39 Trial

(1) If, when a trial is called, the plaintiff appears and the defendant does not appear, the plaintiff may prove his claim so far as the burden of proof lies upon him and judgment shall be given accordingly, in so far as he has discharged such burden. Provided that where the claim is for a debt or liquidated demand no evidence shall be necessary unless the court otherwise orders.

(2) When a defendant has by his default been barred from pleading, and the case has been set down for hearing, and the default duly proved, the defendant shall not, save where the court in the interests of justice may otherwise order, be permitted, either personally or by an advocate, to appear at the hearing.

(3) If, when a trial is called, the defendant appears and the plaintiff does not appear, the defendant shall be entitled to an order granting absolution from the instance with costs, but may lead evidence with a view to satisfying the court that final judgment should be granted in his favour and the court, if so satisfied, may grant such judgment.

(4) The provisions of subrules (1) and (2) shall apply to any person making any claim (whether by way of claim in reconvention or third party notice or by any other means) as if he were a plaintiff, and the provisions of subrule (3) shall apply to any person against whom such a claim is made as if he were a defendant.

(5) Where the burden of proof is on the plaintiff, he or one advocate for the plaintiff may briefly outline the facts intended to be proved and the plaintiff may then proceed to the proof thereof.

(6) At the close of the case for the plaintiff, the defendant may apply for absolution from the instance, in which event the defendant or one advocate on his behalf may address the court and the plaintiff or one advocate on his behalf may reply. The defendant or his advocate may thereupon reply on any matter arising out of the address of the plaintiff or his advocate.

(7) If absolution from the instance is not applied for or has been refused and the defendant has not closed his case, the defendant or one advocate on his behalf may briefly outline the facts intended to be proved and the defendant may then proceed to the proof thereof.

(8) Each witness shall, where a party is represented, be examined, cross-examined or re-examined as the case may be by only one (though not necessarily the same) advocate for such party.

(9) If the burden of proof is on the defendant, he or his advocate shall have the same rights as those accorded to the plaintiff or his advocate by subrule (5).

(10) Upon the cases on both sides being closed, the plaintiff or one or more of the advocates on his behalf may address the court and the defendant or one or more advocates on his behalf may do so, after which the plaintiff or one advocate only on his behalf may reply on any matter arising out of the address of the defendant or his advocate.

(11) Either party may apply at the opening of the trial for a ruling by the court upon the onus of adducing evidence, and the court after hearing argument may give a ruling as to the party upon whom such onus lies: Provided that such ruling may thereafter be altered to prevent injustice.

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(12) If there be one or more third parties or if there be defendants to a claim in reconvention who are not plaintiffs in the action, any such party shall be entitled to address the court in opening his case and shall lead his evidence after the evidence of the plaintiff and of the defendant has been concluded and before any address at the conclusion of such evidence. Save in so far as the court shall otherwise direct, the defendants to any counterclaim who are not plaintiffs shall first lead their evidence and thereafter any third parties shall lead their evidence in the order in which they became third parties. If the onus of adducing evidence is on the claimant against the third party or on the defendant to any claim in reconvention, the court shall make such order as may seem convenient with regard to the order in which the parties shall conduct their cases and address the court, and in regard to their respective rights of reply. The provisions of subrule (11) shall *mutatis mutandis* apply with regard to any dispute as to the onus of adducing evidence.

(13) Where the onus of adducing evidence on one or more of the issues is on the plaintiff and that of adducing evidence on any other issue is on the defendant, the plaintiff shall first call his evidence on any issues in respect of which the onus is upon him, and may then close his case. The defendant, if absolution from the instance is not granted, shall, if he does not close his case, thereupon call his evidence on all issues in respect of which such onus is upon him.

(14) After the defendant has called his evidence, the plaintiff shall have the right to call rebutting evidence on any issues in respect of which the onus was on the defendant: Provided that if the plaintiff shall have called evidence on any such issues before closing his case he shall not have the right to call any further evidence thereon.

(15) Nothing in subrule (13) and (14) contained shall prevent the defendant from cross-examining any witness called at any stage by the plaintiff on any issue in dispute, and the plaintiff shall be entitled to re-examine such witness consequent upon such cross-examination without affecting the right given to him by subrule (14) to call evidence at a later stage on the issue on which such witness has been cross-examined. The plaintiff may further call the witness so re-examined to give evidence on any such issue at a later stage.

(16) A record shall be made of —

(a) any judgment or ruling given by the court,

(b) any evidence given in court,

(c) any objection made to any evidence received or tendered,

(d) the proceedings of the court generally (including any inspection *in loco* and any matter demonstrated by any witness in court); and

(e) any other portion of the proceedings which the court may specifically order to be recorded.

(17) Such record shall be kept by such means as to the court seems appropriate and may in particular be taken down in shorthand or be recorded by mechanical means.

(18) The shorthand notes so taken or any mechanical record shall be certified by the person taking the same to be correct and shall be filed with the registrar. It shall not be necessary to transcribe them unless the court or a judge so directs or a party appealing so requires. If and when transcribed, the transcript of such notes or record shall be certified as correct by the person transcribing them and the

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transcript, the shorthand notes and the mechanical record shall be filed with the registrar. The transcript of the shorthand notes or mechanical record certified as correct shall be deemed to be correct unless the court otherwise orders.

(19) Any party to any matter in which a record has been made in shorthand or by mechanical means may apply in writing through the registrar to a judge to have the record transcribed if an order to that effect has not already been made. Such party shall be entitled to a copy of any transcript ordered to be made upon payment of the prescribed fees.

(20) If it appears convenient to do so, the court may at any time make any order with regard to the conduct of the trial as to it seems meet, and thereby vary any procedure laid down by this rule.

(21) Every stenographer employed to take down a record and every person employed to make a mechanical record of any proceedings shall be deemed to be an officer of the court and shall, before entering on his duties, take the following oath:

> I, A.B., do swear that I shall faithfully, and to the best of my ability, record in shorthand, or cause to be recorded by mechanical means, as directed by the judge, the proceedings in any case in which I may be employed as an officer of the court, and that I shall similarly, when required to do so, transcribe the same or, as far as I am able, any shorthand notes, or mechanical record, made by another stenographer or person employed to make such mechanical record.

[Subrule (21) substituted by GN R235 of 18 February 1966.]

(22) By consent the parties to a trial shall be entitled, at any time, before trial, on written application to a judge through the registrar, to have the cause transferred to the magistrate's court: Provided that the matter is one within the jurisdiction of the latter court whether by way of consent or otherwise.

(23) The judge may, at the conclusion of the evidence in trial actions, confer with the advocates in his chambers as to the form and duration of the addresses to be submitted in court.

(24) Where the court considers that the proceedings have been unduly prolonged by the successful party by the calling of unnecessary witnesses or by excessive examination or cross-examination, or by over-elaboration in argument, it may penalise such party in the matter of costs.

Commentary

General. In civil proceedings a trial is the judicial investigation of the claim and defence of litigants as disclosed in the

summons and plea; [1] and for that purpose, the hearing of such evidence as may be brought forward by the parties; after which the parties or their legal representatives (if they so desire) are heard in argument, and the judgment of the court is given. The term 'trial' is not necessarily confined to proceedings in which evidence is heard, [2] but may include, for example, the case where the defendant fails to enter appearance or to plead, and the plaintiff asks for default judgment; but such use of the word is unusual. [3]

Rule 39 lays down the procedure for the conduct of the trial. There are, however, other rules and sections of the Superior Courts Act 10 of 2013 which also deal with the conduct of the trial and with the various incidents that may be attendant thereon or that may arise during the course of a trial. For convenience, references to these rules and sections of the Act are set out below, more or less in the sequence in which consideration of the various matters may be required.

1. Venue of trial — s 8(6).
2. Removal of proceedings from one division to another or from one seat to another — s 27.
3. Transferral of trial to the magistrate's court — rule 39(22).
4. Recusation of judge — see the *excursus* to s 14 s v 'Recusation' in Volume 1 third edition, Part D.
5. Proceedings to be carried on in open court — s 32.
6. Record of proceedings — rule 39(16) to (19) and (21).
7. Penalties for failure of witness to attend proceedings or to produce documents, etc — s 35.
8. Plaintiff fails to appear — rule 39(3) and (4).
9. Defendant fails to appear — rule 39(1).
10. Defendant barred from pleading — rule 39(2) and (4).
11. Special cases, separation of issues and adjudication upon point of law — rule 33.
12. Opening case — rule 39(5) and (9).
13. Ruling as to who should begin — rule 39(11).
14. Variation of procedure laid down by rule 39 — rule 39(20).
15. Leading of evidence:
    (a) For plaintiff — rule 35(5), (8), (13), (14) and (15).
    (b) For defendant — rule 39(8), (9), (13) and (15).
    (c) Evidence through intermediaries — s 37A.
    (d) Evidence through audiovisual link in proceedings — s 37C; rule 38(9).
    (e) Inspections *in loco* — rule 39(16)*(d)*.
16. Evidence upon affidavit — rule 38(2).
17. Examination by interrogatories — s 39.
18. Commissions *de bene esse* — rule 38.
19. Reference of particular matters for investigation by referee — s 38.
20. Absolution from the instance:
    (a) At the close of the case for the plaintiff — rule 39(6).
    (b) At the close of the case — see the notes to rule 39(6) s v 'Apply for absolution from the instance' below.
    (c) Where the burden of proof is on the defendant — see the notes to rule 39(6) s v 'Apply for absolution from the instance' below.
21. Opening the case for the defendant in event of absolution from the instance not applied for/refused — rule 39(7).
22. Procedure in event of third parties / defendants to a claim in reconvention who are not plaintiffs — rule 39(12).
23. Addressing the court — rule 39(10) and (23).
24. Removal of certain persons — s 41.
25. Contempt of court — see the *excursus* to s 41 s v 'Contempt of court' in Volume 1 third edition, Part D.
26. Intervention by third party — rule 12.
27. Joinder of parties — rule 10.
28. Consolidation of actions — rule 11.
29. Amendment of pleadings during trial — rule 28.

30. Withdrawal, settlement, discontinuance, postponement and abandonment — rule 41.
31. Judgment — s 14 and rule 39(24).

Rule 39(20) provides that if it appears convenient to do so, the court may at any time make any order with regard to the conduct of the trial as to it seems meet, and thereby vary any procedure laid down by rule 39. See further the notes to that subrule below.

If parties reach an agreement to limit issues during trial they are bound by the terms of such agreement. [4]

It is the duty of the trial judge to inform the parties' counsel of a relevant point which the trial judge has come across or which was not raised by the litigants in evidence or in the written and oral submissions to the court. This is especially so where that point is, in the view of the judge, conclusive of the matter. In such instance, the trial judge should invite counsel to submit argument on the point. [5] It is undesirable for a court to deliver judgment with a substantial portion containing issues never canvassed or relied on by counsel. [6] A trial judge may only have regard to the evidence placed before the court during the course of the hearing of the matter and reliance on facts not averred in the pleadings or raised in court constituted serious misdirection. [7]

As a general rule, if the judge is unable to complete a part-heard trial, the judge's successor should recall the witnesses who have given evidence before the first judge and hear their evidence *de novo*. This applies in the unfortunate event of the judge's death before the conclusion of the trial and also where the judge resigns on grounds of ill-health and cannot complete the case. [8] The abortive hearing represents an uncompleted stage in the proceedings with which the court subsequently hearing the matter becomes seized. The second court therefore retains full jurisdiction and discretion in regard to the costs of the abortive hearing, as with all other stages and incidents in the proceedings. [9]

If the evidence has only just begun it may be practicable and unprejudicial for the parties to agree that the evidence already led should stand of record, and the trial continue from that stage. Such a procedure does not deprive the eventual judgment of its validity as such nor renders it the mere award of an arbitrator. [10] If the trial has reached an advanced stage, the general rule should apply and the evidence taken by the incapacitated judge should be led over again. This is, of course, subject to the agreement of the parties, and provided that they are satisfied to do so, they may even go to the length of agreeing that judgment be given by a

judge of an entire record taken down by the predecessor. [11] In *Mondi Shanduka Newsprint (Pty) Ltd v Murphy* [12] the presiding judge in a trial passed away before giving judgment. The parties came to court asking it to finalize the matter in the way that they had agreed, rather than beginning the trial anew. The proposed procedure was that the court read all of the documents that would have been available to the deceased judge; that it hear argument from the parties; and that it then make a decision. The court refused to give effect to the proposed procedure because it would be unable to resolve the many disputes of fact in the matter without resorting to the credibility of witnesses. If it were to decide the matter on the basis agreed, it would be in breach of its oath of office. The court directed that the trial begin *de novo* if the parties wished to continue with the matter. In *Standard Bank of South Africa Ltd v Sibanda* [13] the judge who presided at the trial became indisposed and unable to deliver judgment. The parties did not want the trial to begin *de novo*. By agreement between the parties a transcript of the evidence, together with the documentary exhibits, was placed before another judge for the hearing of argument and the delivery of judgment.

On 28 February 2014 Norms and Standards for the Performance of Judicial Functions were issued by the Chief Justice. [14] The following norms and standards are, *inter alia*, contained therein:

(a) every judicial officer must dispose of cases efficiently, effectively and expeditiously (paragraph 5.1(ii));

(b) judicial officers must at all times strive to deliver quality justice as expeditiously as possible in all cases (paragraph 5.2.1(i));

(c) all judicial officers must strive to finalize all matters, including outstanding judgments, decisions or orders as expeditiously as possible. Civil cases in the High Court should be finalized within one year from the date of issue of summons (paragraph 5.2.5(i));

(d) judgments should, generally, not be reserved without a fixed date for handing down. Judicial officers have a choice to reserve judgments *sine die* where the circumstances are such that the delivery of a judgment on a fixed date is not possible. Save in exceptional cases where it is not possible to do so, every effort must be made to hand down judgments no later than three months after the last hearing (paragraph 5.2.6).

In *Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd* [15] Peter AJ observed: [16]

> 'The efficient conduct of litigation has as its object the judicial resolution of disputes, optimising both expedition and economy. The conduct and finalisation of litigation in a speedy and cost-efficient manner is a collaborative effort. The role of witnesses is to testify to relevant facts of which they have personal knowledge. The role of legal representatives has two key aspects. First is the supervision, organisation and presentation of evidence of the witnesses and, secondly, the formulation and presentation of argument in support of a litigant's case. The diligent observation of those roles facilitates the role of the judicial officer, which is to arrive at a reasoned determination of the issues in dispute, in favour of one or other of the parties. Where practitioners neglect their roles, it leads to the protracted conduct of the litigation in an ill-disciplined manner, the introduction of inadmissible evidence and the confusion of fact and argument, with the attendant increase in costs and delay in its finalisation, inimical to both expedition and economy.'

Once a case has been placed before a court for adjudication, the court is obliged to adjudicate upon the issues raised by rendering a judgment, unless the parties specifically withdraw all or some of the issues from judicial consideration (by, for example, abandoning a claim or defence, or by withdrawing the action or application in its entirety). [17]

It has been held that judicial officers have an ethical duty to give judgment (or any other ruling) in a case promptly and without undue delay, and that litigants are entitled to judgments as soon as reasonably possible. [18] If there is an explanation or excuse for an undue delay it must be dealt with in the judgment. [19]

It is elementary that litigants are ordinarily entitled to reasons for judgments. In *Strategic Liquor Services v Mvumbi NO* [20] it is stated:

> 'It is elementary that litigants are ordinarily entitled to reasons for a judicial decision following upon a hearing, and, when a judgment is appealed, written reasons are indispensible. Failure to supply them will usually be a grave lapse of duty, a breach of litigants' rights, and an impediment to the appeal process.'

A judgment or judicial order has at least two functional components: [21]

(i) it is a command to the party at whom it is aimed, coupled in an appropriate case with a warrant to the sheriff to enforce the command;

(ii) it regulates the legal relationship between the parties and settles their mutual rights and obligations, to the extent necessary for its grant. [22]

It is a fundamental principle of our law that a court order must be effective and enforceable, and it must be formulated in language that leaves no doubt as to what the order requires to be done. [23] Not only must the order be couched in clear terms, but its purpose must also be readily ascertainable from the language used. [24] If an order is ambiguous, unenforceable, ineffective, inappropriate, or lacks the element of bringing finality to a matter, or at least part of the case, it cannot be said that the court that granted it exercised its discretion properly. [25]

In *Solidarity v Black First Land First* [26] it appeared to the Supreme Court of Appeal that the High Court (sitting as an Equality Court), after hearing oral submissions, adjourned the matter to consider the submissions. What occurred thereafter was not known. What was known was that across the front page of what appears to have been the written 'judgment' prepared by the judge, he had written by hand, '[t]he judgment is a nullity in view of the SCA judgment of Jonathan Dubula Qwelane case No 686/2108'. The order that was subsequently issued by the registrar recorded:

> 'The proceedings in case EQ2/2019 are declared a nullity.' [27]

Apparently the judge prepared a judgment in which he found for the applicants but then, before delivering it, in the light of the decision of the Supreme Court of Appeal in *Qwelane v South African Human Rights Commission*, [28] which was delivered after

the judgment was prepared, found it to be a nullity. [29]

The Supreme Court of Appeal held [30] that one of the primary functions of a court was to bring to finality the dispute with which it was seized. That was done by making an order that was clear, exacts compliance, and was capable of being enforced in the event of non-compliance. The order declaring the judgment a nullity did not achieve finality nor was it capable of being enforced. The High Court therefore failed to discharge its primary function.

The order that it issued declared the proceedings a nullity, and hence declined to determine the dispute before the court. To like effect, the court, by rendering its own 'judgment' a nullity, left the parties without a binding decision. A court did not enjoy the power not to decide a case that was properly brought before it. Nor was a court entitled to declare its own proceedings to be a nullity. [31]

The appeal accordingly succeeded and the case was remitted to the Equality Court to be finalized, either by the presiding judge or in the event that the presiding judge was, for whatever reason, unable to finalize the matter, any other judge as the Judge President might direct. [32]

Courts have a duty to ensure that they do not grant orders that are *contra bonos mores*, or that amount to an abuse of process. [33]

A judgment may operate as a novation of the obligation which forms the subject of the judgment, in the sense that the original debt or right of action is extinguished and replaced by entirely new rights flowing from the judgment. [34] In certain circumstances, however, a judgment does not have the effect of a novation. If the only purpose of the judgment is to enable the plaintiff to enforce certain rights, by means of execution if need be, without in any way affecting other rights arising out of the contract between the parties, the judgment does not novate the rights arising out of the contract, but rather strengthens and reinforces them. [35]

Once a court has duly pronounced a final judgment or order it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes *functus officio:* its jurisdiction in the case having been fully exercised, its authority over the subject matter has ceased. [36] In High Court practice certain exceptions to this rule have been recognized and,

[This page contains footnotes only in print]

provided the court is approached within a reasonable time of its pronouncing the judgment or order, a division of the High Court may correct, alter or supplement it in certain cases. See further the notes to rule 42(1)*(b)* s v 'An ambiguity, or a patent error or omission' below.

In High Court practice, application may be made by one of the parties, on notice to the other, for a clarification of a judgment or order made by it in a suit between the parties. See the notes to rule 42(1)*(b)* s v 'An ambiguity, or a patent error or omission' below.

Our law does not endorse the notion that judges may decide cases on the basis of what they regard as reasonable and fair. To hold otherwise would give rise to intolerable legal uncertainty. Reasonable people, including judges, may differ on what is equitable and fair, and the outcome in any particular case would then depend on the personal idiosyncrasies of the individual judge: the law as criterion giving way to the judge. This would be intolerable. [37]

As a general rule, the court may at the end of the trial grant —

(a) judgment for the plaintiff in respect of his claim in so far as he has proved the same;

(b) judgment for the defendant in respect of his defence in so far as he has proved the same;

(c) absolution from the instance, if it appears to the court that the evidence does not justify the court in giving judgment for either party;

(d) such judgment as to costs as may be just.

A judgment must not be conditional: it must definitely determine the litigation between the parties. [38] Our courts have, however, recognized the right of a party to sue for relief on a condition to be fulfilled after issue of the court's order, and have sanctioned the institution of a claim based upon a cause of an action which will only arise conditionally upon an event occurring subsequent to the judgment. [39] Thus, the court may in its judgment order implementation of an agreement between the parties and, in the alternative, order that should the defendant fail to comply with the court's judgment for implementation of the agreement, the court may set aside the agreement and grant consequential relief. [40]

A judgment must not be for more than the prayer. [41] Thus, for example, the court cannot give judgment in excess of the amount claimed as damages, [42] nor can the court give judgment for consequential damages if only direct damages are claimed. [43]

A judgment may be expressed in foreign currency. [44] The rate of exchange is not a matter of judicial notice and should be proved. [45]

In the absence of affording the parties the aforesaid right to deal with any new aspect which a court wishes to raise, it is improper for the court to deal with a point of law or fact not raised by either party, for the first time in its judgment. [46]

Costs and the court's discretion in the award thereof are considered in the notes s v 'Costs in general' in Part D5 below.

While some reliance on an invocation of counsel's heads of argument in a judgment may not be improper, it is better if the judgment is in the judge's own words. [47] Thus, it has been stated: [48]

> 'The true test of a correct decision is when one is able to formulate convincing reasons (and reasons which convince oneself) justifying it. And there is no better discipline for the judge than writing (or giving orally) such reasons. It is only when one does so that it becomes clear whether all the necessary links in a chain of reasoning are present; whether the inferences drawn . . . are properly drawn; whether the relevant principles of law are what you thought them to be; whether or not counsel's argument is as well founded as it appeared to be at the hearing (or the converse); and so on.
>
> . . .
>
> The very act of right of having to summarise in one's own words what a witness has said, or what is stated in an affidavit or what the document says or provides, is in itself a very good discipline and is conducive to a better and more accurate understanding of the case.'

Subrule (1): 'The defendant does not appear.' If a defendant who appeared at the commencement of the trial, failed to appear at the resumed trial hearing, default judgment was granted in circumstances where the defendant made an unequivocal

admission of liability to pay an amount and had never sought leave to withdraw such admission. [49]

A defendant who appears when the hearing of a trial action starts, but thereafter withdraws and absents himself from the remainder of the proceedings, is regarded as being in default. [50]

'The plaintiff may prove his claim.' As a general rule oral evidence is not required where the claim is based on a liquid document or is for a liquidated amount in money, a debt or a liquidated demand. [51] Evidence must be led to prove an unliquidated claim. Thus, for example, in an action for damages sustained in a motor car collision, the plaintiff must lead evidence. Under certain circumstances evidence of damages may be given on affidavit. See further, in this regard, the notes to rule 31(2)*(a)* s v 'After hearing evidence' above.

'Provided that where the claim is for a debt or liquidated demand.' See the notes to this subrule s v 'The plaintiff may prove his claim' above.

Subrule (2): 'In the interests of justice.' In matrimonial causes which affect status, the court will normally permit a defendant to appear though barred.

Subrule (3): 'The plaintiff does not appear.' This is known as the *comparuit* default of the plaintiff.

'An order granting absolution from the instance.' In terms of this subrule the defendant is as of right entitled to an order granting absolution from the instance with costs. If, however, the defendant wishes to close the door finally upon the plaintiff's case, the defendant may lead evidence with a view to satisfying the court that final judgment should be granted in his favour. See further the notes to this subrule s v 'Final judgment should be granted' below.

'Final judgment should be granted.' It has long been recognized that, where in an action a party chooses not to appear at the trial or, having appeared, withdraws from the trial, the other party remaining need not content himself with an order of absolution from the instance but may elect to lead evidence in order to satisfy the court that he is entitled to judgment on the issues raised by those claims. [52] The right to grant final judgment should, however, be exercised with caution and only in special circumstances. [53] In some cases the courts have granted final judgment on the ground that the plaintiff was in deliberate default not due to circumstances beyond his control. [54]

If there is no appearance on behalf of a plaintiff close corporation due to its deregistration prior to the date of set down of the trial, a defendant wishing to bring matters to finality must give proper notice in terms of rule 15 to the Minister of Finance and, if appropriate, any other Minister with sufficient interest as the effect of the deregistration of a close corporation is that all its property, including any claims it might have against third parties, thereupon vest in the State as *bona vacantia*. If, in such a case, the State fails to take action to prosecute the action when the matter is called for trial, an order for absolution from the instance may properly be sought in terms of this subrule. [55]

Subrule (5): 'The burden of proof.' The term 'burden of proof' is used in different senses. In its primary meaning the phrase denotes 'the duty which is cast upon the particular litigant, in order to be successful, of finally satisfying the court that he is entitled to succeed on his claim or defence as the case may be'. [56] The incidence of the burden of proof in this sense is on each issue a matter of substantive law. [57]

In a secondary sense the phrase denotes the duty to adduce evidence in order to combat a prima facie case made by his opponent, sometimes called the 'evidential burden' ('weerleggingslas'). [58] The duty to adduce evidence is merely a procedural device which 'ensures that the parties give their evidence in the most logical order and allows the trial to be shortened by dispensing with the evidence of one party if his opponent has adduced no evidence which could support a finding in his favour'. [59] This secondary meaning is clearly recognized in subrules (11), (12) and (13) by the use of the phrase 'onus of adducing evidence'. [60] The duty to adduce evidence usually coincides with the onus of proof in the primary sense, [61] but there are cases in which from the beginning the duty to adduce evidence is upon the one party but

the onus is on the other. [62] The incidence of the burden of proof in this, secondary, sense is determined by the pleadings. [63]

In this subrule and in subrule (9) the phrase 'burden of proof' is probably used in its primary sense. This does not, however, mean that the two subrules impose a rigid order in which first the plaintiff and then the defendant are entitled or obliged to present their respective cases to the court. The order in which the parties present their cases and adduce their evidence may be altered by a ruling or direction under subrule (11), (12) or (13).

'Outline the facts intended to be proved.' The opening of a case by a party or his legal representative should not be accorded decisive effect in regard to the proof of facts necessary to a party's case or defence. [64]

Subrule (6): General. In Roman-Dutch practice the *conclusie tot absolusie van de instantie* was a species of exception or special plea, one of the so-called 'ongenoemde exceptiën', which was used when the defendant maintained that the plaintiff had brought the wrong action against the defendant. [65] By pleading the *conclusie* the defendant did not say that the plaintiff had no action against him, for that would have been a matter of plea or *contrarie conclusie*; by pleading in this fashion the defendant said that the plaintiff did not have this particular action against him. [66]

In South African practice the decree of absolution from the instance fulfils a different function. It is an order, granted either at the end of the plaintiff's case or at the end of the whole case, dismissing the plaintiff's claim. [67] Its effect is to leave the parties in the same position as if the case had never been brought, for a judgment of absolution from the instance does not amount to *res judicata* and the plaintiff is entitled to proceed afresh. [68]

Subrule (6) only applies to absolution from the instance at the close of the case for the plaintiff. Absolution from the instance could, however, also be granted at the end of the whole case or where the burden of proof was on the defendant.

The question as to when absolution from the instance should be decreed by a court is considered below under the following three headings:

(i) Absolution at the close of the plaintiff's case as contemplated in this subrule.

(ii) Absolution at the end of the whole case.

(iii) Absolution where the burden of proof is on the defendant.

(i) Absolution at the close of the plaintiff's case. When absolution from the instance is sought in terms of subrule (6) at the close of the plaintiff's case the test to be applied is not whether the evidence established what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might

(not should, or ought to) find for the plaintiff. [69] Sufficient evidence to avert a ruling of absolution from the instance at the end of the plaintiff's case is sometimes referred to as prima facie evidence, prima facie proof, or a prima facie case (in the sense that there is evidence relating to all the elements of the claim). [70] The use of the term 'prima facie

evidence' in this sense is not to be confused with another, more common, meaning of the term, viz prima facie evidence which is not only sufficient to avert a ruling of absolution from the instance but which is also sufficient to cast a duty to adduce evidence, sometimes called the 'evidential burden' ('weerleggingslas'), upon the defendant. [71] Prima facie evidence in this latter sense is evidence which 'requires an answer' from the other party, and 'in the absence of an answer from the other side, it becomes conclusive proof and he (the party on whom lies the burden of proof) completely discharges the onus of proof'. [72]

The test for absolution from the instance at the close of the plaintiff's case has from time to time been formulated in different terms —

(a) In *Gascoyne v Paul and Hunter* [73] it was held that the court must consider whether there is evidence upon which a reasonable man might find for the plaintiff.

(b) In *Myburgh v Kelly* [74] the court stated:

> '[m]ust bring to bear upon the evidence not his own but the judgment of the reasonable man. Renouncing for the time being any tendency to exercise a judgment of his own, he is bound to speculate on the conclusion at which the reasonable man of his conception not should, but might, or could, arrive. This is the process of reasoning which, however difficult its exercise, the law enjoins upon the judicial officer.'

(c) In *Supreme Service Station (1969) (Pvt) Ltd v Fox and Goodridge (Pvt) Ltd* [75] it was suggested that in considering what a reasonable court 'might do' allowance must be made for its making a reasonable mistake and giving an incorrect judgment. This suggestion was firmly rejected by Hoexter J in *Gandy v Makhanya*. [76] In case of doubt as to what a reasonable court 'might' do, the court should lean on the side of allowing the case to proceed, [77] for the plaintiff should not be lightly deprived of his remedy without the evidence of the defendant being heard. A defendant who might be afraid to go into the witness-box should not be permitted to shelter behind the procedure of absolution from the instance. [78]

(d) In *Gordon Lloyd Page & Associates v Rivera* [79] the Supreme Court of Appeal held that the court ought not to be concerned with what someone else might think, but that it should rather be concerned with its own judgment and not that of a 'reasonable' person or court.

In deciding whether absolution should be granted at the close of the plaintiff's case it must be assumed that, in the absence of very special considerations, such as the inherent unacceptability of the evidence adduced, the evidence is true. [80] Questions of credibility should not normally be investigated at this stage of the proceedings, except 'where the witnesses have palpably broken down, and where it is clear that what they have stated is not true'. [81]

In the case of an inference the plaintiff at the close of his case need not necessarily persuade the court hearing the application that there exists an actual preponderance of probability in his favour. [82] The test at this stage of the trial is as follows: the court will refuse the application for absolution unless it is satisfied that no reasonable court could draw the inference for which the plaintiff contends. [83] The court is not required, in the case of an application for absolution at the end of the plaintiff's case, to weigh up different possible inferences, but merely to determine whether one of the reasonable inferences is in favour of the plaintiff. [84]

If the plaintiff's evidence consists of the production of a document on which he sues and the sole question is the proper interpretation of the document the distinction between the interpretation that a reasonable court [85] might give to the document and the interpretation that he ought to give to it tends to disappear. Nevertheless, even in such cases the trial court should normally refuse absolution unless the proper interpretation appears to be beyond question. [86]

If monetary damage has been suffered and the plaintiff has failed to produce all available evidence, the court is justified in granting absolution from the instance. [87] However, if the best available evidence has been produced it remains the duty of the court to assess damages in the best way possible if such evidence is not entirely of a conclusive nature. [88] Difficulty in determining what the sum should be should not tempt the court into granting absolution from the instance unless such difficulty is insurmountable. [89]

If certain facts in issue are within the knowledge of the defendant the court should take this into account and more readily refuse to grant absolution from the instance. [90]

Absolution from the instance cannot be decreed at the end of the plaintiff's case where the plaintiff has first adduced evidence because the burden of proving some of the issues was on him, but the burden of proving other issues was on the defendant. [91] It has, however, been held that if the plaintiff's case is based solely on a certificate of balance which constitutes prima facie proof of the indebtedness in question, but the reliability of which has always been in question and was challenged on various grounds, including a counterclaim, the court is justified in granting absolution from the instance once the plaintiff has handed up the certificate and closed its case in terms of rule 39(13). [92]

If there is a claim in reconvention arising from the same facts, [93] and if the evidence is in the nature of things bound to be inextricably interwoven, a trial court should be very chary of granting absolution from the instance at the close of the plaintiff's case, because thereafter the court has in any event to hear the defendant's (plaintiff in reconvention) evidence and to weigh the evidence given on the latter's behalf against that given for the plaintiff in regard to which it has already given a decision. [94]

Absolution from the instance cannot be applied in isolation to separated issues of merits and *quantum*. In other words, if merits and *quantum* have been separated, and the court finds in favour of the plaintiff on the merits, the avenue of bringing an application for absolution by the defendant is closed and absolution cannot be considered in the context of determining the *quantum*. [95]

The approach in a case with multiple defendants is necessarily somewhat different. In the case where there is only one defendant it can fairly be inferred that at the stage when the plaintiff has closed his case the court has heard all the evidence which is available against the defendant. Any further evidence that would be forthcoming if the case continued would be likely to operate only to the detriment of the plaintiff. [96] That being so, it is considered unnecessary in the interests of justice to allow the case to continue any longer if, after the plaintiff has closed his case, there is no prima facie case against the defendant. If, however, the plaintiff has cited two defendants each of the defendants might have or have access to

evidence adverse to the other defendant. The plaintiff, having cited both defendants, cannot expect co-operation from those whom he has made his adversaries. Thus, he may be deprived of access or free access to evidence which is material against one or other of the defendants because that evidence is possessed by or under the control of the other defendant. [97] The court should exercise its discretion whether or not to grant absolution at the end of the plaintiff's case upon a consideration of all the facts. Thus, for example, if it has already been disclosed (e g in summary judgment proceedings or in the pleadings) that the one defendant will endeavour to establish liability on the part of the other defendants absolution should not be granted even if at the end of the plaintiff's case there is no evidence against such other defendants. The grant of absolution can in such circumstances lead to unfairness and inequities, and to further litigation *de novo* against the defendants who have been absolved. [98] Similar considerations apply when the second defendant applies for absolution after the plaintiff and the first defendant have led their evidence and closed their cases. [99]

In *Mazibuko v Santam Insurance Co Ltd* [100] the Appellate Division held that in a case where the defendants have denied liability and have also reciprocally pointed to one another as being the party responsible for the plaintiff's damages, the court should not grant an application for absolution at the suit of either defendant at the end of the plaintiff's case if there is evidence upon which a court, applying its mind reasonably, could hold that it has been established that either the one or the other defendant or both of them are legally liable (it being nevertheless uncertain as to which of the alternatives is the correct one). The court should not consider in turn whether a prima facie case has been made out against the one defendant. In such a case, which is in effect a tripartite suit between three adversaries, it is in the interests of justice that the case should be decided on the evidence that all the parties may choose to place before the court, provided that the plaintiff, when presenting his case, has laid the necessary foundation of showing, prima facie, that one or other or both of the defendants are legally liable. If, however, the evidence for the plaintiff did not support a claim against the second defendant, and no case has been made out against him, absolution from the instance against that defendant is proper. [101]

(ii) Absolution at the end of the whole case. If, in a case where the burden of proof lies on the plaintiff, the court, after hearing all the evidence, cannot decide to its satisfaction on which side the truth lies, the proper judgment is absolution from the instance. [102] Thus, if the versions of the plaintiff and of the defendant are mutually destructive in the sense that acceptance of the one version necessarily involves the total rejection of the other version, and the court is unable to accept the version of the plaintiff as true and the version of the defendant as false, the proper judgment is absolution. [103]

If the court has, on the evidence, found against the plaintiff, it is entitled to grant judgment for the defendant rather than decree absolution from the instance. [104]

When the court comes to consider, after having heard the evidence of the plaintiff and the evidence, if any, adduced by the defendant, whether or not to grant absolution from the instance, the question to be asked is whether a reasonable man should (or ought) to give judgment in favour of the plaintiff. [105] Where absolution from the instance is granted after close of a defendant's case, the plaintiff may proceed afresh on its claim without first obtaining the court's leave to do so. If, however, the plaintiff seeks to proceed again on the same papers, it is required to obtain the court's permission to do so. [106]

(iii) Absolution where the burden of proof is on the defendant. If the defendant adduces his evidence first, either because he bears the burden of proof or because, by reason of an admission or presumption, the duty to adduce evidence is on him, there can be no question of absolution from the instance being granted. If the defendant fails to discharge the burden of proof or the duty to adduce evidence, the proper order would be judgment for the plaintiff. [107]

If the onus is on the defendant the court cannot, after he has led his evidence, give judgment for the plaintiff unless and until the plaintiff closes his case. [108]

Costs. The court has a discretion in awarding costs in granting or refusing absolution from the instance, having regard to all the facts and circumstances. [109] Where absolution from the instance is refused at the end of the plaintiff's case, the usual order seems to be that costs are costs in the action. [110]

Subrule (8): 'Each witness shall . . . be examined, cross-examined or re-examined.' It is outside the scope of this work to deal with the examination, cross-examination and re-examination of witnesses. [111]

Further evidence. At common law the High Court has a discretion, which must be exercised judicially, upon a consideration of all the relevant factors, and in essence as a matter of fairness to both parties, to grant leave to a party to adduce further evidence despite this subrule not making provision for such a situation.

Over the years the courts have indicated certain guiding considerations or factors, but they must not be regarded as inflexible requirements, or as being individually decisive. Some are more cogent than others; but they should all be weighed in the scales. [112]

The considerations which usually fall to be weighed in an application to adduce further evidence include the following: [113]

(i) The reason why the evidence was not led timeously. The party who makes the application for leave to adduce further evidence must show that the fact that he has not brought it forward was not due to any remissness on his part; he must satisfy the court that he could not have obtained this evidence even had he exercised reasonable diligence. [114] Thus, for example, a party will be allowed to adduce further evidence, after the court had reserved judgment, if an eyewitness is discovered whose evidence was new, could not have been adduced before (since he was found quite accidentally), and was weighty and likely to elucidate the truth. [115]

Apart from the above cases of genuine inability to find the evidence earlier despite proper diligence, the reason for allowing production of evidence at a late stage may be justifiable misapprehension or the fact that the applicant was taken by surprise by his opponent's evidence. Thus, where a defendant's evidence discloses a defence of which the plaintiff had no notice and as to which his (the plaintiff's) witnesses were not cross-examined, further evidence should be allowed. [116]

The court will allow a party to adduce evidence which has been omitted through mere inadvertence, [117] or because it was thought unnecessary on account of a bona fide mistake of law. [118] However, a party will not be allowed to adduce further evidence if, having the evidence at his disposal, he deliberately elects not to put it before the court because he is of the opinion that it is unnecessary. [119]

(ii) The degree of materiality of the evidence. The test of materiality should be held to be satisfied where the evidence tendered, if believed, is material and likely to be weighty. [120] There is no obligation on the applicant to show that the

evidence is likely to be believed. [121]

(iii) The balance of prejudice. This means the prejudice to the applicant if the application is refused, and the prejudice to the respondent if it is granted. It may include such factors as the amount or importance of the issue at stake; the fact that the respondent's witnesses may already have dispersed; the question whether the refusal might result in a judgment of absolution and expose the parties to the expense of proceedings *de novo*. [122]

(iv) The general need for finality in judicial proceedings. This factor is usually cited against the party seeking leave to adduce further evidence. However, depending on the circumstances, finality might sooner be achieved by allowing such evidence than by granting absolution and opening the way to litigation *de novo*. [123]

(v) The stage which the particular litigation has reached. In general, the application for leave to reopen should be made at the earliest opportunity. [124] In this regard Holmes JA stated: [125]

> 'Where judgment has been reserved after all the evidence has been led on both sides and, just before judgment is delivered, the plaintiff asks for leave to lead further evidence, it may well be that he will have a harder row to hoe, because of factors such as the increased possibility of prejudice to the defendant, the greater need for finality, and the undesirability of throwing the whole case into the melting pot again, and perhaps also the convenience of the court, which is usually under some pressure in its roster of cases. On the other hand, where a plaintiff closes his case and, before his opponents have taken any steps, asks for leave to add some further evidence, the case is then still *in medias res* as it were.'

In addition to the aforegoing, Holmes JA mentions [126] the following to be considered as factors to be weighed in an application to lead further evidence: the possibility that the further evidence may have been shaped 'to relieve the pinch of the shoe'; [127] the 'healing balm' of an appropriate order as to costs; the appropriateness, or otherwise, in the circumstances, of - visiting the remissness of an attorney upon the head of a client.

Refusal by a court of first instance to allow the leading of supplementary evidence which is admissible in terms of the above considerations is ground for appeal. [128]

Recalling of witnesses. At common law a witness already called may always, subject to the court's discretion, be recalled, either by the court *mero motu*, or by the court on the application of a party, for further examination. [129] The calling by the court of a witness who has not been called by either party is another matter; [130] in general the court has no right to call such a witness, save with the consent of the parties. [131] Rule 39 nowhere affects or alters this principle.

The recall of a witness at the instance of a party is a matter within the discretion of the court. [132] In the exercise of its discretion the court will consider factors such as the possibility of prejudice to the opposing party; the risk of fabrication of evidence to remedy shortcomings in the applicant's case which had become apparent; and the need for expeditiousness in reaching finality in litigation. [133]

The recall of a witness by the court of its own motion is also a matter of discretion which, like any other discretion, must be exercised judicially, upon a consideration of all the relevant factors. In the exercise of its discretion the court will consider the adversarial nature of the South African civil process, which accords the judge a position of relative detachment. [134] The court should recall a witness of its own motion only in those cases where the further examination of a witness is necessary to clear up points that have been overlooked or left obscure.

Examination of witnesses by the court. The court should exercise its power to examine witnesses with circumspection, always keeping in mind the position of relative detachment which the judge occupies in our system of civil procedure. [135] In general the court should

confine its examination to clarification of points that have been overlooked or left obscure: the court should not take over the examination and cross-examination of witnesses from the parties' legal representatives. [136]

Subrule (10): 'May address the court.' Generally, arguments for the litigants in a trial should be delivered orally in open court and not in writing to the judge in his chambers. A trial court should, therefore, not direct that the arguments be delivered in writing except in special circumstances and then only after discussion with counsel. [137] Subrule (23) provides that the judge may, at the conclusion of the evidence in trial actions, confer with the advocates in the judge's chambers as to the form and duration of the addresses to be submitted in court.

Failure to accord each party a fair opportunity of addressing the court constitutes a serious irregularity. [138] However, if the failure on the part of a court to receive argument on behalf of a party was due to the fault or supineness of that party or his legal representative, the omission might not constitute an irregularity. [139]

It is necessary for any court to inform the parties of any point of law, fact or other aspect of the case at hand which it wishes to raise in judgment that has not been dealt with previously. The way to do this is to inform the parties and/or their legal advisers of the court's desire to deal with it and call for their responses in regard thereto. The parties may wish not to respond to such invitation, in which case the court may justifiably proceed in handing down its judgment raising the new aspect. On the other hand, if the parties want to respond, they can be invited by the court to raise the issue in oral argument in open court at a time suitable to all concerned. At such an occasion a party may wish to apply for an amendment to the pleadings or apply for leave to reopen his case and lead further evidence. The court will then have to decide on the appropriate course as justice may demand. Alternatively, the parties may wish to respond by submission of further written argument. In the latter instance it is important to allow the plaintiff or applicant the same rights normally afforded in court, i e by replying to any argument advanced by the other side.

'May reply on any matter.' A refusal of the right of reply is an irregularity, [140] but if the party who has the right to reply does not make use of it because he thinks that the court has already made up its mind for or against him, no irregularity is committed. [141] The right to reply extends to arguing facts as well as law. [142]

Subrule (11): 'A ruling by the court upon the onus of adducing evidence.' It has been held [143] that this subrule allows the court to rule at the commencement of the trial on both the duty to begin as well as the initial onus of proof on the various issues which might arise from the pleadings as they stand at that time. See further the notes to subrule (5) s v 'The burden of proof' above.

Subrule (12): 'One or more third parties.' This subrule regulates the order in which the various parties are to lead their evidence where there are one or more third parties involved in the proceedings, or if there are defendants to a claim in reconvention who are not plaintiffs in the action. The provisions of subrule (11) are *mutatis mutandis* applicable with regard to any dispute as to the onus of adducing evidence.

Where a multiple of parties is involved in proceedings it often happens that two or more parties make common cause against one or more of the other parties. In proceedings where a third party has been joined under rule 13, the third party and the defendant often join forces in resisting the claim of the plaintiff. In such cases questions arise as to *(a)* the order in which the witnesses are to be examined; and *(b)* to whom the right of cross-examination should be accorded. It was held in *Novick v Comair Holdings Ltd* [144] that the court has a discretion which should be exercised in such a manner as seems most likely to lead to a sound assessment of a witness and his testimony and a just decision upon the matters in issue. This will best be achieved by granting the right to ask leading questions only to counsel representing interests truly adverse to those of the litigants who have called the witness.

Subrule (13): 'The onus of adducing evidence on one or more of the issues is on the plaintiff.' A plaintiff who bears the onus of adducing evidence on some of the issues is entitled, after leading his evidence on the issues concerned, to call upon the defendant to proceed and to lead evidence in regard to the issues on which the onus is upon the defendant when the defendant has closed his case. [145] It has, however, been held that if the plaintiff's case is based solely on a certificate of balance which constitutes prima facie proof of the indebtedness in question, but the reliability of which has always been in question and was challenged on various grounds, including a counterclaim, the court is justified in granting absolution from the instance once the plaintiff has handed up the certificate and closed its case in terms of rule 39(13). [146]

Subrule (14): 'The plaintiff shall have the right to call rebutting evidence.' This subrule makes it clear that in the circumstances contemplated by it, the plaintiff has a right to call evidence in rebuttal of the evidence led by the defendant. [147]

Subrule (16): 'A record shall be made of.' It has been said, within the context of magistrates' courts practice, that it is essential that everything which is in any way relevant to the proceedings or to the merits of the case, should be fully, carefully and clearly recorded. This is so because the record is the only source from which it can be determined whether the proceedings were in accordance with justice. [148]

The record should be preserved in the form in which it was made during the course of the trial and it would be highly improper for anyone to tamper with the record. [149]

Subrule (16)*(a)*: 'Any judgment or ruling by the court.' See the notes to this rule s v 'General' above.

Subrule (16)*(b)*: 'Any evidence given in court.' Demonstrations given by witnesses during their evidence must be translated into words and incorporated into the record. [150]

Subrule (16)*(d)*: 'The proceedings of the court generally.' Exchanges between the bench and a party or his legal representative while witnesses are testifying constitute part of the general proceedings of a court which have to be recorded under this subrule and which have to be transcribed in terms of subrule (18). [151]

Arguments and addresses by legal representatives do not constitute part of the proceedings of the court generally and, consequently, should not be regarded as part of the recordable proceedings of a trial. [152]

'Including any inspection *in loco*.' The purpose of an inspection *in loco* is not only to enable the court to follow and apply the evidence, [153] but also to furnish the court with real evidence; in fact, whenever an inspection *in loco* is held, some real evidence must of necessity be led before the court. [154] A refusal to hold an inspection can therefore amount to a rejection of evidence. [155] It is within the discretion of the trial court to decide whether, [156] and at what stage of the trial an inspection should be held. [157] Inspections *in loco* should not, however, take place after all the evidence and argument have been heard, but while the case is still proceeding, so that the court may intimate to the parties the results of any observations made and they may have the opportunity of offering evidence or argument in the light of such intimations. [158]

The inspection should be held in the presence of both parties; it is irregular for an inspection to be held in the presence of only one party or his witnesses. [159] A judge is entitled to make an inspection alone, [160] or to rely upon earlier acquaintance with the property. [161] It is usually the best for the judge to record his observations and communicate them to the parties on the spot, so that if there is a dispute he can take another look and form an opinion. [162]

The record should disclose the nature of the observations made by the court. [163] This may be done either by means of a statement framed by the court and intimated to the parties, who should be given an opportunity of dealing with it or challenging it, and if necessary of leading evidence to correct it, or by means of leading evidence from a witness who is either called or recalled to make the necessary statement. In the latter case, the parties should be allowed to examine the witness in the usual way. [164] The court is not entitled to rely on statements or explanations made by witnesses or what they pointed out at an inspection *in loco*, since they are not made under oath or subject to cross-examination. [165]

If the observations at an inspection *in loco* leave an impression on the court adverse to a party or a particular witness, the party or witness should be given an opportunity of either challenging the inference, or of making such explanation as he is capable of doing. [166]

Observations and opinions which have not been communicated to the parties and recorded must be disregarded. [167]

'Any matter demonstrated in court.' Demonstrations given by witnesses during their evidence must be translated into words and incorporated into the record. [168]

Subrule (20): 'If it appears convenient . . . make any order with regard to the conduct of the trial.' The paramount test laid down by this subrule is convenience. It is submitted that the overriding consideration is that of convenience of the parties, of witnesses and, last but not least, of the court. [169]

The subrule contemplates an order with regard to the conduct of the trial which will 'vary any procedure laid down by this rule'. Subrules (13), (14) and (15) lay down the procedure for the calling of evidence and the cross-examination of witnesses. In terms of these subrules, read with rule 38(2), it is envisaged that witnesses give oral evidence at the seat of the trial court in the presence of the parties and their legal representatives as well as the presiding judge and the public. [170] The general rule is that all witnesses should be examined in the presence of the court, *viva voce*. [171] Under rule 38(9), which was introduced with effect from 1 February 2022, [172] a court may, however, on application on notice by any party and where it appears convenient or in the interests of justice, make an order for evidence to be taken through audiovisual link. Section 37C of the Act, which came into operation on 5 August 2022, [173] now also makes provision for evidence through audiovisual link. Section 37C reads as follows:

> **'37C Evidence through remote audiovisual link in proceedings other than criminal proceedings**
>
> (1) A Superior Court may, on application by any party to proceedings before that court or of its own accord, order that a witness, irrespective of whether the witness is in or outside the Republic, if the witness consents thereto, give evidence by

means of audiovisual link.

(2) A court may make an order contemplated in subsection (1) only if —

(a) it appears to the court that to do so would —

(i) *(aa)* prevent unreasonable delay;

(bb) save costs;

(cc) be convenient; or

(dd) prevent the likelihood that any person might be prejudiced or harmed if he or she testifies or is present at such proceedings; and

(ii) otherwise be in the interests of justice;

(b) facilities therefor are readily available or obtainable at the court; and

(c) the audiovisual facilities that are used by the witness or at the court enable —

(i) persons at the courtroom to see, hear and interact with the witness giving evidence; and

(ii) the witness who gives evidence to see, hear and interact with the persons at the courtroom.

(3) The court may make the giving of evidence in terms of subsection (1) subject to such conditions as it may deem necessary in the interests of justice.

(4) The court must provide reasons for —

(a) allowing or refusing an application by any of the parties; or

(b) its order and any objection raised by the parties against the order, as contemplated in subsection (1).

(5) For purposes of this Act, a witness who gives evidence by means of audiovisual link, is regarded as a witness who was subpoenaed to give evidence in the court in question.

(6) For purposes of this section 'audiovisual link' means facilities that enable both audio and visual communications between a witness and persons at a courtroom in real-time as they take place.'

The existence of s 37C and rule 38(9) side by side has the potential to cause conflict as their requirements are not the same. In the event of conflict the provisions of s 37C will prevail, rule 38(9) being subordinate legislation. [174] In addition to s 37C, s 37A, which also came into operation on 5 August 2022, provides for evidence through intermediaries. In *Uramin (Incorporated in British Colombia) t/a Areva Resources Southern Africa v Perie* [175] it was held to be convenient and

in the interests of justice to vary the general trial procedure and receive the evidence of two witnesses, with their consent, from abroad via video link under circumstances where their evidence was vital to the defendant's defence but both of them were no longer in its employ and not willing to travel from abroad to the seat of the trial court in Johannesburg in order to testify. In granting an application to use video link to procure the evidence of the witnesses (based in Paris and Dubai respectively) made by the defendant at the commencement of the trial, Satchwell J stated, amongst other things: [176]

'[1] This judgment deals with one aspect of the continually developing response of our courts to the marvels of modern technology. Specifically, the use of video link to procure the evidence of witnesses based in Paris and Dubai who are not available or willing to attend at the court in Johannesburg.

. . .

[3] Obviously, each application for the use of video linkage to procure the evidence of witnesses who are not available to a trial court must rely upon its own particular facts and circumstances. I have heard a number of such applications and heard evidence in this manner in a number of trials. My experience is that the approach of both South African courts and courts in other jurisdictions must continuously try to be relevant to and keep pace with rapidly changing demands placed upon judicial practice. On the one hand, there are the claims of globalisation of economies, worldwide dispersal of potential witnesses, dissemination of communication throughout many jurisdictions and in a multiplicity of formats, deployment of employees and the transitory nature of much employment and so on. On the other hand, there are the responses availed by expanding and more easily available technologies of which video conferencing is only one.

. . .

[5] Similarly, I have here included comment on the video conferencing procedures as they eventuated because I have been approached by other judges for information on this procedure and this may be of use to practitioners.

. . .

[13] I have no doubt that, without the evidence of either of these witnesses, the defendant would be severely handicapped in the conduct of its defence and, if necessary, its counterclaim.

[14] There is no doubt that the evidence of both Dragone and Barbaglia were vital to the defendant in response to plaintiff's claims. At the trial it was apparent that, if Dragone and Barbaglia did not give evidence, the defendant would have to rely only upon interpretation of the two written documents and would be precluded from rebutting the evidence of the plaintiff which would then go unchallenged.

[15] If the defendant were precluded from leading the evidence of these essential witnesses, I would have grave doubts about the fairness of the trial and of any judgment which I would hand down.

. . .

[21] Neither potential witness can be subpoenaed to testify before this court in Johannesburg.

. . .

[24] We rightly expect and prefer that viva voce evidence in both civil and criminal proceedings be given in a courtroom at the seat of the court in the presence of the parties and their representatives and the judicial officer and the public. [177] The reasoning is obvious. The court buildings and personnel and the procedures therein are dedicated to the process of litigation. Anyone may attend. The legitimacy of the process derives, in part, from this dedication.

[25] Yet within these stone walls staffed by personnel dressed as though they were clerics in the reign of Henry the Eighth, we have no difficulty in recognising the need for accommodating witnesses to meet the interests of justice. We utilise many different ways of procuring evidence because both the Constitution and the High Court Rules permit development of appropriate procedures. [178] We do so because we recognise that court procedures and the Rules which regulate such practices are devised to administer justice and not hamper it. [179] Evidence is received on affidavit; [180] closed-circuit television regularly allows for evidence to be given in one room and transmitted to a courtroom; [181] inspections in loco take place [182] and judges or nominated persons take evidence on commission. [183] The test to be applied by the court in exercising its discretion is whether or not "it is convenient or necessary for the purposes of justice".

[26] These exceptions to the general rule are not limited to situations where the witness is absolutely unavailable to attend at court. We hear from child witnesses who might be distressed if called to be physically present in court; we receive affidavits from various persons because of the nature of their evidence and because this will reduce the time expended thereon; we go on inspections in loco because only then will we comprehend what a witness has said or will say; we have commissions because the court can travel while the witness cannot or will not. We have regard to both "convenience" and "the interests of justice".

[27] In summary, courts cannot be ignorant of the needs of the societies and economies within which they operate. Legal procedures must comport to the exigencies of globalisation and the availability of witnesses as I have discussed above. Courts must adapt to the requirements of the modernities within which we operate and upon which we adjudicate.

[28] To the extent that I have previously expressed the view [184] that it would be "an indulgence" to grant an application to hear evidence through video conferencing, I would restate my view to be that I still consider that the norm should be to hear witnesses in the courtroom but that relaxation of this preference should neither be considered extraordinary nor be discouraged. I can envisage, though it was not an issue in the present case,

situations where the costs of bringing a witness to the courtroom would be prohibitive and that reasons of economy alone might well dictate that evidence be received outside a courtroom which does not itself have video-conferencing facilities.

[29] We do not currently limit the use of various technologies only to the dire and desperate situations where a witness cannot be physically present. We must accept that witnesses are here today and gone tomorrow and that their employers, colleagues, clients and compatriots see nothing unusual in this. Courts must accommodate this mobility or find ourselves increasingly out of sync and eventually irrelevant save for the most simple and parochial of disputes.

[30] I find that it is sufficient reason that Dragone and Barbaglia are living and working elsewhere, do not desire to travel to South Africa, and have no obligation to either party by which they can be enticed so to do to find that this court should consider receiving evidence by video link.

Technology to be employed

[31] It has been suggested that the form in which evidence is tendered is not finite. [185] After all evidence was originally only received viva voce in person and then accepted by way of affidavit and now is received through video conferencing. No doubt other means will be discovered in due course.

[32] At the time that the Rules of Court were first formulated, witnesses from beyond the jurisdiction of the then Transvaal courts travelled by train from the coast and then by motorcar and then by aeroplane. They may even have arrived at the coast after week-long voyages by steamship from another continent. Urgent messages arrived at this court by way of telegrams whose contents and authors were difficult to authenticate.

[33] Neither the Uniform Rules of Court nor the Civil Proceedings Evidence Act expressly stated that more modern technologies than pen and paper or living, breathing persons are permitted in the High Court. The legislation has not needed so to do. The Constitution and the Rules enjoin us to make the necessary developments on a case-by-case and era-by-era basis.

[34] This court does not have wi-fi throughout as many other courts in South Africa and other jurisdictions; we do not yet have electronic lodgment of pleadings and documents in the office of the registrar nor do we have electronic archives; we do not have closed-circuit television in every courtroom; we do not have any video conferencing facilities in any conference room for holding case management meetings or hearing evidence. We intend to have these facilities. It is budgetary constraints not opposition to technological change which is holding us back.

[35] It is now almost trite that video conferencing "is an efficient and an effective way of providing oral evidence both in chief and in cross examination" and that this is "simply another tool for securing effective access to justice" (see para 10 of the speech of Lord Carswell in *Polanski v Conde Nast Publications Ltd* [2005] UKHL 10). This process has been utilised in numerous South African courts. [186]

[36] Where video conferencing has taken place witnesses have been viewed in person, have been heard without intermediaries, and have been viewed at the same time and in the same manner by all litigants and legal representatives and the judicial officer. The

only barrier to observation has been the exigencies of the electronic medium itself where one or both of the audio or the video may be problematic to make out. In such case all parties are equally entitled to require reconnection or repair of the technology or repetition of the evidence. The witnesses can be supervised in a number of ways. They can be required to present themselves to an agreed venue, may be secluded from other persons, may be monitored by an officer of the court of the jurisdiction in which they are present, and may not view documentation without notification of the monitoring court officer.

[37] In short, I remain of the view (as previously expressed in the *Kidd v Van Heeren* judgment) that:

> "Our rules of court did not initially refer to anything other than pen and paper, they advanced to encompass the concept of the typewriter then the computer thereafter the telefax and now email. Why video conferencing or other technology should be excluded is beyond me."

Procedures followed in this trial

[38] The court reconvened in the offices of the defendant's attorneys. Proceedings were held in a conference chamber where myself, my clerk, counsel and attorneys for both plaintiff and defendant were present as well as several technology boffins.

[39] A large screen was placed against the wall at the end of the conference table. All of us in the room could see ourselves on the screen for much of the time. We could see the witness and the monitoring court officer in both Paris and Dubai. The audio component could be heard by everyone in the room.

[40] There were problems with the technology. Several times we lost the audio or the visuals. One of the witnesses and his monitor changed rooms to improve the technological message.

[41] Before any evidence was heard I asked the person accompanying the potential witness to identify himself or herself and surroundings. In Paris, Ms Marianne Kecsmar, an independent lawyer who is a member of both the Paris and the New York Bars, was present with Dragone in one of the conference rooms of solicitors Linklaters. Sometimes an IT assistant was present. In Dubai, Mr Hamid Tayseer, a Jordanian legal consultant in Dubai, was present in the offices of an independent company in Dubai Internet City. Legal representatives were offered the opportunity to question both of these supervisors or monitors as to their status, independence and understanding of their duties.

[42] I asked both Kecsmar and Tayseer as to the procedures for giving evidence under oath in their jurisdictions. Both indicated an absence of any particular format. Accordingly, I administered the oath to Dragone and Barbaglia in accordance with South African procedure.

[43] Both Dragone and Barbaglia then were led through their evidence-in-chief and were cross-examined.

[44] At the conclusion of their evidence I placed on record observations made by myself. Firstly, there was considerable audio interference prior to Dragone taking the oath. This was resolved and when he did give evidence there were no time delays or lapses in the video/audio. Both the verbal and visual evidence was clear. Secondly, the verbal evidence of Barbaglia was less clear but where there was lack of clarity he was asked to repeat his evidence. There were occasions where the whole of his face did not appear on the screen — this was by reason of the way he was sitting and he was asked to move over. Thirdly, Dragone spoke quickly and with an accent and I sometimes missed out certain words but I did not ask him to repeat himself because his meaning was clear. The same

problem did not occur with Barbaglia. Plaintiff's counsel recorded his comments that the visual problems pertained to a "frozen screen" and sometimes he missed out on contemporaneous visuals with the audio.

[45] The evidence was recorded and has been transcribed. The discs were placed by me in the court file.'

See also rule 38(9) and the notes thereto above.

In appropriate circumstances the trial judge can stop cross-examination in order 'to prevent the proceedings from degenerating into a morass of irrelevant information' [187] or impose a time limit on cross-examination (albeit not in terms of this

subrule, but in the exercise of the High Court's inherent jurisdiction) and make a punitive costs order against a party who conducts the trial in an obstructive fashion. [188]

Subrule (22): 'By consent the parties to a trial shall be entitled.' This subrule provides a cheap and speedy procedure for transferring cases to the magistrate's court where both parties consent.

The rules do not provide for a procedure to transfer cases from the High Court to the magistrate's court in the absence of consent of all of the parties and to that extent the rules 'may properly be said to be deficient on the point'. [189] The case law is not harmonious as to whether the High Court has the power to order a case to be transferred to a magistrate's court without the consent of all the parties. In *Veto v Ibhayi City Council* [190] Jones J held that subrule (22) is not intended to be exhaustive and that the High Court can, in the exercise of its inherent power, order such a transfer on application of a party where the other party does not consent to the transfer. In *Thomson v Thomson* [191] the full court on appeal ordered a case instituted in the High Court to be referred to the maintenance court for hearing without the consent of the parties. In *PT v LT* [192] Binns-Ward J found it difficult to understand how the full court could competently order such a transfer absent consent thereto by the parties and stated, amongst other things: [193]

> 'The magistrates' courts are creatures of statute, and proceedings in those courts fall to be instituted and prosecuted in accordance with the relevant statutory provisions. The same considerations apply to proceedings in the maintenance courts. A High Court has no jurisdiction, outside the applicable statutory frameworks, in proceedings instituted before it to cause those proceedings to continue in another court. Subject to the applicable statutory provisions, it is for a claimant to determine in which court of competent jurisdiction to institute and prosecute proceedings.'

Under s 173 of the Constitution of the Republic of South Africa, 1996, the High Court has the inherent power to protect and regulate its 'own process . . . taking into account the interests of justice'. In *Nedbank Ltd v Thobejane and Similar Matters* [194] the full court held that it was an abuse of process to allow a matter which could be decided in the magistrate's court to be heard in a division of the High Court simply because it had concurrent jurisdiction. [195] The full court

declared that the High Court was entitled to transfer a matter to the magistrate's court *mero motu* if it were in the interests of justice to do so. [196] The judgment of the full court was subsequently overruled on appeal in *Standard Bank of South Africa Ltd v Mpongo*, [197] in which the Supreme Court of Appeal held that a court was obliged by law to hear any matter that fell within its jurisdiction and had no power to exercise a discretion to decline to hear such a matter on the ground that another court (for example, a magistrate's court) had concurrent jurisdiction. An appeal against the order of the Supreme Court of Appeal was dismissed by the Constitutional Court in *South African Human Rights Commission v Standard Bank of South Africa Ltd*. [198]

In *Levin v Corrigan* [199] the High Court, in ordering the case to be transferred to the magistrate's court, and after a consideration of the relevant principles relating to costs, held [200] that 'the sensible and appropriate order is to reserve all costs incurred to date for determination by the trial court at the appropriate time'.

'On written application to a judge through the registrar.' In terms of the definition of 'judge' in rule 1 this means a judge sitting otherwise than in open court, i e a judge in chambers.

The action taken by a judge under this subrule is a *quasi*-administrative act by a judicial officer, but not in his capacity as presiding officer in a court of law. [201] The judge is obliged to grant the application and has no discretion to override the wishes of the parties. [202]

'The cause transferred to the magistrate's court.' The procedure, where an action is transferred from the High Court to a magistrate's court, is regulated by magistrates' courts rule 50(9) and (10).

It does not follow that, because this subrule provides for the transfer of a case to the magistrate's court by consent of the parties on written application to a judge, a plaintiff cannot withdraw the action without consent before set down as provided in rule 41(1). The two rules are not in *pari materia*, nor does the one exclude the operation of the other. Nor does it follow that, because a case can be transferred by consent to the magistrate's court under this subrule, a plaintiff who has withdrawn an action under rule 41(1) cannot reinstate it by the issue of a fresh summons either in the High Court or in the magistrate's court. [203]

Subrule (24): 'Unduly prolonged.' In addition to this subrule, rule 67A(2)*(d)* provides that in considering all relevant factors when awarding costs, the court may have regard to unnecessary time spent in leading evidence, cross examining witnesses and argument.

'By excessive . . . cross-examination.' A court will normally be reluctant to exercise its power to make a special order as to costs. The discretion should, however, be exercised where cross-examination developed into a wide-ranging debate on a host of issues, some of which could only with considerable ingenuity be regarded as relevant and which were never referred to again in argument or judgment. [204]

In appropriate circumstances the trial judge can impose a time limit on cross-examination (albeit not in terms of this subrule, but in the exercise of the High Court's inherent jurisdiction) and make a punitive costs order against a losing party who conducted the trial in an obstructive fashion by, *inter alia*, excessive cross-examination. [205]

1 In *Trotman v Edwick* 1950 (1) SA 376 (C) at 382 it is said that 'before there can be a trial there must be a joinder of issue and this requires, *inter alia*, the filing of a plea which discloses a defence'.

2 *Saunders v Butt* 1906 EDC 17.

3 In *S v Perskorporasie van Suid-Afrika Bpk* 1979 (4) SA 476 (T) at 478 it was held that, within the context of criminal proceedings, the meaning of the word 'trial' is reasonably well established in regard to the commencing stage thereof: that is when the judicial investigation by the court is commenced.

4 *F & I Advisors (Edms) Bpk v Eerste Nasionale Bank van SA Bpk* 1999 (1) SA 515 (A) at 524E–F. In *Denby v Ekurhuleni Metropolitan Municipality* 2021 (1) SA 190 (GJ) the parties' legal representatives had, after the issue of merits was settled in an action for damages arising from bodily injuries and made an order of court, agreed upon a joint memorandum seeking the court to make an order for payment in terms of a draft order to which the parties' legal representatives had agreed, but the defendant itself not. It was held that by all accounts, the defendant had left it in the hands of its legal practitioners to deal with the matter. In the absence of something to the contrary, that would include making such admissions and confessions at a pre-trial conference as were appropriate, which would include the ultimate consequence of agreeing that an order be granted if that was the outcome of the pre-trial engagement. There was no suggestion that what the defendant's legal representatives had agreed to was anything but bona fide, and in the circumstances the court would grant an order on the terms agreed to by the parties' legal representatives (at paragraphs [26]–[28]).

5 *Groenewald NO v Swanepoel* 2002 (6) SA 724 (E) at 726F–I.

6 *Kauesa v Minister of Home Affairs* 1996 (4) SA 965 (Nms) at 973I–974A.

7 *Groenewald NO v Swanepoel* 2002 (6) SA 724 (E) at 727A–B.

8 *Philipp v Lindau* 1948 (1) SA 1033 (SWA) at 1036; *Protea Assurance Co Ltd v Gamlase* 1971 (1) SA 460 (E) at 465A. The order as to costs in the former case has not been followed.

9 *Charmfit of Hollywood Inc v Registrar of Companies* 1964 (2) SA 765 (T) at 770 and *Protea Assurance Co Ltd v Gamlase* 1971 (1) SA 460 (E) at 464E–H. In both these cases the court expressed disagreement with the contrary view expressed in *Philipp v Lindau* 1948 (1) SA 1033 (SWA).

10 *Samuel v Seedat* 1949 (3) SA 984 (N).

11 This was done in *Greenblo v Levitt* 1914 CPD 244; and see *Mhlanga v Mtenenyari* 1993 (4) SA 119 (ZS). In *St Paul Insurance Co SA Ltd v Eagle Ink System (Cape) (Pty) Ltd* 2010 (3) SA 647 (SCA) at 649B such a procedure was described as 'eminently sensible'.

12 2018 (6) SA 230 (KZD).

13 2021 (5) SA 276 (GJ).

14 Under GN 147 in *GG* 37390 of 28 February 2014. The Government Notice is reproduced in Volume 3, Part E1.

15 2016 (1) SA 78 (GJ).

16 At 85D–F.

17 *Maswanganyi v Road Accident Fund* 2019 (5) SA 407 (SCA) at 411H–412A.

18 *Pharmaceutical Society of South Africa v Tshabalala-Msimang; New Clicks South Africa (Pty) Ltd v Minister of Health* 2005 (3) SA 238 (SCA) at 261C; *Exdev (Pty) Ltd v Pekudei Investments (Pty) Ltd* 2011 (2) SA 282 (SCA) at 291F–292C; *Louis Pasteur Holdings (Pty) Ltd v Absa Bank Ltd* 2019 (3) SA 97 (SCA) at paragraphs [30] and [31]; and see *Nkabinde v Judicial Service Commission* 2016 (4) SA 1 (SCA) at 38F–H; *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs, KwaZulu-Natal Provincial Government* 2020 (4) SA 453 (SCA) at paragraphs [52]–[53]; *National Commissioner of Police v Gun Owners South Africa* 2020 (6) SA 69 (SCA) at paragraphs [11]–[12]; *NUMSA v Dunlop Mixing and Technical Services (Pty) Ltd* 2021 (4) SA 144 (SCA) at paragraphs [47]–[48]; *Tsogo Sun Caledon (Pty) Ltd v Western Cape Gambling and Racing Board* (unreported, SCA case no 89/2021 dated 4 June 2022) at paragraph [26]. See also, in general, the directive in respect of norms and standards for the exercise of judicial functions of all courts (i e Directive 1/2014) issued by the Chief Justice on 28 February 2014, which is reproduced in Volume 3, Part E1.

19 In *NUMSA v Dunlop Mixing and Technical Services (Pty) Ltd* 2021 (4) SA 144 (SCA) it took the judge four years to deliver his judgment. The judgment provided no explanation for the extraordinary delay. The Supreme Court of Appeal, in dealing with the delay, stated:
'[47] . . . How it can have taken the judge four years to decide this issue and to deliver his judgment defies understanding. If there was a reasonable explanation or excuse it ought to have been set out in the judgment. It is, after all, on the basis of the judgments delivered by judges that they are held accountable for the administration of justice under their auspices.
[48] The absence of any explanation by the judge concerned suggests that there is none. A four-year delay in the delivery of a judgment constitutes an unconscionable dereliction of duty on the part of the judge. It is a matter which ought to enjoy the consideration of the Judge President of the Division concerned.'
For a further example of the absence of an explanation for a delay in delivering judgment, see *Standard Bank of South Africa Ltd v Mpongo* 2021 (6) SA 403 (SCA) (a case where the appeal was heard on 20 August 2020 and judgment delivered on 25 June 2021).
For an example of an explanation for a delay in delivering judgment, see *Van Greunen v Govern* (unreported, FB case no 5395/2022 dated 6 April 2023) at paragraph [3] (a case where the application was heard on 29 January 2023 and judgment delivered on 6 April 2023).
See also *Tsogo Sun Caledon (Pty) Ltd v Western Cape Gambling and Racing Board* 2023 (2) SA 305 (SCA) at paragraph [26].

20 2010 (2) SA 92 (CC) at 96G; and see *Botes v Nedbank Ltd* 1983 (3) SA 27 (A) at 27H–28A; *Commissioner, South African Revenue Service v Sprigg Investment 117 CC t/a Global Investment* 2011 (4) SA 551 (SCA) at 561A–E; *Mahlangu v Minister of Labour* 2021 (2) SA 54 (CC) at paragraphs [13] and [16]–[17]; *Churchill v Premier of Mpumalanga* 2021 (4) SA 422 (SCA) at paragraph [6]; *GFE-MIR Alloys and Minerals SA (Pty) Ltd v Momoco International Limited* (unreported, GJ case no 55273-2021 dated 2 November 2023 — a decision of the full court) at paragraph 6. In *Mphahlele v First National Bank of South Africa Limited* 1999 (2) SA 667 (CC) Goldstone J held (at paragraph [18]) that if courts of first instance fail to furnish reasons for their decisions, this may amount to a violation of a constitutional duty. This concern was also echoed by Khampepe J in *Chisuse v Director-General, Department of Home Affairs* 2020 (6) SA 14 (CC) at paragraphs [18]–[20]; and see *Mahlangu v Minister of Labour* 2021 (2) SA 54 (CC) where it was stressed that the High Court ordinarily bears a constitutional duty to provide reasons for its decisions and that failure to do so is an abdication of this constitutional duty (at paragraph [17]). An appeal is, however, directed at the order of the court of first instance and not at the reasons for the order (see, for example, *Medox Ltd v Commissioner, South African Revenue Service* 2015 (6) SA 310 (SCA) at 313C–D and *Baliso v FirstRand Bank Ltd t/a Wesbank* 2017 (1) SA 292 (CC) at 296E where *South African Reserve Bank v Khumalo* 2010 (5) SA 449 (SCA) is referred to with approval).
In *King NO v De Jager* 2021 (4) SA 1 (CC) the Constitutional Court held that it was unfortunate that, despite all these missteps in the High Court's judgment, the Supreme Court of Appeal merely issued an order dismissing the appeal to it without reasons. This unusual approach in disposing of an appeal meant that the Supreme Court of Appeal endorsed the reasons of the High Court. Courts are under a duty to give reasons for their decisions and here the Supreme Court of Appeal had failed to discharge that obligation (at paragraph [105]).
On the writing of a judgment, see Corbett 'Writing a judgment' (1998) 115 *SALJ* 116; *Calligeris and Another NNO v Parker NO* (unreported, WCC case no 7937/2017 dated 22 March 2018).

21 When used in its general sense the word 'judgment' comprises both the reasons for judgment and the judgment or order; when used in its technical sense it is the equivalent of an 'order' (*Administrator, Cape v Ntshwaqela* 1990 (1) SA 705 (A) at 715). In general, an order is the operative part of the judgment (*Administrator, Cape v Ntshwaqela* 1990 (1) SA 705 (A) at 716B–D; *SA Eagle Versekeringsmaatskappy Bpk v Harford* 1992 (2) SA 786 (A) at 792C–D; *Carter v Haworth* 2009 (5) SA 446 (SCA) at 450D–E; *Department: Transport, Province of Kwazulu-Natal v Ramsaran* (unreported, SCA case no 1274/2017 dated 23 May 2019) at paragraph [7]; *Elan Boulevard (Pty) Ltd v Fnyn Investments (Pty) Ltd* 2019 (3) SA 441 (SCA) at 448A; *Da Cruz v Bernardo* 2022 (2) SA 185 (GJ) at paragraph [65]).

22 *Lurlev (Pty) Ltd v Unifreight General Services (Pty) Ltd* 1978 (1) SA 74 (D) at 79A–B.

23 *Eke v Parsons* 2016 (3) SA 37 (CC) at 65E–G. See also *Von Abo v President of the Republic of South Africa* 2009 (5) SA 345 (CC) at 364D; *Proxi Smart Services (Pty) Ltd v Law Society of South Africa* 2018 (5) SA 644 (GP) at 656A; *Monteiro v Diedricks* 2021 (3) SA 482 (SCA) at paragraphs [23]–[24]; *O'Brien NO v The Minister of Defence and Military Veterans* [2023] 1 All SA 341 (SCA) at paragraph [37], referring to *Minister of Water and Environmental Affairs v Kloof Conservancy* [2016] 1 All SA 676 (SCA) at paragraph [13]; *Featherbrooke Homeowners' Association NPC v Mogale City Local Municipality* (unreported, SCA case no 1106/2022 dated 22 March 2024) at paragraph [37].

24 *Eke v Parsons* 2016 (3) SA 37 (CC) at 58F. See also *Proxi Smart Services (Pty) Ltd v Law Society of South Africa* 2018 (5) SA 644 (GP) at 655E–F; *Monteiro v Diedricks* 2021 (3) SA 482 (SCA) at paragraphs [23]–[24].

25 *Eke v Parsons* 2016 (3) SA 37 (CC) at 61C–D. See also *Proxi Smart Services (Pty) Ltd v Law Society of South Africa* 2018 (5) SA 644 (GP) at 65G–656A; *Featherbrooke Homeowners' Association NPC v Mogale City Local Municipality* (unreported, SCA case no 1106/2022 dated 22 March 2024) at paragraph [37].

26 Unreported, SCA case no 163/2020 dated 24 March 2021.

27 At paragraph [7].

28 2020 (2) SA 124 (SCA).

29 At paragraph [8].

30 At paragraph [10].

31 At paragraph [11].

32 At paragraph [17].

33 *Maswanganyi v Road Accident Fund* 2019 (5) SA 407 (SCA) at 417B, where it was also held that s 173 of the Constitution of the Republic of South Africa, 1996, specifically empowers a superior court to prevent any such abuse.

34 *Joosab v Tayob* 1910 TS 486 at 488 and 490, quoted with approval in *E A Gani (Pty) Ltd v Francis* 1984 (1) SA 462 (T) at 466C; *Natal Trading and Milling Co Ltd v Inglis* 1925 TPD 724 at 743; *Trust Bank of Africa Ltd v Dhooma* 1970 (3) SA 304 (N) at 309C–D; *Blaikie-Johnstone v P Hollingsworth (Pty) Ltd* 1974 (3) SA 392 (D) at 394D–E.

35 *Trust Bank of Africa Ltd v Dhooma* 1970 (3) SA 304 (N) at 310A–C, approved in *Swadif (Pty) Ltd v Dyke NO* 1978 (1) SA 928 (A). See also *Mulder v Combined Motor Finance (Pty) Ltd* 1981 (1) SA 428 (W) at 431–2; *E A Gani (Pty) Ltd v Francis* 1984 (1) SA 462 (T) at 466–7; *Le Roux v Yskor Landgoed (Edms) Bpk* 1984 (4) SA 252 (T) at 256–7; *Zygos Corporation v Salen Rederierna AB* 1984 (4) SA 444 (C) at 453–5; *North American Bank Ltd (in liquidation) v Granit* 1998 (3) SA 557 (W) at 567E.

36 *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 at 176, 178, 186–7 and 192; *Estate Garlick v CIR* 1934 AD 499 at 502; *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 306F; *Raydean Investments (Pty) Ltd v Rand NO* 1979 (4) SA 706 (N) at 710H; *Seatle v Protea Assurance Co Ltd* 1984 (2) SA 537 (C) at 541E–F; *Van Zyl v Van der Merwe* 1986 (2) SA 152 (NC) at 156D–F; *Sundra Hardware v Mactro Plumbing* 1989 (1) SA 474 (T) at 477B; *Speaker, National Assembly v Land Access Movement of South Africa* 2019 (6) SA 568 (CC) at paragraph [24]; *Rikhotso v Premier, Limpopo Province* 2021 (4) BCLR 436 (CC) at paragraphs [19]–[20].
In *S v Wells* 1990 (1) SA 816 (A) at 820A–D Joubert JA refers to this as the 'strict approach' and contrasts it with 'the more enlightened

approach', which permits a judicial officer to change, amend or supplement his pronounced judgment, provided that the sense or substance of his judgment is not affected thereby. See also *Transvaal Canoe Union v Butgereit* 1990 (3) SA 398 (T) at 403E–404E; *Tshivhase Royal Council v Tshivhase* 1992 (4) SA 852 (A) at 862I; *First National Bank of South Africa Ltd v Jurgens* 1993 (1) SA 245 (W) at 246J–247A; *Bekker NO v Kotzé* 1996 (4) SA 1287 (Nm) at 1290H–J; *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC) at 780C–F and 781J; *Thompson v South African Broadcasting Corporation* 2001 (3) SA 746 (SCA) at 748H–749C; *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* 2002 (1) SA 82 (SCA) at 86C–D; *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 5I–6G; *De Villiers and Another NNO v BOE Bank Ltd* 2004 (3) SA 459 (SCA) at 462H–I; *Zondi v MEC, Traditional and Local Government Affairs* 2006 (3) SA 1 (CC) at 12G–19F; *Minister of Social Development, Ex parte* 2006 (4) SA 309 (CC) at 318E–319A; *Adonis v Additional Magistrate, Bellville* 2007 (2) SA 147 (C) at 153I–154B; *MEC for Economic Affairs, Environment and Tourism v Kruisenga* 2008 (6) SA 264 (CkHC) at 276A–B; *Brown v Yebba CC t/a Remax Tricolor* 2009 (1) SA 519 (D) at 524I–525A; *Freedom Stationery (Pty) Ltd v Hassam* 2019 (4) SA 459 (SCA) at 465A; *Speaker, National Assembly v Land Access Movement of South Africa* 2019 (6) SA 568 (CC) at 578A–C; *Thobejane v Premier of Limpopo Province* (unreported, SCA case no 1108/2019 dated 18 December 2020) at paragraph [6]; *Mukhinindi v Cedar Creek Estate Home Owners Association* (unreported, GP case no 81830/2018 dated 10 May 2021) at pararaph [19]; *Tahilram v Trustees, Lukamber Trust* 2022 (2) SA 436 (SCA) at paragraph [19].

The position in divorce matters was stated as follows in *PL v YL* 2013 (6) SA 28 (ECG) at 53C–55D (footnotes omitted):

'[45] With regard to the second question raised, once the court has made a consent judgment it is functus officio and the matter becomes res judicata. This means, inter alia, that as a general rule the court has no authority to correct, alter or supplement its own order that has been accurately drawn up. Subject to what is said hereunder, in divorce matters this is in practice effectively only limited to those terms of the order which deal with the proprietary rights of the parties and the payment of maintenance to one of the spouses where there is a non-variation clause. The reason for this is that the general rule is subject to a number of exceptions, in terms of the Divorce Act, the rules of court and at common law. The exceptions in the Divorce Act relate to matters which fall within the exclusive jurisdiction of the court, and which that Act requires the court to determine and to grant an order as it may find to be justified. Consequently, orders dealing with the custody, guardianship, or access to and the maintenance of any of the minor children do not assume the character of final judgments, as they are always subject to variation in terms of s 8(1) of the Divorce Act.

[46] A further exception to the general rule that an order of court, once pronounced, is final and immutable, is created by s 8(1) of the Divorce Act. As stated, in the absence of a non-variation clause in the settlement agreement, it permits the court to rescind, vary or suspend a maintenance order granted earlier. Further, there exists in principle no reason why the parties may not subsequently seek an amendment thereof by mutual consent, or in circumstances where the order through error or oversight does not correctly reflect their agreement. Not only is the mandate of the court to exercise its discretion in terms of s 7(1) of the Divorce Act derived from the settlement agreement, but the consent order itself is based on the terms of that agreement. The legal nature of a consent order was considered by the appeal court in *Swadif v Dyke*. It was held that where the purpose of the granting of the consent judgment is to enable the parties to the agreement to enforce the terms thereof through the process of the court, should the need therefor arise, the effect of the order is to replace the right of action on the agreement by a right to execute on the judgment:

"(I)t seems realistic, and in accordance with the views of the Roman-Dutch writers, to regard the judgment not as novating the obligation under the bond, but rather as strengthening or reinforcing it. The right of action . . . is replaced by the right to execute, but the enforceable right remains the same."

The consent order accordingly does not have the effect of eliminating the contractual basis thereof. Rather, through operation of the res judicata principle, the judgment constitutes a bar to any action or proceedings on the underlying settlement agreement. The provisions of the agreement are instead to be enforced by the remedies available to a judgment creditor on a judgment. It is of course always open to the parties to abandon the judgment in whole or in part and to enter into a new agreement. Save for the aforegoing, the effect of the consent order is otherwise that it renders the issues between the parties in relation to their proprietary rights and the payment of maintenance to a former spouse, where the agreement includes a non-variation clause, *res judicata*, and thus effectively achieves a "clean break" as envisaged by the scheme of the Divorce Act.'

See further rule 42 and the notes thereto below.

37 *Potgieter v Potgieter NO* 2012 (1) SA 637 (SCA) at 651C–E.

38 *Getz v Smit* 1914 CPD 982.

39 *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 475D; *Western Bank Ltd v Honeywill* 1974 (4) SA 148 (D) at 153G.

40 *Ras v Simpson* 1904 TS 254 at 256; *Nel v Cloete* 1972 (2) SA 150 (A); *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A); *Western Bank Ltd v Honeywill* 1974 (4) SA 148 (D).

41 *Charney v Paletz* 1924 SWA 5.

42 *Martin v Suluzweni* (1907) 17 CTR 425.

43 *New African Ice Co Ltd v Becker* 1906 TS 889. See further the notes to rule 18 s v 'General' above. As to the effect of the omission of a prayer for costs, see the notes s v 'Costs in general — No prayer for costs' in Part D5 below.

44 *Standard Permanent Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 774C–775A. See also *Murata Machinery Ltd v Capelon Yarns (Pty) Ltd* 1986 (4) SA 671 (C); *Elgen Brown and Hamer Ltd v Dampskibsselskabet Torm Ltd* 1988 (4) SA 671 (N); *Barclays Bank of Swaziland Ltd v Mnyeki* 1992 (3) SA 425 (W).

45 *Barclays Bank of Swaziland v Mnyeki* 1992 (3) SA 425 (W).

46 *Mthimkulu v Mahomed* 2011 (6) SA 147 (GSJ) at 150F–151A. See also *Kauesa v Minister of Home Affairs* 1996 (4) SA 965 (Nm) at 973I–974B.

47 *Stuttafords Stores (Pty) Ltd v Salt of the Earth Creations (Pty) Ltd* 2011 (1) SA 267 (CC) at 271B–C.

48 *Stuttafords Stores (Pty) Ltd v Salt of the Earth Creations (Pty) Ltd* 2011 (1) SA 267 (CC) at 271C–F where the court quoted from an address delivered by Corbett CJ at the first orientation course for new judges under the new constitutional dispensation. See further Corbett 'Writing a judgment' (1998) 115 *SALJ* 116.

49 *Birgin Bower Investments (Pty) Ltd v Marketing International* 2003 (3) SA 382 (W).

50 *Katritsis v De Macedo* 1966 (1) SA 613 (A); *Aheer v Govender* (unreported, KZP case nos 7098/2020P; 7136/2020P dated 8 February 2024) at paragraph [31]. See also *Hayes v Baldachin* 1980 (2) SA 589 (R) which was, however, for other reasons set aside on appeal (*Hayes v Baldachin* 1981 (1) SA 749 (ZA)).

51 For the distinction between a liquidated amount in money and a liquidated demand, see the notes to rule 32(1)*(b)* s v 'Liquidated amount in money' above.

52 *Irish & Co (now Irish & Menell Rosenberg Inc) v Kritzas* 1992 (2) SA 623 (W) at 632I.

53 *Collins v Van der Merwe* 1908 TS 1086; *Verkouteren v Savage* 1918 AD 143; *Bosman v Du Toit's Executors* 1937 CPD 209; *Hayes v Baldachin* 1980 (2) SA 589 (R) at 592; *Sayed v Editor, Cape Times* 2004 (1) SA 58 (C) at 66H–J and 67A–E.

54 See *O'Brien v Nurick* 1930 WLD 322; *Estate De Vries v Estate De Vries* 1943 CPD 502.

55 *Walker Engineering CC t/a Atlantic Steam Services v First Garment Rental (Pty) Ltd (Cape)* 2011 (5) SA 14 (WCC) at 17H and 18D–F.

56 *Pillay v Krishna* 1946 AD 946 at 952; *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 548A; Hoffmann & Zeffertt *Evidence* 495–500; Schmidt *Bewysreg* 27–8; Zeffertt Evidence 127–128.

57 *Tregea v Godart* 1939 AD 16 at 32.

58 On the terminology, see *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 548A–C; Hoffmann & Zeffertt *Evidence* 495–500; Schmidt *Bewysreg* 27–8; Zeffertt *Evidence* 127–128.

59 Zeffertt *Evidence* 177.

60 *H A Millard & Son (Pty) Ltd v Enzenhofer* 1968 (1) SA 330 (T) at 333F; *Groenewald v Minister van Justisie* 1972 (4) SA 223 (O) at 226B.

61 See, for example, *Smith's Trustee v Smith* 1927 AD 482; *Munsamy (also known as Naidu) v Gengemma* 1954 (4) SA 468 (N); *Mobil Oil Southern Africa (Pty) Ltd v Mechin* 1965 (2) SA 706 (A) at 710F; *Topaz Kitchens (Pty) Ltd v Naboom Spa (Edms) Bpk* 1976 (3) SA 470 (A) at 473.

62 See, for example, *Kriegler v Minitzer* 1949 (4) SA 821 (A); *H A Millard & Son (Pty) Ltd v Enzenhofer* 1968 (1) SA 330 (T) at 334; *Pretorius v Van der Merwe* 1968 (2) SA 259 (N); *Groenewald v Minister van Justisie* 1972 (4) SA 223 (O) at 226B.

63 See *Mobil Oil Southern Africa (Pty) Ltd v Mechin* 1965 (2) SA 706 (A) at 710F.

64 *Standard Bank of SA Ltd v Minister of Bantu Education* 1966 (1) SA 229 (N) at 242H–243A; approved in *Saayman v Road Accident Fund* 2011 (1) SA 106 (SCA) at 114G–J.

65 See Van der Linden *Jud Prac* 2, 48; *Koopmans Handboek* 3 1 2 14:

'Dezelve komt eigentlijk dan te pas, wanneer men vermeent, dat aan de zijde van den aanlegger eene verkeerde actie is geïnstutiëerd.'

See also the remarks of De Villiers CJ in *Corbridge v Welch* (1892) 9 SC 277 at 279.

66 As Van der Linden *Koopmans Handboek* 3 1 12 15 puts it, the *conclusie* is not raised when the defendant says, *tibi adversus me non competit actio*, but when he says, *tibi adversus me non competit haec actio*.

67 An order that the plaintiff's claim is 'dismissed' amounts in law to a judgment of absolution from the instance (*Thwaites v Van der Westhuizen* (1888) 6 SC 259; *De Jager v Vorster* (1900) 10 CTR 239; *Cloete v Greyling* (1907) 24 SC 57; *Municipality of Christiana v Victor* 1908 TS 1117; *Sebastian v Brummer* 1928 TPD 679; *Miller v Larter* 1941 EDL 98; *Becker v Wertheim, Becker & Leveson* 1943 (1) PH F34 (A); *Van Rensburg v Coetzee* 1977 (3) SA 130 (T) at 136B; *De Wet v Western Bank Ltd* 1977 (2) SA 1033 (W) at 1035F–G; *Regering van die Republiek van Suid-Afrika v South African Eagle Versekeringsmaatskappy Bpk* 1985 (2) SA 42 (O) at 56J–57A; *Twins Products (Pty) Ltd v Hollywood Curl (Pty) Ltd* 1986 (4) SA 392 (T) at 394D). The decision in *Schutze v Rocher* (1896) 3 Off Rep 126 is not authority to the contrary: 'dismissal of the claim' is an incorrect translation of the Dutch order 'ontzegging van den eisch' — the case was not dismissed but the claim refused.

68 *Grimwood v Balls* (1835) 3 Menz 448; *Thwaites v Van der Westhuizen* (1888) 6 SC 259; *Corbridge v Welch* (1892) 9 SC 277 at 279; *Van Rensburg v Reid* 1958 (2) SA 249 (E) at 252; *Minister of Police v Gasa* 1980 (3) SA 387 (N) at 389D–E; and see *Sparks v Sparks* 1998 (4) SA 714 (W) at 721A–H.

69 This test was first formulated in these terms by De Villiers JP in *Gascoyne v Paul and Hunter* 1917 TPD 170 at 173, and was approved by the Appellate Division/Supreme Court of Appeal in *R v Shein* 1925 AD 6 at 9; *Gafoor v Unie Versekeringsadviseurs (Edms) Bpk* 1961 (1) SA 335 (A) at 340A–C; *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G–H; *Oosthuizen v Standard General Versekeringsmaatskappy Bpk* 1981 (1) SA 1032 (A) at 1035H–1036A; *Levco Investments (Pty) Ltd v Standard Bank of SA Ltd* 1983 (4) SA 921 (A) at 928B; *Swanee's Boerdery (Edms) Bpk (in liq) v Trust Bank of Africa Ltd* 1986 (2) SA 850 (A) at 862F–G; *Gordon Lloyd Page & Associates v Rivera* 2001 (1) SA 88 (SCA) at 92E–93A; *De Klerk v ABSA Bank Ltd* 2003 (4) SA 315 (SCA) at 323B–G; *Holtzhausen v Absa Bank Ltd* 2008 (5) SA 630 (SCA) at 635D–E; *McCarthy Ltd v Absa Bank Ltd* 2010 (2) SA 321 (SCA) at 328H; *Osman Tyres and Spares CC v ADT Security (Pty) Ltd* [2020] 3 All SA 73 (SCA) at paragraph [26]. See also, *inter alia*, *Gandy v Makhanya* 1974 (4) SA 853 (N) at 856A–C; *Van der Merwe Burger v Munisipaliteit van Warrenton* 1987 (1) SA 899 (NC) at 902C–903B; *Dale Street Congregational Church v Hendrikse* 1992 (1) SA 133 (E) at 145B–F; *Build-A-Brick v Eskom* 1996 (1) SA 115 (O) at 123B–C; *Rosherville Vehicle Services (Edms) Bpk v Bloemfonteinse Plaaslike Oorgangsraad* 1998 (2) SA 289 (O) at 293B–G; *Paarlberg Motors (Pty) Ltd t/a Paarlberg BMW v Henning* 2000 (1) SA 981 (C) at 985F; *Klerk NO v SA Metal & Machinery Co (Pty) Ltd* [2001] 4 All SA 27 (E) at 34*a–c*; *Momentum Life Assurers Ltd v Thirion* [2002] 2 All SA 62 (C) at 73*h*; *Swire Pacific Offshore Service (Pty) Ltd v MV 'Roxana Bank'* [2003] 4 All SA 520 (C) at 512*f*; *Hanger v Regal* 2015 (3) SA 115 (FB) at 117F–118B; *Jacobs v The Minister of Justice and Correctional Services* 2022 (2) SACR 569 (SCA) at paragraph [1]; *Dalmar Plant Hire (Pty) Ltd v RMB Structured Insurance Ltd* (unreported, GP case no A219/2018 dated 24 June 2022 — a decision of the full court) at paragraph [8]; *Van Zyl NO obo AM v MEC for Health, Western Cape Provincial Department of Health* [2023] 1 All SA 501 (WCC) (a decision of the full court) at paragraph 9; *Malope v Minister of Home Affairs* (unreported, MM case no 2358/2021 dated 21 October 2022) at paragraphs [37]–[38]; *Sinqobile Equestrian Security Services (Pty) Ltd v Marks Koko Latha* (unreported, NWM case no CIV APP MG 05/20 dated 6 February 2023 — a decision of the full bench) at paragraphs [37]–[38]; *MN v BN* 2023 (5) SA 519 (FB) at paragraph [203]; *MC Carthy (Pty) Limited v Olinsky* (unreported, GJ case no 41796/2020 dated 13 October 2023) at paragraph [10]; *Thema v Mathonsi* (unreported, LP case no HCA36/2023 dated 30 July 2024 — a decision of the Full Bench) at paragraph [7].
The power which a court has to grant absolution at the close of a plaintiff's case is a discretionary power (*Ardecor (Pty) Ltd v Quality Caterers (Pty) Ltd* 1978 (3) SA 1073 (N) at 1076G). In *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) the Constitutional Court, in the context of applications for absolution from the instance in trials where a superior court is asked to develop the common law, stated (at paragraph [80]:
'There may be cases where there is clearly no merit in the submission that the common law should be developed to provide relief to the plaintiff. In such circumstances absolution should be granted. But where the factual situation is complex and the legal position uncertain, the interests of justice will often better be served by the exercise of the discretion that the trial Judge has to refuse absolution. If this is done, the facts on which the decision has to be made can be determined after hearing all the evidence, and the decision can be given in the light of all the circumstances of the case, with due regard to all relevant factors. This has the merit of avoiding the determination of issues on the basis of what might prove to be hypothetical facts. It also ensures that there is a full and complete record on which the dispute can be determined with finality not only by the trial Court, but by an appeal Court required to deal with the matter. This may curtail rather than prolong litigation.'
In *Brickhill v Copper Sunset Trading 223 (Pty) Ltd t/a Retail Crossings Superspar* (unreported, GJ case no 2006/26230 dated 23 January 2012) at paragraph [11] and *MN v BN* 2023 (5) SA 519 (FB) at paragraph [207] the High Court, with reference to the *Carmichele* case, held that where the legal position is uncertain, the interests of justice are better served by the refusal of absolution from the instance at the end of the plaintiff's case. *Sed quaere*.

70 See, for example, *Gascoyne v Paul and Hunter* 1917 TPD 170; *Bee v Railway Passengers Assurance Co* 1947 (4) SA 356 (N) at 358; *De Villiers NO v Summerson* 1951 (3) SA 75 (T) at 79; *Olympic Passenger Service (Pty) Ltd v O'Connor* 1954 (3) SA 906 (N) at 909E–G; *Ruto Flour Mills (Pty) Ltd v Adelson (2)* 1958 (4) SA 307 (T) at 308A; *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 39–40; *Alli v De Lira* 1973 (4) SA 635 (T) at 637G; *Dale Street Congregational Church v Hendrikse* 1992 (1) SA 133 (E) at 145E; *Gordon Lloyd Page & Associates v Rivera* 2001 (1) SA 88 (SCA) at 92G; *Momentum Life Assurers Ltd v Thirion* [2002] 2 All SA 62 (C) at 73*g*; *Hanger v Regal* 2015 (3) SA 115 (FB) at 117E and 118A–B; *Osman Tyres and Spares CC v ADT Security (Pty) Ltd* [2020] 3 All SA 73 (SCA) at paragraph [26]; *Dalmar Plant Hire (Pty) Ltd v RMB Structured Insurance Ltd* (unreported, GP case no A219/2018 dated 24 June 2022 — a decision of the full court) at paragraph [8]; *Sinqobile Equestrian Security Services (Pty) Ltd v Marks Koko Latha* (unreported, NWM case no CIV APP MG 05/20 dated 6 February 2023 — a decision of the full bench) at paragraphs [41]–[42]; *MC Carthy (Pty) Limited v Olinsky* (unreported, GJ case no 41796/2020 dated 13 October 2023) at paragraph [10].

71 See *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) 26 at 39–40; Zeffertt *Evidence* 137–140; Schmidt *Bewysreg* 92.

72 *Ex parte The Minister of Justice: In re Rex v Jacobson & Levy* 1931 AD 466 at 478; *Geoghegan v Pestana* 1977 (4) SA 31 (T) at 34A–B; *Terry v Senator Versekeringsmaatskappy Bpk* 1984 (1) SA 693 (A) at 699E–700A; *Hurley v Minister of Law and Order* 1985 (4) SA 709 (A) at 725H; *Rosherville Vehicle Services (Edms) Bpk v Bloemfonteinse Plaaslike Oorgangsraad* 1998 (2) SA 289 (O) at 293F–G; *Paarlberg Motors (Pty) Ltd t/a Paarlberg BMW v Henning* 2000 (1) SA 981 (C) at 985G–H.

73 1917 TPD 170 at 173, cited with approval in *Gafoor v Unie Versekeringsadviseurs (Edms) Bpk* 1961 (1) SA 335 (A) at 340A–B.

74 1942 EDL 202 at 206.

75 1971 (4) SA 90 (RA) at 92H–93C.

76 1974 (4) SA 853 (N) at 855H.

77 *Supreme Service Station (1969) (Pvt) Ltd v Fox and Goodridge (Pvt) Ltd* 1971 (4) SA 90 (RA) at 93H.

78 *Supreme Service Station (1969) (Pvt) Ltd v Fox and Goodridge (Pvt) Ltd* 1971 (4) SA 90 (RA) at 93G.

79 2001 (1) SA 88 (SCA) at 92H–J; and see *Sinqobile Equestrian Security Services (Pty) Ltd v Marks Koko Latha* (unreported, NWM case no CIV APP MG 05/20 dated 6 February 2023 — a decision of the full bench) at paragraphs [42]–[43]; *MC Carthy (Pty) Limited v Olinsky* (unreported, GJ case no 41796/2020 dated 13 October 2023) at paragraph [11].

80 *Atlantic Continental Assurance Co of SA v Vermaak* 1973 (2) SA 525 (E) at 527C–D.

81 *Siko v Zonsa* 1908 TS 1013. See further *Leo v Geldenhuys* 1910 TPD 980; *Potgieter v Kosana* 1913 EDL 458; *Katz v Bloomfield* 1914 TPD 379; *Theron v Behr* 1918 CPD 443; *Erasmus v Boss* 1939 CPD 204; *Shenker Bros v Bester* 1952 (3) SA 664 (A); *Ruto Flour Mills (Pty) Ltd v Adelson (2)* 1958 (4) SA 307 (T); *Gafoor v Unie Versekeringsadviseurs (Edms) Bpk* 1961 (1) SA 335 (A) at 340D–E; *South Coast Furnishers CC v Secprop 30 Investments (Pty) Ltd* 2012 (3) SA 431 (KZP) at 439D–E; *Malope v Minister of Home Affairs* (unreported, MM case no 2358/2021 dated 21 October 2022) at paragraph [39]; *Sinqobile Equestrian Security Services (Pty) Ltd v Marks Koko Latha* (unreported, NWM case no CIV APP MG 05/20 dated 6 February 2023 — a decision of the full bench) at paragraph [45]; *MN v BN* 2023 (5) SA 519 (FB) at paragraph [204]; *MC Carthy (Pty) Limited v Olinsky* (unreported, GJ case no 41796/2020 dated 13 October 2023) at paragraph [10].

82 *Barker v Bentley* 1978 (4) SA 204 (N) at 208; *Dale Street Congregational Church v Hendrikse* 1992 (1) SA 133 (E) at 145.

83 *Gandy v Makhanya* 1974 (4) SA 853 (N) at 856D–858D; *Van der Merwe Burger v Munisipaliteit van Warrenton* 1987 (1) SA 899 (NC) at 902F–903B; *Sinqobile Equestrian Security Services (Pty) Ltd v Marks Koko Latha* (unreported, NWM case no CIV APP MG 05/20 dated 6 February 2023 — a decision of the full bench) at paragraph [42].

84 *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 38H; *Shezi v Ethekwini Municipality* (unreported, KZD case no 7762/2015 dated 11 October 2017) at paragraph [19]. In *Du Toit v Vermeulen* 1972 (3) SA 848 (A) the Appellate Division held (at 855D) that where there are two possible inferences of more or less equal probability absolution will be refused, but doubted whether the same approach should be adopted where a variety of inferences of equal strength can be made.

85 See *Gordon Lloyd Page & Associates v Rivera* 2001 (1) SA 88 (SCA) where the Supreme Court of Appeal held (at 92H–J) that the court should not be concerned with what the reasonable man might think but rather with its own judgment.

86 *Gafoor v Unie Versekeringsadviseurs (Edms) Bpk* 1961 (1) SA 335 (A) at 340C; *Botha v Minister van Lande* 1967 (1) SA 72 (A) at 76E–G; *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 38H–39A; *Malcolm v Cooper* 1974 (4) SA 52 (C) at 59D–E; *Rosherville Vehicle Services (Edms) Bpk v Bloemfonteinse Plaaslike Oorgangsraad* 1998 (2) SA 289 (O) at 293G–I.

87 *Paarlberg Motors (Pty) Ltd t/a Paarlberg BMW v Henning* 2000 (1) SA 981 (C) at 986C.

88 *Paarlberg Motors (Pty) Ltd t/a Paarlberg BMW v Henning* 2000 (1) SA 981 (C) at 987A–B.

89 *Paarlberg Motors (Pty) Ltd t/a Paarlberg BMW v Henning* 2000 (1) SA 981 (C) at 987B.

90 *Union Government (Minister of Railways) v Sykes* 1913 AD 156 at 173–4; *Dale Street Congregational Church v Hendrikse* 1992 (1) SA 133 (E) at 145.

91 *Schoeman v Moller* 1949 (3) SA 949 (O).

92 *Nelson Mandela Bay Metropolitan Municipality v Coutsourides* NO (unreported, ECPE case no 3472/2012 dated 4 May 2021).

93 For example, a claim and claim in reconvention for damages arising from the same collision, with allegations of negligence on both sides.

94 *Atlantic Continental Assurance Co of SA v Vermaak* 1973 (2) SA 525 (E).

95 *Sinqobile Equestrian Security Services (Pty) Ltd v Marks Koko Latha* (unreported, NWM case no CIV APP MG 05/20 dated 6 February 2023 — a decision of the full bench) at paragraphs [47]–[48].

96 *Sinqobile Equestrian Security Services (Pty) Ltd v Marks Koko Latha* (unreported, NWM case no CIV APP MG 05/20 dated 6 February 2023 — a decision of the full bench) at paragraph [45].

97 *Putter v Provincial Insurance Co Ltd* 1963 (4) SA 771 (W) at 772H–773A, cited with approval in *Mazibuko v Santam Insurance Co Ltd* 1982 (3) SA 125 (A) at 134D–135C. See also *Ardecor (Pty) Ltd v Quality Caterers (Pty) Ltd* 1978 (3) SA 1073 (N) at 1076H–1077C.

98 *Ardecor (Pty) Ltd v Quality Caterers (Pty) Ltd* 1978 (3) SA 1073 (N) at 1078D.

99 *Putter v Provincial Insurance Co Ltd* 1963 (4) SA 771 (W) at 773C–E.

100 1982 (3) SA 125 (A); *K & S Dry Cleaning Equipment (Pty) Ltd v South African Eagle Insurance (Pty) Ltd* 1998 (4) SA 456 (W) at 460E et seq.

101 *K & S Dry Cleaning Equipment (Pty) Ltd v South African Eagle Insurance (Pty) Ltd* 1998 (4) SA 456 (W) at 461F–462F.

102 *Forbes v Golach & Cohen* 1917 AD 559; *Oliver's Transport v Divisional Council Worcester* 1950 (4) SA 537 (C); *Akoon v Kader* 1963 (2) SA 664 (N); *Sager Motors (Pvt) Ltd v Patel* 1968 (4) SA 98 (RA) at 101G.

103 *Koster Ko-operatiewe Landboumaatskappy Bpk v SA Spoorweë en Hawens* 1974 (4) SA 420 (W), applying the principle enunciated in *National Employers Mutual General Insurance Association v Gany* 1931 AD 187 at 199. In *African Eagle Life Assurance Co Ltd v Cainer* 1980 (2) SA 234 (W) at 237F Coetzee J emphasized the fact that this approach only applies in cases where there are no probabilities one way or the other. See also *S v Molautsi* 1980 (3) SA 1041 (B) at 1042–3; *Senekal v Roodt* 1983 (2) SA 602 (T) at 606C–D; *Selamolele v Makhado* 1988 (2) SA 372 (V). Thus, if the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false (*National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at 440H–I). See also *Stellenbosch Farmers' Winery Group Ltd v Martell et Cie* 2003 (1) SA 11 (SCA) at 14–15; *Dreyer NO v AXZS Industries (Pty) Ltd* [2006] 3 All SA 219 (SCA) at 228*c–h*; *Oosthuizen v Van Heerden t/a Bush Africa Safaris* 2014 (6) SA 423 (GP) at 430F–J.

104 *Corbridge v Welch* (1892) 9 SC 277 at 279, where it is pointed out that the court is bound, if the defendant asks for it and the evidence warrants it, to give judgment in the defendant's favour. On the other hand, the court is never bound to grant absolution from the instance in a case where it is deciding on the merits after hearing all the evidence, but in certain circumstances the court has a discretion (*Berkowitz v Wilson* 1922 OPD 230 at 232). This may, for example, be the position where some alternative course is open to the plaintiff, and the court does not wish to close the door finally upon the plaintiff's case (*Damont NO v Van Zyl* 1962 (4) SA 47 (C) at 52, followed in *Mills Litho (Pty) Ltd v Storm Quinan t/a 'Out of the Blue'* 1987 (1) SA 781 (C) at 786I).

105 *Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Geoghehan v Pestana* 1977 (4) SA 31 (T) at 34A.

106 *Liberty Group Ltd v K&D Telemarketing CC* 2019 (1) SA 540 (GP) at 543G–546D, confirmed on appeal *sub nomine Liberty Group Ltd t/a Liberty Life v K&D Telemarketing CC* (unreported, SCA case no 1290/18 dated 20 April 2020). In this case the plaintiff did not apply to set aside the absolution order, and in consequence its claim became prescribed in terms of s 15(2) of the Prescription Act 68 of 1969.

107 See, for example, *Arter v Burt* 1922 AD 303 at 306; *Hirschfeld v Espoch* 1937 TPD 19; *Van Staden v May* 1940 WLD 198 at 203; *Sebogo v Raath* 1947 (2) SA 624 (T); *Schoeman v Moller* 1949 (3) SA 949 (O); *Challinger v Speedy Motors* 1951 (1) SA 340 (C) at 349; *Ramnath v Bunsee* 1961 (1) SA 394 (N) at 400E; *Groenewald v Minister van Justisie* 1972 (3) SA 596 (O) at 600E–F; *Sentraalwes Personeel Ondernemings (Edms) Bpk v Nieuwoudt* 1979 (2) SA 537 (C) at 546B; *Scheepers v Video & Telecommunications Services* 1981 (2) SA 490 (E) at 491H–492A; *Government Employees Pension Fund v VR & L Rental (Pty) Ltd t/a Dros Fried Chicken* (unreported, GP case no A203/2020 dated 11 October 2021) at paragraphs [13] and [14]. Earlier cases in which absolution was granted in such circumstances must now be regarded as incorrect.

108 *Schuster v Geuther* 1933 SWA 114.

109 See, for example, *MN v BN* 2023 (5) SA 519 (FB) at paragraphs [216]–[217].

110 *MN v BN* 2023 (5) SA 519 (FB) at paragraphs [216]–[217], referring to Cilliers *Costs* para 2.23A (Issue 41-SI 46) and *Koukoudis v Abrina 1772 (Pty) Ltd* 2016 (5) SA 352 (SCA) at paragraph [56].

111 The examination, cross-examination and re-examination of witnesses are dealt with in the textbooks on the law of evidence: see Zeffertt *Evidence* 1014–1043 Schmidt *Bewysreg* 291–325. As to the order in which examination and cross-examination should take place, see *Novick v Comair Holdings Ltd* 1978 (3) SA 333 (W).

112 *Oosthuizen v Stanley* 1938 AD 322 at 333; *Mkwanazi v Van der Merwe* 1970 (1) SA 609 (A) at 616B, 619D and 626E; *Barclays Western Bank Ltd v Gunas* 1981 (3) SA 91 (D) at 94B–96F; *PSG Wealth Financial Planning (Pty) Ltd v Gamble Investments (Pty) Ltd* (unreported, ECG case no CA143/2020 dated 31 August 2021 — a decision of the full court) at paragraph [17].

113 See, in particular, the judgments of Holmes JA (at 616G–617D) and of Van Winsen AJA (at 626A–629G) in *Mkwanazi v Van der Merwe* 1970 (1) SA 609 (A). Though Van Winsen AJA delivered a dissenting judgment, the majority subscribed to his general approach (*per* Steyn CJ at 619C). See also *Barclays Western Bank Ltd v Gunas* 1981 (3) SA 91 (D) at 94B–96F; *Liberty Group Ltd v K&D Telemarketing CC* 2019 (1) SA 540 (GP) at 546G–H; *PSG Wealth Financial Planning (Pty) Ltd v Gamble Investments (Pty) Ltd* (unreported, ECG case no CA143/2020 dated 31 August 2021 — a decision of the full court) at paragraphs [5], [17] and [19].

114 In *Mkwanazi v Van der Merwe* 1970 (1) SA 609 (A) at 627H Van Winsen AJA describes this consideration 'as een van die grondreëls met betrekking tot die uitoefening van 'n diskresie in verband met die heropening van 'n saak wat reeds gesluit is'. See also *May v May* 1931 NPD 223; *Du Plessis v Ackermann* 1932 EDL 139; *Bellstedt v SA Railways & Harbours* 1936 CPD 397; *Stephens v Liepner* 1939 WLD 26; *Epstein v Arenstein* 1942 WLD 52; *Roberts v London Assurance Co Ltd (1)* 1948 (2) SA 838 (W); *Myers v Abramson* 1951 (3) SA 438 (C) at 450; *Broderick Properties (Pty) Ltd v Rood* 1963 (2) PH F60; *Makwetlane v Road Accident Fund* 2003 (3) SA 439 (W) at 445I. In *Barclays Western Bank Ltd v Gunas* 1981 (3) SA 91 (D) at 95C, however, it is stated that 'the modern view is that an applicant's failure to show that he exercised due diligence is not decisive of the application'.

115 *Bellstedt v SA Railways & Harbours* 1936 CPD 397; and see *Oosthuizen v Stanley* 1938 AD 322; *Meyer v Meyer* 1942 CPD 4.

116 *Bosomworth v Labistour* (1914) 35 NLR 79; *Kunene v Seedat* (1915) 36 NLR 630; *Strydom v Griffin Engineering Co* 1927 OPD 47; *Hoon v Estate De Kock* 1942 CPD 472; *Myers v Abramson* 1951 (3) SA 438 (C) at 450; *Koster Ko-operatiewe Landboumaatskappy Bpk v SA Spoorweë en Hawens* 1974 (4) SA 420 (W) at 422H–424G. See also *S v Christie* 1982 (1) SA 464 (A) at 476E.

117 *Epstein v Arenstein* 1942 WLD 52 at 62; *Shange v Pearl Assurance Co Ltd* 1965 (1) SA 569 (D); *Hladla v President Insurance Co Ltd* 1965 (1) SA 614 (A) at 621H; *Witschell v Viljoen's Transport* 1966 (1) SA 702 (O); *Taylor v Savage & Lovemore (Tvl) (Pty) Ltd* 1976 (4) SA 222 (T) at 225E; *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 (1) SA 1 (A) at 6B.

118 *Coetzee v Jansen* 1954 (3) SA 173 (T); and see *Witschell v Viljoen's Transport* 1966 (1) SA 702 (O) at 708.

119 *Epstein v Arenstein* 1942 WLD 52 at 62; *Coetzee v Jansen* 1954 (3) SA 173 (T) at 177–8; and see *Odendaalsrust Gold General Investments and Extensions Ltd v Naude NO* 1958 (1) SA 381 (T) at 384–5.

120 *Oosthuizen v Stanley* 1938 AD 322 at 333. See also *Makwetlane v Road Accident Fund* 2003 (3) SA 439 (W) at 445I–J.

121 *Oosthuizen v Stanley* 1938 AD 322 at 333; *Shange v Pearl Assurance Co Ltd* 1965 (1) SA 569 (D) at 571B–G; *Gijzen v Verrinder* 1965 (1) SA 806 (D) at 814D; *Barclays Western Bank Ltd v Gunas* 1981 (3) SA 91 (D) at 96E.

122 *Oosthuizen v Stanley* 1938 AD 322 at 333; *Mkwanazi v Van der Merwe* 1970 (1) SA 609 (A) at 616H and 619G–H.

123 *Mkwanazi v Van der Merwe* 1970 (1) SA 609 (A) at 616F, 617C and 619H. See also *Witschell v Viljoen's Transport* 1966 (1) SA 702 (O) at 710G–H.

124 See *Witschell v Viljoen's Transport* 1966 (1) SA 702 (O), in which Hofmeyr J stated (at 710F) that ''n ander faktor wat ook in die guns van die applikant moet geld, is dat die aansoek op die vroegste geleentheid gemaak is'.

125 In *Mkwanazi v Van der Merwe* 1970 (1) SA 609 (A) at 617A–B. See also *Gijzen v Verrinder* 1965 (1) SA 806 (D) at 814F.

126 In *Mkwanazi v Van der Merwe* 1970 (1) SA 609 (A) at 616G–617D.

127 See also *Du Plessis v Ackermann* 1932 EDL 139 at 143; *Myers v Abramson* 1951 (3) SA 438 (C) at 450.

128 See *Godloza v Smith* 1932 EDL 154; *Coetzee v Jansen* 1954 (3) SA 173 (T); *Mkwanazi v Van der Merwe* 1970 (1) SA 609 (A); *Taylor v Savage & Lovemore (Tvl) (Pty) Ltd* 1976 (4) SA 222 (T).

129 See *Heinze v Friedrich* 1927 SWA 106; *Pauley v Marine & Trade Insurance Co Ltd (2)* 1964 (3) SA 657 (W) at 658D–659D.

130 The distinction between the calling and recalling of a witness seems to have escaped the court in *Pillay v Pillay* 1961 (1) SA 699 (D) at 701 — see *Pauley v Marine & Trade Insurance Co Ltd (2)* 1964 (3) SA 657 (W) at 658B–D.

131 *Raath v Smith* 1916 TPD 200; *Ward v Lea* 1924 OPD 6; *Rowe v Assistant Magistrate, Pretoria* 1925 TPD 361; *Pauley v Marine & Trade Insurance Co Ltd (2)* 1964 (3) SA 657 (W) at 658D. See also *Nzimande v MEC for Health, Gauteng* 2015 (6) SA 192 (GP) at 198B–G.

132 *Godloza v Smith* 1932 EDL 154 at 157; *Mlombo v Fourie* 1964 (3) SA 350 (T) at 357C; *Pauley v Marine & Trade Insurance Co Ltd (2)* 1964 (3) SA 657 (W) at 659A.

133 *Pauley v Marine & Trade Insurance Co Ltd (2)* 1964 (3) SA 657 (W) at 659B.

134 See *R v Roopsingh* 1956 (4) SA 509 (A), in which the decision of the English Court of Appeal in *Yuill v Yuill* [1945] 1 All ER 183 (CA) is cited with approval. In *Hamman v Moolman* 1968 (4) SA 340 (A) it was held (at 344) that the remarks in *R v Roopsingh* 1956 (4) SA 509 (A) on the limits which a judge should observe in intervening in the conduct of proceedings over which he presides apply with even greater force in the conduct of proceedings in a civil trial. On the distinction between 'adversarial', 'accusatorial' and 'inquisitorial' see Van Loggerenberg (1987) 50 *THRHR* 201–3.

135 *Hamman v Moolman* 1968 (4) SA 340 (A) at 344E–F.

136 *Hamman v Moolman* 1968 (4) SA 340 (A) at 344D–G.

137 *Transvaal Industrial Foods Ltd v BMM Process (Pty) Ltd* 1973 (1) SA 627 (A) at 628G.

138 *S v Bresler* 1967 (2) SA 451 (A) and the authorities referred to therein; *Transvaal Industrial Foods Ltd v BMM Process (Pty) Ltd* 1973 (1) SA 627 (A) at 629B–D; *Brian Kahn Inc v Samsudin* 2012 (3) SA 310 (GSJ).

139 *R v Cooper* 1926 AD 54; and see *S v Bresler* 1967 (2) SA 451 (A) and the authorities referred to therein; *Transvaal Industrial Foods Ltd v BMM Process (Pty) Ltd* 1973 (1) SA 627 (A) at 629B–D.

140 *Ablansky v Bulman* 1915 TPD 71.

141 *R v Mahambahla* 1924 EDL 2.

142 *Ablansky v Bulman* 1915 TPD 71. Early Natal practice varied in this regard. The right to reply was allowed, both as to law and facts, in *In re Thompson & Williams* (1909) 30 NLR 120, and, on review, in *Horsley v Owen & Collier* (1885) 6 NLR 27, but refused as to the facts in *Hall v Hodgson* (1892) 13 NLR 212 and *Master and Owners SS 'Hilcrag' v Beckett* (1902) 23 NLR 450.

143 *Intramed (Pty) Ltd v Standard Bank of South Africa Ltd* 2004 (6) SA 252 (W) at 256G. See also *Burchell v Anglin* 2010 (3) SA 48 (ECG) at 58G–59B.

144 1978 (3) SA 333 (W) at 336H, followed and applied in *Raditsela v Senior Magistrate, Johannesburg* 1986 (4) SA 559 (W).

145 *Merchandise Exchange (Pty) Ltd v Eagle Star Insurance Co Ltd* 1962 (3) SA 113 (C) at 114H–115A; *Mobil Oil Southern Africa (Pty) Ltd v Mechin* 1965 (2) SA 706 (A) at 710H; *Merryweather v Scholtz* 2020 (3) SA 230 (WCC) at paragraph [1]. See also the remarks of Kotze AJ in *Bester v Calitz* 1982 (3) SA 864 (O) at 872E–H.
In actions for damages for delict affecting a plaintiff's personality and bodily integrity, the defendant should ordinarily bear the onus of proving the excuse or justification, such as self-defence, raised in his plea (*Mabaso v Felix* 1981 (3) SA 865 (A) at 875A–H; *Merryweather v Scholtz* 2020 (3) SA 230 (WCC) at paragraphs [4]–[14]) and should, accordingly, bear the duty to begin (*Merryweather v Scholtz* 2020 (3) SA 230 (WCC) at paragraphs [12]–[15]).

146 *Nelson Mandela Bay Metropolitan Municipality v Coutsourides* NO (unreported, ECPE case no 3472/2012 dated 4 May 2021).

147 Cf *Meeth v Hoppan & Co* 1951 (2) SA 581 (T).

148 *S v Maxaku, S v Williams* 1973 (4) SA 248 (C) at 257E; *S v K* 1974 (3) SA 857 (C) at 858H.

149 *S v Mpopo* 1978 (2) SA 424 (A) at 429A. See also *S v Booi* 1972 (4) SA 68 (NC); *S v Brandt* 1972 (4) SA 70 (NC); *S v Ntlahla* 1977 (3) SA 109 (TSC).

150 *Arthur v Bezuidenhout and Mieny* 1962 (2) SA 566 (A) at 571E.

151 *Germani v Herf* 1975 (4) SA 887 (A) at 898E; *Mahomed v Shaik* 1978 (4) SA 523 (N) at 527F.

152 *Omega Africa Plastics (Pty) Ltd v Swisstool Manufacturing Co (Pty) Ltd* 1978 (4) SA 675 (A) at 682E–683D.

153 *R v Sewpaul* 1949 (4) SA 978 (N) at 980; *R v Robertson* 1958 (1) SA 676 (A) at 679.

154 *Goldstuck v Mappin & Webb Ltd* 1927 TPD 723; *Newell v Cronje* 1985 (4) SA 692 (E) at 697B.

155 *East London Municipality v Van Zyl* 1959 (2) SA 514 (E) at 517B.

156 *R v Sewpaul* 1949 (4) SA 978 (N) at 680; *R v Robertson* 1958 (1) SA 676 (A) at 697.

157 *East London Municipality v Van Zyl* 1959 (2) SA 514 (E) at 517B.

158 *Goldstuck v Mappin & Webb Ltd* 1927 TPD 723.

159 *Hansen v R* (1924) 45 NLR 318; *Norwitz v The Magistrate of Fauresmith* 1928 OPD 109.

160 *R v Magadia* 1924 EDL 21; *Akoon v R* (1926) 47 NLR 306; *R v Mouton* 1934 TPD 101; it is, however, a course of conduct which cannot be encouraged (see *R v Steenkamp* 1947 (1) SA 714 (SWA)).

161 *Thubela v Pretorius NO* 1961 (4) SA 506 (T).

162 *H A Millard & Son (Pty) Ltd v Enzenhofer* 1968 (1) SA 330 (T) at 334C; *Newell v Cronje* 1985 (4) SA 692 (E) at 697C.

163 *H A Millard & Son (Pty) Ltd v Enzenhofer* 1968 (1) SA 330 (T) at 334C.

164 *Kruger v Ludick* 1947 (3) SA 23 (A) at 31; *R v Holland* 1950 (3) SA 37 (C); *H A Millard & Son (Pty) Ltd v Enzenhofer* 1968 (1) SA 330 (T) at 334C; *Newell v Cronje* 1985 (4) SA 692 (E) at 697C–E.

165 *R v Van der Merwe* 1950 (4) SA 17 (O).

166 *R v Steenkamp* 1947 (1) SA 714 (SWA) at 717; and see *Newell v Cronje* 1985 (4) SA 692 (E) at 697E.

167 *R v Trotsky* 1947 (1) SA 612 (SWA) at 614; *R v Smith* 1949 (4) SA 782 (O); *R v Du Plessis* 1950 (1) SA 297 (T); *S v Barnardo* 1960 (3) SA 552 (A); *Newell v Cronje* 1985 (4) SA 692 (E) at 698.

168 *Arthur v Bezuidenhout and Mieny* 1962 (2) SA 566 (A) at 571E.

169 Cf *Rail Commuters' Action Group v Transnet Ltd* 2006 (6) SA 68 (C) at 88B.

170 Cf *Uramin (Incorporated in British Colombia) t/a Areva Resources Southern Africa v Perie* 2017 (1) SA 236 (GJ) at 241A–B.

171 *Kantor v James Bell & Co* (1906) 27 NLR 363 at 366; and see the notes to s 32 of the Act s v 'General' in Volume 1 third edition, Part D.

172 Under GN 1603 of 17 December 2022 (*GG* 45645).

173 Proclamation Notice R 75 of 2022 dated 4 August 2022.

174 *Rennies Travel (Pty) Ltd v Commissioner, South African Revenue Services* 2022 (6) SA 349 (SCA) at paragraph [5].

175 2017 (1) SA 236 (GJ), a case decided before the introduction of rule 38(9). See also *M K v Transnet Ltd t/a Portnet* [2018] 4 All SA 251 (KZD); and see *Hills v Hills (II)* 1933 NPD 293 at 294–5; I Knoetze 'Virtual evidence in courts — a concept to be considered in South Africa' 2017 (October) *De Rebus* 30–1; N Whitear-Nel 'Video-link testimony in civil courts in South Africa: *K v Transnet Ltd t/a Portnet* (KZD)' (2019) 136.2 *SALJ* 245; Y T Mbatha 'To video link or not to video link? Safeguarding vulnerable persons' right of access to courts in civil matters' (2022) *Journal of the South African Chapter of the International Association of the Women Judges* 69.
In *Union-Swiss (Pty) Ltd v Govender* 2021 (1) SA 578 (KZD) the plaintiff applied for an order that the trial set down for a period of 10 days be conducted remotely via the electronic platform of Microsoft Teams in the light of the prevailing Covid-19 lockdown. The plaintiff proposed that the following measures be introduced during the trial (at paragraph [10]):
'23.1 When not speaking all participants will be required to mute their devices (so as to prohibit background noise);
23.2 When a participant is introduced or wishes to interrupt a speaker, he/she shall raise his/her hand;
23.3 Headsets should not be allowed;
23.4 The presiding Judge, the witness giving evidence and lead counsel for both parties shall remain visible on video at all times;
23.5 Each witness, at the outset of their testimony, will be asked to identify anyone who is in the room with them and to give a display on their device of the room from where they are testifying to verify that fact;
23.6 During their testimony, witnesses must not communicate with anyone other than the examiner and the Judge and must not refer to documents other than those in the agreed trial bundle without the Judge's knowledge and permission;
23.7 Each witness shall give his/her evidence sitting at an empty desk or table and the witness's face shall be clearly visible throughout the hearing;
23.8 Each witness shall at all times during his/her testimony and as far as possible: (i) maintain eye contact with the camera of the relevant device that the witness is using and (ii) maintain a reasonable distance from the camera to ensure that the witness's head and upper body are visible.'
The first defendant opposed the plaintiff's application on the basis, amongst other things, that he had the right to challenge the plaintiff's evidence and witnesses in an open court and to present his evidence in the same forum, that there were issues of internet connectivity and the difficulty in assessing a witness's demeanour on a video screen. The court was not much swayed by these objections. The critical issue which the plaintiff, however, could not get past was to demonstrate why its trial, and the outcome thereof, was of such urgency that the practice directive of the Judge President of 1 May 2020 should have recognized it as sufficiently urgent to warrant it forging ahead, albeit by electronic means. The court did not suggest that it was inconceivable for civil trials to take place in the midst of the pandemic. It held that it was entirely dependent on the nature of the action and the potential prejudice that would be suffered if the matter had to wait for the

allocation of a new date, several months or years ahead. Urgency would be the determining factor in all cases (at paragraphs [11]–[32]). The plaintiff's application was accordingly dismissed (at paragraph [34]).

176 At 237D–244H (footnotes included).

177 Uniform Rule 38(2).

178 Section 173 of the Constitution conjoins the inherent power of the courts to protect and regulate their own process with the power to develop the common law, taking into account the interests of justice. Rule 39(20) provides that a court is endowed with a discretion to vary any of its procedures.

179 See *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 783A.

180 Uniform Rule 38(2).

181 Section 158 of the Criminal Procedure Act.

182 Uniform Rule 39(16).

183 Uniform Rule 38(3)–(8).

184 See *Kidd v Van Heeren* (GJ 27973/1998), an unreported judgment of 3 September 2013.

185 See *S v Ndhlovu and Others* 2002 (2) SACR 325 (SCA) at 340; *S v Van der Sandt* 1997 (2) SACR 116 (W) at 132.

186 See *S v McLaggan* [2012] ZAECGHC 76; *S v Staggie and Another* 2003 (1) SACR 232 (C) (2003 (1) BCLR 43); *S v Grandhomme and Another* (WCC 18/1997); *Kidd v Van Heeren* above n10.

187 *Twine v Naidoo* [2018] 1 All SA 297 (GJ) at paragraph [32].

188 Cf *De Sousa v Technology Corporate Management (Pty) Ltd* 2017 (5) SA 577 (GJ) at 608I–610E, 652J–654B and 655C–655J.

189 *Veto v Ibhayi City Council* 1990 (4) SA 93 (SE) at 96A.

190 1990 (4) SA 93 (SE) at 95G–96D.

191 2010 (3) SA 211 (W) at 219E–H.

192 2012 (2) SA 623 (WCC) at 630E–F.

193 At 630, n 13.

194 2019 (1) SA 594 (GP).

195 At 617G–H.

196 At 621E.

197 2021 (6) SA 403 (SCA) (dated 25 June 2021). See also *TMT Services & Supplies (Pty) Ltd t/a Traffic Management Technologies v MEC: Department of Transport, Province of KwaZulu-Natal* (unreported, SCA case no 1059/2020 dated 15 March 2022) at paragraphs [29]–[35] and [37].

198 2023 (3) SA 36 (CC).

199 Unreported, GJ case no 45456/17 dated 16 April 2020.

200 At paragraph [27].

201 *Briel v Van Zyl* 1985 (4) SA 163 (T) at 167H.

202 *Veto v Ibhayi City Council* 1990 (4) SA 93 (SE) at 95H.

203 *Franco Vignazia Enterprises (Pty) Ltd v Berry* 1983 (2) SA 290 (C) at 296G.

204 *Van der Schyff v Gemeenskapontwikkelingsraad* 1984 (2) SA 497 (W) at 499F. In this case the plaintiff was ordered to pay to the defendant the costs of two days wasted by excessive cross-examination. See also *Africa Solar (Pty) Ltd v Divwatt (Pty) Ltd* 2002 (4) SA 681 (SCA) at 699A–E and *De Sousa v Technology Corporate Management (Pty) Ltd* 2017 (5) SA 577 (GJ) at 608I–610E, 652J–654B and 655C–655J.

205 Cf *De Sousa v Technology Corporate Management (Pty) Ltd* 2017 (5) SA 577 (GJ) at 608I–610E, 652J–654B and 655C–655J.