NOTICE 535 OF 2004

PRACTICE MANUAL OF THE KZN DIVISION OF THE HIGH COURT

1. Introduction

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

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

Judges are however not bound by practice directives. While we obviously strive to achieve uniformity it must clearly be understood that these directives cannot fetter the exercise of a judge's discretion and in an appropriate case he/she may be persuaded to relax or change a practice of the court. We envisage that this will only arise in exceptional circumstances. If a judge

does depart from a particular practice this will not be regarded as a modification of the practice. Changes can only come about if this is done with the **authority of the Judge President in consultation with the other judges of the Division**.

2. Service of Process[2]

2.1. On Company or Corporation[3]

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

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

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

Rule 4(10) makes it clear that the court has a discretion whether to accept service at a *domicilium* as good service. Whether such service

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[1] See Rule 31(5)
[2] Rule 4
[3] Rule 4(1)(a)vii
[4] This a change to the existing practice.
[5] Rule 4(1) a(iv)
[6] This is a change to the existing practice.

will be accepted as good service will depend on the particular facts of each case. There is, however, no rule of practice to suggest that such service is ordinarily not good or effective service. In most case it will be regarded as good service.[7]

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

3. Filing of Returns of Service[9]

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

4. The Short Form of Summons

[7] JP's memorandum 14/7/1982
[8] New practice
[9] JP's memorandum 14/7/1982

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

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

[10] JPs memorandum 14/7/82

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

5. *Mora* Interest

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

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

6. Bank Overdraft Interest

Where the agreement between banker and customer provides that interest will be paid at the "current overdraft rate" and there has been a change in the rate of interest since the date of issue of the summons an employee of the bank is required to put up a certificate setting out all relevant changes in the

[11] JP's memorandum 15/12/86
[12] JP's memorandum 15/12/1986

overdraft rate since the date of issue of summons as well as dates upon which such changes occurred.[13]

7. Confession to Judgment[14]

Where application is made through the registrar for the entry of judgment in terms of a confession, the party submitting same is required to depose to an affidavit which shall set forth all payments made subsequent to the execution of the confession and demonstrate how the capital and interest claimed is calculated. In addition such affidavit shall also very briefly set out the nature of the default that gave rise to the plaintiff's entitlement to lodge the confession[15] and any reason for the delay in submitting the confession.

8. Application Procedure [16]

8.1. Introduction

There are fundamentally three categories of Applications.

8.1.1. *Ex parte* applications, which are catered for in Rule 6(4)(a), read with form 2 of the first schedule. Here the applicant gives notice to the Registrar in what is termed "a short form of notice of motion". In sequestration and winding up proceedings where the applicant relies on an act of insolvency or inability to pay debts and is able to produce documentary evidence of such inability - eg a letter or balance sheet, the application may be brought

[13] JP's memorandum 15/12/1986
[14] Rule 31(1)(c)
[15] This is a new practice directive although we are aware that some judges in the past have followed this procedure

ex parte without notice. This is a practice of long standing in this Division[17] In winding up proceedings an amendment to the Companies Act and the Insolvency Act[18] requires *inter alia* that the applicant "must furnish the company or the debtor, whatever the case may be, with a copy of the application unless the court in the exercise of its discretion dispenses with this after being satisfied that it would be in the interests of the creditors and the debtor to do so." We do not consider that this amendment detracts from the aforesaid practice. The furnishing of the copy of the application is intended to take place informally.[19] It is envisaged that in the majority of cases the applicant will make out a case to dispense with the provision.

8.1.1.1. This Division adheres to the practice laid down in *ex parte Three Sisters (Pty) Ltd* [20] (that is to say, where a company applies for its own winding up) which is set forth as follows :[21]

"Whatever a company's reason may be for wanting to be wound up in terms of s 344(a) of the Companies Act 61 of 1973, and

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[16] Rule 6
[17] see Collective Investments (Pty Ltd v Brink 1978(2) SA 252N esp @ 254 and 255. See also JP's memorandum dated 15/12/1986.
[18] Sub-s (4A) inserted in to both Acts by Act no 69 of 2002
[19] see Sub-s (4A) (b) Act 69 of 2002
[20] 1986(1)SA 592 (D)

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

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

[21] Headnote Three Sisters case *supra*
[22] Rule 6(11)

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

9. Opposed Applications

Apart from opposed applications that are governed by Rule 6(5) insofar as the time periods for delivery of affidavits and the like are concerned, judges presiding in the motion court are very often asked to adjourn applications which have become opposed and to issue directions in

[23] Rule 6(12)(a) and (b); see *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 782.

[24] See Rule 4(1)(a) : "Service of any process of the court directed to the sheriff and subject to the provisions of paragraph (aA) any document initiating application proceedings shall be effected by the sheriff ..."

regard to the filing of further affidavits. Generally speaking these would be applications brought before the court as a matter of urgency. Many judges of this Division have expressed concern about the frequent adjournments that are sought during process of exchanging affidavits prior to the application being placed on the opposed roll. The practice that will be followed henceforth is as follows:[25]

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

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

If the judge is satisfied that the application ought to receive preference, he may direct the registrar to accord the matter such preference as she/he is able. If the applicant wishes to seek interim relief pending the opposed hearing representations shall be made to the senior civil judge on duty to give the necessary directions for an urgent hearing.

9.2. The registrar will not allocate a date for hearing on the opposed roll unless the applicant or his/her attorney or in cases where the applicant fails to do so after a reasonable time, the respondent or his/her attorney certifies **in writing** that the application is ripe for hearing, that is to say, that all the affidavits have been

[25] New practice

delivered. A matter shall be deemed to be ripe for hearing where the applicant has not delivered a replying affidavit on the date agreed or directed by the court.

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

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

9.4.1. The applicant, excipient or plaintiff in opposed motions, exceptions and provisional sentence proceedings shall not less than five court days before the day of the hearing deliver concise heads of argument (ideally no longer than five pages) and not less than three court days before the hearing the respondent or defendant shall do likewise. The heads should indicate the issues, the essence of the party's contention on each point and the authorities sought to be relied on. Further heads may be handed in at the hearing.

9.4.2. By no later than noon two court days before the day of hearing the applicant, excipient or plaintiff shall notify the registrar in writing whether the

[26] Practice direction 1998(1) SA 365

matter will be argued, and if not what alternative relief (for example postponement, referral to evidence, etc) will be sought.

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

9.4.4. If any of the aforesaid matters is of such a nature – by reason of the volume of the record or the research involved or otherwise – that the judge allocated to hear the matter would, in order to prepare for the hearing, reasonably need to receive the papers earlier than he or she would normally do, the applicant, excipient or plaintiff (as the case may be) shall notify the Registrar in writing to that effect not less than seven court days before the day of the hearing. Failure to do so could result in the matter not being heard on the allocated day.

9.4.5. This direction does not apply to Rule 43 proceedings.

10. Urgent Applications :

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

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

(b) This should be followed by a call every hour to inform the registrar who in turn will apprise the duty judge of the current position.

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

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

10.2. In every urgent application (including the ordinary motion court) a draft order must be presented to the judge. If the draft is amended in chambers, practitioners must come to the

assistance of the registrar's typist in order to ensure that the order is in a form where it can be issued forthwith.[27]

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

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

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

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

"1. There must be sufficient proof of the applicant's *locus standi*. There must be facts establishing

[27] JP's memorandum 29/1/2003
[28] JP's memorandum 15/12/1986
[29] [2000] 3 All SA 512
[30] Page 517

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

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

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

[31] 1996 (3) SA 822 (W)

4. In the case of immovable property, I consider that it is insufficient to merely put up an affidavit by a valuer who expresses an opinion as to the value of the property. The valuer should state why he is qualified to make the valuation, what experience he has in valuing houses in the area and give details of comparable sales on which he relies for his value. In addition he must state what he considers the house will fetch on a sale by public auction.

5. In the case of urgent applications to stay the sale-in-execution of an immovable property, full reasons must be given why the application is brought at the last moment. In addition details must be given of attempts the debtor has made to sell the property by way of private treaty.

6. Where there is a bondholder, notice of the application must be given to it.

7. Any application for the extension of a provisional order must be supported by an affidavit in which full and acceptable reasons for the extension are set out."

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

12.1. The general rule is that provisional sequestration orders are served personally on the respondent(s). Where the respondent happened to be present in court when the order was pronounced, it should nonetheless still be served on her/him

because of the consequences which flow from such service as set out in the Insolvency Act.

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

13. Divorce Custody and Other Matrimonial Cases

13.1. **Service of Summons :**

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

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

13.2. Where it appears at the hearing of an undefended divorce that service was effected more than six (6) months before the date of the hearing it is the practice to require that the notice of set down be served on the defendant alternatively that the plaintiff

satisfy the court by other means that the defendant is aware that the case is to be heard on that day.[32]

14. Marriage Certificates

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

15. Divorce Settlement Agreements

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

> "For many years this court has set its face against the making of agreements orders of court merely on consent. We have frequently pointed out that the court is not a registry of obligations. Where persons enter into an agreement, the obligee's remedy is to sue on it, obtain judgment and execute. If the agreement is made an order of court the obligee's remedy is to execute merely. The only merit in making such an agreement an order of court is to cut out the necessity for instituting action and to enable the obligee to proceed direct to execution. When, therefore, the court is asked to make an agreement an order of court it

[32] This is an old practice; however the 6 month provision is new.
[33] See JP's memorandum 14/7/82
[34] 1953 (3) SA 716 AT 712B

must, in my opinion, look at the agreement and ask itself the question 'Is this the sort of agreement upon which the obligee (normally the plaintiff) can proceed direct to execution?' If it is, it may well be proper for the court to make it an order. If it is not, the court would be stultifying itself in doing so. It is surely an elementary principle that every court should refrain from making orders which cannot be enforced. If the plaintiff asks the court for an order which cannot be enforced, that is a very good reason for refusing to grant his prayer. This principle appears to me to be so obvious that it is unnecessary to cite authority for it or to give examples of its operation."

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

Where a party to a divorce agrees that the other party shall be entitled to receive a share of his pension interest when that accrues and that the fund concerned makes an endorsement in its record to that effect, the court will only make the said agreement an order of court if it is satisfied that due and

timeous notice has been given to the fund in question indicating that such order will be sought. The order of court must clearly and unambiguously identify the fund in question.

16. **Variation of Custody Orders**

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

17. **Application for a Change in the Matrimonial Regime**

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

18. ***Curators ad Litem***

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

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

Only those particulars will be ordered which the court is satisfied are justified in terms of the Rules. It will no longer be permissible to avoid the question as to whether each request is so justified by arguing that all that is required is

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[35] JP's memorandum 15/12/1986-
[36] 1986 (2) SA 291C
[37] JP's memorandum 15/12/1986
[38] 1984 (2) SA 410D
[39] 1984 (4) SA 325 D
[40] JP's memorandum dated 15/12/86. The provision in regard to wills and trusts is set forth in a practice note issued by the society of advocates Natal
[41] JP's memorandum 14/7/1982

that the respondent "respond" to the request. If an order is granted for the furnishing of further particulars, the **form** of the order will still be that the respondent "respond" to the request (or, if only some of the particulars are justifiably sought, that the respondent respond to the questions asked in certain specified paragraphs). This form is considered correct since the defendant may, in some cases, conceivably turn out to be unable to furnish such particulars. The court must, however, be satisfied that each question is justified in terms of the Rules before ordering that the respondent respond to such question.

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

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

21. Expedited Hearing[43]

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

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

21.3. In all matters to which the provisions of :

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

[42] This is a new practice.

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

21.3.3. Uniform Rule 8, or

21.3.4. Uniform Rule 32

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

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

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

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

[43] The first expedited hearings will be set down from 2 August 2004.

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

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

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

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

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

complied with and/or attended to, the registrar shall place the matter on the expedited roll. Where any additional directions have been made by the court or the judge these shall be set out with sufficient particularity in the certificate.

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

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

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

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

21.9.2. on a continuous roll for each such weekly roster;

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

21.10. The registrar shall advise the plaintiff or applicant or party upon whose application the direction was obtained of the date of set

down by telefacsimile transmission to a number specified or email address in the notice referred to in sub-rule 6.

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

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

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

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

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

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

Where a judge has given a ruling on an issue separated in terms of Rule 33(4), eg liability in a damages action, the matter will be regarded as partly heard before that judge. Should, however, the said judge for any reason not be available at the resumed hearing of the trial, and where the parties agree in writing, another judge shall be allocated to try the remaining issues in the action provided, however, that the second mentioned judge is satisfied that his/her decision does not depend on the credibility of any witness whose credibility was also in issue at the first hearing.[44]

23. Bail Appeals

These are heard by a single judge both in Pietermaritzburg and Durban,[45] both in term and during the recesses. While the judges of this Division recognize that these matters are inherently urgent, it is nonetheless necessary that appeals be put before the court in an orderly and structured manner. The following practice will henceforth be followed :[46]

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

23.2. The registrar shall allocate a date which is not less than five (5) court days from the date of the application. The registrar shall then place the matter before the senior civil judge who generally

[44] JP's direction 10./12/.2002
[45] S. 65(1)b of Act 51 of 1977
[46] new practice

speaking, will allocate it to the judge presiding in the motion court on that day. Where however the record of the proceedings before the magistrate is voluminous and in the opinion of the registrar will require extensive reading and preparation, the registrar shall allocate a date not less than 10 court days from the date of the application.

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

24. Applications for Striking-off of Practitioners in Pietermaritzburg

The practice in applications to strike the names of practitioners from the roll is for a single judge to grant the rule *nisi* even if it involves interim relief such as suspension from practice and the appointment of a *curator bonis*. On the return day the matter is dealt with by two judges opposed or unopposed.[47]

25. Applications for Default Judgment in Actions for Damages

This Division will henceforth follow the practice laid down in *Havenga v Parker*[48] which is to the following effect.

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

[47] JP's memorandum 15/2/91
[48] 1993 (3) SA 724 T