

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 024804-2022

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
<u>2024/10/23</u>	
DATE	SIGNATURE

In the matter between:

NGIRI AUTO (PTY) LTD

Applicant

and

MAHOMED IRFAN BUX

First Respondent

B&B MEDIA (PTY) LTD

Second Respondent

SUHAIL ESSACK

Third Respondent

ALBARAKA BANK

Fourth Respondent

Summary

Civil procedure – explanatory affidavit – status of – in principle, admissible – duty of legal representatives – rejection of technical approach to procedural matters – punitive costs – application objectively vexatious

JUDGMENT

FRIEDMAN AJ:

- [1] This is an opposed rule 30 application. I have felt the need to write a full judgment because it raises one surprisingly unusual question, and one question which is sufficiently important, in my view, to warrant comment. The unusual question is: what precisely is the status of a so-called “explanatory affidavit”, filed by a respondent in an application which he or she has not opposed? The important question is: what are the duties of legal representatives when it comes to the proper use of civil procedure? The latter has received the attention of countless judgments. However, the proliferation of formalistic and highly technical litigation calls for further comment, in the context of the facts of this case.
- [2] To avoid confusion, it is best for me to refer to the parties by their names. In August 2022, two parties, Mahomed Irfan Bux (“Bux”) and B&B Media (Pty) Ltd (“B&B”) brought an application in which they claim R1 873 500.00, plus interest and a punitive costs order, from the first respondent, Ngiri Auto (Pty) Ltd (“Ngiri”), and the second respondent (“Essack”). The application brought by Bux and B&B, which I shall describe below as “the main application”, relates to payment for a vehicle in terms of a complicated arrangement which, thankfully, I do not have to consider in any detail. The third respondent in the main application, the Albaraka Bank (“the Bank”), is not involved in this rule 30 application. On 23 May 2023, the Bank filed an affidavit styled as a “supporting affidavit”. In its introduction, it made clear that, in filing that affidavit, it did not intend to oppose the main application.
- [3] On 7 November 2022, Ngiri filed its answering affidavit in the main application. On 21 November 2022, Bux and B&B filed their replying affidavit. On 1 December 2022, Bux and B&B filed a supplementary replying affidavit. In the introduction, Bux and B&B acknowledged that they have no right to file a supplementary reply, and recorded that they will seek leave to do so at the hearing of the main

application. They indicated in the introduction to the supplementary reply that its purpose was to address facts which apparently came to the attention of Bux after the main replying affidavit was filed.

- [4] On 9 May 2023, Ngiri filed a “Supplementary Affidavit in response to First and Second Applicants’ Supplementary Replying Affidavit”. As far as I am aware, no leave was sought to file this affidavit. It was filed, according to the introduction, “in an abundance of caution, having regard to the scathing but baseless allegations” in the supplementary reply. Ngiri did not seek to strike out those allegations, or to have the supplementary replying affidavit, as a whole set, aside.
- [5] So, as of 23 May 2023, the pleadings consisted of:
- a. the founding affidavit;
 - b. the answering affidavit;
 - c. the first replying affidavit;
 - d. the supplementary replying affidavit;
 - e. Ngiri’s response to the supplementary replying affidavit; and
 - f. the “supporting affidavit” filed by the Bank.
- [6] On 11 August 2023, Ngiri launched this rule 30 application. Although the facts of this matter have to be pieced together from a combined reading of the affidavits in the rule 30 application – a regrettable consequence of the failure of the founding affidavit to address the chronology succinctly – they are ultimately not complicated. Let me try to describe them as briefly as possible.
- [7] On 21 June 2023, the attorneys acting for Bux and B&B (“Hajibhay-Bhyat”) wrote an email to Ngiri’s attorneys (“Amod & Van Schalk”), annexing the affidavit which is the object of this rule 30 application (“the Explanatory Affidavit”). As an aside, I note that the email of 21 June 2023 included an express settlement proposal and was marked “Without Prejudice”. The reason I know about it is that, despite this, Ngiri apparently formed the view that it was not a bona fide attempt at

settlement, and so unilaterally disclosed it. While it is true that marking a letter “Without Prejudice” is, by itself, legally meaningless,¹ this email self-evidently contained a settlement proposal. Unless I am missing something, it was clearly privileged.

- [8] In any event, both parties referred to the 21 June email during argument, and it is helpful evidence of the history of this matter. In the 21 June email, Hajibhey-Bhyat recorded that the Explanatory Affidavit had been served on its offices on 2 June 2023 by the attorneys representing Essack. Essack was the deponent to the Explanatory Affidavit. It will be recalled that Essack is the second respondent in the main application. In the letter, Hajibhay-Bhyat recorded its view that the Explanatory Affidavit assisted its clients’ case. It then said that it would “naturally afford your client an opportunity to consider the contents of the affidavit in the context of your client’s defence”. The letter proceeded to make the settlement proposal and give a deadline for its acceptance. In conclusion, the letter recorded that, if no settlement was reached, Bux and B&B would “proceed with the filing of Heads of Argument and the prosecution of the application in the ordinary course”.
- [9] According to Amod & Van Schalk, on 7 July 2023 it received heads of argument filed on behalf of Bux and B&B in the main application (they are dated 4 July 2023). On reading them, Amod & Van Schalk says that it noticed a reference to the “Explanatory Affidavit”, which had since apparently been uploaded to Caselines. It is not entirely clear when the Explanatory Affidavit was uploaded to Caselines, but it had to be between 21 June and 7 July 2023, because the heads of argument filed on behalf of Bux and B&B in the main application refer to the Explanatory Affidavit by giving Caselines references to it. *Mr Mohammed*, who filed heads of argument on behalf of Bux and B&B in this rule 30 application, but who did not appear at the hearing (having been replaced by *Mr Casey*), says that the Explanatory Affidavit was uploaded on 5 July 2023. If I am not mistaken, he deduces this from the Caselines notation, which reflects the date on which the document was uploaded. He is probably correct, but I have discovered over time

¹ See, for example, *Van der Westhuizen v Akarana Homeowners’ Association* 2024 (1) SA 301 (WCC) at para 15.

that these Caselines notations are not always entirely reliable – most notably because, as part of general housekeeping, documents can be uploaded and removed and uploaded again, sometimes on several occasions. I may be wrong about all of this, but since the precise date is not important, there is no need to dwell on it. What does seem clear is that the Explanatory Affidavit was uploaded shortly before the heads of argument were filed.

[10] On 17 July 2023, Amod & Van Schalk wrote to Hajibhey-Bhyat. The following aspects of the letter are noteworthy:

- a. It was recorded that Caselines did not contain notices of appointment of attorneys acting for Essack or the Bank. Hajibhey-Bhyat was asked, kindly, to “rectify this, if possible”.
- b. It was recorded that no firm of attorneys “and assuredly not Reddy Incorporated” had served a notice of appointment on Amod & Van Schalk’s offices. For context, in the 21 June letter, Hajibhey-Bhyat had informed Amod & Van Schalk that Reddy Inc was acting for Essack.
- c. It was recorded that the Explanatory Affidavit had not been served on Amod & Van Schalk’s offices and had been uploaded to Caselines without the consent of Ngiri.
- d. Hajibhey-Bhyat was asked whether it was responsible for uploading the Explanatory Affidavit to Caselines and, if so, when. The view was expressed that there was no basis for the affidavit to have been uploaded to Caselines and that, if “any of the parties wished to place the document before Court (and therefore on Caselines), it should be done properly and in terms of the Rules of Court”.
- e. Amod & Van Schalk recorded that the filing of the Explanatory Affidavit constituted an irregular step, which should be rectified within ten days. It noted that, in the interim, it would regard the affidavit as “pro non scripto”. It recorded further that, if the document were to be served on its offices, it

would “take the necessary steps in that regard”. In the context of the rest of the letter, this statement is somewhat mystifying to me.

- f. The letter recorded that, because they referred to the Explanatory Affidavit, the heads of argument filed on behalf of Bux and B&B were also considered by Ngiri to be irregular and liable to be struck out if the references to the Explanatory Affidavit were not removed.
- g. The letter also took the opportunity to ask Hajibhey-Bhyat whether the case against Essack had been withdrawn as a result of the contents of the Explanatory Affidavit – in essence, the implication of the question was that Bux and B&B had agreed to withdraw the application against Essack in exchange for his agreement to provide the affidavit. It concluded by placing on record that, if the “aforesaid problems and objections were not resolved within ten days”, Ngiri would file a “formal notice of all irregular steps” or take “any step available” to it.

[11] On the same day – ie, 17 July 2023 – Hajibhey-Bhyat wrote both to Reddy Inc and Amod & Van Schalk. In the letter, Hajibhey-Bhyat, in effect, admonished Reddy Inc for not serving the Explanatory Affidavit on all of the parties and not regularising its appointment as Essack’s firm of attorneys. It also recorded that Hajibhey-Bhyat disagreed with Amod & Van Schalk that Bux and B&B required Ngiri’s consent before uploading the Explanatory Affidavit to Caselines.

[12] On 14 August 2023, this rule 30 application (which seems to have been served on 11 August 2023) was formally launched. In the meantime, on 3 August 2023, Reddy Inc served a notice of appointment and the Explanatory Affidavit on Amod & Van Schalk. It would seem that, at the same time as serving these documents, Reddy Inc provided Amod & Van Schalk with an unsigned version of a Confirmatory Affidavit by Essack. At first glance this unsigned document seems identical to the Explanatory Affidavit, but is not.

[13] In any event, in the notice of motion in the rule 30 application, Ngiri seeks the following relief:

- a. That the Explanatory Affidavit “purportedly signed by the Third Respondent on 31 May 2023 and filed by the First and Second Respondents onto Caselines, be declared an irregular step and that the Explanatory Affidavit be removed from Caselines within 2 hours of receipt of service of this order”.
- b. “That the First and Second Respondents’ Heads of Argument and Practice Note be declared irregular, alternatively ordered to be amended to exclude any reliance on the Explanatory Affidavit.”
- c. “That the service and filing of the unsigned and un-commissioned Confirmatory Affidavit by the Third Respondent on 3 August 2023, without the Third Respondent being a party before Court, be declared an irregular step and that the Explanatory Affidavit [sic] be removed from Caselines within 2 hours of receipt of service of this order.”
- d. A punitive costs order.

[14] When I was allocated this matter and first looked at the Caselines folder, it was substantially incomplete. I therefore issued a directive requiring the Caselines folder to be rectified, and for the many missing items to be uploaded. It then turned out that there are two Caselines files in this matter, and I was thereafter given access to both. Seemingly in response to my directive (I make this deduction because of the dates on which various documents were uploaded), certain correspondence was added to the Caselines file. It is not presented as evidence, in affidavit form, but nothing turns on that, for present purposes. On 4 October 2023, Reddy Inc wrote to Amod & Van Schalk. The purpose of the letter was, first, to assert the right of Essack to file his Explanatory Affidavit; and, secondly, to record an intention to remove the unsigned affidavit from Caselines. The letter explained that the unsigned version was a draft, and that the correct version was the Explanatory Affidavit now appearing in Caselines (in two places). It also recorded that Essack had filed a notice of intention to abide. Ngiri says that there is no notice to abide, and I have been unable to find one in either

version of the Caselines file in this matter. I therefore assume that Ngiri is correct when it says that none was ever filed.

[15] I would not have mentioned the missing notice to abide at all, were it not for one of Ngiri's arguments, which I address below. In the meantime, I should conclude the discussion of the facts by mentioning that Amod & Van Schalk responded to Reddy Inc's letter of 4 October 2023 on 10 October 2023. The letter is lengthy, and I would not wish to drag out an already turgid story by discussing the letter in detail. Its purpose was to insist that Reddy Inc had not cured any irregular steps and so Ngiri was intent on persisting in its rule 30 application. It also once again disputed that the Explanatory Affidavit had ever been served by Reddy Inc on Amod & Van Schalk. In its letter of 4 October, Reddy Inc had referred to the unsigned Explanatory Affidavit "uploaded onto caselines [sic] by our offices". The Amod & Van Schalk letter seized on that language, and pointed out that Hajibhey-Bhyat, and not Reddy Inc, had uploaded the document. Attention was also drawn to the fact that the unsigned affidavit (described by Reddy Inc as a draft) was different to the signed Explanatory Affidavit, and it was implied that there was something untoward about this. The letter recorded that Amod & Van Schalk was not aware of the notice of intention to abide and "[y]ou and your client are put to the proof thereof". The overall tenor of the letter was to imply collusion between Essack and Bux and B&B. Importantly, it was also to emphasise Ngiri's stance that, that without formally (through) a notice, abiding or opposing the application, Essack was not entitled to file an affidavit.

[16] On the same date, Amod & Van Schalk also wrote to Hajibhey-Bhyat. Once again, the point was made that until Essack either filed a notice to abide or a notice to oppose the application, he was not permitted to "place a purported statement on Caselines". The letter recorded that, if Essack were to file a notice to oppose or abide, Ngiri would consider its position in relation to the rule 30 application.

[17] It would seem that no further step was taken in this regard. As I have noted, there does not seem to be a notice to abide on record. The unsigned affidavit has been removed from Caselines. The main fight, at this point, is therefore about the Explanatory Affidavit which first emerged on 2 June 2023, and which remains on

Caselines. I shall have more to say about the unsigned affidavit when dealing with costs.

THE PROCESS FOLLOWED BY NGIRI

- [18] Rule 30 imposes three conditions which must be met before a party such as Ngiri may bring an application to declare conduct to be irregular.
- [19] First, the prospective applicant must not himself or herself have taken a “further step in the cause” with knowledge of the irregularity.
- [20] Secondly, the prospective applicant must have, within 10 days of becoming aware of the irregular step, by written notice afforded his or her opponent an opportunity to remove the irregular step within 10 days.
- [21] Thirdly, the rule 30 application must be delivered within 15 days after the expiry of the 10-day warning period (premised, of course, on a failure of the opponent to heed the warning and remove the perceived defect).
- [22] In their answering affidavit in the rule 30 application, Bux and B&B criticised the procedure followed by Ngiri. Interestingly, though, they did not take the point that the application was not preceded by a proper written notification to remove the cause of complaint. It would seem that they, like me (at least, in principle), were willing to treat the 17 July letter sent by Amod & Van Schalk as reflecting substantial compliance with the rule summarised in paragraph [20] above. They had a different objection, relating to timing, which I need not discuss here.
- [23] Interestingly, though, Ngiri appears to have been advised that it may have difficulties in this regard. I say this because, in the founding affidavit supporting the rule 30 application, Ngiri took the unorthodox approach of saying that the rule 30 application was itself the “written notice” envisaged by rule 30(2)(b) (see paragraph [20] above) and that Bux and B&B would be given a further ten days from the date of receipt of the rule 30 application to rectify the irregular step, failing which the relief set out in the notice of motion would be sought.
- [24] This is a curious approach to adopt, to say the least, and is not envisaged by the rule. This is unsurprising, because it is a recipe for unnecessary litigation and

fight about costs. The whole purpose of rule 30 is to give parties the opportunity to avoid litigation by curing irregularities. This purpose will surely be undermined – especially in the highly technical environment in which we seem to have found ourselves, in which every litigious step stands the risk of becoming a nuclear war – if parties routinely act in this way.

- [25] I would have no difficulty concluding that, in principle, a letter is as good as a formal notice to comply with the requirement to afford an opponent an opportunity to remove a cause of complaint.² Since Bux and B&B did not take the point that a letter is insufficient to comply with rule 30(2)(b), I do not have to decide the point. I would simply observe, that, to me, the main issue is not whether the step envisaged by rule 30(2)(b) is encapsulated in a formal notice or letter. The main issue is whether it adequately identifies the author's complaints and gives his or her adversary a proper chance to rectify them. If a letter or notice is framed in a way in which a reasonable lawyer receiving it cannot properly identify any non-compliance with the rules on the part of his or her client, then it cannot achieve its purpose – ie, to avoid litigation by inviting reasonable conduct in response.

THE MAIN DISPUTE – THE STATUS OF THE EXPLANATORY AFFIDAVIT

- [26] I do not intend to dwell on the founding affidavit in the rule 30 application any more than strictly necessary. It is not a model of good pleading. To take one example: despite expressly seeking relief in the notice of motion in respect of the heads of argument filed by Bux and B&B (itself, a questionable path to have taken), Ngiri threatens in the founding affidavit to file a notice in terms of rule 6(15) seeking to strike out any reference to the Explanatory Affidavit in Bux and B&B's heads of argument. Rule 6(15) concerns itself with striking out matter from an affidavit, not heads of argument. Perhaps unsurprisingly, therefore, the rule 6(15) notice does not appear ever to have materialised.
- [27] It would appear from a combined assessment of the founding affidavit, heads of argument and oral address of *Mr Zietsman* – who appeared for Ngiri and also prepared its heads of argument – that Ngiri's overall argument is this:

² See *Diamond Igoda View (Pty) Ltd v Igoda Farms CC* 2011 JDR 0718 (ECB) at paras 13-19.

- a. A party who does not file a notice of intention to oppose or abide is not before court, and therefore has no right to file any affidavits.
- b. The Explanatory Affidavit was, in substance, an affidavit filed as part of Bux and B&B's case. But it was non-compliant with the rules of court, because an applicant must make out a case in its founding affidavit. This perceived irregularity was pleaded, in the founding affidavit, as "[t]he filing of a further affidavit by the First and Second Respondents, out of sequence, whilst being an affidavit purporting to be by another party in the main application, ie . . . Essack . . . , which inter alia amounts to hearsay".

[28] It would seem that Ngiri takes issue with the apparent collusion between Bux and B&B and Essack, and wants to ensure that Essack's version is not permitted to assist Bux and B&B in establishing the correctness of the facts in the founding affidavit. This can be the only explanation for the stance taken. For their part, Bux and B&B do not shy away from this co-operation between them and Essack. They have annexed to their answering affidavit in the rule 30 application the covering email dated 2 June 2023, under cover of which Reddy Inc first sent the Explanatory Affidavit to Hajibhey-Bhyat. It is clear from that email that the Explanatory Affidavit was furnished by Essack in exchange for Bux and B&B withdrawing their application against Essack. It is not apparent to me from the Caselines file whether this has been done.

[29] In oral argument, I repeatedly pressed *Mr Zietsman* to show me where Ngiri had clearly identified in the papers what prejudice it would suffer if the rule 30 application were to be dismissed. *Mr Zietsman* took the same stance as he took in his heads of argument – that the Explanatory Affidavit constituted inadmissible hearsay and that this was prejudicial. It is inconceivable that any qualified lawyer could consider Essack's affidavit to constitute hearsay, and so I must assume that this is not what *Mr Zietsman* actually meant. I may be wrong, but I suspect that the true contention is that Bux and B&B should be precluded from relying on evidence of a respondent to support their case. Or, perhaps, to frame it slightly differently: that there is something untoward in citing a party as a respondent and then, in due course, relying on his evidence in support of one's case.

[30] I mean no disrespect to *Mr Zietsman* or *Amod & Van Schalk* when I draw attention to the duty of legal practitioners to ensure that pleadings are clear and that argument advanced is sustainable. I have had to read much into the various documents filed by Ngiri to try to get to the root of Ngiri's true difficulty with the Explanatory Affidavit. The lack of precision in the various documents supporting Ngiri's case is not simply a matter of style. I have strong views about style in legal writing, but that is something for another day.³ Here, the issue is substantive.

[31] I could have understood a concern framed like this: the Explanatory Affidavit is, in substance, part of Bux and B&B's case. That being so, it should have been annexed to, and relied upon in, the founding affidavit. Instead, it was procured, and then uploaded, out of sequence, which is prejudicial because a case must be made out in the founding affidavit. If that had been the beginning and the end of the pleaded case, I would have had more sympathy for Ngiri's position. I perhaps would still have wondered whether a full-blown opposed rule 30 application was necessary or appropriate, when Ngiri could simply have filed an affidavit in response. But, by the time this application was launched, Bux and B&B had already filed heads of argument. So, I would at least have had some sympathy for Ngiri because I would have at least understood why it might have felt prejudiced by having to deal with heads of argument, relying on the Explanatory Affidavit, without having had a chance to reply to it.

[32] But the problem is that this was not how the case was presented. The bulk of the energy marshalled on behalf of Ngiri focused, rather, on the question of who uploaded the document, whether Essack had a right to file an affidavit at all, and a range of very technical issues focusing on issues of service, a notice to abide and other matters. In isolation, some of these issues are, of course, not merely technical. Proper service is, undoubtedly, essential to ensure fairness. But, in this case, a series of concerns were raised, and then discussed in the founding affidavit, in a manner which makes it impossible for any outside reader (by which I mean, most importantly, the other parties and me) to understand the prejudice claimed to have been suffered. It is puzzling, for example, to understand what

³ I am also mindful of the advice to people living in glass houses, furthering my reluctance to wade into this issue.

seems to have been an unhealthy obsession in the papers on whether the Explanatory Affidavit had been served at Amod & Van Schalk's offices, at a time when it was common cause that all of the parties had seen the affidavit.

[33] It seems that, at the heart of this application, is a misunderstanding of what is meant by the term "prejudice" in the context of procedural remedies such as that envisaged by rule 30. It should not be necessary for me to spell out that prejudice, in this context, does not mean that the step is substantively harmful or destructive of the other side's case. In this context, prejudice refers to detriment to a party in the conduct of litigation. Once this is appreciated, a simple basis on which to dismiss this application is that Ngiri has not established that, if the application is not granted, it will be prejudiced in the future conduct of the main application.

[34] However, understood in its best light, Ngiri's case is premised on the notion that a party who has not filed a notice to oppose or abide has no right to file an explanatory affidavit (or any affidavit, for that matter). If that is correct, then Ngiri's prejudice arises from it having to contend with a version which could not permissibly be placed before Court in the first place. This is the only part of Ngiri's case which could, if correct, take it anywhere concrete. What might be considered its alternative argument – that the Explanatory Affidavit was filed out of sequence – carries the simple remedy that Ngiri should be given a chance to respond to it. But if Essack was categorically precluded from filing it in the first place, then it cannot be allowed to stand.

The status of the explanatory affidavit

[35] Part of why I have seen fit to write a full judgment in this matter is because, as highlighted in the introduction, the true status of an explanatory affidavit has not received much consideration by our courts. If one searches the law reports and the unreported online catalogues of *Juta* and *LexisNexis*, one will find countless examples of parties filing explanatory affidavits. Here, I intend only to refer to affidavits filed by parties who do not oppose the relief sought. In most of these cases, the courts have treated those affidavits as part of the evidence. However, the admissibility of such affidavits has rarely been discussed.

[36] There is at least one exception. *Mr Mohammed*, who, as I explained earlier, filed heads of argument on behalf of Bux and B&B but did not appear at the hearing, referred me to the decision of Dlodlo J, as he then was, in *Clairison's CC*.⁴ In that case, the applicant brought a review of a decision of the first respondent to refuse an application to change the land use of certain property (to simplify the impugned administrative decisions slightly). The second respondent was a municipality which, according to the founding affidavit, was cited because of its potential interest in the matter, and not because any relief was sought against it. The municipality filed a notice to abide, and the antagonistic parties then exchanged the usual set of affidavits. More than a month after the applicant filed its replying affidavit, the municipality filed an affidavit from one of its officials. It was, in substance, the same as the Explanatory Affidavit in this case. The first respondent in that case sought to have the affidavit of the municipality struck out in its entirety under rule 6(15). As in this case, the true reason why the first respondent wished to be rid of the explanatory affidavit was because it supported the applicant's case.

[37] In *Clairison's CC*, unlike here, the municipality had, as I have noted, filed a notice of intention to abide. The first respondent's complaint was that the municipality was approbating and reprobating because it had first conveyed an intention not to enter the fray, but had then contradicted that intention by coming in, boots and all, in support of the applicant.

[38] Dlodlo J pointed out that the municipality was a party to the application. He acknowledged that it was unusual for a party, having elected to abide, to bother to file an affidavit. However, he was aware of no rule, or reason of principle, precluding any party to the litigation from filing an affidavit and placing its position on record.⁵ Dlodlo J highlighted, more than once in his judgment, the fact that the first respondent placed great emphasis on the issue of the timing of the filing of the documents: the notice to abide had been filed before the parties exchanged the traditional affidavits, but the explanatory affidavit was filed after

⁴ *Clairison's CC v MEC for Local Government* 2012 (3) SA 128 (WCC).

⁵ *Clairison's CC* (supra) at para 9.

the replying affidavit. This was described by the first respondent as an abuse of process, but Dlodlo J could not see why it should be characterised in that way.⁶

- [39] Perhaps the most important finding of Dlodlo J in *Clairison's CC*, was that the first respondent had been unable to explain the prejudice which it would suffer if the affidavit was not struck out.⁷ In that case, the first respondent, in the alternative to its main submission that the affidavit should be struck out, sought leave to file a further affidavit, responding to the municipality's affidavit. Unsurprisingly, having decided to dismiss the strike-out application, Dlodlo J granted this alternative relief. This self-evidently cured the first respondent's prejudice.
- [40] Both teams of counsel who appeared in *Clairison's CC* made submissions about rule 6, the filing of affidavits and the implication of notices to abide. Rather than summarising and dealing in more detail with these submissions, I wish to make a broader point which flows from the judgment and some of the arguments raised.
- [41] Rule 6 clearly envisages the exchange of affidavits by adversarial parties. It does not provide for a party, who does not oppose an application, to file an affidavit. Notably, it does not provide for the filing of a notice to abide either. Its clear premise is that any party who does not expressly oppose an application, or who files a notice of intention to oppose but does not then timeously file an answering affidavit, cannot prevent the applicant from setting the matter down for argument, on the applicant's papers.
- [42] There is, at least in principle, an interesting interpretive debate which could arise from the wording of rule 6. It is, at least notionally, possible to interpret the rule as precluding (by its omission to provide for this expressly) the filing of notices and affidavits other than those expressly listed there – and I found one unreported judgment which seems to take that view.⁸ But it seems to me that this

⁶ See *Clairison's CC* (supra) at paras 10-11.

⁷ *Clairison's CC* (supra) at para 8.

⁸ See *Mangaung Metropolitan Municipality v University of the Free State* 2024 JDR 0216 (FB) (see, in particular, para 15).

interpretive ship has long since sailed. So common is the practice of filing both notices to abide and explanatory affidavits, that one could reasonably say that a practice has now arisen which renders them presumptively permissible (to be precise, in the case of explanatory affidavits, admissible). There are countless decisions in the law reports where our courts, having pointed out that a particular litigant abided the decision, referred to an explanatory affidavit filed by that party. This does not appear ever to have been seen as controversial, outside of very rare cases such as *Clairison's CC*, in which a party expressly objected. The only other example of such cases that I have been able to find – ie, in addition to *Clairison's CC* – is the unreported judgment which I mentioned above. I would not be surprised if there are other unreported judgments on this topic which I failed to pick up in my research. But I am relatively confident that the weight of authority, albeit mostly implicit, supports the admission of such affidavits and that it has become an accepted practice to allow them. Whether they take the matter further is, of course, an entirely different issue and will depend on the circumstances of each case.

- [43] If it had been left to me to resolve this interpretative question, then I would have had no hesitation in finding that the rules are wide enough to accommodate the filing of explanatory affidavits. It is true that they are far more common – and normally of far more utility – in public-law matters. It is often necessary for an organ of state which, for whatever reason, does not oppose the relief sought by an applicant, to provide evidence to the court to assist it in its determination.
- [44] Similar considerations do not often feature in private litigation. The argument advanced by counsel for the applicant in *Clairison's CC* – ie, that a party should not be allowed to contradict itself by saying, on the one hand, that it does not adopt an adversarial position but, on the other hand, taking a side – certainly has some logical appeal. However, primarily for two reasons, my view is that the argument collapses under proper scrutiny.
- [45] First, if one keeps a clear eye on the difference between evidence and the identification of adversarial parties, much of the consternation about explanatory affidavits should fall away. In this case, Ngiri is aggrieved that Essack seems to be taking the side of Bux and B&B, and Ngiri cannot even seek a costs order

against him. But Essack's affidavit is simply evidence which Bux and B&B seek to use as part of the presentation of their case. What would have happened if Bux and B&B had, despite citing Essack as a respondent, attached his explanatory affidavit to their founding affidavit as confirming evidence of their version? Could Ngiri seriously have objected to that? As I briefly noted above, Ngiri almost implicitly accepts that it could not, because it focuses on this having been done "out of sequence". The point is that Ngiri's fight is with Bux and B&B. It is to them which it will look for costs, should it prevail. The evidence on which they rely has nothing to do with who is "before court".

[46] But that leads me to the second point. A notice to abide is unnecessary to bring Essack before court. He is already here because he was cited from the outset as a respondent. And once that is so, it is hard to see why he should be precluded from having his say. What great catastrophe would arise if non-adversarial parties to motion proceedings were to be given the express right to file explanatory affidavits? In the unlikely event of this practice becoming endemic, practice directives and even amendments to the rules might become necessary to prevent procedural difficulties from arising. But, as is implicit in Dlodlo J's remarks in *Clairison's CC*, it is unlikely that most non-adversarial parties would wish to incur costs to give evidence – after all, keeping out of the fray is often motivated by a desire to spare costs, both eagerness to save one's own and also to be spared from having to meet an adverse costs order.

[47] The point, though, is that any party joined to proceedings should – at least in principle – be entitled to give evidence because our law recognises well-established principles to protect litigants, especially respondents, in motion proceedings. The fact that proceedings begin on motion does not make the truth-seeking component of the judicial function any less important. An unwarranted barrier to the filing of affidavits by non-adversarial parties has the potential to thwart that exercise. In principle, courts will benefit from as much ventilation of the versions of the role-players as possible. This is not to endorse a free-for-all. On the contrary, the reason why I highlight the rules specific to motion proceedings is because they serve a special purpose. If an applicant cannot

come home within the discipline imposed by *Plascon-Evans* and its successors,⁹ then he or she will fail. Those rules are more than adequate to protect parties, especially respondents, from substantive prejudice arising from conflicting or far-fetched factual narratives in the papers.

[48] The facts of this case offer an excellent example of why undue formalism is unwarranted in this context. As I have intimated above – and this would be even clearer to anyone forced to read the papers in this matter for him or herself – Ngiri’s real complaint seems to be that it objects to what it perceives as untoward collusion between Essack and Bux and B&B. It is not quite clear to me where that objection would ultimately take Ngiri on the merits, but that is not for me to decide. Whatever the underlying, substantive concern of Ngiri, the question is this: what is to stop it filing whatever factual response to the Explanatory Affidavit it sees fit and then arguing that Essack’s version should not be taken seriously because it was provided as a result of collusion? I have no view on whether that will be a sustainable argument – I have deliberately refrained from looking at the facts of the main application in any detail. But either such an argument would be compelling, or it would not be. Either way, the place to address it is as part of the merits of the main application, and not through an ill-conceived attempt to be rid of the affidavit on unclear procedural grounds. This applies not only to the present case, but to almost any example of an explanatory affidavit that I can think of.

[49] At the risk of repetition, I fully accept that the filing of an explanatory affidavit could, depending on the facts, cause prejudice. To take the best example: if an explanatory affidavit adverse to the position of one of the parties is filed on the morning of a hearing in urgent court, and if no time is left to postpone the matter to enable a response, it may be an appropriate case not to allow its admission. I do not mean to suggest that explanatory affidavits are, in all circumstances, admissible. But the notion advanced by Ngiri – that a party who has neither formally opposed nor abided a decision has no right to file any affidavit – cannot be correct.

⁹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E – 635C; *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at para 12; and *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at para 26.

THE CONDUCT OF LEGAL REPRESENTATIVES

[50] This then brings me to the second issue which has troubled me in this case.

[51] Back in the 1950s, long before the advent of Caselines, Schreiner JA said the following in *Trans-Africa Insurance Co Ltd v Maluleka*:¹⁰

'No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.'

[52] This statement has been approved and applied by our courts on multiple occasions. The most recent example I could find in the law reports was the decision of Pullinger AJ in this court, in *Sasol South Africa Ltd t/a Sasol Chemicals v Penkin*.¹¹ In a detailed, but succinct, survey of the case-law, Pullinger AJ discussed various judgments which support the same overarching proposition – that “when dealing with less-than-perfect procedural steps, the correct approach is to evaluate them on the basis of prejudice and the interests of justice”.¹² I can do no better than to commend to the reader the discussion in paragraphs 5 to 32 of *Penkin*, which, with respect, clearly and decisively conveys the message that undue formalism is inimical to the administration of justice.

[53] I have some sympathy with Ngiri arising from the fact that, after the 21 June letter from Hajibhey-Bhyat, when the settlement proposal presumably lapsed, Bux and B&B uploaded the Explanatory Affidavit to Caselines and filed heads of argument in short order, the latter drawing heavily on the former. I can understand Ngiri's disquiet at being faced with heads of argument – which are meant to be filed when pleadings are closed – and also an affidavit which, at the very least, potentially called for a response. I can also empathise with Ngiri's offence at being presented with an application to compel it to file its heads of argument,

¹⁰ 1956 (2) SA 273 (A) at 278F-G.

¹¹ 2024 (1) SA 272 (GJ).

¹² *Penkin* (supra) at para 11.

although this was brought before this rule 30 application was launched. In any event, as a starting point, Ngiri clearly had a right, whether under rule 30 or otherwise, to be given a proper opportunity to respond to the Explanatory Affidavit. If it had framed its complaint in this way, given clear written notice under rule 30(2)(b) and followed up with a succinct, and properly-targeted rule 30 application, it would at least have had a plausible case that it was simply exercising its rights under rule 30, as it was entitled to do.

[54] However, if I were to distil the cases mentioned by Pullinger AJ in *Penkin* into a guiding principle, it would be this: the existence of a power or a right does not mean that it must be exercised or asserted. This is where the duty of legal representatives to behave sensibly arises. The second main reason why I have felt moved to write a full judgment in this matter is because of an unseemly practice which has developed, spawning multiple cases like this one. Practitioners appear to see rules 30 and 30A not as conferring an entitlement on litigants to avoid injustice arising from substantial and prejudicial irregularities, but as conferring an opportunity to cure any perceived procedural fault through opposed litigation. It appears now to be seen as virtuous – as a sign of the energetic and forceful defence of a client's interests – to hit one's adversaries with every procedural hammer available in the rules.

[55] I have had the privilege to be allowed to preside over an allocated part of the opposed motion roll on at least one occasion every year since 2021. It is no exaggeration to say that, at least once each time but normally many more than once, I have been called upon to resolve opposed applications raising minor, formalistic, interlocutory disputes. And on each occasion, I was only one of five or six colleagues (amongst whom the whole weekly opposed motion roll was shared) being placed in the same position, and this applies only to one week. One need only do the maths, and do a cursory search on the various platforms which contain unreported judgments in electronic form, to see how common these types of dispute have become. One can only speculate what the court rolls would look like, if these technical fights were removed from the equation. But it seems obvious that the massive strain, facing this division in particular, would be

at least partially or even substantially alleviated, if judges could be freed up to use their time more productively.

[56] And then there is the position of the litigants. As I explained at the beginning, this application was launched in August 2022, and here I am in October 2024 giving judgment in an interlocutory matter with no imminent prospect of the main proceedings being set down for hearing. Even if the parties diligently take the remaining steps necessary to ensure readiness for a hearing (and I hope that my order will facilitate that), there is a very strong prospect that judgment in the main proceedings will only be given approximately three years after the case commenced. In that time, the parties have incurred legal expenses entirely unnecessarily and Ngiri, through its conduct, has engineered (whether deliberately or not is irrelevant) the frustration of the ventilation of the main dispute.

[57] This is particularly troubling when one considers that Ngiri is a respondent in motion proceedings. I have deliberately avoided saying anything about the merits, and will continue in that vein now. I therefore have no view on whether Essack's affidavit dealt a killer blow to Ngiri's defence, or whether Ngiri could simply have triggered an irresolvable dispute of fact by responding to the affidavit with its own version (let alone refuting it conclusively through its own evidence). But the answer is immaterial. In substance, any prejudice suffered by Ngiri in this matter was, as *Mr Casey*¹³ put it, of its own making. What would have stopped Amod & Van Schalk from writing to Hajibhey-Bhyat, on receipt of the heads of argument, to object and to assert a right to file a further affidavit? Hajibhey-Bhyat could not reasonably have refused such a request. Indeed, it made this point itself in its answering affidavit in the rule 30 application. That affidavit, to which Mr Bhyat (the attorney of record of Bux and B&B, representing his firm Hajibhey-Bhyat) deposed, pointed out that it was open to Ngiri to file a response to the Explanatory Affidavit. If Ngiri was concerned about the heads of argument, a simple letter could have been written asking Bux and B&B to withdraw their

¹³ It will be recalled that Mr Casey argued this matter but inherited heads of argument from Mr Mohammed.

heads of argument, indicating a date by which Ngiri would file a further affidavit and then suggesting a timetable for the exchange of heads of argument.

[58] The point is this: the proper administration of justice depends on all the role-players, not just judges. Legal representatives have a duty to be sensible and to recommend pragmatism to their clients. If the clients demur, then there is a further duty on legal representatives to refuse to be party to abusive conduct. Self-evidently – and I mention this because my assumption is that in the vast majority of these cases the formalism originates from the lawyers and not the client – when clients are none the wiser about the intricacies of the rules of court, legal representatives should desist from running up costs for procedural conduct which is at odds with the proper ventilation of disputes.

[59] We cannot do without rule 30 and its analogues. There has to be a mechanism – in fact, a variety of mechanisms – in the rules, to prevent real prejudice. That is why the law now stands as summarised by Pullinger AJ in *Penkin* (supra) – applications under rule 30 (and analogous causes, such as objections to amendments and the like) will only be upheld when there is real prejudice. That is why there must be a duty on legal practitioners to do their part by using rule 30 sparingly and to object only to conduct which is truly prejudicial.

[60] The present case is a perfect example of a case which, as Pullinger AJ remarked in *Penkin* in his introduction to that judgment, “ought never to have come before court”.

COSTS

[61] As ought, by now, to be apparent, I do not intend to grant Ngiri’s rule 30 application. That leaves the question of costs. Bux and B&B argued that this application was an abuse of process, and that a punitive costs order should follow.

[62] The fact that I could find (with the assistance of *Mr Mohammed*) only one reported case on the admissibility of explanatory affidavits might suggest that this application was arguable. The relative novelty of a point will generally point in that direction, but this case is a rare exception. The overarching reason is that

in the correspondence, the papers and heads of argument, Ngiri never precisely pinpointed the premise of its application. I have dealt with the status of explanatory affidavits because there is no doubt that, as one of many complaints raised by Ngiri, it took the point that a party who has not filed a notice of intention to oppose or abide is precluded from filing one. I have dealt with it not because I considered the point, taken as a whole, to be arguable – there is no doubt that a notice to abide has no special magic, despite Ngiri's suggestion to the contrary. I have dealt with it because Ngiri's application triggered the following response in me: my first reaction was to be puzzled that any person could argue that an explanatory affidavit is not admissible in this context. But I then turned to the online resources and law reports to find authorities to buttress my view and all I could find was *Clairison's CC* – which *Mr Mohammed* helpfully mentioned in his heads of argument – and the unreported judgment seemingly going the other way (mentioned above). This moved me to write this judgment, in the hope that further interlocutory skirmishes on this issue may be avoided. This may seem presumptuous, but it is up to all of us to play our part, however small, in improving the administration of justice.

- [63] The bottom line is that the difficulty in this matter is this: the way in which Ngiri framed its complaint, both in the correspondence before this application was launched and in the founding affidavit itself, was so incoherent and unreasonable, that it made it very difficult for Bux and B&B to know how to respond.
- [64] A good "smell test", to use a colloquialism, is to ask: could a party in the position of Bux and B&B do anything to avoid the interlocutory litigation? In other words, there may be cases where, despite an applicant taking a highly technical and formalistic route, the respondent could simply take some or other procedural step to avoid the need to become embroiled in a costly waste of time. For example, respondents in exception proceedings, where the accusation is that a pleading is vague and embarrassing, will often simply amend the pleading in question to avoid opposed litigation on something which is immaterial to the overall case. In almost all cases, the drafter will steadfastly believe that the pleading is a model of clarity and precision. He or she will invariably realise, though, that his or her

client will save time and money by curing the perceived defects quickly in the form of an amendment. Another example might be where, despite being faced by scandalous or irrelevant evidence in an affidavit, a party elects simply to argue the matter, instead of bringing a strike-out application.

[65] But here, Bux and B&B had no choice but to oppose this application. As I have pointed out earlier, Bux and B&B could as easily have asked Essack to file a supporting affidavit and annexed it to their founding affidavit. The only difference between that, and what actually happened, is of form and not substance. So, the underlying substantive issue is that Bux and B&B consider Essack's evidence to assist their case. They understandably wish to rely on it. Fairness self-evidently requires Ngiri to be able to respond to Essack's version. But that is never what Ngiri has wanted in these proceedings. It wants to preclude Bux and B&B from relying on it categorically – this is the only way to make sense of Ngiri's stance in this matter. Were Bux and B&B to have conceded this issue, in the interests of avoiding litigation, they would have prejudiced their substantive case. No party should be expected to do that.

[66] I do not intend to subject the reader to a further summary of the papers. It is sufficient for me to record, again, that Amod & Van Schalk's 17 July letter did not present a clear way forward to resolve the matter sensibly. It was a combination of interrogatories (only tangentially relevant to the rule 30 application) and demands for steps to be taken, the purpose of which was never made clear. Ngiri then exacerbated the position by adopting the bizarre procedure, described above, of essentially using the rule 30 application as a combination of an application and a notice, advertising in the introduction that Bux and B&B could (despite the application already having been launched) still cure the perceived complaint to avoid Ngiri pressing on. This presented Hajibhey-Bhyat with its first opportunity to consider the scope of the application including any allegations made by Ngiri as to prejudice.

[67] In a letter dated 18 August 2023, in explaining why its clients could not acquiesce in Ngiri's proposed approach (ie removing the Explanatory Affidavit from Caselines), Hajibhey-Bhyat expressly invited Ngiri to file an affidavit in response

to the Explanatory Affidavit and explained that, if it did so, any perceived prejudice would be cured.

[68] Despite being invited to file an affidavit, Ngiri pressed on, doubling down on the various unsustainable arguments – for instance, that a party can only file an affidavit if it first (or simultaneously) files a notice to abide, or its inexplicable argument that Essack’s affidavit amounted to hearsay – which it considered to justify this application. At that point, which is roughly a week after the application was launched and, on Ngiri’s own chosen procedure, still within the window in which Bux and B&B were entitled to “cure” the “irregularity”, what options were left to Bux and B&B? The only step left to them was to oppose this ill-conceived application, which ought never to have been brought in the first place.

[69] Despite everything which I have said above, there are countervailing features. Tempers appear to have risen as a result of the fact that, very soon after uploading the Explanatory Affidavit, Bux and B&B filed their heads of argument. It would have been much more appropriate, and the responsible thing to do, for the Explanatory Affidavit first to have been uploaded, and then a letter addressed to Amod & Van Schalk inviting Ngiri to file a further affidavit in response. There is then the separate question of whether it was appropriate for Bux and B&B to pursue an application to compel Ngiri to file heads of argument, even after advising Ngiri that it could file an affidavit if it so wished. (The reasonableness of the respective stances of the parties on the issue of application to compel the heads of argument is not straightforward. The issue of costs in that application should be addressed separately, since it is not before me.)

[70] Despite these considerations, I cannot see Ngiri’s conduct as anything other than unreasonable. Ngiri chose to use the strange approach of combining its application with written notice, which meant that the first opportunity presented to Hajibhey-Bhyat to place its clients’ position on record, was in response to the application itself (the 17 July letter does not count, because it was so filled with extraneous matter that it was impossible for the reader to anticipate what would or would not find its way into a future rule 30 application). Hajibhey-Bhyat expressly recorded, more than once, that Ngiri could take the opportunity to file an affidavit in response, before filing its heads of argument. The only possible

prejudice to Ngiri which could possibly have arisen from the admission of the Explanatory Affidavit was being denied the opportunity of dealing with it. Once the tender was made, at the earliest possible opportunity, that it could do so, Ngiri had an election: it could withdraw its application on the basis that, as it had said it would do in the introduction to the affidavit, the irregularity was cured. Or, it could press on. Because of its view of the facts and the law, it chose the latter. This was objectively unreasonable. This is especially so when one considers that, on a previous occasion in this litigation (see paragraph [4] above), Ngiri itself showed itself more than willing to take a pragmatic approach to the filing of further affidavits, when it took umbrage at the contents of the supplementary replying affidavit.

- [71] This, to me, is a classic example of a case in which punitive costs should be awarded: ie, where a respondent is given no choice but to defend litigation which could easily have been avoided with even a dash of pragmatism and restraint. To frame it within the traditional language – this is a classic example of unreasonable litigation of the *In re: Alluvial Creek* variety. This would be an appropriate occasion to recall Gardiner JP's words in that case:

“An order is asked for that he pay the costs as between attorney and client. Now sometimes such an order is given because of something in the conduct of a party which the Court considers should be punished, malice, misleading the Court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexations. There are people who enter into litigation with the most upright purpose and a most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear. That I think is the position in the present case.”¹⁴

- [72] There is a concern one might raise, with some justification, that this test is circular. Surely any application, when dismissed, entailed unnecessary trouble

¹⁴ *In re Alluvial Creek* 1929 CPD 532 at 535. See also *Penkin* (supra) at para 61.

and expense on the part of the respondent? Yes, as far as it goes. But the words just quoted, and which have been the subject of much interpretation and refinement in the almost one hundred years since they were written, suggest the framework of a test which necessarily must depend on the facts of each case. Just as judges in applications for leave to appeal must try to distinguish between arguable and indefensible legal stances, judges in this context have to distinguish between steps which were entirely unnecessary and wasteful, and those which were not. On the facts of this case, Bux and B&B were faced with an extremely unpalatable set of choices: they could abandon reliance on the Explanatory Affidavit or they could incur costs in opposing this application. The only way to assuage the undesirable impact of them being put to that choice, is to minimise their out-of-pocket expenses as much as possible. A punitive costs order is the mechanism to achieve that.

- [73] Before concluding, I wish to return to the unsigned confirmatory affidavit, which was initially the subject of one of the prayers in the notice of motion in this application. If I understand the correspondence correctly, it was first provided to Amod & Van Schalk on 3 August 2023, was uploaded sometime after that and was then removed sometime before 4 October 2023. The latter date is when Reddy Inc sent a letter to Amod & Van Schalk explaining that (a) the confirmatory affidavit had been a draft (b) had, as a result, been removed from Caselines and (c) that the correct version of the affidavit was the Explanatory Affidavit. I have given consideration to whether the costs order should only apply from 4 October 2023. This is because, at least understood in isolation, one has some sympathy for Ngiri's objection to the unsigned confirmatory affidavit being part of the papers in the matter. Ultimately, though, my view is that these developments change nothing. First, Ngiri's response to Reddy Inc's letter was to say that, because the unsigned confirmatory affidavit had been removed later than 10 days after the application was launched, the irregular step was cured too late and Ngiri therefore intended to persist in the interlocutory litigation. This was self-evidently unreasonable and vexatious. Secondly, Essack does not oppose this application and the costs order which I intend to make is in favour only of Bux and B&B. In their answering affidavit, they disavowed any knowledge of the circumstances

surrounding the unsigned confirmatory affidavit. It does not strike me as fair to hold them responsible for it.

THE APPROPRIATE ORDER

[74] Unlike in *Clairison's CC*, Ngiri has not sought an alternative order, seeking leave to file an affidavit in response to the Explanatory Affidavit. However, it makes clear in its affidavits that it would wish to do so, if the rule 30 application is not upheld. This matter has already dragged on for too long, and it is time for the matter to be finalised. I therefore intend to make an order regulating the further conduct of the matter, so that it may be brought to conclusion as soon as possible.

[75] In the circumstances, I make the following order:

Order

- (1) The application under rule 30 brought by the first respondent ("Ngiri") in the application under case number 024804-2022 ("the main application") is dismissed.
- (2) Ngiri is granted leave to file an affidavit, if any, responding to the "Explanatory Affidavit" of Mr Suhail Essack, appearing at item 15-1 in the main Caselines file in this matter, within ten days of this Court's order.
- (3) The applicants in the main application ("Bux and B&B") are granted leave to file amended heads of argument, with the intention that those heads of argument should replace the version already filed (appearing at item 16-4 in the main Caselines file in this matter), within ten days of receipt of the affidavit described in paragraph (2) above.
- (4) Should the affidavit described in paragraph (2) above not be filed by the deadline, the heads of argument already filed by Bux and B&B described in paragraph (3) above, and dated 4 July 2023, will stand.
- (5) Ngiri is to file its heads of argument within ten days of either (a) receipt of the amended heads of argument described in paragraph (3) above, or (b) the day after the expiry of the ten-day period described in paragraph (2) above in

circumstances where Ngiri has elected not to file a further affidavit as envisaged by that paragraph. These heads of argument are to replace the “provisional” version now appearing in the main Caselines file.

- (6) Once the parties have filed their heads of argument, the remaining aspects of the normal procedure for the application for a hearing date envisaged by paragraph 25.1 of the *Revised Consolidated Practice Directive 1 of 2024 – Court Operations in the Gauteng Division* shall apply.
- (7) Ngiri is to pay the costs incurred by Bux and B&B in this rule 30 application on the attorney-client scale.


[REDACTED]
ADRIAN FRIEDMAN
Acting Judge of the High Court
Gauteng Division, Johannesburg

Delivered: This judgment was prepared and authored by the Judge whose name is reflected above and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter. The date for hand down is deemed to be **23 October 2024**.

Date of hearing:

9 OCTOBER 2024

For the Applicant:

C Zietsman instructed by Amod & Van
Schalk

For the First and
Second Respondents:

B Casey instructed by Hajibhay Bhyat
Mayet & Stein Inc