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**IN THE HIGH COURT OF SOUTH AFRICA  
FREE STATE PROVINCIAL DIVISION**

Reportable  
**Case no: 3832/2023**

In the matter between:

**INZALO ENTERPRISE MANAGEMENT SYSTEMS (PTY) LTD**      Applicant<sup>1</sup>

and

**THE MANTSOPA LOCAL MUNICIPALITY**      Respondent<sup>2</sup>

**Coram:**      Opperman J

**Heard:**      7 September 2023

**Delivered:**      22 November 2023. The judgment was handed down in court and electronically by circulation to the parties' legal representatives *via* email and released to SAFLII on 22 November 2023. The date and time of hand-down is deemed to be 15h00 on 22 November 2023

**Summary:**      Rule 6(12) – process of enrollment after matter struck from the roll for lack of urgency – interlocutory application to have enrollment of application set aside as an irregular step – irregular amendment of notice of motion

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<sup>1</sup> “Inzalo”. Inzalo is the applicant in the main application.

<sup>2</sup> “The Municipality”. The Municipality is the applicant in the rule 30/30A – application. This is the application that stands to be adjudicated here.

## JUDGMENT

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[1] The judgment turns on the enrollment of an application after it was struck from the roll for lack of urgency.

[2] The Municipality filed and served a notice of interlocutory application in terms of uniform rule 30(1)<sup>3</sup> read with uniform rule 30A(2).<sup>4</sup> They maintain enrollment of Inzalo's application is irregular and stands to be set aside. Their prayers are:

1. That the enrollment of the application, alternatively the notice of enrollment be set aside.
2. That the applicant in the main application, Inzalo Enterprise Management Systems (Pty) Ltd, pays the costs of the application.

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<sup>3</sup> 30 Irregular proceedings

- (1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.  
[Subrule (1) substituted by GN R2164 of 2 October 1987, by GN R2642 of 27 November 1987 and by GN R1883 of 3 July 1992.]
- (2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if —
  - (a) the applicant has not himself taken a further step in the cause with knowledge of the irregularity;
  - (b) the applicant has, within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days;
  - (c) the application is delivered within fifteen days after the expiry of the second period mentioned in paragraph (b) of subrule (2).  
[Subrule (2) substituted by GN R1883 of 3 July 1992 and amended by GN R2047 of 13 December 1996.]
- (3) If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet.
- (4) Until a party has complied with any order of court made against him in terms of this rule, he shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order.  
[Subrule (4) substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]
- (5) . . .  
[Subrule (5) deleted by GN R2047 of 13 December 1996.]

<sup>4</sup> 30A Non-compliance with Rules and Court Orders

[Heading substituted by GN R2133 of 3 June 2022.]

- (1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, or with an order or direction made by a court or in a judicial case management process referred to in rule 37A, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days from the date of delivery of such notification, to apply for an order —
  - (a) that such rule, notice, request, order or direction be complied with; or
  - (b) that the claim or defence be struck out.  
[Subrule (1) substituted by GN R2133 of 3 June 2022.]
- (2) Where a party fails to comply within the period of 10 days contemplated in subrule (1), application may on notice be made to the court and the court may make such order thereon as it deems fit.  
[Rule 30A inserted by GN R881 of 26 June 1998 and substituted by GN R842 of 31 May 2019.]

- [3] The two issues whereupon the enrollment of the application is challenged are that Inzalo amended the notice of motion without doing so in terms of the provisions of rule 28<sup>5</sup> and the main application was not enrolled in terms of uniform rule 6(5)(a).<sup>6 7</sup>

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28 Amendments to pleadings and documents

- (1) Any party desiring to amend any pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.
- (2) The notice referred to in subrule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected.
- (3) An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded.
- (4) If an objection which complies with subrule (3) is delivered within the period referred to in subrule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend.
- (5) If no objection is delivered as contemplated in subrule (4), every party who received notice of the proposed amendment shall be deemed to have consented to the amendment and the party who gave notice of the proposed amendment may, within 10 days of the expiration of the period mentioned in subrule (2), effect the amendment as contemplated in subrule (7).
- (6) Unless the court otherwise directs, an amendment authorized by an order of the court may not be effected later than 10 days after such authorization.
- (7) Unless the court otherwise directs, a party who is entitled to amend shall effect the amendment by delivering each relevant page in its amended form.
- (8) Any party affected by an amendment may, within 15 days after the amendment has been effected or within such other period as the court may determine, make any consequential adjustment to the documents filed by him, and may also take the steps contemplated in rules 23 and 30.
- (9) A party giving notice of amendment in terms of subrule (1) shall, unless the court otherwise directs, be liable for the costs thereby occasioned to any other party.
- (10) The court may, notwithstanding anything to the contrary in this rule, at any stage before judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit.

[Rule 28 substituted by GN R181 of 28 January 1994.]

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The Municipality's heads of argument from pages 2 to 18.

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Rule 6 Applications

- (1) Every application must be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief.  
[Subrule (1) substituted by GN R2133 of 3 June 2022.]
- (2) When relief is claimed against any person, or where it is necessary or proper to give any person notice of such application, the notice of motion must be addressed to both the registrar and such person, otherwise it must be addressed to the registrar only.
- (3) . . .  
[Subrule (3) repealed by GN R2133 of 3 June 2022.]
- (4) (a) Every application brought *ex parte* upon notice to the registrar supported by an affidavit as aforesaid must be filed with the registrar and set down, before noon on the court day but one preceding the day upon which it is to be heard. If brought upon notice to the registrar, such notice must set forth the form of order sought, specify the affidavit filed in support thereof, request the registrar to place the matter on the roll for hearing, and be as near as may be in accordance with Form 2 of the First Schedule.  
[Paragraph (a) substituted by GN R2133 of 3 June 2022.]
- (b) Any person having an interest which may be affected by a decision on an application being brought *ex parte*, may deliver notice of an application for leave to oppose, supported by an

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affidavit setting forth the nature of such interest and the ground upon which such person desires to be heard, whereupon the registrar must set such application down for hearing at the same time as the initial application.

- (c) At the hearing the court may grant or dismiss either of or both such applications as the case may require or may adjourn the same upon such terms as to the filing of further affidavits by either applicant or otherwise as it deems fit.
- (5) (a) Every application other than one brought *ex parte* shall be brought on notice of motion as near as may be in accordance with Form 2(a) of the First Schedule and true copies of the notice, and all annexures thereto, shall be served upon every party to whom notice thereof is to be given.  
[Paragraph (a) substituted by GN R3397 of 12 May 2023.]
- (b) In a notice of motion, the applicant shall —
  - (i) appoint an address within 25 kilometers of the office of the registrar and an electronic mail address, if available to the applicant, at either of which addresses the applicant will accept notice and service of all documents in such proceedings;
  - (ii) state the applicant's postal or facsimile addresses where available; and
  - (iii) set forth a day, not less than 10 days after service thereof on the respondent, on or before which such respondent is required to notify the applicant, in writing, whether respondent intends to oppose such application, and shall further state that if no such notification is given the application will be set down for hearing on a stated day, not being less than 10 days after service on the said respondent of the said notice;
 Provided that —
  - (aa) for the purposes of this subrule, the days between 21 December and 7 January, both inclusive, shall not be counted in the time allowed for delivery of the notice of intention to oppose or delivery of any affidavit;
  - (bb) the provisions of subparagraph (aa) shall not apply to applications brought under subrule 6(12) of this rule and applications brought under rule 43.
 [Paragraph (b) substituted by GN R1055 of 29 September 2017 and by GN R3397 of 12 May 2023.]
- (c) If the respondent does not, on or before the day mentioned for that purpose in such notice, notify the applicant of an intention to oppose, the applicant may place the matter on the roll for hearing by giving the registrar notice of set down before noon on the court day but one preceding the day upon which the same is to be heard.
- (d) Any person opposing the grant of an order sought in the notice of motion shall —
  - (i) within the time stated in the said notice, give applicant notice, in writing that such person intends to oppose the application, and in such notice appoint an address within 25 kilometers of the office of the registrar and an electronic mail address, if available to such person, at either of which addresses such person will accept notice and service of all documents, as well as such person's postal or facsimile addresses where available;
  - (ii) within 15 days of notifying the applicant of intention to oppose the application, deliver such person's answering affidavit, if any, together with any relevant documents; and
  - (iii) if such person intends to raise any question of law only such person shall deliver notice of intention to do so, within the time stated in the preceding sub-paragraph, setting forth such question.
 [Paragraph (d) substituted by GN R2133 of 3 June 2022 and by GN R3397 of 12 May 2023.]
- (e) Within 10 days of the service upon the respondent of the affidavit and documents referred to in sub-paragraph (ii) of paragraph (d) of subrule (5) the applicant may deliver a replying affidavit. The court may in its discretion permit the filing of further affidavits.
- (f) (i) Where no answering affidavit or notice in terms of sub-paragraph (iii) of paragraph (d), is delivered within the period referred to in sub-paragraph (ii) of paragraph (d) the applicant may within five days of the expiry thereof apply to the registrar to allocate a date for the hearing of the application.
- (ii) Where an answering affidavit is delivered the applicant may apply for such allocation within five days of the delivery of a replying affidavit or, if no replying affidavit is delivered, within five days of the expiry of the period referred to in paragraph (e) and where such notice is delivered the applicant may apply for such allocation within five days after delivery of such notice.

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(iii) If the applicant fails so to apply within the appropriate period aforesaid, the respondent may do so immediately upon the expiry thereof. Notice in writing of the date allocated by the registrar shall be given by the applicant or respondent, as the case may be, to the opposite party within five days of notification from the registrar.

[Subparagraph (iii) substituted by GN R3397 of 12 May 2023.]

- (g) Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.
- (h) . . .  
[Paragraph (h) repealed by GN R2133 of 3 June 2022.]
- (6) The court, after hearing an application whether brought ex parte or otherwise, may make no order thereon (save as to costs if any) but grant leave to the applicant to renew the application on the same papers supplemented by such further affidavits as the case may require.
- (7) (a) Any party to any application proceedings may bring a counter-application or may join any party to the same extent as would be competent if the party wishing to bring such counter-application or join such party were a defendant in an action and the other parties to the application were parties to such action. In the latter event the provisions of rule 10 will apply.
- (b) The periods prescribed with regard to applications apply to counter-applications: Provided that the court may on good cause shown postpone the hearing of the application.
- (8) Any person against whom an order is granted ex parte may anticipate the return day upon delivery of not less than twenty-four hours' notice.
- (9) A copy of every application to court in connection with the estate of any person deceased, or alleged to be a prodigal, or under any legal disability, mental or otherwise, must, before such application is filed with the registrar, be submitted to the Master for consideration and report; and if any person is to be suggested to the court for appointment as curator to property, such suggestion must likewise be submitted to the Master for report. Provided that the provisions of this subrule do not apply to any application under rule 57 except where that rule otherwise provides.
- (10) The provisions of subrule (9) further apply to all applications for the appointment of administrators and trustees under deeds or contracts relating to trust funds or to the administration of trusts set up by testamentary disposition.
- (11) Notwithstanding the foregoing subrules, interlocutory and other applications incidental to pending proceedings may be brought on notice supported by such affidavits as the case may require and set down at a time assigned by the registrar or as directed by a judge.
- (12) (a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as it deems fit.
- (b) In every affidavit filed in support of any application under paragraph (a) of this subrule, the applicant must set forth explicitly the circumstances which is [sic] averred render [sic] the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course.  
[Paragraph (b) substituted by GN R2133 of 3 June 2022.]
- (c) A person against whom an order was granted in such person's absence in an urgent application may by notice set down the matter for reconsideration of the order.
- (13) In any application against any Minister, Deputy Minister, Member of an Executive Council, officer or servant of the State, in such capacity, the State or the administration of any province, the respective periods referred to in paragraph (b) of subrule (5), or for the return of a rule nisi, must be not less than 15 days after the service of the notice of motion, or the rule nisi, as the case may be, unless the court has specially authorized a shorter period.
- (14) The provisions of rules 10, 11, 12, 13 and 14 apply to all applications.

[4] The Constitutional Court in *Mukaddam v Pioneer Foods (Pty) Ltd and Others* (CCT 131/12) [2013] ZACC 23; 2013 (5) SA 89 (CC); 2013 (10) BCLR 1135 (CC) (27 June 2013) declared that:

1. In our constitutional dispensation everyone is guaranteed access to a competent court to have their dispute resolved by the application of law and decided in a fair manner. But this guarantee does not include the right to choose the method of approaching and placing a dispute before a particular court. The determination of the process to be followed when litigants approach courts is left in the hands of the courts. (Accentuation added)

[5] Counsel for Inzalo correctly pointed out in their heads of argument:

... There is no rule dealing with the re-enrolment of an urgent application struck from the roll. When referring to “*compliance*”, it is submitted that the Constitutional Court in *Hawker* had in mind compliance with the rules of practice of any particular division. Similarly, proper notice also refers to a new notice of set down.<sup>8</sup>

[6] Slotting in with the above counsel for Inzalo voiced an issue that has been a topic of debate for some time:

In striking a matter off the roll for a lack of urgency, the court declines to hear it, declines to enroll it and somewhat peculiarly strikes it off at the same time.<sup>9</sup> (Accentuation added)

[7] The enigma is not new. It has, as will be shown later, caused erroneous orders in the end. The question is whether a matter is struck from the roll for lack of urgency or not allowed onto the roll for that reason?

Rule 6(12)

- (a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as it deems fit.
- (b) In every affidavit filed in support of any application under paragraph (a) of this sub-rule, the applicant must set forth explicitly the circumstances which is averred render the matter urgent and

- (15) The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted.

[Rule 6 substituted by GN R3 of 19 February 2016 and amended by GN R2133 of 3 June 2022.]

<sup>8</sup> At paragraph 2.11 of their heads of argument: Enrollment.

<sup>9</sup> At paragraph 2.12.1 of their heads of argument: Enrollment.

the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course.

[Substituted by GNR.2133 of 3 June 2022.]

(c) ...

[8] The legislatively caused dilemma is that in terms of rule 6(12)(a) the court or judge must rule on urgency before it may dispense with the forms and service dictated in the rules. The matter must be on the roll for the adjudication of the urgency; it is akin to an application for condonation.

[9] The judgment in the case of *PT Operational Services (Pty) Ltd v Rawu on behalf of Ngwetsana*, 2013 (34) ILJ 1138 (LAC) confirmed the fact that confusion reigns:

[31] It is unfortunate that Cellier decided to dismiss the application instead of striking it from the roll. I have seen many rulings of a technical or a formalistic nature where the correct order ought to be striking a matter from the roll, but the matter would be dismissed instead.

[32] This also happens in the High Courts and Labour Court especially when a finding is made that a matter is not urgent and the Judge refuses to enrol it. The application is frequently dismissed for lack of urgency instead of removed from the roll because of lack of urgency.

[33] In *Commissioner for SARS v Hawker Air Services (PTY) Ltd; In Re Commissioner for SARS v Hawker Aviation Service Partnership and Others*, Cameron JA, as he then was, said the following about such orders:

“One of the grounds on which Patel, J dismissed the application was that at their inception they had lacked urgency. This was erroneous. 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. Where an application is brought on the basis of urgency, the rules of court permit a court ( or a judge in chambers) to dispense with the forms of service usually required and to dispose of it “as it seems meet’ (rule 6(12)(a)). This in effect permits an urgent applicant, subject to the court’s control, to forge its own rules (which must as far as practicable be in accordance with the rules). Where the application lacks the requisite element or degree of urgency, the court can for that reason decline to exercise its powers under rule 6(12)(a). The matter is then not properly on the court’s roll, and it declines to hear it. The appropriate order is ordinarily to strike the application from the roll. Thus enables the applicant to set the matter down again, on proper notice and compliance,”

[34] Hawker Air Services tells us what the appropriate order should be, but it is silent on what the consequences of such an erroneous order would be where the substantive merits were clearly not

dealt with. In *Vena v Vena*, Jones, J discusses Hawker Air Services and correctly in my view says the following:

“My understanding of an order for the dismissal of a claim in circumstances such as these is that, generally speaking, it is equivalent to an order for absolution from the instance, in which event it is open to an applicant to set the matter down again. In a given set of circumstances, it may be that dismissal may amount to a final judgment on an issue, with the consequence of res judicata. But that is not in the normal course where the case turns on a procedural point, and, I believe, it is not the case here...”

- [35] Although I agree that the appropriate order in a matter where urgency has not been shown should be striking the matter from the roll, it seems to me that even where the word dismissed is used it does not necessarily mean that the dismissal amounts to a final order. One will still have to enquire, where there is doubt, whether the matter was dismissed on the merits or not. If it was dismissed on the merits, then the order is final. If not, then it is not final. A finding that a matter is not urgent does not mean that there are no merits in the applicant’s case. Even if a matter is dismissed for lack of urgency, it can and should be re-enrolled. To reason otherwise would be to allow form to triumph over substance.
- [36] The same applies in my judgment to applications for rescission that are out of time and not accompanied by an application for condonation. Although the appropriate order would be to strike it from the roll, dismissing it does not mean that the merits of the rescission application have been considered. A commissioner may only hear the rescission application if it is accompanied or preceded by a proper application for condonation. (Accentuation added)

- [10] The confusion that prevails on the differently worded orders after lack of urgency was ruled in the recent history of case law, syphers through to the process that is to be used to get the real and main application on the roll to cause redress at a hearing in due course. I will contain the judgment to when an application was struck from the roll for lack of urgency.

- [11] In *Commissioner for South African Revenue Service v Hawker Air Services (Pty) Ltd; Commissioner for South African Revenue Service v Hawker Aviation Services Partnership and Others* (379/05) [2006] ZASCA 51; 2006 (4) SA 292 (SCA); [2006] 2 All SA 565 (SCA) (31 March 2006) Cameron JA that wrote for a unanimous court, ruled:

- [9] ...Where the application lacks the requisite element or degree of urgency, the court can for that reason decline to exercise its powers under Rule 6(12)(a). The matter is then not properly on the court’s roll, and it declines to hear it. The appropriate order is generally to strike the application

from the roll. This enables the applicant to set the matter down again, on proper notice and compliance. (Accentuation added)

- [12] Primarily, the Supreme Court of Appeal stated that: “The matter is then not properly on the court’s roll, and it declines to hear it.” The Supreme Court of Appeal did not foresee and dictate that the matter must be struck from the roll in all circumstances but that the court may decline to hear the application. This suggests a dismissal of the application to allow the matter onto the roll. To strike it from the roll whilst it was not properly enrolled is a contradiction in terms. The reliance for the dictum was on *Luna Meubel Vervvaardigers (Edms) Bpk v Makin* 1977 (4) SA 135 (W) at 139F-140A.

...It will therefore be struck off the roll because it was not properly so enrolled. The applicant is naturally at liberty to enrol it for next week's motion roll, if it so chooses, by filing by Thursday a notice of set down.

- [13] The Luna Meubels – case is pre – constitution. The practice to, after a matter was struck from the roll, re-enroll the case on the same papers by mere notice of set down; unamended and in the form and substance of an urgent application have the real potential to cause severe constitutional harm. Affidavits and evidence were prepared in haste and may not be complete; hearsay evidence may be admissible in urgent applications and some other factors may contaminate the application that now serves on the roll. There may even be crucial amendments that came to the fore since as is the case *in casu*. Heads of argument might not have been filed as is the practice in opposed applications. Substance now becomes an issue too and not only form or process. The effect of the conundrum on the administration of justice is substantial and worrisome.

- [14] The Supreme Court of Appeal in the Hawker Aviation – case *supra* referred to rule 6(6) in footnote 5 of the judgement when they stated: “This enables the applicant to set the matter down again, on proper notice and compliance”. In footnote 5 it is said that:

Cf Rule 6(6): ‘The court, after hearing an application whether brought *ex parte* or otherwise, may make no order thereon (save as to costs if any) but grant leave to the applicant to renew the application on the same papers supplemented by such further affidavits as the case may require. (Accentuation added)

- [15] The above clearly allows the application:

1. To be set down again;
2. but, on proper notice and compliance.
3. A mere notice of set down may not suffice and will not suffice in the majority of the applications. It might be procedurally and constitutionally improper. In compliance with the *audi alteram partem* – dictum; the exception is if orders to substitute, amend and re-enroll accompanied the order to strike the matter from the roll.

[16] “Proper notice” and “compliance” bring me to the nature of the application that served on the urgent roll but was struck and is now enrolled again for redress at a “hearing in due course”. It is not an urgent application anymore and the application must be defined and the rules applicable thereto applied to ensure “proper notice” and “compliance”. “In due course” suggests at a proper time and this should be in terms of the rules.

[17] There are many kinds of applications, and each has its own rules applicable to litigate with. Erasmus<sup>10</sup> correctly recognizes and differentiates between different applications: General.

In terms of rule 1 ‘application’ means ‘a proceeding commenced by notice of motion or other forms of applications provided for by rule 6.’ Rule 6 makes provision for the following distinct applications:

- (a) applications on notice and, in this regard —
  - (i) unopposed applications;
  - (ii) opposed applications, which may further be divided into those that can properly be decided on affidavit and those that cannot;
- (b) *ex parte* applications;
- (c) interlocutory and other applications incidental to pending proceedings;
- (d) urgent applications;
- (e) application for the striking out from any affidavit matter which is scandalous, vexatious or irrelevant; and
- (f) counterapplications.

Every application must comply with the provisions of rule 62.

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<sup>10</sup> Erasmus: *Superior Court Practice*, CD-Rom & Intranet: ISSN 1561-7467, Internet: ISSN 1561-7475, Jutastat e-publications, 19 November 2023 at “Rule 6 Applications” on RS 21, 2023, D1-50. Also see Harms: *Civil Procedure, Civil Procedure in the Superior Courts*, Part B High Court, UNIFORM RULE 6 APPLICATIONS. Last Updated: August 2023 - SI 77 at “B6.2 Kinds of applications”, Jutastat.

- [18] All the above said, the answer to the order when lack of urgency was ruled lies in rule 6(12)(a) itself; it is an application *sui generis* to enroll the matter as one of urgency and to dispense with the forms and service provided for in the uniform rules of court. This specific legislatively unique application is on the roll and stands to be granted or dismissed before the case on the merits of the main application may continue.
- [19] Dismissal of the rule 6(12)(a) – application is not dismissal of the merits of the main application. It is an application to rule on form and not substance.
- [20] The order after the issue of urgency was heard, adjudicated and rejected is proposed to read:  
The application in terms of rule 6(12)(a) to enroll the matter as one of urgency and to dispense with the forms and service provided for in the uniform rules of court; is dismissed.
- [21] Nothing prevents the court from making any other and further orders at the same instance and in addition to the order above and as will be suitable to the facts and circumstances of the case to direct the way forward and on the process.
- [22] When an additional order on form and process has not been made or requested by any of the parties, the enrollment must be in accordance with the nature of the application and the rules applicable thereto. *In casu*, it is clearly an opposed application and rule 6(5)(a) finds application. Rule 6(5)(a) is peremptory in its direction on form and process.
- [23] The amendment to the notice of motion suffers the same fate. The amendment cannot be effected and then enrolled on the same papers on a notice of set down; the amendment is crucial and substantive and must be made in terms of the rules. Rule 28 must be adhered to. A rule 28 – application is an application that is a procedural entity of its own; just as any other application identified by Erasmus and Harms with reference to the rules and case law above.

- [24] If the application in its amended form was brought in terms of rule 6(5)(a) and anew with sufficient time for the Municipality to reply; there could be no objection thereto. Hence the importance of setting the matter back on the roll in a procedurally sound and legitimate manner. This brings me to the facts of this case and the arguments proffered.
- [25] 5 May 2023: The issues in this judgment eventuated from case number: 1582/2023, the case on which the 5 May 2023 – order (“The original order”),<sup>11</sup> was issued. The application enrolled by Inzalo sought among other orders for the cancellation and re-advertisement of a tender. The main application now is for declaring the non-compliance of the original court order to be contempt of court (“The contempt of court – application/main application”).
- [26] 25 July 2023: Inzalo launched an urgent application during which it enrolled for hearing before the duty judge dealing with urgent matters on 1 August 2023, the main – application for contempt of court to be declared.

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<sup>11</sup> Page 71 of the record indexed on 30 August 2023: “INDEX”. Inzalo in this application is the applicant in case number 1582/2023. On 5 May 2023, Mhlambi J from this court, issued an order against the Mantsopa Local Municipality, the applicant *in casu*. It is this order that Inzalo now claim that the Municipality does not comply with and is in contempt of. The order reads as follows:  
Having considered the documents filed of record and having heard the legal practitioners,

IT IS ORDERED THAT:

1. The Respondent shall cancel and re-advertise the tender for the supply of Hosting, supply, delivery, installation and commissioning of MSCOA compliant Financial Management and Internal control system to the Municipality that complies with MFMA Circular 80, which stipulates the requirements of the municipal financial systems and processes in support of the Municipal Standard Chars of Accounts (MSCOA) and all subsequent MFMA MSCOA circulars as promulgated, under Bid Number: MLM-27/23/24 (“the Tender”) including the specified statutory time periods;
2. The Respondent is ordered to provide the applicant with the proof of information in respect of the Tender within 5 days of this court order. Proof of the Respondent’s compliance with MSCOA obligations in terms of the Circulars issued by the National Treasury in respect of the appointment and replacement of the Respondent’s financial management system and service provider including but not limited to compliance with:
  - 2.1 MFMA Circular no. 123
  - 2.2 MFMA Circular no 80 and annexure B thereto.
3. The Respondent shall pay the costs of this application on the attorney and client scale including the cost of counsel.

- [27] The content of the notice of motion of the urgent application of Inzalo on 1 August 2023 shows, and as appears from prayer 1 of the notice of motion; that Inzalo sought condonation for non-compliance with the requirements of the uniform rules of court, specifically relating to form, process and service.
- [28] 12pm on 25 July 2023. Inzalo stipulated severely abridged time periods for the giving of the notice of intention to oppose the application and for filing of answering affidavits. So severe was the application that was issued on 25 July 2023 that the Municipality had to give notice of its intention to oppose on or before 12pm on 25 July 2023; the application was served not on the Municipality, but on the attorney per email at d[...]@matlhoincorporated.co.za; the Municipality was further required to file its answering affidavit on or before 13h00 on 27 July 2023 and as noted above, the matter was enrolled for hearing on 1 August 2023.
- [29] 31 July 2023: Notwithstanding their best efforts, the Municipality only managed to file and serve an answering affidavit on 31 July 2023. In paragraph 33 of the answering affidavit the Municipality's deponent stated in unambiguous terms the issues regarding the severely truncated time periods:
33. It is by now well-established that the Applicant may not act unreasonably towards the Court or the Respondent. There is nothing reasonable in the aforesaid conduct of the Applicant. Leaving itself 2 weeks, at worst, to draw the urgent application and then affording the Respondent only 48 hours, is manifestly unreasonable. The conduct remains unreasonable even with the additional time that the respondent took to file this answering affidavit. And to avoid uncertainty, the Respondent is prejudiced by the Applicants aforesaid conduct.
- [30] 1 August 2023: The content of the application for amendment shows that the application will be moot without the amendment. This is the application for amendment dated 31 July 2023 and filed and served on 1 August 2023 in terms of rule 28 and apparently to have been heard on 1 August 2023:
- KINDLY TAKE NOTICE THAT AT THE HEARING OF THIS MATTER the Applicant intends to amend its amended notice of motion, dated 22 June 2021, in terms of Rule 28(8) of the Uniform Rules of Court, as follows: -

1. By inserting a new prayer as new prayer 1A after the existing prayer 1 and before the existing prayer 2 as follows:  
*“1A. Declaring the Respondent to be in contempt of the court order handed down by His Lordship Justice Mhlambi on 5 May 2023.”*
2. By renumbering the prayers sequentially in numerical order consequent upon the amendments as aforesaid.
3. A copy of the amended notice of motion appears at Annexure A hereto.<sup>12</sup>

[31] 1 August 2023: Mhlambi J, after consideration of the evidence and arguments, struck the main application from the roll for lack of urgency. Crucial is the fact that Mhlambi J refused to condone the deviation from the prescribed time periods stipulated in rule 6 and the “adaption” of Form 2(a) to suit the urgent application. This is the order:

Having considered the documents filed of record and having heard the legal practitioners,

IT IS ORDERED THAT:

1. The application is struck off the roll with costs.

[32] Inzalo was thereafter in law obligated by the order of the court, absent any other direction in the court order, to comply with the prescribed time periods, manner of service and Form 2(a). The court heard the applicant on the issue of urgency and ruled on the issue. The court declined and refused to grant condonation for the non-compliance with the normal rules of the court pertaining to the form, process and service. It signifies that the applicant must comply with the prescribed rules of court pertaining to applications.

[33] 4 August 2023: Inzalo did not do this; they did not comply with the prescribed rules of court pertaining to applications. Inzalo’s contempt of court application (the main application) was hereafter set down on 4 August 2023 for hearing on 24 August 2023.<sup>13</sup> The matter was simply enrolled by notice of set down on 4 August 2023 in the same form and with the same content as the urgent application.

[34] 15 August 2023: The Municipality served a notice in terms of rules 30/30A on 15 August 2023. Two complaints came to the fore; namely, (i) that Inzalo enrolled the contempt

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<sup>12</sup> Pages 234 to 245 of the record indexed on 30 August 2023: “INDEX”.

<sup>13</sup> Pages 253 to 254 of the record indexed on 30 August 2023: “INDEX”.

application without first amending its notice of motion after the matter was struck from the urgent court roll on 1 August 2023, and (ii) that Inzalo did not afford the Municipality the ordinary court time periods to file an answering affidavit in the contempt application.

- [35] The Municipality demanded that Inzalo remove the complaints within the usual period of ten days prescribed by rules 30 and 30A of the uniform rules of court, failing which the Municipality threatened to bring its exception. The *dies* set in the notice expired on 25 August 2023, that is a day after the hearing of the pending contempt application on 24 August 2023.
- [36] 17 August 2023 and 20 August 2023: The second urgent application served before the court. It was the case for the Municipality that on the evening of 16 August 2023, its counsel became aware that the time periods in the notice were an oversight. The Municipality launched an urgent application on 17 August 2023 to amend the time periods in the notice from 25 August 2023 to 22 August 2023; two days before the hearing of the contempt application.
- [37] This did not make sense since the complaints cannot effectively, practically and procedurally be removed before the 24<sup>th</sup> of August 2023. I noted in the judgment of this urgent application that the application seems to be still born and moot; the prejudice to Inzalo grave and the effect on the administration of justice real. The urgent application for the condonation of the amended *dies* was unsuccessful.
- [38] 24 August 2023: The main application served on the opposed motion court roll but was postponed. This is the order:
- Having considered the documents filed of record and having heard the legal practitioner/ss,  
IT IS ORDERED BY AGREEMENT THAT:
1. The matter is postponed to the opposed roll of 7 SEPTEMBER 2023.
  2. The Applicant will, if so advised, file supplementary heads by Wednesday 30 August 2023.
  3. The Respondent will file heads of argument on Friday 1 September 2023.
  4. None of the parties abrogate any rights they may have to still argue any irregularity in the process followed.

5. The costs of the postponement shall be determined on 7 September 2023.<sup>14</sup>

- [39] 7 September 2023: The Municipality now again applies by means of an interlocutory application for the enrollment of the application, alternatively the notice of enrollment to be set aside and that the applicant in the main application pays the costs of the application as per the relief set out in the prefixed notice of application in terms of the provisions of rule 30(1) read with rule 30A(2). Added to the above the Municipality argues that Inzalo also finds itself guilty of a further irregularity in the proceedings; namely that it purported to amend the notice of motion without doing so in terms of the provisions of rule 28. It also never moved an application to amend in court when the urgent matter served *in facie curiae*. The result is simply that the notice of motion has not been amended. The Municipality argues that if for whatever reason an argument can be made that the amendment exists, which would be legally incompetent, then the “amendment” also constitutes an irregular step in the proceedings and stands to be set aside.
- [40] The proposition of the Municipality is that the main application cannot simply be enrolled for substantive redress in due course if there was not compliance with rule 6(5)(a). It is now an opposed application and not an urgent opposed application.
- [41] The hypothesis of the Municipality is that an urgent opposed application in terms of rule 6(12) is not an opposed application in terms of rule 6(5)(a).
- [42] Important is that the challenge lies against process, form, service and now; substance.
- [43] The *audi alteram partem* – dictum has been negated by the one-sided amendment of the notice of motion and the setting down of the matter without further ado on both issues.
- [44] The assertion of the Municipality is that there exists a severe difference between the two processes and if not applied in courts for what it is; real prejudice and confusion in the

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<sup>14</sup> Page 255 of the record indexed on 30 August 2023: “INDEX”.

process itself may be the result. The effective presentation and adjudication of the evidence will suffer. It will cause injustice and affect the right to a fair hearing.

- [45] Counsel for Inzalo in their attack against the arguments of the Municipality maintains that the Municipality has not subsequently to the urgent application, whether formally or informally, indicated that it wished to supplement its proffered opposition to the merits of the application. Instead, what it has done is to raise an argument by means of a rule 30 - notice, indicating that it views the re-enrollment in the ordinary course of the same application as irregular.
- [46] The Municipality, according to Inzalo, contends that Inzalo first had to give notice of its intention to amend its notice of motion (in terms of rule 28 or otherwise), wait out the ten - day legislatively allotted *dies* and then place the matter on the roll in the event of no objection. "...Or something else. The defence is thus a technical one, which pontificates that Inzalo was not entitled to simply re-enrol the matter in the ordinary course."<sup>15</sup>
- [47] Inzalo submits that the only true question is if they are entitled to have enrolled the matter in accordance with the practice directives of this court in the ordinary course after its claim of urgency had failed? And, according to them, the answer is a resounding positive. Consequently, the main application is to be adjudicated. They did not refer the court to the applicable practice directives. The only practice directives that exist are not applicable to the issues *in casu*.<sup>16</sup> It might be that they refer to the Luna Meubels – dictum *supra*. As pointed out above; the dictum on this issue is constitutionally outdated.

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<sup>15</sup> Paragraph 1 and specifically paragraph 1.4 of their heads of argument: Enrollment.

<sup>16</sup> Source: Erasmus, *Superior Court Practice*/Volume 3: Practice Directions/Part G Free State/G1 Free State Rules/Rules regulating the conduct of the proceedings of the Orange Free State provincial division of the High Court of South Africa — GN 820 of 2007/14. Striking off the Roll URL: [http://jutastat.juta.co.za/nxt/gateway.dll/scpr/650/719/720/721/734?f=templates\\$fn=default.htm](http://jutastat.juta.co.za/nxt/gateway.dll/scpr/650/719/720/721/734?f=templates$fn=default.htm) on 20 November 2023.

14. Striking off the Roll

14.1 If a matter is struck off the roll on the ground of non-appearance of a party, it is regarded as finally disposed of and can be reinstated upon presentation of an explanation under oath as to why there was no appearance.

14.2 Once an Appeal has been struck off the roll, the registrar returns the record to the clerk of the court.

[48] The applicant is *dominus litis* and if they elected to bring the matter back onto the roll in a manner that is not in service of the administration of justice; they may not expect the respondent to rectify the error. If they applied rule 6(5)(a) all the litigation would not have erupted. The necessity of an application for an amendment would have fallen away. The argument proposed that the Municipality had not subsequently to the urgent application, whether formally or informally, indicated that it wished to supplement its proffered opposition to the merits of the application and that the main application must be heard in the absence of such applications, is wrong.

[49] Rule 6(5)(a) directs peremptory so, that:

Rule 6(5)(a)

**Every application other than one brought *ex parte* shall** be brought on notice of motion as near as may be in accordance with Form 2(a) of the First Schedule and true copies of the notice, and all annexures thereto, shall be served upon every party to whom notice thereof is to be given.

[Substituted by GG 39715 of 19 February 2016 and by GNR.3397 of 12 May 2023.] (Accentuation added)

[50] All applications other than those brought *ex parte* must be brought on notice of motion as near as possible in accordance with the prescribed form. The prescribed form is Form 2(a) and not a notice of set down.

Form 2(a)

Notice of motion  
(To Registrar and Respondent)

IN THE HIGH COURT OF SOUTH AFRICA  
( ..... DIVISION)

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- 14.3.1 In all criminal appeals where the appellant's heads of argument have not been handed in on the date when the dies therefore have expired, the state may request that the appeal be struck off the roll because of such failure.
  - 14.3.2 An application for striking off does not affect the discretion of the court to deal with the appeal and/or an application for condonation, which includes hearing the appeal or deciding it by virtue of the Court's inherent review powers.
  - 14.3.3 Where the state has applied for the striking off of an appeal, but thereafter an application for condonation of the appellant's failure is filed and/or where heads of argument are then filed by the appellant, the state also has to file heads of argument, even though the appellant's heads of argument were not timeously filed.
  - 14.3.4 Where the state has applied for the striking off of the appeal and where no condonation application and/or heads of argument were filed by the appellant, the state is not obliged to file heads of argument unless the presiding judge requests the state to do so.

In the matter between:

Applicant  
and  
Respondent

TAKE NOTICE that ..... (hereinafter called the applicant) intends to make application to this Court for an order:

- (a) .....
- (b) .....
- (c) .....

(here set forth the form of order prayed) and that the accompanying affidavit of .....  
(or petition where required by law) will be used in support thereof.

TAKE NOTICE FURTHER that the applicant has been appointed .....  
(here set forth an address referred to in rule 6(5)(b)) at which he will accept notice and service of all process in these proceedings.

TAKE NOTICE FURTHER that if you intend opposing this application you are required (a) to notify applicant's attorney in writing on or before the ..... (b) and **within fifteen days after you have so given notice of your intention to oppose the application, to file your answering affidavits, if any; and further that you are required to appoint in such notification an address referred to in rule 6(5)(b) at which you will accept notice and service of all documents in these proceedings.**

If no such notice of intention to oppose be given, the application will be made on the ..... at .....(time).

DATED at ..... this ..... day of ..... 20.....

.....  
Applicant or his/her Attorney  
(address)

[Form 2(a) amended by GN R2410 of 30 September 1991 and substituted by GN R3[sic] of 19 February 2016 (w.e.f. 22 March 2016).] (Accentuation added)

[51] A rule 6(12) – application and a rule 6(5)(a) – application is not only distinguishable in form but also in substance and thus purpose, preparation and nature. It aims to obtain different relief through different processes at specific times and instances. Each case is to be adjudicated on its unique and particular facts.

[52] The right of access to courts is essential in a constitutional democracy under the rule of law and specifically so in terms of section 34 of the Constitution of the Republic of South Africa, 1996: “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 or, where appropriate, another independent and impartial tribunal or forum.”

- [53] The right of access to courts that is a fundamental right, is eclipsed by the right to justice that also entails, *inter alia*, a fair trial or hearing. Section 34 of the Constitution refers to the application of law decided in a fair public hearing.
- [54] This case is a reminder that the rules of courts and litigation must be proper and may not cause trials or hearings to become chaos. The *audi alteram partem* – dictum is sacrosanct.
- [55] In conclusion:
1. This is the order proposed to be made after the court adjudicated that an application in terms of rule 6(12) lacks urgency:  
The application in terms of rule 6(12)(a) to enroll the matter as one of urgency and to dispense with the forms and service provided for in the uniform rules of court is dismissed.
  2. Any additional orders to amend, substitute or augment the papers, the process and *dies* may be issued at this stage.
  3. Absent further orders by the court the application may only be enrolled in correlation and compliance with the rules applicable to it and on due notice.
- [56] The enrollment that was effected on 4 August 2023 by notice of set down constitutes an irregular step causing manifest prejudice to the Municipality and the administration of justice and stands to be set aside with costs, including the costs occasioned by the employment of two counsel. Inzalo will have to comply with the rules pertaining to the enrollment of an application and, if applicable, an amendment to a notice of motion. Imperative is that the main application to declare the conduct of the Municipality to be in contempt of a court order, is not the subject of the dismissal that will follow in the order below; the matter may be enrolled with proper notice and in compliance with the rules.
- [57] The Constitutional Court in *Mukaddam v Pioneer Foods (Pty) Ltd and Others supra*, again:

30. In *Chief Lesapo v North West Agricultural Bank and Another*, this Court underscored the importance of access to courts in these terms:  
 “The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalized mechanisms to resolve disputes, without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable.” (Footnote omitted.)
31. However, a litigant who wishes to exercise the right of access to courts is required to follow certain defined procedures to enable the court to adjudicate a dispute. In the main these procedures are contained in the rules of each court. The Uniform Rules regulate form and process of the High Courts. The Supreme Court of Appeal and this Court have their own rules. These rules confer procedural rights on litigants and also help in creating certainty in procedures to be followed if relief of a particular kind is sought.
32. It is important that the rules of courts are used as tools to facilitate access to courts rather than hindering it. Hence rules are made for courts and not that the courts are established for rules. Therefore, the primary function of the rules of courts is the attainment of justice. But sometimes circumstances arise which are not provided for in the rules. The proper course in those circumstances is to approach the court itself for guidance. After all, in terms of section 173 each superior court is the master of its process.

[58] **ORDER**

1. The enrollment of the main application for hearing is irregular and set aside.
2. The applicant in the main application, Inzalo Enterprise Management Systems (Pty) Ltd, to pay the costs of the application that shall include the costs of two counsel.

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**M OPPERMAN J**

**APPEARANCES**

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SC

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**S REINDERS**

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