



REPUBLIC OF SOUTH AFRICA
KWAZULU-NATAL HIGH COURTS

THE HONOURABLE ACTING JUDGE PRESIDENT MR JUSTICE M I MDONDO

3 November 2022

Adv E Zungu
Director of Public Prosecutions

Adv E Smith
Deputy Director of Public Prosecutions

Advocate S Mahabeer SC
Chairman, Society of Advocates, Kzn (Dbn)

Advocate T S I Mthembu SC
Chairman, Pmb Bar Committee, Kzn

Ms P. Mfusi
Legal Practice Council

Ms R. Mahabeer
Chief Registrar, Pietermaritzburg High Court

Ms T. Mohamed-Hanif
Chief Registrar, Durban High Court,

Dear All,

RE: PRACTICE DIRECTIVE 41

After consultation and comments by all relevant stakeholders the Practice Directive 41 is hereby implemented with effect from Wednesday, 9 November 2022.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'M I Madondo', written over a horizontal line.

Acting Judge President
Mr Justice M I Madondo
HIGH COURT OF SA: KZN

PRACTICE DIRECTIVE 41
PRE-TRIAL PROCEDURES

1. Systematic delays in the setting of trial dates, the finalization of cases and the delivering of judgments undermines the right of access to courts. Some legal representatives exploit the inherently contentious aspects of the adversarial system to their private advantage at the public's expense. This results in trial cases not finishing in their allotted time and becoming part-heard matters. Experience has shown that part-heards are now a norm rather than an exception, to the detriment of the proper functioning of the courts and the expeditious finalization of cases.

2. In ensuring that the cases do not linger on the roll, the court should promote firm trial dates, early court interventions, and virtual proceedings. Delays in bringing a matter to trial should be avoided. This can be achieved by considering alternative dispute resolution mechanisms (mediation, arbitration etc) before the matter is set down for trial.

3. Both civil and criminal proceedings should be preceded by pre-trial conferences and before a matter is set down for hearing it must be certified trial ready. For both civil and criminal proceedings, trial readiness questionnaires have been prepared and made available. A matter is considered ripe for trial if, on the appointed day, it will be ready to commence immediately and to run continuously until its conclusion. The holding of pre-trial conferences and the certification of matters as being trial ready are intended to assist in ensuring that all important and relevant issues in the prospective trial proceedings, be it civil or criminal, are covered and to minute the outcome of the trial conference, and directions given, or determinations made by the presiding officer, as well as whatever agreements the parties may have reached during the course of the pre-trial conference.

4. The objects of pre-trial conferences and the certification of criminal cases as being trial ready are to identify and narrow the issues between the parties and to more accurately determine the trial date and the expected duration of the trial and thus to ensure that cases will proceed and finish within their allotted time. The narrowing of issues

helps to eliminate irrelevancies and thereby curtails the proceedings. The process is aimed at the optimal utilisation of court hours.

5. The pro forma documents drafted for civil and criminal pre-trial conferences are intended to facilitate uniformity in the approaches of various courts in the Division when conducting pre-trial conferences. Pro forma minutes also serve as a record that civil or criminal matters, as the case may be, are trial ready before they are enrolled for hearing. This should assist in enhancing levels of performance and expedite outcomes in the delivery of quality justice to all within the Division.

6. In order to avoid delays in the finalization of cases and unnecessary part-heards, the parties and legal representatives are required to comply with the following procedure before or during the hearing of a particular case:

- (a) Agreements reached between the parties at the pre-trial conferences should strictly be adhered to;
- (b) In both civil and criminal matters, parties or their legal representatives must take practical steps to determine the exact time required for the trial of their matters, and to ensure that a case is completed within the allotted time. In civil cases, the estimate of the number of days required for a case is the ultimate responsibility of the plaintiff, but the task should be undertaken in conjunction with other parties to the litigation. What is required is a genuine estimate of the time required for the presentation of all evidence, argument and, in a case where it is reasonably anticipated that a judge would or might deliver an ex-tempore judgment, a short period for the preparation by the judge of some notes and the delivery of the judgment should be allowed.
- (c) To avoid miscalculations of the time required for a particular trial or hearing, the judge to whom a trial is allocated should, before its commencement, interrogate the assessment of the time required in conjunction with the counsel to make sure that there is a genuine expectation that the proceedings will terminate within the allocated time. The judge must take active and primary responsibility for the progress of cases from initiation to conclusion to ensure that cases are concluded without unnecessary delay.

- (d) Time limits should be established in advance through consultation with counsel during a trial management conference. However, it may be necessary to impose time limits during a trial to deal with irrelevant issues or problems with witness credibility. A judicial officer is required to ensure that there is compliance with all applicable time limits.
- (e) The duty to grant a party a fair hearing does not preclude a judge from keeping a firm hand on proceedings. Reasonable time limits may be laid down for argument which may be cut short when the judge is satisfied that more time would not be of material assistance. The examination and cross-examination of witnesses may be curtailed if it exceeds reasonable bounds. Time limits should be reasonable and related to the circumstances of each case. However, they should be adjusted, if necessary, during a trial if the need arises, but counsel must have adequate time to present their clients' case.

Civil cases

Preparing for trial

7. One of the significant ways to ensure the effective use of trial time is a pre-trial management conference to be held approximately two weeks before the scheduled trial commencement date, and more than one conference may be appropriate for a complex case. The following subjects can be addressed in pre-trial management conferences:

- (a) The resolution of any remaining discovery issues;
- (b) The determination of issues of law and facts that are obviously in dispute;
- (c) The exchanging of exhibits;
- (d) The exchanging of witness lists, the scheduling of witnesses, and avoidance of the unnecessary duplications of testimony;
- (e) Agreement with counsel on time limits for different segments of the trial;
- (f) The addressing of any special needs, such as the use of interpreters and audio-visual materials or video technology; and
- (g) The consideration of the possibility of settlement.

Scheduling to start trials on time and to provide adequate time for them

8. There may be many reasons why a trial does not start at the scheduled time, such as problems relating to the presence of particular witnesses, the necessity of bringing the accused to the court from a correctional centre, load-shedding, last minute problems for the judge to work out with counsel or demands from other cases on the judge's time. Any problems that can be reasonably anticipated should be resolved so that case participants will not be frustrated by any delay and so that the court can give as much time as possible to the trial on its first day.

Maintaining of momentum by a judge

9. A judge should allow instructing counsel who are questioning witnesses to proceed to a conclusion without excessive interruption. The judge must allow counsel to consult with parties or another counsel. The judge must require counsel to state objections succinctly and in appropriate legal terms to permit the court to rule succinctly. The judge must periodically review the progress of the case with counsel to help ensure its reasonable movement to a conclusion.

Criminal case readiness for trial

10. A criminal case must only be set down for trial when both the prosecution and the defence have confirmed the readiness of the matter for trial. The matter is ready for trial if:

- (a) The defence has received full disclosure of the charge against the accused, i.e., the indictment has been received by the defence;
- (b) Consultations necessary for trial purposes by both the defence and the State have taken place;
- (c) The defence has been placed in sufficient funds for the dates of the trial;
- (d) The dates upon which the trial is proposed to run are suitable to both the prosecution and the defence; and
- (e) The parties have satisfied the presiding judge that they have exhausted all possibilities to enter into a plea arrangement.

Part-heards

11. Courts should work on the basis that, accidents aside, cases must finish in the time allotted and should not commence if the legal representatives have concluded that the case is unlikely to be completed in the designated time. Save in exceptional circumstances, a trial should not be permitted to commence if the risk of it not finishing in the allotted time is too high. Should such circumstances exist, then the parties must file a joint memorandum setting out the reasons why there is a risk that the trial will not be finalised within the allotted time period.

12. Part-heards may only be permitted to occur under exceptional circumstances, for example, where the illness of a necessary participant has occurred or the trial has taken an unpredictable course, which requires a premature halt to proceedings. But experience shows that a substantial number of part-heard trials occur simply because the parties, and the court, pay far too little attention to optimally utilising court hours, and because of the granting of unnecessary adjournments and the permitting of time-consuming frivolous point-taking. A judge should not be too flexible in the management of time during a trial or in controlling the inclination of some legal practitioners to enter into irrelevancies and issues which do not advance a case.

13. Counsel/legal representatives must be advised that a trial cannot simply run over the time allotted as the judge would have been allocated other duties for the days that follow the trial.

14. In criminal proceedings, the prosecution must in a session make enough backup cases of different possible durations available to ensure that if a backup trial is commenced the appropriate length trial will be commenced to ensure that it will finish within the time remaining in the session. There must be proper communication between the prosecution and the defence in the various enrolled cases on this subject, both prior to the commencement of the session and, whenever the need arises, during the course of the session. All this is directed at ensuring that wasted time is minimised without taking risks with regard to the generation of the part-heards. Judges must also play their part in ensuring that matters are expeditiously heard, and that part-heards are avoided.

15. Save in exceptional cases which require more than one session for their disposal, it is an absolute rule that judges do not start trials which, on a reasonable assessment, are likely to become part-heard.

Postponements

16. The current statistics show that the majority of criminal matters, for instance, are being postponed. In an application for postponement, the applicant must show good and sufficient cause, i.e., the applicant must furnish a full and satisfactory explanation of the circumstances that give rise to the application. An application for a postponement must be made timeously as soon as the circumstances which might justify such an application become known to the applicant. If illness is a ground for a postponement, proper medical evidence must be produced directly and positively to the effect that the witness or party cannot attend and disclosing the nature of the illness and the date when the person will probably be able to appear. In the absence of these particulars the party may have to proceed without the witness. The unavailability of a specific legal representative is not a good ground for allowing a postponement.

Ways and means of ensuring the hearing and finalization of matters without delay

17. The following should be considered:

- (a) The optimal use of court times;
- (b) Start the matter to finish it;
- (c) Legal practitioners should not be double booked;
- (d) State witnesses are to remain at court until they are excused from further attendance by the court;
- (e) In appeals, the legal practitioners should submit heads of argument in time (Legal Aid South Africa and Judicare included) as per the notice issued by the Registrar.
- (f) If the appeal record is somehow defective, the legal representatives concerned must bring that to the notice of the Registrar or appeals clerk within 10 court days of receipt of the appeal record for the purpose of remedying it as soon as possible before that appeal is set down for hearing. If the parties agree that such appeal record should be reconstructed, the parties must return the appeal record to the Registrar together with the draft

consent order, signed and dated by both parties. The draft consent order must simultaneously be emailed to the appeals section.

- (g) The holding of meaningful pre-trial conferences and the adherence to the agreements reached thereat, the identification of issues and the narrowing of issues, which help to eliminate irrelevancies and thereby curtail the proceedings;
- (h) The strict observance of court time after a short break and lunch; and
- (i) The use of pro bono presiding officers to reduce backlogs.

Managing a high-profile case

18. This is a case which draws intense attention from the public and from the media. A high publicity case should be specially assigned to a judge with the requisite training, experience and temperament to manage the case from its inception through to its conclusion. The judge should determine how the trial will proceed in the court room with regard to news media arrangements, seating, security, and media access to exhibits.

19. The court must establish an effective communication method with the media about procedural and legal aspects of the case. There should be a single reliable source of information for media representatives. The court must plan for all foreseeable contingencies in dealing with the media and public. Before the trial begins, the trial judge should establish the ground rules for the media regarding the trial procedures and access to proceedings and trial participants. The judge, security personnel and court manager, should plan in advance to respond to the level of the security risk presented by the trial by reviewing the adequacy of current security measures, determining the security needs of assessors, judges and parties, and assessing the location and size of the courtroom in terms of security requirements. Public and media access to the court should be reviewed about matters such as seating arrangements, courtroom entry screening, times when the media and the public may enter and leave the courtroom, and the possibility of making available different periods of access to the courtroom for the media and the public. If it is necessary to deal with security issues beyond the courthouse itself, there should be collaboration with law enforcement agencies, private security staff, adjacent buildings, and other security personnel. Court staff and media liaison personnel should know about

security arrangements to avoid inadvertent interference with them. However, the security plan should be sufficiently flexible to accommodate unexpected developments.

Media coverage of the proceedings

20. To standardize the procedure when requests for permission to film or record court proceedings are received, the following guidelines are provided:

- (a) Any party who wishes to film or record proceedings must notify the Registrar of its intention at least 5 days before hand. The Registrar will then establish from the presiding judge whether there is any objection to the request;
- (b) Any party who wishes to object to any filming or recording must raise its objection in writing;
- (c) The court may on good cause withdraw permission to film or record or change the conditions under which such permission was granted.

Equipment limitations

21. The following equipment limitations shall apply:

- (a) Video: only one camera may be used at a time and the location of the camera is not to change while the court is in session.
- (b) Audio: the media may install their own audio recording system provided this is unobtrusive and does not interfere with proceedings or the official recording of the proceedings. Individual journalists may bring tape recorders into the court room for the purposes of recording the proceedings but the changing of cassettes in the court room is not permitted while the court is in session.
- (c) Still cameras: only one photographer will be allowed, and the location of the camera is not to change, and no changing of lenses or film is permitted in the court while the court is in session.
- (d) All cameras, video and audio equipment must be in position at least 15 minutes before the start of proceedings and may be moved or removed only when the court is not in session. Cameras, cables and the like are not to interfere with the free movement within the court.
- (e) Lighting: no movie lights, flash attachments or artificial lighting devices are permitted during court proceedings.

- (f) Operating signals: no visible or audible light or signal may be used on any equipment.

Pooling arrangements

- 22. The following pooling arrangements shall apply:
 - (a) Only one media representative may conduct each of the audio, video and still photography activities.
 - (b) This media representative is to be determined by the media themselves and is to operate an open and impartial distribution scheme, in terms of which the footage, sound, or photographs are to be distributed in a 'clean' form, that is, with no visible logos etc to any other media organization requesting same and must be archived in such a manner that it remains freely available to other media.
 - (c) If no agreement can be reached on these arrangements, no expanded media coverage may take place.

Rules regarding behaviour of media representatives

- 23. Media representatives shall be subject to the following rules:
 - (a) Conduct must always be consistent with the decorum and dignity of the court.
 - (b) No identifying names, marks, logos or symbols should be used on any equipment or clothing worn by media representatives.
 - (c) All representatives (including camera crew) must be appropriately dressed.
 - (d) Equipment must be positioned and operated to minimize any distraction while the court is in session.

Absolute bar

- 24. There shall be an absolute bar on:
 - (a) Audio recordings or close up photography of bench discussions;
 - (b) Audio recordings or close up photography of communications between legal representatives or between clients and their legal representatives;
 - (c) Close-up photographs or filming of judges, lawyers, or parties in court;

- (d) Recordings (whether video or audio) being used for commercial or political advertising purposes thereafter;
- (e) Use of sound bites without the prior consent of the presiding judge (this does not apply to extracts from judgments or order).

25. Failure to comply with these instructions may lead to contempt of court proceedings.