MAGISTRATES' COURTS JUDICIARY

JOHANNESBURG

PRACTICE GUIDELINES – MOTION COURT

Motion Court: Practice Guidelines: Johannesburg Magistrate's Court Civil Section

Dated: 03 March 2011

Revised: 31 Oct 2011

Revised: 18 June 2015

Revised: 29 June 2020

Revised: 8 July 2022

1 GENERAL

1.1 These practice guidelines in respect of applications on motion set out the practice of the Civil Section of the Magistrate's Court, Johannesburg, South Africa.

1.2 The purpose of these practice guidelines is to promote and expedite access to the courts in applications on motion. The practice guidelines are to be applied so as to facilitate the expeditious handling of disputes and the minimization of costs involved. As such it seeks to inform how the courts in this magistrate court function. It also seeks to obtain uniformity amongst magistrates in respect of practice rulings pertaining to applications on motion. It must be emphasised that no magistrate is bound by practice guidelines. Accordingly, the practice guidelines are not intended to bind judicial discretion. Nonetheless, it should be noted, that the magistrates of this magistrate's court strive for uniformity in the functioning of the courts and their practice rulings.

1.3 These practice guidelines supersedes all previous practice guidelines in respect of applications on motion and will came into effect on 18 June 2015.

1.4 Amendments to these practice guidelines can only be made by the Senior Magistrate after consultation with the other magistrates of the Johannesburg Magistrate's Court Civil Section.
1.5 References in these practice guidelines to sections and the rules are to the rules of the Magistrate's Courts Act 32 of 1944 as amended, unless indicated otherwise.
1.6 References in these rules to "Senior Magistrate" are to the Senior Magistrate who is head of the Civil Section.
1.7 References in these rules to "attorney", includes "counsel".
1.8 Reference to "court" is to "court 28" or any other court where applications are heard.
1.9 Reference to the "clerk of the court" is – unless indicated otherwise – the clerk dealing with applications on motion.

2 COURT DAYS FOR APPLICATIONS ON MOTION

2.1 A date need to be arranged with the clerk of the court before the matter can be set down.
2.2 Only Mondays, Tuesdays, Wednesdays and Thursdays which are not public holidays – are allocated. The motion court is not available for hearing of applications on Fridays.

3 DRESS CODE

In order to maintain the decorum of the court, the following dress code has been suggested. It is expected that all practitioners will adhere to this directive:
3.1 Attorneys are required to be properly dressed.
3.2 Proper dress for attorneys comprises:

- A black attorney's gown.
- Appropriate clothing (no t-shirts, takkies, or any other inappropriate dress).

3.3 It is not proper for attorneys to enter court not fully robed as set out in paragraph 2 supra. It follows that attorneys should not robe in court.

4 COURT SITTINGS

4.1 Applications on motion (except applications for eviction in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, which are dealt with in trial court) are to be set down for hearing in Court 28 and no other court.
4.2 Court 28 will commence at 9h00. The court adjourns at 11h00 and resumes sitting at 11h15. The court adjourns at 13h00 and commences at 14h00. The court adjourns for the day at 15h30.
4.3 Attorneys must be punctual in their attendance in court at the aforesaid times.

5 PREPARATION OF PAPERS

5.1 The original applications on motion, all original pleadings (including the original summons), the original return of service, and other original documents – including a service affidavit containing original attachments – comprising the application must be contained in the court file.

5.2 In the event that a plaintiff applies for summary judgment, the summons and return of service must be filed simultaneously with the application for summary judgment. Only in exceptional circumstances explained in an affidavit which was served on the defendant and filed at court timeously would the plaintiff be allowed to hand the summons in at the date of hearing. This rule will be enforced strictly.

5.3 Documents not stapled or properly affixed to the application will not be considered.

6 INDEX

6.1 Prior to the hearing of the application (and preferably simultaneous with the notice of set down) the applicant must deliver a complete index of documentation before the court for the determination of the application.

6.2 The index should briefly describe each affidavit and annexure as a separate item.

7 BINDING OF PAPERS

7.1 Prior to the set down of the application the applicant must ensure that all the original documentation before the court for the determination of the application is properly bound (refer to paragraph 5.1).

7.2 In binding the application, care must be taken to preclude that the method of binding hinders the turning of pages.

7.3 The documentation should not be bound in volumes of more than 100 pages each.

8 PAGINATION

8.1 The applicant must paginate the notice of motion, founding affidavit and annexures thereto, the answering affidavit and annexures thereto and the replying affidavit, if any, and annexures thereto. A copy of the answering affidavit may be utilised for pagination purposes, if the original is not in the court file.

8.2 Additional documents generated during the application (e.g. returns of service, reports, etc.) must be indexed, paginated and placed in an “Additional Documents Bundle.”

8.3 The applicant must ensure that prior to the hearing of the application it is properly indexed and paginated.

9 ENROLMENTS

9.1 The roll for applications on motion for a particular week closes at 15h00 on the Thursday preceding the week. If the Thursday is a public holiday the roll closes one day earlier.

9.2 After the closure of the roll, the parties to an application on motion are not entitled to access to the court file and may not insert or remove documents from it. Such leave must be sought at the first calling of the matter and must be supported by an affidavit.

9.3 Access to the court file must not be sought from the relevant magistrate.

9.4 A firm of attorneys may not enrol more than ten (10) matters per day. The Senior Magistrate may order otherwise in suitable circumstances. This rule will be strictly applied.

9.5 The notice of set down must specify the nature of the application, i.e. rescission, summary judgment etc. and reflect that the application is set down in court 28 at 09h00.

10 CALLING OF THE ROLL IN APPLICATIONS ON MOTION

10.1 At the commencement of the proceedings the presiding magistrate will invite attorneys to mention matters that are only to be postponed, withdrawn or removed from the roll. Attorneys are to state their surnames and initials and counsel is in addition to give (preferably) their landline telephone number.

10.2 Thereafter matters on the unopposed roll will be called consecutively according to their number on the roll, or as the presiding magistrate deem fit. The opposed roll will be called after the unopposed roll.

10.3 If there is no appearance when a matter is called it may there and then be struck from the roll. Such matters will only be enrolled subsequently if an acceptable explanation on affidavit is given for the failure to appear.

10.4 If a matter has to stand down after it has been called, it must stand down until the roll has been called once, unless the presiding magistrate indicates otherwise.

11 MATTERS NOT ON ROLL

11.1 Any matters not on the roll must be brought to the attention of the presiding magistrate at the commencement of proceedings when the presiding officer determine which matters are to be postponed, removed or withdrawn. AFTER the roll has been called at least once the presiding magistrate will invite attorneys to mention matters not on the roll. It is imperative that attorneys appear in court from the outset and inform the court about the matter/s not on roll. Once the matter is enrolled the presiding magistrate will give directions for the hearing of the matter.

11.2 Once attorneys have determined that a matter is not on the roll and the relevant court file has been located, the clerk of the court must be requested to hand the file the magistrate or stenographer doing duty in court 28.

11.3 If the matter is not on the roll due to a fault in the clerk of the court's office, the file should be so endorsed to that effect by the clerk of the court dealing with motion court.

11.4 If the matter is not on the roll due to an act or omission on the part of the attorney who was responsible for the enrolment of the application on motion, an affidavit explaining the act or omission by the attorney must be filed in the court file. In the absence of urgency and prejudice the matter will not be enrolled.

12 OPPOSED MATTERS

12.1 Opposed matters will be placed on a separate roll ('the opposed roll').

12.2 The presiding magistrate will direct the sequence in which opposed matters will be heard, but matters of urgency, estimated duration and efficiency form the basis of allocation. The date when the matter was enrolled may also be considered when the matter is allocated.

12.3 Opposed matters will generally be heard after finalisation of the unopposed roll.

12.4 Date for opposed matters in terms of rule 55(1) must be arranged with clerk of the court (motion court). At this stage there is provision for only two opposed matters per day, unless the Senior Magistrate orders otherwise. To apply for a date of hearing; kindly complete the form 4, in duplicate and lodge it with the clerk of the court (motions). No future new date will be allocated to the same matter unless the party who applied for the date informed the clerk of the court timeously that the allocated date is not going to be utilised or furnish comprehensive reasons in an explanatory affidavit (and lodged with the clerk of the court) why the allocated date was not utilised.

12.5 Where the respondent has failed to deliver and answering affidavit and has not given notice of intention to raise a question of law (rule 55(g)(iii) or a point *in limine*, the application must not be enrolled for hearing on the opposed roll. Such an application must be enrolled on the unopposed roll. In the event of such an application thereafter becoming opposed (for whatever reasons), the application will not be postponed as a matter of course, but will be either referred to the Senior Magistrate for direction or will be dealt with by the presiding magistrate as s/he deems fit.

12.6 The notice of set down of such an application must be served on the respondent or the respondent's attorney of record.

12.7 Unless otherwise directed by the Senior Magistrate there would be no hearing of any applications on Fridays.

12.8 The applicant and respondent are required to file practise notes, specifying briefly the nature of the relief sought, the disputed issues and the main arguments and list of authorities that each party will rely on during the hearing of the opposed application. Where possible, a bundle of authorities should be prepared for the magistrate's consideration. These practise notes are to be filed before the close of the roll (15h00 on the Thursday preceding the week during which the opposed application will be heard). The presiding magistrate may, in his or her discretion, require the parties to file heads of argument, in addition to the brief practise notes. Parties are encouraged to prepare heads of argument in matters of a complicated nature.

13 POSTPONEMENTS

13.1 Applications on motion, whether opposed or unopposed, will generally not be postponed to a specific date. It will either be postponed *sine die* or removed from the roll.

13.2 Prior to allocation and in respect of unallocated matters, the clerk of the court must be informed in person or telephonically immediately it becomes known that an opposed matter is to be postponed.

14 SERVICE

14.1 Returns of service must be filed timeously. It is the duty of the attorney to ensure that the Sheriff's return of service (or where informal service has been effected, proof of such service) is in the court files before they are send to the magistrate's chamber. This also applies to newspaper tear sheets in cases where, for example, service has been effected by substituted service and where publication has been ordered in liquidation proceedings. If for some reason, the return or other proof of service cannot be filed timeously then an explanation on oath must be included in the court file. The papers will not be read in the absence of the return of proof of service or a satisfactory explanation for the absence of such documents.

14.2 Service is proved by filing in the court file the original return of service which establishes the service. In the absence of an acceptable explanation, returns of service will generally not be accepted from the bar.

14.3 In respect of service by fax or email the following requirements are applicable:

14.3.1 A service affidavit has to be filed at the clerk of the court simultaneously with the filing of the application. In the absence of an acceptable explanation, service affidavits will generally not be accepted from the bar.

14.3.2 The service affidavit must contain proper allegations with reference to the agreement of the manner of service as well as attachment of original documents in support of those allegations.

14.3.3 The service affidavit must contain allegations of the proper transmission of the application by the person who effected service via email or fax as well as documents in support of those allegations.

14.3.4 The service affidavit must contain proper allegations that the email and fax addresses furnished in respect of a so-called “general consent” of credit providers are still operative and utilised for service purposes by each relevant credit provider.

14.4 When service of any document by registered post is prescribed or authorised (in any application), such service is proved by the production of an affidavit by the person who procured the dispatch of such document, in which he/she –

14.4.1 indicates the date of dispatch together with the name and address of the addressee;

14.4.2 describes the document so dispatched;

14.4.3 indicates, if that be the case that the item in question has not been returned to the sender by the Post Office has been undelivered, and to which he annexes the documentary proof of posting of a registered article issued by the Post Office.

15 AFFIDAVITS

15.1 The usual requirements as provided in the rules in respect of affidavits must be followed. Parties and attorneys must comply with any rules that govern motions. Materials the parties wish the court to consider must be attached.

15.2 The founding affidavit must contain all the reasons for the application; failure to include a reason may constitute a bar from raising it later.

15.3 Any factual statements are made under penalties of perjury.

15.4 Electronic signatures are unacceptable.

15.5 Electronic filing is unacceptable.

16 STRIKING FROM ROLL (“REMOVED”)

16.1 If there is no appearance when a matter is called in court 28 it may there and then be struck from the roll. Such matters will only be enrolled subsequently if an acceptable explanation on affidavit is given for the failure to appear.

16.2 Ignorance of these practice guidelines will not necessarily constitute an acceptable explanation for non-appearance.

17 URGENT APPLICATIONS

17.1 Urgency mainly involves the abridgement of times prescribed by the rules and secondarily the departure from established filing and sitting times.

17.2 The motion court magistrate for the week is designated for the hearing of urgent applications for that week of the year.

17.3 The normal time for the bringing of an urgent application is 09h00 on the Tuesday of the motion court week.

17.4 If the urgent application cannot be brought at 09h00 on the Tuesday of the motion court week, it may be brought on any other day of the motion court week at 09h00. The applicant in the founding affidavit must set out facts which justify the bringing of the application at a time other than 09h00 on the Tuesday.

17.5 If the urgent application cannot be brought at 09h00 on the Tuesday of the motion court week or at 9h00 on any other day of the motion court week, the Senior Magistrate must be approached for suitable arrangements. The applicant in the founding affidavit must set out facts which justify the bringing of the application at a time other than 09h00 on the Tuesday or at 9h00 on any other day of the motion court week.

17.6 The aforementioned requirements are in addition to the applicant's obligation to set out explicitly the circumstances which render the matter urgent. In this regard it is emphasised that while an application may be urgent, it may not be sufficiently urgent to be heard at the time selected by the applicant.

17.7 The aforementioned practices will be strictly enforced by the presiding magistrate. If an application is enrolled on a day or at a time that is not justified, the application will not be enrolled and an appropriate punitive cost order may be made.

17.8 The first paragraph of relief sought in the applicant's notice of motion must be for the enrolment of the application as an urgent application and for the dispensing of the forms and service provided for in the rules of court, to the extent necessary.

17.9 Unless the circumstances are such that no notice of the application is given to the respondent, or unless the urgency is so great that it is impossible to comply therewith, the notice of motion must follow the format of Form 1A of Annexure 1 to the rules of court and therefore must provide a reasonable time, place and method for the respondent to give notice of intention to oppose the application and must further provide a reasonable time within which the respondent may file an answering affidavit. The date and time selected by the applicant for the enrolment of the application must enable the applicant to file a replying affidavit if necessary.

17.10 Deviation from the time periods prescribed by the rules of court must be strictly commensurate with the urgency of the matter as set out in the founding papers.

17.11 In cases of extreme urgency, the reasonable time afforded to the respondent to give notice of intention to oppose, is usually not less than 2 hours, excluding the hour between 13h00 and 14h00.

17.12 If the facts and circumstances set out in the applicant's affidavits do not –

17.12.1 constitute sufficient urgency for the application to be brought as an urgent application and/or

17.12.2 justify the abrogation or curtailment of the time periods referred to in the rule and/or

17.12.3 justify the failure to serve the application as required in the rules, the court will decline to grant an order for the enrolment of the application as an urgent application and/or for the dispensing of the forms and services provided for in the rules. Save for a possible adverse cost order against the applicant the court will make no order on the application.

17.12.4 The aforementioned requirements will be strictly enforced by the presiding magistrate.

17.13 When an urgent application is brought for the Tuesday at 09h00 the applicant must ensure that the relevant papers are filed with the clerk of the court by the preceding Thursday at 12h00.

17.14 The clerk of the court must ensure that the court files of all urgent application set down for the Tuesday at 09h00 are brought to the magistrate hearing the urgent applications by 16h00 on the preceding Friday.

17.15 The clerk of the court will prepare a roll in respect of the urgent applications to be heard on the Tuesday at 09h00. The clerk will publish the roll on the first floor in the main passage of the Magistrates' Court by no later than 09h00 on the Tuesday.

17.16 Where an urgent application is brought for any other time than Tuesday at 09h00, the clerk of the court's office shall ensure that the court file is brought to the magistrate hearing urgent applications as soon as possible. The clerk of the court shall prepare a roll in respect of the urgent applications to be heard on the other days of the week. The clerk of the court will publish the roll on the first floor in the main passage of the Magistrate Court by no later than 09h00 on the day of the hearing.

17.17 Save in exceptional circumstances the applicant should not frame the relief sought in the form of a *rule nisi* which has in whole or in part interim effect. Where applicable the urgent relief should be sought pending the determination of the application.

18 PARTICULAR APPLICATIONS

I PROVISIONAL SENTENCE SUMMONS

1 A provisional sentence summons must contain the court number (Court number 28) or in the absence thereof the notice of set down served by Sheriff must contain the court number.

2 The original liquid document upon which provisional sentence is sought must be handed to the court when the provisional sentence is sought. If the original liquid document is not available, provisional sentence may not be granted, unless the plaintiff complied with the requirements as per *Sebenza Shipping & Forwarding (Pty) Ltd v Passenger Rail Agency of South Africa SOC Ltd* 2019 (2) SA 318 (GJ).

3. The provisional sentence summons must comply with Form 2A of Annexure 1 to the rules.

II SECTION 32 APPLICATIONS FOR ATTACHMENT

1 An application in terms of section 32 must not contain a request to have the goods immediately removed. Once the order (Form 11 of Annexure 1 to the rules) is granted, the clerk of the court may be approached to endorse the immediate removal in terms of rule 41(7)(a).

III ENFORCEMENT OF DISCOVERY IN TERMS OF RULE 23(8)

1 The notice of motion or the supporting affidavit, as the case may be, must state the date when the pleadings closed, unless leave in terms of rule 23(1)(b) is sought.

2 If in the absence of a party the court ordered compliance in terms of rule 23(8), such order must be served upon the party against whom compliance is ordered, before an order to have the claim dismissed or to strike out the defence is sought.

IV LIQUIDATIONS OF CLOSE CORPORATIONS

1 The applicant should seek a final winding-up order in the notice of motion.

2 The court may nonetheless in the exercise of its discretion grant a provisional order and direct that service and publication of the provisional order be affected.

3 The service referred to in paragraph 2 *supra* could include:

3.1 service of the order on the close corporation at its registered office;

3.2 publication of the order in the Government Gazette;

3.3 publication of the order in a newspaper circulating in the area where the close corporation carries on business;

3.4 service on all known creditors. This will only be ordered where the applicant has ready access to the identity and address of the creditors. Depending on the information that the applicant has as to the address/addresses of close corporations creditor/s such

service can be ordered to be effected by e-mail, facsimile transmission or pre-paid registered post.

3A Service of the application and winding-up order is also to be served upon:

3A.1 the South African Revenue Services at its offices within the jurisdiction of the Johannesburg Magistrate's Court;

3A.2 trade union of employees;

3A.3 employees of the close corporation [See for more detail section 346(4A) and section 346A (1)(a)-(d) of the Companies Act 61/1973 read with paragraph 9 of the Transitional Arrangements in Schedule 5 of the Companies Act 71/2008]

4 If a provisional order of liquidation is granted, proof of compliance with the service ordered must be provided on the return date. Such proof is provided by filling an affidavit setting out the manner in which the ordered service was complied with. The presiding magistrate will accept the affidavit of service from the bar only in exceptional circumstances made out in an affidavit.

5 If an extension of the return date of a provisional order of liquidation is sought, the party seeking such an extension must deliver an affidavit motivating such an extension.

6 Where a close corporation seeks its own winding-up, it is not necessary for the application or for any provisional order that may be granted to be served on the close corporation.

7 Where the applicant seeking a winding-up order is a member of a close corporation, he shall serve the application on all interested parties, such as a joint member. Failing such service the applicant should indicate in the founding affidavit why such service is not necessary.

8 It is suggested that the following form [Form 5: Provisional Winding Order] be used as a draft order.

<u>V SECTION 66 EXECUTIONS AGAINST IMMOVABLE PROPERTY</u>

1 In terms of section 26 of the Constitution declaring immovable property executable is not a procedural matter, but substantive law.

2 In instance where such immovable property is to be declared executable notice of motion procedures (rule 55(1)) is necessary in accordance with the decision in *ABSA Bank Ltd v Xonti* 2006 (5) SA 289 (C).

3 Where execution against residential immovable property is sought the applicant must comply with the provisions of rule 43A. The notice of application must-

3.1 comply substantially with Form 1B of Annexure 1 to the rules;

3.2 be served by the sheriff on the judgment debtor personally unless the court authorised substituted service;

3.3 be supported by all the documentation listed in rule 43A (5); and

3.4 if the immovable property is the judgment debtor's primary residence, the judgment creditor is to pursue section 65A proceedings, prior to applying for execution against the primary residence, unless a detailed explanation is provided to motivate why section 65A proceedings will not be a viable alternative.

4 Applications for the variation or reconsideration of a reserve price must comply with the requirements laid down by Fisher J in *Changing Tides 17 (Proprietary) limited N.O. v Khubheka and Another; Changing Tides 17 (Proprietary) limited N.O. v Mowasa and Another*; *Changing Tides 17 (Proprietary) Limited N.O. v Bucktwar; Changing Tides 17 (Proprietary) Limited N.O. v Hasley* (13719/2016, 14932/2016, 14488/2017, 11647/2019) [2022] ZAGPJHC 59 (15 February 2022)).

VI CURATOR-AD-LITEM

1 Where the appointment of a curator ad litem is sought to assist a litigant in the institution or conduct of litigation, the applicant must establish the experience of the proposed curator ad litem in the type of litigation which the litigant wishes to institute or conduct.

2 A consent to act by the proposed curator ad litem must be annexed to the application.

3 In order to preclude giving notice of the application to the prospective defendant, the applicant should seek that the costs of the application be reserved for determination in the contemplated trial.

VII RESCISSIONS

1 The Notice of Motion procedure in terms of rule 55(1) ("long form") is to be followed in all applications for rescission in terms of rule 49 ("long form").

2 Applications in terms of section 36(2) may be done in terms of rule 55(4), but within the parameters observation of the time limit in rule 55(1)(f) sufficient time should be allowed for the clerk of the court to put the matter timeously (see above paragraph 9.1) on the roll.

3 See Forms 1A; 1B; 2A; 2B; 3; 6 and 7 for suggested formats.

VIII EVICTION IN TERMS OF THE PREVENTION OF ILLEGAL EVICTIONS AND UNLAWFUL OCCUPATION OF LAND ACT, 19 OF 1998

These matters are dealt with in the trial court.

19 LONG DURATION

1 An opposed motion which is expected to require a day or more (including the delivery of an *ex tempore* judgment) may not be enrolled for hearing without the consent of the Senior Magistrate.

2 The consent of the Senior Magistrate for the enrolment of the matter is sought in writing, a copy of which must simultaneously be made available to the other party or parties to the opposed motion and must contain:-

2.1 a short exposition of the nature and complexity of the matter;

2.2 the estimated duration thereof;

2.3 an assurance that all the necessary affidavits have been exchanged (or in exceptional cases an indication of the date by when they will have been exchanged);

2.4 an assurance that the papers have been properly indexed and paginated;

2.5 proposals for the filing of heads of argument by the parties;

2.6 suggestions as to when the application can be heard.

2.7 The other party or parties to the opposed motion who wish to make representations in respect thereof may do so in writing.

3 The Senior Magistrate will determine the date of the hearing of the aforesaid opposed motion and furnish such directions as s/he deems fit in respect thereof.

4 The opposed motion must forthwith be enrolled for hearing in terms of the determination of the Senior Magistrate.

20 MATTERS TO BE DONE BY NOTICE OF MOTION IN TERMS OF RULE 55(1)

Without derogating the general effect of rule 55(1) the following matters should be brought by way of notice of motion:

1 *Mandament van Spolie* (Spoliation Orders).

2 Liquidation of Close Corporation.

3 Declaring Immovable Property Executable in terms of Section 66.

4 Attachment of Property in Security of Rent (section 32).

5 Applications for Rescission in terms of rule 49.

6 Applications for eviction in terms of the Prevention of Illegal Eviction Act 19 of 1998.

7 Applications in terms of section 86 of the National Credit Act 34 of 2005 (“debt reviews”).

21 NOTICES OF APPEAL AND REQUEST FOR REASONS IN TERMS OF RULE 51

All notices of Appeal and Requests for Reasons in terms of Rule 51 are to be handed to the Magistrates’ Clerks at Room 2008 and nowhere else.

Signed at Johannesburg on this the 8th day of July 2022

Dr Mhlanga

Senior Magistrate

Head: Civil Section, Johannesburg