REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

(1) REPORTABLE: Yes
(2) OF INTEREST TO OTHER JUDGES: Yes
(3) REVISED.

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DATE SIGNATURE

In re several matters on the urgent court roll 18 September 2012

J U D G M E N T

Summary

Practice – Motions – Urgent matters. All matters must comply with the provisions of the Rules and South Gauteng Practice Manual – Practice directives valid and enforceable in both actions and applications.

WEPENER J:

[1] There are a number of matters on today's urgent court roll which do not comply with the provisions of the Rules of Court ('the Rules') and the South Gauteng Practice Manual ('the Practice Manual') regarding applications, and in particular, the provisions regarding urgent applications.

[2] The Rules and directives contained in the Practice Manual are there to assist judges to prepare for and hear urgent matters expeditiously. These rules of practice were introduced to also assist the judge who is to hear the matters to be able to properly prepare for the hearing.

[3] It is not only that non-compliance with the Rules and Practice Manual per se is of relevance; it is also discourteous towards the judge who has to hear a considerable number of so-called urgent matters on a particular day not to comply with the provisions of the Rules and the Practice Manual.

[4] Some of the defects are the following:

1. a lack of indexing and pagination – the latter which assists a judge to easily work with the papers and find relevant documentation;

2. a lack of proper binding of papers – the latter which, similarly to indexing and pagination, assists a judge to work through the papers with a measure of convenience;

3. a lack of the index to describe each affidavit and annexure as a separate item – making the work of a judge more difficult and indices that read ‘Annexure A’, ‘Annexure B’, ‘Annexure C’ etc., are of no assistance whatsoever and lacks compliance with the Practice Manual;

4. a lack of compliance with the Practice Manual chapter 9.24 regarding urgent applications in particular. As an example I refer to the requirement that the applicant is obliged to set out explicitly the circumstances which render the matter urgent. In this regard a practice has developed in this Division that practitioners see to it that there is a specific section headed ‘Urgency’ wherein this requirement is fully dealt with. This enables the presiding judge to quickly and conveniently

determine the nature of the urgency and why the matter should be afforded preference on the motion roll i.e. why it should be heard in the urgent court and not in the normal course of events.

[5] The Practice Manual in 9.24 paragraph 3.5 provides:

> '*The aforementioned practices will be strictly enforced by the presiding judge. If an application is enrolled on a day or at a time that is not justified, the application will not be enrolled and an appropriate punitive cost order may be made.*'

[6] The Practice Manual echoes the words of Rule 6(12)(b) which provides:

> '*In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, 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.*'

In *Western Bank Ltd v Packery* 1977 (3) SA 141(T), Coetzee J (as he then was) held at 141B:

> *'The Rules of Court are delegated legislation, have statutory force and are binding on the Court'.*

The Rules are also binding on litigants, who must comply therewith.

[7] The importance of these provisions is that the procedure set out in Rule 6(12) is not there for the mere taking. Notshe AJ said in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* (11/33767) [2011] ZAGPJHC 196 (23 September 2011) in paras 6 and 7 as follows:

> *'[6] The import thereof is that the procedure set out in rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a*

> *litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.*
>
> *[7] It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his case in that regard.'*

[8] There are a number of matters where these provisions have simply been ignored. Practitioners are setting matters down in the urgent court for flimsy and inadequate reasons. This practice needs to be discouraged.

[9] In addition, in Practice Manual paragraph 9.24 under the heading Urgent Applications, it provides:

> '*When an urgent application is brought for the Tuesday at 10h00 the applicant must ensure that the relevant papers are filed with the registrar by the preceding Thursday at 12h00.*'

There is a clear duty on an applicant, who does not comply with this provision, to supply a proper explanation why there has been non-compliance with it.

[10] In *Greenberg v Khumalo and Another* [2012] JOL 29170 (GSJ), Potgieter AJ held that the practice directive which is inconsistent with the Rules is procedurally incompetent. I disagree with the views expressed in *Greenberg* for two reasons. Firstly, on the reasoning of the learned judge it has to be determined whether a practice directive is indeed inconsistent with the Rules. If the practice directive is compatible with or in addition to the Rules, the objection of the learned judge falls away.

[11] More importantly though, there has been a prescribed practice in this Division as in many other Divisions where practice directives have been

issued by the Judges President or Deputy Judges President on authority of the Judges President. This practice has been a long standing one that has been respected by judges and practitioners.

[12] The reasoning in the *Greenberg* matter in paragraph 17 as follows:

> '*[17] The Supreme Court Act empowers the judge president of a provincial division to make rules regulating proceedings with reference to the times for the holding of courts, the placing on the roll of actions for hearing and the extension or reduction of time periods in terms of the Rules of Court. In terms of Rule 1 of the Rules of Court "action" is defined to mean "a proceeding commenced by summons or by writ in terms of rule 9". Accordingly, the provisions of the Supreme Court Act as to the powers of the judge president to make rules are not relevant to the matters under discussion.*'

I do not believe that it is correct to interpret the word 'action' in the Supreme Court Act 59 of 1959 ('Supreme Court Act') by referring to the definition in the Rules. The meaning of the word 'action' in the Supreme Court Act is to be determined with reference to that Act. There is no definition of the word 'action' in the Supreme Court Act. It is consequently necessary to interpret the word 'action' in section 43 of the Supreme Court Act purposefully for purposes of that Act. As was pointed out by Ngcobo J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 CC para 90:

> *'The emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous. Recently, in Thoroughbred Breeders' Association v Price Waterhouse 2001 (4) SA 551 (SCA) at para 12 the SCA has reminded us that:*
>
> > *"The days are long past when blinkered peering at an isolated provision in a statute was thought to be the only legitimate technique in interpreting it if it seemed on the face of it to have a readily discernible meaning.""*

If regard is had to the definition section of the Supreme Court Act which defines 'civil summons' as:

> *'…any summons whereby civil proceedings are commenced, and includes any rule nisi, notice of motion or petition the object of which is to require the appearance before the court out of which it is issued of any person against whom relief is sought in such proceedings or of any person who is interested in resisting the grant of such relief;*'

and 'defendant':

> *'…includes any respondent or other party against whom relief is sought in civil proceedings;'*

and 'plaintiff':

> *'…includes any petitioner or other party who seeks relief in civil proceedings;',*

I am of the view that there can be no doubt that the Supreme Court Act is intended to regulate all proceedings in the High Court and not only actions in the narrower sense as described in the Rules. The legislature could not have intended that a Judge President can only make rules regarding actions in the narrow sense of the word. There is no justification to have recourse to a definition in the Rules to interpret the meaning of a word in the Supreme Court Act.

[13] I am consequently of the view that the word 'action' in s 43 of the Supreme Court Act should be read to include all proceedings in the High Court. This would entitle the Judge President to issue practice directives relating to the setting down of matters both in actions and in the application court. In the circumstances, all practice directives issued by the Judge President, or which are issued on his authority in relation to matters contained in the Practice Manual, are competent and should be adhered to.

[14] Potgieter AJ said in the *Greenberg* at para 22:

> '*[22] The wording of paragraph 5 of chapter 9.22 of the practice manual conveys a requirement additional to those contained in Rule 6(5)(f) of the Rules of Court in order to obtain an allocation for the hearing of an application which has been struck from the roll. I refer to the wording of the directive which suggests that such an application "may only be enrolled… if … an affidavit explaining the previous non-appearance is filed".*'

There is however no prohibition against a Judge President making rules in addition to those contained in Rule 6(5)(f).

[15] Further, if a matter becomes opposed in the urgent court and the papers become voluminous there must be exceptional reasons why the

matter is not to be removed to the ordinary motion roll. '*The urgent court is not geared to dealing with the matter which is not only voluminous but clearly includes some complexity and even some novel points of law*.' See *Digital Printers v Riso Africa (Pty) Ltd* case number 17318/02, an unreported judgment of Cachalia J delivered in this Division.

[16] There are also matters brought against departments of State. Experience has taught that such respondents need time to look into the allegations contained in the affidavits in order to be able to file answering affidavits, if they so wish. When these affidavits are filed, the matters can be seen in a proper perspective. Attempts to disallow them to file affidavits are usually based on the judgment in *Arse v Minister of Home Affairs and Others* 2012 (4) SA 544 (SCA) where it was said at para 10 that a detained person should not be deprived of his or her right to freedom for one second longer than necessary. Malan JA however, added the words that the detention should not be '*longer than necessary by an official who cannot justify his detention*'. This statement must been seen in its proper context. It does not say that all persons who are incarcerated are entitled to be released post haste. It deals with unlawful incarceration and that determination can only be made upon a proper consideration of all the facts as the governing legislation specifically provides for incarceration. By allowing the respondents to place facts before the court to attempt to justify the actions of its employees, the matter can be properly considered. The success or otherwise of the respondents opposition to the matter can only then be determined.

[17] An abuse of the process regarding urgent applications has developed (in all likelihood with a hope that the respondents would not be able to file opposing affidavits in time). This practice must be addressed in order to stop matters being unnecessarily enrolled and to clog a busy urgent court roll. In these matters, sufficient time should be granted to the respondents to file affidavits and they can rarely do so when papers are served less than a week before a matter is to be heard. That week includes a weekend when State

machinery normally comes to a standstill. Practitioners will be well advised to be realistic and to afford the State departments a more reasonable time to file affidavits. No doubt there are matters which require urgent attention on shorter notice but amongst the thirty or so applications by foreigners to be released from custody on the roll today, I am struggling to find a single one that justifies a hearing urgently today. If there are such matters, the affidavits generally fail to set out the urgency of the matter as required by the Practice Manual and Rule 6.

[18] Urgency is a matter of degree. See *Luna Meubel Vervaardigers (Edms) Bpk v Makin (t/a Makins Furniture Manufacturers)* 1977 (4) SA 135 (W). Some applicants who abused the court process should be penalised and the matters should simply be struck off the roll with costs for lack of urgency. Those matters that justify a postponement to allow the respondents to file affidavits should in my view similarly be removed from the roll so that the parties can set them down on the ordinary opposed roll when they are ripe for hearing, with costs reserved.

[19] Those matters that do not comply with the Rules and Practice Manual will not be afforded a hearing in this court. They fall to be struck from the roll with costs where appropriate.

[20] The aforegoing does not affect the remaining rules regarding the enrolling of urgent matters but were cited as examples of the non-compliance by practitioners with the clear directives contained in the Rules and issued in the Practice Manual of this Division.

[21] If litigants suffer prejudice as a result of practitioners' laxity to comply with the clear directives, they have only themselves to blame for not

complying with a set of simple and clear Rules and directives that exist regarding the hearing of urgent applications in this Division.

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WEPENER J
JUDGE OF THE HIGH COURT

DATE OF HEARING: *18 September 2012*

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