and Another v FirstRand Bank Ltd* [2010 \(6\) SA 439](#) (SCA), in particular in paras 33-37.)
- (2) In order to satisfy the court of the matters referred to in section 130 (3) of the Act, an affidavit must be filed when a credit provider applies for judgment.

34. Urgent Applications[50](#).-

- (1) When an application is alleged to be of extreme urgency, the applicant's legal representative shall approach the Registrar to arrange a hearing as soon as possible in consultation with the duty judge.
- (2) Practitioners are expected to adhere as far as possible to the basic requirement of Rule 6 (5) (a) that Form 2 (a) be used in applications, including applications with an element of urgency. (In this regard, the attention of practitioners is drawn to the judgment in *Gallagher v Norman's Transport Lines* [1992 \(3\) SA 500](#) (W) at 502D-504C.)[51](#)
- (3) Opposed matters which are not of extreme urgency but which are nevertheless too urgent to await a hearing in the ordinary course on the continuous roll, will be granted some preference. For convenience these matters are called 'semi-urgent' matters.

35. 'Anton Piller' Orders[52](#).-

- (1) In all applications brought *ex parte* for an order to allow the entry and search of premises (an 'Anton Piller' order), a draft order substantially in accordance with **Form "C"** in the Schedule hereto (varied or amplified to the extent necessary in particular circumstances) is to be attached.
- (2) When service of the order is effected, it shall be accompanied by a copy of the notice to respondent substantially in accordance with **Form "D"** in the Schedule hereto (varied or amplified to the extent necessary in particular circumstances), and the attention of the person served is to be pertinently directed to such notice and order, and no further steps in pursuance of the order shall be taken until the notice and order have been read or read to and understood by the said person and he has availed

himself of his rights thereunder should he wish to do so. Where necessary, the services of an interpreter are to be called for.

- (3) The '*supervising attorney*' referred to in the notice and draft order should be an attorney whom the court considers suitable in the circumstances and who is not a member or an employee of the firm acting for the applicant. The application shall include information as to the identity and experience of the proposed supervising attorney.
- (4) Where the premises concerned are likely to be occupied by an unaccompanied woman and the supervising attorney is a man, at least one of the persons attending on the service of the notice and order should be a woman.
- (5) The order and the accompanying notice are to be served by the sheriff and the contents explained by the supervising attorney in whose presence and under whose supervision the provisions of the order are to be carried out. The supervising attorney shall ensure that no items are removed from the premises until a list of items to be removed has been prepared, and a copy thereof has been supplied to the applicant's attorney and the person served with the order, if present, and such person has been afforded a reasonable opportunity to check such list. The supervising attorney shall not permit the premises to be subjected to a search for items not appearing on the schedule of listed items referred to in paragraph 2 of the order.
- (6) The supervising attorney shall file with the registrar, by no later than noon on the day but one preceding the return day of the order, a concise report describing the manner in which the order was complied with. The supervising attorney shall ensure that a copy of his/her report is delivered to applicant's attorney and to respondent (or his/her attorney, if represented).

36. Hague Convention Matters.[53](#)-

- (1) All applications brought pursuant to the provisions of the Hague Convention on the Civil Aspects of International Child Abduction 1980 will ordinarily be treated as urgent, subject to the right of any party to argue that it should not be so treated in any given case.
- (2) It will be the responsibility of the applicant's legal representatives to ensure that the court file is clearly endorsed so as to indicate that it is a '*Hague Convention*' matter. Where an applicant is not represented, the Registrar should assist litigants insofar as is possible.
- (3) The relevant court file must be placed before the duty judge at the earliest opportunity.
- (4) Should the matter not be disposed of by the judge in the urgent court during the course of that particular week, the judge that dealt with the matter or another judge designated by the Judge President will ordinarily be seized with the matter and will continue to manage the case procedurally, with due regard to the urgency thereof, until it is ripe for hearing, the aim being to ensure finalisation within a maximum of 6 weeks from date of issue of the application.

37. Chamber Book Applications.[54](#)-Applications may be brought through the Chamber Book in the following matters-

- (1) to authorise the issue of process on Saturdays, Sundays, public holidays and outside the times specified in Rule 3;
- (2) for directions as to the set down of applications referred to in Rule 6 (11);
- (3) for judgment on confession as provided for in Rule 31 (1);
- (4) for judgment following acceptance of an offer or tender and failure to pay or perform within the period specified in Rule 34 (7);
- (5) for an order for payment of unpaid costs following acceptance of an offer or tender made in terms of Rule 34 (9);
- (6) for an order as to the conditions for the conduct of an examination as provided for in Rule 36 (3);
- (7) for an order to resolve a dispute as contemplated in Rule 36 (7);
- (8) for an order for the transcription of a record (see Rule 39 (19));
- (9) for an order by consent of the parties for the transfer of a trial to the magistrate's court, subject to the proviso in Rule 39 (22);
- (10) for leave, in an *in forma pauperis* matter, to withdraw, settle or compromise the proceedings or to discontinue assistance therein and for the giving of directions as to the appointment of a substitute(s) (see Rule 40 (5));
- (11) for directions for service in applications involving the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (*PIE*) 19 of 1998;
- (12) for an order on a case submitted by the taxing master (including an award as to costs) in terms of Rule 48 (2);
- (13) for an order by consent of the parties for the promotion of a matter on the roll (old Cape Rule 34 (4) (a));

- (14) for an order by consent of the parties removing a matter to another division of the High Court or to a circuit court or for the removal of a matter from the circuit court to the court sitting in Cape Town or for the removal of a matter to the Divorce Court;
- (15) for an order for the substitution of a *curator ad litem*;
- (16) for an order referring any matter concerning the welfare, custody or maintenance of minors to the Family Advocate for investigation and report;
- (17) for the grant of an interdict (or the amendment or the setting aside thereof) by consent of the parties pursuant to the provisions of the Prevention of Family Violence Act, 1993;
- (18) applications by minors for leave to marry or to enter into apprenticeships or other contracts where the court's sanction is sought;
- (19) applications to compel the filing of opposing papers where a notice of opposition has been filed, but no further steps have been taken by the respondent, failing which the matter may be enrolled on the unopposed roll;[55](#)
- (20) for any order which is required to be brought in Chambers by reason of the provisions of any Act or law or these Practice Notes.

D. TRIALS AND OTHER OPPOSED MATTERS

- 38.** Upon the close of pleadings, the plaintiff's attorney, or if he or she fails to do so, any party, may apply for a trial date by entering the relevant particulars as required by the Registrar in a register kept for that purpose.[56](#)
- 39.** Before applying for a date of set-down, the attorney in question shall collate, number consecutively and suitably secure all pages of the pleadings and documents in the court file. A complete index thereof, together with a questionnaire substantially in accordance with **Form "E"** in the Schedule hereto, shall also be prepared and delivered.[57](#)
- 40.** The Registrar will not allocate a trial date in any trial matters until such time as the provisions of Practice Note 39 above have been complied with.
- 41. Pre-Trial Procedure and Case Management.**[58-](#)
 - (1) In order to ensure that it is effective, a pre-trial conference should be held after discovery and after the parties have exchanged documents and further particulars.[59](#)
 - (2) At a pre-trial conference the parties must genuinely endeavour to achieve the objects of Rule 37 (by defining triable issues and curtailing proceedings) and the minute must show this.[60](#)
 - (3) A document which purports to be a pre-trial minute but which does not achieve the objects of Rule 37 (e.g. if it is a mere recordal or paraphrase of the agenda items for discussions at a Rule 37 conference), shall not be accepted as a proper pre-trial minute. Proper compliance with Rule 37 (4) is required to ensure a meaningful conference.[61](#)
 - (4) Where any party is of the view that the matter is ready for trial, but no notice of a trial date as contemplated by Rule 37 (1) has as yet been received, or that for any other reason a conference as contemplated by Rule 37 (8) before a judge in Chambers needs to be convened, such party may apply through the Chamber Book, on notice to all other parties, for an order that such a conference be convened; provided that no such conference will be convened unless the party requesting the conference has complied with the provisions of Practice Note 39 above.
- 42. Allocation of Opposed Matters.-**
 - (1) Where a matter set down for hearing on the continuous roll is placed before the Judge President for allocation to a judge, and the provisions of Rule 62 (4) have not been complied with, or the signed minute referred to in Rule 37 (1) (a) has not been filed, the Judge President may refuse to allocate such matter to any judge and may order that the matter be struck from the roll for the date for which it has been set down, and he/she may make such other order or orders as to him/her seems appropriate, including any order as to costs.[62](#)
 - (2) Not less than two (2) days[62a](#) before a matter on the continuous or opposed motion roll is set down to commence, the plaintiff's/applicant's counsel (or in the event of the plaintiff's/applicant's counsel not being available, his/her instructing attorney) shall advise the secretary to the Judge President in writing (including facsimile and/or e-mail)[63-](#)
 - (a) whether or not the matter has been settled;
 - (b) if not settled, what the prospects are of the matter being settled;
 - (c) of the likely duration of the matter;
 - (d) the names and telephone numbers of counsel on both sides; and
 - (e) a brief description of the issues involved.[64](#)

(f) when and by which case managing judge the matter has been released as "trial ready".

- (3) As soon as possible after counsel becomes aware that in a particular matter on the continuous or motion roll witnesses and/or counsel from out of town will be testifying or appearing, this information shall be conveyed by counsel to the secretary to the Judge President.
- (4) If an opposed matter is settled, or is to be withdrawn or postponed, or if any issue raised will not be pursued, the attorney of record shall, without delay, notify the Registrar in terms of Rule 41 (3) and, where applicable, shall immediately delete the entry on the continuous roll.[65](#)

43. Early Allocation of Opposed Matters.-

- (1) If any matter on the continuous roll requires early allocation, the legal representatives for the plaintiff, excipient or applicant (as the case may be), shall after compliance with the provisions of Rule 62 (4), deliver to the secretary of the Judge President, not less than seven (7) days[65a](#) before the date of hearing, the relevant court file, together with a notice to that effect, setting out the case number, the names of the parties and their legal representatives, and the date of hearing.[66](#)
- (2) The notice shall otherwise comply with the provisions of Practice Note 42 (2) above and shall include a list enumerating those parts of the record or the heads of argument, if applicable, which, in the opinion of the parties' legal representatives, are not relevant for the determination of the matter.[67](#)
- (3) Matters will be deemed to require early allocation, as contemplated above-
 - (a) where the papers (including annexures) in the matter exceed 200 pages; or
 - (b) where the issues are such 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 so (that is, the day before the hearing).[68](#)
- (4) Failure to comply with the provisions of this notice may result in the matter not being heard on the allocated day.[69](#)

44. Opposed Motions.[70](#)-

- (1) The Registrar shall keep an Opposed Motion Roll, separate from the continuous roll for trials.
- (2) The applicant or respondent in an opposed motion shall apply to the Registrar for a date of set-down on the Opposed Motion Roll in terms of Rule 6 (5) (f) after complying with the requirements of Practice Note 39 above.
- (3) The Registrar shall allocate the first available date of set-down and shall give notice to all parties of such date, which date shall not be less than 25 days from the date of such notice.
- (4) The applicant's legal representative shall, together with the applicant's heads of argument, file a short note setting out the name and number of the matter, the names of counsel involved (if known) and, in brief, the nature of the matter and its estimated duration. If an applicant is not represented, this subparagraph shall be complied with by respondent's legal representative.

E. APPEALS AND HEADS OF ARGUMENT

45. Leave to appeal.[71](#)-Whenever an application for leave to appeal to the Supreme Court of Appeal or to the Full Court of this Division is lodged with the Registrar, the following procedure will apply, both to civil and criminal matters-

- (1) Counsel or the attorney for the applicant for leave to appeal shall simultaneously therewith deliver a copy of such application to the judge against whose judgment and/or order the application is directed.
- (2) Counsel or the attorney for the applicant for leave to appeal shall, after consultation with counsel or the attorney for the respondent, and not later than 10 days after the lodging of the application, approach the judge in chambers in order to arrange for a convenient time and date for the hearing of the application.
- (3) Whenever counsel or the attorney for the applicant fails to take the steps provided in paragraph (2) above, the attorney for the respondent may not later than 15 days after the lodging of the application and on 48 hours notice to the attorney for the applicant approach the judge to arrange a time and date for the hearing of the application.
- (4) An unrepresented party who lodges an application for leave to appeal shall simultaneously therewith deliver to the Registrar an additional copy of the application which is endorsed for delivery to the judge against whose judgment/order the application is directed.
- (5) Whenever a party in a civil matter is unrepresented, the provision of paragraphs (2) and (3) shall be complied with as if such party was his/her own legal representative save, however, that the unrepresented party and/or the legal representative of any other party shall approach the Registrar who will in turn approach the judge in order to arrange for a convenient time and date for the hearing of the application.
- (6) Whenever the applicant for leave to appeal in a criminal matter is unrepresented, the Director of Public Prosecutions or his/her representative shall not later than 15 days after the filing of the application

approach the Registrar who will in turn approach the judge in order to arrange for a convenient time and date for the hearing of the application. The Registrar shall give the applicant written notice of the date fixed, which notice shall be posted to the applicant not less than 10 (ten) days before the hearing.

- (7) Where counsel and/or the attorney for a party or the party, as the case may be, fails to comply with the provisions aforesaid, the judge may take such steps as he/she deems necessary to deal with the application.

46. Full Bench Appeals.-Full Bench appeals will ordinarily be heard during the first week of the FIRST term and the first week of the THIRD term of every year; or on such other dates as the Judge President may determine from time to time.

- (1) The roll for appeals will close on 15 September each year (for appeals to be heard during the FIRST term of the following year) and on 15 March (for appeals to be heard during the THIRD term) respectively, by which dates appellants must have complied with the provisions of Rule 49 (6) (a) and Rule 49 (7) (a).
- (2) At the same time as the application for a date for the hearing of an appeal in terms of Rule 49 (6) (a) and delivery of the record in terms of Rule 49 (7) (a) the appellant must deliver a Practice Note indicating-
 - (a) the nature of the appeal succinctly stated (for example 'negligence in MVA case'; 'appeal against conviction and sentence on a charge of murder'; 'interpretation of a contract/will/Act 00 of 0000'; etc');
 - (b) the date of the judgment appealed against and the name of the judge;
 - (c) the date when leave to appeal was granted;
 - (d) the length of the record;
 - (e) an estimate of the duration of the argument (if more than one day is required for argument, the reasons for the request);
 - (f) the portions or pages of the record that are in a language other than English;
 - (g) the name(s) of counsel involved in the appeal (if known).
- (4) The Registrar shall give the parties written notice in terms of Rule 49 (7) (c) of the dates assigned for the hearing of appeals and of the dates by when heads of argument are to be delivered so as to allow all parties' heads of argument to be filed before the end of the term preceding the hearing of the appeal.
- (5) The heads of argument of each party must be accompanied by a Practice Note indicating-
 - (a) the name and number of the matter;
 - (b) the issues on appeal succinctly stated;
 - (c) a summary of the argument, not exceeding 100 words;
 - (d) a list reflecting those parts of the record, if any, the party regards as irrelevant to the appeal and to which they do not intend to refer.

47. Criminal Appeals from the magistrates' court.-Heads of argument in all civil appeals from the Magistrates' courts shall be delivered in accordance with the provisions of Rule 50 (9), as modified by Practice Note 46 above and Practice Note 49 below; provided that where the record on appeal exceeds 400 pages, the appellant must arrange with the Registrar for the early allocation of the matter for hearing and for earlier delivery of heads of argument.

48. Criminal Appeals from Magistrates' Courts.-Heads of argument in all criminal appeals from the Magistrates' courts shall be delivered in accordance with the provisions of Rule 51 (4). Pursuant to this rule the Judge President of this Division has determined as follows-

- (1) The appellant's heads of argument and list of authorities together with two copies thereof shall be delivered not less than 15 days before the date on which the appeal is set down for hearing and the respondent's not less than 10 days before such date.
- (2) Delivery by the appellant of heads of argument in terms of Rule 51 (4), read with Rule 1, shall include service on the Director of Public Prosecutions of such heads of argument in accordance with the time-periods provided for in paragraph (2) above.
- (3) Not less than 30 days prior to the date on which a criminal appeal from the Magistrates' court is set down for hearing, the attorney of record or advocate for the appellant (or the appellant) shall confirm in writing to the Director of Public Prosecutions that the appeal is to proceed on the date allocated in the notice of set-down for the hearing thereof. Failing timeous receipt by the Director of Public Prosecutions of such confirmation, the appeal will not be heard on the allocated date and will be struck from the roll.⁷²

49. Appeals Generally.-

- (1) Failure on the part of an appellant to comply with the provisions of Rules 49 (15), 49A (3) and (5), 50 (9)

and 51 (4) as read with Practice Note 48 (1) above may result in the appeal being struck from the roll or dismissed. Failure on the part of a respondent to comply with any of the said provisions will result in the court making such order thereon as it deems fit, unless in each such instance condonation of such failure is sought on good cause shown on written application, and is granted. In the case of a civil appeal, the court may make such order or orders as to costs as may to it appear appropriate.

- (2) '*Heads of Argument*', shall mean, in addition to or in lieu of the '*concise and succinct statement of the main points (without elaboration) which he intends to argue on appeal*' as provided for in Rules 49 (15), 49A (3), 50 (9) and 51 (4), full heads of argument with, where appropriate, references to the record and to the authorities relied upon, together with a list of such authorities. When delivering the heads of argument, each party must deliver a practice note as contemplated by Practice Note 46 (5) above.
- (3) '*Deliver*' in Practice Notes 46, 47 and 48 above shall include the handing in of heads of argument at the office of the Registrar (Room 24 in the case of criminal appeals and Room 5 in the case of all civil appeals) and the entering of the required particulars in the register for heads of argument by the person handling the same.
- (4) The Judge President may, in any particular instance when he/she deems it expedient to do so, determine earlier dates than those provided for in this Notice.

50. Heads of Argument in Other Matters.73-

- (1) In all matters (except trials and civil or criminal appeals) which have been set down for hearing or argument on a specific date by the Registrar, heads of argument as defined in Practice Note 49 (2) above and clearly indicating the names of the parties, the number of the case and the date upon which it is set down on the roll shall be delivered by counsel as follows, viz.
 - (a) by the delivery of an appropriate number of copies of the heads of argument of plaintiff, applicant, or excipient (as the case may be) to Room 5 of the office of the Registrar and by the entry of the required information in the register of heads of argument by the person who files same not less than 10 days before the date upon which the matter is to be heard;
 - (b) by like delivery of the heads of argument of defendant or respondent (as the case may be) in like manner not less than 5 days before the said date;
 - (c) by exchange between the parties' attorneys of a copy of each party's heads of argument on the dates on which same are filed in Room No. 24 by Counsel.
- (2) The Judge President may in any particular instance determine earlier or later dates than those prescribed in these directions.
- (3) Failure on the part of a plaintiff, applicant, excipient or appellant (as the case may be) to comply with the provisions of these directions may result in the matter being struck from the roll or dismissed. Failure on the part of defendant or respondent (as the case may be) to comply with the said provisions will result in the court making such order as it deems fit, unless in each case condonation of such failure is sought on good cause shown by way of written application and is granted; and the court may make such order or orders as to costs as may to it appear appropriate.

F. CRIMINAL MATTERS

51. Pre-trial Conference in Criminal Matters.74-

- (1) The provisions of this rule shall apply to all criminal trials to be heard in the High Court from the beginning of the Second Term, 2008.
- (2) All criminal trials shall be preceded by a pre-trial conference conducted in terms of this rule.
- (3) The notification of the trial date shall be accompanied by a notice of the date upon which the pre-trial conference is to be conducted in terms of this rule.
- (4) The pre-trial conference shall be conducted under the control of the presiding judge.
- (5) The pre-trial conference shall in all cases be attended by-
 - (a) the accused;
 - (b) the legal representative of the accused;
 - (c) a representative of the DPP.
- (6) The purpose of the pre-trial conference is to consider, and, where appropriate, to address matters such as-
 - (a) the legal representation of the accused;
 - (b) admissions sought by the DPP and the accused;
 - (c) the consideration of plea agreements;
 - (d) the compliance by the parties of their pre-trial obligations in terms of the Act and the rules;

- (e) the state of readiness for trial of the respective parties.
- (7) All parties may seek directives from the presiding judge in regard to the implementation of any pre-trial procedures.
- (8) The DPP shall be responsible for the preparation of a minute of the conference, to be filed as soon as possible after the conclusion of the conference.
- (9) The procedure set forth in this Practice Note is intended as a pilot project to avoid unnecessary delays in criminal trials. Amendments to the procedure may be considered on an ongoing basis in the light of the experience gained by all participants in the course of the application of this rule in practice.

52. Pro Deo/Legal Aid Counsel in Third Division.-

- (1) Practitioners acting at the request of the court or upon legal aid instructions in High Court criminal trials will be allowed to retain their briefs to appear in respect of *unopposed* matters in Third Division on the same day; provided that they shall-
 - (a) notify in advance the registrars of the respective judges presiding in their criminal trial and in Third Division of the fact;
 - (b) appear in Third Division at 10h00 when their matters will receive precedence; and
 - (c) report back to the registrar of the judge presiding in the criminal trial as soon as their unopposed matters have been disposed of.
- (2) Save as set out above, such practitioners will *not* be allowed, without the prior consent of the judge presiding in the criminal trial, to retain any clashing briefs for appearances in any other courts while the criminal trial is running.

G. FILMING AND RECORDING OF COURT PROCEEDINGS

53.1 Discretion.-Filming and recording of court proceedings shall be allowed at the sole discretion of the presiding judge. In instances where more than one judge is sitting, filming and recording of court proceedings shall be at the discretion of the presiding judge in consultation with his/her fellow sitting judge(s). Filming and recording shall be permitted on such terms and conditions as the presiding judge, in all instances, may impose.

53.2 Application for filming and recording

53.2.1 Any media organisation that wishes to be permitted to film or record the proceedings shall, in the first instance, ascertain from the parties in the proceedings which it is desired to be filmed or recorded if it, he or she has an objection to the proposed filming and recording/filming or recording.

53.2.2 Any party to the proceedings which it is desired to be filmed or recorded shall, within twelve (12) hours of being requested to do so, record its objection in writing to the media organisation which is desirous to have the proceedings filmed or recorded; provided that if no objection is raised within the said period of twelve (12) hours, such a party will be deemed not to have an objection to the proposed filming and recording. Any party who wishes to object to the proposed filming or recording of the proceedings must raise its objection in writing.

53.2.3 Should any one of the parties to the proceedings which it is desired to be filmed or recorded, either by reason of infirmity, disability or level of literacy or any other reason, be unable to respond to a request for filming or filming and recording as contemplated in paragraph 38.2.2, such fact shall be brought to the attention of the presiding judge. In that event, it shall be the prerogative of the presiding judge to ascertain from such a party whether he or she objects to the proposed filming or recording of the proceedings, having due regard to public interest, in the proceedings or any potential prejudice such party is likely to suffer.

(Editorial Note: Wording as per original Practice Note. It is suggested that the phrase "paragraph 38.2.2" is intended to be "paragraph 53.2.2".)

53.2.4 Any party who desires to have the proceedings filmed or recorded must notify the registrar of the presiding judge of its intention to record or film such proceedings at least twenty four (24) hours before the commencement of the hearing simultaneously indicating if any party to the proceedings has any objection to the proposed filming or recording.

53.2.5 On receipt of a notice contemplated in paragraph 38.2.4 above, the presiding judge shall consider such request. In considering a request to have the proceedings filmed or recorded, the presiding judge shall take into account the public interest in the proceedings desired to be recorded or filmed including any prejudice any party to such proceedings is likely to suffer as a result of such recording or filming.

(Editorial Note: Wording as per original Practice Note. It is suggested that the phrase "paragraph 38.2.4" is intended to be "paragraph 53.2.4".)

53.2.6 It is generally undesirable that the *viva voce* testimony of any witness to the proceedings be recorded or filmed. The decision to grant or refuse such permission shall be made by the presiding judge hearing a request to that effect, due regard had to the public interest in the matter.

53.3 Conditions.-Filming and recording of court proceedings shall be permitted on such terms and conditions as the presiding judge, in all instances, may impose. The following conditions, which in themselves are not exhaustive, shall apply in all instances where filming and recording of court proceedings is allowed:

Equipment limitations

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

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

53.3.3 Still Cameras: Only one photographer allowed and the location of the camera is not to change and no changing of lenses or film is permitted while the court is in session.

53.3.4 All camera, video and audio equipment must in position at least fifteen (15) minutes before the start of the 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.

(Editorial Note: Wording as per original Practice Note. It is suggested that the phrase "must in position" is intended to be "must be in position".)

53.3.5 Lighting: no movie light, flash attachments or artificial lighting devices are permitted during court proceedings.

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

Pooling arrangements

53.3.7 It is generally undesirable for more than one media representative to conduct each of the audio, video and still photography activities.

53.3.8 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 would have to be distributed in a 'clean' form, that is, with no visible logos etc, to any other media organisation requesting same and would also be archived in such a manner that it remains freely available to other media.

53.3.9 Failing an agreed impartial distribution scheme, the presiding judge shall give directions as to the appropriate manner for conducting audio, video and/or still photography activities.

Rules regarding behaviour of media representatives

53.3.10 Conduct must be consistent with the decorum and dignity of the court.

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

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

53.3.13 Equipment must be positioned and operated to minimise any distraction while court is in session.

53.3.14 Equipment must not be placed in or removed from the court room.

53.3.15 No film, videotape, cassette tape or lens may be changed.

53.4 Undesirable practices.-Subject to the discretion of the presiding judge, it is undesirable that there be:

53.4.1 audio recordings or close-up photography of bench discussions;

53.4.2 audio recordings or close-up photography of communications between legal representatives or between clients and their legal representatives;

53.4.3 close-up photographs or filming of judges, lawyers or parties in court;

53.4.4 recordings (whether video or audio) being used for commercial or political advertising purposes thereafter;

53.4.5 use of sound bites without the prior consent of the presiding judge. (This does not apply to extracts from judgments or orders)

53.5 Withdrawal of leave or change of conditions.-The court may, on good cause in any particular case, withdraw the leave to film and/or record court proceedings or change any condition imposed by the presiding judge or as listed in paragraph 38.3 above.

53.6 Failure to comply with conditions.-Once leave to record or film court proceedings is granted, failure to comply with any condition imposed by the presiding judge and/or any of the conditions listed in paragraph 38.3 and 38.4 may lead to contempt of court proceedings.

SCHEDULE

FORMS

- A. Default Judgment (PN 28)
- B. Default Judgment - Draft Order (PN 28)

- C. Anton Piller Order (PN 35 (1))
- D. Anton Piller Notice (PN 35 (2))
- E. Rule 37 Questionnaire (PN 39)

FORM "A"

APPLICATION FOR JUDGMENT BY DEFAULT (RULE 31(5))
 IN THE HIGH COURT OF SOUTH AFRICA
 (WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No.

In the matter between:

Plaintiff

And

Defendant

- (a) The summons has been duly served on the defendant on
- (b) The time for entering appearance to defend having expired on
- (c) The defendant has not entered an appearance to defend.

The plaintiff hereby applies for judgment by default against the defendant as claimed in the summons, in accordance with the attached draft, as follows-

- 1. Payment of the sum of R
- 2. Interest on the said sum at the rate of % per annum from to date of payment.
- 3. Costs of suit.

DATED THIS DAY OF 20...

PLAINTIFF/PLAINTIFF'S ATTORNEY

ATTORNEY & TELEPHONE NUMBER

FORM "B"

JUDGMENT BY DEFAULT (RULE 31(5))
 IN THE HIGH COURT OF SOUTH AFRICA
 (WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No.:.....

In the matter between:

Plaintiff

And

Defendant

After having read the summons and other documents filed of record, judgment by default is granted in favour of the plaintiff for-

- 1. Payment of the sum of R.....
- 2. Interest on the said sum at the rate of % per annum as from to date of payment.
- 3. Costs in the sum of R200,00 (plus the Sheriff's fees) or R650,00 (plus the Sheriff's fees) or taxed costs. (Delete which are not applicable).

.....

REGISTRAR

Any other directions in terms of Rule 31 (5) (b) (iii) - (vi) inclusive

.....

REGISTRAR

ATTORNEY & TELEPHONE NUMBER

FORM "C"

EX PARTE: APPLICANT
 IN RE: APPLICANT vs RESPONDENT

ORDER

- 1. Respondent is called upon to show cause before this court at 10.00 on why an order in the following terms should not be made:
 - (a) that the listed items in the possession of the sheriff pursuant to the execution of this order should not be retained by him pending the directions of the court; and
 - (b) why the costs of this application, including the costs of the supervising attorney, should not stand over for determination in the action referred to in paragraph 7 below.
- 2. Respondent or the person on whom service is effected in terms of paragraph 9 (a) below is ordered to allow the sheriff, AB ("the supervising attorney") together with CD, applicant's attorney and EF,, being (their capacity stated) accompanying them to immediately enter the following premises namely, and any vehicles on such premises, for the purpose of searching for, and delivering into

the possession of the sheriff all the documents and articles which are listed in the schedule set out at the foot of this order ('the listed items') or which any of the aforementioned persons believes to be listed items.

3. Respondent or the person on whom service is effected in terms of paragraph 9 (a) below is further ordered to permit the said persons to remain on the premises until the search has been completed, and if necessary to re-enter the premises on the same or following day in order to complete the search.
4. The supervising attorney shall, together with the sheriff, make a list of all items removed by the sheriff in terms of this order. A copy of this list shall be handed by the supervising attorney to applicant's attorney and to the respondent or the person referred to in paragraph 3 above, if present, and a copy shall be retained by the sheriff.
5. In the event that any of the listed items exists only in computer readable form, respondent or the person referred to in paragraph 3 above is ordered to forthwith provide the sheriff with effective access to the computers, with all necessary passwords, to enable them to be searched, and cause the listed items to be printed out; a print-out of these items is to be given to the sheriff or displayed on the computer screen so that it may be read and copied by him.
6. All listed items or copies thereof taken into possession by the sheriff pursuant to this order, shall be retained by him until the court orders otherwise. Save as provided hereinafter, no person shall be entitled to inspect any of the items taken into possession by the sheriff nor shall any copies be made of such items. Provided that pending the return day and for the sole purpose of satisfying himself that the inventory correctly reflects the items seized, respondent or his attorney, shall be entitled to inspect the items in the sheriff's possession.
7. Applicant is directed to institute an action against respondent in which the listed items are concerned within 10 days of the date of this order, and if he fails, without good reason being shown on the return day to have instituted such action by that date, the sheriff shall be obliged to return all the listed items immediately to respondent, and in such event the court, in its discretion, shall make such order as it deems meet. This order shall under no circumstances constitute against applicant for damages (or other relief) sustained or claimed in consequence of these proceedings.
8. On the return day there shall be placed before the court the report of the supervising attorney with proof that a copy thereof has been served on applicant's attorney and on respondent (or his attorney) and an affidavit of the applicant's attorney that the said action has been instituted, and if not the reason why this has not been done.
9. (a) Service of this order together with the notice to respondent shall be effected by the sheriff on the respondent or the person in charge of the premises and the contents thereof explained by the supervising attorney before the provisions of paragraph 2 of this order are carried out.
(b) In addition to the service referred to in subparagraph (a) above, service of this order together with the notice of motion and supporting affidavits and accompanying notice to respondent shall be effected by the sheriff in accordance with the Rule of court by not later than 48 hours after the supervising attorney has directed that the search has been completed.
(c) The provisions of paragraphs 2, 3 and 5 of this order may only be carried out in the presence and under the supervision of the supervising attorney.

FORM "D"

EX PARTE: (APPLICANT)

IN RE: (APPLICANT) vs (RESPONDENT)

NOTICE TO RESPONDENT

1. The order being served on you requires you to allow the persons named therein to enter the premises described in this order and to search for, examine and remove or copy the articles specified in the order. You are also required to hand over any of the specified articles on the premises or under your control to the sheriff.
2. When these documents are handed to you, you are entitled, if you are an employee of respondent or in charge of the premises, to contact respondent immediately and you or respondent are entitled to contact an attorney and have him come to the premises to advise you. The attorney must be called and must arrive without delay, and the supervising attorney must inform you as to how long the search can be delayed so as to have the attorney present. Until the attorney, if called, arrives or until the time has passed for him to arrive, you need not comply with any part of this order, except that you must allow the supervising attorney, the sheriff and the other persons named in the order to enter the premises and to take such steps as, in the opinion of the supervising attorney, are reasonably necessary to prevent any prejudice to the further execution of this order.
3. You are further entitled to have the supervising attorney explain to you what this notice and order mean.
4. If you disobey this order you will be guilty of an offence, that is, contempt of court.
5. If the order being served upon you was granted in your absence and without notice to you, you are entitled-
 - (a) in terms of Rule 6 (8) to anticipate the return day of the order upon delivery of not less than 24 hours' written notice:

- and/or
- (b) in terms of Rule 6 (12) (c) by similar notice to set down the mailer for reconsideration of the order.76

FORM "E"

RULE 37 QUESTIONNAIRE

NOTE 1: This questionnaire must be completed on behalf of each of the parties to the action by the Attorney who on behalf of his/her client is responsible for the running of the action or where a party is unrepresented, by such party personally.

NOTE 2: The completed questionnaire must be file (*sic*) with the Registrar and a copy thereof must be delivered to all other parties not later than THREE MONTHS after the entry date.

CASE NO:..... /20 ...

TITLE OF ACTION:

..... (1st) Plaintiff

..... (2nd) Plaintiff

and

..... (1st) Defendant

..... (2nd) Defendant

NATURE OF THE ACTION:

PARTY FILING THIS FORM:

NAME OF ATTORNEY COMPLETING THIS QUESTIONNAIRE:

CONTACT TELEPHONE NUMBER:

NAME/S OF COUNSEL REPRESENTING YOUR CLIENT:

1. DISCOVERY

(a) Have discovery and inspection been completed?

(b) If not, what is outstanding?

2. PARTICULARS FOR TRIAL

(a) (i) Are any replies to Requests for Particulars for Trial in respect of your pleadings outstanding?

.....

(ii) If so, when will the Particulars be delivered?

.....

(b) (i) Have you received all the Particulars that you require?

.....

(ii) If not, have you requested them?

.....

3. AMENDMENTS

(a) (i) Do you at present intend to amend your pleadings?

.....

(ii) If so, when?

.....

(b) Can you make any additional admissions?

.....

(c) (i) Are you intending to join any further parties?

.....

(ii) If so, whom and when?

.....

4. ISSUES

(a) What are the important issues in the action?

.....

(b) (i) Are any of them capable of resolution by agreement?

.....

(ii) If so, have steps been taken to seek the required agreement?

.....

(c) (i) Are any of the issues in the action suitable for trial as preliminary or separate question in terms of Uniform Rule 33 (4)?

.....

(ii) If so, what issues are they?

.....

5. EXPERT EVIDENCE

- (a) On what topic issues may you wish to call expert evidence?
.....
- (b) (i) How many experts do you expect to call?
.....
- (ii) Can you at this stage indicate-
(aa) their names? and/or
.....
- (bb) the nature of their expertise? and/or
.....
- (cc) the topics/issues upon which each will testify?
.....
- (c) By what date can you deliver their written reports to all the other parties?
.....
- (d) (i) Is there scope for agreement between any of the parties' experts?
.....
- (ii) Would a meeting of such experts be useful? If not, why not?
.....

6. TRIAL

- (a) What is your present estimate of the length of the trial?
.....
- (b) What is the earliest date that you believe that you can be ready for trial?
.....

7. INDEXING OF PLEADINGS

Has there been compliance with the provisions of Court Notice 3 (5)?
.....

8. SETTLEMENT OF THE PARTIES' DISPUTES

Is there any way in which the Court can assist the parties to fully or partially resolve their dispute without the need for a trial/full trial?
.....

Does any party request that a conference be held before a judge in chambers, as contemplated by Rule 37 (8)?
.....

9. ALTERNATIVE DISPUTE RESOLUTION

- (a) Have the parties considered mediation or another alternative dispute resolution procedure?
.....
- (b) If not, could such consideration be worthwhile?
.....

DATE:

.....
SIGNATURE OF ATTORNEY

Footnotes

- 1 Compare Old Cape Rule 3 (1).
- 2 CN 1.
- 3 CN 2.1.
- 4 PN 24.
- 5 CN 21.
- 6 CN 2.2.
- 7 CN 8.6 (modified).
- 8 CN 8.7.
- 9 CN 6.1 & 6.2.
- 10 Cf Old Cape Rule 3(7).
- 11 CN 3(3) (as modified).
- 12 CN 3(1), 3(4).
- 13 CN 4 (as modified).
- 14 CN 4.
- 15 PN 11.
- 16 CN 12.1.
- 17 CN 12.5.
- 18 CN 12.2, 12.6.
- 19 PN 1.
- 20 See Practice Note 37 below.
- 21 CN 29.
- 22 CN 22, 31.
- 23 New.
- 24 New. See Erasmus *Superior Court Practice* D5-12, 14.
- 25 New.
- 26 CN 12.4 (modified).
- 27 PN 16.

- 28 New.
29 New.
30 New.
31 CN 24.
32 CN 24.
33 New.
34 PN 10.
35 CN 18.
36 New.
37 PN 2, CN 3(6).
38 New. Cf *Ersamus Superior Court Practice D4-7*.
39 PN 14.
40 CN 14; PN 3.
41 New.
42 CN 15.
43 CN 16.
44 PN 5.
45 See PN 5, as amended, and as published in [2000 \(4\) SA 135](#).
46 CN 17.
47 New.
48 PN 17.
49 PN 25.
50 CN 11.
51 New. See *Erasmus Superior Court Practice D5-1*.
52 PN 18.
53 New.
54 CN 26.
55 PN 23.
56 Cf Old Cape Rule 34 (1).
57 CN 3 (5), CN 28 (i) (modified).
58 PN 8, 9, 15. This largely repeats the existing practice, but forms the subject of further discussions. A new pre-trial procedure will hopefully be implemented in the near future.
59 New.
60 New.
61 New.
62 PN 9.
62a This amendment took effect on 10 October 2016.
63 Fax No. 021 423 4977; E-mail: ASheldont@justice.gov.za; mmatthews@justice.gov.za.
64 PN 19.
65 CN 5.1.
65a This amendment took effect on 10 October 2016.
66 CN 8.1.
67 CN 8.2, 8.3.
68 CN 8.4.
69 CN 8.5.
70 CN 13, as modified.
71 PN 7.
72 CN 9.
73 CN 10.
74 PN 26.
76 New. See *Sun World International Inc v Unifruco Ltd* [1998 \(3\) SA 151](#) (C) at 161J - 162C.

Practice Note 34A - After hour urgent matters

To assist the after-hour registrars dealing with urgent matters a practice note along the following lines has been formulated by the Practice Committee of the Western Cape High Court:

1. Any person seeking a hearing as a matter of urgency outside the hours of 09h00-16h00 on a court day and outside court days, must furnish the following information to the duty registrar, preferably in writing:
 - 1.1 particulars of the parties;
 - 1.2 whether the respondent already has an attorney and whether the attorney is aware of the application;
 - 1.3 the names and telephone contact numbers of the parties' legal representatives;
 - 1.4 a brief description of the nature of the matter;
 - 1.5 why it justifies a hearing out of hours and, in particular, why it cannot stand over for consideration until the next court day during the hours of 09h00 and 16h00;
 - 1.6 details of the service that has been or will be effected, or if service will not be effected, why relief is being sought *ex parte*.
2. After considering the information provided in terms of paragraph 1, above, the judge on urgent duty will give such directions to the registrar and/or the parties' legal representatives as to the further conduct or disposal of the matter as he or she considers appropriate. Practitioners are advised that the duty judge may require that a copy of all or part of the papers be emailed to the judge for consideration in addition to the information

to be furnished to the registrar in terms of paragraph 1, above.

3. Practitioners are advised that the registrar ordinarily should not be requested to contact the urgent duty judge after hours until the founding papers in the matter have been completed and served on the respondent parties, where applicable.

Practice Directive - Caseflow management: Semi-urgent date allocations - 14 November 2016

NOTICE TO ALL PRACTITIONERS

CASEFLOW MANAGEMENT

Semi-Urgent date allocation

As from 21 November 2016, we will be streamlining the allocation of semi-urgent dates.

The attached document will be utilised for the purposes of this process and may be downloaded and partially completed by practitioners.

Once a date has been confirmed amongst the parties the applicant's attorney/counsel may approach Mr Zane Booyesen in Room 5 to obtain this document which will be used to confirm the date arranged. **This can only be done the day before Motion Court.**

This document must be handed in together with the draft order for a date on the semi-urgent roll, alternatively for a postponement with the Third Division Judge, Deputy Judge President or Judge President.

All queries relating to semi-urgent dates should be directed to Mr Zane Booyesen at ZBooyesen@judiciary.org.za

DEPUTY JUDGE PRESIDENT GOLIATH



**OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA
WESTERN CAPE HIGH COURT**

| | |
|------------------|--------------------|
| 35 KEEROM STREET | PRIVATE BAG X 9020 |
| CAPE TOWN | CAPE TOWN |
| 8000 | 8000 |

**CASEFLOW MANAGEMENT
SEMI-URGENT DATE ALLOCATION**

| | |
|------------------------------------|--|
| CASE NO. | |
| PARTIES | |
| PLAINTIFF'S/APPLICANT'S ATTORNEYS | |
| DEFENDANT'S/RESPONDENT'S ATTORNEYS | |
| SEMI-URGENT DATE ASSIGNED | |
| REGISTRAR/REGISTRAR'S CLERK | |
| SIGNATURE | |

| |
|------------|
| DATE STAMP |
|------------|

5.2 Liquidations - company

Critical averments:

Locus standi

Solvency / insolvency of company

Grounds for winding-up

General

Winding-up proceedings by the Court are governed by the general rules pertaining to motion court procedure, subject to the provisions of Chapter 14 of the Companies [Act 61 of 1973](#) and certain provisions of the Insolvency [Act 24 of 1936](#), and Part G of [Chapter 2](#) of the Companies [Act 71 of 2008](#). While the winding-up of solvent companies is regulated by the provisions of the Companies [Act 71 of 2008](#), until the date determined in terms of Item 9(4) of [Schedule 5](#) to the Companies [Act 71 of 2008](#), the Companies [Act 61 of 1973](#) continues to apply with respect to the winding-up and liquidation of insolvent companies

Solvent companies are either not "actually (or factually) insolvent" or not "commercially insolvent"

FirstRand Bank Ltd v Lodhi 5 Properties Investments CC [2013 \(3\) SA 212](#) (GNP) at [35]

FirstRand Bank Ltd v Bunker Hill Investments 499 CC [2012] JOL 29144 (GSJ)

Standard Bank of South Africa Ltd v R-Bay Logistics CC [\[2013\] 1 All SA 364](#) (KZD) at [40], [2013 \(2\) SA 295](#) (KZD) at [37]

Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd [2014] 1 All SA 507 (SCA) at [22], [2014 \(2\) SA 815](#) (SCA) at [22]

Insolvent companies

Locus standi

- (a) the company itself

Board of directors does not have *locus standi* without a resolution of the general meeting - *Ex parte New Seasons Auto Holdings* [2008 \(4\) SA 341](#) (W) at 345H

BUT SEE: *Henochsberg on the Companies Act, 71 of 2008*, Vol 2, APPI-71-72

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- (b) one or more of its creditors, including contingent and prospective creditors
- (c) one or more of its members, subject to [section 346\(2\)](#) of the Companies [Act 61 of 1973](#)
- (d) the Master
[S 346\(1\)](#) Companies [Act 61 of 1973](#)
- (e) the provisional and final judicial manager of the company
[Ss 346\(1\)](#) and 433(1) Companies [Act 61 of 1973](#)
- (f) the Minister of Trade and Industry
[S 262\(1\)](#) Companies [Act 61 of 1973](#)

Jurisdiction

In terms of the Companies Act 71 of 2008, the registered address of a company must be situated at the principal or only place of business

[S 23\(3\)](#) Companies Act 71 of 2008

A pre-existing company is obliged to change its registered address if not in accordance with the Act

Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd (Nedbank Ltd intervening) [2012 \(1\) SA 191](#) (WCC) at [19], [20], [23]

Accordingly, for purposes of winding-up, the Court having jurisdiction over the registered address of the company, being the same address as its principal or only place of business, has the requisite jurisdiction

Sibakhulu supra; CIPC Practice Note 2 of 2012

BUT SEE: *Lonsdale Commercial Corporation v Kimberley West Diamond Mining* (312/2012) [2013] ZANCHC 11 (17 May 2013); *De Bruyn v Grandselect 101 (Pty) Ltd* (1961/2013) [2014] ZANCHC 3 (5 March 2014)

Grounds for liquidation

SEE: [Sections 344](#) and [345](#) of the Companies [Act 61 of 1973](#) for a complete list of the grounds for winding-up a company that is insolvent

The following are the more prevalent grounds for winding-up:

- (a) a special resolution is passed by the company for its winding-up
[S 344\(a\)](#) Companies [Act 61 of 1973](#)

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It must be alleged that such a resolution has been passed
Ex parte East London Café (Pty) Ltd 1931 EDL 111 at 112

As to the requirements of a special resolution, see [sections 199, 200, 202](#) and [203](#) of the Companies [Act 61 of 1973](#)

Where reliance is placed on an ordinary resolution, the applicant must establish one or other of the circumstances set out in [section 344](#) of the Companies [Act 61 of 1973](#)

In order that the Court properly exercise its discretion, sufficient information must be provided as to the company's financial position, assets, liabilities and creditors
Ex parte Three Sisters (Pty) Ltd [1986 \(1\) SA 592](#) (D) at 593-594

- (b) the company is unable to pay its debts
[S 344\(f\)](#) Companies [Act 61 of 1973](#)

This can be demonstrated in one or more of the following manners:

- (i) a demand for payment has not been met
[S 344\(f\)](#) read with [s 345\(1\)\(a\)](#) Companies [Act 61 of 1973](#)

It must be alleged that

the applicant is a creditor for a sum of not less than R100,00 then due and payable and
Barclays Bank (DC&O) v Riverside Dried Fruit Co (Pty) Ltd [1949 \(1\) SA 937](#) (C) at 948

service on the company's registered office of a demand requiring payment of the sum has been effected and
BP and JP Investments (Pty) Ltd v Hardroad (Pty) Ltd [1977 \(3\) SA 753](#) (W) at 760A

the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor

The onus is on the applicant to prove compliance with the subsection
Phase Electrical Co (Pty) Ltd v Zinman's Electrical Sales (Pty) Ltd [1973 \(3\) SA 914](#) (W) at 917G-918B
BUT SEE: *Nathaniël & Efthymakis Properties v Hartebeestspuit Landgoed CC* [\[1996\] 2 All SA 317](#) (T) at 323

[Page 5-11]

- (ii) a *nulla bona* return has been obtained, either to the effect

that the Sheriff did not find sufficient disposable property to satisfy the judgment or

that any disposable property found did not upon sale satisfy the process

The *nulla bona* should relate to both movable and immovable property and a copy of the return should be attached

[S 344](#) read with [s 345\(1\)\(b\)](#) Companies [Act 61 of 1973](#)

Richard Goldman Finance (Pty) Ltd v Elmtree Finance & Investment Co (Pty) Ltd [1977 \(2\) SA 624](#) (W) at 630C

Tucker's Land and Development Corporation (Pty) Ltd v Soja (Pty) Ltd [1980 \(3\) SA 253](#) (W) at 259

- (iii) it is proved that the company is unable to pay its debts
[S 344](#) read with [s 345\(1\)\(c\)](#) and (2) Companies [Act 61 of 1973](#)

Such facts, including the contingent and prospective liabilities of the company, as would satisfy the Court that the company is unable to pay its debts, should be furnished

Rand Produce Supply Co v Orchards Dairy Ltd 1912 WLD 124 at 127

Ex parte East London Café supra at 111

Chandlers Ltd v Dealesville Hotel (Pty) Ltd [1954 \(4\) SA 748](#) (O) at 749

SEE ALSO: *Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd* [1962 \(4\) SA 593](#) (N) at 600

A company's assets may exceed its liabilities, but it is still unable to pay its debts - in such a case the company is said to be commercially insolvent

Rosenbach supra at 597

AND SEE: *FirstRand Bank v Lodhi 5 supra* par [30]

The Court retains a discretion

Liquidation proceedings are inappropriate for resolving a dispute as to the existence of a debt
Badenhorst v Northern Construction Enterprises Ltd [1956 \(2\) SA 346](#) (T) at 347-8

[Page 5-12]

Exploitatie- en Beleggingsmaatschappij Argonauten 11 BV v Honig [\[2012\] 2 All SA 22](#) (SCA) at 26-27 par [11] - the application should be dismissed

- (c) it is just and equitable that the company be wound-up
[S 344\(h\)](#) Companies [Act 61 of 1973](#)

This is not a "catch-all" ground. This is a special ground under which certain features of the way in which a company is being run or conducted can be questioned to the point of requesting the Court to wind it up

Five broad categories have been identified, but this is not a *numerus clausus*:

- (i) the disappearance of the company's sub-stratum
- (ii) illegality of the objects of the company and fraud committed in connection therewith
- (iii) deadlock in the management of the company's affairs
- (iv) grounds analogous to those for the dissolution of partnerships
- (v) oppression of minority shareholders

Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd [1985 \(2\) SA 345](#) (W) at 350

SEE ALSO: The grounds set out in *Kia Intertrade Johannesburg (Pty) Ltd v Infinite Motors (Pty) Ltd* [\[1999\] 2 All SA 268](#) (W) at 279-280 and in *Sunny South Cannery (Pty) Ltd v Mbangxa* [\[2001\] 1 All SA 474](#) (SCA) at 481

Two steps are envisaged by this sub-section. The first step is the determination of the relevant facts and the Court forming an opinion that it is just and equitable that the company should be wound up. The second, which only arises once such an opinion has been formed, is whether the Court should exercise its discretion and grant a winding-up

Tjospomie Boerdery (Pty) Ltd v Drakensberg Botteliers (Pty) Ltd [1989 \(4\) SA 31](#) (T) at 41-42

Application

The application is brought on notice of motion (either Form 2 or Form 2(a)), with a founding affidavit

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The affidavit must set out the following:

- (a) in respect of the applicant
 - (i) where the applicant is a company, personal knowledge and authority of the deponent
Victor Kent (Natal) (Pty) Ltd v De Jager 1942 NP 337 at 338-339
Barlows (EP) Ltd v Bouwer [1950 \(3\) SA 850](#) (E) at 851
 - (ii) *locus standi* of applicant
Fraser v Warmbaths Cotton Estates Ltd 1926 WLD 110 at 112
Ex parte Muller: In re PL Myburgh (Edms) Bpk [1979 \(2\) SA 339](#) (N) at 340G-H
Rubinstein v Langhold (Pty) Ltd [1983 \(2\) SA 228](#) (C) at 229G-H, 231H-232A
 - (iii) where the applicant applies as a member - that he has been a member for the requisite period of 6 months
Fraser supra
 - (iv) where the applicant is a creditor, a description of the cause of the indebtedness
Du Preez v Boetsap Stores (Pty) Ltd [1978 \(3\) SA 560](#) (NC) at 563C
- (b) in respect of the respondent:
 - (i) name and registration number
 - (ii) principal place of business or registered office
[S 170\(1\)\(b\)](#) Companies [Act 61 of 1973](#)
Uniform Rules of Court [Rule 4\(1\)\(a\)\(v\)](#)
Klass v Zwarenstein & Odendaal (Pty) Ltd 1961 (2) 552 (W)
- (c) jurisdiction
- (d) insolvency of the respondent
If the respondent contends that it is solvent, the onus to adduce evidence of such solvency rests upon the

respondent - *R-Bay Logistics supra* at [40]

- (e) grounds for winding-up
[S 344](#) read with [s 345](#) Companies [Act 61 of 1973](#)
- (f) any such facts as may have a bearing on the exercise of the Court's discretion, such as security held by the applicant for its claim and assets of the company, should be provided

Advantage to creditors / calculation of a dividend is not required

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- (g) security for costs of the application (issued by the Master less than 10 days before the date of the notice of motion, provided that it is ready for issue)
[S 346\(3\)](#) Companies [Act 61 of 1973](#)

Failure to provide security or stale security cannot be condoned

Melcost Investments (Pty) Ltd v Kruger [1968 \(2\) SA 69](#) (O) at 72B-D, F

A Holman Trading Co (Pty) Ltd v Pipeweld Construction & Erection (Pty) Ltd [1977 \(4\) SA 360](#) (T) at 362

Mafeking Creamery Bpk v Mamba Boerdery (Edms) Bpk [1980 \(2\) SA 776](#) (NC) at 782A-B

Anthony Black Films v Beyl [1982 \(2\) SA 478](#) (W) at 480E-G

RSA Factors Ltd v Hansen [1983 \(4\) SA 873](#) (D) at 876

The certificate need not accompany the application either when it is filed with the Registrar or when it is served on the respondent, but it must accompany the application when it is heard

De Wet v Mandelie (Edms) Bpk [1983 \(1\) SA 544](#) (T) at 545-546

RSA Factors supra at 874

Court v Standard Bank of SA Ltd; Court v Bester NO [1995 \(3\) SA 123](#) (A) at 131E

- (h) that service has been effected as provided in [section 346\(4\)](#) and [346\(4A\)](#) Companies [Act 61 of 1973](#)
[S 346\(4A\)\(b\)](#) Companies [Act 61 of 1973](#)

Solvent companies

Jurisdiction

As with insolvent companies

Locus standi and grounds for liquidation

Under this Act, parties having *locus standi* to apply for the company's winding-up, may do so under specific grounds only

- (a) the company itself
 - (i) a special resolution is passed by the company for its winding-up, or
- [Page 5-15]
- (ii) for the continuation of a voluntary liquidation by the Court
[S 81\(1\)\(a\)\(i\)](#) and [\(ii\)](#) Companies [Act 71 of 2008](#)
 - (b) the practitioner of a company
 - (i) where there is no reasonable prospect of the company being rescued
[S 81\(1\)\(b\)](#) read with [s 141\(2\)\(a\)](#) Companies [Act 71 of 2008](#)
 - (c) one or more of its creditors
 - (i) where business rescue proceedings have ended in the manner contemplated in [section 132\(2\)\(b\)](#) or [\(c\)\(i\)](#) Companies [Act 71 of 2008](#) and it is just and equitable, or
 - (ii) it is just and equitable
[S 81\(1\)\(c\)\(i\)](#) and [\(ii\)](#) Companies [Act 71 of 2008](#)
 - (d) a shareholder
 - with leave of the Court and subject to having been a shareholder for at least 6 months
 - (i) fraudulent or illegal conduct by persons in control of the company, or
 - (ii) waste or misapplication of the company's assets
[S 81\(1\)\(c\)\(i\)](#) and [\(ii\)](#) Companies [Act 71 of 2008](#)
 - (e) the company itself, one or more of its creditors, or one or more of its shareholders
 - (i) deadlock of directors, or

- (ii) deadlock of shareholders, or
[S 81\(1\)\(d\)\(i\)](#) and (ii) and Companies [Act 71 of 2008](#)
- (iii) just and equitable
[S 81\(1\)\(d\)\(iii\)](#) Companies [Act 71 of 2008](#)

The legal basis for winding-up under this sub-section is the same as that under [section 344\(h\)](#) of the Companies [Act 61 of 1973](#)

Muller v Lily Valley (Pty) Ltd [\[2012\] 1 All SA 187](#) (GSJ)

Budge NO v Midnight Storm Investments 256 (Pty) Ltd [2012 \(2\) SA 28](#) (GSJ) at 34 par [12]

HBT Construction & Plant Hire CC v Uniplant Plant Hire [2012 \(5\) SA 197](#) (FB)

Budge supra at 33 par [9], *Thunder Cats Investments 92 (Pty) Ltd v Nkonyane Economic Prospecting & Investment (Pty) Ltd* [2014 \(5\) SA 1](#) (SCA) at pars [12]-[20]

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This basis should not be interpreted so as to only include matters *eiusdem generis* the other grounds enumerated in [section 81](#)

Budge supra at 33 par [9]; *Thunder Cats Investments 92 (Pty) Ltd v Nkonyane Economic Prospecting & Investment (Pty) Ltd* [2014 \(5\) SA 1](#) (SCA) at pars [12]-[20]

- (f) the Commission or Panel
 - (i) failure to comply with a compliance notice
[S 81\(1\)\(f\)](#) Companies [Act 71 of 2008](#)

Application

The application is brought on notice of motion (either Form 2 or Form 2(a)), with a founding affidavit

The affidavit must set out the following:

- (a) in respect of the applicant
as with an application in terms of Companies [Act 61 of 1973](#), subject to [s 81\(3\)](#)
- (b) in respect of the respondent
as with an application in terms of Companies [Act 61 of 1973](#)
- (c) jurisdiction
- (d) that the respondent company is solvent
- (e) grounds for winding-up
[S 81](#) Companies [Act 71 of 2008](#)
- (f) any such facts as may have a bearing on the exercise of the Court's discretion
- (g) security for costs of the application
The Companies [Act 71 of 2008](#) does not provide for security for costs, but in terms of Item 9(2) of Sch 5, the provisions of, *inter alia*, [s 346](#) of the Companies [Act 61 of 1973](#) are retained to the extent necessary to give full effect to the provisions relating to the winding-up of companies under the Companies [Act 71 of 2008](#). The purpose of security being to ensure that there is a fund available to meet the costs which result from the operation of the process of winding-up, it is submitted that an applicant for the winding-up of a solvent company, is also obliged to provide security
SEE: notes in respect of security for costs for winding-up applications of insolvent companies

[Page 5-17]

- (h) that service of the application has been effected
An affidavit must be filed setting out how compliance with [s 346\(4A\)](#) was effected. This is usually deposed to by the attorney

General

Service - application

Although the Companies Act 71 of 2008 does not provide for service of the application, in terms of Item 9(2) of Schedule 5, the provisions of, *inter alia*, [section 346](#) of the Companies [Act 61 of 1973](#) are retained to the extent necessary to give full effect to the provisions relating to the winding-up of companies under the Companies [Act 71 of 2008](#) and it is submitted that this necessarily includes notice of the application

- (a) Master
[S 346\(4\)\(a\)](#) Companies [Act 61 of 1973](#)
- (b) the South African Revenue Services - any method of service at its office within the jurisdiction of the Court

[S 346\(4A\)\(a\)\(iii\)](#) Companies [Act 61 of 1973](#)

Compliance is peremptory - *Corporate Money Managers (Pty) Ltd v Panamo Properties 49 (Pty) Ltd* [2013 \(1\) SA 522](#) (GNP) at [10]

AND SEE: *Sphandile Trading Enterprise (Pty) Ltd v Hwibidu Security Services CC* [2014] JOL 31470 (GSJ); [2014 \(3\) SA 231](#) (GJ) at par [18]

- (c) respondent - registered address
Unless the Court is satisfied that it would be in the interest of the respondent or its creditors to dispense with service and in its discretion, does so - s 346(4A)(a)(iv) Companies [Act 61 of 1973](#), *Sibakhulu supra*
CIPC Practice Note 2 of 2012
- (d) employees of respondent - by affixing a copy of the application at an accessible place
[S 346\(4A\)\(a\)\(ii\)\(aa\)](#) and [\(bb\)](#) Companies [Act 61 of 1973](#)
- (e) trade union of employees - any method of service at its place of business
[S 346\(4A\)\(a\)\(i\)](#) Companies [Act 61 of 1973](#)

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The Practice Manuals of the GSJ and GNP require service of the application on all interested parties, such as co-shareholders or joint members, where the application is brought by a shareholder of a company or a member of a close corporation

See also [s 157](#) Insolvency [Act 24 of 1936](#) in respect of formal defects

The applicant must file an affidavit setting out how [section 346\(4A\)\(a\)](#) was complied with. This is usually deposited to by the applicant's attorney

[S 346\(4A\)\(b\)](#) of the Companies [Act 61 of 1973](#)

Corporate Money Managers supra at [10]; *Sphandile Trading Enterprise supra* at par [18]

Order

On hearing an application for the liquidation of a company, the Court may:

- (a) adjourn the hearing, conditionally or unconditionally
- (b) make an interim order
- (c) grant or dismiss the application
- (d) make any other order it may deem just
[S 347\(1\)](#) Companies [Act 61 of 1973](#), Item 9(2) of Sch 5 Companies Act [71 of 2008](#)
- (e) where a company is already being wound up voluntarily, the Court may confirm any or all of those proceedings
[S 347\(4\)](#) Companies [Act 61 of 1973](#)
- (f) neither the Companies [Act 61 of 1973](#) nor the Companies [Act 71 of 2008](#) require a final order to be preceded by a provisional order
The Practice Manuals of the GSJ and the GNP require the applicant to seek a final winding-up order in the Notice of Motion, although the Court may in the exercise of its discretion grant a provisional order. However, there is no uniform practice in the country
Henochsberg submits that a provisional order be granted, save in exceptional circumstances: Vol 2 at APPI-86
SEE ALSO: *Kalil v Decotex (Pty) Ltd* [\[1988\] 2 All SA 159](#) (A), [1988 \(1\) SA 943](#) (A) at 976A-B

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Service - provisional order

Although the Companies [Act 71 of 2008](#) does not provide for service of the provisional order, Items 9(1) and (2) of Schedule 5 retain the application of [section 346A](#) of the Companies [Act 61 of 1973](#) to the winding-up of companies under the Companies [Act 71 of 2008](#)

- (a) trade union
[S 346A\(1\)\(a\)](#) Companies [Act 61 of 1973](#)
- (b) employees of the company
[S 346A\(1\)\(b\)](#) Companies [Act 61 of 1973](#)
- (c) the South African Revenue Services
[S 346A\(1\)\(c\)](#) Companies [Act 61 of 1973](#)
- (d) the respondent company
[S 346A\(1\)\(d\)](#) Companies [Act 61 of 1973](#)
- (e) publication in

- (i) the *Government Gazette* and
 - (ii) a local newspaper
- (f) notice to all known creditors by registered post
The latter two depend on the facts and circumstances, the practice directives of the different divisions, and are within the Court's discretion. It is required if the applicant is a director or shareholder of the company to be wound up

It is practice that an affidavit be filed on the return day stating in what manner service of the provisional order has been effected, together with the necessary proof

ORDER SOUGHT IN NOTICE OF MOTION

Provisional order:

1. That the respondent company be and is hereby placed under provisional winding-up
2. That all persons who have a legitimate interest are called upon to put forward their reasons why this Court should not order the final winding-up of the respondent company on [insert date] at 10h00

[Page 5-20]

3. That a copy of this order be forthwith served on the respondent company at its registered office and be published in the *Government Gazette* and in the [insert name] newspaper
4. That a copy of this order be forthwith forwarded to each known creditor by prepaid registered post

Final order:

1. That the respondent company be and is hereby placed under final winding-up

PRACTITIONER'S CHECKLIST

1. Notice of motion
 - 1.1 service - [Rule 6](#)
 - 1.2 notice of opposition - [Rule 6\(5\)\(b\)](#) - 5 days
 - 1.3 hearing - [Rule 6\(5\)\(b\)](#) - not less than 10 days after service
2. Statutory service - [section 346\(4\)\(a\)](#) and [346\(4A\)](#) Companies [Act 61 of 1973](#)
 - 2.1 trade union
 - 2.2 employees on notice board or front gate
 - 2.3 the SARS
 - 2.4 respondent
 - 2.5 the Master

Affidavit must be filed before or during hearing re service of application and where applicable, provisional order
3. Essential averments
 - 3.1 jurisdiction
 - 3.2 identity of applicant and *locus standi*
 - 3.3 company itself, creditor, member
 - 3.4 basis of application - [section 344](#) Companies [Act 61 of 1973](#) / [section 81](#) Companies [Act 71 of 2008](#)
 - 3.5 certificate of Master re security

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