

40 Legal assistance to indigent persons

RS 22, 2023, D1 Rule 40-1

[Heading substituted by GN R2133 of 3 June 2022.]

(1)(a) A natural person who desires to bring or defend proceedings, as an indigent litigant and who does not qualify for legal aid, or who requires to continue as an indigent litigant in an action or defended action already instituted, may apply to the registrar who, if it appears to him or her that such person is as contemplated by paragraph (a) of subrule (2), shall refer such person to an attorney and an advocate.

(aA) Where a person applies to continue as an indigent litigant in an action or defence already instituted, such person may do so by proceeding in terms of the provisions of this rule but in addition, shall —

- (i) set out the alteration in his or her circumstances which renders it necessary to continue the action or defence as an indigent litigant; and
- (ii) give notice of the application to the opposite party.

(aB) In the event of the opposite party objecting to the granting of the application, the applicant must apply formally to the court after giving proper notice to the opposite party.

(b) The attorney referred to in paragraph (a) of subrule (1) shall inquire into such person's means and the merits of his or her cause and upon being satisfied that the matter is one in which such attorney may properly act in assisting the indigent litigant, such attorney shall request the registrar to nominate an advocate who is willing and able to act, and upon being so nominated such advocate shall act therein.

(c) Should such attorney or advocate thereafter become unable so to act, the registrar may, upon request, nominate another practitioner to act in such attorney's or advocate's stead.

[Subrule (1) substituted by GN R2133 of 3 June 2022.]

(2) If such proceedings are instituted the following must be lodged with the registrar on behalf of such person —

- (a) an affidavit setting forth fully his or her financial position and stating that except for household goods, wearing apparel and tools of trade, such person is not possessed of property to the amount of R640 000 and will not be able within a reasonable time to provide such sum from such person's earnings;

[Paragraph (a) substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987 and amended by GN R109 of 22 January 1993.]

- (b) a statement signed by the advocate and attorney aforementioned that being satisfied that the person concerned is unable to pay fees they are acting for the said person in their respective professional capacities gratuitously in the proceedings to be instituted or defended by such person; and

- (c) a certificate of *probabilis causa* by the said advocate, the registrar shall issue all process and accept all documents in the said proceedings for the aforesaid person without fee of office.

[Subrule (2) substituted by GN R2133 of 3 June 2022.]

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(3) All pleadings, process and documents filed of record by a party proceeding as an indigent litigant shall be headed accordingly.

[Subrule (3) substituted by GN R2133 of 3 June 2022.]

(4) The registrar shall maintain in his or her office a roster of attorneys and advocates, and in referring persons desirous of bringing or defending proceedings as indigent litigants to practitioners in terms of subrule (1), the registrar shall do so as far as possible in rotation.

[Subrule (4) substituted by GN R2133 of 3 June 2022.]

(5) The said advocate and attorney shall thereafter act gratuitously for the said person in their respective capacities in the said proceedings, and shall not be at liberty to withdraw, settle or compromise such proceedings, or to discontinue their assistance, without the leave of a judge, who may in the latter event give directions as to the appointment of substitutes.

(6) When a person sues or defends as an indigent litigant under process issued in terms of this rule, such person's opponent shall, in addition to any other right such person's opponent might have, have the right at any time to apply to the court on notice for an order dismissing the claim or defence or for an order debarring such person from continuing as an indigent litigant; and upon the hearing of such application the court may make such order thereon, including any order as to costs, as it deems fit.

[Subrule (6) substituted by GN R2133 of 3 June 2022.]

(7) If upon the conclusion of the proceedings an indigent litigant is awarded costs, such litigant's attorney may include in the bill of costs such fees and disbursements which [sic] such attorney would ordinarily have been entitled, and upon receipt thereof, in whole or in part, such attorney shall pay out in the following order of preference: first, to the sheriff, charges for the service and execution of process; second, to such attorney and the advocate, their fees as allowed on taxation, *pro rata* if necessary.

[Subrule (7) amended by GN R2410 of 30 September 1991 and substituted by GN R2133 of 3 June 2022.]

Commentary

General. Rule 40 makes provision for the following distinct procedures involving an indigent natural person:

- (a) an application (i e a request) to the registrar for leave to bring or defend proceedings as an indigent litigant by a person who does not qualify for legal aid;
- (b) an application (i e a request) to the registrar by an indigent litigant for leave to continue as an indigent litigant in an action already instituted or in a defended action;
- (c) a formal application to the High Court by an indigent litigant for leave to continue as an indigent litigant in an action already instituted or in a defended action where the opposite party has raised an objection to the request for leave made to the registrar.

Rule 40 does not make provision for a revision by the High Court of a ruling made by the registrar by any party dissatisfied by such ruling.

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Subrule (1)(a): 'A natural person.' Primarily 'person' does not include an executor ¹ unless the executor is also a beneficiary and both the estate and the executor are without means. ² An alien or a *peregrinus* may apply ³ provided he is within the jurisdiction. ⁴ The fact that a *peregrinus* plaintiff is proceeding *in forma pauperis* does not prevent him from being ordered to furnish security under rule 47. ⁵ If a minor applies he must be assisted by his guardian. ⁶

'Who does not qualify for legal aid.' The subrule does not refer to a person who does not qualify for legal aid rendered by a statutorily established legal aid board, as does rule 47A. 'Legal aid' in the context of the subrule therefore seems to include legal aid rendered by, for example, the law clinic of a university.

Subrules (1)(a), (aA) and (aB): General. Under these subrules a litigant may apply to the registrar for leave to continue as an indigent litigant in an action already instituted. He may do so by proceeding in terms of the provisions of this rule but should, in addition, set out the alteration in his circumstances which renders it necessary for him to continue the action or defence as an indigent litigant, and he must give notice of his application to the opposite party. In the event of the opposite party intimating that he objects to the grant of the application, the applicant must apply formally to the court for such leave after giving proper notice to the other side. ⁷ It is submitted that the 'application' to the registrar would suffice if it is made in the form of a request.

Subrule (1)(b): 'The attorney . . . shall inquire.' The attorney to whom the matter has been referred for investigation under subrule (1)(a) is not necessarily obliged to go into all the evidence of both parties. He must satisfy himself from the *ex parte* statement of the person seeking leave to litigate as an indigent person, with such confirmatory evidence as the latter can conveniently produce and with such evidence as the opposite party may voluntarily put before him, that the such person has *prima facie* a good cause for the action or for the defence. ⁸

'Into such person's means.' The test is that set out in subrule (2)(a), i e whether or not such person is, except for household goods, wearing apparel and tools of trade, possessed of property to the amount of R640 000 or will be able within a reasonable time to provide such sum from his earnings. What is relevant, therefore, is not only the actual possession of cash, but also the means of obtaining it.⁹ The word 'means' covers all cash or assets to which the applicant is entitled and includes, for example, a vested right to instalments paid by the applicant under a contract of sale.¹⁰ A contingent asset need not be considered.¹¹

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The question of means where the applicant is a minor has been the subject of conflicting decisions. In *Lentzner v Friedman*,¹² where the father was possessed of some small means but the minor was a pauper, leave was refused. In other cases where the minor was a pauper but his father had some small means, leave was granted.¹³ The general rule appears to be that leave will be granted to the minor to sue as an indigent litigant if his guardian has only limited means but not if his father is well-to-do.¹⁴ The financial position of the guardian is thus a factor to consider, but is not the governing factor.¹⁵ Every case must be decided on its own facts and circumstances.

'And the merits of his or her cause.' It is not part of the attorney's function at this stage to investigate the opposite party's case or to consider where the balance of probabilities lies; he must satisfy himself from the *ex parte* statement of the applicant with such confirmatory evidence as the latter can conveniently produce and with such evidence as the opposite party may voluntarily put before him that the applicant has *prima facie* a good cause for the action or for the defence.¹⁶

'Request the registrar to nominate an advocate.' In *Hackert v Hackert*¹⁷ the court authorized, in terms of its inherent jurisdiction, an advocate practising in another division to act *in forma pauperis* on behalf of a defendant who was subject to an order of committal in that other province.

Subrule (2)(a): 'Except for household goods.' This will not include luxury items: it was held in *Ex parte Battiss*¹⁸ that a radiogram did not fall within the ambit of the phrase.

'And tools of trade.' The intention underlying the subrule is that persons who earn a living by working with tools and who without such tools are not able to carry on their trade should not be obliged in order to institute or defend proceedings to dispose of their only means of support.¹⁹

'Provide such sum from such person's earnings.' Leave to sue as an indigent litigant will not be granted to a person who is able to earn good wages.²⁰ One case has recognized a presumption that a well-educated, healthy male adult can earn money.²¹ The mere fact that an applicant is in receipt of a salary does not necessarily debar him from relief; all the circumstances of the case must be taken into consideration.²² Leave will not be given where the applicant

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is earning sufficient to enable him to save enough to proceed in the ordinary way;²³ though regard must be had to his living and other expenses.²⁴

Subrule (2)(c): 'A certificate of *probabilis causa*.' The object of the certificate is, on the one hand, to prevent a denial of justice to a pauper; and, on the other, to secure defendants from being improperly harassed by groundless suits in which they cannot recover their costs.²⁵ Counsel should take into consideration all the facts which come to his knowledge, whether he is made aware of them by the applicant or by the proposed defendant, but he is not obliged to approach the defendant if the information is not volunteered to him.²⁶

The court will generally attach great importance to counsel's certificate but is not bound by it.²⁷

Subrule (5): 'Shall thereafter act gratuitously.' The advocate and attorney are obliged in terms of this subrule to render their professional services free of charge. The pauper litigant is obliged, however, to provide cover for the disbursements made by the attorney on his behalf.²⁸ The advocate and attorney are obliged to act gratuitously until released: an attorney who has not been released is not entitled, without a directive from the court to that effect, to demand fees from his pauper client.²⁹

'Withdraw, settle or compromise such proceedings.' In *Nkosi v Caledonian Insurance Co*³⁰ the court laid down the procedure to be followed when, in an action in which the plaintiff has been given leave to sue *in forma pauperis*, a settlement is sought to be approved. A report by the attorney incorporating the terms of the settlement and stating briefly the reasons why the settlement is recommended should be submitted to the judge. Information should also be furnished regarding the attitude of the client to the settlement and if it cannot be shown that he understands the terms of the settlement and agrees to them arrangements should be made for him to be given an opportunity to explain his attitude personally to the judge when the application is made.³¹

Although this subrule requires the leave of a judge before an advocate and an attorney are at liberty to settle *in forma pauperis* proceedings, there is nothing in the rules or the common

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law that deprives an indigent litigant of contractual capacity or the right himself to 'withdraw, settle or compromise' the proceedings.³²

'Judge.' 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.

Subrule (6): 'To apply to the court on notice.' The application under this subrule is an application as envisaged by rule 6(1) read with rule 6(7)(a).³³

'An order dismissing the claim or defence.' This subrule envisages the possibility that, apart from depauperization, the claim or defence may be dismissed; but it is submitted that this would be ordered only if the action is frivolous or an abuse of the process of the court or in cases of gross impropriety or misconduct.

'An order debarring such person from continuing as an indigent litigant.' It is submitted that the onus rests upon the applicant party to show that a party should be depauperized. The court will have to be satisfied on a balance of probabilities that the party who is proceeding as an indigent litigant has no reasonable prospect of success in the action, or that other good grounds exist for depauperizing him. Such grounds would include the following: that the most that the plaintiff is likely to recover is within the jurisdiction of the magistrate's court;³⁴ that the court sued in has no jurisdiction;³⁵ that the pauper has misrepresented his financial position to the registrar; or that the pauper has been guilty of some other improper or unfitting conduct.³⁶ Leave to sue or defend as an indigent litigant is an indulgence; and this privilege may be withdrawn in suitable cases.

'Make such order . . . as it deems fit.' Other orders which the court may make would include, for example, an order that the action or defence be not proceeded with until costs already incurred have been paid.

'Including any order as to costs.' The court may make an order as to the payment of the costs of the application against the party who was proceeding as an indigent litigant. ³⁷

Subrule (7): 'Is awarded costs.' There must be an order for costs in favour of the pauper before his attorney can claim to be paid his costs. ³⁸ This subrule clearly provides that only upon receipt of the awarded costs, the attorney shall pay out the amount received in the order of preference stipulated in the subrule.

A cession by a successful pauper of the benefit of the judgment to his attorney, subject to an undertaking to account for the balance, is not in itself invalid or reprehensible. ³⁹

'Such fees and disbursements which such attorney would ordinarily have been entitled.' It has been held that the advocate and attorney acting for a pauper may not receive from the opposing party more than the fees allowed by the taxing master on taxation. ⁴⁰

¹ *Gartrell NO v Southern Life Association* 1909 TH 86; *Budaza's Executor v Budaza* 1912 EDL 149; *Filmer NO v African Guarantee & Indemnity Co Ltd* 1916 WLD 7; *Bikitsha v Bikitsha* [1917 AD 546](#); *Uys' Executor v Van der Spuy* 1938 CPD 118.

² *Samuels NO v African Homes Trust Ltd* 1914 CPD 626, approved in *Bikitsha v Bikitsha* [1917 AD 546](#); *Ex parte Nieuwenhuizen* [1950 \(3\) SA 125 \(SWA\)](#).

³ *Gendre & Cavallera v Pagel* 1914 WLD 108; *Neal v Neal* [1959 \(1\) SA 828 \(N\)](#); *Fourie v Ratefo* [1972 \(1\) SA 252 \(O\)](#).

⁴ *Ex parte Kutteneuler* 1911 CPD 8; *Becker v Eastern Province Guardian Co* 1923 EDL 502; *Slocock v Plenderleith* 1927 CPD 338; *Ex parte Du Preez* [1964 \(2\) SA 227 \(SR\)](#).

⁵ *Fourie v Ratefo* [1972 \(1\) SA 252 \(O\)](#).

⁶ *Myburgh v J & A Jorgenson* 1914 EDL 89; *Wright v Stuttaford & Co* 1929 EDL 10; *McLoughlin v Royal Hotel Co* 1931 EDL 339.

⁷ The provisions of subrules (1)(a), (aA) and (aB) render obsolete the decisions in *Commercial Union Assurance Co of SA Ltd v Van Zyl* [1971 \(1\) SA 100 \(E\)](#); *Protea Assurance Co Ltd v Gamlase* [1971 \(1\) SA 460 \(E\)](#).

⁸ *Ormond v Jordan* (1884) 4 EDC 260; *Nkosi v Caledonian Insurance Co* [1961 \(4\) SA 649 \(N\)](#).

⁹ *Behrens v Berg* (1877) 7 Buch 138.

¹⁰ *Ex parte Theron* 1946 CPD 770. See also *Theron v Gayba* 1920 CPD 292.

¹¹ *Meyer v African Homes Trust Ltd* 1921 OPD 197; *Morley v Wicks* 1924 (2) PH F8 CPD.

¹² 1919 OPD 6, followed in *Grobler v Potgieter* [1954 \(2\) SA 188 \(O\)](#). However, in *Lentzner's* case the father asked for leave to appeal against an order refusing to award him damages in his own name for the pain and suffering endured by the minor. It does not follow that had the application been for leave to institute action, leave would have been refused (see *Hodgkinson v King* 1933 EDL 219 at 221).

¹³ *Meyer v Mohammed* 1930 CPD 301; *Weston v Daddy Bros & Johnstone (Pty) Ltd* 1930 NPD 133; *Hodgkinson v King* 1933 EDL 219; *Bezuidenhout v Northern Assurance Co Ltd* [1948 \(3\) SA 629 \(E\)](#).

¹⁴ *Meyer v Mohammed* 1930 CPD 301.

¹⁵ *Weston v Daddy Bros & Johnstone (Pty) Ltd* 1930 NPD 133, followed in *Hodgkinson v King* 1933 EDL 219 but differed from in *Grobler v Potgieter* [1954 \(2\) SA 188 \(O\)](#) at 191-2.

¹⁶ *Nkosi v Caledonian Insurance Co* [1961 \(4\) SA 649 \(N\)](#) at 653. See also *Ormond v Jordan* (1884) 4 EDC 260; *Hendricks v The Cape Tramways Co Ltd* (1905) 22 SC 548; *Du Plessis v Lamb* 1906 TH 165; *Saunders v The Cape Tramways Co Ltd* (1906) 23 SC 35; *Hendricks v Verster* 1912 CPD 435; *Williams v Nel* 1939 WLD 188; *Finchell v Finchell* 1936 NPD 630; *Plotz v African Guarantee & Indemnity Co Ltd* [1947 \(4\) SA 327 \(E\)](#).

¹⁷ [1985 \(1\) SA 717 \(C\)](#).

¹⁸ [1961 \(2\) SA 288 \(SR\)](#).

¹⁹ *Ex parte Magwaga* [1959 \(3\) SA 472 \(SR\)](#).

²⁰ *In re Ismail Mahomed Jassat* (1896) 17 NLR 99; *Epstein v Epstein* (1902) 19 SC 183; *Spring v Coetze's Executor* 1905 TS 347; *Coetze & Coetze v De Bruyn* 1916 OPD 71; *Obell v Zwarenstein* 1925 WLD 234.

²¹ *Honey v Cryer* 1910-17 GWL 112.

²² *Crowley v Crowley & Geater* 1919 TPD 426. Examples of cases in which other circumstances were taken into consideration, include *David v Abdul Rajieb* 1877 Buch 81; *Leathern v Surtees* 1879 Kotzé 100; *Potterill v Potterill* (1884) 5 NLR 250; *La Combre v Hutchins* (1892) 9 SC 155; *Wroth v Harmer* 1907 EDC 118; *In re Naga* (1907) 28 NLR 492; *Brink v Moodley* (1908) 18 CTR 331; *Campbell v Macintosh, Findlay & Co* 1910 TPD 260; *Fedder v McCreadie* 1914 WLD 128; *Foxon v Foxon* [1914 AD 176](#); *Honey v Cryer* 1910-17 GWL 112; *Mazwe v Presbyterian Church, Africa* 1923 EDL 141; *Poppendiek v Union Bag Co* 1923 EDL 88; *O'Connor v SAR & H* 1931 (1) PH F50 (C); *Ex parte Nieuwenhuizen* [1950 \(3\) SA 125 \(SWA\)](#).

²³ *Schneegans v Schneegans* 1876 Buch 9; *Ex parte Milne* (1907) 17 CTR 886; *Flack v Hatch* 1907 EDC 107; *Gillingham v Fehrsen* 1909 TS 671; *Hay v Nel's Executors* 1910 EDL 360; *Jensen v Lamprecht* 1912 OPD 1; *Van der Byl v Schierhout* 1914 CPD 664; *Steenkamp v Jackson* 1916 EDL 16.

²⁴ *Otterstrom v Estate Stephan* (1907) 17 CTR 287; *Fernando v Fernando* (1908) 18 CTR 298; *Warner v Wright* (1908) 18 CTR 641; *Ex parte Dahl* (1909) 19 CTR 447; *Crowley v Crowley & Geater* 1919 TPD 426; *Liesching v SA Railways & Harbours* 1920 OPD 31.

²⁵ *Ormond v Jordan* (1884) 4 EDC 260 at 265.

²⁶ *Ormond v Jordan* (1884) 4 EDC 260 at 265. See also *Hendricks v The Cape Tramways Co Ltd* (1905) 22 SC 548; *Du Plessis v Lamb* 1906 TH 165; *Saunders v The Cape Tramways Co Ltd* (1906) 23 SC 35; *Hendricks v Verster* 1912 CPD 435; *Williams v Nel* 1939 WLD 188; *Finchell v Finchell* 1936 NPD 630; *Plotz v African Guarantee & Indemnity Co Ltd* [1947 \(4\) SA 327 \(E\)](#); *Nkosi v Caledonian Insurance Co* [1961 \(4\) SA 649 \(N\)](#) at 653.

²⁷ *Ormond v Jordan* (1884) 4 EDC 260 at 265; *Van Zyl v Commercial Union Assurance Co of SA Ltd* [1971 \(3\) SA 480 \(E\)](#) at 481A.

²⁸ See *Cumberlege v Cumberlege* [1972 \(2\) SA 346 \(E\)](#).

²⁹ *Machenheimer v Machenheimer* [1991 \(4\) SA 387 \(C\)](#) at 395B.

³⁰ [1961 \(4\) SA 649 \(N\)](#) at 660G-H.

³¹ As a general rule the court will disallow as part of the settlement a provision for the payment of attorney and client costs (*Mtembu v Eagle Star Insurance Co* [1960 \(2\) SA 50 \(E\)](#), and *Somaci v SA Fire Insurance and Accident Co Ltd* [1960 \(3\) SA 150 \(E\)](#)). See also *Magasela v Santam Insurance Co Ltd* [1962 \(2\) SA 398 \(E\)](#) where the court disallowed the attorney's costs because it disapproved of his conduct.

³² *Machenheimer v Machenheimer* [1991 \(4\) SA 387 \(C\)](#) at 392E-F.

³³ *Da Silva v Pillay NO* [1997 \(3\) SA 760 \(D\)](#) at 770H-J. See also the definition of 'application' in rule 1 above.

³⁴ See *Frances v British & American Boot Co* 1906 TH 85; *Skippers v Bellville Bus Co* 1931 CPD 26.

³⁵ See *Ex parte Kaiser* 1902 TH 165.

³⁶ See *Cumberlege v Cumberlege* [1972 \(2\) SA 346 \(E\)](#).

³⁷ See *Goliath v Keating* (1889) 7 SC 52, followed in *Ex parte Theron* 1946 CPD 770 at 773. See also *Ex parte Brink* 1907 TS 626; *Schultz v Schultz Syndicate Ltd* 1909 TS 270; *Crowley v Crowley & Geater* 1919 TPD 426; *Du Plessis v Marais* 1931 EDL 70; *McLoughlin v Royal Hotel Co* 1931 EDL 339; *Ex parte Hartley* [1964 \(4\) SA 598 \(W\)](#).

³⁸ Where a pauper defendant succeeded on a claim in reconvention but, owing to her conduct, without costs, the High Court held that under its rules it was not entitled to allow her representative any fees out of the amount recovered (*London & SA Exploration Co Ltd v Moodoosoodam* (1885) 3 HCG 305).

³⁹ *Kader v Frank & Warshaw* [1926 AD 344](#).

⁴⁰ *Mtembu v Eagle Star Insurance Co* [1960 \(2\) SA 50 \(E\)](#) at 51H; *Somaci v SA Fire Insurance and Accident Co Ltd* [1960 \(3\) SA 150 \(E\)](#) at 152A.

