



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

CASE NO.: 2021/26828

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
DATE	SIGNATURE

10/08/25

[Redacted Signature]

In the matter between:

AFRICA'S BEST FOODS (PTY) LTD

Applicant

and

CISA SPECIALITA ALIMENTARI S.R.L

Respondent

JUDGMENT

Q LEECH AJ

Introduction

1. The application before me is an interlocutory application brought in the context of an application for repayment of a purchase price, less the value of the goods delivered, paid under a failed contract of sale. The main application was instituted in June 2021 and is ready to be heard. The respondent in the main application is the applicant in the interlocutory application. In the interlocutory application, the applicant applies to refer the main application to trial and to consolidate the main application with an action. The

applicant in the interlocutory application is the plaintiff in the action. The applicant in the main application is the respondent in the interlocutory application and the defendant in the action.

2. The interlocutory application is the applicant's second attempt at consolidation. The applicant previously attempted to consolidate the main application with another action instituted in August 2021. The attempt failed and the applicant has not persisted with that action. The applicant instead instituted the current action in August 2023 and renewed the application for consolidation. The respondent objects to this second attempt. The respondent contends that the actions are substantially similar and the renewed application is an abuse of process designed to frustrate its right to expeditious relief on motion. The actions arise out of the same dispute and the cause of action, amount claimed and many of the allegations are identical. The relevance of the few differences in the actions is not readily apparent.
3. The interlocutory application was initially broader in scope. The respondent is a *peregrinus* and disputes both the service of the summons and the jurisdiction of this court in the current action. The preponderance of the relief contained in the notice of motion was directed at establishing certainty in respect of the service of the summons in the current action. The applicant did not, however, persist in this relief at the hearing of this application. The applicant limited the relief to referring the main application to trial and consolidating it with the current action.

Consolidation of actions and applications

The premise

4. The first issue is whether the consolidation of actions and applications is possible in terms of rule 11. The respondent submits that actions and applications cannot be consolidated. There is support for this proposition in the commentaries on rule 11 of the uniform rules of court¹ which cite as authority, *Solar Basic Industries Inc v Advance Transformer Company of South Africa (Proprietary) Ltd and Fluorescent Corporation SA Ballast Manufacturers (Proprietary) Ltd*.² The provisions of rule 11 were identical to the current rule at the time of the judgment in *Solar Basic Industries*. Rule 11 appears under the heading, "[c]onsolidation of actions", and refers only to actions. The definition for "action" in the rules was broader at the time but included the current definition being "a proceeding commenced by a summons." There was no definition for "application". However, rule 6, which sets out the procedure for applications, was materially similar and the subsequent inclusion in the rules of a definition for "application" as "a proceeding commenced by notice of motion or other forms of applications provided for by rule 6" does not vitiate the judgment in *Solar Basic Industries*.

5. In *Solar Basic Industries*, the court held that “[t]he rule applies to proceedings instituted by way of action and there can be no consolidation of an action and an application.”³ In *Absa Bank Limited v Erasmus*,⁴ the court, quoting *Solar Basic Industries* and apparently *obiter*, stated that “I align myself with these sentiments, action proceedings cannot be consolidated with application proceedings.” In *Phalane N.O. and Another v Department of Co-operative Governance, Human Settlements and Traditional Affairs of the Limpopo Provincial Governance and Others*,⁵ the court held that “[i]t is trite law that only actions can be consolidated.” The latter statement should be read in context and be understood to mean that only actions can be consolidated with other actions as the provisions of rule 11 are extended to applications by rule 6(14), and accordingly applications can be consolidated.
6. The absence of any discussion of rule 6(14) in the abovementioned authorities should not be assumed to be an omission. The provisions of rules 11 and 6(14) have been in existence in their current form for decades without amendment to include any indication that actions and applications as defined in the rules may be consolidated. Rule 6(14) currently states that the provisions of *inter alia* rule 11 “apply to all applications”.⁶ *Prima facie* rule 6(14) merely permits the consolidation of applications and the proper interpretation of rule 11, read with rule 6(14), may lead to the conclusion that the rules do not provide for the consolidation of actions and applications. If so, the statement in Civil Procedure in the Superior Courts,⁷ that “[e]ven though [rule 11] applies to the consolidation of application proceedings, an action and an application cannot be consolidated”, would be correct.
7. Despite some inviting indications to the contrary in the heads of argument, counsel for the applicant explained that the applicant did not contend that actions and applications can be consolidated in terms of the rules. The applicant instead opted for the approach adopted in *Solar Basic Industries* and expressed as follows in the dissenting judgment in *Spencer and Others v Memani and Another*,⁸ “[i]n *Solar Basic Industries* ... it was held that an application and an action cannot be consolidated in terms of rule 11. It would, however, be open for a court to refer an application to trial in terms of [r]ule 6(5)(g) and, having done so, to then consolidate the respective actions under rule 11.” This route was attempted in *Solar Basic Industries* but blocked by the prescribed procedure which required an application.⁹ The applicant in the current proceedings does not face a similar hurdle and, as indicated above, the applicant in *Phalane* succeeded with this approach.
8. The proposed approach is conceptually premised on the proposition that an application is converted into an action upon being referred to trial or an acceptance of the proposition that some applications are susceptible to consolidation with actions. The former proposition is indicated by the language used by the learned judge in *Spencer* which, along with the other authorities mentioned above, expressly disavow the latter

proposition. In *Solar Basic Industries* the applicant applied to refer an application for the revocation of a patent to trial. The court described the application as “an application for conversion of the application for revocation into a trial.”¹⁰ The court held that the Patents Act No. 37 of 1952, “sets out the various forms of evidence which the Commissioner may accept and nowhere in the section is he authorised to change the nature of proceedings which have been prescribed by the Act.”

9. I mention that the premise is necessary only because the definition of “action” in the rules limits its meaning to “a proceeding commenced by summons”. As stated in Erasmus: Superior Court Practice, “[i]n the rules the word ‘action’ is used in its narrow sense”.¹¹ The word in its broad sense includes any process, irrespective of its form, in which the doing of something or the payment of a sum of money or a declaration of rights is demanded, and accordingly, an application.¹² The broad sense is concerned with the substance of the proceeding and the narrow sense, with its form. The assumption that the narrow sense definition is the intended meaning of “actions” in rule 11 makes the premise necessary. If the broad sense is intended in rule 11, there is no need for the premise that an application is converted into an action upon being referred to trial. The broad sense interpretation is permissible if the context indicates that the defined meaning is not the intended meaning. The broad sense interpretation will have the pragmatic consequence that the consolidation of any proceedings, including actions and applications, could be determined mainly on the basis of convenience and prejudice, and the device of conversion could be jettisoned. The broad sense interpretation appears to hold advantages not presented by the conversion device. The broad sense interpretation has broader application and simplifies the application of rule 11. In the circumstances, I considered whether the effect of the only amendment introduced to rule 6(14) on the ambit of rule 11, was to remove the hard line established by the definition between actions and applications.
10. However, as explained by counsel, the applicant did not contend for such an interpretation and I cannot make such a decision in the absence of considered submissions on the proper interpretation of rule 11, read with rule 6(14). I cannot do so for the principal reason that the decision in *Solar Basic Industries* is binding upon me by reason of the provisions of sections 3(1), 4(1) and 77(2), and particularly section 82(2), of the erstwhile Patents Act No. 37 of 1952, and accordingly, the decision requires a finding that *Solar Basic Industries* is clearly wrong. The applicant did not make that submission and I cannot make that decision as the interpretation to the opposite effect is at the very least tenable,¹³ if not correct, as indicated by the definition, the authorities mentioned above and the commentaries.

Inherent jurisdiction

11. In contrast, the submission by counsel for the applicant that “this court can consolidate an action and an application that has been referred to trial based on the court’s inherent jurisdiction” is premised on the proposition that an application referred to trial remains an application, and accordingly rules 11 and 6(14) do not apply and this court is required to exercise its inherent jurisdiction in order to consolidate the proceedings. The submission runs contrary to the contentions in the applicant’s affidavits. The affidavits found the application on the conversion device and the application of rule 11. In the replying affidavit the applicant explains that the application is made in terms of *inter alia* rule 6(5) (g) and rule 11. In the founding affidavit, the applicant contends that “[i]n terms of the prayer for the disputes of fact matter 2021/26828 to be referred to trial and which is an issue for legal argument, once referred, this Court will be consolidating two actions.” In other words, the applicant’s case is founded on the rules and counsel’s submission is founded on the absence of a provision in the rules.
12. In my view, counsel’s submission is not available to the applicant, as an alternative, as it misconceives the restraints imposed on exercising the contemplated power. As the constitutional court firmly stated in *Social Justice Coalition and Others v Minister of Police and Others*,¹⁴ to which counsel for the applicant referred, the court does not have unlimited power to do as it pleases. The constitutional court has repeatedly held¹⁵ that the power must be exercised sparingly and with caution. The power is ordinarily exercised to cater for an extraordinary procedural situation where there is a legislative lacuna and pending the promulgation of appropriate rules of procedure. In *Mukaddam v Pioneer Foods (Pty) Ltd and Others*,¹⁶ the constitutional court emphasised that the rules of court assist in creating certainty in the procedure to be followed. Although courts should not be inflexible and rigid in the application of the rules, strong grounds must be advanced to persuade the court to act outside the powers specifically provided for in the rules¹⁷ and the power must be exercised only in clear cases.¹⁸
13. The application in this matter is unexceptional and no grounds were advanced to persuade me that the consolidation of actions and applications in general should be permitted. I am not prepared to do so and open the door to uncertainty and potential chaos. The power cannot be exercised in an ordinary matter merely because the procedural step a litigant wishes to adopt does not fall within the ambit of the rules. The absence of an applicable rule is not the equivalent of a legislative gap as the absence of a specific rule may indicate that the procedural step is prohibited.
14. The starting point should be an interpretation of the relevant rules to determine whether the rules fail to provide for the circumstances presented or contemplate the circumstances presented and intentionally exclude the circumstances from their ambit. In the latter event, the intention is to prohibit the application of the rules in those

circumstances and it cannot be said that there is a gap. In my view, the consolidation of actions and applications falls into the latter category. There are fundamental differences between actions and applications and good reasons exist to prohibit their consolidation, and there is no indication in the language, context or purpose of the relevant rules that the consolidation of actions with other actions and the consolidation of applications with other applications was contemplated, but not the consolidation of actions with applications. The absence of a specific rule is more an indication of an intention to preclude the application of the rules than an indication of a failure to recognise and provide for the consolidation of actions and applications. Furthermore, if applications are converted to actions on being referred to trial, as discussed below, the rules provide a mechanism in appropriate circumstances to consolidate actions and applications.

15. In the premises, this matter does not provide a clear case for the exercise of this court's inherent power. This does not mean that a court is not permitted to deviate from this general prohibition in appropriate circumstances to enable it to do justice between the parties.¹⁹ It means only that it would be inappropriate and not in the interests of justice to do so in the current, run-of-the-mill matter.

Converting an application into an action

16. The second issue is whether an application referred to trial in terms of rule 6(5)(g) remains an application or is converted into an action.
17. In *Solar Basic Industries*, the court indicated that the application would be converted into an action and other more direct statements can be found in this division. In *Van der Merwe v Regenstreich*,²⁰ the court referred to "the papers in the main application, which has now become an action"; and the matter which had been "converted into an action". The court decided that "[i]t is left to the court which determines the action into [which] the main application has been converted to decide ...". And similar statements are found in other divisions. For example, in *Chetty v Govender; Govender v Chetty*²¹ the court referred to the plaintiff's application "which had subsequently been converted into an action".
18. However, as stated above, "action" is defined as meaning "a proceeding commenced by a summons" and the rules do not, expressly state that a court may convert an application into an action. Rule 6(5)(g) affords the court a discretion to be exercised in appropriate circumstances to refer an application to trial with appropriate directions as to pleadings or definition of issues, or otherwise. The conversion construction requires the language of rule 6(5)(g) to be read as meaning the court "may refer the matter to trial [action]". In *Erasmus: Superior Court Practice*,²² a trial is described as "the judicial investigation of the claim and defence of litigants as disclosed in the summons and plea; and for that purpose, the hearing of such evidence as may be brought forward by the parties; after

which the parties or their legal representatives (if they so desire) are heard in argument, and the judgment of the court is given." As the language indicates, a trial requires a summons and, as a proceeding commenced by a summons is an action, the procedure is often referred to as a trial action. The term encapsulates the procedure and the distinction between the narrow and broad meanings of action. And this appears to be the intended meaning attributed to "trial" in statements such as "the proceedings were converted into a trial."²³

19. The terms are not, however, synonymous and a distinction is drawn between trials and trial actions in the rules and authorities. For example, rule 35(8) refers to "the trial of the action" and rule 39(23) refers to "the conclusion of the evidence in trial actions". The distinction between trials and trial actions is evident in statements in, for example, *Mamadi v Premier, Limpopo and Others*,²⁴ in which the constitutional court held that,

"It may be possible to replicate these advantages in a trial action, but the procedural route to achieve this has not been determined. But even if it were possible, there seems to be no compelling reason to require a litigant to forgo the utility of rule 53, even if a dispute of fact is reasonably anticipated. Recourse to rule 53 will not be in vain. What may need to be referred to evidence or trial will become clear. To insist on the institution of a trial action may very well prove cumbersome and time-wasting. That is constitutionally unacceptable."

20. The difference is well known and the drafters of the rule could be expected to have used "trial action" in rule 6(5)(g) if that was their intention. The drafters did so in a similar context in rule 8(8) which expressly caters for the continuation of a provisional sentence matter as a trial action. Rule 8(8) provides that, "[s]hould the court refuse provisional sentence it may order the defendant to file a plea within a stated time and may make such order as to the costs of the proceedings as to it may seem just. Thereafter the provisions of these rules as to pleading and the further conduct of trial actions shall *mutatis mutandis* apply." Rule 8(8) is markedly different to rule 6(5)(g). However, the orders often made in terms of rule 6(5)(g) are similar.

21. The resemblance to rule 8(8) is found in the orders concerning the application of the rules of court. In some instances, courts have simply made an order that, "the rules relating to actions shall apply"²⁵ or more elaborately that, "[t]he rules of Court relating to action proceedings will apply to the action until its conclusion"²⁶ or more comprehensively that, "[t]he uniform rules of court relating to trial action proceedings and pleadings will thereafter apply to the further conduct of the matter subsequent to the filing of the declaration by the applicants".²⁷ In other instances, courts have ordered that "[t]he Uniform Rules of Court dealing with further pleadings, discovery and conduct of trials shall thereafter apply"²⁸ or "[t]he normal rules of court relating to trial and discovery process will be applicable to the further conduct of the proceedings".²⁹ The aforementioned variations may serve to limit the application of the rules to those mentioned but that does not appear to have been the intention, or preclude the

understanding that the matters should proceed as trial actions. (Cf. *Van Niekerk v Stone*,³⁰ in which the intention to do so was made clear by reference to specific rules.)

22. The variations referred to above serve to remove any possible doubt that the matter is to proceed according to the trial action procedure. However, in many cases, the order is merely that the uniform rules of court shall govern or apply to the proceedings. In *Rosenberg v Nuco Chrome Bophuthatswana (Pty) Ltd*,³¹ for example, the supreme court of appeal ordered that "[t]hereafter the proceedings shall be governed by the Uniform Rules of Court" and in *Botha v Coetzee*³² that "after which the usual Uniform High Court rules will apply." In others, the matter is merely referred to trial without any reference to the rules. An example of this is found in *Thomas v Henry and Another*.³³ The same orders are found in this division in, for example, *Bapela supra*, *Applied Coating Technologies SA (Pty) Ltd v Wilford*,³⁴ and *Young v Curtis*.³⁵ It was not necessary for these courts to express the obvious implication that such matters have to proceed according to an established procedure and read in context and purposively, that they should do so in accordance with the rules applicable to actions. An express statement that the matter proceeds as an action is nevertheless found in *Muhanga Mines (Pty) Ltd v Phumela Mining (Pty) Ltd*³⁶ in which the court ordered that "[t]he applicant's founding affidavit is to stand as the plaintiff's simple summons in the action." And in *Standard Bank of SA Ltd v Neugarten and Others*,³⁷ the court stated that in referring an application to trial the court "orders that the litigation be undertaken by action procedure."
23. The order in its simplest form implements rule 6(5)(g) which requires a referral to trial with appropriate directions as to pleadings or definition of issues. In addition an order is made that the notice of motion stands as a simple summons. In my view, the sole purpose of this aspect of the order is to convert the application into an action. As stated above, the distinction between an action and an application is found in the initiating process. In order to constitute an action, the proceeding is required to be commenced by summons. An application that is referred for the hearing of oral evidence without more would remain an application because it was commenced by notice of motion or another form contemplated rule 6. The order that the notice of motion stands as a simple summons brings the proceeding within the ambit of the definition by changing the form of the initiating process³⁸ and the proceeding is thereafter a proceeding "commenced by a summons." I need not consider whether this occurs from the outset (*ex tunc*) or from then on (*ex nunc*). A further order is occasionally included that the answering affidavit stands as the notice of intention to defend, despite the presence of notice of intention to oppose, which can only serve to fix the conversion.
24. The directions concerning the pleadings ordinarily prescribe a declaration to be delivered within a specified period of time or a determinable time.³⁹ Rule 6(5)(g) does not require

any further directions and often no order is made. The commencement of pleadings is considered adequate indication that the rules applicable to trial actions shall apply.

25. The application generally takes on the form of an action. The matter has a summons, pleadings, rules applicable to actions and proceeds to trial, and as the definition of action is concerned with form, not substance, an application referred to trial under these and similar orders is converted into and becomes an action. The authorities indicate this to be the general understanding of our courts and counsel for the respondent appeared to accept the proposition that the word "trial" in rule 6(5)(g) effectively means "trial action". To hold otherwise, merely because the initiating document was not a summons would be to place indefensible store in formalism.
26. Although recently in *Molatjane v Joffe and Others*,⁴⁰ the court stated that a "rule 6(5)(g) application is essentially an interlocutory application which asks this court to keep the main application alive by referring it to trial", the court did not, in my view, mean that the proceeding is preserved in the form of an application. The court did not consider the issue of conversion. (The statement applies in respect of applications referred for the hearing of oral evidence.⁴¹)

Separate prevenient applications in terms of rule 6(5)(g)

27. The third issue is whether a separate prevenient application to refer the application to trial is appropriate. The respondent effectively contends that the request to refer the matter to trial must be made to and heard by the the court hearing the application. Counsel for the respondent was forthright in argument that no authority could be found for the proposition. The applicant submits in the replying affidavit that there is no authority that only the court hearing the main application can make such a referral and that "[o]ur case law is replete with examples of interlocutory applications being brought to courts simply for the underlying main application to be referral to trial or oral evidence."
28. Rule 6(5)(g) affords the court the power to "make such order as it deems fit with a view to ensuring a just and expeditious decision" and in doing so it may refer the matter to trial. The exercising of the power *mero motu* is rare and undesirable,⁴² and accordingly the court should be approached for an order. The request usually takes the form of a motivated submission that the matter cannot properly be decided on the papers for the reasons set out therein and the court should exercise the rule 6(5)(g) discretion in favour of referring the matter to trial.⁴³ The request is an application because the word 'application' has a wide meaning and includes any form of request to a judge or court in legal proceedings⁴⁴ and 'motion' has an identical meaning.
29. As a general rule, an application for referral to trial must be made *in limine* (on the threshold) or *in initio* (in the beginning).⁴⁵ As the language indicates, the request is generally made at the hearing of the application prior to argument on the merits. This

rule is described as salutary but not inflexible or without exception.⁴⁶ The flexibility of the rule permitted litigants to apply in the alternative for the matter to be referred if the main argument in support of the relief should fail. This practice required the general rule to be restated in *De Reszke v Maras and Others*,⁴⁷ because, in the opinion of the court, "the pendulum has swung too far the other way. Some younger counsel, in particular, seem to take it half for granted that a court will hear argument notwithstanding disputes of fact and, failing success on such argument, will refer such disputes, or some of them, for oral evidence." The court reminded practitioners that there was a time "when in practice an application to refer for oral evidence had *invariably to be made at the commencement of argument*. Counsel in effect had to elect at that stage and could not save a reference for oral evidence as an alternative." And held that, "the general rule of practice remains". This admonition and the subsequent approval it received in the supreme court of appeal in *Mogami* served to reset the pendulum's equilibrium for a period. I sense, however, that recently the pendulum has been nudged in the opposite direction. There is nascent development which threatens to become a practice in terms of which applications for referral to trial are commenced by notice of motion, and replete with affidavits are set down for hearing before a court other than the court that will hear the main application. On being presented with a few hundred pages of papers in a matter listed on my roll as an 'interlocutory', I naturally questioned the legitimacy and desirability of such a development.

The form of the application

30. In *Molatjane*,⁴⁸ the court stated that the application in terms of rule 6(5)(g) was defective because it was not brought on notice of motion supported by a founding affidavit. The statement appears to be *obiter* as the court determined whether there was a genuine dispute of fact and finding none, dismissed the application. And in *All Occupiers of 1 Willow Place, Kelvin, Sandton v K2016498847 SA (Pty) Ltd*,⁴⁹ the court indicated that an application in terms of rule 6(5)(g) was not considered because it was not brought on notice of motion. I do not understand these authorities to be referencing a general rule that an application for referral must be brought on notice of motion, supported by a founding affidavit. The rules and authorities are clear and to the contrary. The adequacy of the notice and whether a supporting affidavit is required depends on the circumstances.
31. An application for referral is interlocutory.⁵⁰ In terms of rule 6(11), interlocutory applications may be brought on notice supported by such affidavits as the case may require. The difference between an application brought on notice and an application brought on notice of motion is well established.⁵¹ As stated in *Yorkshire Insurance Co Ltd v Reuben*,⁵² "interlocutory and other applications incidental to pending proceedings were not intended to be brought by way of formal notice of motion", and, "[i]t follows, therefore, that the applicant unnecessarily adopted the procedure applicable to notices of motion

when initiating the application".⁵³ In *Viljoen v Federated Trust Ltd*,⁵⁴ the court held that an interlocutory application "can be initiated by way of an ordinary notice. Such a notice need not be in accordance with Form 2(a) of the First Schedule at all and can be much more concise and to the point." In some instances, our courts have firmly stated that a notice of motion procedure is not to be used.⁵⁵ In *Swartz v Van der Walt t/a Sentraten*,⁵⁶ the court pointed out that rule 6(11) is an exclusionary provision and in *SA Metropolitan Lewensversekeringsmaatskappy Bpk v Louw NO*,⁵⁷ that despite the permissive terms, the rule did not contemplate an election to use either a notice of motion as contemplated in rule 6(1) and 6(5) or a notice, as in rule 6(11).

32. The applicant is simply required to give proper notice.⁵⁸ In *Yorkshire Insurance*, the court held that "all that is required in terms of Rule 6(11) is a notice advising the other party that an application will be brought on a date assigned by the Registrar."⁵⁹ There is no prescribed form for notices. However, the use of a notice similar to form 2 in the first schedule to the uniform rules of court was approved in *Viljoen*. I point out that the heading of the approved form indicated that it was a motion. The current practice is to use form 2 modified for the circumstances. The template is prescribed for use with applications brought *ex parte* and accordingly bears the heading, notice of motion. Although technically the form should be modified to reflect its nature as a notice and ground the application squarely within the provisions of rule 6(11), the mere retention of the heading cannot be criticised. However, in combination with other indications of a long form notice of motion, the retention of the heading may cause confusion.

33. The issue is not about the heading. The issue is whether the applicant initiated proceedings in terms of rule 6(1) and 6(5) or rule 6(11). The use of a notice of motion similar to form 2(a) is an indication that the application is in terms of rule 6(1) and 6(5). In *SA Metropolitan Lewensversekeringsmaatskappy*,⁶⁰ the learned judge expressed,

"doubts about the correctness of plaintiff's contention that the notice of motion despite being a replica of Form 2(a) should not be interpreted as a 'notice of motion' but as a 'notice' in terms of Rule 6(11) with an addition about notice of objection and the filing of affidavits so that both parties know where they stand in regard to such matters. There appears to be distinct procedures and the form of the application makes it recognisably an attempt to move within Rule 6(1) and 6(5)."

34. The institution of a separate application in terms of rule 6(1) and 6(5) would be irregular and impermissible for the reason stated in *Transnet Soc Ltd and Another v CRR C E- Loco Supply (Pty) Ltd and Others*.⁶¹ The aforementioned case concerned a separate application to dismiss a review based on delay and in that context the court stated that "it is not open to a respondent or defendant to outflank an applicant or plaintiff by initiating a wholly separate application aimed at exploding the 'main case'. The counter-assault must engage with the adversary within the 'main case'." The opposing party would have reason to complain in the event that it was prejudiced and could do so in terms of rule 30.

35. Although the use of a short form notice of motion is permissible, the notice is not invariably required to be in a form as near as may be in accordance with form 2. The notice must be adequate in the circumstances and "ensure that the respondent is neither taken by surprise nor deprived of the opportunity to prepare his case."⁶² The parties should not lose sight of the fact that the court should be notified and this is usually done by delivering a notice. However, the notice required for the purposes of rule 6(5)(g) need not be written provided these requirements are satisfied. As indicated by the authorities, applications for referral made orally from the bar are not uncommon. In appeals, applications for referral made for the first time during argument have been entertained and, although mostly unsuccessful, were not dismissed because the notice was inadequate.⁶³ The reason for this tolerance by the parties and courts concerned is to be found in the requirements for the notice, affidavits and the practice.
36. As expressly stated in rule 6(11), an application brought on notice does not require a supporting affidavit unless the particular circumstances so require.⁶⁴ In my experience, there is a reluctance to institute interlocutory proceedings without a supporting affidavit because the risks associated with not filing an affidavit where the circumstances require one are greater than those associated with doing so.⁶⁵ However, practitioners should be reminded that affidavits are not the proper place for argument and proceeding on notice without an affidavit "not only facilitates the work of the Courts but also enables litigants to resolve their differences as speedily and inexpensively as possible".⁶⁶ The general rule on applications for referral to trial has similar objectives - to avoid unnecessary costs and delay, and is convenient to the court.⁶⁷ These objectives are countered by delivering affidavits in matters in which they are not required.
37. A supporting affidavit should not be required in applications for referral to trial because the affidavits filed in the application must set out the grounds for the request and communicate the intention to apply for an order.⁶⁸ A court faced with an affidavit in support of an application for referral to trial should be circumspect and guard against unwittingly permitting the delivery of a further set of affidavits. The applicant for referral should not be permitted to supplement its case in the main application without leave by delivering a supporting affidavit containing matter that should be contained in the affidavits in the main application. The circumstances would have to be extraordinary before a supporting affidavit was required in an application for referral to trial.
38. In practice, the intention to apply for an order on the grounds set out in the affidavits in the application is often reaffirmed in the heads of argument, and in this division in the practice note, the pre-hearing conference, joint practice note and a draft order. The order made in referring applications to trial is elementary and this form of notice should serve as adequate notice in all but the most extraordinary cases. A concise notice would,

however, place the issue beyond any reasonable debate and is, for that reason, advisable but not required in all instances.

39. I should not be understood to mean that precision can be abandoned. The consequences of imprecision are evident in *Santino Publishers CC v Waylite Marketing CC*,⁶⁹ in which the applicant stated in the replying affidavit that "[s]hould this honourable court require the *viva voce* evidence of Mr Santino Cianfanelli for the purposes of this affidavit, an order will be sought to compel Mr Santino Cianfanelli to be subpoenaed to give oral evidence at the hearing of this application. The court stated that "[t]he sole purpose for obtaining the proposed order (which was not persisted with at the hearing) was to present the oral evidence of Cianfanelli on a specified issue. It was clearly not intended nor can it in any way be construed as an application for the referral of the matter as a whole to the hearing of oral evidence." In *4 Africa Exchange (Pty) Ltd v Financial Sector Conduct Authority and Others*,⁷⁰ the applicant stated in a supplementary affidavit that a draft order would in due course accompany its heads of argument. The draft order was attached to the applicant's heads of argument and the interlocutory application was heard *in limine*. The respondent nevertheless submitted that the application was irregular in that the applicant "did not file a notice of application indicating the relief to be sought in the interlocutory application". However, the complaint of greater substance was that the relief sought in the draft order was materially different to the relief foreshadowed in the supplementary affidavit. In the circumstances, the court held that the applicant had failed to give proper notice to the respondent.
40. In my view, a judicial approach which is too tolerant of interlocutory applications brought in a form better suited to initiating proceedings, supported by unnecessary affidavits and permitting periods for the filing of papers risks needless interruption and inordinate delay to application proceedings.⁷¹ Our courts have sought to counter these disruptive consequences by requiring an explanation for the delay in bringing applications for referral. In *Mercantile Bank v Ross*,⁷² the respondent launched an application on notice of motion supported by a founding affidavit a week before the hearing. In the founding affidavit, the applicant dealt with matters he contended amounted to disputed issues but failed to define the issues to be referred to oral evidence. The court dismissed the application because *inter alia* there was no explanation for the delay in launching the application in terms of Rule 6(5)(g). In *True North Holdings (Pty) Ltd and others v Sky Gecko Software Lab (Pty) Limited and another*,⁷³ the referral application was delivered on the morning of the hearing. The application was on notice supported by a short affidavit. The applicant claimed the application was urgent and requested condonation for the non-compliance with the rules relating to service and time periods. There was no prior mention of any dispute which precluded the court deciding the matter in either the applicant's replying affidavit or the heads of argument in the main application. The court was critical of the delay and dismissed the application. In both matters, the applicants

appear to have allowed inadequate time for the papers to be finalised and the application heard at the hearing, and were attempting to supplement their papers without leave.

41. The difficulty is not the notice period *per se* but the notice period coupled with the form adopted for the application for referral. The root cause is the institution of applications for referral on notice of motion with supporting affidavits that require an answer in close proximity to the hearing. The applications brought in that form have the potential to interrupt and delay the main application. An applicant who opts for that form must allow an adequate period between delivering an application for referral and the hearing.⁷⁴ In most instances, this means that the notice will have to be concise and the supporting affidavit uncontentious. The risk of not doing so is on the applicant.⁷⁵ If the papers required to be delivered cannot be finalised in time for the application to be heard at the hearing of the main application, the applicant must apply for a postponement and in that context an explanation for any delay in instituting the application is required. An applicant faced with insufficient time has an election to either apply for referral on notice without a supporting affidavit and request that the application be heard *in limine* or apply for a postponement in order to finalise the papers. The former approach is the preferable approach for the reasons stated above and should be encouraged. In the absence of a supporting affidavit, there should be no need for any further affidavits and the respondent would be pressed to explain why the case required an affidavit. However, the approach which is all too often adopted is to deliver an application for referral on notice of motion supported by a prolix affidavit. The assumption is that the risk of doing so entails nothing more than a determination that the application for referral is not 'ripe for hearing' and will be removed from the roll, directions given for the filing of papers and a hearing, and the main application suspended pending its resolution with or without a costs order.⁷⁶ This assumption should be dispelled. The legal representatives who are reluctant to facilitate the work of the courts and to resolve differences speedily and inexpensively as possible, should not be allowed to deflect the focus of a postponement application and immunise their clients against the risks and consequences of an unsuccessful application.⁷⁷
42. In my view, a separate application on notice of motion supported by a founding affidavit is generally unnecessary and the authorities do not provide any reason to encourage such a practice. An application on adequate notice without affidavits should be appropriate and required in all but the most exceptional of cases. The issue should be whether the application for referral to trial is available to the party making the request on the affidavits in the main application. If the affidavits are properly drawn, I would expect any counsel or attorney appearing in such a matter to be ready to address an application for referral to trial in argument without complaint. The genuine complaints about surprise and claims to an opportunity to prepare should be rare.

The hearing of the application

43. The issue is whether hearing the matter prior to the main application is permissible and appropriate. The hearing of applications for referral to trial independently of the main application is rare. Although I disagree with applicant's counsel that "[o]ur case law is replete with examples", I accept that it can be done. The question is whether it should be done other than in exceptional circumstances. In my view, there are a number of considerations which favour the hearing of applications for referral at the hearing of the main application.
44. The discussion should commence from the appreciation that applicant for referral does not have "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."⁷⁸ The uniform rules of courts confer procedural rights on litigants and assist in creating certainty in the procedures to be followed but the rules of court must be applied flexibly and contesting rights must be balanced. A litigant has a procedural right to "secure relief by motion proceedings in appropriate cases",⁷⁹ and the right to "the more expeditious and less expensive method of enforcing a claim by motion" should not be delayed merely because an opposing party institutes an application for referral to trial.
45. Rule 6(11) permits an interlocutory application to be set down at a time assigned by the registrar or as directed by a judge but the decision to do so is administrative. The registrar performs an administrative function. The purpose of the rule is "to enable the Registrar to perform the administrative function of placing the matter on the roll in the appropriate Division of the Court."⁸⁰ The registrar "does not adjudicate upon matters before the court."⁸¹ I understand that in exercising this power the registrar accepts the applicant's statement that the application is interlocutory and should be set down as such. The registrar does not consider whether application is incidental to pending proceedings, whether the notice is adequate, whether the periods for the filing of affidavits is reasonable or whether it is appropriate for a court other than the court hearing the main application to hear the interlocutory application. A judge exercising this power probably does so but that decision nevertheless remains administrative and is provisional. In assigning a date and time for the hearing, the judge does not adjudicate upon these issues. The parties are entitled to be heard and the appropriate court to hear the parties is the court hearing the application. The court, after hearing the parties, is entitled to adopt a different view. In *Premier Fmcg (Pty) Ltd v Baker*,⁸² the applicant conceded the understanding that the court was not bound by the direction of the deputy judge president.
46. In a wide and general sense, an interlocutory application is an "incidental application for an order at an intermediate stage in the course of litigation, aimed at settling or giving

directions with regard to some preliminary or procedural question",⁸³ and required to be "subordinate or accessory to while at the same time being distinct from the main proceeding".⁸⁴ An application to refer a matter to trial strains every aspect of this description. In my view, prevenient interlocutory applications should be concerned with *inter alia* procedural issues in the narrow sense, and although procedural in a broad sense, evidential issues should be raised as points *in limine*.⁸⁵ A request for an application to be referred to trial is essentially an objection to the matter being decided on the evidence contained in the affidavits before the court without the benefits of a trial action. The appropriate court to hear the request, assess the affidavits, determine whether the application "cannot properly be decided on affidavit" and, if so, the procedure to be adopted, is the court hearing the main application. There is certainly something to be said for the contention by the respondent that the requirement to determine whether an application "cannot properly be decided on affidavit", implies some attempt to decide the application on the papers and accordingly indicates that "the court" referred to in rule 6(5)(g) is the court hearing the main application.

47. The current practice directive in this court permits matters that are "strictly interlocutory in nature" to be enrolled in the special interlocutory court. The practice directive requires interlocutory matters of a substantive nature, matters that do not concern "procedural delinquency", to be enrolled in the general motion court. The practice directive provides a useful example to assist litigants in determining the difference between those categories. As indicated above, this application falls into the substantive interlocutory category. I do not, however, understand the practice directive to mean that pragmatism must be abandoned.
48. The delay and convenience in hearing a prevenient application for referral to trial must be considered by the court hearing the application. As stated in *National Union of Mineworkers v Optimum Coal Terminal (Pty) Limited and another*,⁸⁶ in regard to urgent applications, "[c]onvenience to the court and the judges presiding is an important consideration when deciding to launch urgent litigation of this nature. The failure to do so, in my view, is tantamount to an abuse of the court process." In *Transnet Soc Ltd and Another v CRRC E-LoCo Supply (Pty) Ltd and Others*,⁸⁷ the court held that even "the deliberation on a genuinely discrete issue must be a 'convenient' way of litigating the case, a factor requiring a fact-specific assessment of the given case in the context of its own circumstances."
49. Although an application for referral is required, as a rule, to be brought *in limine*, there are exceptions and, as stated in *Abaany Property Investments Ltd v Fatima Ayob & Sons Ltd*,⁸⁸ "the Court retains a discretion to consider whether counsel should be put to an election or not depending upon the circumstances of each case. Broadly speaking, it is convenient and salutary that an election in appropriate circumstances should be

made. But the Court is entitled to consider alternative remedies where the circumstances justify such a step.” The court hearing the application at the main application also retains the power to direct whether any point raised *in limine* should be argued first or “argued first and separately from the remainder of the application or not” and to this end should afford the parties “proper opportunity to debate this issue.”⁸⁹ The power to order a separation should be exercised with circumspection⁹⁰ and the separation of a request for referral would be generally inappropriate and probably deprecated.⁹¹ The development of a practice which permits separate applications for referral to be brought as a matter of course prior to the hearing of the main application would effectively remove this discretion and place this power in the hands of the parties, and deprive any opposing party of the opportunity to be heard on the issue. A separate application for referral would effectively impose the election and separation on the court and other parties.

50. As a general principle, piecemeal litigation is not to be encouraged,⁹² and particularly in application proceedings in which the desirable course “is for all the affidavits to be delivered and the entire application to be disposed of in a single hearing.”⁹³ Although a successful application for referral does not dispose of the relief sought in the main application and is not final and definitive in effect, I am unaware of any reversal of the decision to refer an application to trial. The decision effectively disposes of the application as a legal proceeding by converting it into a trial action and all issues which have that potential should be heard at the same hearing.
51. As stated above, the grounds for the request are embedded in the affidavits in the main application. In deciding the application for referral, the court is required to locate and examine the basis for the request in the main application. The request is usually but not invariably founded on the presence of a dispute of fact and in such instances the court is required to examine the allegations to determine whether a genuine dispute exists that cannot be satisfactorily determined without the aid of oral evidence. In doing so, the court is required to consider whether the respondent seriously and unambiguously engaged with the issues sought to be placed in dispute.⁹⁴ The court is required to assess whether there are reasonable grounds for doubting the correctness of the allegations and to carefully scrutinise allegations peculiarly within the knowledge of an applicant that cannot be directly contradicted or refuted.⁹⁵ The court is not required to accept any allegation at face value.⁹⁶ This process naturally extends to contextual allegations that may not be in dispute because “factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision.”⁹⁷ The court “should be guided to a large extent by the prospects of *viva voce* evidence tipping the balance [of probabilities] in favour of the applicant.”⁹⁸ The court “should be astute to prevent an abuse of its process by an unscrupulous litigant intent only on delay or a litigant intent on a fishing expedition to ascertain whether there might be a defence without there being any credible reason to believe that there is one.”⁹⁹ The

process is rigorous and exacting, and serves the indirect purpose of supplementing the court's understanding of the merits. A court that performs this task is ideally placed to hear the merits of the main application if the request is refused and almost without exception proceeds to do so.

52. A referral to trial is one of three specifically mentioned options in the rule. These options do not restrict the discretion. The options available to the court are limited only by the demand in the rule to ensure a just and expeditious decision. The court is required to "select the most suitable method of employing *viva voce* evidence for the determination of the dispute."¹⁰⁰ The selection flows naturally from the examination of the allegations. As stated in *Repas v Repas*,¹⁰¹

"A court has to have regard to a number of disparate and incommensurable features in coming to an appropriate decision in terms of rule 6(5)(g): (i) the foreseeability of the dispute, (ii) the degree of blameworthiness, if any, in the circumstances of the given case of the applicant having proceeded in the face of a foreseeable dispute, (iii) the nature and ambit of the dispute in question, (iv) its amenability to convenient determination by a reference to oral evidence on defined issues, as distinct from in action proceedings to be commenced *de novo*, (v) the probabilities as they appear on the papers (if those are against the applicant, the court will be less inclined to send the dispute for oral evidence) (vi) the interests of justice, and (vii) the effect of any other feature that might be relevant in the circumstances of the given case."

And,

"It seems to me, on the face of matters, that the decision that a court has to make under rule 6(5)(g) involves what EM Grosskopf JA referred to in *Media Workers Association* as 'a determination . . . [to be] made by the court in the light of all relevant considerations'. The appropriate decision has to be informed by those considerations. Despite the sub rule affording a choice of courses to follow, the court's decision on which to adopt has to be informed by those considerations."

53. The court hearing the submission that the main application cannot properly be decided on affidavit should not be constrained to the granting or refusal of one of the options. The court should be entitled to proceed to consider all available options and the relief sought in the main application if the application for referral fails. If the parties are permitted to approach the court in a separate *prevenient* application, the parties could immunise themselves against relief other than that sought in the application and request the exercising of the discretion on one of the unlimited options available. The parties could do so at any stage in the course of the litigation and do so sequentially. The parties would be constrained by only their ingenuity and the process would be rendered susceptible to abuse. In my view, the party who seeks relief under rule 6(5)(g) should be placed at the risk of any other available relief being granted. In *Transnet Soc Ltd and Another v CRR E-LoCo Supply (Pty) Ltd and Others*,¹⁰² the court stated "[t]here is no room for a risk-free tactic in our civil procedure. Nor, in my view is there, on policy grounds, any reason to suppose that any unfairness is inadvertently caused by such a stricture."

54. The refusal of an application for referral in separate proceedings would result in delay and would not advance the proceedings as the decision would not be binding on the

court hearing the main application. The application for referral would serve as a litmus test for the presence of dispute of fact and an unsuccessful applicant may renew the application for referral at the hearing of the main application after seeking to shore up the allegations in its papers. As a result, the judicial resources applied in assessing the allegations may be wasted, the risk of conflicting decisions on the same issue would arise and the parties would be exposed to the costs of repetitive hearings, none of which is desirable or convenient.

55. In my view, the following statement in the context of a striking out application in *Elher (Pty) Ltd v Silver* is apposite:¹⁰³

"I think that the application to strike out is premature. Such an application must, in my opinion, be made to the Court that tries the application at the time the application is before the Court for a decision on the merits. The course now taken of objecting in a preliminary application to strike out would lead to the very greatest inconvenience and difficulty."

"After all, what is the real nature of the objection? This is not an objection to a pleading, it is an objection to evidence which is proposed to be tendered to the Court that hears the application. How can a Court which is not hearing the application disallow evidence which it is proposed to tender later on as irrelevant to the merits of the dispute? The Court which ultimately decides the application may have quite a different view as regards the relevancy of some of the passages when all the evidence is presented to it and the matter has been fully argued."

"A great waste of time, energy and expense is involved in the procedure which *Mr. Miller* has followed. First of all, there must be a full-dress argument or, at any rate, very considerable argument on the merits in order to enable the Court to decide whether the passages objected to are or are not relevant. Then a decision as regards the relevancy of various passages must be given. Then more evidence is to be filed by the petitioner, and finally the merits must be argued again before that Court which hears the application."

56. And in *Premier Fmcg (Pty) Ltd v Baker*,¹⁰⁴

"In my view, common sense and the authority of *Elher*, *Theron* and *Louis Pasteur* are in favour of the proposition that an interlocutory application to strike out material in affidavits in application proceedings on the basis of inadmissibility should very rarely (if ever) be granted — such relief should be restricted to the very clearest cases of inadmissibility, where there is no possibility of the court in the main application arriving at a different conclusion (and, of course, if the case is so clear, then there seems no good reason why that clear decision shouldn't be left for the court in the main application)."

57. In my view, the appropriate court to hear the request and to determine the approach that should be adopted is the court hearing the main application. An applicant seeking a referral to trial in a separate prevenient interlocutory application must demonstrate that the hearing of the application for referral is both convenient and will not disrupt the hearing of the main application, failing which the application for referral should be heard by the court hearing the main application.

58. I should not be understood to mean that there are no circumstances that would justify a separate prevenient application. In *Lekup Prop Co No 4 (Pty) Ltd v Wright*, the applicant instituted motion proceedings against the respondent and after the respondent delivered an answering affidavit, the matter was, by consent, referred to trial.¹⁰⁵ And, as indicated above, I was referred to *Phalane N.O. and Another v Department of Co-operative*

Governance, Human Settlements and Traditional Affairs of the Limpopo Provincial Governance and Others,¹⁰⁶ in which the court heard the application without demur.

59. In *Mamadi*, the constitutional court was concerned with the contention that a review application should be dismissed because of the presence of foreseeable disputes of fact. The irresolvable disputes of fact were noted by the court *a quo* during argument and the applicants filed supplementary written submissions on the appropriate remedy in which it was submitted that the matter should be referred for the hearing of oral evidence. The court *a quo* dismissed the main application. The constitutional court decided that “a court does not have a discretion under rule 6(5)(g) to dismiss an application brought in terms of rule 53 on the basis that reasonably anticipated disputes of fact arise on the papers.”¹⁰⁷ In this context the court held that,

“This does not mean that an applicant in a rule 53 application is entitled, as of right, to have a matter referred to oral evidence or trial. General principles governing the referral of a matter to oral evidence or trial remain applicable. Litigants should, as a general rule, apply for a referral to oral evidence or trial, where warranted, as soon as the affidavits have been exchanged.”

60. The statement in *Mamadi* indicates an earlier point in the proceedings to that stated in *Di Meo v Capri Restaurant*,¹⁰⁸

“When an opposed motion, or opposed action for provisional sentence, reaches the stage that it is ready to be argued, there is available to both parties all the information and affidavits which are to be before the Court. In my view, it is at that stage that a party should make an application for leave to lead *viva voce* evidence to resolve any conflict which, it appears from the papers, is incapable of being decided without it. In the present instance, the matter was not even mentioned until after the plaintiff’s counsel had completed his argument and until near the end of the argument for the defendant.”

61. The statement in *Di Meo* found support in this division before being recognised as and subsequently restated as the salutary but not inflexible general rule.¹⁰⁹ In the opinion of the court in *De Reszke*,¹¹⁰ these subsequent judgments ushered in an undesirable practice which required correction. The judgment in *De Reszke* was confirmed on appeal without comment on this issue but cited with approval in *Mogami*. The courts in *De Reszke* and *Mogami* were addressing the practice and tightening up on the flexibility of the rule. The courts were emphasising that the rule is a generally applicable rule with true exceptions. The judgments of these courts do not evidence an intention to jettison the development of the general rule that the application is made *in limine*. In *Mogami*, the court held that,

“An application for the hearing of oral evidence must, as a rule, be made *in limine* and not once it becomes clear that the applicant is failing to convince the court on the papers or on appeal. The circumstances must be exceptional before a court will permit an applicant to apply in the alternative for the matter to be referred to evidence should the main argument fail”.¹¹¹

62. The passage in *Mamadi*, is similar in effect. The constitutional court proceeded as follows after the abovementioned statement,

"Where timeous application is not made, courts are, in general, entitled to proceed on the basis that the applicant has accepted that factual disputes will be resolved by application of *Plascon-Evans*. Likewise, where an applicant relies on *Plascon-Evans*, but fails to convince a court that its application can prevail by application of the rule, a court might justifiably refuse a belated application for referral to oral evidence. A court should, however, proceed in a rule 53 application with caution. An applicant might institute proceedings in good faith in terms of rule 53, in order to secure the advantages of the rule and on the basis that the application can properly be decided by application of *Plascon-Evans*, only for the respondent to later show that this is not so. In these circumstances, provided the dispute of fact which emerges is genuine and far-reaching and the probabilities are sufficiently evenly balanced, referral to oral evidence or trial, as the case may be, will generally be appropriate."

63. I accept that if the implementation of the general rule is to have any prospect of avoiding unnecessary costs and delay,¹¹² notice of the application for referral to trial should be given at the earliest opportunity. I do not, however, understand the judgment in *Mamadi* to sanction, much less require, the application to be set down for hearing separately and prior to the main application irrespective of the disruption and inconvenience, and additional costs. In *Mamadi*, the constitutional court cited the abovementioned passage in *Mogami*. The *Mamadi* judgment is consistent with the general rule and contemplates and addresses the approach to applications for referral made during the hearing. The general rule as developed in our courts sits uncomfortably with an interpretation that demands a separate application at some earlier stage in the proceedings. In *Mamadi*, the application for referral was heard at the hearing of the main application in the court *a quo*. The constitutional court upheld the appeal against the dismissal and referred the main application to trial. This too indicates that the constitutional court did not intend to usher in a new practice. I find confirmation for this in *Repas v Repas*,¹¹³ in which the point, founded on *Mamadi*, was taken that the appellant ought to have applied for a referral to oral evidence as soon as a dispute was evident on the papers. The court recognised that the earliest opportunity was in the affidavits in the main application and the appellant had foreshadowed the application in the replying affidavit. There was no criticism of the fact that the application was heard during the hearing of the main application. The appeal against the dismissal was upheld and the application referred for the hearing of oral evidence.

The application for referral in this matter

64. As indicated in *SA Metropolitan Lewensversekeringsmaatskappy*,¹¹⁴ the documents must be interpreted to determine whether the application for referral is a separate application in terms of rule 6(1) and 6(5). In this instance, the applicant has made use of curious combination of form 2 and 2(a). The notice bears the heading notice of motion, indicates an address at which it "will accept notice and service of all processes in these proceedings", requires the respondent to do the same and provide notice of its intention to oppose and deliver an answering affidavit within the periods specified in rule 6(5)(b) and (d), and informs the respondent that application will be made on an unspecified date in the event that no notice of intention to oppose is given. However, the notice was

served on the respondent's attorneys at the address specified in the main application, seeks relief which is predominantly interlocutory and requests the registrar to place the matter on the roll. The application was set down as an interlocutory. The application was understood by the respondent to be an interlocutory and there was no complaint in terms of rule 30. In the absence of a complaint, I assume for the purposes of this judgment that the application is made in terms of rule 6(11).

65. The disruption and inconvenience caused by a too tolerant approach to separate prevenient applications for referral is evident in this matter. In this matter, the applicant served the application for referral eight court days prior to the hearing of main application. The referral application was part of a broader application to consolidate the application with the action. The applicant afforded the respondent the time periods specified for a long form notice of motion, and presumably intended to take the full period provided in rule 6(5)(e) to deliver a replying affidavit. The applicant made no attempt to finalise the papers prior to the hearing of the main application and applied for a postponement for the interlocutory application to be heard. The postponement was granted.
66. The finalised papers are voluminous. The applicant has annexed *inter alia* all four of the affidavits (without annexures), and various documents in the main and other proceedings between the parties to the founding affidavit. The founding papers alone are nearly 350 pages and the reply another 125 pages with the answer taking up about 80 pages in between. However, nearly nothing is said in the applicant's papers about the basis for the application for referral. The material is almost entirely in support of the other relief. The applicant then exploited the practice in this division which requires interlocutory applications relating to matters other than in respect of procedural delinquency to be enrolled in the ordinary opposed motion court. The result of these steps is an inordinate delay to the main application.
67. I have difficulty with the approach adopted by the applicant. The main application could not be consolidated with the action unless it was referred to trial and an interlocutory application to consolidate the main application and the action prior to an order converting the main application into an action would be premature. The applicant had previously attempted to consolidate the main application with another markedly similar action. The previous application for consolidation had failed and both the court *a quo* and the supreme court of appeal had refused leave to appeal against the dismissal of the application. Furthermore, the applicant had argued for the referral in both applications for leave to appeal. Despite the absence of reasons indicating the views of those courts on this issue, their decisions must have signalled to the applicant that its prospects of success were uncertain and the third attempt at the same argument did not warrant the cost and delay occasioned by this application. In my view, the application for referral

could and should have been brought on notice without a supporting affidavit and made *in limine* at the hearing of the main application.

68. The founding affidavit filed in support of the application for referral contains only a couple of paragraphs which address the disputes in the main application. These paragraphs include a short, partial list of disputes allegedly extracted from the affidavits in the main application which the applicant contends cannot be decided in the respondent's favour on affidavit. The applicant effectively maintains that the *Plascon-Evans* rule precludes final relief in the main application but unexpectedly proceeds to contend that "[w]hen these material disputes of fact and issues are viewed within the larger context of the litigation between the parties, they are to be resolved at a trial (rather than through mere oral evidence aimed at each specific issue)" The contention is materially different to the approach proposed in the answering affidavit in the main application.
69. The answering affidavit in the main application contains a list of similar disputes. However, the applicant maintains that the application should be dismissed because these disputes were foreseeable. In a further affidavit in response to the replying affidavit in the main application, the applicant maintains that "[t]he [respondent] has not delivered any formal application for the amendment of its notice of motion nor for the matter to be referred to oral evidence." And, "the [respondent] has not set out any exceptional circumstances that would warrant the matter to be referred to oral evidence." The applicant persists in this approach in the heads of argument in the main application and only in the alternative contends that there should be a referral to oral evidence. The heads of argument conclude with the submission that "[c]onsequently, by applying the long-established legal consequences in such circumstances, the application ought to be dismissed, with costs, failing which, the application ought to be referred for the hearing of oral evidence." The respondent contends that there are no relevant, genuine disputes of fact which preclude the relief. The respondent only contemplates the possibility of one dispute being referred to oral evidence and proposes that "[s]hould this court find that there is a dispute as to the correct amount of the invoice, the [respondent] will seek an order for payment of €130 130 with only the question of the correct value of the goods delivered in terms of the disputed invoice to be referred to oral evidence." The respondent does not, however, seek an order to this effect in any of its papers.
70. In the premises, both parties intimate an intention to first attempt to persuade the court on the merits and only if unsuccessful to seek a referral to oral evidence, not trial. The adequacy of the notice is to be determined by the court hearing the main application¹¹⁵ and the parties should be aware of the general rule against doing so and the risk that the court may not entertain that approach. The parties have not abandoned these applications. If this application for referral is dismissed, the court hearing the main application is bound to be faced with more than one application in terms of rule 6(5)(g).

71. A court should cautiously approach an application for referral to trial brought by a respondent who contends that a genuine dispute of fact is raised in its affidavits as the main application can be properly decided on affidavit through the application of the *Plascon-Evans* rule which requires the applicant to accept the respondent's version of the facts. An applicant may have good reasons to accept the risks of the application of the *Plascon-Evans* rule and to avoid a trial. As stated in *Joh-Air (Pty) Ltd v Rudman*,¹¹⁶ an applicant "may not want to be involved in the cost thereof; his prospects of success, after studying the answering affidavits, may be slender; it may possibly lead to an undesired protracted hearing; the amount involved may be small; the respondent may be a man of straw or on account of any of the other usual considerations".
72. A respondent would usually apply only if the denials or allegations do not raise a genuine dispute of fact or the court would be justified in rejecting them on paper,¹¹⁷ or where the respondent is unable to produce an affidavit. (The respondent who could have made the necessary averments but fails to do so should not be permitted to supplement the allegations through a referral to trial.) In the latter case, the respondent does not dispute the facts alleged by applicant but seeks an opportunity to prove allegations that would constitute a defence. As stated in *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others*,¹¹⁸

"In the former case the respondent in effect says: given the opportunity, I propose showing that the applicant will not be able to establish the facts which it must establish in order to obtain the relief it seeks; and in the latter the respondent in effect says: given the opportunity, I propose showing that even if the facts alleged by the applicant are true, I can prove a defence. (It is no answer to say that motion proceedings must be decided on the version of the respondent even when the onus of proving that version rests upon the respondent, because *ex hypothesi* the respondent is unable to produce evidence in affidavit form in support of its version.) It would be essential in the situation postulated for the deponent to the respondent's answering affidavit to set out the import of the evidence which the respondent proposes to elicit (by way of cross-examination of the applicants' deponents or other persons he proposes to subpoena) and explain why the evidence is not available. Most importantly, and this requirement deserves particular emphasis, the deponent would have to satisfy the court that there are reasonable grounds for believing that the defence would be established. Such cases will be rare, and a court should be astute to prevent an abuse of its process by an unscrupulous litigant intent only on delay or a litigant intent on a fishing expedition to ascertain whether there might be a defence without there being any credible reason to believe that there is one. But there will be cases where such a course is necessary to prevent an injustice being done to the respondent."

73. As indicated above, the alleged irresoluble disputes of fact are described in the founding affidavit in the application for referral to trial, without reference to any of the affidavits in the main application. In argument, counsel for the applicant could not direct my attention to the passages in the affidavits in the main application that contained the alleged disputes. The court cannot be expected to search for the passages containing the relevant allegations and evidence and on locating them, perform the functions described above without assistance. However, on a reading of the answering affidavit, the applicant appears to be able to address the allegations made by the respondent and has done so. The applicant does not allege that it is unable to produce evidence in

affidavit form in support of its version or explain why such evidence is unavailable. The applicant certainly does not satisfy the requirements set out in *D & F Wevell Trust*.

74. The inability of the applicant to adequately indicate the disputes that justify a referral to trial at the instance of a respondent is, in my view, a symptom of the purpose of the application for referral which presents as an afterthought. The applicant did not contend at the time the answering affidavit and further affidavit were prepared that the main application cannot properly be decided on affidavit in its favour through the application of the *Plascon-Evans* rule and a referral to trial is not sought in any of the affidavits in the main application. The necessity for referral to trial similarly escaped the attention of the counsel responsible for the heads of argument in the main application who sought to introduce therein a referral to oral evidence, not trial. The contention was first made in the applications for leave to appeal and only after the applicant had failed in its first attempt to consolidate this application with another action. The only discernible purpose of the application is to render feasible the consolidation of the main application with the action.
75. In the circumstances of this matter, the mere presence of some disputes of fact is insufficient for a referral to trial at the instance of the applicant. The applicant has not explained and I cannot detect any convenience to either the court or the parties in hearing only this application separately and prior to the hearing of the main application. In the premises, the application for referral to trial is to be dismissed. As the consolidation is dependent on the main application being referred to trial that too must be dismissed.

Costs

76. The parties submitted that costs should follow the result and scale C should apply. In my view, scale C is the correct scale. The main reasons being the connection between this interlocutory application and the main application and action, rendered it sufficiently complex to warrant the aforementioned scale, as did the consequences for the main application and the action, and therefore the importance of the relief for the parties.
77. The respondent sought punitive costs. The respondent principally did so on the basis that the purpose of the application for referral was to frustrate the right to expeditious relief on motion. In other words, the application for referral was vexatious. The supreme court of appeal has endorsed the extended meaning of 'vexatious' to include conduct which puts the other side to unnecessary trouble and expense which it ought not to bear in the particular circumstances of the matter.¹¹⁹ However, in doing so, the supreme court of appeal cited with approval *Johannesburg City Council v Television & Electrical Distributors (Pty) Ltd and Another*,¹²⁰ in which the appellate division cautioned against "censuring a party by way of a special costs order when with the benefit of hindsight a

course of action taken by a litigant turns out to have been a lost cause". The constitutional court has repeatedly stated that a punitive costs order is warranted in circumstances where it would be unfair to expect a party to bear any of the costs occasioned by the litigation.¹²¹

78. In my view, the application for referral to trial should have been brought on notice without an affidavit at the hearing of the main application. If the applicant had done so, presumably the respondent would have raised the points of opposition mentioned in the answering affidavit and the heads of argument at the hearing. The costs may have been less but would nevertheless have been substantially incurred. I cannot speculate as to the course of action the court seized with the main application would have adopted if faced with an opposed application for referral. The court was presented with a postponement application and granted the postponement in order for this application to be resolved and, as indicated above, the approach is not entirely without support in the authorities. In such circumstances, the conduct of applicant cannot be described as clear and indubitably vexatious or reprehensible.¹²² In the premises, I decline the request for punitive costs.

Order

79. In the premises, I make the following order:
1. The application is dismissed.
 2. The applicant shall pay the costs of the application on scale C.



Q LEECH

Acting Judge of High Court

Gauteng Local Division, Johannesburg

APPEARANCES

For the Applicant: A. Pillay
Instructed by C&O Inc.

For the Respondent: M. Nieuwoudt
Instructed by WerthSchröder Inc.

Heard on: 20 November 2024

Delivered on: 10 March 2025

This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to Case Lines and by release to SAFLII. The date and time for hand-down is deemed to be 10 March 2025.

1 *Harms et al*, Civil Procedure in the Superior Courts, Part B, B11.3.

2 1970 BP 448. See too *Absa Bank Limited v Erasmus* (482/2022) [2022] ZAFSHC 309 (21 October 2022) and the dissenting judgment in *Spencer and Others v Memani and Another* (675/2012) [2013] ZASCA 146 (1 October 2013), para. 44 to 45.

3 fn. 2 *supra*, p. 449.

4 fn. 2 *supra*, para. 20.

5 (1971/2018) [2023] ZALMPPHC 88 (21 September 2023), para. 23.

6 Rule 6(14) initially provided that *inter alia* rule 11 "shall *mutatis mutandis* apply to all applications."

7 fn. 1 *supra*.

8 fn. 2 *supra*, para. 45.

9 s 43 of the Patents Act No. 37 of 1952.

10 fn. 2 *supra*, p. 449 - 450.

11 *DE Van Loggerenberg*, 3rd ed., RS 20, 2022, D1-11.

12 *Collier v Redler* 1923 AD 640; *Kempton Park Bombay (Pty) Ltd v Kempton Park Municipality* 1956 (1) SA 643 (T); *Steelpark Estate Co Ltd v Vereeniging Town Council* 1963 (3) SA 657 (T); and *Dorpsraad van Schweizer Reneke v Van Zyl* 1966 (4) SA 115 (T).

13 *Patmar Explorations (Pty) Ltd and Others v Limpopo Development Tribunal and Others* 2018 (4) SA 107 (SCA), para. 8.

14 2022 JDR 2047 (CC), para. 80.

15 *S v Pennington and Another* 1997 (4) SA 1076 (CC), para. 22; *Phillips and Others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC), para. 48; and *S v Molaudzi* 2015 JDR 1315, para. 34.

16 2013 (5) SA 89 (CC), para. 31 - 32.

17 *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another* 1979 (2) SA 457 (W), p. 462 H - 463 B; and *Oosthuizen v Road Accident Fund* 2011 (6) SA 31 (SCA), para. 19.

18 *Phillips* fn. 15 *supra*, para. 51.

19 *PFE International and Others v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 (CC), para. 30 - 31.

20 1999 JDR 0408 (W), p. 21 - 23.

21 2009 JDR 0223 (N), p. 6.

22 fn. 11 *supra*, D1 Rule 39-3.

23 *The MEC for the Eastern Cape Department of Education v Playways Pre-Primary School* 2018 JDR 0999 (ECGEL), para. 30. See too *Nedbank Ltd v Steyn and Others* 2016 (2) SA 416 (SCA), para. 12; *Peer v Greenhouse (Pty) Ltd and Others* 1952 (4) SA 614 (N), p. 618 A - B; and *Solar Basic Industries*, fn. 2 *supra*.

24 2024 (1) SA 1 (CC), para. 39.

25 *De Jager v Heyman* 2015 JDR 0096 (GJ); *MGC Express Proprietary Limited v South African Express Airways Soc Limited* 2019 JDR 2630 (GJ) and *Fourie v Olivier* 2022 JDR 0444 (GJ).

26 *South African National Civic Organisation v Ramosie and Others* 2022 JDR 1155 (GJ).

27 *Hazmat Logistics SA (Pty) Ltd v Bracher* 2013 JDR 1863 (GSJ).

28 *Zamalwandle Transport Logistics (Pty) Limited v Azania Infracon (Pty) Limited* 2018 JDR 1033 (GJ); *Sithole NO. v Giannakis* 2022 JDR 0668 (GJ) and *Airports Company of South Africa (Soc) Ltd v Tswelokgotso Trading Enterprise CC* 2022 JDR 1754 (GJ).

29 *Mitre Wood Products CC v Shungube* 2019 JDR 0260 (GJ).

30 2013 JDR 1243 (GNP).

31 2011 JDR 1610 (SCA).

32 2010 JDR 0608 (SCA).

33 1985 (3) SA 889 (A).

34 2019 JDR 0271 (GJ).

35 2015 JDR 2003 (GJ).

36 2012 JDR 1018 (GSJ).

37 1987 (3) SA 695 (W), p. 698 I - 699 E.

38 *Geeco Investments (Pty) Ltd v Gourmet Cape Distributors (Pty) Ltd* 2022 JDR 3543 (WCC), para. 5 and 14.

39 *Woolf v Zenex Oil (Pty) Ltd* 1999 (1) SA 652 (W), p. 653 I - 654 B.

40 2022 JDR 0711 (GJ), para. 15.

41 *Pfizer Inc v South African Druggists Ltd* 1987 (1) SA 259 (T), p. 262 E; and *Lekup Prop Co No 4 (Pty) Ltd v Wright* 2012 (5) SA 246 (SCA), para. 32.

42 *Santino Publishers CC v Waylite Marketing CC* 2010 (2) SA 53 (GSJ), para. 5.

43 See for example, *Law Society, Northern Provinces v Mogami and Others* 2010 (1) SA 186 (SCA), para. 23.

44 *Rembrandt Fabrikante en Handelaars (Edms) Bpk v Gulf Oil Corporation* 1962 (3) SA 158 (T), p. 159 E, referred to in *Joh-Air (Pty) Ltd v Rudman* 1980 (2) SA 420 (T), p. 427 G - H and *Food & Nutritional Products (Pty) Ltd v Neumann* 1986 (3) SA 464 (W), p. 475 D.

45 *Mogami*, fn. 43 *supra*, para. 23.

46 *Pahad Shipping CC v The Commissioner For The South African Revenue Service* 2009 JDR 1322 (SCA), para. 20; *Bocimar NV v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (A), p. 587 C - D; *Administrator, Transvaal, and C Others v Theletsane and Others* 1991 (2) SA 192 (A), p. 200B-E; and *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A), p. 981 E - F.

47 2006 (1) SA 401 (C), para. 33.

48 fn. 40 *supra*, para. 14.

49 2022 JDR 2696 (GJ), para. 23.

50 *Bocimar*, fn. 46 *supra*, p. 586 F - 587 A; *Pfizer* fn. 41 *supra*, p. 263 G; and *Parker v Quantum Leap Investments 386 (Pty) Ltd and another* 2024 JDR 1286 (WCC), para. 1.

51 *Swartz v Van der Walt t/a Sentraten* 1998 (1) SA 53 (W), p. 56H.

52 1967 (2) SA 263 (E), p. 265 G.

53 p. 266 A.

54 1971 (1) SA 750 (O), p. 755 A - B.

55 *Swartz*, fn. 51 *supra*, p. 56 I.

56 *Ibid*, p. 58 B.

57 1981 (4) SA 329 (O), p. 332 G.

58 *Hendricks v Santam Insurance Co Ltd* 1973 (1) SA 45 (C), p. 47C.

59 fn. 52 *supra*, p. 266 A.

60 fn. 57 *supra*, p. 332 F.

61 2022 JDR 0984 (GJ), para. 20.

62 *Hendricks*, fn. 58 *supra*, p. 47 H - 48 A.

63 *Fax Directories (Pty) Ltd v SA Fax Listings CC* 1990 (2) SA 164 (D), 167 B - 168 A; *Inkwanca Municipality v Bathembu* 2014 JDR 0801 (ECG), para. 3 and 17; *Du Plessis and Another NNO v Rolles Ltd* 1997 (2) SA 354 (A), p. 366 G - 367 A; *Minister of Environmental Affairs and Tourism and Another v Scenematic Fourteen (Pty) Ltd* 2005 (6) SA 182 (SCA), para. 28 - 31 (in which the application was successful); *Pahad Shipping*, fn. 46 *supra*, para. 20; *Mogami* fn. 43 *supra*, para. 23; *Lombaard v Dropprop CC and Others* 2010 (5) SA 1 (SCA), para. 19; and *De Reszke*, fn. 47 *supra*, para. 32 - 34.

64 *Swartz*, fn. 51 *supra*, p. 57 J.

65 Cf. *Selepe v Santam Insurance Co Ltd* 1977 (2) SA 1025 (D), p. 1028 G - H; and *Yorkshire Insurance*, fn. 52 *supra*, p. 266 A - B or *Chelsea Estates & Contractors CC v Speed-O-Rama* 1993 (1) SA 198 (SE), p. 202 C.

66 *Reynolds NO v Mecklenberg (Pty) Ltd* 1996 (1) SA 75 (W), p. 78 J; and *Viljoen*, fn. 54 *supra*, p. 756 C.

67 *Pahad Shipping*, fn. 46 *supra*, 2009 JDR 1322 (SCA), para. 20.

68 *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others* 2008 (2) SA 184 (SCA), para. 43, and 56 - 60; *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA), para. 28; and *LG Electronics SA (Pty) Ltd v The Commissioner for the South African Revenue Service* 2009 JDR 0045 (T), para. 6.

69 fn. 42 *supra*, para. 4.

70 2020 (6) SA 428 (GJ), para.

71 *Swartz*, fn. 51 *supra*, p. 57 D.

72 2021 JDR 1953 (GJ), para. 28, 31, 35 and 37.

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74 *Gisman Mining and Engineering Co (Pty) Ltd (In Liquidation) v LTA Earthworks (Pty) Ltd* 1977 (4) SA 25 (W), p. 27 H - 28 A.

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77 *Reynolds*, fn. 66 *supra*, p. 78 J; and *Viljoen*, fn. 54 *supra*, p. 756 C.

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79 *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T), p. 1165.

80 *Hendricks*, fn. 58 *supra*, p. 47 F.

81 *Ibid*.

82 2023 (5) SA 279 (GP), para. 9.

83 *Graham and Another v Law Society, Northern Provinces and Others* 2016 (1) SA 279 (GP); and *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A), p. 549 F - G.

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85 Herbstein and Van Winsen: The Civil Practice of the Superior Courts of South Africa, 6th ed., *Dendy M and Loots C*, OS,
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86 *National Union of Mineworkers v Optimum Coal Terminal (Pty) Limited and another* 2023 JDR 0606 (KZD), para. 2.

87 fn. 61 *supra*, para. 9.

88 1994 (2) SA 342 (T), p. 346 F.

89 *Brian Kahn Inc v Samsudin* 2012 (3) SA 310 (GSJ), para. 4 - 5.

90 *Louis Pasteur Holdings (Pty) Ltd and Others v Absa Bank Ltd and Others* 2019 (3) SA 97 (SCA), para. 33.

91 *Brian Kahn*, fn. 89 *supra*, para. 4; and *Louis Pasteur*, *ibid.*, para. 32 - 33.

92 *Consolidated News Agencies (Pty) Ltd (In Liquidation) v Mobile Telephone Networks (Pty) Ltd and Another* 2010 (3) SA 382
(SCA), para. 89; and *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 (3)
SA 486 (SCA), para. 49.

93 *Theron and Another NNO v Loubser NO and Others* 2014 (3) SA 323 (SCA), para. 26.

94 *Repas v Repas* 2023 JDR 0409 (WCC), para. 12.

95 *Khumalo v Director-General of Co-Operation and Development and Others* 1991 (1) SA 158 (A), p. 167 J.

96 *Da Matta v Otto NO* 1972 (3) SA 858 (A), p. 869 D - E.

97 *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA), para. 13.

98 *Kalil v Decotex*, fn. 46 *supra*, p. 981 D - G, read with *Bocimar*, fn. 46 *supra*, p. 587 D - G.

99 *D & F Wevell Trust*, fn. 68 *supra*, para. 56.

100 *Room Hire*, fn. 79 *supra*, p. 1164.

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102 fn. 61 *supra*, para. 20.

103 1947 (4) SA 173 (W), p. 176 - 177.

104 fn. 82 *supra*, para. 11.

105 fn. 41 *supra*, para. 3.

106 fn. 5 *supra*, para. 23.

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110 fn. 47 *supra*, para. 33.

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Africa and Others* [2016] ZALAC 37 (6 July 2016), para. 46; and *Public Protector v South African Reserve Bank*, fn. 121
supra, para. 221.