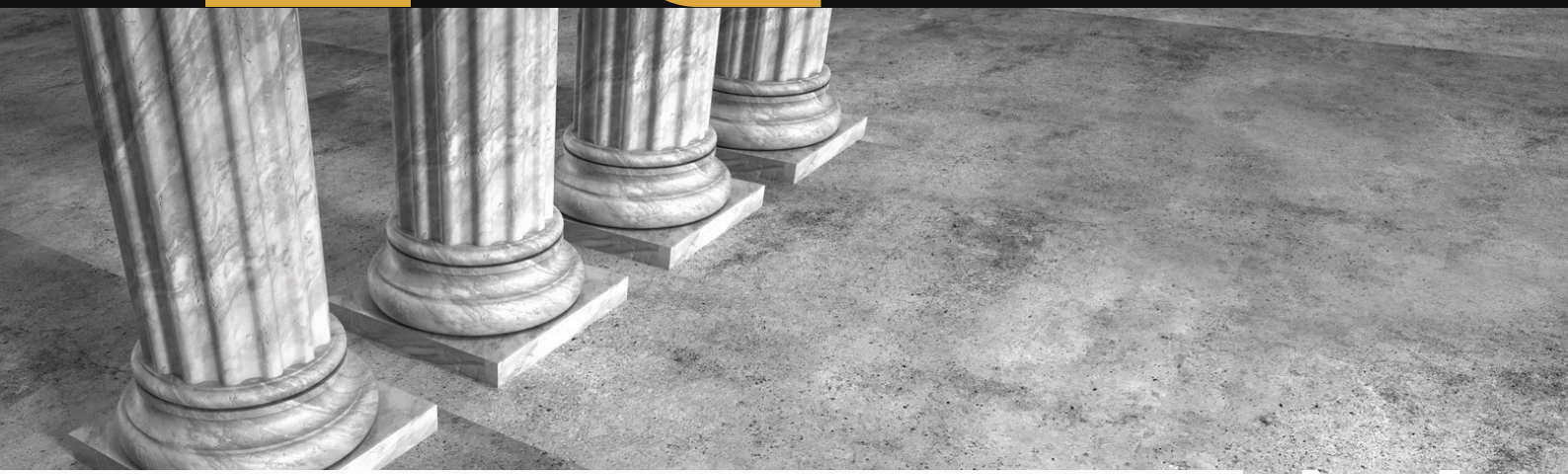
PRACTICAL VOCATIONAL TRAINING (PVT) STRUCTURED COURSEWORK PROGRAMME FOR CANDIDATE LEGAL PRACTITIONERS (CANDIDATE ATTORNEYS)

High court practice, in terms of Regulation 6(10)(d)

LEGAL PRACTICE COUNCIL

Author acknowledgement

Adv. Nicholas J. Tee



2026/2027 PVT Structured Coursework Programme

Publication and Copyright information

Acknowledgements
The Legal Practice Council extends its gratitude to the Evaluator for his/her rigorous review, quality assurance, and contributions to the pedagogical effectiveness of this study guide:

Reviewer:
Adv Ahmed Iqbal Cajee

Published by:
The South African Legal Practice Council
National Office, Building 10, Riverview Office Park
100 River View Park Street,
Halfway Gardens
Midrand, 1686

GUIDE FOR HIGH COURT PRACTICE

Regulation 6 (10)(d)

FIFTEEN GUIDES

There are fifteen guides for practical vocational training of candidate attorneys. This guide deals with the High Court Practice module in regulation 6(10)(d).

OVERVIEW

On 20 September 2014 Parliament assented to the Legal Practice Act 28 of 2014 (LPA). In terms of section 4 of the LPA, the Legal Practice Council (LPC) was established on 31 October 2018. The following day, on 1 November 2018 the bulk of the rest of the LPA came into effect.

The Legal Practice Act regulates all legal practitioners whether on the practising roll or the non-practising roll. There are three forms of legal practice. They are an attorney, an advocate and an advocate with a Fidelity Fund certificate: see section 34 of the LPA.

Under section 109(1)(a) of the LPA, the LPC published GN R921 in GG 41879 of 31 August 2018, as amended by GN R3779 in GG 49104 of 11 August 2023. The compulsory course work required in the regulations for candidate attorneys was standardised by the LPC in terms of the Norms and Standards. Regulation 6(10) reads:

"(10) The programme of structured course work referred to in sub-regulation (1)(a) and (b) must be standardised and uniform throughout the Republic and comprise the following modules:

(a) constitutional practice;
(b) professional legal ethics;
(c) personal injury claims;
(d) **high court practice**;
(e) magistrate's court practice;
(f) criminal court practice;
(g) labour dispute resolution;
(h) alternative dispute resolution;
(i) attorneys' bookkeeping;
(j) wills and estates;
(k) matrimonial law;
(l) legal costs;
(m) drafting of contracts;
(n) information and communication technology for practice, and associated aspects of cyber law; and
(o) introduction to practice management."

On 11 December 2020 the LPC published the Norms and Standards in Government Gazette 43981 under section 3 (g)(i) read with section 6(1)(b)(i) and section 95(1)(n) of the LPA.

Regulation 6(10) requires candidate attorneys to be trained in the modules listed above. The similarity between regulation 6(10) for candidate attorneys and regulation 7(9) for pupils is not an accident. Section 32 of the LPA permits legal practitioners at any time, as determined in the rules and upon payment of the fee determined by the LPC, to apply to the LPC to convert their enrolment as attorneys to that of advocates and *vice versa*. Consequently, the training of candidate legal practitioners must allow for seamless section 32 conversions.

Each guide *per* module deals with the requirements in regulation 6(10). Examiners set questions derived only from the latest LPC candidate attorneys' curriculum and reading list. The combined curriculum and reading list is referred to as the "syllabus".

Each of the fifteen guides will assist training supervisors, mentors, busy legal practitioners and candidate attorneys to navigate the syllabus. The focus is on practical vocational training.

INTRODUCTION TO EACH GUIDE

Each guide *per* module in Regulation 6(10) is designed to assist candidate attorneys to understand, in real time, the minimum that is required under practical vocational training to become effective attorneys in practice. The essence of effective legal practitioners is the ability to read, to assimilate legal principles from that reading and to apply those principles in practice to the facts of your client's case and in argument before courts, tribunals, disciplinary bodies, and any other forms of formal gatherings and meetings.

The guides avoid prolixity.
However each guide requires dedicated concentration.

For the examinations, candidate legal practitioners (candidate attorneys and pupils) must be up to date with the latest Constitutional Court and Supreme Court of Appeal cases to within one week before the date of each exam.

The guides do not rehash what you studied at University. Your LLB proves your capability. This guide will assist you to prepare for the LPC admission examinations. More importantly, this guide will also equip you to be an effective, competent, calm and (reasonably) confident attorney when you enter the legal profession.

REQUEST TO CANDIDATE ATTORNEYS FOR DUE DILIGENCE
Please read this guide attentively.
Please carry out all recommended court attendances.
Please carry out all the recommended practical exercises.
Please complete reading all the material in the LPC reading list.
Please note the notional hours to complete all 15 guides are 400 hours.
Please note this guide, like the other fourteen guides, is sufficient for self-study.
Please remember, the exams are based on the LPC's most up to date reading list.

- Currently the most up to date reading list is from 28 March 2025 of Notice 3086 of 2025 published in Government Gazette 52388.
- Matters omitted from the LPC reading list will not be in the examinations unless the statute, case or article is included in your exam paper and allows you extra reading time to consider that statute, case or article.
- Matters mentioned in the LPC reading list will be the subject of exam questions.
- You will be required to answer the exam questions from the perspective of:
    - Facts first
    - Law later
- The LPC exams, also referred to as assessments, are practical in nature.
- The questions will proceed from the following perspective: –
    - What would you, as attorney of record, advise your client to consider?
    - What would you, as attorney of record, advise your client to do?
    - When and why would you refer a matter to another attorney or to counsel?
    - And similar practical questions.

REFERENCES
One of the products of Juta & Co Ltd is Jutastat. Many of the notes to this guide are downloaded from Jutastat. Please read the notes with care and diligence. This guide also relies on the Southern African Legal Information Institute (SAFLII). SAFLII is free and open access on the Internet.

NOTE WELL
The sequence of this guide follows the sequence in the most recent LPC syllabus of 28 March 2025 for candidate attorneys. The fifteen guides are designed to be updated when the LPC so requires. Bullet points below are drafted to assist you to grasp the material in the reading list. You must decide whether to accept or to amend the bullet points to suit your understanding. When there are no bullet points, you need nonetheless to read the rule or case or article to prepare for your exams.

NOTE FURTHER
In this module, emphasis falls on Motion Court proceedings because there are many more matters conducted in the High Court under motion than action proceedings. However, trial court matters are considered as well. The central theme of motion and action proceedings is to read the rules and to apply the rules effectively.

LPC SYLLABUS AND THE OFFICIAL SOURCE FOR ALL EXAMINATION QUESTIONS AT THE LPC ATTORNEYS' ADMISSION EXAMS

CURRICULUM AND COURSE CONTENT	READING LISTS
Introduction to the High Court **This column is sourced from the Norms and Standards the LPC published on 11 December 2020 in Government Gazette 43981** High Court jurisdiction and courts of similar jurisdiction Superior Courts Act 10 of 2013. Uniform Rules of Court (the Rules). There will be emphasis on those rules that are in regular use in practice; such rules will be set out in the reading list. Mediation The impact of and compliance with Rule 41A of the Uniform Rules of Court. Contingency Litigation: Contingency litigation and how	**PRINCIPAL WORKS:** • Erasmus: Superior Court Practice Vol 2 ("Erasmus") • Hussain: Practical Drafting Skills • Hussain: Trial Advocacy: The Art of Persuasion • Marnewick: Litigation Skills for South African Lawyers • Schmidt & Others: Law of Evidence • Zeffertt & Paizes: The South African Law of Evidence To avoid prolixity, for the detail on the law of evidence see the module on Magistrate's Court Practice. For example remember the parol evidence rule: *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA) ([2009] 2 All SA 523) at para [39]. **COMPULSORY READING** "The ethics of the hopeless case", by Owen Rogers, in the Advocate magazine, December 2017 especially the summary at pages 50 and 51. https://gcbsa.co.za/law-journals/2017/december/2017-december-vol030-no3-pp46-51.pdf • *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA) at para [35]. • Superior Courts Act 10 of 2013 • Uniform Rules of Court **1. GENERAL** 1.1. *Character of application proceedings* Rule 6;

to decide whether to take a matter on contingency. How to charge contingency fees. How to carry out a risk analysis when requested to take a matter on contingency. <u>Case management:</u> Case Management in practice. Candidates must know how to refer a matter to case management, the process and procedures in case management. Section 60 in Part VI of the Code of Conduct: Commitment of legal practitioner to an effective court process. <u>Certification</u>: How the trial certification process works according to the directives of the court where the action is brought. How to discern triable issues. <u>Trial Preparation:</u> Candidates **must** understand that there is a duty on a practitioner to settle a matter at any stage. The earlier the matter gets settled, the better. Candidates must acquire the following skills: How to obtain all the relevant facts and documents How to carry out an effective fact analysis * How to analyse pleadings. * How to determine triable issues. * How to limit the issues for trial. * How to initiate case conferences for certification and for trial readiness. * How to do pre-trial conferences, how to achieve the purpose of the conference and how to draft the agenda.	*Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at para [55] *Gold Fields Ltd v Motley Rice LLC* 2015 (4) SA 299 (GJ) at paras [121] to [125] Form of notice of motion: *Mynhardt v Mynhardt* 1986 (1) SA 456 (T) at 463H *Arendsnes Sweefspoor CC v Botha* 2013 (5) SA 399 (SCA) at para [18] and *Eke v Parsons* 2016 (3) SA 37 (CC) at paras [25], [26] and [39] to [42] and Ekurhuleni City v Rohlandt Holdings CC 2025 (1) SA 1 (CC) at paras [99] to [103] 1.2 *Ex parte* applications ***See the section under the corresponding heading in ethics***: Herbstein & Van Winsen p290 *Mynhardt v Mynhardt* 1986 (1) SA 456 (T) at 458H–I *Mahomed NO & others v NDPP* 2002 (4) SA 366 (W) at 373B-374B. Rules *nisi* 1.3 *Disputes of fact in application proceedings* The distinction between motion proceedings and actions: In motion proceedings, the affidavits constitute both the pleadings and the evidence. See *Kham v Electoral Commission* 2016 (2) SA 338 (CC) at para [46]. This rule applies to all the affidavits: founding, answering and replying. See *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA) at para [28]. However, an applicant may not make out a new cause of action in the replying affidavit. See *Airports Company South Africa Ltd v Airport Bookshops (Pty) Ltd t/a Exclusive Books* 2016 (1) SA 473 (GJ) at para [17]: case confirmed on appeal. *Mostert and Others v FirstRand Bank Ltd t/a RMB Private Bank and Another* 2018 (4) SA 443 (SCA) at para [13]. *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at the Headnote and pages 1162 to 1163 *Soffiantini v Mould* 1956 (4) SA 150 (E) at page 154 E-H; Cf *Metallurgical and Commercial Consultants v Metal Sales Co* 1971 (2) SA 388 (W) at page 390F *Economic Freedom Fighters v Manuel* 2021 (3) SA 425 (SCA) at para [92] Referral to trial or to oral evidence: 1971 (2) SA 388 (W) at pages 396D to 397B for the form of order; *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A) at 981D-F *Lekup Prop Co No 4 (Pty) Ltd v Wright* 2012 (5) SA 246 (SCA) at para [32] *Hotz v University of Cape Town* 2017 (2) SA 485 (SCA) at para [29] and paras [36] and [39] *Director-General, Depart of Rural Development and Land Reform, and Another v Mwelase and Others* 2019 (2) SA 81 (SCA) at para [64] *Murray NO and Others v Humansdorp Co-Operative Ltd* 2023 (3) SA 66 (SCA) at paras [21] to [23] 1.4 *Approach to disputes of fact in applications for final relief*: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635D.

* How to carry out a proof analysis. What is meant by "proof of a fact" and how to discharge the onus. * How to carry out witness and documentation analysis. * How to prepare chronology documents. <u>Discovery:</u> * Latest developments on how to obtain, preserve and present relevant documentation including Electronic Documents. What is meta data and how to use it to authenticate documents. How to use secondary evidence to prove a document where the metadata is unavailable. * The concept of narrow discovery and proportionality. * How to prepare trial bundles. The importance of sequencing. <u>Trial or hearing</u> What is "the Case Concept: how to proceed with the hearing and discharge the onus. * Witness briefing. Candidates must know how to prepare a witness for court appearances. * Opening Statement. * Leading a witness in chief. * Cross examination. * Re-examination. * Presenting argument. <u>Heads of Argument.</u> * When are heads required. * What are "main heads of argument". * What are Short or Concise heads. * What are Comprehensive heads. * How to draft heads of argument Appeal procedures Enforcement of judgments and orders Execution of process	*Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at page 235 *Director-General, Department of Rural Development and Land Reform v Mwelase* 2019 (2) SA 81 (SCA) (overturned on appeal) at para [64] for a crisp statement of Plascon-Evans (para [64] was not overturned on appeal) 1.5 Character of trial and motion proceedings Uniform Rules of Court The vital aspect of jurisdiction *Standard Bank of SA Ltd v Mpongo* 2021 (6) SA 403 (SCA) *South African Human Rights Commission v Standard Bank of South Africa Ltd and Others* 2023 (3) SA 36 (CC) **2. INSTITUTING APPLICATIONS** ***General provisions*** 2.1 *Notice of motion and founding affidavit* *Hlophe v Freedom Under Law, and Other Matters* 2022 (2) SA 523 (GJ) at para [28] Rule 6 and commentary thereon on Erasmus and Harms - Annexures to affidavits (numbering and reference to content) Avoid the **sloppy method** identified in para [31] of *Drift Supersand (Pty) Ltd v Mogale City Local Municipality and Another* [2017] 4 All SA 624 (SCA) ([2017] ZASCA 118) and the **slovenly practice** identified in para [3] of *Eskom Holdings SOC Ltd v Masinda* 2019 (5) SA 386 (SCA) ([2019] ZASCA 98) Important to set out the whole case in the founding affidavit: *Advertising Regulatory Board NPC and Others v Bliss Brands (Pty) Ltd* 2022 (4) SA 57 (SCA) at para [39]. See also Esau v Minister of Co-op Governance & Traditional Affairs 2021 (3) SA 593 (SCA) ([2021] 2 All SA 357; [2021] ZASCA 9) at para [60]. - Annexures to affidavits (numbering and reference to content) - pleadings and evidence: *Mostert v FirstRand Bank t/a RMB Private Bank* 2018 (4) SA 443 (SCA) ([2018] ZASCA 54) at paras [13]; *Fischer and Another v Ramahlele and Others* 2014 (4) SA 614 (SCA) ([2014] 3 All SA 395; [2014] ZASCA 88) at para [13] affirmed by the *Constitutional Court in Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) (2019 (9) BCLR 1113; [2019] ZACC 29) at para [234]. - Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 - Applications that raise constitutional issues Rule 16A ▪ *Shaik v Minister of Justice and Constitutional Development* 2004 (3) SA 599 (CC) at para [24]] and *Sarrahwitz v Maritz NO* 2015 (4) SA 491 (CC) at paras [28] to [31]. 2.2 *Joinder under rule 10A and Joinder of respondents* - Who must be joined? - Joint and several liability *Alberts and Others v Minister of Justice and Correctional Services* 2022

Superior Courts Act 10 of 2013 section 43 Uniform Rules of Court: rules 45, 45A, 46, 46A The following rules in the Uniform Rules of Court will not be examined. If candidate legal practitioners, candidate attorneys or pupils ever need to use the rules below, the rules can be mastered in practice by reading and applying the rule. **Drafting Legal Documents – Pleadings and Motions** <u>Drafting pleadings</u> a) Drafting on one's own without precedents and AI. b) Understand and apply rules 18 and 22 of the Uniform Rules. c) How to establish a "cause of action" or "defence" from a set of facts or instructions. d) Particulars of claim and a plea in contract, delict and divorce. The focus is on contract and delict. e) The correct lay-out of pleadings with proper paragraph numbering, appropriate spacing, font types, use of headings and point first drafting. f) No pleading may be vague: each pleading must disclose a cause of action or a defence and must be based on the peculiar facts of your case. g) A plea must comply with Rule 22 of the Uniform Rules. Bare denials are not allowed. Candidates must plead their client's version, which, if proved, will amount to a defence to plaintiff's claim. h) Candidates must be able to	(6) SA 59 (SCA) at paras [17] to [21] 2.3 *Service generally Rule 4* Candidates should know the essential requirements and procedure involved in applications for substituted service Rule 4(2) Proceedings against firms, etc. Rule 14 Change of parties Rule 15 Substituted service Edictal citation (rules 5 and 63) Attachment to found or confirm jurisdiction **3. URGENT APPLICATIONS** Rule 6(12): refer to the practice directives where you intend to bring an application *Luna Meubel Vervaardigers (Edms) Bpk v Makin* 1977 (4) SA 135 (W) at page 137A-F (paras 1 to 4) *Sikwe v SA Mutual Fire & General Insurance Co Ltd* 1977 (3) SA 438 (W) at 440H on the substance of the affidavit over its form. Not to be confused with the *CSARS* case below. *Nelson Mandela MM v Greyvenouw CC* 2004 (2) SA 81 (SE) at para [37] *CSARS v Hawker Air Services (Pty) Ltd; CSARS v Hawker Aviation Partnership* 2006 (4) SA 292 (SCA) at paras [9] to [11]. See especially para [9]: "Urgency is a reason that may justify deviation from the times and forms the Rules prescribe. It relates to form, not substance, and is not a prerequisite to a claim for substantive relief." **4. ANSWERING AND REPLYING AFFIDAVITS** Content and form Answering affidavits cannot contain mere bald denials. This principle is similar to rule 22 concerning pleas. See Skog NO v Agullus 2024 (1) SA 72 (SCA) at paras [23] – [24] Points *in limine* *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC) at para [75] Late filing, barring and condonation *Motloung v Sheriff, Pretoria East* 2020 (5) SA 123 (SCA) at paras [10] to [17], [23] to [25] and para [28] - Rule 26 - Rule 27 Raising new matters in the replying affidavit – not normally permitted However, see *Mostert v FirstRand Bank t/a RMB Private Bank* 2018 (4) SA 443 (SCA) ([2018] ZASCA 54) at paras [13] to [15] **5. ADDITIONAL AFFIDAVITS** Leave required *NM v John Wesley School and Another* 2019 (2) SA 557 (KZD) at paras [56] and [57] Form and content **6. DISCOVERY IN MOTION PROCEEDINGS** Obligation to put up evidence on which party intends to rely *MV Alina II: Transnet Ltd v MV Alina II* 2013 (6) SA 556 (WCC) at

draft a Special Plea and know when and how to draft a Special Plea. See the Crompton Street Motors CC t/a Wallers Garage Service Station v Bright Idea Projects 66 (Pty) Ltd t/a All Fuels 2022 (1) SA 317 (CC) at para [33] below.	paras [19] to [26] *STT Sales (Pty) Ltd v Fourie* 2010 (6) SA 272 (GSJ) at paras [13] to [17]: note para [17] Rules 35(12) and (14) Non-application of Promotion of Access to Information Act 2 of 2000 Cf *Arena Holdings (Pty) Ltd t/a Financial Mail v South African Revenue Service* 2023 (5) SA 319 (CC); [2023] ZACC 13; 2023 (8) BCLR 905 (CC) at paras [147] to [150] and [155] to [157] and [170] to [172], Authentication of documents Rule 63
	7. OBJECTIONS TO PROCESS OR PLEADINGS Failure to deliver pleadings - barring Rule 26 Extension of time periods Rule 27 Amendments Rule 28 Irregular proceedings Rule 30 *Afrocentrics Projects and Services (Pty) Ltd t/a Innovative Distribution v State Information Technology Agency (SITA) SOC Ltd and Others* [2023] ZACC 2; 2023 (4) BCLR 361 (CC) especially at para [30] Non-compliance with Rules Rule 30A Vexatious proceedings and abuse of process *Mineral Sands Resources (Pty) Ltd v Reddell* 2023 (2) SA 68 (CC) at paras [2] and [89] to [100] *South African Human Rights Commission v Standard Bank of South Africa Ltd* 2023 (3) SA 36 (CC) at paras [29] to [33], and [38] *PFC Properties (Pty) Ltd v Commissioner for the South African Revenue Services and Others* and *Brita De Robillard NO and Another v PFC properties (Pty) Ltd* [2023] ZASCA 111; 2024 (1) SA 400 (SCA) Applications to strike out Security for costs
Drafting Notices of Motion and three sets of affidavits a) Candidates must learn the different types of notices of motion and when each is used. This must include a long form notice of motion, a short form notice of motion and a Two-Part notice of motion. b) Candidates must know when and how each of the three types is used. c) Candidates must understand what is a provisional order, interim order, a rule nisi, and a final order. d) Candidates must learn to draft founding, answering and replying affidavits. e) Candidates must know the required lay-out of each of the affidavits with reference to the requirements in the Uniform Rules and directives. f) Candidates must know how to index and paginate court files. g) Candidates must know how to prepare draft orders. h) Candidates must know how to draft interdicts.	**8. PARTICIPATION BY OTHER PARTIES** Intervention applications Rule 12 Joinder and consolidation Rule 10 Third party procedures Rule 13 Interpleaders Rule 58 and commentary thereon in Erasmus *The Fonarun Naree: Trustees, Copenship Bulkers A/S (in Liquidation) and Others v Afri Grain Marketing (Pty) Ltd and Others* 2020 (4) SA 188 (GJ) at paras [24] and [34] and [35] Curators Rule 57
Managing Fact: a) How to obtain relevant facts. b) What are the sources of	**9. AFTER PLEADINGS CLOSE** Heads and practice note (check the practice directives for these requirements) Set down Hearing Settlement and/or withdrawal Rule 41 **10. ORDERS**

fact. c) Obtaining documents including electronic documents. d) How to preserve documents. e) Obtaining witness statements. f) Carrying out *in loco* inspections: how to record the evidence. g) How to obtain and preserve relevant exhibits: what is Visual Evidence and how to use it.	Interim and final orders The finality of judgments Skog NO v Agullus 2024 (1) SA 72 (SCA) at paras [63] to [75] The *functus officio* doctrine See Public Investment Corporation Soc Ltd and Another v Trencon Construction (Pty) Ltd and Another 2024 (1) SA 66 (SCA) at para [12] Rescission Rule 42, Rule 31(2)(b), Common law requirements Candidates are particularly required to understand the differences between applications in terms of Rule 31, Rule 42 and the common law. See *Ellis v Eden* 2023 (1) SA 544 (WCC) at paras [25] to [38] o *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at para [12] at page 9F and *HLB Intl (SA) v MWRK Accountants & Consultants* 2022 (5) SA 373 (SCA) at paras [19] to [28] and *Ingosstrakh v Global Aviation Investments (Pty) Ltd* 2021 (6) SA 352 (SCA) at para [21]
<u>Analysing Fact.</u> h) Candidates must demonstrate logical sequencing of facts and documents and the use of chronology documents. i) Candidates must demonstrate their ability to analyse facts: only relevant facts must be obtained, retained and presented at a hearing; only facts that are admissible, in terms of the rules of evidence, can be relied on. j) Candidates must demonstrate that any version of facts on which they intend to rely, must be probable in the circumstances of the case. k) Candidates must know that they cannot rely in court on a version that is improbable, implausible or impossible. l) Candidates must be able to work out what facts support their client's version and what facts do not support their client's version.	Claims for interest Sections 1, 2, 2A and 4 of the Prescribed Rate of Interest Act 55 of 1975. Cf Da Cruz v Bernardo 2022 (2) SA 185 (GJ) at paras [17] to [62] **HOW TO EXECUTE JUDGMENTS** Rule 45 Execution - general and movables 45A Suspension of orders by the court *BP Southern Africa (Pty) Ltd v Mega Burst Oils & Fuels (Pty) Ltd & Similar Matter* 2022 (1) SA 162 (GJ) *MEC, Dept of Public Works v Ikamva Architects* 2022 (6) SA 275 (ECB) at paras [81] to [93] 46 Execution – immovable property 46A Execution against residential immovable property *Bestbier and Others NNO v Nedbank Ltd* 2024 (4) SA 331 (CC) at paras [54] to [82] **11. COSTS** Ordinary rule of costs Costs in interlocutory applications Punitive costs *Borcherds v Duxbury and Others* 2021 (1) SA 410 (ECP) at paras [40] to [43] The *Biowatch* rule compared to the public function rule, the conduct of the parties rule, the abuse of process rule and the SLAPP suit rule: *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC) in paras [28] to [31] and at paras [42] to [49] and [56] and [60]
<u>Working out the case concept</u> (or theory of the case) a) What happened according to your client's version of	Compared to the public function rule *Minister of Water and Sanitation v Sembcorp Siza Water (Pty) Ltd* 2023 (1) SA 1 (CC) at para [91] Compared to the conduct of the parties rule Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality 2023 (2) SA 31 (CC) at para [59] Compared to the abuse of process rule

the facts? b) What are the issues, factual and legal, that emerge from the facts? c) What are you going to tell the judge at the hearing? d) What version are you going to present in your papers? e) How will you present evidence? f) Who will be the witnesses and what documents will you need? g) How will you run the case from pleadings to final argument? h) This process has to be applied **before** any papers are drafted. **<u>Candidates will need and know the following:</u>** * Candidates will know how to analyse three sets of affidavits in motion matters. * Candidates will know how to grasp findings of facts on affidavits, including the *Plascon-Evans* test. The *Plascon-Evans* test is best understood by asking the question: what are the probabilities concerning the allegations in the respective affidavits bearing in mind the undisputed facts ? * Candidates need good literacy skills to pass exams. * Candidates are not allowed access to the internet during the exams. * Candidates must not rely on AI, like ChatGPT, when drafting legal documents. To draft well requires personal agency not the crutch of an AI programme or a set of precedents. * Candidates will be examined and need to draft pleadings and	*Mineral Sands Resources (Pty) Ltd v Reddell* 2023 (2) SA 68 (CC) at paras [69] and [70] Which rule includes SLAPP suits *Mineral Sands Resources (Pty) Ltd v Reddell* 2023 (2) SA 68 (CC) at paras [76], [77], [90] and [98] **12. PARTICULAR KINDS OF APPLICATIONS** 12.1. *Default judgment / Judgment by confession* Rule 31 and commentary thereon in Erasmus Rule 26; and see paras 15 and 20 below. *Havenga v Parker* 1993 (3) SA 724 (T). *Nedbank Ltd v Fraser & Four Other Cases* 2011 (4) SA 363 (GSJ) at para [47] Relevance of the National Credit Act, 2005 Special requirements for declaring property specially executable - Form of notice of motion - Content of affidavits - Service requirements *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC) (2012 (8) BCLR 785; [2012] ZACC 11) o Sale in execution values (Rule 43A) o Jaftha v Schoeman & Others; van Rooyen v Stoltz & Others 2005 (2) SA 140 (CC) o Standard Bank of South Africa Ltd v Saunderson & Others 2006 (2) SA 264 (SCA) o Gundwana v Steko Development & Others 2011 (3) SA 608 (CC) o Nkata v FRB 2016 (4) SA 257 (CC) at paras [94] to [126] o *NPGS Protection and Security Services CC v Firstrand Bank* 2020 (1) SA 494 (SCA) o *Bayport Securitisation Ltd and Another v University of Stellenbosch Law Clinic and Others* 2022 (2) SA 343 (SCA) at para [3] o *Bestbier and Others NNO v Nedbank Ltd* 2023 (4) SA 25 (SCA) at paras [26] to [28] and [32] 12.2. *Eviction applications* Difference between commercial and residential evictions Requirements under PIE *Grobler v Phillips and Others* 2023 (1) SA 321 (CC) at paras [23] and [34] **read with** para [36], then paras [37] to [48] Meme-Akpta and Another v Unlawful Occupiers at 44 Nugget Street 2023 (3) SA 649 (GJ) – **the entire case** *Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2000 (2) SA 67 (C) at paras [13] to [21], especially para [18] *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others* 2001 (4) SA 1222 (SCA) at para [16] - Municipal joinder - Service - Risk of homelessness - Process *Stay At South Point Properties (Pty) Ltd v Mqulwana and Others (UCT intervening as amicus curiae)* [2023] ZASCA 108 at paras [11], [18] and [19]

affidavits without the assistance of the internet during the exams. * **Most importantly**, candidates must understand and apply the ethical precepts discussed in the article by Judge Owen Rogers in the reading list under the title: "The ethics of the hopeless case", Owen Rogers, Advocate December 2017. Candidates will apply the principles of drafting set out below. The principles commence with a grasp of the facts and end with the case concept. Writing involves thinking. There is a method in this. Candidates must apply their minds before putting pen to paper. **The importance of remaining within the case pleaded** *City of Cape Town v Sanral* 2015 (3) SA 386 (SCA) ([2015] 2 All SA 517; 2015 (5) BCLR 560; [2015] ZASCA 58) at para [10] on page 397 **Candidates will learn to think before they ink**. *University of South Africa v Socikwa and Others* (J 675/23; J 680/23) [2023] ZALCJHB 172 (7 June 2023) especially at paras [1], [4] and [45]	12.3. *Summary judgment* Rule 32 (as amended) *FirstRand Bank Ltd t/a First National Bank v Moonsammy t/a Synka Liquors* 2021 (1) SA 225 (GJ) *Ingenuity Property Investments (Pty) Ltd v Ignite Fitness (Pty) Ltd* 2023 (5) SA 439 (WCC) *Absa Bank Ltd v Meiring* 2022 (3) SA 449 (WCC). The whole of this case is profoundly important for all lawyers in South Africa. Vital to understand about this case is the concept of **pleading over** despite the temporary advantage a litigant may gain by a special plea or point *in limine*. **Candidates must read this case**. *City Square Trading 522 (Pty) Ltd v Gunzenhauser Attorneys (Pty) Ltd* 2022 (3) SA 458 (GJ) at para [29] *Hennie Ehlers Boerdery CC v APL Cartons (Pty) Ltd* 2024 (1) SA 149 (ECGq) 12.4. *Interdicts* (LAWSA, Volume 11, 2nd edition, paras 389 to 428 and 429 to 435) *Interdicts and mandamenten van spolie* *Ngqukumba v Minister of Safety and Security and Others* 2014 (5) SA 112 (CC) 2014 (2) SACR 325; 2014 (7) BCLR 788; [2014] ZACC 14 Interim interdicts: Candidates are particularly required to understand the distinctions between: (a) applications for final relief; (b) applications for interim relief; (c) rules *nisi*; and (d) orders operating as interim interdicts, and to be able to draft appropriate prayers and draft orders illustrating same. *Public Protector of South Africa v Speaker, National Assembly and Others* 2023 (4) SA 205 (WCC) at paras [3] to [7] *Saharawi Arab Democratic Republic v Owners & Charterers of The Cherry Blossom* 2017 (5) SA 105 at paras [49] – [50]. *Camps Bay Residents and Ratepayers Association v Augoustides* 2009 (6) SA 190 (WCC) paras [7] – [8]. 12.5. *Insolvency* (LAWSA Volume 11, 2nd edition paras 199 to 365) Candidates are required to know: (a) The essential requirements and differences between; and (b) The procedures and requirements involved in the following applications: Provisional sequestration – section 10 of the Insolvency Act 24 of 1936 Sequestration – sections 9 to 17 of the Insolvency Act – **Investec Bank Ltd v NS 2025 (1) SA 210 (GP)** **With regard to availability of evidence, see Wiese and Others v Commissioner, SARS 2025 (1) SA 127 (SCA) at paras [63] and [64]** Friendly sequestration – *Ex parte Arntzen (Nedbank Ltd as Intervening Creditor)* 2013 (1) SA 49 (KZP) at para [12] Surrender – sections 3 to 17 of the Insolvency Act Rehabilitation – sections 124 to 130 of the Insolvency Act Liquidation *Afgri Operations Ltd v Hamba Fleet (Pty) Ltd* 2022 (1) SA 91 (SCA)

	Business rescue – section 131 as part of Chapter 6 of the Companies Act 71 of 2008 - Purpose - Requirements - Process, service and publication - Ending business rescue 12.6. *Applications for Anton Piller (search & seizure) orders* Erasmus, Anton Piller Type Orders See the Notice of Motion in the Practice Directives for the Gauteng Divisions *Viziya Corporation v Collaborit Holdings (Pty) Ltd and Others* 2019 (3) SA 173 (SCA) 12.7. *De lunatico inquirendo*, curators *ad litem*, *ad personam* and *bonis* Rule 57. 12.8. *Rule 43 procedures* Rule 43 *TS v TS* 2018 (3) SA 572 (GJ) see the court order on 573 *E v E* 2019 (5) SA 566 (GJ) 12.9. *Reviews* Rule 53. Sections 3, 5, 6, 7 and 8 of the Promotion of Administrative Justice Act 3 of 2000. *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at para [26] *Van Zyl v Govt of the RSA* 2008 (3) SA 294 (SCA) at paras [54] and [55] *Mamadi v Premier, Limpopo 2024 (1) SA 1 (CC)* 12.10. *Interpleaders* Rule 58. 12.11. *National Credit Act* National Credit Act sections 65, 86, 88, 129 and 130; *Collett v First Rand Bank* 2011 (3) SA 585 (SCA); *Nedbank v National Credit Regulator* 2011 [4] All SA 131 (SCA); *Rossouw v First Rand Bank* [2011 All SA 56 (SCA); *Sebola v Standard Bank* 2012 (5) SA 142 (CC); *Kubyana v Standard Bank* 2014 (3) SA 56 (CC). In respect of 12.5 to 12.11 above, candidates are expected to consult the practice directives in their respective divisions. **NOTE WELL**: Practice Directives will not be examined unless a copy of the relevant directive is supplied to candidates writing the exams.

PRINCIPAL READING MATERIAL

- DE van Loggerenberg *Erasmus: Superior Court Practice* Vol 2 (Juta) (Erasmus)
- I Hussain SC *Practical Drafting Skills* (LexisNexis)
- I Hussain SC *Trial Advocacy: The Art of Persuasion* (LexisNexis)
- CG Marnewick *Litigation Skills for South African Lawyers* (LexisNexis)
- Schmidt & Others: Law of Evidence (LexisNexis)
- Zeffertt & Paizes: The South African Law of Evidence (LexisNexis)

INDEX FOR HIGH COURT PRACTICE

High Court Practice – HOW TO USE THE READING LIST

A. GENERAL

This module prepares you to understand the basic but essential principles, concepts and procedures of High Court Practice. Candidates must read each section of the Acts and all the case law indicated in the reading list. Some of the salient issues are set out in bullet points below.

The reason to read the references in the reading list is to prepare for your attorneys' admission exams. The examiners draft exam questions from the syllabus. The syllabus includes the column **Curriculum and Course Content** and the column **Reading List** in the table above.

Questions based on matters not in the syllabus are allowed only where the statute, case or article being examined is added into the examination paper. In that event, you will be given an extra fifteen minutes to read and consider the question before writing your exam. This principle applies to all the modules in regulation 6(10) and for all your admission exams.

The reading list is repeated below with bullet points to focus your grasp of the material. For SAFLII references to the case law, see the **Guide for Magistrate's Court Practice**. You will be able to download the case law from SAFLII onto your mobile devices at any time, and while in court.

Remember: the bullet points are designed to help you understand salient issues. The phrase: *Subject to your reading, the following points may be drawn from the case cited above* requires you to check whether the bullet points are indeed an accurate reflection of the case. Be proactive: you can develop your own bullet points for exam preparation and for use later in practice.

Note well: many candidate attorneys do not have access to the South African Law Reports nor the All South Africa reports published by LexisNexis. In this guide some references to the URLs of SAFLII are included. This will assist all candidates to access the relevant document, even when you are in court – of course – if the court has internet access and accessible WiFi.

The Department of Justice website also has up to date legislation and subordinate legislation.

See the following URLs:
https://www.justice.gov.za/
https://www.justice.gov.za/constitution/index.html
https://www.justice.gov.za/legislation/acts/acts_full.html
https://www.justice.gov.za/legislation/rules/rules.htm

B. INTRODUCTION

The main purpose of the Norms and Standards is to provide a national approach to standardise and implement practical vocation training of candidate attorneys in terms of regulation 6(10). Five years of deliberation including two colloquiums and frequent publications of the syllabus have preceded the gazetting of the LPC syllabus on 28 March 2025. In future, the LPC syllabus will be updated and amended as required by circumstances in the legal profession.

The topics dealt with below are part of the syllabus for High Court Practice. After the topics, the reading list is dealt with in detail. It is important to understand that the topics underlined below form part of the syllabus from which examiners may set exam questions.

Legislation and rules

As a candidate attorney you need a working knowledge of the Superior Courts Act 10 of 2013 and the Uniform Rules of Court (the Rules). However, you do not need to know the Superior Courts Act and the Rules by heart. In practice you will always read the legislation and the rules applicable to your case while drafting pleadings and consulting with your clients.

Examiners' obligations

There will be an emphasis on rules in regular use in practice; see the reading list. In your admission exams any questions posed on the interpretation of an Act of Parliament or a rule requires the examiners to include that text in the question paper itself. To reiterate: you do not need to know the legislation and rules by heart.

The following topics may be examined.

In any event, you need to know these topics for practice when you qualify as an attorney.

Mediation

Rule 41A became obligatory in March 2020. Rule 41A deals with mediation as a dispute resolution mechanism. All legal practitioners have a general duty to try to settle disputes between potential litigants before and during litigation. The purpose is:

- To reduce the costs of access to justice to the public in general and the public purse (organs of state *et cetera*.) as well
- To reduce the burden on our courts
- To eliminate delays in determining matters in courts and tribunals
- To facilitate settlement of litigious matters generally
    - To facilitate the settlement of discrete issues in a case, even if the entire case is not settled
    - To facilitate agreement on the triable issues a court may need to determine if an out and out settlement is not reached
- To facilitate the settlement of matrimonial disputes in particular
- To require legal practitioners to adopt a non-adversarial mindset to dispute resolution
    - Mediation requires legal practitioners to place their client's interests first
    - Mediation if successful, results in lawyers earning lower fees than in adversarial litigation
- To require legal practitioners to apply mediation genuinely and not as a tick-box exercise

Rule 41A deals with the process. Please read the rule.
Also read the **Guide for Alternative Dispute Resolution** in terms of regulation 6(10)(h) and the **Guide for Matrimonial Law** in terms of regulation 6(10)(k)

Contingency Litigation:
Please read the Contingency Fees Act 66 of 1997.
https://www.saflii.org/za/legis/consol_act/cfa1997170/
It is only eight sections long.
The Contingency Fees Act is very important for litigation against the Road Accident Fund and other mainly delictual actions.
The Act stipulates that:

- **if** you are of the (level-headed) opinion there are reasonable prospects that your client may be successful in any proceedings;
- **then**, you may enter into an agreement with your client that you will not charge any fees unless your client succeeds in the proceedings
- **and**, the amount you will charge will be higher than your normal fee.
    - The higher fee is called the 'success fee', usually expressed as a percentage over and above your normal fee.
    - The success fee cannot be more than 25% of the total claim
    - How the courts interpret this: see for example *Tjatji v Road Accident Fund* 2013 (2) SA 632 (GSJ) **Although the *Tjatji* case is not in the reading list, it is a useful case to understand a contingency fee**
      https://www.saflii.org/za/cases/ZAGPJHC/2012/198.html

The Contingency Fees Act sets out:

- the form and content of a contingency fees agreement in section 3 and
- the requirements for payment upon settlement in section 4
- and the need for any settlement to be made an order of court where a contingency fees agreement had been entered into if the matter was before court.

Finally, you need to carry out a risk analysis when requested to take a matter on contingency. The risk assessment is threefold:

- Objectively speaking, are the merits in favour of your client's case good in fact and law?
- Objectively speaking, can the defendant pay the plaintiff's claim?
- Subjectively speaking, can *you* afford to run a trial without getting payment in the interim while conducting the case for the client on a contingency fee?

If any of the threefold test results in a negative assessment, do not take the case on contingency.

Case management:
Please read **Rule 37A** on Judicial Case Management.
You need to know how to refer a matter to case management, and the process and procedures in case management. The purpose of Rule 37A was to expedite matters in court from after a notice of intention to defend is filed to judgment.

Remember: Unless the parties agree in writing, the case management judge and the trial judge shall not be the same person.

Remember also: "In any case where the pleadings and pre-trial procedures have not resulted in a clear statement of the issues, the trial judge should require the parties to deliver a statement of the issues in accordance with rule 37A(9)(a), that is, a statement of what is not in dispute and a statement of what is in dispute, setting out the parties' respective contentions on those issues. If the matter is subject to judicial case management under that rule such a detailed statement is a requirement. If it is not, it is within the judge's powers, under rule 38(8)(c) and their inherent power to regulate the proceedings, to require that such a statement be provided."

See: *HAL obo MML v MEC for Health, Free State* 2022 (3) SA 571 (SCA) ([2021] ZASCA 149) at para [199].
https://www.saflii.org/za/cases/ZASCA/2021/149.pdf
Although the *HAL* case is not in the reading list, it is a useful case on how to prepare a matter properly for trial. You will use it well in practice in due course.

Remember further: "The advent of judicial case management inaugurated a new dispensation for the setting-down of cases. By virtue of para 5.2.4 of the Norms and Standards for Judicial Officers — which made it incumbent on judicial officers to actively take cases from initiation to conclusion — read with rules 37A(1)(b) and 37A(2)(a) of the Uniform Rules of Court — which regulated case management — there was no reason in law or logic why case management should not, *mutatis mutandis*, also apply to motion proceedings."
Bobotyana and Others v Dyantyi and Others 2021 (1) SA 386 (ECG)
https://www.saflii.org/za/cases/ZAECGHC/2020/89.html
Although the *Bobotyana* case is not in the reading list, it is authority for Rule 37A applying to motion proceedings as well.

PLEASE NOTE: on 29 November 2023 the Deputy Judge President of the Gauteng Division placed a moratorium on new matters for judicial case management. The moratorium remains in place in Gauteng. The moratorium does not affect High Courts in other Divisions.

To expedite cases, there are many directives which legal practitioners must read in practice. Regrettably, there is no uniformity on how directives apply across our different courts. However, you will not be examined on any directives unless the directive is published in your exam paper and you are given an extra fifteen minutes reading time.

Finally, section 60 of the Code of Conduct requires the commitment of legal practitioners to an effective court process.

Please read the **Guide for Professional Ethics** in terms of regulation 6(10)(b) on this topic.

Certification
How the trial certification process works according to the directives of the court where the action is brought. Depending on where you are registered for your practical vocational training contract you may come across Case Online and CaseLines.

NOTE WELL:
While you will need to know how to move from Case Online to CaseLines for your practice, you will not be examined concerning these platforms in your attorneys' admission exams. This is analogous to not being examined on how a document assembly programme works or accounting systems like Lexpro, Quantim, Sage (Pastel), QuickBooks Online and others work in Attorneys' Bookkeeping. https://www.judiciary.org.za/index.php/63-caselines?start=3

How to discern triable issues.
Triable issues are dealt with below under trial preparation.
Remember: a triable issue is a genuine dispute of fact or law or both which the parties cannot settle between them. A triable issue must be determined by a judge, magistrate, arbitrator or other judicial official acting independently of the parties to the dispute.

C. PRACTICAL MESSAGE FOR CANDIDATE LEGAL PRACTITIONERS

- To avoid an unnecessary repetition on how you as candidates need to learn the skills to advise your clients and to take instructions in practice, please read pages 16 to 24 of the **Guide for Constitutional Practice**, and apply the necessary changes for matters that are not constitutional issues.

- Then, from the Norms and Standards column at pages 4 to 10 in this module:

    - the following topics are best grasped by reading *Practical Drafting Skills*, Ismail Hussian SC, LexisNexis (reprinted 2020) using the Contents to find:

        - drafting skills
        - drafting pleadings
        - drafting notices of motion
        - drafting affidavits
        - drafting heads of argument

    - and these topics are best grasped by perusing *Trial Advocacy, The Art of Persuasion*, Ismail Hussain SC, LexisNexis (2022) using the Contents to find:

        - case analysis
        - managing fact
        - analysing fact
        - working out the case concept
        - eDiscovery
        - trials and hearings
        - heads of argument

- Lastly, from the Norms and Standards column at pages 4 to 10 in this module, the text below adds a few pointers you need to consider for your admission exams.

Drafting Legal Documents – Pleadings and Motions: basic overview

> "To succeed in the profession of law, you must seek to cultivate command of language. Words are the lawyer's tools of trade. When you are called upon to address a judge, it is your words which count most."
> Lord Denning *The Discipline of Law* (Butterworths, 1979) page 5.

Candidates need to use words to draft legal documents and to present cases. Here are the pointers:

First: Think before you ink.
University of South Africa v Socikwa and Others (J 675/23; J 680/23) [2023] ZALCJHB 172 (7 June 2023) especially at paras [1], [4] and [44]
https://www.saflii.org/za/cases/ZALCJHB/2023/172.html
Subject to your reading, the following points may be drawn from the case cited above.

- Courts are constitutional constructs designed to serve justice and enhance the rule of law.
- Courts are not theatres of amusement to elevate hedonism.
- Courts must be respected
  - by their officers and
  - those privileged to have the right of audience.
- Legal practitioners bringing hopeless cases to court must be prepared for consequences that flow.
- Legal practitioners must not align themselves with cases that are absolutely hopeless for pecuniary reasons and thereby frustrate *bona fide* litigants with worthy cases for courts to adjudicate.

Second: Remember to remain within the case pleaded
City of Cape Town v Sanral 2015 (3) SA 386 (SCA) ([2015] 2 All SA 517; 2015 (5) BCLR 560; [2015] ZASCA 58) at para [10]
https://www.saflii.org/za/cases/ZASCA/2015/58.html
Subject to your reading, the following points may be drawn from the case cited above.

- The nature of civil litigation in our adversarial system, means that it is for the parties,
  - either in the pleadings or
  - affidavits (which serve the function of both pleadings and evidence),
- to set out and define the nature of their dispute, and
- it is for the court to adjudicate upon those issues.
- It is impermissible for a party to rely on a constitutional complaint that was not pleaded.
  - There are cases where the parties may expand on issues by the way in which they conduct the proceedings.
  - There may also be instances where the court may *mero motu* raise a question of law that emerges fully from the evidence and is necessary for the decision of the case.
  - That is subject to the proviso that no prejudice will be caused to any party by its being decided.
  - Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.
- It is not for the court to raise new issues not traversed in the pleadings or affidavits

Third: apply the rules of court to your pleadings without using precedents or AI.

Remember: In drafting pleadings

- Rule 18 relates to pleadings generally.
- Rule 22 concerns the plea to a claim.
- Both rules require you to plead the material facts of the claim or defence.
- The claim must establish a cause of action.
- The plea must admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent, and must clearly and concisely state all material facts upon which one relies.
- Any pleading that states "noted" amounts to an admission of what is noted.
- The rationale to avoid using precedents or AI for your pleadings is simple: you need to apply the facts of your own client's case to the necessary pleading:
    - If you rely on a precedent you import by accident facts from unrelated cases
    - If you rely on AI, how do you know the answer is accurate or an hallucination?

- You also need to know how to draft a **Special Plea**.

See *Crompton Street Motors CC t/a Wallers Garage Service Station v Bright Idea Projects 66 (Pty) Ltd t/a All Fuels* 2022 (1) SA 317 (CC) at para [33]:

Subject to your reading, the following points may be drawn from the case cited above.

- A special plea is one of several dilatory pleas and can be included in pleadings. Like:
    - Prescription
    - Jurisdiction (lack of)
    - Non-joinder or misjoinder
    - *Lis pendens*
    - *Res judicata*
        - Settlement renders litigious matters *res judicata*
        - Issue estoppel is analogous to *res judicata* on the issue in dispute
    - Arbitration (a species of the lack of jurisdiction, being a dilatory plea)
    - Foreign-act-of-state doctrine
    - Unclean hands (*ex turpi causa non oritur actio*)
- Generally, when a special plea is raised, all the defences on which the defendant intends to rely must be raised at the same time.
- This is so because, should the special plea fail, there would be no further opportunity to plead over on the merits.
- There is no objection to pleading a special defence in the course of the plea, with or without a special heading.

Remember: The essential difference between a special plea and an exception is that in an exception the excipient is confined to the four corners of the pleading. Special pleas, on the other hand, do not always appear *ex facie* the pleadings.

Paraphrased from: Herbstein & Van Winsen, *The Civil Practice of the Supreme Court of South Africa*, 5 ed at 599 and 600

Finally: Metadata – document properties – are details about an electronic file that describe or identify it. They include details such as:

- title,
- author name,
- subject, and
- keywords that identify the document's topic or contents.

- Forensic experts use metadata—the "data about data" embedded in electronic files—to reconstruct timelines, verify file authenticity, and identify users or devices involved in digital activity.
- All metadata that can identify a person (like emails, browser searches and banking details) are protected by POPIA, the GDPR and other similar legislation worldwide.
- **Remember**: almost all digital photos are embedded with geolocation metadata.

D. READING LIST

The reading list is to the point. Please read the following:

Parol evidence rule:

KPMG Chartered Accountants (SA) v Securefin Ltd 2009 (4) SA 399 (SCA) at para [39]

Subject to your reading, the following points may be drawn from the case cited above.

- First, the integration (or parol evidence) rule remains part of our law
    - Parol evidence rule arises with boiler plate clauses where if a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning
- Second, interpretation is a matter of law and not of fact
    - Accordingly, interpretation is a matter for the court and not for witnesses
- Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent
- Fourth, to the extent that evidence may be admissible to contextualise the document to establish its factual matrix or purpose or for purposes of identification, 'one must use it as conservatively as possible'
- The time has arrived for us to accept that there is no merit in trying to distinguish between 'background circumstances' and 'surrounding circumstances'.
    - The distinction is artificial and, in addition, both terms are vague and confusing.
    - Consequently, everything tends to be admitted.
    - The terms 'context' or 'factual matrix' ought to suffice.

COMPULSORY READING

Owen Rogers 'The ethics of the hopeless case' 2017 (Dec) *Advocate* 46 (especially the summary at pages 50 and 51).
https://gcbsa.co.za/law-journals/2017/december/2017-december-vol030-no3-pp46-51.pdf

Children's Resource Centre Trust v Pioneer Food (Pty) Ltd 2013 (2) SA 213 (SCA) at para [35] concerning the two aspects of a hopeless case.

Subject to your reading, the following points may be drawn from the case cited above.

- Whether a case is hopeless has two aspects.
    - It is hopeless if it is advanced on a basis that is legally untenable.
    - It is also hopeless if it is advanced in the absence of any credible evidence to support it.
    - A case is legally hopeless if it could be the subject of a successful exception.
    - It is factually hopeless if the evidence available and potentially available after discovery and other steps directed at procuring evidence will not sustain the cause of action on which the claim is based.
    - In other words, if there is no *prima facie* case then it is factually hopeless.

Superior Courts Act 10 of 2013:
https://www.saflii.org/za/legis/consol_act/sca2013224/
Uniform Rules of Court:
https://www.saflii.org/images/superiorcourts/Uniform%20Rules%20of%20Court%20[F].pdf

MOTION COURT

1. GENERAL

1.1. *Character of application proceedings*

Application proceedings, also known as motion proceedings are quicker and cheaper than trial proceedings. Yet conflicting affidavits are not suitable for determining disputes of fact. [1]

Some matters cannot be brought on motion, like illiquid claims for damages, matters in which a material dispute of fact is foreseen or foreseeable and matrimonial matters (other than interim relief pending a divorce trial).

While other matters, despite disputes of fact being foreseen or foreseeable, must be brought on motion, such as company and insolvency law matters, interdicts and applications required in terms of the Uniform Rules of Court (Rules). [2]

---

[1] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) – Howie P and Cachalia AJA concurred in the judgment of Cameron JA:

[55] That conflicting affidavits are not a suitable means for determining disputes of fact has been doctrine in this court for more than 80 years. Yet motion proceedings are quicker and cheaper than trial proceedings and, in the interests of justice, courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. More than 60 years ago, this Court determined that a Judge should not allow a respondent to raise 'fictitious' disputes of fact to delay the hearing of the matter or to deny the applicant its order. There had to be a '*bona fide* dispute of fact on a material matter'. This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* this Court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or *bona fide* dispute of fact but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.

[2] **Uniform Rules of Court**

Rules relating to special categories of applications
3A Admission of Advocates
5 Edictal citation
40 Legal assistance to indigent persons
53 Reviews
57 Appointment of curators in respect of persons under disability and release from curatorship
59 Sworn translators

Rules relating to orders of court
42 Variation and rescission of orders
45A Suspension of orders by the court
46 Execution – immovable property

Essential case law points on motion proceedings

What follows here are the essential points on motion proceedings which are used every day in practice and which frequently appear as questions in your admission exams.

> **Note well**: the SAFLII references for all these cases are attached in the Case Law Appendix to the **Guide for Magistrate's Court Practice**.

In *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) Harms DP (Farlam, Ponnan, Maya and Cachalia JJA concurring) said:

> "[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities… ."

Mynhardt v Mynhardt 1986 (1) SA 456 (T) at 463:

Subject to your reading, the following points may be drawn from the case cited above

- To use the wrong form of notice of motion is not a nullity;
- But to get condonation for using the wrong form requires an explanation.
- An *ex parte* application is used:
  - (1) when the applicant is the only person who is interested in the relief which is being claimed;
  - (2) where the relief sought is a preliminary step in the proceedings, *eg* an application to sue by edictal citation or to attach property *ad fundandam jurisdictionem*;
  - (3) where, though other persons may be affected by the Court's order, immediate relief, even though it may be temporary in nature, is essential because of the danger in delay or because notice may precipitate the very harm the applicant is trying to forestall, *eg* an application for an interdict or an arrest *suspectus de fuga* under the common law.

Arendsnes Sweefspoor CC v Botha 2013 (5) SA 399 (SCA) at para [18]:

Subject to your reading, the following points may be drawn from the case cited above

- The rules exist for the courts, not the courts for the rules.

46A Execution against residential immovable property

Rules relating to procedural matters

10 Joinder of parties and causes of action
10A Joinder of provincial or national executive authorities and service on Rules Board for Courts of Law
11 Consolidation of actions
12 Intervention of persons as plaintiffs or defendants
23 Exceptions and applications to strike out
26 Failure to deliver pleadings - barring
27 Extension of time and removal of bar and condonation
28 Amendments to pleadings and documents
30 Irregular proceedings
30A Non-compliance with Rules and Court Orders
35 Discovery, inspection and production of documents
43 Interim relief in matrimonial matters
47 Security for costs

- The rules of procedure of the High Court are devised for the purpose of administering justice and not of hampering it.
    - where the Rules are deficient, the court can grant orders which help to further the administration of justice.
    - If one is absolutely prohibited by the Rule, one is bound to follow the Rule,
    - But if there is a construction which can assist the administration of justice, the court will be disposed to adopt that construction
    - Courts should not be bound inflexibly by rules of procedure unless the language clearly necessitates this
    - Courts have a discretion, which must be exercised judicially on a consideration of the facts of each case; in essence it is a matter of fairness to both parties

- With the advent of the constitutional dispensation, it has become a constitutional imperative to view the object of the rule as ensuring a fair trial or hearing.
    - 'The rules of court are delegated legislation, having statutory force, and are binding on the court, subject to the court's power to prevent abuse of its process.'
    - And rules 'are provided to secure the inexpensive and expeditious completion of litigation' and are 'devised to further the administration of justice'

- Logically, the principles concerning court rules must apply to court directives as well.

See also *Eke v Parsons* 2016 (3) SA 37 (CC) at paras [39] to [41].
Subject to your reading, the following points may be drawn from the case cited above

- It is important to obey the rules of court;
- But the court will not be hamstrung by the rules;
- The facts of each case are paramount to determine deviations from the rules.

You are required to have a working knowledge of the Superior Courts Act 10 of 2013 and the Uniform Rules. You will not be examined on court directives, unless a copy of the directive is made available during the relevant exam.

Remember: Normally only three affidavits are permitted in motion proceedings.

See: *Gold Fields Ltd v Motley Rice LLC* 2015 (4) SA 299 (GJ) at paras [121] to [125]
Subject to your reading, the following points may be drawn from the case cited above.

- An applicant is obliged to make out his/her/its case in the founding affidavit
    - and to stand or fall by it.
- The case in the founding affidavit is the one on which the applicant brings the respondent to court.
    - That is the case that the respondent must respond to;
    - and the applicant must, at the hearing, succeed or fail on the case in the founding affidavit.

- The respondent is given one opportunity only, to deal with the applicant's cause of action and present evidence in opposition, in the answering affidavit.

- The applicant is then afforded an opportunity in the replying affidavit to reply only to what the respondent has stated and may not raise new matter or new issues.

- The three affidavits, founding affidavit, answering affidavit and replying affidavit (with any necessary supporting affidavit), then conclude the essential affidavits and thus close the pleadings and evidence in motion proceedings.

- There is no automatic right to file a fourth or further affidavits
    - Additional affidavits are allowed only in exceptional circumstances
    - And only with leave of the court.
- The most important consideration in adhering to the strict rule concerning affidavits, is that adhering to the principles ensures disputes between litigants are resolved in a just, orderly and well recognised procedure.

Please read **Rule 6** carefully.

Form and Forms of notice of motion
There are two main forms of notice of motion and four forms for certain specific applications.
The main forms are –

- Form 2, for *ex parte* matters; and
- Form 2(a), for opposed matters or matters where other parties have an interest.

The specialised forms are:

- Form 1: Edictal citation: Short form of process.
- Form 2A: Notice of application to declare immovable property executable ito rule 46A.
- Form 2B: Application for rescission of judgment in terms of rule 31(6)(*a*).
- Form 2C: Application for rescission of judgment in terms of rule 31(6)(*b*).

To reiterate: the sequence of affidavits in motion proceedings is:

- Founding affidavit – deposed to by the applicant – rule 6(5)(a)
- Answering affidavit – deposed to by the respondent – rule 6(5)(d)(ii).
- Replying affidavit – deposed to by the applicant – rule 6(5)(e).

Applicants must set out their cause of action and evidence in the founding affidavit. [3]

You are not allowed to make your case in the replying affidavit. [4]

Parties require the leave of court to deliver further affidavits. [5]

---

[3] See *Kham v Electoral Commission* 2016 (2) SA 338 (CC) at para [46]. This rule applies to all the affidavits: founding, answering and replying. See *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA) at para [28].

[4] See *Airports Company South Africa Ltd v Airport Bookshops (Pty) Ltd t/a Exclusive Books* 2016 (1) SA 473 (GJ) at para [17]: case confirmed on appeal. *Mostert and Others v FirstRand Bank Ltd t/a RMB Private Bank and Another* 2018 (4) SA 443 (SCA) at para [13].

[5] *Gold Fields Ltd v Motley Rice LLC* 2015 (4) SA 299 (GJ) at paras [121] to [125] referred to above.

1.2 *Ex parte* applications
See also the section under the corresponding heading in the **Guide for Professional Legal Ethics**.

Remember: there is an ethical duty on practitioners in *ex parte* applications to bring all relevant facts to the court's attention, even those adverse to the applicant.

A Cilliers, C Loots and H Nel *Herbstein & Van Winsen: The Civil Practice of the Superior Courts of South Africa* 5ed (Cape Town: Juta) at p290.
Please read the original text at the chambers of your principal or nearest law library or online at the LPC Law Library.

Bullet points from Herbstein & Van Winsen, chapter 9, *Form of proceedings* at page 290, other than the *Mynhardt* case:

- *Mynhardt* case bullet points – see below;
- In an application on notice to the Registrar only, the court will not grant final relief where the rights or duties or obligations of other parties may be affected;
- The court will grant a rule *nisi* where the rights or duties or obligations of other parties may be affected.
    - The principle of law is that the *audi alteram partem* rule must apply
    - As to the application of a rule *nisi*, see *Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2001 (4) SA 1222 (SCA) at paras [16] and [17].
    - A rule *nisi* cannot be described as a ruling on procedure only.
    - What was sought and granted included an eviction order in the form of a rule *nisi*.
    - It constituted substantive relief.

Mynhardt v Mynhardt 1986 (1) SA 456 (T) at 458H–I:
Subject to your reading, the following points may be drawn from the case cited above

- An *ex parte* application concerns only the applicant;
- An *ex parte* application may be a preliminary step to another procedure like edictal citation or an attachment to found jurisdiction; or
- An *ex parte* application is for immediate relief where notice to a respondent would defeat the object of the application: like search and seizure applications.
- If an *ex parte* application is served on the respondent, it is no longer considered *ex parte*.

See also *Mohamed NO and Others v NDPP* 2002 (4) SA 366 (W) at paras [18] to [23].
Subject to your reading, the following points may be drawn from the case cited above
Rules *nisi* –

- *Audi alteram partem* is the cornerstone of our jurisprudence;
- In all *ex parte* applications, the right of an interested person to be heard is recognised by granting a rule *nisi* which operates as a temporary interdict;
- Section 34 of the Constitution provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court;
- An infringement of a right does not cease to be such just because the infringement is of limited duration (does not exist for a long time); and

- One must be careful to ensure that the alarming level of crime is not used to justify extensive and inappropriate invasions of individual rights.

1.3 ***Disputes of fact in application proceedings***
The distinction between motion proceedings and actions:

In motion proceedings, the affidavits constitute both the pleadings and the evidence.
See *Kham v Electoral Commission* 2016 (2) SA 338 (CC) at para [46].
This rule applies to all the affidavits: founding, answering and replying.
See *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA) at para [28].
Subject to your reading, the following points may be drawn from the case cited above

- The fundamental problems facing Transnet are twofold.
    - In motion proceedings the affidavits constitute not only the evidence, but also the pleadings.
    - Transnet's answering affidavit is deficient in both respects.

Remember: An applicant may not make out a new cause of action in the replying affidavit.

See *Airports Company South Africa Ltd v Airport Bookshops (Pty) Ltd t/a Exclusive Books* 2016 (1) SA 473 (GJ) at para [17].
Subject to your reading, the following points may be drawn from the case cited above

- ACSA was not permitted to change its stance in this manner.
    - Firstly, a party may not approbate and reprobate.
    - Secondly, it is trite that a party may not seek to make out a new cause of action in reply. It must make out its cause of action in the founding affidavit.
    - The effect is that Exclusive Books has never had an opportunity to meet this cause of action.
    - This is in conflict with what the Constitutional Court has described as the 'fair hearing component' of the fundamental right of access to court in s 34 of the Constitution.

Mostert and Others v FirstRand Bank Ltd t/a RMB Private Bank and Another 2018 (4) SA 443 (SCA) at para [13].
Subject to your reading, the following points may be drawn from the case cited above

- It is trite that in motion proceedings the affidavits constitute both the pleadings and the evidence.
- A respondent has the right to know what case he or she has to meet and to respond thereto
- The general rule is that an applicant will not be permitted to make or supplement his or her case in the replying affidavit.
- This, however, is not an absolute rule.
    - A court may in the exercise of its discretion in exceptional cases allow new matter in a replying affidavit.
    - **In the exercise of this discretion a court should in particular have regard to**:

(i) whether all the facts necessary to determine the new matter raised in the replying affidavit were placed before the court;
(ii) whether the determination of the new matter will prejudice the respondent in a manner that could not be put right by orders in respect of postponement and costs;

(iii) whether the new matter was known to the applicant when the application was launched; and
(iv) whether the disallowance of the new matter will result in unnecessary waste of costs.

In action proceedings the parties' cases are set out in pleadings and then oral evidence in court.

Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at the Headnote and pages 1162 to 1163.

- **Note to candidates**: *Room Hire* is a 1949 case: the Uniform Rules of Court were published under GN R48 in GG 999 of **12 January 1965** amended, with effect from 8 July 2022 (GN R2133 in GG 46475 of 3 June 2022). Rule 9 is now **Rule 6**, as amended.
- Please find the SALR report and read it.
- Here is a brief summary of the Headnote to the *Room Hire* case.

Headnote
Except in interlocutory matters it is undesirable to attempt to settle disputes of fact solely on probabilities disclosed in contradictory affidavits. Where no real dispute of fact exists there is no reason for the incurring of the delay and expense involved in a trial action **and** motion proceedings are generally recognised as permissible. Where a dispute of fact is shown to exist the Court has a discretion as to the future course of the proceedings: if the dispute of fact cannot properly be determined by *viva voce* evidence under Rule 9 - and the calling of evidence under this Rule rests with the Court or Judge regardless of whether the parties request it - the parties may be sent to trial in the ordinary way (either on the affidavits as constituting the pleadings or with a direction that pleadings be filed) or the application may be dismissed with costs.

- A claimant who elects to proceed by motion runs the risk that a dispute of fact may be shown to exist.
- In that event the Court has a discretion
    - If it does not consider the case such that the dispute of fact can properly be determined by calling *viva voce* evidence
    - the parties may be sent to trial in the ordinary way,
        - either on the affidavits as constituting the pleadings,
        - or with a direction that pleadings are to be filed.
- Or the application may even be dismissed with costs
    - particularly when the applicant should have realised when launching the application that a serious dispute of fact was bound to develop
    - It not proper that an applicant commence proceedings by motion with knowledge of the probability of a protracted enquiry into disputed facts

- The crucial question is always whether there is a real dispute of fact.
    - In every case the Court must examine the alleged dispute of fact and see whether in truth there is a real issue of fact which cannot be satisfactorily determined without the aid of oral evidence;
    - if this is not done, the respondent might be able to raise fictitious issues of fact and thus delay the hearing of the matter to the prejudice of the applicant

Types of disputes of fact:

- The respondent denies all the material allegations made by the applicant and produces positive evidence to the contrary;

- The respondent admits the applicant's affidavit evidence but alleges other facts which the applicant disputes;
- The respondent concedes that he has no knowledge of the main facts stated by the applicant, but denies them as biased, untruthful or otherwise unreliable;
- The respondent concedes that he has no knowledge of the main facts stated by the applicant, which are peculiarly within the applicant's knowledge and puts the applicant to the proof.

Soffiantini v Mould 1956 (4) SA 150 (E) at page 154 E-H:
Subject to your reading, the following points may be drawn from the case cited above

- Bare denials are not sufficient to defeat the applicant's claim;
- The respondent must disclose material facts which are *bona fide* in dispute;
- The court must make a robust, common sense decision on disputes of fact.

Economic Freedom Fighters v Manuel 2021 (3) SA 425 (SCA) at para [92]:
Subject to your reading, the following points may be drawn from the case cited above

- Unliquidated claims for damages are for action/trial proceedings, not motion proceedings;
- Defamation claims are for action/trial proceedings;
- Plaintiffs must adhere to Uniform Rules 17(2) read with 18(10) on pleading damages;

Referral to oral evidence or trial:
Metallurgical and Commercial Consultants v Metal Sales Co 1971 (2) SA 388 (W) at pages 396D to 397B for the form of the court order.

In practice many of the points below are amended to suit the facts of the matter before court.

- The matter is referred to oral evidence on whether …; (state the issue for determination);
- The evidence shall be that of any witnesses the parties call; (the court may restrict this);
- No witness may give evidence for the respondent unless his/her witness statement is delivered to the applicant 14 days before the hearing;
- No witness may give evidence for the applicant unless his/her witness statement is delivered to the respondent ten days before the hearing;
- Either party may subpoena any competent witness to testify;
- Neither party is required to call a witness they subpoenaed;
- Within 21 days of this order, the parties will make discovery in terms of rule 35;
- Costs in the application will be determined at the hearing of the matter.

Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (A) at 981D-F:
Subject to your reading, the following points may be drawn from the case cited above

- A request for referral to oral evidence should be made <u>before</u> argument;
- However, this rule of practice is not absolute;
- On good cause, the matter may be referred to evidence during argument.

Lekup Prop Co No 4 (Pty) Ltd v Wright 2012 (5) SA 246 (SCA) at para [32]
Subject to your reading, the following points may be drawn from the case cited above

- The appellant initiated motion proceedings
    - The matter was referred to trial after the respondent filed his answering affidavit.
    - At the trial the respondent was allowed to read from that affidavit.
- That was not the correct procedure.
- A witness who gives evidence in trial proceedings must do so in the ordinary way.

  - In our practice, lay witnesses are not permitted to read from pre-prepared statements even if those statements have been prepared by themselves.
  - The learned judge *a quo* was under a misapprehension as to the status of the affidavits. The judge had said: '*I will accept that the affidavits in this application are proper evidence before this court*.'
- Affidavits filed may be used for cross-examination
  - and also as proof of admissions therein,
  - but (save to the extent that they contain admissions)
- Affidavits have no probative value;
  - and in the absence of agreement, they do not stand as the witness's evidence-in-chief, or supplement it.
  - And if, by agreement, they are to be treated as such, it is unnecessary and a waste of time and costs for them to be read into the record.
- A referral to trial is different to a referral to evidence, on limited issues.
- In a referral to evidence the affidavits stand as evidence,
  - save to the extent that they deal with disputes of fact;
  - and once the disputes have been resolved by oral evidence,
  - the matter is decided on the basis of that finding
  - together with the affidavit evidence that is not in dispute.

Hotz v University of Cape Town 2017 (2) SA 485 (SCA) at para [29],[36] and [39]:
Subject to your reading, the following points may be drawn from the case cited above

- An applicant for a final interdict must show:
  - A clear right;
  - An injury actually committed, or reasonably apprehended; and
  - The absence of any other remedy.
- Once the applicant has established those three requirements:
  - The applicant is entitled to a final interdict;
  - The court does not have a general discretion to refuse the interdict.

- The purpose of an interdict is to end the conduct in breach of the applicant's rights;
- The existence of another remedy will only preclude (prevent) the granting of an interdict if the other remedy gives the applicant similar protection to the interdict;
- The alternative remedy must be a legal remedy which the court may grant;
- The fact the judge thinks the problem may be better solved by extra-curial means, is not a reason to refuse to grant the interdict.
- The nature and purpose of interdicts is rooted in constitutional principles:
  - Section 34 of the Bill of Rights;
  - Stability of society where disputes are resolved institutionally and not by self-help;
  - To avoid vigilantism, chaos and anarchy.
- See Interdicts below.

Director-General, Depart of Rural Development and Land Reform, and Another v Mwelase and Others 2019 (2) SA 81 (SCA) at para [64] confirming the Plascon-Evans test.

"[64] It is well established that in a case such as this the decision must be based on the facts alleged by an applicant which are admitted by the respondent, together with the facts alleged by the respondent, unless the respondent's allegations or denials are so far-fetched or clearly untenable that they may be rejected out of hand."

Murray NO and Others v Humansdorp Co-Operative Ltd 2023 (3) SA 66 (SCA) at paras [21] to [23]

- Confirms the *Lekup* case
- Please verify that statement yourself

1.4 ***Approach to disputes of fact in applications for final relief***

Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E-635D:

Subject to your reading, the following points may be drawn from the case cited above

- Where there is a dispute of facts, a final order should only be granted if:
    - The facts stated by the respondent;
    - Together with the facts in the applicant's affidavits admitted by the respondent;
    - Justify such an order.
    - Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted.

- When the respondent's denial fails to raise a real, genuine, or *bona fide* dispute of fact:
    - The respondent does qualify to request a referral to evidence or trial;
    - The court may determine the matter in favour of the applicant when satisfied as to the inherent credibility of the applicant's affidavits;
    - Where the respondent's allegations are far-fetched or clearly untenable the court may reject them on the papers.

- The principles for a final order granted on interdict apply to other final relief as well.

Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd 1957 (4) SA 234 (C) at page 235

Subject to your reading, the following points may be drawn from the case cited above

- Where there is a dispute as to the facts a final interdict should only be granted in motion proceedings if:
    - the facts as stated by the respondents
    - together with the admitted facts in the applicant's affidavits
    - justify such an order.
- A Judge is not confined to such facts as were substantially common cause.
- Consider the facts alleged or admitted by the respondent.
    - Where it is clear that facts,
    - though not formally admitted cannot be denied,
    - they must be regarded as admitted.
- The <u>arguments, submissions and opinions</u> contained in the affidavits <u>are not facts</u>, and must not be regarded as facts.

See also: *Director-General, Department of Rural Development and Land Reform v Mwelase* 2019 (2) SA 81 (SCA) at para [64] for a crisp statement of *Plascon-Evans* (while the case was overturned on appeal, para [64] was not overturned):

> "[64] It is well established that in a case such as this the decision must be based on the facts alleged by an applicant which are admitted by the respondent, together with the facts alleged by the

respondent, unless the respondent's allegations or denials are so far-fetched or clearly untenable that they may be rejected out of hand."

1.5 ***Character of trial and motion proceedings***
Uniform Rules of Court
The vital aspect of jurisdiction

Standard Bank of SA Ltd v Mpongo 2021 (6) SA 403 (SCA)
Subject to your reading, the following points may be drawn from the case cited above

- A High Court is obliged to hear a matter brought before it, even where the matter falls within the jurisdiction of a magistrates' court; and
- Likewise a main seat (Division) had a duty to hear a matter brought before it, even where the matter fell within the jurisdiction of a local seat (Division)
- A financial institution is not obliged to consider a litigant's costs and access to justice when it chooses the court in which to proceed
    - The ruling that it was an abuse of process to bring a matter within a magistrates' court's jurisdiction in a High Court was unsupportable:
        - case law was against it and
        - the reasons the banks supplied for the practice were entirely legitimate.
            - These included greater efficiency and
            - the associated saving of costs, and
            - the benefits of having judges rather than magistrates making decisions on special execution.
    - Moreover, where the law gave a litigant a choice of forum, exercise of that choice could hardly be characterised as an abuse of process.

- The determination of the Eastern Cape bench that a High Court's jurisdiction is ousted in any National Credit Act matter is erroneous: it is unsupported by the National Credit Act or Magistrates' Courts Act and ran counter to established authority.
    - See *Nedbank Ltd v Mateman; Nedbank Ltd v Stringer* 2008 (4) SA 276 (T)

South African Human Rights Commission v Standard Bank of South Africa Ltd and Others 2023 (3) SA 36 (CC)

- The SAHRC was an *amicus curiae* in the 13 matters before the High Court and SCA
- The SAHRC appealed against the decision in the SCA
- The appeal failed
- The Constitutional Court upheld the decision in *Standard Bank of SA Ltd v Mpongo* 2021 (6) SA 403 (SCA)

2. INSTITUTING APPLICATIONS
General provisions

2.1 ***Notice of motion and founding affidavit***
Hlophe v Freedom Under Law, and Other Matters 2022 (2) SA 523 (GJ) at paras [27] and [28]:

- Rule 18 has no application to motion proceedings;
- Rule 6 is the primary rule that regulates applications;
- Rule 6(14) that the provisions of rules 10, 11, 12, 13, and 14 apply to all applications.

- Prominently absent from the list is any reference to rule 18.

Access to the LPC Library
After your PVT contract is registered with your LPC Provincial Office, you will have access to the LPC Library online.

Annexures to affidavits (numbering and reference to content)
Avoid the **sloppy method** identified in para [31] of *Drift Supersand (Pty) Ltd v Mogale City Local Municipality and Another* [2017] 4 All SA 624 (SCA) ([2017] ZASCA 118) and the **slovenly practice** identified in para [3] of *Eskom Holdings SOC Ltd v Masinda* 2019 (5) SA 386 (SCA) ([2019] ZASCA 98):

- It is a *sloppy method* and a *slovenly practice* to draft an affidavit where the deponent relies on hearsay evidence which is 'confirmed' by deponents in confirmatory affidavits;
- The proper practice is that the deponents who have direct knowledge of the facts must depose to the relevant affidavits themselves;
- When drafting affidavits, use paragraph numbers carefully:
    - Set out the main point (or principle) in the principal paragraph.
    - Use sub-paragraphs sparingly.
    - Do **not** use sub-sub-paragraphs.
    - It is an indication of a lack of clarity in your case concept.
- Use point first writing:
    - begin each paragraph by stating the main point;
    - followed by the evidence or reason (pleading in law) for that point.

It is important to set out the whole case in the founding affidavit:
Advertising Regulatory Board NPC and Others v Bliss Brands (Pty) Ltd 2022 (4) SA 57 (SCA) at para [39]. See also Esau v Minister of Co-op Governance & Traditional Affairs 2021 (3) SA 593 (SCA) ([2021] 2 All SA 357; [2021] ZASCA 9) at para [60].

- In motion proceedings, applicants are required to make out their case in their founding affidavit and
- may not make out their case in reply.
    - The challenges were not raised in the founding affidavit,
    - but only in the replying affidavit,
    - with the result that the respondents had no opportunity to answer them.

Annexures to affidavits (numbering and reference to content)
Pleadings and evidence: *Mostert v FirstRand Bank t/a RMB Private Bank* 2018 (4) SA 443 (SCA) ([2018] ZASCA 54) at para [13]

- It is trite that in motion proceedings the affidavits constitute both the pleadings and the evidence.
- As a respondent has the right to know what case he or she has to meet and to respond thereto, the general rule is that an applicant will not be permitted to make or supplement his or her case in the replying affidavit.
- This, however, is not an absolute rule.
    - A court may in the exercise of its discretion in exceptional cases allow new matter in a replying affidavit.
    - In the exercise of this discretion a court should in particular have regard to:

- (i) whether all the facts necessary to determine the new matter raised in the replying affidavit were placed before the court;
- (ii) whether the determination of the new matter will prejudice the respondent in a manner that could not be put right by orders in respect of postponement and costs;
- (iii) whether the new matter was known to the applicant when the application was launched; and
- (iv) whether the disallowance of the new matter will result in unnecessary waste of costs.

Fischer and Another v Ramahlele and Others 2014 (4) SA 614 (SCA) at para [13] affirmed by the *Constitutional Court in Public Protector v SARB* 2019 (6) SA 253 (CC) at para [234].

Subject to your reading, the following points may be drawn from the cases cited above

- Turning then to the nature of civil litigation in our adversarial system, it is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of their dispute,
- and it is for the court to adjudicate upon those issues.
  - That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for '(i)t is impermissible for a party to rely on a constitutional complaint that was not pleaded'.
  - There are cases where the parties may expand those issues by the way in which they conduct the proceedings.
  - There may also be instances where the court may *mero motu* raise a question of law that emerges fully from the evidence and is necessary for the decision of the case.
  - That is subject to the *proviso* that no prejudice will be caused to any party by its being decided.
  - Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.
- It is not for the court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it, and
- It is not for the court to insist that the parties deal with them.

<u>Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002</u>

Please read the latest version of Act 42 of 2002 which includes the amendments made in terms of the Judicial Matters Amendment Act 8 of 2017

Applications that raise constitutional issues

Please read the **Guide for Constitutional Practice** as well

- Rule 16A –

▪ *Shaik v Minister of Justice and Constitutional Development* 2004 (3) SA 599 (CC) at para [24]:

- Rule 16A(1) requires specificity;
- The purpose of the rule is to alert people who have a legitimate interest to the substance of the constitutional challenge;
- So that those people may get involved in the case if they seek to defend their interests;
- The Rule 16A notice is especially important when the applicant seeks to limit a right in the Bill of Rights and will lead evidence to substantiate that limitation.

And *Sarrahwitz v Maritz NO* 2015 (4) SA 491 (CC) at paras [28] to [32]:

Note the nuances in the passages in the *Sarrahwitz* case:

- The principle that a point of law must be raised timeously and not for the first time on appeal is not inflexible;
- This also applies to raising constitutional points for the first time on appeal;
- The test whether the appeal court will allow a point of law to be raised for the first time on appeal is threefold:
    - The point must be a point of law;
    - The point must be covered by the pleadings;
    - There should be no prejudice to the other party.

2.2 ***Joinder under rule 10A and joinder of respondents***

- Who must be joined?

Under rule 10A, the party challenging the validity of the law must join the provincial or national executive authorities responsible for the administration of the law; and the party challenging a rule must serve on the Rules Board for Courts of Law, its notice setting out the basis of the challenge.

Alberts and Others v Minister of Justice and Correctional Services 2022 (6) SA 59 (SCA) at paras [17] to [21]:

- Where cases involve many applicants/plaintiffs with similar facts against a single respondent/defendant, joinder is not only a matter of convenience;
- The causes of action are founded on incidents taking place at the same time and place;
- It avoids a multiplicity of applications/actions.

- Joint and several liability –

Joint liability means each party is only liable for his/her ***share*** as co-debtors;
Several liability means all the parties are ***fully liable*** as co-debtors, but any party who pays the full debt has a right to claim a proportionate recompense from the other party/ies;
For a practical example, **not in the reading list**, see *MS v HOD, WCED* 2017 (4) SA 465 (WCC) and the decision on appeal in *HOD, WC Education Department v MS* 2018 (2) SA 418 (SCA).

2.3 ***Service generally Rule 4***

You should know the essential requirements and procedure for substituted service Rule 4(2).
Substituted service.
CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens 2012 (5) SA 604 (KZD) at paras [3] to [7]:

- An application for substituted service should only succeed if the applicant has set out:
    - the nature of and extent of the claim;
    - the grounds upon which the claim is based;
    - the grounds upon which the court has jurisdiction to entertain the claim;
    - the manner of service which the court is asked to authorise;
    - the last known whereabouts of the person to be served;
    - the inquiries which have been made to ascertain the present whereabouts; and
    - any information which may assist the court in deciding whether leave should be granted and, if so, on what terms.

Edictal citation (rules 5 and 63).
When proceedings are instituted, no process may be served outside the Republic of South Africa, except by leave of the court.

- To obtain such leave the applicant must apply to court and set out concisely:
  - the nature and extent of the claim;
  - the grounds upon which it is based;
  - the grounds upon which the court has jurisdiction to entertain the claim; and
  - the manner of service which the court is asked to authorise.

- If such manner be other than personal service, set out:
  - the last-known whereabouts of the person to be served; and
  - the inquiries made to ascertain that person's present whereabouts.

Proceedings against firms, etcetera. Rule 14 – for your own reading.
Change of parties Rule 15 – for your own reading.

Attachment to found or confirm jurisdiction.
Remember:
The Superior Courts Act 10 of 2013 prohibits an attachment to found jurisdiction within the Republic at section 28 as follows:

> 'No attachment of property to found jurisdiction shall be ordered by a Division against a person who is resident in the Republic.'

Children's Resource Centre Trust v Pioneer Food (Pty) Ltd 2013 (2) SA 213 (SCA) at para [40]:

- To establish a *prima facie* case on the evidence to confirm or found jurisdiction not a difficult hurdle to cross:
  - if an applicant shows that there is evidence which, if accepted, will establish a cause of action;
  - the mere fact that such evidence is contradicted will not disentitle the applicant to relief;
  - not even if the probabilities are against the applicant.
- The evidence on which an applicant relies must consist of allegations of fact as opposed to mere assertions.

3. URGENT APPLICATIONS

- Rule 6(12) –

Luna Meubel Vervaardigers (Edms) Bpk v Makin 1977 (4) SA 135 (W) at page 137A-F (paras 1-4).
Ascending order of urgency:

- Must there be a departure at all from the times prescribed in rule 6(5)(b)?
- Is the matter so urgent the applicant cannot wait for the next motion day?
- Is the urgency such that the applicant dare not wait even for the next Tuesday?
- Is the urgency such that the applicant cannot possibly wait for the hearing until the next court day?

Sikwe v SA Mutual Fire & General Insurance Co Ltd 1977 (3) SA 438 (W) at 440H on the substance of the affidavit over its form. Not to be confused with the *CSARS* case below.

- Make specific averments of urgency.
- Set out the facts and evidence to support that the matter is urgent.
- The court will determine urgency on the facts, not the form of the application used.

Nelson Mandela Metropolitan Municipality v Greyvenouw CC 2004 (2) SA 81 (SE) at para [37].

- Applicants in urgent applications must give proper consideration to the degree of urgency and tailor the notice of motion to that degree of urgency.
- When Courts are enjoined by Rule 6(12) to deal with urgent applications this involves the exercise of a judicial discretion by a Court concerning which deviations it will tolerate in a specific case

CSARS v Hawker Air Services (Pty) Ltd; CSARS v Hawker Aviation Partnership 2006 (4) SA 292 (SCA) at paras [9] to [11].

See especially para [9]: 'Urgency is a reason that may justify deviation from the times and forms the Rules prescribe. It relates to form, not substance, and is not a prerequisite to a claim for substantive relief.'

- Facts and evidence to substantiate urgency.
- Urgency permits one to use rule 6(5)(g).
- The use of the rule is part of procedure.
- Once urgency is established, substantive relief is sought on the merits of why the applicant comes to court.

4. ANSWERING AND REPLYING AFFIDAVITS

Content and form

Skog NO v Agullus 2024 (1) SA 72 (SCA) at paras [23] – [24]

- In assessing a dispute of fact on motion proceedings, the rules developed by our courts to address such disputes will be applied.
- Ordinarily, a court will consider those facts alleged by the applicant and admitted by the respondent together with the facts as stated by the respondent to consider whether relief should be granted.
- Where however a denial by a respondent is not real, genuine or in good faith, …, the Court may adjudicate the matter on the basis of the facts asserted by the applicant.
- In this case, the applicant's photographic evidence was not disputed.
- The respondent had no version.

Points *in limine*:

Gcaba v Minister for Safety and Security 2010 (1) SA 238 (CC) at para [75]:

- Jurisdiction is determined on the pleadings.
- Jurisdiction is **not** determined on the substantive merits of the case.

If the court's jurisdiction is challenged at the outset (*in limine*):

- The applicant's pleadings are the determining factor:
    - They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence.
    - The pleadings – including, in motion proceedings, the formal terminology of the notice of motion, and the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is.

- It is not for the court to say the facts asserted by the applicant would also sustain another claim, cognisable only in another court.

Late filing, barring and condonation:
Motloung v Sheriff, Pretoria East 2020 (5) SA 123 (SCA) at paras [10] to [17], paras [23] to [25] and para [28].

- Though Uniform Rule 17(3)(c)'s requirement of signature by the registrar is peremptory, the requirement's breach is condonable under rule 27(3) on the following grounds:
  - Authority was to the effect that even breach of a peremptory rule did not necessarily result in nullity
  - breach of a peremptory provision of rule 17(3)(a) had been condoned in two cases
  - though authority provided that a registrar's failure to issue a summons nullified it,
    - issue and signature were distinctive acts, and
    - while issue brought the summons into existence,
    - signature was merely evidence of issue and
- condonation's requirement of 'good cause' would allow for consideration of prejudice to the other party

Please read the following rules:

o Rule 26
o Rule 27
The court may, on good cause shown, condone any non-compliance with the Uniform Rules of Court.
There are three categories of irregularity –

- directory rules whose breach can be condoned;
- peremptory rules whose breach can be condoned; and
- peremptory rules whose breach is visited with nullity.

5. ADDITIONAL AFFIDAVITS

Leave required
NM v John Wesley School and Another 2019 (2) SA 557 (KZD) at paras [56] and [57].
Form and content
Leave to file additional/supplementary affidavits will only be granted:

- in special circumstances;
  - like something new arising in the applicant's replying affidavit;
- and a satisfactory explanation why the information was not placed before court earlier;
  - the explanation demonstrates there is no bad faith is seeking leave to file another affidavit.

6. DISCOVERY IN MOTION PROCEEDINGS

Obligation to put up evidence on which party intends to rely

MV Alina II: Transnet Ltd v MV Alina II 2013 (6) SA 556 (WCC) at paras [19] to [26]:

- Rule 35(7) is designed to assist a party dissatisfied with the discovery that has been made, and remedies under rule 35(3) have been exhausted.

- Rule 35(7) empowers the court to dismiss a claim, or strike out the defence, if a party fails to give discovery in compliance with the rules.
- A party is required to discover every document relating to the matters in question, and that means relevant to any aspect of the case.
    - The obligation to discover is in very wide terms.
    - Even if a party may lawfully object to producing a document, such party must still discover it.

STT Sales (Pty) Ltd v Fourie 2010 (6) SA 272 (GSJ) at paras [13] to [17]: note paragraph [17].
Rules 35(12) and (14):

- Discovery in motion proceedings should only be allowed once the legal issues are identified.
- In motion proceedings legal issues are only identified once all the affidavits are filed.
- To allow discovery in motion proceedings before all the affidavits are filed will invite chaos.
- Discovery in motion/application proceedings is an exceptional procedure.

Non-application of Promotion of Access to Information Act 2 of 2000 – see section 7.

Cf *Arena Holdings (Pty) Ltd t/a Financial Mail v SARS* 2023 (5) SA 319 (CC); [2023] ZACC 13; 2023 (8) BCLR 905 (CC) at paras [147] to [150] and [155] to [157] and [170] to [172]
Subject to your reading, the following point may be drawn from the case cited above.

- In a rule-based society, serious criminality undermines the values of the Constitution
    - just as a serious and imminent environmental or health risk
    - poses a high level of threat to the populace.
- These considerations are, objectively, sufficiently serious in the public interest to warrant lifting the cloak of confidentiality that otherwise vests in information worthy of protection.
- Taxpayer records generally contain personal information submitted to the tax authorities as part of compliance with the tax obligations imposed by law.
- That information is ordinarily of no concern or interest to the public at large, is correctly characterised as confidential and warrants the mandatory protection from disclosure that PAIA affords it.
- This case is about the limitation of the right of access to information under PAIA, and the prohibition that is referred to can only be the prohibition in s 35(1) of PAIA.
- Section 32 of the Constitution and PAIA, which is the national legislation contemplated in s 32, are concerned with the right which 'everyone', that is, the public at large to information held by the state.
- The Court concluded that the limitation in s 35(1) is absolute and cannot be said to be reasonable and justifiable in an open and democratic society.
- It followed that ss 35(1) and 46 of PAIA, as well as ss 67(4) and 69(2) of the Tax Administration Act, are unconstitutional.

Authentication of documents rule 63 – for your own reading, please.

7. OBJECTIONS TO PROCESS OR PLEADINGS – for your own reading, please:

- Failure to deliver pleadings – barring rule 26.
- Extension of time periods rule 27.
- Amendments – rule 28.
- Irregular proceedings – rule 30.

- *Afrocentrics Projects and Services (Pty) Ltd t/a Innovative Distribution v State Information Technology Agency (SITA) SOC Ltd and Others* [2023] ZACC 2; 2023 (4) BCLR 361 (CC) especially at para [30]
- Non-compliance with rules – rule 30A.
- Vexatious proceedings and abuse of process.

Mineral Sands Resources (Pty) Ltd v Reddell 2023 (2) SA 68 (CC) at paras [2] and [89] to [100].
A SLAPP suit is:

- A lawsuit initiated against individuals or organisations that –
    - speak out or take a position on an issue of public interest;
    - initiated not as a direct tool to vindicate a *bona fide* claim;
    - but as an indirect tool to limit the expression of others;
    - or to deter that party, or other potential interested parties;
    - from participating in public affairs.
- Abuse of process can appear in different forms –
    - the first, and most common, type of abuse of process is the use of the rules of court, for example to delay a case or to deliberately misemploy a claim for urgency;
    - the second is that of the vexatious litigant who repeatedly brings unmeritorious cases;
    - the third is not an abuse of court process, but illegal in respect of other processes, like illegal arrest, and thus also constitutes a form of abuse;
    - the fourth type of abuse is where conduct plays a central, indispensable role, like malicious prosecution.

- To sustain a SLAPP type of defence, the defendants must prove the plaintiff's suit –
    (a) is an abuse of process of court;
    (b) is not brought to vindicate a right;
    (c) amounts to the use of court process to achieve an improper end and to use litigation to cause the defendants financial and/or other prejudice in order to silence them; and
    (d) violates, or is likely to violate, the right to freedom of expression entrenched in s 16 of the Constitution in a material way.

- The common law doctrine of abuse of process accommodates the SLAPP suit defence in South African law.

South African Human Rights Commission v Standard Bank of South Africa Ltd 2023 (3) SA 36 (CC) at paras [29] to [33], and [38]:

- When a matter is within the jurisdiction of a court, that court has no discretion to decline that jurisdiction.
- Once the court assumes jurisdiction, how that court decides to exercise its jurisdiction is a separate issue.
- How the court exercises its jurisdiction includes considerations –
    - whether in exceptional circumstances jurisdiction is not exercised by reason of, for example;
    - abuse of process;
    - the stay of proceedings pending some other form of dispute resolution; or
    - on grounds of comity.

- In certain special circumstances, a South African court may decide that comity dictates the matter be best adjudicated by a foreign court with a closer connection to the matter.
- When a court entertains an application for leave to appeal –
    - first it assumes jurisdiction to determine whether to grant leave to appeal;
    - then it makes the determination in the interests of justice.

PFC Properties (Pty) Ltd v Commissioner for the South African Revenue Services and *Brita De Robillard NO and Another v PFC properties (Pty) Ltd* [2023] ZASCA 111; 2024 (1) SA 400 (SCA)

- Business rescue proceedings are aimed at restoring a company to solvency and
- Must not be abused by a company with no prospects of rescue to avoid a winding-up or to obtain respite from creditors.
- The launch of the business rescue application was a stratagem to thwart the winding-up proceedings
- The court must use the power it has to safeguard the integrity of its process.
- The conduct of the trustees was so tainted by impropriety that exercising the court's power to non-suit the trustees was warranted.

Applications to strike out – for your own reading, please.
Security for costs – for your own reading, please.

8. PARTICIPATION BY OTHER PARTIES – for your own reading, please.
Intervention applications
o Rule 12.
Joinder and consolidation
o Rule 10.
Third party procedures
o Rule 13.
Interpleaders
o Rule 58 and commentary thereon in Erasmus.

The Fonarun Naree: Trustees, Copenship Bulkers A/S (in Liquidation) and Others v Afri Grain Marketing (Pty) Ltd and Others 2020 (4) SA 188 (GJ) at paras [24] and [34] and [35]:

- the position of the sheriff in interpleader proceedings is analogous to execution proceedings;
- the sheriff holds the property for a third party; and
- the sheriff does not hold the property as sheriff *per se*.

Curators
o Rule 57 – for a useful case on the proper approach to the evidence required to sustain a rule 57 application, see *Scott and Others v Scott and Another* 2021 (2) SA 274 (KZD).
Note well: **<u>the case is not prescribed in the reading list</u>**.

9. AFTER PLEADINGS CLOSE

- Heads and practice note – see **Practical Message to Candidates** at page 18 above
- Set down.
- Hearing.
- Settlement and/or withdrawal rule 41 – for your own reading, please.

10. ORDERS

- **Interim and final orders**
- **The *functus officio* doctrine**

Freedom Stationery (Pty) Ltd v Hassam 2019 (4) SA 459 (SCA) at para [16]:

- A court has no power to set aside or alter its own final order:
  - as opposed to an interim or interlocutory order.
- The reasons are twofold:
  - First, once a court has pronounced a final judgment, it becomes *functus officio* and its authority over the subject-matter ends.
  - Second is the principle of finality of litigation.

Finality of orders

Skog NO v Agullus 2024 (1) SA 72 (SCA) at paras [63] to [75]

- The defence of *res judicata* was available at common law if it were shown that the judgment in the earlier case was given in a dispute between:
  - the same parties,
  - for the same relief
  - on the same ground
  - or on the same cause.
- The gist of the plea of *res judicata* is that the matter or question raised by the other side had been finally adjudicated upon in proceedings between the parties and can therefore not be raised again

Rescission rule 42, rule 31(2)(b), common law requirements

You are particularly required to understand the differences between applications in terms of rule 31, rule 42 and the common law.

See *Ellis v Eden* 2023 (1) SA 544 (WCC) at paras [25] to [38]:

- rule 31(2)(a) applies to the grant of default judgment by the court where one (or more claims) in an action is not 'for a debt or liquidated demand';
- rule 31(2)(b) provides for the rescission of such judgments; and
- rule 31(5) empowers a registrar to grant default judgment for a debt or liquidated demand.

Both rules 31(2)(b) and 31(5)(d) require the aggrieved defendant to take action within 20 days of learning of the default judgment.

- Rule 31(2)(b) applies where the court rather than the registrar granted default judgment.

To rely on rule 31(2)(b), if the applicant exceeds the 20-day limit, the applicant must:

(a) First, discharge the burden which rule 31(2)(b) imposes on all defendants seeking rescission to show 'good cause', even those who bring rescission proceedings within the 20-day limit. Good cause includes a full and frank explanation for the delinquent party's default.

(b) Second, obtain condonation in terms of rule 27 for the failure to comply with the 20-day time limit in rule 31(2)(b).
For condonation, the applicant must again show good cause. Good cause still includes a full and frank explanation for the delinquent party's default.

- Good cause, in both contexts, requires the court to assess the delinquent party's prospects of success in the main case. In the case of a delinquent defendant, this is usually expressed as a requirement that he show that he has a *bona fide* defence. And the defendant must also show that the rescission application is brought *bona fide* and not for purposes of delay.

- If the delinquent defendant blames former attorneys for the delay, then:
    - To explain the delay may require a waiver of legal privilege.
    - The delinquent cannot make an unsubstantiated allegation of delay.

Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) at para [12]:
- Documents lost in an attorney's office is not an explanation for delay.
- How, where, when, why and by whom they were lost must be explained.
- Sometimes the client must bear the consequences of the negligence of his or her attorneys.
- An unsatisfactory and an unacceptable explanation remain so, whatever the prospects of success on the merits.

HLB Intl (SA) v MWRK Accountants & Consultants 2022 (5) SA 373 (SCA) at paras [19] to [28]:
- There is no essential difference between an 'order' and a 'judgment'.
- The word 'judgment', when used in the general sense, comprises both the reasons for the judgment and the judgment or order.
- The guiding principle of the common law is certainty of judgments.
- When a judgment has been given, it is final and unalterable: the judge becomes *functus officio* and may not ordinarily vary or rescind his or her own judgment.
- Rule 42 caters for rectification of the same types of mistakes the common law recognised.

The court can, however, declare and interpret its own order and likewise correct the wording of it, by substituting more accurate or intelligent language so long as the sense and substance of the order are not affected by such correction;
- To interpret or correct the order is not allowed.

Claims for interest sections 1, 2, 2A and 4 of the Prescribed Rate of Interest Act 55 of 1975.

How to Execute Judgments
Rule 45 Execution - general and movables
45A Suspension of orders by the court

BP Southern Africa (Pty) Ltd v Mega Burst Oils & Fuels (Pty) Ltd & Similar Matter 2022 (1) SA 162 (GJ)
- The principle that the judgment creditor was entitled to seek payment almost immediately after judgment has never been overturned
- The 'clear right' that BP relied on did not exist:
    - the law is not that execution can only be levied once the time periods for lodging an application or petition for leave to appeal had expired.
    - Hence BP's contention that it had a 'right' to demand that execution be stayed until the right to petition lapsed was ill-founded and could not form the basis for an interim interdict.
- This left the interests of justice under rule 45A and the court's inherent jurisdiction.

    - Rule 45A involves a discretionary indulgence based on an apprehension of injustice:
    - the court has to ask if real and substantial justice required a stay, and
    - this required, *inter alia*, an inquiry into the balance of harm and convenience.
- In exceptional circumstances a residual equitable discretion to stay execution could be exercised to prevent an injustice, even where a litigant had an enforceable judgment and was entitled to payment.
- The imminent service of a petition for leave to appeal was a potentially significant factor, and if an applicant undertook (as BP did) that an application for leave to appeal would be delivered, the court ought to consider the prospects of success of this step as best it can.

MEC, Dept of Public Works v Ikamva Architects 2022 (6) SA 275 (ECB) at paras [81] to [93]

- Execution is a process of the Court
- The Court has an inherent power to control its own process subject to such rules as there are
- Courts enjoy constitutionally supported inherent jurisdiction to control their own processes, taking into account the interests of justice.
- This inherent discretion operates independently of the provisions of Uniform Rule 45A.
- Execution must generally be allowed.
    - This is so even in cases where a stay is sought pending the determination of proceedings still to be instituted.
    - Courts will generally grant a stay of execution if the applicant demonstrates that real and substantial justice requires this or where an injustice will result if execution proceeds.
    - The court's discretion must be exercised judicially, but cannot otherwise be limited

MMEC for Public Works, Eastern Cape and Another v Ikamva Architects CC 2023 (2) SA 514 (SCA)

- The Constitution and rule of law established a strong principle supporting the sanctity of valid and binding court orders and the right of persons in whose favour they have been issued to enforce them.
- In the light of this, and also the need to uphold the rule of law; the public interest in finality; the constitutional imperative that court orders must be complied with; the lack of precedents in our law and the absence of specific powers granted to courts to render a judgment nugatory in this fashion, the discretion under s 172(1)(b) did not extend to such an order — it was not permissible.
- The application for leave to appeal would accordingly be dismissed.

46 Execution – immovable property – please read the rule

46A Execution against residential immovable property – please read the rule

11. COSTS

- Ordinary rule of costs
- Costs in interlocutory applications

Please also read the **Guide for Legal Costs**

Punitive costs

Borcherds and Another v Duxbury and Others 2021 (1) SA 410 (ECP) at paras [40] to [43]:

- An overzealous party who abuses the rules of court or wrongly misinterprets a contract to get an unfair or undue advantage will be mulcted with costs on a punitive scale.
- The normal rule is costs follow the result on a party and party scale.

The *Biowatch* rule compared to the public function rule, the conduct of the parties rule, the abuse of process rule and the SLAPP suit rule:

Biowatch Trust v Registrar, Genetic Resources, and Others 2009 (6) SA 232 (CC) at paras [42] to [49], [56] and [60]:

- In assessing costs, omission of a constitutional dimension constitutes a serious misdirection.
- The general rule for an award of costs in constitutional litigation between a private party and the State is that if the private party is successful, it should have its costs paid by the State.
- And if unsuccessful, each party should pay its own costs.

- The general point of departure in a matter where the State is shown to have failed to fulfil its constitutional and statutory obligations –
    - and where different private parties are affected, should be as follows:
        - the State should bear the costs of litigants who have been successful against it; and
        - ordinarily there should be no costs orders against any private litigants who have become involved.
- This approach locates the risk for costs at the correct door – at the end of the day, it was the State that had control over its [own] conduct.

Compared to the **public function rule:**

Minister of Water and Sanitation v Sembcorp Siza Water (Pty) Ltd 2023 (1) SA 1 (CC) at para [91]:

- When a private company performs a public function on behalf of a municipality, it should be treated as an organ of state with regard to the rule on costs.
- Consequently, the protection in *Biowatch* does not extend to it.
- The *Biowatch* protection applies to private litigants who lose a case against the state.

Compared to the **conduct of the parties rule:**

Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality 2023 (2) SA 31 (CC) at para [59]:

- Where an applicant is unsuccessful, but raised constitutional issues of considerable import in an effort to vindicate its rights.
- Ordinarily, each party should bear their own costs.
- However, in light of the municipality's reprehensible conduct, the applicant was entitled to all its costs, including the costs of two counsel.

Compared to the **abuse of process rule:**

Mineral Sands Resources (Pty) Ltd v Reddell 2023 (2) SA 68 (CC) at paras [69] and [70] –

- a clear distinction must be made between an abuse of process concerning the rules of court;
- compared to the abuse of process of vexatious, unmeritorious and intimidatory litigation, like SLAPP suits.

Which rule includes SLAPP suits
Mineral Sands Resources (Pty) Ltd v Reddell 2023 (2) SA 68 (CC) at paras [76], [77], [90] and [98]:

- There are different types of cases dealing with abuse. Cases illustrate the fact that –
    - sometimes, motive is constitutive of the cause of action, for example, in a malicious prosecution;
    - sometimes, the reason for the action is irrelevant, it is the legality of the action that counts for example, in an unlawful arrest;
    - sometimes, it is the gross abuse of the court's processes that warrants sanction; and
    - SLAPP cases use the processes of the court with no evident abuse but to achieve an end that may be harmful for other reasons.
- The SLAPP suit defence forms part of our law.

12. PARTICULAR KINDS OF APPLICATIONS

12.1. *Default judgment/judgment by confession*

Rule 31 and commentary thereon in Erasmus.
Rule 26 – failure to deliver pleadings – barring – to read on your own, please.

Havenga v Parker 1993 (3) SA 724 (T) at the headnote –

- 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;
- this often saves costs and eliminates the unnecessary wastage of court time;
- this practice is to be encouraged; and
- the court retains the power to require *viva voce* evidence, where evidence is considered advisable.

Nedbank Ltd v Fraser & Four Other Cases 2011 (4) SA 363 (GSJ) at para [47] –

- in default judgments; or
- unopposed summary judgments against immovable property of a person's home –
    - the judicial oversight required by s 26(3) of the Constitution requires more;
    - rule 31(2)(a) permits a court to hear evidence;
    - this procedure permits a court to receive evidence on affidavit;
    - rule 31(5) permits the registrar to request and receive written and oral submissions.

Relevance of the National Credit Act 34 of 2005
Special requirements for declaring property specially executable:

o Form of notice of motion – see Form 2A.
o Content of affidavits – see rules 46 and 46A – for your own reading, please.
o Service requirements.

Sebola and Another v Standard Bank of South Africa Ltd 2012 (5) SA 142 (CC) at paras [2], [45] to [54], [61] and [87].

Subject to your reading, the following points may be drawn from the case cited above

- The requirement that a credit provider provide notice in terms of s 129(1)(a) to the consumer must be understood in conjunction with s 130, which requires delivery of the notice.
- The statute, though giving no clear meaning to 'deliver', requires that the credit provider seeking to enforce a credit agreement aver and prove that the notice was delivered to the consumer.
- Where the credit provider posts the notice,
    - proof of registered despatch to the address of the consumer,
    - together with proof that the notice reached the appropriate post office for delivery to the consumer,
    - will in the absence of contrary indication constitute sufficient proof of delivery.
- If, in contested proceedings the consumer avers that the notice did not reach him or her, the court must establish the truth of the claim.
- If it finds that the credit provider has not complied with section 129(1), it must in terms of section 130(4)(b) adjourn the matter and set out the steps the credit provider must take before the matter may be resumed.

o Sale in execution values (**Rule 43A**) – for your own reading, please.

o *Jaftha v Schoeman and Others; van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC):

- Where there are circumstances it would be unjustifiable to order execution because the advantage that attached to a creditor who sought execution would be far outweighed by the immense prejudice and hardship caused to the debtor, no order will be granted.
- Section 26(1) of the Constitution applies.
- Please read the entire case on your own.

o *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA):

- At issue in the *Jaftha* case was section 26(1) of the Constitution and the impact of that right on execution against residential property. (Section 26(3) was relevant in the event of eviction consequent upon a sale in execution. That was not in issue in *Jaftha*.)
- Section 26(1) did not confer a right of access to housing *per se* but only a right of access to 'adequate' housing. This concept is of necessity relative.
- In *Jaftha* the sale in execution had deprived the debtor of entitlement to the home because she had been unable to pay a relatively trifling extraneous debt, and no judicial oversight was interposed to preclude an unjustifiably disproportionate outcome.
- The situation in this *Saunderson* case is thus radically different from that in *Jaftha*.
- In *Saunderson*, the property owners had willingly bonded their property to the bank to obtain capital.
- Their debt was not extraneous, but fused into the title to the property.

o *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC):

- In sales of homes in execution after judgment on money debt.
- Execution may only follow upon judgment in a court of law –
    - judicial oversight is required where execution is sought against the homes of indigent debtors after judgment on a money debt.

- Bondholders who wish to execute on a mortgage bond must first approach a court of law for it to make a proper determination as to whether the sale in execution of a person's home is justifiable in the circumstances of the case.
- It is unconstitutional for a registrar to declare immovable property specially executable when ordering default judgment under rule 31(5) of the Uniform Rules of Court to the extent that this permits the sale in execution of a person's home.

- The judgments in *Nedbank Ltd v Mortinson* 2005 (6) SA 462 (W); [2006] 2 All SA 506 (W); and *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA); 2006 (9) BCLR 1022 (SCA); [2006] 2 All SA 382 (SCA) are overruled, to the extent that they held that a registrar is constitutionally competent to make execution orders when granting default judgment in terms of rule 31(5)(b).

- Relief and retrospectivity: Persons affected by the above ruling have to approach the courts to have affected sales and transfers set aside.
    - Aggrieved debtors will have to show – in addition to the normal requirements for rescission –
        - that a court, with full knowledge of all the relevant facts existing at the time of the granting of default judgment;
        - would nevertheless have refused leave to execute against the debtor's home;
        - after this the question of the effect of invalid execution sales and subsequent transfers will have to be considered in the light of the applicable principles.
- Please read the entire case on your own.

o *Nkata v FirstRand Bank Ltd* 2016 (4) SA 257 (CC) at paras [94] to [126]:

- Unlike in the past, the sheer raw financial power difference between the credit giver and its much-needed but weaker counterpart, the credit consumer, will not always rule the roost.
- Sections 129(3) and (4) have introduced the novel relief of reinstatement.
- Once the consumer makes specified overdue payments, the agreement is reinstated.
- The reinstatement occurs by operation of law.
- This is so because the wording of the provision is clear that the consumer's payment in the prescribed manner is sufficient to trigger reinstatement.
- What are 'all amounts that are overdue'?
- Only the arrear instalments, and not the full accelerated debt, needed to be paid in order to effect reinstatement.
- Reinstatement may occur only before the credit provider has cancelled the agreement.
- If the acceleration clause is resorted to while the contract subsists and the bank demands full payment it is not the same thing as cancellation of the agreement for breach.
- The credit provider is required to take the appropriate steps if it wants to recover the costs for enforcing an agreement with the consumer.
- The legal costs would become due and payable only when they are reasonable, agreed or taxed, and on due notice to the consumer.

o *Bayport Securitisation Ltd v University of Stellenbosch Law Clinic* 2022 (2) SA 343 (SCA) at para [3]:

- While the object of the NCA is largely to protect consumers, the interests of creditors must also be safeguarded and should not be overlooked.

o *Bestbier and Others NNO v Nedbank Ltd* 2023 (4) SA 25 (SCA) at paras [26] to [28] and [32]:

- Rule 46A requires a preceding enquiry in all cases where the immovable property of the judgment debtor is used as residential immovable property.
- Vulnerable and poor beneficiaries of a trust who use the trust's immovable property as their home ought not to be barred from the protection of s 26 of the Constitution merely because the judgment debtor is a trust and not a natural person.

12.2. *Eviction applications*

o **Difference between commercial and residential evictions**

Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd 2016 (1) SA 621 (CC) (2016 (1) BCLR 28; [2015] ZACC 34)

Although the *Mighty* case is not in the reading list, it is a useful case for your practice as an attorney

- The common-law rule that the subtenant cannot raise the sublessor's lack of title as a defence in an action for eviction flows naturally from the rule that a valid lease is not dependent on the title of the landlord.
    - Unless expressly agreed, a landlord does not warrant that it is entitled to let.
    - The rule is well-established and not in need of constitutional development.
- The Court accordingly held that Engen, the holder of the head lease, could evict Orlando, its subtenant who ran an Engen-branded service station on the premises,
    - despite the fact that Engen's head lease with the site owner had terminated
    - before the commencement of the [commercial] eviction proceedings
- In a commercial dispute between two private parties costs should follow the result.
- Orlando's conduct in bringing in a completely new argument to this court does not mitigate its circumstances.

o **Residential evictions: Requirements under PIE**

Grobler v Phillips and Others 2023 (1) SA 321 (CC) at paras [23] and [34] **read with** para [36], then paras [37] to [48]:

- The question whether the constitutional rights of the unlawful occupier are affected by the eviction is one of the relevant considerations.
- But the wishes or personal preferences of the unlawful occupier are not relevant.
- PIE was enacted to prevent the arbitrary deprivation of property.
- PIE is not designed to allow for the expropriation of land from a private landowner from whose property the eviction is being sought.
- There is no obligation on a private landowner to provide alternative accommodation to an unlawful occupier.

Meme-Akpta and Another v Unlawful Occupiers at 44 Nugget Street 2023 (3) SA 649 (GJ) – Headnote:

- Applicants were owners of a building who sought eviction of approximately 200 destitute individuals who occupied the property without right to do so
- The individuals fell within the category of unlawful occupiers in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), and

    - so the eviction application was required to follow the procedure provided in s 4 of PIE and the Practice Manual of the Gauteng Division
    - The procedure was, however, not followed, and the application consequently dismissed
- In coming to its decision, the court collated the procedure in s 4 and the Practice Manual, as set out in paras [12] and [13].
- Please read paras [12] and [13] of the judgment in particular

o **Please read the entire case on your own**.

Cape Killarney Property Investments (Pty) Ltd v Mahamba 2000 (2) SA 67 (C) [confirmed on appeal: *Cape Killarney Property Inv (Pty) Ltd v Mahamba* 2001 (4) SA 1222 (SCA)] at paras [13] to [21], especially para [18]:

- Notices under PIE need to be effective.
- When dealing with illiterate people written notices must be read to the illegal occupiers in their own language to be effective.

o Municipal joinder.
o Service.
o Risk of homelessness.
o Process – the correct process is required: see *Meme-Akpta* above at para [13].

12.3. *Summary judgment*
Rule 32 (as amended) – for your own reading, please.

FirstRand Bank Ltd t/a First National Bank v Moonsammy t/a Synka Liquors 2021 (1) SA 225 (GJ):

- To obtain summary judgment a plaintiff must plead a full cause of action:
    - Here the plaintiff omitted to give notice of breach as required in the written contract.
    - The debt had accordingly not become due.
    - The s 129 notice did not cure the failure to abide by the contract's breach clause.
- Failure to serve an s 129 notice before commencing action, cannot be cured by attaching the notice to the particulars of claim.
- Delivery of the s 129 notice is a prior step before issuing summons.
- Delivery of the s 129 notice to the wrong address is not proper delivery.
- The court must adjourn an application for summary judgment pending adequate delivery.

Ingenuity Property Investments (Pty) Ltd v Ignite Fitness (Pty) Ltd 2023 (5) SA 439 (WCC) – Headnote:

- Under the new rule 32, an application for summary judgment may be brought together with, or even after, delivery of a replication.
- Rule 32(2)(b) requires a plaintiff, in the affidavit in support of its application for summary judgment, to explain briefly why the defence as pleaded does not raise any issue for trial.
- A replication, serves as a response to defences raised in the plea.
- As such, a replication serves to explain why the defences do not raise triable issues.
- A replication performs a similar function to the summary judgment affidavit.
- Accordingly, a plaintiff should be allowed to deliver its replication simultaneously with its application for summary judgment and to incorporate by reference the allegations in the replication.

Absa Bank Ltd v Meiring 2022 (3) SA 449 (WCC): The whole of this case is important for all lawyers in South Africa. Vital to understand is the concept of **pleading over** despite the temporary advantage a litigant may gain by a special plea or point *in limine*.
You should read this case:
https://www.saflii.org/za/cases/ZAWCHC/2022/31.html

- A general practice had developed in the Cape to the effect that it was unnecessary for a defendant to 'plead over' when filing a special plea.
- The amended Uniform Rule 32(2)(*b*) requires the plaintiff in its affidavit accompanying its application for summary judgment, *inter alia*, to explain briefly why the defence *as pleaded* did not raise any issue for trial.
- In future, defendants who raise a special plea, must nevertheless plead over.

Consider the nuance here:
City Square Trading 522 (Pty) Ltd v Gunzenhauser Attorneys (Pty) Ltd 2022 (3) SA 458 (GJ) at para [29] –

- rule 32(4) should not deprive the plaintiff of its rights under rule 28(8) but rather as a prohibition against introducing factual matter which is a reply or rejoinder to the defendant's case; **and**
- which is not consequential on the amendment of the plea.

Hennie Ehlers Boerdery CC v APL Cartons (Pty) Ltd 2024 (1) SA 149 (ECGq)

- Rule 32 – summary judgment – was recently amended
  - (i) to prevent a plaintiff from applying for summary judgment before the defendant delivered a plea; and
  - (ii) to require the plaintiff to deliver a more detailed affidavit than the formulaic one previously allowed.
- Rule 32(2)(b) requires the affidavit:
  - to verify the cause of action and the amount, if any, claimed and
  - to identify any point of law relied upon and the facts upon which the plaintiff's claim is based, and
  - to explain briefly why the defence as pleaded does not raise any issue for trial
- While the amended rule 32 was not a model of clarity and would likely increase the judges' workload and parties' costs, it was clear that the requirements for a rule 32(2) affidavit were substantive rather than formal in nature
- Accordingly, rule 30 was not the appropriate procedural mechanism to address complaints that rule 32 affidavits exceeded the ambit of what was permissible
- Whether the plaintiff's supporting affidavit met the substantive requirements of subrule 32(2)(b) and the merits of the defendant's complaints were therefore matters for the court hearing the summary judgment application

12.4. ***Interdicts*** (LAWSA, vol 11, 2ed, paras 389 to 428 and 429 to 435)
Interdicts and mandamenten van spolie

Interim interdicts:
You are particularly required to understand the distinctions between:

(a) applications for final relief;
(b) applications for interim relief;
(c) rules *nisi* and two-part applications; and
(d) orders operating as interim interdicts:
and to be able to draft appropriate prayers and 'draft orders' illustrating same.

Public Protector of South Africa v Speaker, National Assembly and Others 2023 (4) SA 205 (WCC) at paras [3] – [7]:

- In part A of the application the applicant sought an interim interdict prohibiting the President from suspending her –
    - and the withdrawal of the letter in which the President sought representations regarding her possible suspension.
- The President suspended the applicant on 9 June 2022.
- On 10 June 2022, a full court dismissed all the relief sought by the applicant in the part A.
- In the part B proceedings before this court, the applicant was granted leave to file an amended notice of motion which was a necessary consequence of the decision of the court in the part A proceedings.
- Because the applicant was suspended, she now sought an order in terms of s 172(1) of the Constitution declaring the decision of the President to suspend her on 9 June 2022 to be irrational, unconstitutional and invalid.

Saharawi Arab Democratic Republic v Owners and Charterers of the Cherry Blossom 2017 (5) SA 105 (ECP) at paras [49] – [50]:

- For an interim interdict an applicant is required to establish four elements –
    - a *prima facie* right, which may even be open to some doubt;
    - an apprehension of irreparable harm if the interdict is not granted;
    - a balance of convenience in favour of the grant of the interdict; and
    - the absence of any other satisfactory remedy.

- An applicant for an interim interdict pending a vindicatory action:
    - need not allege irreparable loss inasmuch as there is a presumption –
        - which may be rebutted by the respondent;
    - that the injury is irreparable;
    - nor does the applicant need to show there is no other satisfactory remedy.

Note the nuance below:
Camps Bay Residents and Ratepayers Association v Augoustides 2009 (6) SA 190 (WCC) at paras [7] – [8].

- The requirements an applicant for an interim or interlocutory interdict has to satisfy are –
    (a) a *prima facie* right;
    (b) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;
    (c) a balance of convenience in favour of the granting of the interim relief; and
    (d) the absence of any other satisfactory remedy.
- The stronger the prospects of success (ie, the strength of the applicant's case), the less the need for the balance of convenience to favour the applicant; the weaker the prospects of success, the greater the need for the balance of convenience to favour the applicant.

12.5. ***Insolvency*** (LAWSA, vol 11, 2ed, paras 199 – 365)
See the LPC Library online.

You are required to know –
(a) the essential requirements and differences between; and
(b) the procedures and requirements involved in the following applications:
- Provisional sequestration – section 10 of the Insolvency Act 24 of 1936.
- Sequestration – sections 9 – 17 of the Insolvency Act.
- Friendly sequestration – *Ex parte Arntzen (Nedbank Ltd as Intervening Creditor)* 2013 (1) SA 49 (KZP) at para [12]:

  > "Voluntary surrender applications therefore require an even higher level of disclosure than do 'friendly' sequestrations."
- Surrender – sections 3 – 17 of the Insolvency Act.
- Rehabilitation – sections 124 – 130 of the Insolvency Act.
- Liquidation.
- Business rescue – section 131 as part of chapter 6 of the Companies Act 71 of 2008.
- Purpose.
- Requirements.
- Process, service and publication.
- Ending business rescue.

Notes to candidates:
- In any examination of the topics listed under 12.5 *Insolvency*, the exam paper will include the relevant sections of the statute in question.
- **You are not required to learn the sections in the statutes by heart**.
- In practice, competent attorneys and advocates read the statutes and regulations before taking instructions from their clients and before drafting papers.
- After reading the law, you take instructions from your clients.
- In taking instructions, competent practitioners use the approach of:
  - facts first;
  - law later.
- Competent lawyers listen to their clients.
- Then competent lawyers apply the law to the facts.
- In short, competent lawyers listen and think before they ink.

12.6. ***Applications for Anton Piller (search and seizure) orders***
- **Erasmus, Anton Piller Type Orders**

Viziya Corporation v Collaborit Holdings (Pty) Ltd and Others 2019 (3) SA 173 (SCA):
- An Anton Piller order is directed at preserving evidence that would otherwise be lost or destroyed –
  - it was not a form of early discovery;
  - it is not a mechanism for a plaintiff to search for evidence to ascertain whether it may have a cause of action.
- The cause of action must already exist.
- Then the evidence to be preserved must be identified [clearly and carefully].

See also: https://www.saflii.org/images/Practice_Manual_Gauteng.pdf at **16.29 Anton Piller Order** at pages 204 to 209.

12.7. *De lunatico inquirendo*, curators *ad litem*, *ad personam* and *bonis* – for your own reading.
Rule 57.

12.8. *Rule 43 procedures*
Rule 43:
Du Preez v Du Preez 2009 (6) SA 28 (T) at paras [3] – [6]:

- Prolixity in a rule 43 proceeding is an abuse of process because it defeats the purpose or object of the rule.

Overruled by a Full Bench in *E v E* 2019 (5) SA 566 (GJ):

- Relevance should govern the length of the papers;
- So long as material was relevant, it should be admitted;
- Any predetermined length restriction would likely be unconstitutional.

12.9. *Reviews* – for your own reading, please.
Rule 53:
Sections 3, 5, 6, 7 and 8 of the Promotion of Administrative Justice Act 3 of 2000.
Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA) at para [26]:

- Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked.

12.10. *Interpleaders* – for your own reading please.
Rule 58: See participation by other parties above.

12.11. *National Credit Act*
National Credit Act sections 65, 86, 88, 129 and 130.
See the LPC online library.

Collett v First Rand Bank Ltd 2011 (4) SA 508 (SCA)
Subject to your reading, the following points may be drawn from the case cited above

- A credit provider may terminate a debt review in terms of s 86(10) of the NCA even after the matter has been referred to the magistrates' court for a rearrangement order in terms of s 87 of the NCA.

Rossouw v First Rand Bank 2010 (6) SA 439 (SCA), [2011] 2 All SA 56 (SCA)
Subject to your reading, the following points may be drawn from the case cited above

- The despatch of a section 129(1)(a) notice by a credit provider in a manner chosen by a consumer from
- Six alternatives provided in s 65(2)(a) of the Act - namely,
    - in person at the credit provider's business premises or
    - at any location chosen by the consumer at his expense, or
    - by ordinary mail, or
    - by fax, or
    - by e-mail or
    - by printable web-page

- is sufficient to establish compliance with the subsection,
- actual receipt of the notice being the consumer's responsibility.
- Section 130(2) of the National Credit Act has no application to mortgage agreements since the subsection deals only with credit agreements relating to movable property.

- The summons or certificate of compliance must contain allegations of the manner in which the section 129(1)(a) notice was delivered, to place a court in a position to determine whether there was delivery in terms of the NCA
- While section 65(2)(b) obliges a credit provider to deliver the notice in a manner chosen in s 65(2)(a).
    - Credit providers cannot reserve other options for delivery
    - credit agreements should provide for all the specified delivery alternatives, so that a consumer may make an informed choice of a service address.

Nedbank v National Credit Regulator 2011 (3) SA 581 (SCA), [2011] 4 All SA 131 (SCA)
Subject to your reading, the following points may be drawn from the case cited above

- Section 103(5) of the NCA abolishes the common-law *in duplum* rule insofar as it concerns credit agreements within the ambit of the NCA.
- Once the amounts referred to in section 101(1)(b) – (g) that accrue during the period of default, whether or not they are paid, equal in aggregate the unpaid balance of the principal debt at the time the default occurs, no further charges may be levied.
    - under the statutory rule, all the amounts — such as the
        - initiation fees,
        - service fees,
        - interest (contractual and default),
        - costs of any credit insurance,
        - default administration charges, and
        - collection costs
    - cease to run if they combine to exceed the outstanding principal debt

Sebola v Standard Bank 2012 (5) SA 142 (CC) – see service requirements above.
Subject to your reading, the following points may be drawn from the case cited above

- The requirement that a credit provider provide notice in terms of s 129(1)(a) to the consumer must be understood in conjunction with s 130, which requires delivery of the notice.
- The statute, though giving no clear meaning to 'deliver', requires that the credit provider seeking to enforce a credit agreement aver and prove that the notice was delivered to the consumer.
- Where the credit provider posts the notice,
    - proof of registered despatch to the address of the consumer,
    - together with proof that the notice reached the appropriate post office for delivery to the consumer,
    - will in the absence of contrary indication constitute sufficient proof of delivery.
- If, in contested proceedings the consumer avers that the notice did not reach him or her, the court must establish the truth of the claim.
- If it finds that the credit provider has not complied with section 129(1), it must in terms of section 130(4)(b) adjourn the matter and set out the steps the credit provider must take before the matter may be resumed.

Kubyana v Standard Bank 2014 (3) SA 56 (CC)

Subject to your reading, the following points may be drawn from the case cited above

- Section 65 of the NCA specifies that documents delivered under the Act must be made available to the recipient through one or more of [the six] enumerated mechanisms.
- If the consumer has chosen a particular mode of delivery from the enumerated options, the document must be delivered in accordance with that election.
- The consumer chose delivery by the postal service of registered mail.
- The NCA does not require a credit provider to bring the contents of a s 129 notice to the subjective attention of a consumer.
    - Delivery consists of taking certain steps, prescribed by the NCA, to apprise a reasonable consumer of the notice.
    - The credit provider's obligation is to make the s 129 notice available to the consumer by having it delivered to a designated address.
    - When the consumer has elected to receive notices by way of the postal service, the credit provider's obligation to deliver
        - consists of dispatching the notice by registered mail,
        - ensuring that the notice reaches the correct branch of the Post Office for collection
        - and ensuring that the Post Office notifies the consumer (at the designated address) that a registered item is awaiting collection.
- The ultimate question is whether delivery as envisaged in the NCA was effected. In each case, this must be determined by evidence.

APPEAL PROCEDURES

Finally, a note where to find the appeal procedures.

- Start with the Superior Courts Act 10 of 2013
    - Read Chapter 5 on orders of constitutional invalidity, appeals and settlement of conflicting decisions: sections 15 to 20 and
    - Chapter 6 on provisions applicable to the High Court only: sections 21 to 28.

- Then read the:
    - Rules of the Supreme Court of Appeal, GN R1523 of 1998 as amended to include GN R5561 in GG 51627 of 22 November 2024.
      https://www.saflii.org/images/superiorcourts/Rules%20of%20the%20Supreme%20Court%20of%20Appeal%20[Fin].pdf
    - Constitutional Court Rules, 2003, GN R1675 of 2003 at Part VIII, Direct Access and Appeals: rules 18 to 21.
      https://www.saflii.org/za/legis/consol_reg/rotcc369/
    - Uniform Rules of Court, published under GN R48 in GG 999 of 12 January 1965 amended to include GN R6504 in GG 53149 of 15 August 2025: rules 48 to 52.
      https://www.saflii.org/images/superiorcourts/Uniform%20Rules%20of%20Court%20[F].pdf

Nicholas J. Tee
January/February 2026