

## 41 Withdrawal, settlement, discontinuance, postponement and abandonment

RS 23, 2024, D1 Rule 41-1

(1)(a) A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs; and the taxing master shall tax such costs on the request of the other party.

(b) A consent to pay costs referred to in paragraph (a), shall have the effect of an order of court for such costs.

(c) If no such consent to pay costs is embodied in the notice of withdrawal, the other party may apply to court on notice for an order for costs.

[Subrule (1) substituted by GN R2021 of 5 November 1971.]

(2) Any party in whose favour any decision or judgment has been given, may abandon such decision or judgment either in whole or in part by delivering notice thereof and such judgment or decision abandoned in part shall have effect subject to such abandonment. The provisions of subrule (1) relating to costs shall *mutatis mutandis* apply in the case of a notice delivered in terms of this subrule.

[Subrule (2) substituted by GN R2004 of 15 December 1967.]

(3) If in any proceedings a settlement or an agreement to postpone or withdraw is reached, it shall be the duty of the attorney for the plaintiff or applicant immediately to inform the registrar accordingly.

(4) Unless such proceedings have been withdrawn, any party to a settlement which has been reduced to writing and signed by the parties or their legal representatives but which has not been carried out, may apply for judgment in terms thereof on at least five days' notice to all interested parties.

[Subrule (4) substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

### Commentary

**General.** 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). <sup>1</sup>

Rule 41 makes provision for the following distinct procedures:

- (a) withdrawal of proceedings by the person who instituted such proceedings at any time before the matter has been set down with or without costs (subrule (1));
- (b) withdrawal of proceedings by the person who instituted such proceedings at any time after the matter has been set down, by consent of the parties or leave of the court, with or without costs (subrule (1));
- (c) in the event of the withdrawal of proceedings with costs, the taxing of such costs on the request of the other party, the consent to pay the costs having the effect of an order of court (subrule (1)(a) and (b));
- (d) in the event of a withdrawal without costs, the application by the other party, on notice, for an order for costs (subrule (1)(a) and (c));
- (e) the abandonment of a decision or judgment, in whole or in part, by a party in whose favour it has been given (subrule (2));

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- (f) in the event of an abandonment of proceedings with costs, the taxing of such costs on the request of the other party, the consent to pay the costs having the effect of an order of court (subrule (2) read with subrule (1)(a) and (b));
- (g) in the event of an abandonment without costs, the application by the other party, on notice, for an order for costs (subrule (2) read with subrule (1)(c));
- (h) notification of the registrar by the attorney for the plaintiff or applicant if in any proceedings a settlement, an agreement to postpone or an agreement to withdraw is reached by the parties (subrule (3));
- (i) in the event of a settlement which has been reduced to writing and signed by the parties or their legal representatives which has not been carried out, an application by any party for judgment in terms thereof on at least five days' notice to all interested parties (subrule 4)).

The rule applies to proceedings instituted by way of action as well as application.

The principles applicable to an application for the grant of a postponement of an application otherwise than by agreement between the parties are the same as those that apply to trials. <sup>2</sup> The principles are discussed in the *excursus* s v 'Postponement' below.

**Subrule (1)(a): 'A person instituting any proceedings may at any time before the matter has been set down . . . withdraw such proceedings.'** A person who has instituted proceedings is entitled to withdraw such proceedings without the other party's concurrence and without leave of the court at any time before the matter is set down. <sup>3</sup>

In *Roupell v Metal Art (Pty) Ltd* <sup>4</sup> the plaintiff was permitted, a dispute having arisen as to the effect of a settlement that had been entered into, to withdraw his notice of withdrawal and to reinstate the matter on the roll for hearing. It is submitted that this should be permitted only in exceptional circumstances.

The 'proceedings' referred to in this subrule are those envisaged by the rules in which there is a *lis* between parties, one of whom seeks redress or the enforcement of rights against the other. <sup>5</sup> The proceedings under s 276A(3) of the Criminal Procedure Act 51 of 1977 are *sui generis* and not proceedings in which one party seeks relief against the other: the *lis* between the State and the accused has come to an end, the court has given its order and that order is being enforced. These proceedings do not constitute an 'application' as envisaged by the rules <sup>6</sup> and the State is therefore not bound by the subrule in withdrawing a matter instituted under the said Act. <sup>7</sup>

**'And thereafter by consent of the parties or leave of the court.'** Once a matter has been set down for hearing, it is not competent for the party who has instituted such proceedings to withdraw them without either the consent of all the parties or the leave of the court. <sup>8</sup> In the absence of such consent or leave, a purported notice of withdrawal will be invalid. <sup>9</sup> The court has a discretion whether or not to grant such leave, and the question of injustice to the other

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parties is germane to the exercise of the court's discretion. <sup>10</sup> It is, however, not ordinarily the function of the court to force a person to proceed with an action against his will or to investigate the reasons for abandoning or wishing to abandon one. <sup>11</sup>

**Subrule (1)(b): 'A consent to pay costs . . . shall have the effect of an order of court for such costs.'** There is no provision in rule 41 that an undertaking in a settlement to pay costs shall have the effect of an order of court. It is clear that in order to execute an undertaking in a settlement to pay costs, a judgment will have to be obtained and the costs will have to be taxed. A taxed bill of costs alone is not enough to levy execution on an undertaking to pay costs. <sup>12</sup> An *allocatur* does not amount to a judgment for purposes of execution. <sup>13</sup> Under this subrule, however, a consent to pay costs on withdrawal of proceedings has the effect of an order of court for such costs. Thus, once the taxing master has taxed such costs on the

request of the other party, the taxed bill of costs can be enforced by means of execution.

The subrule does not stipulate what course a party must follow if he wants costs on a basis other than the one in the consent. It is submitted that in such instance the party aggrieved by the scale/basis on which costs were embodied in the consent would have to approach the court on application for an order of costs on another basis (e.g. attorney and client costs) and that the court, in terms of its inherent jurisdiction, could make an appropriate order. In *Pienaar NO v Silver Lakes Home Owners Association NPC* <sup>14</sup> the court, in dealing with the interpretation of a similar provision in [rule 27\(3\)](#) of the magistrates' courts rules, held that an interpretation of the rule according to its literal meaning was not correct; it had to be interpreted in its context, in a purposive way, to get the true meaning, taking into account the fundamental values in the Constitution. <sup>15</sup> On that approach [rule 27\(3\)](#) of the magistrates' courts rules meant that the other party was not tied down to the amount or scale of costs embodied in the consent but had the right to approach the court for an appropriate order as to costs. <sup>16</sup>

**Subrule (1)(c): 'Apply to court on notice for an order for costs.'** An applicant for an order for costs need only deliver a notice of his intention to ask for an order as to costs — no affidavit is required since the relevant material is already before the court. <sup>17</sup> The respondent is entitled to oppose the application for an order for costs and to place the grounds of his opposition before the court on affidavit, <sup>18</sup> especially if the facts relied upon by the respondent in opposing the application do not appear from the pleadings filed in the main proceedings. <sup>19</sup>

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Where a party brings an urgent application under rule 6(12) with service on the respondent but without notice to the registrar, and subsequently decides not to proceed with the application, the other party is entitled on notice of motion and by affidavit to place before the court the papers of the incomplete proceedings and to apply for an order of costs. <sup>20</sup>

The general principle is that the party withdrawing is liable, as an unsuccessful litigant, to pay the costs of the proceedings. <sup>21</sup> The court, however, retains a discretion to deprive the successful party of his costs. <sup>22</sup> In the exercise of its discretion the court should have due regard to the question whether, objectively viewed, the applicant acted reasonably in launching the main proceedings but was subsequently driven to withdraw it in order to save costs because of facts emerging for the first time from, for instance, the respondent's answering affidavit in the main proceedings or because the relief was no longer necessary or obtainable because of developments taking place after to the launching of the main proceedings. <sup>23</sup> In an appropriate case the court should also have due regard to the constitutional nature of the litigation and the public interest. <sup>24</sup>

**Subrule (2): 'May abandon such decision or judgment.'** The decision or judgment referred to may be either final or interlocutory. <sup>25</sup> This subrule has no bearing in respect of judgments or orders which affect the status of persons. <sup>26</sup> An abandonment in terms of the subrule may even take place during the hearing of an appeal. <sup>27</sup> If a plaintiff in action proceedings erroneously obtains default judgment against a defendant and subsequently abandons the judgment in terms of this subrule, the abandonment does not extinguish the existence of the judgment. The abandonment is merely an election available to the plaintiff to enforce the rights obtained in terms of the judgment or not. The judgment is final in effect and stands until it is varied, rescinded or set aside. <sup>28</sup>

In the absence of a consent by the party abandoning to pay costs, the other party may apply on notice for an order for costs. The party abandoning will normally be held liable for costs up to the time of abandonment <sup>29</sup> but the court retains a discretion. <sup>30</sup>

**Subrule (3): 'The duty of the attorney . . . immediately to inform the registrar.'** The registrar should be informed of a settlement, postponement or withdrawal as soon as possible. If the settlement is reached at a time so close to the calling of the roll that the registrar cannot

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timeously be informed thereof, then, as a matter of courtesy, an explanation can be given in court.

A case cannot be said to have been postponed until the notice of postponement has been delivered to the registrar. <sup>31</sup>

The principles relating to postponements otherwise than by agreement between the parties as contemplated in this subrule are discussed in the *excursus* s v '[Postponement](#)' below.

**Subrule (4): 'Signed by the parties or their legal representatives.'** This subrule in its present form supersedes the judgment in *Siebert & Honey v Van Tonder* <sup>32</sup> in which it was held that the written settlement referred to need not contain the signatures of the parties. <sup>33</sup>

However, the judgment is still applicable in so far as it was held that the settlement in question must be a settlement which intends to bring an end to the suit as a whole. <sup>34</sup>

**'May apply for judgment in terms thereof.'** An application for judgment in terms of this subrule is not an application which is incidental to pending proceedings in the sense contemplated in rule 6(11); the application can be brought under rule 6(1). <sup>35</sup>

Once judgment has been applied for on at least five days' notice to all interested parties, a writ of execution may be issued. <sup>36</sup>

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## Postponement

The legal principles applicable to an application for the grant of a postponement by the court are as follows: <sup>37</sup>

- (a) The court has a discretion as to whether an application for a postponement should be granted or refused. <sup>38</sup> Thus, the court has a discretion to refuse a postponement even when wasted costs are tendered <sup>39</sup> or even when the parties have agreed to postpone the matter. <sup>40</sup>
- (b) That discretion must be exercised in a judicial manner. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons. <sup>41</sup> If it appears that a court has not exercised its discretion judicially, or that it has been influenced by wrong principles or a misdirection on the facts, or that it has reached a decision which could not reasonably have been made by a court properly directing itself to all the relevant facts and principles, its decision granting or refusing a postponement may be set aside on appeal. <sup>42</sup>

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- (c) An applicant for a postponement seeks an indulgence. <sup>43</sup> The applicant must show good and strong reasons, <sup>44</sup> i.e. the applicant must furnish a full and satisfactory explanation of the circumstances that give rise to the application. <sup>45</sup> A court should be slow to refuse a postponement where the true reason for a party's non-preparedness has been fully

explained, where his unreadiness to proceed is not due to delaying tactics, and where justice demands that he should have further time for the purpose of presenting his case. [46](#)

- (d) An application for a postponement must be made timeously, as soon as the circumstances which might justify such an application become known to the applicant. [47](#) If, however, fundamental fairness and justice justify a postponement, the court may in an appropriate case allow such an application for postponement even if the application was not so timeously made. [48](#)
- (e) An application for postponement must always be bona fide and not used simply as a tactical manoeuvre for the purpose of obtaining an advantage to which the applicant is not legitimately entitled. [49](#)

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- (f) Considerations of prejudice will ordinarily constitute the dominant component of the total structure in terms of which the discretion of the court will be exercised; the court has to consider whether any prejudice caused by a postponement can fairly be compensated by an appropriate order of costs or any other ancillary mechanism. [50](#)
- (g) The balance of convenience or inconvenience to both parties should be considered: [51](#) the court should weigh the prejudice which will be caused to the respondent in such an application if the postponement is granted against the prejudice which will be caused to the applicant if it is not. [52](#)
- (h) In *Lekolwane v Minister of Justice and Constitutional Development* [53](#) the court added the following factors to be considered in granting a postponement: (i) the broader public interest; and (ii) the prospects of success on the merits.
- (i) In *Shilubana v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as Amici Curiae)* [54](#) the court held that the following factors could non-exhaustively be added to the above: (i) the reason for the lateness of the application for postponement if not timeously made; (ii) the conduct of counsel; (iii) the costs involved in the postponement; (iv) the potential prejudice to other interested parties; (v) the consequences of not granting a postponement; and (vi) the scope of the issues that must ultimately be decided.
- (j) In *National Police Service Union and Others v Minister of Safety and Security* [55](#) it was stated:  
'Ordinarily . . . if an application for a postponement is to be made on the day of the hearing of a case, the legal representatives . . . must appear and be ready to assist the Court both in regard to the application for the postponement itself and, if the application is refused, the consequences that would follow.'

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- (k) One of the oldest tricks in the book is the practice of some legal practitioners, whenever the shoe pinches, to withdraw from the case (and more often than not to reappear at a later stage), or of clients to terminate the mandate (more often than not at the suggestion of the practitioner), to force the court to grant a postponement because the party is then unrepresented. Judicial officers have a duty to the court system, their colleagues, the public and the parties to ensure that this abuse is curbed by, in suitable cases, refusing a postponement. Mere withdrawal by a practitioner or the mere termination of a mandate does not, contrary to popular belief, entitle a party to a postponement as of right. [56](#)

If the *plaintiff* is the applicant for postponement, he must adduce good and strong reasons for his request, as he is *dominus litis* and as a judgment of absolution is possible. [57](#) From *Greyvenstein v Neethling* [58](#) the following rules appear: (i) when application is made for postponement, it must be made timeously; (ii) a postponement will not be granted to a plaintiff in circumstances where the postponement is occasioned by a happening or circumstance which the plaintiff, at the time of set-down, could have or should have foreseen; and (iii) the court should not grant a postponement to the plaintiff where the defendant will suffer prejudice thereby which cannot be met by an order as to costs entrenched by such safeguards as to payment and the further hearing of the matter as the circumstances may warrant.

If the *defendant* is the applicant for postponement, he also must make out a strong case in support of his application. Thus, where he applies for an adjournment to obtain further evidence he must show (i) that the evidence he desires to make available is relevant and material to an issue in the case, (ii) that there is such evidence to be had, and (iii) that it is through no fault of his that the evidence is not available at the moment. If he can establish this, he is entitled to claim that the discretion of the court be exercised in his favour. [59](#) The following cases illustrate the reasons which the courts have held to be adequate or otherwise for granting or refusing postponements:

- (i) **Illness.** This will usually be regarded as an adequate ground for postponement where it is a material witness or a party who is ill. Proper medical evidence must be produced, directly and positively to the effect that the witness or party cannot attend, and disclosing the nature of his illness and the date when he will probably be able to appear. [60](#) In the absence of these particulars the party may have to proceed without the witness. [61](#)
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- (ii) **Evidence not to hand.** As a rule, the fact that evidence is not to hand should be no reason to grant a postponement, but it has been done in the absence of prejudice to the parties, [62](#) or where the ends of justice would not be attained without the production of certain material evidence, [63](#) or where a party desired to prove foreign law. [64](#) Postponement of a trial will not be granted upon a vague allegation that certain witnesses can be produced in corroboration of evidence already given. [65](#) The fact that a witness awaiting trial on a criminal charge refuses to attend consultations is not sufficient ground for a postponement. [66](#)
  - (iii) **Unforeseeable circumstances.** If such a circumstance arises immediately before or during the course of the trial or application, it is only equitable to grant a postponement. Postponement has been granted where, on exception, a point of law was raised which could not have been anticipated from the terms of the exception; [67](#) where a new defendant intervened shortly before the trial and his case presented new features; [68](#) where, after set-down, circumstances arose which made it impossible for the defendant to proceed with the adequate preparation of its case; [69](#) and where, on the day of the trial, the defendant set up an entirely new defence. [70](#) If the circumstances which give rise to the necessity for an application for a postponement were foreseeable, the court may, in the exercise of its discretion, refuse the application. [71](#)
  - (iv) **Legal representative unavailable.** Whether the unavailability of counsel previously engaged in a matter might afford a reasonable basis for a postponement at the instance of the affected party will depend on the facts of the given case. Fairness and the interests of justice are the principal determining criteria in all contested applications for postponement. Appropriate regard must be had not only to the position of the applicant but also to the legitimate interests of the other parties to the litigation and the needs of the effective administration of justice. Ordinarily, and certainly when there is sufficient time for another advocate to prepare, alternative counsel should be instructed when counsel of first choice is not available on the date allocated for the hearing of a matter. To avoid doing so is, in effect, a delaying tactic. [72](#)  
The fact that the trial date does not suit the legal representative of a party is not a good ground for allowing a postponement. [73](#) A postponement on the ground of counsel's illness was refused where it was not shown that the

before the trial of a matter involving complex legal issues. <sup>75</sup>

- (v) **Convenience and prejudice.** In the exercise of its discretion to grant or refuse an application for adjournment the court will take into consideration the question of convenience and the question of prejudice. <sup>76</sup> Thus, where it appeared that the defendant was ignorant of the fact that the matter had been set down, and the amount in issue was small and no real inconvenience would be caused, the court postponed the hearing. <sup>77</sup> If a litigant can be present only at the expense of sacrificing the interests of a large number of people, the court can grant a postponement. <sup>78</sup> That a party has travelled a long distance to attend a hearing is a reason against postponing it. <sup>79</sup>
- (vi) **Concurrent criminal proceedings.** If both civil proceedings and criminal proceedings, arising out of the same facts, are pending against the same person, the civil proceedings will, as a general rule, be stayed if —
- (a) there is an element of state compulsion impacting on the accused person's right to silence; <sup>80</sup> and
  - (b) the accused person can show that he might be prejudiced in the criminal proceedings should the civil proceedings be heard first. <sup>81</sup>
- (vii) **Professional exigencies.** Whether the urgency of a litigant's or witness's professional duties is sufficient to justify a postponement depends upon the circumstances of each case, and questions of prejudice and convenience will be taken into consideration. <sup>82</sup>
- (viii) **Death of a witness.** This will usually be regarded as an adequate ground for postponement, provided it is a material witness who died. <sup>83</sup>
- (ix) **Lack of legal representation.** The right to legal representation is a corollary of the right of access to justice. Nevertheless, a litigant may not benefit from his own misconduct or other careless approach in seeking to obtain legal representation, especially where the rights of other litigants are prejudicially affected and the scales inevitably tipped in favour of the refusal of a postponement sought for purposes of obtaining legal representation. <sup>84</sup>

**Costs.** There are three types of costs relevant to applications for postponement: <sup>85</sup>

- (a) 'costs of postponement' means the costs for the application for postponement; <sup>86</sup> and does not include costs incurred in another case in consequence of the postponement; <sup>87</sup>
- (b) 'costs of the day' are those extra costs caused by a postponement of the proceedings and which are ordered to be paid by the party responsible for the postponement and consequent waste of a day; <sup>88</sup>
- (c) 'wasted costs' are those extra costs incurred in consequence of the postponement which have become useless and unnecessary by reason of the postponement. <sup>89</sup> 'Costs of the day' are in principle the same as 'wasted costs'. <sup>90</sup>

If a postponement has become necessary in consequence of the fault or default of a party or of his legal representative, the general rule is that the wasted costs of the postponement are awarded against the party who is at fault or in default. <sup>91</sup> Thus, the respondent (in the application for postponement) will be ordered to pay the costs of the day or wasted costs when his fault or default has forced the applicant to ask for a postponement. <sup>92</sup>

Generally the applicant for postponement is ordered to pay the wasted costs if the illness of a party, <sup>93</sup> or of a witness <sup>94</sup> or of counsel <sup>95</sup> or the death of a material witness <sup>96</sup> necessitates a postponement. In *Van Staden v Union and South-West Africa Insurance Co Ltd* <sup>97</sup> the court, not following the earlier decisions, declined to order the eventually successful plaintiff to pay the costs of a postponement necessitated by his illness, on the ground that this was not due to the fault of either party. In *Grobbelaar v Snyman* <sup>98</sup> it is pointed out that not only the fault or default of the parties but also considerations of fairness to both parties should be taken into

account in determining liability for wasted costs. The latter appears to be the better view. <sup>99</sup> If the matter is postponed on account of the attorney at the seat of the court not being in a position to deal with a problem which arises during a court hearing, such attorney being merely a 'postbox', not having a mandate beyond indexing and paginating papers, the litigant represented by that attorney should bear the wasted costs of the postponement. <sup>100</sup>

Costs stand over for determination at the trial when the court hearing the application for postponement decides that, in the circumstances, the trial court will be in a better position to ascertain the facts and decide who should pay the costs of postponement. <sup>101</sup>

Costs are made costs in the cause, as a general rule, when it appears to the court, not that it cannot decide where the liability for costs of postponement lies, but that the postponement is not due to the fault of any party but is necessary in any event, and it will be equitable that the loser of the main action or application should pay all costs incurred, including costs of postponement. <sup>102</sup>

The court may, in appropriate circumstances, order that the costs to be paid by the party whose default necessitated the postponement should include attorney and client costs. <sup>103</sup> If the applicant for a postponement has not made his application timeously, or is otherwise to blame with respect to the procedure which he has followed, but substantial justice nevertheless justifies a postponement in the particular circumstances of the case, the court in its discretion might allow the postponement, but direct the applicant in a suitable case to pay the wasted costs of the respondent occasioned to such respondent on the scale as between attorney and client <sup>104</sup> or even direct the applicant's attorney to pay the costs of the postponement *de bonis propriis* and on the basis as between attorney and client. <sup>105</sup>

Though the court has the power to order that wasted costs be paid before the trial be allowed to proceed, the court will be slow to place a clog upon a litigant's free access to the courts and will make such an order only where the postponement and the resultant wastage of costs are due to blameworthy conduct of a high degree. <sup>106</sup>

If an application for a postponement is refused, the unsuccessful applicant will ordinarily be ordered to pay the costs of the application. <sup>107</sup>

**Appeal.** An order refusing a postponement is not appealable. <sup>108</sup>

<sup>1</sup> *Maswanganyi v Road Accident Fund* 2019 (5) SA 407 (SCA) at 411H-412A.



- 2 *Persadh v General Motors South Africa (Pty) Ltd* [2006 \(1\) SA 455 \(SE\)](#) at 459E–G.
- 3 *Franco Vignazia Enterprises (Pty) Ltd v Berry* [1983 \(2\) SA 290 \(C\)](#) at 295H.
- 4 [1972 \(4\) SA 300 \(W\)](#). See also *Ditsoane v ACWA Power Africa Holdings (Pty) Ltd* [2024 \(3\) BCLR 307 \(CC\)](#).
- 5 *De Lange v Provincial Commissioner of Correctional Services Eastern Cape* [2002 \(3\) SA 683 \(SECLD\)](#) at 686F–G/H, followed in *Chief Executive Officer, Northern Cape Liquor Board v Reed* (unreported, NCK case nos 1179/2018; 731/2018 dated 9 February 2024) at paragraph [9]. See also *Bondev Midrand (Pty) Ltd v Madzhie* [2017 \(4\) SA 166 \(GP\)](#) at 170E.
- 6 See the definition of ‘application’ in rule 1 above.
- 7 *De Lange v Provincial Commissioner of Correctional Services Eastern Cape* [2002 \(3\) SA 683 \(SECLD\)](#) at 687G–H/I. See also *Bondev Midrand (Pty) Ltd v Madzhie* [2017 \(4\) SA 166 \(GP\)](#) at 170E.
- 8 See also *Bondev Midrand (Pty) Ltd v Madzhie* [2017 \(4\) SA 166 \(GP\)](#) at 170E.
- 9 *Protea Assurance Co Ltd v Gamlase* [1971 \(1\) SA 460 \(E\)](#) at 465G.
- 10 *Pearson and Hutton NNO v Hitzeroth* [1967 \(3\) SA 591 \(E\)](#) at 593D, 594H. See also *Karoo Meat Exchange Ltd v Mtwazi* [1967 \(3\) SA 356 \(E\)](#) at 359B–G; *Huggins v Ryan NO* [1978 \(1\) SA 216 \(R\)](#) at 218D.
- 11 *Levy v Levy* [1991 \(3\) SA 614 \(A\)](#) at 620B.
- 12 *Road Accident Fund v Nnosa* [2005 \(4\) SA 575 \(T\)](#) at 580C–D.
- 13 *Road Accident Fund v Nnosa* [2005 \(4\) SA 575 \(T\)](#) at 580D.
- 14 Unreported, GP case no A391/2019 dated 12 July 2021.
- 15 At paragraphs 7–9.
- 16 At paragraph 12.
- 17 *Nel v OVS Staalkonstruksie en Algemene Sweiswerke* [1977 \(3\) SA 993 \(O\)](#) at 996H; *Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape* [2005 \(6\) SA 123 \(ECD\)](#), distinguishing *Kaplan v Dunell Ebden and Co* [1924 EDL 91](#) at 93, and holding that it was no authority for the proposition that a court, faced with an application for costs in terms of subrule (1)(c), may have no regard whatsoever to the papers filed in the main proceedings in order to resolve the cost issue (at 127J–128C). See also *Hull v Free Market Foundation (Southern Africa)* (unreported, GJ case no 2021/39680 dated 8 February 2023) at paragraph [41].
- 18 *Nel v OVS Staalkonstruksie en Algemene Sweiswerke* [1977 \(3\) SA 993 \(O\)](#) at 997C; *Hull v Free Market Foundation (Southern Africa)* (unreported, GJ case no 2021/39680 dated 8 February 2023) at paragraph [41].
- 19 *Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape* [2005 \(6\) SA 123 \(ECD\)](#) at 129A; *Hull v Free Market Foundation (Southern Africa)* (unreported, GJ case no 2021/39680 dated 8 February 2023) at paragraph [41].
- 20 *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* [1972 \(1\) SA 773 \(A\)](#).
- 21 *Germishuys v Douglas Besproeiingsraad* [1973 \(3\) SA 299 \(NC\)](#); *Sentraboer Koöperatief Bpk v Mphaka* [1981 \(2\) SA 814 \(O\)](#) at 818A; *Waste Products Utilisation (Pty) Ltd v Wilkes (Biccari Interested Party)* [2003 \(2\) SA 590 \(W\)](#) at 597A; *Reuben Rosenblum Family Investments (Pty) Ltd v Marsubar (Pty) Ltd (Forward Enterprises (Pty) Ltd and Others Intervening)* [2003 \(3\) SA 547 \(C\)](#) at 550C–D; *Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape* [2005 \(6\) SA 123 \(ECD\)](#) at 129E–130B and 131B.
- 22 *Waste Products Utilisation (Pty) Ltd v Wilkes (Biccari Interested Party)* [2003 \(2\) SA 590 \(W\)](#) at 597A; *Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape* [2005 \(6\) SA 123 \(ECD\)](#) at 130C–131C; *Scharrighuisen N.O. v Black Rock Property Management* (unreported, GP case no 74701/2018 dated 2 December 2021) at paragraphs 2.4–2.7.
- 23 *Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape* [2005 \(6\) SA 123 \(ECD\)](#) at 132J–133A and 143H–144C.
- 24 *Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape* [2005 \(6\) SA 123 \(ECD\)](#) at 131C–133E.
- 25 *Ex parte Taljaard* [1975 \(3\) SA 106 \(O\)](#) at 108B.
- 26 *Ex parte Taljaard* [1975 \(3\) SA 106 \(O\)](#) at 109A.
- 27 See *Department, Transport, Province of Kwazulu-Natal v Ramsaran* (unreported, SCA case no 1274/2017 dated 23 May 2019) at paragraph [6].
- 28 *Coetzer v Wesbank t/a FirstRand Bank Ltd* [2022 \(2\) SA 178 \(GJ\)](#) at paragraphs [26]–[27].
- 29 *Bonthuys v Visser’s Garage* [1950 \(3\) SA 130 \(SWA\)](#); *Durban City Council v Kistan* [1972 \(4\) SA 465 \(N\)](#); *Sentraboer Koöperatief Bpk v Mphaka* [1981 \(2\) SA 814 \(O\)](#) at 817F and 818A.
- 30 See *Vaal Investment & Trust Co (Pty) Ltd v Ladegaard (Pty) Ltd* [1973 \(2\) SA 799 \(T\)](#).
- 31 *Naicker v Commercial Properties (Pty) Ltd* [1978 \(3\) SA 992 \(D\)](#).
- 32 [1981 \(2\) SA 146 \(O\)](#).
- 33 See, in general, Leslie Kobrin ‘Function of the court on settlements’ 2021 (March) *De Rebus* 6.
- 34 *Siebert & Honey v Van Tonder* [1981 \(2\) SA 146 \(O\)](#) at 148D.
- 35 *Massey-Ferguson (South Africa) Ltd v Ermelo Motors (Pty) Ltd* [1973 \(4\) SA 206 \(T\)](#) at 214C–H. In *HGM Steelboys CC v Moepathutse Property Management* (unreported, LP case no 6305/2018 dated 11 March 2021) an application was made in terms of rule 41(4) based on an agreement signed by the parties which, amongst other things, provided as follows:  
 ‘1. The first to fourth defendants shall jointly and severally, one pays the other to be absolved, pay to the plaintiff an amount of R700 000-00 (seven hundred thousand rand) in full and final settlement of this action.  
 2. The amount referred to in clause 1 hereof (R700 000-00) shall be paid by the defendants to the plaintiff on or before close of business on 04 May 2019.  
 3. The plaintiff and defendants shall each be liable for their own costs incurred in this matter as at the respective dates of signature hereof.’  
 It was the applicant’s case that payment was not made as provided in the agreement. Kganyago J dismissed the application and stated:  
 ‘[14] An agreement should be drafted in clear and unambiguous terms so that it will not leave any room for doubt. The plaintiff’s and defendants’ agreement makes no provision for breach or failure to comply with its terms. It therefore does not appear in the settlement agreement as to how many days must the defendants be given in case of breach or failure to comply with its terms. From the papers filed, it does not appear that any demand for payment was ever made to the defendants after the 4th May 2019 which will have put the defendants in mora.’  
 It is submitted that the decision is incorrect, being clearly based on a misunderstanding of the law relating to *mora ex re*, i.e. if a date for performance has been fixed in the agreement between the parties, and the debtor fails to perform on that date, *mora ex re* arises: no prior demand is necessary (*Kessel v Davis* 1905 TS 731; *Becker v Stusser* 1910 CPD 289; *West Rand Estates Ltd v New Zealand Insurance Co Ltd* [1926 AD 173](#) at 195–6; *Venter v Venter* [1949 \(1\) SA 768 \(A\)](#) at 784; *Van der Merwe v Reynolds* [1972 \(3\) SA 740 \(A\)](#) at 747A–D; *Mokala Beleggings v Minister of Rural Development and Land Reform* [2012 \(4\) SA 22 \(SCA\)](#) at 25D–C; *Crookes Brothers Ltd v Regional Land Claims Commission, Mpumalanga* [2013 \(2\) SA 259 \(SCA\)](#) at 269E–F).
- 36 *Brandtner v Brandtner* [1999 \(1\) SA 866 \(W\)](#) at 868B–D; *Bokamoso Painting Firm (Pty) Ltd v Masilonyana Local Municipality* (unreported, FB case no 4396/2022 dated 10 August 2023) at paragraph [13].
- 37 *Myburgh Transport v Botha t/a SA Truck Bodies* [1991 \(3\) SA 310 \(NmS\)](#) at 314F–315J; *Hall v Multilateral Motor Vehicle Accidents Fund* [1998 \(4\) SA 195 \(C\)](#) at 200B–C; *Rabie v Cotterell NO* (unreported, ECEL case no 813/2017 dated 31 January 2023) at paragraph [15]; *Bandra Investments CC v Chetwynd-Palmer* (unreported, KZP case no 17574/2022P) dated 18 October 2023) at paragraph [17], where the court cited the whole of the paragraph in the text to this footnote with approval; and see *Bovungana v Road Accident Fund* [2009 \(4\) SA 123 \(E\)](#) at 131A–D; *Mokhethe v MEC for Health, Gauteng* [2014 \(1\) SA 93 \(GSJ\)](#) at 97B–E. The principles are also applicable to an application for the grant of a postponement of an application (*Persadh v General Motors South Africa (Pty) Ltd* [2006 \(1\) SA 455 \(SE\)](#) at 459E–G) and to an application for the postponement of an application for summary judgment (*Dynlog Rental (Pty) Ltd v First Rand Bank t/a Wesbank* (unreported, FB case no A185/2019 dated 3 December 2021 — a decision of the full court) at paragraphs [13]–[21]).
- 38 *Estate Norton v Smerling* 1936 OPD 44 at 53; *R v Zackey* [1945 AD 505](#); *Isaacs v University of the Western Cape* [1974 \(2\) SA 409 \(C\)](#) at 411H; *Myburgh Transport v Botha t/a SA Truck Bodies* [1991 \(3\) SA 310 \(NmS\)](#) at 314G; *Persadh v General Motors South Africa (Pty) Ltd* [2006 \(1\) SA 455 \(SE\)](#) at 459F; *Baron Camilo Agasim-Pereira of Fulwood v Wertheim Becker Incorporated* [2006] 4 All SA 43 (E) at 49i; *Ketwa v Agricultural Bank of Transkei* [2006] 4 All SA 262 (Tk) at 271f; *Grootboom v National Prosecuting Authority* [2014 \(2\) SA 68 \(CC\)](#) at 75G and 79B–C; *Magistrate Pangarker v Botha* [2015 \(1\) SA 503 \(SCA\)](#) at 509E; *Van Den Steen NO v Khewija Engineering and Construction Proprietary Limited* (unreported, GJ case no 2021/12760 dated 10 October 2022) at paragraph [55]; *Imperial Logistics Advance (Pty) Ltd v Remnant Wealth Holdings (Pty) Ltd* (unreported, SCA case no 326/2021 dated 24 October 2022) at paragraph [6].
- 39 *Estate Norton v Smerling* 1936 OPD 44 at 53; *Labuschagne v Van Schalkwyk* 1949 (1) PH F34 (O); *Kenridge v Coastal Finance Co (Pty) Ltd* [1960 \(2\) SA 40 \(D\)](#); *Vollenhoven v Hoenson & Mills* [1970 \(2\) SA 368 \(C\)](#) at 373B; *Van Den Steen NO v Khewija Engineering and*

*Construction Proprietary Limited* (unreported, GJ case no 2021/12760 dated 10 October 2022) at paragraph [55]; *Imperial Logistics Advance (Pty) Ltd v Remnant Wealth Holdings (Pty) Ltd* (unreported, SCA case no 326/2021 dated 24 October 2022) at paragraph [6]; *Aheer v Govender* (unreported, KZP case nos 7098/2020P; 7136/2020P dated 8 February 2024) at paragraph [33].

40 *National Police Service Union v Minister of Safety and Security* [2000 \(4\) SA 1110 \(CC\)](#) at 1112E; *Aheer v Govender* (unreported, KZP case nos 7098/2020P; 7136/2020P dated 8 February 2024) at paragraph [33].

41 *R v Zackey* [1945 AD 505](#) at 511–12; *Madnitsky v Rosenberg* [1949 \(2\) SA 392 \(A\)](#) at 298–9; *Joshua v Joshua* [1961 \(1\) SA 455 \(GW\)](#) at 457D; *Myburgh Transport v Botha t/a SA Truck Bodies* [1991 \(3\) SA 310 \(NmS\)](#) at 314G; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [2000 \(2\) SA 1 \(CC\)](#) at 14A–C; *Baron Camilo Agasim-Pereira of Fulwood v Wertheim Becker Incorporated* [2006] 4 All SA 43 (E) at 49i. See also *Venter Joubert Inc v Du Plooy* [2017 \(5\) SA 439 \(NCK\)](#) at 4421–443A; *Nedbank Limited v Bravo Petroleum* (unreported, KZD case no D1108/2020 dated 15 September 2021) at paragraph [8]; *Van Den Steen NO v Khewija Engineering and Construction Proprietary Limited* (unreported, GJ case no 2021/12760 dated 10 October 2022) at paragraph [55].

42 *Prinsloo v Saaiman* [1984 \(2\) SA 56 \(O\)](#) at 61G–62A; *Myburgh Transport v Botha t/a SA Truck Bodies* [1991 \(3\) SA 310 \(NmS\)](#) at 314I–315A; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [2000 \(2\) SA 1 \(CC\)](#) at 14A–C; *Baron Camilo Agasim-Pereira of Fulwood v Wertheim Becker Incorporated* [2006] 4 All SA 43 (E) at 50i–51a. In these cases it is stressed that an appeal court is not entitled to set aside the decision of a trial court granting or refusing a postponement in the exercise of its discretion merely on the ground that if the members of the court of appeal had been sitting as a trial court, they would have exercised their discretion differently.

43 *Isaacs v University of the Western Cape* [1974 \(2\) SA 409 \(C\)](#) at 411H; *Western Bank Ltd v Lester* [1976 \(3\) SA 457 \(E\)](#) at 460A; *Grootboom v National Prosecuting Authority* [2014 \(2\) SA 68 \(CC\)](#) at 75F–G; *Van Den Steen NO v Khewija Engineering and Construction Proprietary Limited* (unreported, GJ case no 2021/12760 dated 10 October 2022) at paragraph [55].

44 *McCarthy Retail Ltd v Shortdistance Carriers CC* [2001 \(3\) SA 482 \(SCA\)](#) at 494D; *Grootboom v National Prosecuting Authority* [2014 \(2\) SA 68 \(CC\)](#) at 76C–D; and see *Bovungana v Road Accident Fund* [2009 \(4\) SA 123 \(E\)](#) at 131B; *Nedbank Limited v Bravo Petroleum* (unreported, KZD case no D1108/2020 dated 15 September 2021) at paragraph [8]; *Van Den Steen NO v Khewija Engineering and Construction Proprietary Limited* (unreported, GJ case no 2021/12760 dated 10 October 2022) at paragraph [55]; *Rabie v Cotterell NO* (unreported, ECEL case no 813/2017 dated 31 January 2023) at paragraph [19].

45 *National Police Service Union and Others v Minister of Safety and Security* [2000 \(4\) SA 1110 \(CC\)](#) at 1112C–F; *McCarthy Retail Ltd v Shortdistance Carriers CC* [2001 \(3\) SA 482 \(SCA\)](#) at 494D–H; *Shilubana v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as Amici Curiae)* [2007 \(5\) SA 620 \(CC\)](#) at 624B–C; *Magistrate Pangarker v Botha* [2015 \(1\) SA 503 \(SCA\)](#) at 509E–F; *Van Den Steen NO v Khewija Engineering and Construction Proprietary Limited* (unreported, GJ case no 2021/12760 dated 10 October 2022) at paragraph [55]; *Imperial Logistics Advance (Pty) Ltd v Remnant Wealth Holdings (Pty) Ltd* (unreported, SCA case no 326/2021 dated 24 October 2022) at paragraph [6]; *Rabie v Cotterell NO* (unreported, ECEL case no 813/2017 dated 31 January 2023) at paragraph [19].

46 *Madnitsky v Rosenberg* [1949 \(2\) SA 392 \(A\)](#) at 398–9; *Myburgh Transport v Botha t/a SA Truck Bodies* [1991 \(3\) SA 310 \(NmS\)](#) at 315B–C; *Persadh v General Motors South Africa (Pty) Ltd* [2006 \(1\) SA 455 \(SE\)](#) at 459F; *Bovungana v Road Accident Fund* [2009 \(4\) SA 123 \(E\)](#) at 131C; *Van Den Steen NO v Khewija Engineering and Construction Proprietary Limited* (unreported, GJ case no 2021/12760 dated 10 October 2022) at paragraph [55].

47 *Greyvenstein v Neethling* [1952 \(1\) SA 463 \(C\)](#); *Joshua v Joshua* [1961 \(1\) SA 455 \(GW\)](#) at 457A–C; *Myburgh Transport v Botha t/a SA Truck Bodies* [1991 \(3\) SA 310 \(NmS\)](#) at 315D; *Gwenzi v Cebekhula* [1996 \(1\) SA 525 \(N\)](#) at 528I–529C; *National Police Service Union v Minister of Safety and Security* [2000 \(4\) SA 1110 \(CC\)](#) at 1112E; *Baron Camilo Agasim-Pereira of Fulwood v Wertheim Becker Incorporated* [2006] 4 All SA 43 (E) at 49i–50e; *Shilubana v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as Amici Curiae)* [2007 \(5\) SA 620 \(CC\)](#) at 624B; *Nedbank Limited v Bravo Petroleum* (unreported, KZD case no D1108/2020 dated 15 September 2021) at paragraph [8]; *Van Den Steen NO v Khewija Engineering and Construction Proprietary Limited* (unreported, GJ case no 2021/12760 dated 10 October 2022) at paragraph [55]; *Rabie v Cotterell NO* (unreported, ECEL case no 813/2017 dated 31 January 2023) at paragraphs [16] and [18].

48 *Hanson, Tomkin and Finkelstein v DBN Investments (Pty) Ltd* [1951 \(3\) SA 769 \(N\)](#); *Greyvenstein v Neethling* [1952 \(1\) SA 463 \(C\)](#) at 467F; *Myburgh Transport v Botha t/a SA Truck Bodies* [1991 \(3\) SA 310 \(NmS\)](#) at 315D, 317C; *Ketwa v Agricultural Bank of Transkei* [2006] 4 All SA 262 (Tk) at 271g–274f; *Van Den Steen NO v Khewija Engineering and Construction Proprietary Limited* (unreported, GJ case no 2021/12760 dated 10 October 2022) at paragraph [55]. See also *Shilubana v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as Amici Curiae)* [2007 \(5\) SA 620 \(CC\)](#).

49 *Myburgh Transport v Botha t/a SA Truck Bodies* [1991 \(3\) SA 310 \(NmS\)](#) at 315E; *Van Den Steen NO v Khewija Engineering and Construction Proprietary Limited* (unreported, GJ case no 2021/12760 dated 10 October 2022) at paragraph [55]; *Rabie v Cotterell NO* (unreported, ECEL case no 813/2017 dated 31 January 2023) at paragraph [19].

50 *Myburgh Transport v Botha t/a SA Truck Bodies* [1991 \(3\) SA 310 \(NmS\)](#) at 315F; and see *Greyvenstein v Neethling* [1952 \(1\) SA 463 \(C\)](#) at 467H; *Gwenzi v Cebekhula* [1996 \(1\) SA 525 \(N\)](#) at 529G–530E; *Nelson Mandela Metropolitan Municipality v Greyvenouw CC* [2004 \(2\) SA 81 \(SE\)](#) at 90F–G; *Persadh v General Motors South Africa (Pty) Ltd* [2006 \(1\) SA 455 \(SE\)](#) at 459F–G; *Shilubana v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as Amici Curiae)* [2007 \(5\) SA 620 \(CC\)](#) at 624F; *Nedbank Limited v Bravo Petroleum* (unreported, KZD case no D1108/2020 dated 15 September 2021) at paragraph [8]; *Simons v De Ruig* (unreported, GP case no 55908/18 dated 15 June 2022) at paragraph [8]; *Van Den Steen NO v Khewija Engineering and Construction Proprietary Limited* (unreported, GJ case no 2021/12760 dated 10 October 2022) at paragraph [55].

51 *Panigel v Kremetart Kliniek (Pty) Ltd* [1976 \(4\) SA 387 \(T\)](#) — a case with rather unusual circumstances; *New Zealand Insurance Co Ltd v Stone* [1963 \(3\) SA 63 \(C\)](#) at 72; *Murphy v SA Railways & Harbours* (3) 1946 NP 642; *Nedbank Limited v Bravo Petroleum* (unreported, KZD case no D1108/2020 dated 15 September 2021) at paragraph [9]; *Van Den Steen NO v Khewija Engineering and Construction Proprietary Limited* (unreported, GJ case no 2021/12760 dated 10 October 2022) at paragraph [55].

52 *Myburgh Transport v Botha t/a SA Truck Bodies* [1991 \(3\) SA 310 \(NmS\)](#) at 315G; *Gwenzi v Cebekhula* [1996 \(1\) SA 525 \(N\)](#) at 530E; *National Police Service Union v Minister of Safety and Security* [2000 \(4\) SA 1110 \(CC\)](#) at 1112E–F; *McCarthy Retail Ltd v Shortdistance Carriers CC* [2001 \(3\) SA 482 \(SCA\)](#) at 494H; *Shilubana v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as Amici Curiae)* [2007 \(5\) SA 620 \(CC\)](#) at 624B–C; *Van Den Steen NO v Khewija Engineering and Construction Proprietary Limited* (unreported, GJ case no 2021/12760 dated 10 October 2022) at paragraph [55].

53 2007 (3) BCLR 280 (CC) in paragraph [17]. See also *Shilubana v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as Amici Curiae)* [2007 \(5\) SA 620 \(CC\)](#) at 624C–D; *Magistrate Pangarker v Botha* [2015 \(1\) SA 503 \(SCA\)](#) at 510F–511A; *Nedbank Limited v Bravo Petroleum* (unreported, KZD case no D1108/2020 dated 15 September 2021) at paragraph [8].

54 [2007 \(5\) SA 620 \(CC\)](#) at 624E–F. See also *Madnitsky v Rosenberg* [1949 \(2\) SA 392 \(A\)](#) at 399; *Ngcobo v Union & South West African Insurance Co Ltd* [1964 \(1\) SA 42 \(D\)](#) at 44F–G; *Myburgh Transport v Botha t/a SA Truck Bodies* [1991 \(3\) SA 310 \(NmS\)](#) at 315B–G; *Magistrate Pangarker v Botha* [2015 \(1\) SA 503 \(SCA\)](#) at 509G–I and the factors there referred to; *Bester NO v Master, High Court* [2023 \(6\) SA 199 \(WCC\)](#) at paragraphs [4]–[13].

55 [2000 \(4\) SA 1110 \(CC\)](#) at 1113D. For a case where an application for postponement made from the bar on the day of the hearing was granted due to a similar case pending in the Constitutional Court, the outcome of which would be of direct relevance to the case at hand, see *Ndamase v Commissioner: Private Inquiry into the affairs SNS Holdings (Pty) Ltd (In Liquidation)* (unreported, GP case no 2023/019694 dated 17 January 2024).

56 *Take and Save Trading CC v Standard Bank of SA Ltd* [2004 \(4\) SA 1 \(SCA\)](#) at 4H–5B; *Magistrate Pangarker v Botha* [2015 \(1\) SA 503 \(SCA\)](#) at 510D–F; *Nedbank Limited v Bravo Petroleum* (unreported, KZD case no D1108/2020 dated 15 September 2021) at paragraph [8]; *Van der Westhuizen N.O. v The Land and Agricultural Development Bank of SA* (unreported, LP case no 3173/2020 dated 14 February 2022) at paragraph [17].

57 *Estate Norton v Smerling* 1936 OPD 44 at 53–4.

58 [1952 \(1\) SA 463 \(C\)](#) at 466A–D.

59 *Estate Norton v Smerling* 1936 OPD 44 at 54. In *Gwenzi v Cebekhula* [1996 \(1\) SA 525 \(N\)](#) it was held (at 529B) that the principles set out in *Greyvenstein v Neethling* [1952 \(1\) SA 463 \(C\)](#) at 466A–D in relation to an application for postponement by a plaintiff apply *a fortiori* to an application by a defendant.

60 See *Myburgh Transport v Botha t/a SA Truck Bodies* [1991 \(3\) SA 310 \(NmS\)](#) at 312I–313D; and see *Baron Camilo Agasim-Pereira of Fulwood v Wertheim Becker Incorporated* [2006] 4 All SA 43 (E). If the court doubts the authenticity of a medical certificate, the matter should be allowed to stand over to have the certificate verified (*Goldman v Solomon* 1924 (2) PH L23 (T)); a mere suspicion on the part of the court that the witness's illness is pretended and that he does not intend to give evidence is no reason for refusing a postponement (*Harris v Coulson* 1926 OPD 91). A postponement will obviously not be granted where other witnesses testify that the supposedly sick witness is in fact well, notwithstanding the certificate handed in (*Venketsamy v Muller* 1924 (2) PH F35 (D), where the certificates were, however, unsworn).

61 *Gabb and Fraser v Greenshields* (1896) 13 SC 466. Sudden illness of a party or a witness may make it impossible to comply with these requirements. In *Harris v Coulson* 1926 OPD 91 the court allowed an appeal against a magistrate's refusal to act on a telegram. In *Hanson, Tomkin & Finkelstein v DBN Investments (Pty) Ltd* [1951 \(3\) SA 769 \(N\)](#) the court accepted an affidavit handed in from the bar, but the circumstances were exceptional and in *Joshua v Joshua* [1961 \(1\) SA 455 \(GW\)](#) the court declined to follow a similar course.

- [62](#) *The National Bank of SA Ltd v Assigned Estate Lentini and Tobias* 1924 SWA 84.
- [63](#) *Isaacs v Froomberg* (1894) 15 NLR 166; *Schapiro v Schapiro* 1904 TS 673.
- [64](#) *Schapiro v Schapiro* 1904 TS 673; *Hairman v Crawley* 1918 OPD 16.
- [65](#) *Sonkwele v Woynich* 1917 EDL 339.
- [66](#) *Hartley v Newman* 1937 CPD 143.
- [67](#) *Bekker v Hoffmann* 1918 SR 87.
- [68](#) *Hudson v Hudson* 1926 (2) PH F45 (C).
- [69](#) *Deciduous Fruit Board v Taylor* 1943 CPD 158.
- [70](#) *Standard Bank of SA Ltd v Fourie* 1924 OPD 40; and see *Van Wyk v Boedel Louw* [1957 \(3\) SA 481 \(C\)](#) and the authorities referred to therein.
- [71](#) *Gwenzi v Cebekhula* [1996 \(1\) SA 525 \(N\)](#) at 529G.
- [72](#) *Investec Bank Ltd v O'Shea NO* (unreported, WCC case no 10038/2014 dated 31 July 2020) at paragraphs [24]–[28].
- [73](#) *Duncan v Roets* [1949 \(1\) SA 226 \(T\)](#); *D'Anos v Heylon Court (Pty) Ltd* [1950 \(2\) SA 40 \(C\)](#); *Centirugo AG v Firestone (SA) Ltd* [1969 \(3\) SA 318 \(T\)](#); *S v Paweni* [1985 \(1\) SA 301 \(Z\)](#), upheld on appeal *sub nomine Paweni v Acting Attorney-General* [1985 \(3\) SA 720 \(ZS\)](#).
- [74](#) *Ecker v Dean* 1939 SWA 22; and see *Murphy v SA Railways & Harbours (3)* 1946 NPD 642; *Madnitsky v Rosenberg* [1949 \(2\) SA 392 \(A\)](#) at 399; *Cohn v Cohn* [1965 \(3\) SA 203 \(O\)](#); *Centirugo AG v Firestone (SA) Ltd* [1969 \(3\) SA 318 \(T\)](#).
- [75](#) *Cosmetic Distributing Co v Industrial Products* 1944 WLD 201.
- [76](#) *Murphy v SA Railways & Harbours (3)* 1946 NPD 642; *New Zealand Insurance Co Ltd v Stone* [1963 \(3\) SA 63 \(C\)](#) at 72; *Panigel v Kremetart Kliniek (Pty) Ltd* [1976 \(4\) SA 387 \(T\)](#); *Myburgh Transport v Botha t/a SA Truck Bodies* [1991 \(3\) SA 310 \(NmS\)](#) at 315F.
- [77](#) *Hayes v Rhodie* (1906) 16 CTR 124.
- [78](#) *Sachs v Stuart* 1946 WLD 433.
- [79](#) *Hudson v Hudson* 1926 (2) PH F45 (C).
- [80](#) *Law Society of the Cape of Good Hope v Randell* [2013 \(3\) SA 437 \(SCA\)](#) at 443E–G. See also *Coutries v Levergy Marketing Agency Ltd* (unreported, GJ case no 2020/5802 dated 19 October 2020) at paragraphs [11]–[21].
- [81](#) *Law Society of the Cape of Good Hope v Randell* [2013 \(3\) SA 437 \(SCA\)](#) at 440I–J. See also *Whalley v Buchner* 1910 CPD 223; *Luyt v Preston* 1911 EDL 220; *Donaldson v Veleris* 1936 WLD 84; *Munnich v Munnich's Estate* 1942 EDL 33; *Madnitsky v Rosenberg* [1949 \(2\) SA 392 \(A\)](#); *Du Toit v Van Rensburg* [1967 \(4\) SA 433 \(C\)](#) at 435H–436A; *Irvin & Johnson Ltd v Basson* [1977 \(3\) SA 1067 \(T\)](#) at 1073A; *Gwenzi v Cebekhula* [1996 \(1\) SA 525 \(N\)](#) at 529G–530E; *Davis v Tip NO* [1996 \(1\) SA 1152 \(W\)](#) at 1157A–E; *Gilfillan t/a Grahamstown Veterinary Clinic v Bowker* [2012 \(4\) SA 465 \(ECG\)](#) at 468I–469A; *Coutries v Levergy Marketing Agency Ltd* (unreported, GJ case no 2020/5802 dated 19 October 2020) at paragraphs [11]–[21].
- [82](#) Postponements were granted in *Deciduous Fruit Board v Taylor* 1943 CPD 158; *Greyvenstein v Neethling* [1952 \(1\) SA 463 \(C\)](#), and *Panigel v Kremetart Kliniek (Pty) Ltd* [1976 \(4\) SA 387 \(T\)](#), but refused in *Blackburn v Union Government* 1927 CPD 127.
- [83](#) *Westbrook v Genref Ltd* [1997 \(4\) SA 218 \(D\)](#).
- [84](#) *Magistrate Pangarker v Botha* [2015 \(1\) SA 503 \(SCA\)](#) at 512C–H.
- [85](#) See Cilliers Costs paragraph 8.08.
- [86](#) See, for example, *Sanvido & Sons (Civil Engineering) (Pty) Ltd v Aglime (Pty) Ltd* [1984 \(4\) SA 339 \(C\)](#) at 341I–343B.
- [87](#) *Kruger v Franken* 1914 TPD 276.
- [88](#) *Carlis v Hay* 1903 TS 317; *Lucas' Trustee v Ismail and Amod* 1905 TH 45; *Van der Hoven v Erasmus* 1921 TPD 383; *Suliman Ismael Mia & Co v Cajee* 1924 WLD 25; *Craig v Kopermijn Ltd* 1926 TPD 63; *Delfos en Atlas Copco (Edms) Bpk v VV Bande (Edms) Bpk* [1972 \(3\) SA 907 \(O\)](#); *Kroonstad Verbruikers Koöp Bpk v National Egg Producers Co-op Ltd* [1981 \(3\) SA 674 \(O\)](#).
- [89](#) *Konjillia v Govender* (1929) 50 NLR 189; *O'Reilly v Lakofski* 1933 WLD 145 at 148; *Van Heerden v Tarr* [1959 \(2\) SA 328 \(E\)](#); *Salie v Shield Insurance Co Ltd* [1978 \(2\) SA 396 \(T\)](#); *Greenberg v Mortimer* [1979 \(4\) SA 642 \(T\)](#); *Sanvido & Sons (Civil Engineering) (Pty) Ltd v Aglime (Pty) Ltd* [1984 \(4\) SA 339 \(C\)](#); *Mbekeni v Jika* [1995 \(1\) SA 423 \(Tk\)](#) at 424F; *Flame Lily Investments (Pty) Ltd v Solomon* (unreported, KZP case no 3581/2019P dated 3 February 2022) at paragraphs [17], [18] and [23]; *Simons v De Ruig* (unreported, GP case no 55908/18 dated 15 June 2022) at paragraph [8].
- [90](#) *Craig v Kopermijn Ltd* 1926 TPD 63 at 66; *Delfos en Atlas Copco (Edms) Bpk v VV Bande (Edms) Bpk* [1972 \(3\) SA 907 \(O\)](#) at 911B; *Mbekeni v Jika* [1995 \(1\) SA 423 \(Tk\)](#) at 424F.
- [91](#) *Jowell v Behr* 1940 WLD 63 at 64; *Botes v Potchefstroom Municipality* 1940 TPD 113; *Burger v Kotze* [1970 \(4\) SA 302 \(W\)](#) at 304E–G; *Cessions (Pty) Ltd v Stumrab (Pty) Ltd* [1980 \(2\) SA 361 \(W\)](#); *Myburgh Transport v Botha t/a SA Truck Bodies* [1991 \(3\) SA 310 \(NmS\)](#) at 315H; *Sublime Technologies (Pty) Ltd v Jonker* [2010 \(2\) SA 522 \(SCA\)](#) at 524G–H.
- [92](#) *Burger v Kotze* [1970 \(4\) SA 302 \(W\)](#); *Sublime Technologies (Pty) Ltd v Jonker* [2010 \(2\) SA 522 \(SCA\)](#) at 524H–525A. See also *Standard Bank of SA Ltd v Fourie* 1924 OPD 40; *Greyling v Peacock* 1942 OPD 74 at 76–7.
- [93](#) *Winter v Gluckman* 1931 WLD 257; *Talinsky v Masones* 1931 WLD 259; *Pohl v De Marillac* 1941 WLD 35; *Cape Law Society v Feldman* [1979 \(1\) SA 930 \(E\)](#) at 934A–C; *Myburgh Transport v Botha t/a SA Truck Bodies* [1991 \(3\) SA 310 \(NmS\)](#); *Manong and Associates (Pty) Ltd v City of Cape Town* [2011 \(2\) SA 90 \(SCA\)](#) at 116H–I.
- [94](#) *Pillay v Pillay* 1946 CPD 372. In *Grandin v The Curators of the person and property of GC Cato* (1892) 13 NLR 132 the costs were ordered to be costs in the cause.
- [95](#) *Cosmetic Distributing Co v Industrial Products* 1944 WLD 201 at 204; *Manong and Associates (Pty) Ltd v City of Cape Town* [2011 \(2\) SA 90 \(SCA\)](#) at 116H–I.
- [96](#) *Westbrook v Genref Ltd* [1997 \(4\) SA 218 \(D\)](#).
- [97](#) [1972 \(1\) SA 758 \(E\)](#).
- [98](#) [1975 \(1\) SA 568 \(O\)](#).
- [99](#) See *Cape Law Society v Feldman* [1979 \(1\) SA 930 \(E\)](#) at 933F–934E; *Brown v Santam Insurance Co Ltd* [1979 \(4\) SA 370 \(W\)](#) at 379F; *Simons v De Ruig* (unreported, GP case no 55908/18 dated 15 June 2022) at paragraph [8].
- [100](#) *Van der Burgh v Guardian National Insurance Co Ltd* [1997 \(2\) SA 187 \(E\)](#) at 191A–G.
- [101](#) *Gie v Ferreira* 1943 CPD 259; *Sachs v Stuart* 1946 WLD 433; *Sublime Technologies (Pty) Ltd v Jonker* [2010 \(2\) SA 522 \(SCA\)](#) at 525A–B. See also Beverly Shiells 'The impasse of reserved costs — the winning party does not take it all' 2018 (March) *De Rebus* 30–1.
- [102](#) See, for example, *Shaw v Williams* (1883) 3 EDC 251; *Grandin v The Curators of the person and property of GC Cato* (1892) 13 NLR 132; *Jamalodien v Ajimudien* 1917 CPD 293; *Cohn v Cohn* [1965 \(3\) SA 203 \(O\)](#); *Helm v Helm* [1969 \(1\) SA 89 \(O\)](#).
- [103](#) *Lakofski v O'Reilly* 1933 WLD 126; *Gerry v Gerry* [1958 \(1\) SA 295 \(W\)](#); *Tarry & Co Ltd v Matatiele Municipality* [1965 \(3\) SA 131 \(E\)](#) at 137G–H; *Ferreira v Endley* [1966 \(3\) SA 618 \(E\)](#); and see *Van Dyk v Conradie* [1963 \(2\) SA 413 \(C\)](#) at 418E–H.
- [104](#) *Myburgh Transport v Botha t/a SA Truck Bodies* [1991 \(3\) SA 310 \(NmS\)](#) at 315H–J and 317C.
- [105](#) *Leibowitz t/a Lee Finance v Mhlana* [2006 \(6\) SA 180 \(SCA\)](#) at 184F–185C.
- [106](#) See, for example, *White v The Northern Insurance Co* 1918 WLD 25; *Lakofski v O'Reilly* 1933 WLD 126; *Weiner v Matthews* 1938 WLD 273; *Boles v Potchefstroom Municipality* 1940 TPD 113; *Pillay v Pillay* 1946 CPD 372; *Solomons v Allie* [1965 \(4\) SA 755 \(T\)](#); *Gerry v Gerry* [1958 \(1\) SA 295 \(W\)](#); *Tarry & Co Ltd v Matatiele Municipality* [1965 \(3\) SA 131 \(E\)](#) at 136H–137A; *Ferreira v Endley* [1966 \(3\) SA 618 \(E\)](#) at 623G; *Myburgh Transport v Botha t/a SA Truck Bodies* [1991 \(3\) SA 310 \(NmS\)](#) at 315I–J.
- [107](#) See, for example, *Murphy v SA Railways & Harbours (3)* 1946 NPD 642; *Centirugo AG v Firestone (SA) Ltd* [1969 \(3\) SA 318 \(T\)](#); *Gwenzi v Cebekhula* [1996 \(1\) SA 525 \(N\)](#) at 530F–G.
- [108](#) *Priday t/a Pride Paving v Rubin* [1992 \(3\) SA 542 \(C\)](#).