



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

CASE NO.: 2018/17932

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

DATE

SIGNATURE

In the matter between:

ADCORP FULFILMENT SERVICES (PTY) LTD

Applicant

and

PRODIGY HUMAN CAPITAL ARCHITECTS (PTY) LTD

Respondent

In re:

PRODIGY HUMAN CAPITAL ARCHITECTS (PTY) LTD

Plaintiff

and

CCI SA (UMHLANGA) (PTY) LTD

First Defendant

ADCORP FULFILMENT SERVICES (PTY) LTD

Second Defendant

Neutral Citation: Prodigy human capital Architects (pty) ltd vs CCI SA (Umhlanga) (pty), ADCORP Fulfilment Services, Webhelp SA Outsourcing (Case No: 2018/17932) [2023] ZAGP JHC 579 (26 May 2023).

JUDGMENT

Q LEECH AJ

1. The applicant applies for condonation for the late filing of a notice of objection to an amendment sought to be effected by the respondent.
2. The uniform rules of court afforded the applicant ten (10) days in which to deliver the notice of objection, calculated from the date on which the notice of intention to amend was delivered.¹ In order to deliver the notices of intention to amend and objection, the parties were required to serve copies on all the parties and file the originals with the registrar.²
3. The notice of intention to amend is dated 8 September 2021 and was filed on that date. However, the copy of the notice served on the applicant was incomplete as pages from one of the annexures were omitted and a complete notice was served the following morning, on 9 September 2021. The parties do not state in their affidavits whether the notice of intention to amend filed with the registrar was complete or incomplete.
4. The date of filing is nevertheless immaterial to the dispute. The applicant was entitled to a copy of the notice of intention to amend. The respondent appears to have accepted that the missing pages were material and accordingly that the incomplete document served on the applicant was not a copy of the notice of intention to amend.³ The respondent did not ask the applicant to incorporate the missing pages into the incomplete copy and instead corrected the non-compliance

1 Uniform Rules of Court, Rule 28(2).

2 Rule 1, "deliver".

3 *Estate Jacobs v Jacobs* 1914 CPD 204.

by serving a complete copy. The delivery of the notice of intention to amend accordingly occurred, at the earliest, on the date on which the complete copy was served, 9 September 2021, and for the purposes of this application the ten day period in which to file a notice of objection can be calculated from that date. Counsel for the applicant accepted during the hearing that the period can be calculated from 9 September 2021, despite the uncertainty concerning the filing of the complete notice of intention to amend.

5. In the founding affidavit, the applicant describes the complete copy of the notice of intention to amend as a “fresh notice of intention to amend”, defines that notice as “the Notice to Amend” and calculates the period permitted for the delivery of an objection from 9 September 2021. In the answering affidavit, the respondent does not deny the facts set out by the applicant or take issue with the description and similarly calculates the period from 9 September 2021. Although issue could be taken with the applicant’s description, there can be no complaint about commencing the calculation on 9 September 2021.
6. The ten day period in which to deliver the notice of objection accordingly expired on 23 September 2021. The period in which to deliver the notice of objection was confirmed in correspondence between the attorneys. On 22 September 2021, the applicant wrote to the respondent to request an extension of time. The respondent refused the request on the morning of 23 September 2021, and required the applicant to, “file your client’s notice today, failing which we will serve our client’s amended particulars of claim” (emphasis added). The parties were accordingly in agreement at that the time that the period expired on 23 September 2021. Although the joint practice note contains a suggestion by the respondent that the period expired on 22 September 2021,⁴ and implicitly that the period commenced on 8 September 2021, the contention is unsustainable on the papers and was correctly abandoned during the hearing by counsel for the respondent.
7. The applicant proceeded to serve the notice of objection at 17:26 and filed the notice at 17:27 on 23 September 2021. The applicant served the notice by electronic mail and filed the notice by uploading it to the electronic file. The respondent does not dispute that the applicant was entitled to serve and file in this manner. The applicant states in the founding affidavit that the notice of objection was “served and filed on the day on which it fell due”.

4 Joint practice note, para. 3.

8. However, the respondent's attorneys expressed the view in a telephone call (recorded in correspondence from the applicant's attorneys, which is not in dispute) that the notice of objection was served after business hours and therefore out of time. In the correspondence that followed the respondent stated that the applicant "had been advised by the writer that should the contemplated notice not be served by the close of business on the due date, our client would file its amended pages." This is not expressly stated in the correspondence refusing the request for an extension of time. The respondent thereafter adopted the position that the notice of objection was "due before the close of business on ... 23 September 2021" and, as the business day ended at 17:00, the notice was late.
9. The applicant's attorneys initially, tentatively responded that "we do not necessarily agree with your view" and subsequently stated that the applicant would apply for condonation "insofar as this may be necessary". However, in the founding affidavit the applicant abandoned the possibility that the notice was not late and stated that "due to the fact that the Notice of Objection was only served at 5:26 PM and filed on CaseLines at 5:27 PM on the due date, it was technically marginally late".
10. The attorneys did not motivate their views in the correspondence mentioned above and the parties did not do so in their papers. The parties seemingly without appreciable consideration arrived at the conclusion that 17:00 on the last day was the cutoff time for delivery of the notice of objection. The papers do not clearly indicate whether service or filing or both is in dispute.
11. Although reference is made to both service and filing in the founding affidavit, the notice of motion only sought condonation for late filing, and not for late service or delivery. The applicant's heads of argument, however, contain the following statement, "[t]he marginal lateness of the service of the Notice of Objection on the day on which it fell due for service in terms of the Rules of Court ... prompted the launching of the present application." It is unclear whether the applicant failed to consistently distinguish between the concepts of service, filing and delivery or intentionally adopted the position in the notice of motion that the notice was served in time but filed late.
12. The answering affidavit addresses the relief sought by the applicant and accordingly focuses only on the late filing of the notice of objection. The respondent repeatedly refers to the late filing of the notice of objection. Despite the strident contention by

the respondent's attorneys in the correspondence mentioned above that service was late, there is no mention in the answering affidavit or the respondent's heads of argument of the allegation that the notice of objection was served late. It is not clear, however, whether the respondent abandoned this contention.

13. I asked both counsel whether the notice of objection was delivered late and, if so, whether service or filing or both were late. Counsel for the applicant accepted that the notice was served within the ten day period afforded to the applicant and that the matter concerned the filing component of the requirement to deliver the notice. Counsel appreciated that the notice may have been filed within the stipulated period for the reasons mentioned below. The application for condonation was, according to counsel, instituted from an abundance of caution. Although this view is incongruous with the heads of argument, in the joint practice note counsel defined the first issue requiring determination as “[w]hether or not the applicant has satisfied the requirements for an order condoning the late filing of the Notice of Objection”.⁵
14. The respondent persisted in the contention that the notice of objection was not delivered within the ten day period afforded to the applicant and counsel for the respondent initially maintained that both service and filing were late. The argument, however, devolved into a submission that the notice was filed late in terms of the directive that introduced the CaseLines system in this division and in effect at the time.⁶ Although I understood counsel to concede during the course of argument that the notice was served within the stipulated period, in order to avoid this dispute surviving in another form, I address the contention that the notice had to be served before 17:00.
15. In argument, counsel for the respondent emphasised the word “today” in the correspondence referred to above,^[fn] and submitted that meant the notice of objection had to be delivered during the day, “not this evening”, and the day ended on the close of business. This submission ignores the fact that the respondent was not entitled to unilaterally abridge the period afforded to the applicant by the uniform rules of court and the issue is whether the period afforded to the applicant by rule 28(2) is restricted as alleged by the respondent. If not, any unilateral attempt by the respondent's attorneys to do so is irrelevant. I nevertheless address this submission.

5 Joint practice note, para. 9.

6 Revised - 18 September 2020 Consolidated Directive, dated 11 June 2021, para. 214.

16. The correspondence must be interpreted in accordance with the well settled principles.⁷ “[T]he objective approach should ordinarily be adopted, ie the letters have to be construed as documents in the ordinary way. It is therefore irrelevant what [the author] subjectively intended or meant in writing ... the true inquiry is how a reasonable [person] in the recipient's position would have read and understood them.”⁸
17. The dictionary meaning of “today”, as used by the respondent in the correspondence referred to above, is “[o]n or in the course of this present day”.⁹ As a unit of time, a “day” is “the period of twenty-four hours ..., esp. from midnight to midnight”.¹⁰ The word day may have other meanings, for example, “(The time of) sunlight” or “[t]he time which the sun is above the horizon; the interval of light between two nights; the interval between the usual times of getting up in the morning and going to be at night” or “[t]he period of time in each day ... during which work is customarily done; a working-day.”¹¹ The “evening” is “[t]he close of day; esp. the time from about 6p.m. or sunset if earlier”.¹² None of the meanings other than possibly the meaning of “working-day” lead to the conclusion that the day ended at 17:00.
18. Although the word, “today”, is capable of diverse meanings and divorced from context and purpose may be ambiguous,¹³ objectively considered in the context in which it appears and with regard to the purpose with which it was written, the meaning is clear. In the context of correspondence between attorneys concerning an act to be performed in terms of the uniform rules of court, and written with the purpose of refusing an extension of the period permitted for that act, the ordinary meaning - the plain, natural and literal interpretation¹⁴ - is the period of time contemplated in the rules. The hours of sunlight are not usually relevant to attorneys and I would venture to suggest that there is no custom that governs their working hours. The performance of an act outside of those hours is ordinarily inconsequential and the advantage to be gained or prejudiced negated or ameliorated by insisting on performance within working hours in any matter other

7 *Naidoo v Marine & Trade Insurance Co Ltd* 1978 (3) SA 666 (A), p. 675B; *Auction Alliance (Pty) Ltd v Wade Park (Pty) Ltd* 2018 (4) SA 358 (SCA), para. 17; and *Road Traffic Management Corporation v Waymark Infotech (Pty) Ltd* 2019 (5) SA 29 (CC), para. 29.

8 *Naidoo v Marine & Trade Insurance Co Ltd* 1978 (3) SA 666 (A), p. 675B.

9 SOED, 5th ed., “today”, art. A, note 1.

10 SOED, 5th ed., “day”, art. II, note 6 and art. III, note 8.

11 SOED, 5th ed., “day”, art. 1, notes 1 and 3, and art. III, note 8(b).

12 SOED, 5th ed., “evening”, art. 1.

13 LAWSA, 2nd ed., vol. 27, para. 279.

14 *Road Traffic Management Corporation v Waymark Infotech (Pty) Ltd*, para. 33.

than the most urgent is insignificant. In my view, a reasonable person can expect an attorney who is writing in this context and intends any period other than that provided by the rules to describe that period with appropriate language.

19. The correspondence on which counsel relies was preceded by a request for an extension of time that was introduced with the words “[w]e refer to your client’s notice of intention to amend ... As you are aware, tomorrow is our last day to object ... we would be most obliged if you would grant us an extension ... in which to do so” (emphasis added). The applicant’s attorneys were referring to the last day of the ten day period afforded to the applicant by rule 28(2). The respondent’s attorneys replied the following morning. The purpose of the reply was to inform the applicant that the respondent was not prepared to grant an extension of the period afforded to the applicant in terms of rule 28(2) and that the applicant should comply with the rule. The respondent was not granting the applicant an extension of time but merely insisting on delivery of the notice of objection on the last permissible day in accordance with rule 28(2).
20. As stated above, the respondent was not entitled to unilaterally abridge the period afforded to the applicant by the uniform rules of court and, in my view, did not purport to do so. The correspondence does not contain any express indication that the respondent intended to restrict the day to the period prior to the close of business or 17:00, and the applicant’s attorneys did not understand the correspondence to contain such a restriction, as evidenced by their conduct and their contemporaneous response to the contention that the notice was late. Although the respondent’s attorneys were under the impression that the aforesaid period ended at 17:00 on the last day, their correspondence did not communicate that to the reasonable recipient.
21. In my view, the respondent’s attorneys intended to permit the applicant the whole of the period afforded by rule 28(2) and the issue to be determined is whether the period provided for the delivery of a notice of objection is restricted as contended by the respondent. As stated above, this is not a matter of interpretation of the correspondence and is a matter of interpretation of the rule.

22. The uniform rules of court are subordinate legislation¹⁵ and the well settled principles of statutory interpretation must be applied to determine the meaning.¹⁶
23. Although statutory provisions which limit certain activities and particularly inspections to business hours are common, I am unaware and unable to find any legislation which restricts a day to business hours and, if such a definition exists, I expect it would be the exception rather than the rule. The Criminal Procedure Act distinguishes between “day” and “night”.¹⁷ A day is restricted to “the space of time between sunrise and sunset”, and night is the converse. The times of sunrise and sunset are determined by reference to tables prepared by official observatories and approved by the Minister of Justice. In contrast there are numerous definitions which define a day without restriction.¹⁸ The definitions of a court day, calendar day, clear day, business day and working day, which I have been able to find, do not restrict the hours of the day to business hours,¹⁹ and a day measured in hours is not less than 24 hours.²⁰ Although none of these statutory provisions are dealing with the same subject matter or *in pari materia*,²¹ it is significant that the absence of any restriction is the norm rather than the exception.
24. The Interpretation Act 33 of 1957 applies to the uniform rules of court.²² The rules are made in accordance with the Rules Board for Courts of Law Act 107 of 1985.²³ The Rules Board for Courts of Law established pursuant thereto has the power to make, amend or repeal the rules for *inter alia* the High Court of South Africa. Those rules are subject to the approval of the Minister of Justice and required to be

15 *Computer Brilliance CC v Swanepoel* 2005 (4) SA 433 (T), para. 36.

16 *Road Traffic Management Corporation v Waymark Infotech (Pty) Ltd*, para. 31 - 33; *Afriforum and Another v University of The Free State* 2018 (2) SA 185 (CC), para 43.

17 No. 51 of 1977, section 1.

18 Contingency Fees Act, No. 66 of 1997, section 1, Customs and Excise Act, No. 91 of 1964, section 77A, State Liability Act, No. 20 of 1957, section 4A, Money Bills and Related Matters Act, No. 9 of 2009, section 1 and Mineral and Petroleum Resources Development Act, No. 28 of 2002, section 1.

19 Diamond Export Levy (Administration) Act, No. 14 of 2007, section 4, Superior Courts Act, No. 10 of 2013, section 1, National Payment System Act, No. 78 of 1998, section 11, Tax Administration Act, No. 28 of 2011, section 1, Magistrates' Courts Act, No. 32 of 1944, section 1, Mine Health and Safety Act, No. 29 of 1996, schedule 6, section 24, Customs Control Act, No. 31 of 2014, section 1 and Division of Revenue Act, No. 5 of 2022, section 1. Cf. Public Holidays Act, No. 36 of 1994, section 3.

20 Basic Conditions of Employment Act, No. 75 of 1997, section 8 and International Health Regulations Act, No. 28 of 1974, schedule, article 1.

21 *Commander v Collector of Customs* 1920 AD 510 at 513; *Hoban v Absa Bank Ltd t/a United Bank and Others* 1999 (2) SA 1036 (SCA), 1044 I.

22 Section 1: “Application of Act.—The provisions of this Act shall apply to the interpretation of every law (as in this Act defined) in force, at or after the commencement of this Act, in the Republic or in any portion thereof, and to the interpretation of all bylaws, rules, regulations or orders made under the authority of any such law, unless there is something in the language or context of the law, bylaw, rule, regulation or order repugnant to such provisions or unless the contrary intention appears therein.” *Baron & Jester v Eastern Metropolitan Local Council* 2002 (2) SA 248 (W), para. 15.

23 Superior Courts Act, No. 10 of 2013, section 30.

published in the *Gazette*.²⁴ The rules are delegated legislation with statutory force²⁵ and, as stated above, constitute subordinate legislation. The rules are part of our procedural or adjectival law.²⁶ Section 1 of the Interpretation Act provides that the act applies to the interpretation of every law ...” and, to the extent that there may be any doubt, “the interpretation of all ... rules ... made under the authority of any such law ...”. The Interpretation Act provides for the computation of a period prescribed in number of days,²⁷ which differs from both the ordinary and extraordinary civil methods in that the first day is excluded and the last day is included, unless on a Sunday or public holiday. However, the act does not provide a definition of “day”.

25. The Constitutional Court Rules and Uniform Rules of Court provide a computation of any period expressed in days which adjusts the method prescribed in the Interpretation Act to exclude all public holidays, Saturdays and Sundays, and provides a definition of “court day”. The definition does not restrict the court day to any particular hours. The Superior Courts Act 10 of 2013 defines “business day” as a day that is not a public holiday, Saturday or Sunday and the Supreme Court of Appeal Rules utilise that definition as the meaning of “court day”. The business day is similarly not restricted in those sources.
26. As a general rule, in the absence of any contrary indication, a period of time must be computed according to the ordinary civil method in terms of which “fractions of a day are not admitted” and “no account is taken of broken units”, “a whole day [is] one point of time”.²⁸ As pointed out by Cloete J, as he then was, in the minority judgment in *Dormell Properties 282 CC v Renasa Insurance Co Ltd and Others NNO*,²⁹ the old authorities generally permitted “the whole of the day” and the last day of any stipulated period “must have ended” before the period expired. The day ended on the “close of the day”, not on the close of business. Our courts adopted³⁰ and continue to apply³¹ this aspect of the civil method, and in the pursuit of certainty do not readily depart from the civil method of computing time.³² Accordingly, a day ordinarily begins and ends in the immeasurable moment on either side of midnight.

24 Rules Board for Courts of Law Act 107 of 1985, section 6(1) and (4).

25 *Arendsnes Sweefspoor CC v Botha* 2013 (5) SA 399 (SCA), at para. 19.

26 *Fair v SA Eagle Insurance Co Ltd* 1995 (4) SA 96 (E), at 99 A.

27 Section 4.

28 *Joubert v Enslin* 1910 AD 6, at p. 26 and 34; *Tiopaizi Appellant v Bulawayo Municipality Respondent* 1923 AD 317, p. 321 and 326; *Kleynhans v Yorkshire Insurance Co Ltd* 1957 (3) SA 544 (A), at 449 F; and *Dormell Properties 282 CC v Renasa Insurance Co Ltd and Others NNO* 2011 (1) SA 70 (SCA), para. 27. (In *Coface South Africa Insurance Co Ltd v East London Own Haven t/a Own Haven Housing Association* 2014 (2) SA 382 (SCA), the SCA held that *Dormell* was wrongly decided by the majority on a different issue.)

29 2011 (1) SA 70 (SCA), para. 56 - 58.

30 *Joubert v Enslin supra* (fn. Xxx).

31 *Justice Alliance of South Africa v President of the Republic of South Africa and Others* 2011 (5) SA 388 (CC), para.6; and *Arendsnes Sweefspoor CC v Botha* 2013 (5) SA 399 (SCA), at para. 1 and 20.

27. This aspect of the civil method of calculating time is applied to the periods stipulated in *inter alia* the uniform rules of court³³ and in instances where the whole of the day was not intended, the uniform rules of court specified the fraction of the day which did apply by stipulating the time of day by or during which the contemplated action must be performed. For example, rule 32 (prior to amendment in 2019) required a defendant to file the affidavit opposing summary judgment prior to noon on the court day preceding the day on which the application is to be heard; a similar requirement is found in rule 6(4)(a); noon is also set as the cutoff in rules 6(5)(c) and 8(4) and (5); and the inspection of documents provided for in rules 35(6) and 70(3B)(a)(i) may only take place during business hours. The uniform rules of court do not expressly do so in rule 28(2) and the absence of any restriction in rule 28(2) is an indication that none was intended.
28. Accordingly, the ten (10) day period afforded to the applicant by rule 28(2) in which to deliver the notice of objection expired at midnight on the last day, 23 September 2021, and the applicant served and uploaded the notice within that period.
29. In addition, I cannot find any indication in the uniform rules that the cutoff for service of a notice of objection in terms of rule 28(2) is 17:00. The rules governing service of all subsequent documents and notices (post the summons and notice of intention to defendant) indicate the contrary. An indication that ordinary business periods are not intended can be found in rule 4 of the uniform rules of court. In terms of rule 4(1)(c), service of *inter alia* any notice, proceeding or act required in any civil action - the latter being any step taken in an action already commenced by the issue of summons³⁴ - may not take place on a Sunday, unless otherwise directed by the court or a judge.³⁵ In other words, service may be effected on public holidays and Saturdays, which are not typically considered to be business days and accordingly outside of business hours.
30. The clearest indication that the period for service does not terminate on the close of business can be found in rule 4(1)(b) of the uniform rules of court which restricts service to, “as near as possible between the hours of 7:00 and 19:00”. If the service of documents to which the rule applies is permitted during and in proximity to those times, the rules could not have been intended to restrict service of a notice of

32 *Kleynhans v Yorkshire Insurance Co Ltd* 1957 (3) SA 544 (A), at 549 F and 550 G; *South African Mutual Fire and General Insurance Co Ltd v Fouché en 'n Ander*; *AA Mutual D Insurance Association Ltd v Tlabakoe* 1970 (1) SA 302 (A) at 316B - C; and *Nedcor Bank Ltd v the Master and Others* 2002 (1) SA 390 (SCA), para. 12.

33 *Felix and Another v Nortier NO and Others* (2) 1994 (4) SA 502 (SE), at 504G.

34 *Minister of Police v Johannes and Another* 1982 (3) SA 846 (A), p. 853H.

35 Rule 4(1)(c).

objection under rule 28(2) to business hours or prior to 17:00. If service of process and documents initiating application proceedings may be effected as near as possible to 19:00 on a duly authorised agent under rule 4(1)(a)(vi) or the attorney of record representing a person under rule 4(1)(aA), the rules could not have been intended to require service of a notice under rule 28(2) at an attorney's physical address prior to 17:00. An attorney's physical address is an address at which an attorney is normally present and usually is the office of the instructing attorney or their correspondent.³⁶ The application of such a restriction, for example, to circumstances in which the responsible attorney or staff is present and performing or carrying out the work of an attorney after 17:00, which is not unusual, would not be sensible. A prohibition on service at a business address in circumstances when the business did not close at 17:00 would similarly lack sense, as would an insistence on service at a residential address during business hours. There is even less reason to require service at a postal address, facsimile address or electronic mail address prior to 17:00.

31. The address specified for service indirectly determines when the parties will become involved in the service of subsequent documents and notices. The parties are free to select any address which is convenient to them and accordingly where, and when they may be disturbed by the service of documents and notices. Although there may be reason to restrict service of subsequent documents and notices at a residential address to reasonable times, particularly where a party has no other option, there is no reason why service should be strictly prior to 17:00. The service contemplated in rule 4(1)(a), other than in a couple of instances, requires personal service. If personal service of process of court directed to the sheriff or documents initiating application proceedings is permitted at a residential address as near as possible to 19:00, there can be no reason to require service of subsequent documents and notices at a residential address prior to 17:00.
32. In particular, there is no reason to do so when the parties opt in to service by registered post, facsimile and electronic mail because in such instances, the parties retrieve the documents and notices at their convenience. The introduction of electronic mail as a manner of service,³⁷ provided a convenient means to send and receive documents and notices. The applicable rules³⁸ require the parties to opt in to service by electronic mail and do so in the context of the rules which inform them of

36 *Small Business Development Corporation Ltd v Kubheka* 1990 (2) SA 851 (T), at 852 F.

37 Rules 17(3), 19(3) and 4A.

38 Rules 17(3) and 19(3).

the manner, means and timing of such service. The uniform rules of court effectively provide that service by electronic mail will take effect the moment the notice is sent³⁹ and received⁴⁰ at the specified address.⁴¹ The receipt of the electronic mail is worth emphasising as that moment will be the relevant time of service if the time when the electronic mail is sent is different to the time when it is received. The recipient does not have to acknowledge receipt or read the electronic mail. The electronic mail is received the moment the data is capable of being retrieved and processed by the addressee. In that context, the rules providing for service by electronic mail⁴² do not apply the restriction contended for by the respondent.

33. Accordingly, the applicant did not contravene the uniform rules of court by effecting service of the notice of objection on the respondent by electronic mail at 17:26.

34. The directive that introduced the CaseLines system did not alter this position and, to the contrary, the directive in effect at the time specifically required practitioners to adhere to the rules relating to service of notices.⁴³ The directive did, however, impact on the filing of notices required to be delivered in terms of the uniform rules of court. The uniform rules of court provide that the original of a notice of objection must be filed with the registrar and such filing “shall not be done by way of ... electronic mail.”⁴⁴ The office of the registrar is open for that purpose from 9:00 to 13:00 and 14:00 to 15:00. The registrar may nevertheless “in exceptional circumstances ... accept documents at any time, and shall do so when directed by a judge.”⁴⁵ The directive provided (with emphasis added) that,

34.1. “... all pleadings and documents must be uploaded in all matters to the CaseLines digital platform, save for Full Bench and Full Court Appeals in which the electronic transcript or record is not available.”⁴⁶

34.2. “[e]lectronic uploading of properly served pleadings/ notices/ legal process shall be regarded as compliant filing as contemplated in the Rules of Court.

39 “enters an information system designated or used for that purpose” (section 23(b), Chapter III, Part 2 of the Electronic Communications and Transactions Act, 2002 (Act 25 of 2002).

40 “capable of being retrieved and processed by the addressee” (section 23(b), Chapter III, Part 2 of the Electronic Communications and Transactions Act, 2002 (Act 25 of 2002).

41 Rule 4A(3), read with section 23(b), Chapter III, Part 2 of the Electronic Communications and Transactions Act, 2002 (Act 25 of 2002).

42 Rules 17(3), 19(3) and 4A.

43 Revised - 18 September 2020 Consolidated Directive, dated 11 June 2021, para. 214.

44 Rule 1 and 4A(5).

45 Rule 3.

46 Para. 4.1.

Such filing by uploading of served pleadings / documents (sic) / process must strictly comply with the Rules of Court as to time limit and time of day on that Court day. NO filing of hardcopy pleadings and other documents shall be allowed."⁴⁷

34.3. "As regards filing of notices or process, Uniform Rule 3 stipulates that filing may take place between 09:00 to 13:00 and 14:00 to 15:00 on Court days, apart from in exceptional circumstances or when so directed by a Judge. Practitioners are therefore required to file notices and process by uploading to CaseLines only on court days and only between the hours of 09:00 and 15:00."⁴⁸

34.4. "Thus, the uploading of notices or process to CaseLines will be regarded as compliant with the Rules of Court as the effective date of proper filing of the document, but not the service of same."⁴⁹

34.5. "Originals of documents for filing shall be uploaded to the electronic case file on CaseLines in satisfaction of the provisions of Rule 4A(5)."⁵⁰

35. The directive further required the parties to invite the "the relevant Registrar's Office profile" to the electronic file and required the registrars and registrar's clerks to diligently manage the files. In this manner, the requirement to file the original⁵¹ with the registrar is satisfied and the prohibition against filing by electronic mail is avoided.⁵²

36. There are a number of paragraphs that restrict the interaction between the parties and the registrar to the hours during which the offices of the registrar are required to be open in terms of rule 3. And, in regard to the invitations mentioned above, the directive provides a consequence for the contravention of the prescribed time. The registrar is directed to remove the registrar's office profile from the electronic file if the invitations are done outside the prescribed hours in order to "enforce compliance

47 Para. 12.

48 Para. 213.

49 Para. 214.

50 Para. 215.

51 Electronic Communications and Transactions Act, No. 25 of 2002, section 14.

52 Rule 4A(5).

with Rule 3 of the Uniform Rules of Court.”⁵³ The directive did not grant a licence to file documents at any time of day.

37. The Caselines system provided a means for Judge’s secretaries to block access to specific files (“freeze’ the court bundle”) in order to “prohibit the late filing of pleadings, notices and any legal process”. The system did not, however, automatically bar access to the files other than during the registrar’s office hours and, in the absence of a “bundle freeze”, parties were able to file documents outside of those times and, as in this matter, did so.
38. The filing of documents outside the times stipulated in rule 3 is not a novel issue. A document could be physically filed, before the directive came into effect, prior to 15:00 but the office of the registrar remained open until 16:00 and, as stated above, the registrar could in exceptional circumstances accept documents at any time and was required to do so when directed by a judge. If the registrar exercised the discretion to accept documents outside the stipulated times in circumstances considered to be exceptional, the filing was or would be treated as valid, unless the decision of the registrar was challenged.⁵⁴
39. Although the directive insisted on the uploading of documents during the hours stipulated in rule 3, the directive did not expressly indicate whether the uploading of documents outside of the registrar’s office hours would be regarded as compliant filing and, if not, when the uploaded document would be considered to be filed. The circumstances that ushered in the directive were exceptional and the directive is a direction by a judge. The system seems to have unintentionally opened the registrar’s office for the filing of documents with the registrar outside of the hours contemplated in rule 3. The Office of the Judge President appears to have accepted that such was the unfortunate effect of the directive as the subsequent directive⁵⁵ provided that “[d]ocuments ... filed outside of court hours are deemed to have been filed on the following court day.” The language suggests that filing outside of the hours contemplated in rule 3 in the absence of that deemed position was regarded as compliant filing. If such filing was not considered to be compliant, there would be no need for the deeming provision. In other words, although the uploaded document was filed, it would be deemed not to be filed until the following day.

53 Para. 13.2.

54 *Minister of Police v Johannes and Another*, 1982 (3) SA 846 (A).

55 Directive 3 of 2022, 29 September 2022.

40. In the premises, the notice of objection may not have been filed late. I am, however, reluctant to make a finding on this issue without properly prepared argument. The correct interpretation of the directive is a legal issue and, although both counsel addressed the issue as best they could in argument, I am not convinced that the parties will not be prejudiced. The parties are free to identify and define the dispute for the court to determine,⁵⁶ and in this instance agreed on the papers that the notice was filed late and condonation is required. The parties may have good reasons for having done so. The real issue between the parties is whether the notice of objection or amended pages should be allowed to stand. An application in terms of rule 27 provides a procedure to deal with both the notice of objection and the amended pages. Accordingly, I assume that the filing was late and condonation was required.

Condonation

41. The court may grant condonation “upon application on notice and on good cause shown”.⁵⁷ The applicant for condonation seeks an indulgence and court has a discretion whether to grant condonation.⁵⁸ The court will grant condonation when it is in the interests of justice to do so.⁵⁹ “[T]he basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides” and “[a]ny attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts.”⁶⁰ In other words, “[w]hether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case.”⁶¹
42. However, the factors which weigh with the Court have been consistently applied and frequently restated.⁶² In *Uitenhage Transitional Local Council v South African Revenue Service*⁶³ the Supreme Court of Appeal held that,

56 *National Commissioner of Police and Another v Gun Owners South Africa* 2020 (6) SA 69 (SCA), para. 25 - 26; *Fischer and Another v Ramahlele and Others* 2014 (4) SA 614 (SCA), para. 13 - 15; xxx.

57 Rule 27(1).

58 *Grootboom v National Prosecuting Authority* 2014 (2) SA 68 (CC), para. 20.

59 *Moluele and Others v Deschatelets, NO* 1950 (2) SA 670 (T), 675G; *Grootboom v National Prosecuting Authority* 2014 (2) SA 68 (CC), para. 22; *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC), para. 20.

60 *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A), 532C-F; and *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A), 720E.

61 *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC), para. 20.

62 *Darries v Sheriff, Magistrate's Court, Wynberg, and Another* 1998 (3) SA 34 (SCA), 40H.

63 2004 (1) SA 292 (SCA), para. 6.

“[C]ondonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.”

43. In *Grootboom v National Prosecuting Authority*,⁶⁴ the Constitutional Court held, concisely, that “the explanation must be reasonable enough to excuse the default.” In *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)*,⁶⁵ the Constitutional Court held that the explanation must be “a full explanation for the delay” and “cover the entire period of delay. And, what is more, the explanation given must be reasonable.”
44. In *Mulaudzi v Old Mutual Life Assurance Co (South Africa) Ltd and Others*,⁶⁶ the Supreme Court of Appeal held that, “[w]hat calls for an explanation is not only the delay in the timeous prosecution of the appeal, but also the delay in seeking condonation. An appellant should, whenever he realises that he has not complied with a rule of this court, apply for condonation without delay.”
45. In *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Limited and others*,⁶⁷ the Supreme Court of Appeal held that,
- “Factors which usually weigh with this Court in considering an application for condonation include the degree of noncompliance, the explanation therefor, the importance of the case, a respondent’s interest in the finality of the judgment of the court below, the convenience of this Court and the avoidance of unnecessary delay in the administration of justice”.⁶⁸
46. In *Melane v Santam Insurance Co Ltd*,⁶⁹ the Appellate Division included the prospects of success. (See too *General Accident Insurance Co South Africa Ltd v Zampelli* 1988 (4) SA 407 (C), 411C-E; *Saloojee supra*, 141H; and *Valor IT v Premier, North West Province and Others* 2021 (1) SA 42 (SCA), para. 38).

64 2014 (2) SA 68 (CC), para. 23.

65 2008 (2) SA 472 (CC), para. 22.

66 2017 (6) SA 90 (SCA), para. 26.

67 [2013] 2 All SA 251 (SCA), para. 11.

68 See too *Saloojee and Another, NNO v Minister of Community Development* 1965 (2) SA 135 (A), para. 10; and *Commissioner for Inland Revenue v Burger* 1956 (4) SA 446 (A) at 449G-H.

69 *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A), 532C-D.

47. In *Du Plooy v Anwes Motors (Edms) Bpk*,⁷⁰ the court added that the graver the consequences which have already resulted from the omission, the more difficult it will be to obtain the indulgence. And, “[t]he list is not exhaustive.”⁷¹

48. In *Grootboom v National Prosecuting Authority and Another*,⁷² the Constitutional Court stated the factors as,

“[T]he nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both *Brummer* and *Van Wyk* emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above.”

49. In *United Plant Hire (Pty) Ltd v Hills and Others*,⁷³ the Appellate Division held that, “[t]hese factors ... must be weighed one against the other” and in *Gumede v Road Accident Fund*⁷⁴ the court explained that, “the one is weighted against the other so that the strength of one or more may compensate for the weakness of one or more of the others.” In *Melane v Santam Insurance Co Ltd*,⁷⁵ the Appellate Division explained that,

“Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. ... Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked.”

50. And in *Valor IT v Premier, North West Province and Others*,⁷⁶ the Supreme Court of Appeal held that,

“[T]he grant or refusal of condonation is not a mechanical process but one that involves the balancing of often competing factors. So, for instance, very weak prospects of success may not offset a full, complete and satisfactory explanation for a delay; while strong prospects of success may excuse an inadequate explanation for the delay (to a point).”

70 1983 (4) SA 212 (O), 217C.

71 *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A), 720F; *Grootboom v National Prosecuting Authority* 2014 (2) SA 68 (CC), para. 22.

72 2014 (2) SA 68 (CC), para. 22.

73 1976 (1) SA 717 (A), 720G.

74 2007 (6) SA 304 (C), para. 7.

75 *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A), 532D-F.

76 2021 (1) SA 42 (SCA), para. 38.

51. In *Grootboom supra*,⁷⁷ the Constitutional Court held that, “[t]he particular circumstances of each case will determine which of these factors are relevant” and in *Federated Employers Fire & General Insurance Co Ltd and Another v McKenzie*,⁷⁸ the Appellate Division held that, “[t]he cogency of any such factor will vary according to the circumstances, including the particular Rule infringed.”
52. A useful summary is found in *S v Yusuf*,⁷⁹ in which the court, referring to the then Appellate Division Rule corresponding to Rule 27, held that,
- “[T]he Court has a discretion, to be exercised judicially, on a consideration of the facts of each case, and in essence it is a matter of fairness to both sides. It is unnecessary to define the basic principle further, for that would tend towards a rule of thumb, which would be the negation of a flexible discretion. ... The most that the Court can do in this direction is to indicate certain factors usually relevant; but the weight to be given to any factor depends on the particular circumstances of each case. Thus the Court has had regard to factors such as the efforts made towards compliance with the Rules, the degree of non-compliance (in this case the length of the delay), the explanation therefor, the prospects of success, and the importance of the case. Such factors are not individually decisive, but must be weighed one against another, for example a short delay and good prospects of success might compensate for a weak explanation. In each case the question is whether sufficient cause has been shown for the relief sought.”
53. The non-compliance does not concern the period afforded to the applicant by rule 28(2), the late service of the notice of objection or the *de facto* filing of the notice on the electronic file. Although the respondent received the notice and the notice was placed on the electronic file within the period provided for in rule 28(2), the respondent complains that the applicant filed the notice after 17:00. The respondent was under the impression that the notice must be filed by that time. The degree of non-compliance measured against that expectation is approximately half an hour.
54. The respondent did not complain that the applicant had contravened the directive in effect at the time.⁸⁰ Counsel for the respondent resorted to the directive in order to substantiate the contention that the notice was filed late. The directive required the notice to be filed by 15:00, not 17:00. The nature of the non-compliance is a failure to comply with rule 3 as required by the directive. The respondent does not and cannot complain that the notice was not placed on the court file. The respondent complains only that the applicant placed the notice on the court file outside of the hours specified for that purpose. The degree of non-compliance is nevertheless only

77 2014 (2) SA 68 (CC), para. 22.

78 1969 (3) SA 360 (A), 363H.

79 1968 (2) SA 52 (AD) at pp. 53-4.

80 Revised - 18 September 2020 Consolidated Directive, dated 11 June 2021, para. 214.

approximately two and a half hours, and the respondent was not concerned about the first two hours. The nature and degree of the non-compliance is slight by any measure and could be described as, “quibbling about trivial deviations”.⁸¹

55. The explanation is set out in the founding affidavit. The applicant explains that the attorneys responsible for the matter received the draft notice of objection from counsel at 15:05. The attorneys were out of the office, as their work premises were being sanitised, and committed to a virtual meeting at that time. The meeting ended at 16:00 and the deponent to the founding affidavit proceeded to finalise the notice but was unable to connect to the office server from outside the office. The deponent travelled home and immediately proceeded to finalise and deliver the notice. None of these facts are disputed by the respondent.

56. Counsel for the respondent submits in the heads of argument that the court should not be satisfied with the explanation because the applicant’s attorneys only briefed counsel on 22 September 2022 and, on the basis of *Saloojee and Another, NNO v Minister of Community Development*,⁸² the applicant should not be permitted to escape this lack of diligence.⁸³ Counsel in effect contends that the events on 23 September 2022 would not have caused the delay if counsel was briefed earlier. The difficulty with this submission is that the fact on which counsel relies is not found in the papers. In the founding affidavit, the applicant states that “[c]ounsel on brief in the main action was immediately briefed to consider the Notice to Amend and, in particular, to advise whether he considered that an objection was warranted.” And, “counsel had, in the period 9 September 2021 to 22 September 2021, reviewed the papers filed in the main action, considered the Notice to Amend in conjunction with the unamended pleadings and formed the view that the Notice to Amend was objectionable but had not, in light of immense work pressure in that period, found the time to draft a notice of objection.” The respondent can be expected to have no knowledge of these facts and the denial in the answering affidavit is bare. The submission by counsel for the respondent is wholly unsubstantiated.

57. The submission also runs contrary to the contention in the answering affidavit. In the answering affidavit the respondent takes aim at counsel and contends that,

“[I]t is inconceivable that counsel ... was not able to draft a simple notice of objection in the period allegedly afforded to him. ... Had counsel’s work

81 *Louw v Grobler & another* (3074/2016) [2016] ZAFSHC 206 (15 December 2016) para 18.

82 1965 (2) SA 135 (A),

83 Respondent’s heads of argument, p. 076-139, para. 18.

demands prevented him from carrying out his instructions, alternative counsel should have been briefed to do so.”

And,

“the non-availability of counsel ... is not a basis for condonation to be granted.”

58. Although the unavailability of counsel is not an excuse⁸⁴ and not ordinarily a good reason for condonation,⁸⁵ in *Social Justice Coalition and Others v Minister of Police and Others*,⁸⁶ the minority (Kollapen J) stated that,

“It has been pointed out by the state respondents that part of the delay was occasioned by the unavailability of counsel as well as the Judges who made the merits order. While those are factors that would require consideration, I am not satisfied that they stand as justification for the delay ... The diary of counsel or the unavailability of Judges (even for good reason) cannot justify an inordinate delay, in particular, where a matter requires a level of urgency to be brought to it. Also, *New Clicks CC* reminds us that the delay need not be deliberate.”

59. The majority did not comment on condonation. However, In *Premier, Limpopo Province v Speaker of the Limpopo Provincial Government and Others*,⁸⁷ condonation was granted in circumstances where,

“The affidavit on behalf of the provincial legislature was late by some six days. The explanation for the delay is the late briefing of counsel and the unavailability of counsel. The period of delay has not been fully explained and the explanation that has been tendered is not entirely satisfactory. However, the period of delay is minimal and the questions presented in these proceedings are of considerable importance to the provincial legislature.”

60. The reasons for granting condonation were,

“The affidavits filed on behalf of Parliament and the provincial legislature were late. Condonation is sought in each case. We consider that it is in the interests of justice to grant condonation in respect of each application. In reaching this conclusion we have had regard to: the absence of prejudice to, and opposition by, other parties; and the minimal period of delay involved in each case, as well as the explanations therefor. More importantly, the questions presented in this case are of considerable importance to Parliament and the provincial legislature and it is undesirable to consider these questions without their participation.”

84 *Imperial Logistics Advance (Pty) Ltd v 2022 JDR 3071 (SCA)*, para. 10.

85 *Hall v The Head, Specialised Commercial Crimes Unit of The National Prosecuting Authority* 2010 JDR 0973 (GNP), para. 19; *Afric Oil (Pty) Ltd v Ramadaan Investments CC* 2004 (1) SA 35 (N), 40E.

86 2022 JDR 2047 (CC), para. 105.

87 2011 (6) SA 396 (CC)

61. The authorities mentioned above indicate that the availability of counsel is a factor to be considered in exercising the discretion to either grant or refuse condonation. As stated above, the cogency of any factor will vary according to the circumstances and the grant or refusal of condonation is not a mechanical process but one that involves the balancing of competing factors.
62. The respondent's contention ignores the facts already mentioned, and that counsel informed the applicant's attorneys on 22 September 2021 that, "he might, in light of his continuing work pressure, have some difficulty preparing the objection timeously". Counsel advised that the attorneys should request a short extension. The applicant's attorneys did so but the request was refused. Counsel accordingly proceeded to prepare the notice of objection. The draft notice was provided to the applicant's attorneys at 15:05, well before the time anticipated by the respondent's attorneys. The applicant's attorneys probably would have successfully served and filed the notice before 17:00, if they had not experienced the difficulties mentioned above.
63. In the course of events set out by the applicant, the point at which the respondent suggests that the applicant should have insisted on other counsel being brief is unclear. Counsel was working on the matter and due to work pressure experienced difficulty in completing the task in sufficient time for the applicant's attorneys to comply with the time periods stipulated in rule 3. Other than possibly arriving at that realisation sooner, counsel cannot be criticised. The conduct certainly does not reach the limits of laxity and neglect mentioned in *Saloojee and Another, NNO v Minister of Community Development*.⁸⁸ In the result, the notice of objection was served and uploaded within the period afforded by rule 28(2). The time periods stipulated in rule 3 were missed because counsel provided the draft notice marginally outside the stipulated period for the filing of notices. However, the degree of non-compliance was slight and would have been less but for the difficulties mentioned above.
64. The respondent does not complain about any delay in instituting the application for condonation. The application was instituted approximately three weeks after the notice of objection was uploaded to the electronic file and during the first week of that period the parties exchanged correspondence in an attempt to avoid the condonation application. In any event, the parties do not appear to be overly concerned about delays. I need only point to the fact that this application was

instituted in October 2021 and the papers finalised on November 2021 but only set down on January 2023.

65. The hours prescribed in rule 3 have as their purpose the proper functioning of the registrar's office which is part of the system of administering justice. The respondent does not allege that the uploading of the notice of objection to an electronic file outside of the hours prescribed in rule 3 impacted on the proper functioning of the registrar's office in a manner that affects the administration of justice, or inconvenienced the court.
66. Although the respondent alleges that it sustained prejudice, the respondent fails to provide any particularity as to the nature and extent of that prejudice. The bald allegation that the prejudice sustained by the respondent far exceeds that sustained by the applicant is repeated in the heads of argument. Counsel could not, however, point to any prejudice on the papers or any possible prejudice that could be caused by the uploading of the notice of objection to the electronic court outside of the hours prescribed by rule 3. As stated above, the respondent was under the impression that the notice must be filed by 17:00 and that the applicant had been informed of that requirement. The respondent also waited until 17:05 before taking any further action. The reasonable inference is that the respondent would have accepted the notice without complaint if the applicant had served and filed the notice by 17:00. I am unsurprised at the inability of the respondent to indicate any prejudice that arose in the twenty seven (27) minutes between 17:00 and 17:27.
67. The grounds on which the applicant intends to object to the notice of amendment are set out in the notice of objection. The first of those grounds is founded on the alleged delay in seeking the amendment. The action was instituted in May 2018. The pleadings in the action closed in March 2019. The notice of intention to amend was delivered on 9 September 2021. The respondent seeks to amend the particulars of claim. The amendment concerns both the cause of action and the quantum of the claim, and is not merely a quantification of the amount claimed as alleged by the respondent. The action was preceded by an urgent application in December 2015. The urgent application concerned the same subject matter as the action. The applicant relied on the assistance of a Mr Pienaar in opposing the urgent application and defending the action. Mr Pienaar has passed away and the applicant contends that it will be prejudiced by the amendment. The applicant contends that the amendment seeks to "secure a tactical advantage in the absence of Mr

Pienaar.”⁸⁹ Although the respondent contends that the applicant has other witnesses, the respondent does not dispute that Mr Pienaar was intimately involved in the subject matter of the dispute. In addition, the applicant objects on the basis that the amendment is excipiable - the second and third grounds.

68. Although amendments are usually granted, unless the amendment will cause an injustice that cannot be compensated by costs,⁹⁰ an unreasonable delay in seeking the amendment may be a ground for refusal⁹¹ and only in exceptional circumstances will a party be able to introduce an amendment which renders the pleading excipiable.⁹² In my view, these objections are arguable and have some prospect of success. The refusal of condonation will deprive the applicant of the right to challenge the amendment on the first ground and not assist in progressing the matter towards finality as, in that event, the second and third grounds will be raised in an exception. The granting of condonation will allow the applicant to object on all three grounds and dispose of the exceptions.⁹³ The only material difference is that the respondent will be required to explain the delay and establish a triable issue. In the context of the matter, this seems fair.
69. The respondent claims a substantial amount from the applicant, approximately R292 million, which the applicant contends will severely impact on the applicant and for that reason the matter is of importance to the parties.
70. In my view, the factors mentioned above are overwhelmingly in favour of the applicant and condonation for the late filing of the notice of objection should be granted.
71. The applicant seeks an order setting aside the amended pages.⁹⁴ The court did not receive the benefit of any argument that either supported or undermined the possibility of this relief being granted in an application for condonation. The respondent submits that the amendment was “effected and perfected” prior to the notice of objection and accordingly “[a]ny condonation would simply be superfluous” and “does not remedy the fact that the amendment stands.” The respondent

89 Applicant’s heads of argument, p. 076-125, para. 47.

90 *Affordable Medicines Trust and others v Minister of Health and others* 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC), para 9.

91 *Florence Soap and Chemical Works (Pty) Ltd v Ozen Wholesalers (Pty) Ltd* 1954 (3) SA 945 (T),

92 *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and another* 1967 (3) SA 632 (D), 640H-641B; *Du Plessis and another v De Klerk and others* 1995 (2) SA 40 (T), 43I-44A.

93 *Krischke v Road Accident Fund* 2004 (4) SA 358 (W), 363A-B; *Manyatshe v South African Post Office Ltd* 2008 JDR 0999 (T), para. 2.

94 Notice of motion, p. 076-6, prayer 2.

contends in the heads of argument that “[t]he opportunity for (sic) to object cannot be extended where the amendment has already been perfected.”⁹⁵ No authority is cited, and no process of reasoning was presented, in support of these submissions.

72. As stated above, the respondent adopted the position that the amendment was effected either on 23 September 2021 or 27 September 2021. The first of those dates is based on the fact that the amended pages were served and uploaded on 23 September 2021. The difficulty with that contention is that period in which to deliver the notice of objection had not expired when the amended pages were served and uploaded. The period expired at midnight on 23 September 2021.

73. The consequences of a failure to deliver a notice of objection are provided for in rule 28(5), “... every party who received notice of the proposed amendment shall be deemed to have consented to the amendment and the party who gave notice of the proposed amendment may, within 10 days of the expiration of the period mentioned in subrule (2), effect the amendment as contemplated in subrule (7).” Rule 28(7) provides that, “[u]nless the court otherwise directs, a party who is entitled to amend shall effect the amendment by delivering each relevant page in its amended form.” The respondent was entitled to effect the amendment only if the applicant failed to deliver a notice of objection in the period provided for that purpose.⁹⁶ The respondent served and uploaded the amended pages during the period afforded to the applicant in which to deliver a notice of objection and prior to being entitled to amend. The respondent had not obtained the deemed consent or the leave of the court to effect the amendment. The amended pages served and uploaded during the period afforded to the applicant in which to object to the notice of amendment did not effect the amendment.

74. The second date, 27 September 2021, is founded on the contention that, in the event of early service and filing, delivery is deemed to take effect on the first permissible court day. There is no authority for this submission. In my view, the respondent was obliged to abridge the period afforded to the applicant by agreement or an order of court. The respondent did not do so and the amendment was not effected.

75. In any event, the court has the power to set aside the amended pages. In terms of rule 27(1), “... the court may ... make an order extending ... any time prescribed by

95 Respondents’ heads of argument, p. 076-140, para. 19.

96 Rule 28(5).

these rules ... for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet." And, in terms of rule 27(2), "the court ordering any such extension may make such order as to it seems meet as to the recalling, varying or cancelling of the results of the expiry of any time so prescribed or fixed, whether such results flow from the terms of any order or from these rules." The language of these rules is exceptionally wide, as indicated by the repetition of "any" - any time, any act, any step, any proceeding of any nature whatsoever⁹⁷ - and, "[s]ub-rule (2) is couched in language which is no less wide."⁹⁸ As stated in *FO Kollberg (Pty) Ltd v Atkinson's Motors Ltd*,⁹⁹ "[n]o express limitation is placed on the type of 'results of the expiry of any time' which is covered by this sub-rule" and as stated in the headnote in *Kemp v Booysen*,¹⁰⁰ the rule "does not include the possibility of an exception." The rules provide the court "wide general powers"¹⁰¹ and in *Chasen v Ritter*,¹⁰² the court held that, "if condonation should be granted, the order must be designed to eliminate any prejudice whereby a fair trial is not assured."

76. The expiry of the period in which to deliver a notice of objection to a proposed amendment results in a procedural right to effect the amendment. The amended pages are delivered in order to demonstrate the exercising of that procedural right and to effect the amendment in compliance with the manner prescribed by the rules. The procedural right results from the expiry of the period to object and flows from the rules. In my view, the court may cancel the procedural right and demonstrate that it has done so and that amendment has not been effected in compliance with the manner prescribed by the rules by setting aside the amended pages. "What the Rules can do they can surely undo."¹⁰³

97 *F O Kollberg (Pty) Ltd v Atkinson's Motors Ltd* 1970 (1) SA 660 (C), 661F; *Kemp v Booysen* 1979 (4) SA 34 (T), 38A.

98 *F O Kollberg (Pty) Ltd v Atkinson's Motors Ltd supra* 661H.

99 *supra*.

100 1979 (4) SA 34 (T), 35. See too 38A

101 *Himelsein v Super Rich CC and Another* 1998 (1) SA 929 (W), 933C.

102 1992 (4) SA 323 (SE), 329C.

103 *Mahabro Investments (Pty) Ltd v Kara* 1980 (2) SA 772 (D), 775E-F.

Costs

Costs of opposition

77. The general rule is that the applicant for an indulgence pays the costs of the application, including the costs “reasonably incurred in opposing the application”.¹⁰⁴ “There is ample authority for the proposition that where a party seeks an indulgence from the Court [they] must bear the costs not only of [their] application, but any reasonable opposition thereto.”¹⁰⁵

78. In *Standard Bank v Estate Van Rhyn*,¹⁰⁶ the Appellate Division held that,

“It is true that the appellants also asked the Court for an extension of time within which to file the record, and that in the ordinary course the costs of such an application are paid by the party who is in default and who petitions the Court for relief. If, however, the respondent had acceded to the appellant’s request to omit the documents in question, as he should have done, there would have been no necessity to apply to the Court for an extension of time. In these circumstances it is right that the costs of the application should be paid by the respondent.”

79. The judgment does not indicate the reasons why the respondent should have acceded to the request to omit the documents. The statement suggests that the failure to do so was unreasonable and the unreasonable refusal necessitated the application, and the trouble and expense which that entails. In that sense the refusal was potentially vexatious.¹⁰⁷ The intention to be vexatious is not required,¹⁰⁸ a vexatious effect is sufficient.

80. The rationale for this general rule is found in *Myers v Abramson*,¹⁰⁹ where the court explained that,

“[I]t does not appeal to me as being fair and reasonable that the opponent to [an application] for an indulgence should be put in a position that he opposes

104 *Dobsa Services CC v Dlamini Advisory Services (Pty) Ltd* 2016 JDR 1786 (SCA), para. 11; *Fourie v Saayman* 1950 (3) SA 724 (O), 725G-H; *Maloney’s Eye Properties Bk en ’n Ander v Bloemfontein Board Nominees Bpk* 1995 (3) SA 249 (O), 257F-H; and more recently in *Ndlovu v Member of the Executive Council for Police, Roads and Transport: Free State Province* 2020 JDR 0340 (FB), para. 24; *Rand Water Board v Rautenbach* 2020 JDR 0658 (GP), para. 37.

105 *HDS Construction (Pty) Ltd v Wait* 1979 (2) SA 298 (E), 302B-C.

106 1925 AD 266, 281.

107 Law of Costs, *Cilliers*, para. 4.13.

108 *Simmons, NO v Gilbert Hamer & Co Ltd* 1962 (2) SA 487 (D), 497A; *Carmichael Automotive (Pty) Limited v Gehlig* (13119/2019) [2019] ZAWCHC 135 (16 October 2019), para. 29-30.

109 1951 (3) SA 438 (C), 455F-H.

the granting of the indulgence at his peril in the sense that if the amendment is granted he cannot recover his costs of opposition or may even have to pay such costs as are occasioned by his opposition. It seems to me that the applicant for the indulgence should pay all such costs as can reasonably be said to be wasted because of the application, these costs to include the costs of such opposition as is in the circumstances reasonable, and not vexatious or frivolous. This seems to me to be the purport of such judgments as *Middeldorf v Zipper, N.O.*, 1947 (1) SA 545 (SR); *Frenkel, Wise & Co., Ltd v Cuthbert*, 1947 (4) SA 715 (C); *Greyling v Nieuwoudt*, 1951 (1) SA 88 (O)."

81. In *MacDonald, Forman & Co v Van Aswegen*,¹¹⁰ the court agreed with these remarks and was not prepared to find that the opposition in that matter was unreasonable, frivolous or vexatious.
82. In *Dimension Data Middle East and Africa (Pty) Limited and others v Ngcaba*,¹¹¹ the court substituted unreasonable with "unmeritorious". The court ordered the applicant to pay the costs, despite findings to that effect. The raising of objections that are unsuccessful or once scrutinised found to be without merit does not necessarily lead to the conclusion that the opposition is unreasonable. The description of the opposition as "unmeritorious" should be understood as wholly without merit, meritless, or to borrow the language of the Constitutional Court in the context of leave to appeal, "totally unmeritorious".¹¹² The opposition is reasonable if the grounds are arguable in the sense that there is "substance in the argument advanced", "some degree of merit in the argument" or the argument has "a measure of plausibility."¹¹³ If not, the opposition could be described as unreasonable, frivolous or vexatious.
83. This language is found in *Myers v Abramson*,¹¹⁴ in which the court held that,
- "Plaintiff in seeking to amend the declaration at this stage of the case is asking for an indulgence from the Court and no good reason has been advanced to me why he should not pay the wasted costs occasioned by his application. Mr. Gordon was perfectly entitled to place the arguments he did before the Court. These arguments, albeit they did not prevail, were of some substance."
84. A further illustration is found in *Meintjies NO v Administrasieraad van Sentraal-Transvaal*,¹¹⁵ in which the court found that the opposition was justified, although unsuccessful, and "geensins onredelik nie". The court specifically mentioned that the

110 1963 (2) SA 150 (O), 155.

111 2022 JDR 3826 (GJ), para. 41.

112 *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC), para. 21-22.

113 *supra*.

114 1951 (3) SA 438 (C),

115 1980 (1) SA 283 (T), 295F

unsuccessful argument contributed to the decision, and ordered the applicant to pay the costs. And in *Sentrachem Ltd v Terreblanche*,¹¹⁶ the court held that, “[a]lthough the applicant seeks an indulgence, the respondent had no real grounds for objecting, and accordingly he must bear the costs of the application.”

85. In my view, a respondent is not imperilled by such a demand. The respondent is merely required to make a qualitative assessment of the possible grounds of opposition, and abandon those that are not arguable. The respondent is not precluded from raising unarguable grounds but cannot expect the applicant to pick up the tab for such opposition. This is fundamentally a matter of fairness to both sides. As the Appellate Division held in *Ward v Sulzer*,¹¹⁷ the awarding of costs is, in essence, a matter of fairness to both sides. The requirement that respondents consider the possible grounds of opposition and only raise those that are arguable further advances the administration of justice by avoiding delays and costs, and the resources of the court being leached away to the hearing of opposed matters that should not be in court at all or heard in the unopposed motion court.

86. The opposition in this matter was unreasonable to the point of being frivolous and potentially vexatious. The respondent should have agreed to condone the alleged late delivery which would have rendered the application unnecessary or not opposed the application.

87. The respondent undoubtedly put the applicant to additional trouble and expense. The respondent invited the applicant to provide the explanation for the slight delay in writing, which the applicant did. The explanation was satisfactory. The respondent nevertheless refused condonation. The applicant’s attorneys proposed in their correspondence that the respondent should agree that the applicant “does not need to apply for condonation” and stated that, “[w]e believe that our client’s proposal is both sensible and reasonable. We say so because the legal costs and the delay that an application for condonation will cause is clearly not in any of the parties’ interests.” The applicant made a further attempt to avoid the application for condonation and amendment by requesting the respondent to provide an explanation for the late amendment which, if satisfactory, would dispose of one of the grounds of objection. The remaining objections could be raised in an exception. The respondent failed to respond. This correspondence was preceded by a telephone call between the attorneys. The involvement of the attorneys in this

116 2015 JDR 0411 (GP), para. 44.

117 1973 (3) SA 701 (A), 706G.

communication increased the cost of the proceedings and should have been avoided.

88. In the circumstances, the respondent should pay the costs occasioned to both parties by the opposition.

Attorney and client costs

89. The correspondence warned the respondent that opposition would be met with a prayer for punitive costs. The respondent was afforded a further opportunity to reconsider its opposition to the application and warned in notice of motion that any opposition to the application for condonation would attract a request for an order that the respondent pay the costs of the application on the scale as between attorney and client.¹¹⁸ The applicant persisted in that request at the hearing and the issue is whether the court should accede to that request.

90. The court should not readily grant punitive costs. In *Mallinson v Tanner*,¹¹⁹ the court held that,

“The circumstances under which the Court will grant attorney and client costs have been dealt with in a number of cases. The most recent decision is the case that has just been reported in the last volume of the Transvaal Provincial Division, the case of *Ebrahim v Excelsior Shopfitters & Furnishers (Pty.) Ltd.* (1946 TPD 226), and there it is pointed out that the Court awards attorney and client costs on rare occasions. This is one of the occasions when I have no hesitation in coming to the conclusion that the Court should grant the respondent attorney and client costs.”

91. The rationale for this principle is that litigants should not be discouraged from approaching court and exercising the right to have their dispute decided in a fair public hearing before a court. In *Moosa v Lalloo and Another*,¹²⁰ the court held that,

“As I understand the matter, the Courts lean against awarding attorney and client costs, and I do not think a litigant should be discouraged from exercising his right of resort to the Courts in order to present his case, even though it may not appear at first sight to be a strong one.”

92. The awarding of party and party costs is usually considered to be sufficient to discourage meritless cases and the raising of unreasonable, frivolous or vexatious opposition to a request for an indulgence attracts such costs. The question is in

118 Notice of motion, p. 076-6, prayer 3.

119 1947 (4) SA 681 (T), 686.

120 1957 (4) SA 207 (N), 225B.

what circumstances should the costs occasioned by such conduct be awarded on a punitive scale.

93. In *Jewish Colonial Trust Ltd v Estate Nathan*,¹²¹ the Appellate Division held that the ground for an award of attorney and client costs “is generally to mark the Court’s disapproval of the unsuccessful party’s conduct”. And, in *Koetsier v SA Council of Town and Regional Planners*,¹²² the court held that, “[a]wards of attorney and client costs are used by the Court to mark its disapproval of some conduct which should be frowned upon.” There are authorities in which attorney and client costs were ordered merely on the presence of unreasonable, frivolous or vexatious opposition.¹²³ However, the awarding of costs against a respondent in an application for an indulgence based on such conduct is already a mark of disapproval and the additional mark of ordering punitive costs against the respondent is rarely applied. In my view, whether or not unreasonable, frivolous or vexatious opposition attracts punitive costs in such matters turns on a matter of degree that requires an independent, separate enquiry.¹²⁴

94. In *Ward v Sulzer*,¹²⁵ the Appellate Division held that,

“In awarding costs the Court has a discretion, to be exercised judicially upon a consideration of all the facts; and, as between the parties, in essence it is a matter of fairness to both sides.”

And,

“The same basic principles apply to costs on the attorney and client scale. For example, vexatious, unscrupulous, dilatory or mendacious conduct (this list is not exhaustive) on the part of an unsuccessful litigant may render it unfair for his harassed opponent to be out of pocket in the matter of his own attorney and client costs” (emphasis added).

95. In *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging*,¹²⁶ the Appellate Division held that,

“The true explanation of awards of attorney and client costs not expressly authorised by statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of

121 1940 AD 163, 183-184.

122 1987 (4) SA 735 (W), 744J.

123 For example, *Moshal Gevisser (Trademark) Ltd v Midlands Paraffin Co* 1977 (1) SA 64 (N), 70F.

124 Cf. *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* 2014 (3) SA 265 (GP), 290D-H.

125 1973 (3) SA 701 (A), 706G.

126 1946 AD 597, 607.

pocket in respect of the expense caused to him by the litigation” (emphasis added).

96. In the *United Printing and Publishing Co. v John Haddon & Co. (Africa) Ltd*,¹²⁷ the court remarked that,

“The Trial Court found that the defence set up was not a genuine one ... the Learned Judge did not mark his sense of the defendant’s conduct by making any special order as to costs as between attorney and client. We are now asked to make such an order with regard to the costs of this appeal. The question of when a litigant should be penalised in that way is not an easy one to make a pronouncement upon. I do not say that such an order should never be made in respect of appeal proceedings. But the circumstances would have to be very special. I do not think such circumstances exist here. The appeal has been prosecuted on points of law, which though they did not succeed, were not wholly without substance” (emphasis added).

97. In *Van Dyk v Conradie and Another*,¹²⁸ the court held that,

“[i]t is clear that normally the Court does not order a litigant to pay the costs of another litigant on the basis of attorney and client unless some special grounds are present, such as those alluded to in the passage just quoted, viz. that the party has been dishonest or fraudulent, or was actuated by malice or has been guilty of grave misconduct either in the transaction under enquiry or in the conduct of the case” (emphasis added).

98. In *Plastic Converters Association of South Africa (PCASA) Obo Members v National Union of Metalworkers Union of South Africa and Others*,¹²⁹ the Labour Appeal Court held that,

“[t]he scale of attorney and client is an extra-ordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible conduct. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium” (emphasis added).

99. In *Public Protector v South African Reserve Bank*,¹³⁰ the Constitutional Court held that, “[t]he punitive costs mechanism exists to counteract reprehensible behaviour on the part of a litigant.”

100. The authorities mentioned above indicate a requirement for special circumstances, considerations or grounds, or a degree of unreasonable, frivolous or vexatious

127 1916 AD 474, 479.

128 1963 (2) SA 413 (C)

129 (JA112/14) [2016] ZALAC 37 (6 July 2016), para. 46.

130 2019 (6) SA 253 (CC), para. 221.

opposition that warrants punitive costs. However, in *Zuma v Office of the Public Protector and Others*,¹³¹ the Appellate Division held that,

“In *Johannesburg City Council v Television & Electrical Distributors*, this Court endorsed the extended meaning placed on the term ‘vexatious’ in the context of a punitive costs award, namely that proceedings may [be] regarded as vexatious when a litigant puts the other side to unnecessary trouble and expense which it ought not to bear” (emphasis added).

101. In the broadest of sense of this extended meaning, “vexatious” would find application in every matter but that would entail ignoring the limitations imposed by “unnecessary” and “ought not to bear”. The court proceeded to explain that,¹³²

“The Constitutional Court has affirmed this approach in *Public Protector v SARB*, in which it held that a punitive costs order is appropriate ‘in circumstances where it would be unfair to expect a party to bear any of the costs occasioned by litigation” (emphasis added).

“Like any other litigant, Mr Zuma was entitled to exercise his right of appeal in relation to the costs order. But in doing so, he put the respondents to unnecessary trouble and expense, which in the particular circumstances of this case, they ought not to bear. A punitive costs order is appropriate to mark the court’s displeasure at a litigant’s conduct, which includes vexatious conduct and ‘conduct that amounts to an abuse of the process of court’.”

102. In *Johannesburg City Council v Television & Electrical Distributors (Pty) Ltd and Another*,¹³³ referred to above, the Appellate Division held that,

It was not disputed that in appropriate circumstances the conduct of a litigant may be adjudged ‘vexatious’ within the extended meaning that has been placed upon this term in a number of decisions, that is, when such conduct has resulted in ‘unnecessary trouble and expense which the other side ought not to bear’. ... Naturally one must guard 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” (emphasis added).

103. In the result,¹³⁴

“An award of punitive costs on an attorney and client scale may be warranted in circumstances where it would be unfair to expect a party to bear any of the costs occasioned by litigation.

The question whether a party should bear the full brunt of a costs order on an attorney and own client scale must be answered with reference to what would be just and equitable in the circumstances of a particular case. A court is bound to secure a just and fair outcome.”

131 (1447/2018) [2020] ZASCA 138 (30 October 2020), para. 38.

132 para. 38-39.

133 1997 (1) SA 157 (A), 177D-F.

134 *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC), para. 221 and 222.

104. In my view, the opposition was unreasonable and the grounds and argument were frivolous, and potentially vexatious. The respondent appears to have given no appreciable consideration to the basis for the contention that the notice of objection was delivered late, the requirements for condonation and the prejudice that may have been sustained. The respondent had no real grounds to oppose the application for condonation. The grounds that were raised were without substance, unarguable and meritless. The respondent further appears to have attempted to steal a march on the applicant by serving and uploading the amended pages early in order to block recourse to condonation. The respondent thereafter refused all reasonable proposals to avoid the necessity for the application and the warnings made by the applicant. The respondent did so, according to counsel for the respondent, in order to avoid lodging an application for leave to amend. This course of conduct runs close to an abuse of process.
105. The respondent undoubtedly has put the applicant to additional trouble and expense. However, the applicant does not contend that the conduct was vexatious or rely on any circumstances or conduct beyond the unreasonable opposition to justify the prayer for punitive costs. The applicant accepts that condonation is required and indicated in the notice of motion that it was prepared to pay its own costs if the application was unopposed.¹³⁵ The applicant accordingly accepts that certain costs were necessary and ought to bear those costs. In my view, it would be fair to expect the applicant to bear some of the costs occasioned by the application.
106. In *Star Marine Yacht Services v Nortier*,¹³⁶ the court seriously considered but did not order attorney and client costs where there was an elementary disregard of the rules. I find myself in the same position. Although I take a disapproving view of the conduct of the respondent, parties should be afforded a "wide latitude" in conducting their cases and be able to "fight from every available angle".¹³⁷ The opposition in this matter was impetuous but in the course of litigation that spans a period of eight years, involving *inter alia* multiple parties, claims for substantial damages and numerous interlocutory applications, parties are bound to make mistakes - opposing parties will at times act unreasonably and even frivolously, such is the risk of litigation - and not all those mistakes should attract punitive costs. The unreasonable conduct already carries the costs of the opposition and the usual costs order on a scale as between party and party is theoretically meant to ensure that the successful

135 The applicant sought for no order as to costs, save in the event of opposition.

136 1993 (1) SA 120 (SE), 121F.

137 *Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 (2) SA 545 (A), 560E-F.

party is not 'out of pocket' in respect of expenses. In my view, in the circumstances of this matter, punitive costs would not be just and equitable.

Order

107. In the premises, I make the following order:

1. The late filing of the notice of objection is condoned.
2. The amended pages are set aside.
3. The applicant shall pay the costs of this application on an unopposed scale.
4. The respondent shall pay the costs occasioned by its opposition.

QG LEECH
Acting Judge of High Court
Gauteng Local Division, Johannesburg

Heard on: 17 April 2023
Delivered on: 26 May 2023

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 26 May 2023.