32 Summary judgment

(1) The plaintiff may, after the defendant has delivered a plea, apply to court for summary judgment on each of such claims in the summons as is only —

(a) on a liquid document;

(b) for a liquidated amount in money;

(c) for delivery of specified movable property; or

(d) for ejectment;

together with any claim for interest and costs.

[Subrule (1) substituted by GN R842 of 31 May 2019.]

(2)*(a)* Within 15 days after the date of delivery of the plea, the plaintiff shall deliver a notice of application for summary judgment, together with an affidavit made by the plaintiff or by any other person who can swear positively to the facts.

(b) The plaintiff shall, in the affidavit referred to in subrule (2)*(a)*, verify the cause of action and the amount, if any, claimed, and identify any point of law relied upon and the facts upon which the plaintiff's claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial.

(c) If the claim is founded on a liquid document a copy of the document shall be annexed to such affidavit and the notice of application for summary judgment shall state that the application will be set down for hearing on a stated day not being less than 15 days from the date of the delivery thereof.

[Subrule (2) substituted by GN R1262 of 30 May 1991 and by GN R842 of 31 May 2019.]

(3) The defendant may —

(a) give security to the plaintiff to the satisfaction of the court for any judgment including costs which may be given; or

(b) satisfy the court by affidavit (which shall be delivered five days before the day on which the application is to be heard), or with the leave of the court by oral evidence of such defendant or of any other person who can swear positively to the fact that the defendant has a *bona fide* defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor.

[Subrule (3) substituted by GN R842 of 31 May 2019.]

(4) No evidence may be adduced by the plaintiff otherwise than by the affidavit referred to in subrule (2), nor may either party cross-examine any person who gives evidence orally or on affidavit: Provided that the court may put to any person who gives oral evidence such questions as it considers may elucidate the matter.

[Subrule (4) substituted by GN R842 of 31 May 2019.]

(5) If the defendant does not find security or satisfy the court as provided in paragraph *(b)* of subrule (3), the court may enter summary judgment for the plaintiff.

(6) If on the hearing of an application made under this rule it appears —

(a) that any defendant is entitled to defend and any other defendant is not so entitled; or

(b) that the defendant is entitled to defend as to part of the claim,

the court shall —

(i) give leave to defend to a defendant so entitled thereto and give judgment against the defendant not so entitled; or

(ii) give leave to defend to the defendant as to part of the claim and enter judgment against such defendant as to the balance of the claim, unless such balance has been paid to the plaintiff; or

[Subparagraph (ii) substituted by GN R1883 of 3 July 1992 and by GN R842 of 31 May 2019.]

(iii) make both orders mentioned in sub-paragraphs (i) and (ii).

(7) If the defendant finds security or satisfies the court as provided in subrule (3), the court shall give leave to defend, and the action shall proceed as if no application for summary judgment had been made.

(8) Leave to defend may be given unconditionally or subject to such terms as to security, time for delivery of pleadings, or otherwise, as the court deems fit.

(8A) . . .

[Subrule 8A, previously subrule (8)*bis*, inserted by GN R2004 of 1967, amended by GN R1262 of 1991, renumbered by GN R2410 of 30 September 1991 and deleted by GN R842 of 31 May 2019.]

(9) The court may at the hearing of such application make such order as to costs as to it may seem just: Provided that if —

(a) the plaintiff makes an application under this rule, where the case is not within the terms of subrule (1) or where the plaintiff, in the opinion of the court, knew that the defendant relied on a contention which would entitle such defendant to leave to defend, the court may order that the action be stayed until the plaintiff has paid the defendant's costs; and may further order that such costs be taxed as between attorney and client; and

[Paragraph *(a)* substituted by GN R842 of 31 May 2019.]

(b) in any case in which summary judgment was refused and in which the court after trial gives judgment for the plaintiff substantially as prayed, and the court finds that summary judgment should have been granted had the defendant not raised a defence which in its opinion was unreasonable, the court may order the plaintiff's costs of the action to be taxed as between attorney and client.

Commentary

Form. Writ of ejectment, E.

General. Summary judgment was a procedure introduced in England, in the second half of the last century, [1] to assist a plaintiff in a case where a defendant, who cannot set up a bona fide defence or raise against the plaintiff's case an issue which ought to be tried, [2] enters appearance merely in order to delay the granting of the plaintiff's rights. [3]

In *Meek v Kruger* [4] Boshoff J observed that the summary judgment procedure: [5]

> '[W]as not intended to "shut (a defendant) out from defending" unless it was very clear indeed that he had no case in the action; *Sheppards v Wilkinson*, 6 T.L.R. 13. It was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights; *Jacobs v Booth's Distillery Company*, 85 L.T.R. 263 (H.L.).'

The object of rule 32 is very much the same: the rule was designed to prevent a plaintiff's claim, based upon certain causes of action, from being delayed by what amounts to an abuse of the process of the court. [6] In certain circumstances, therefore, the law allows the plaintiff to apply to court for judgment to be entered summarily against the defendant, thus disposing of the matter without putting the plaintiff to the expense of a trial. The procedure is not intended to shut out a defendant who can show that there is a triable issue applicable to the claim as a whole from laying his defence before the court. [7]

The remedy provided by the rule has for many years been regarded as an extraordinary and a very stringent one in that it closes the doors of the court to the defendant and permits a judgment to be given without a trial. [8] In *Joob Joob Investments (Pty) Ltd v Stocks Mavundla*

Zek Joint Venture [9] the Supreme Court of Appeal, in holding that the time has perhaps come to discard labels such as 'extraordinary' and 'drastic', stated: [10]

> 'The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the *Maharaj* case at 425G–426E, Corbett JA was keen to ensure, first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of a defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor.
>
> Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are "drastic" for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the *Maharaj* case at 425G–426E.' [11]

The remedy should be resorted to and accorded only where the plaintiff can establish his claim clearly and the defendant fails to set up a bona fide defence. [12] A court must be careful to guard against injustice to the defendant who is called upon at short notice and without the benefit of further particulars, discovery or cross-examination to satisfy it that he has a bona fide defence. [13] While on the one hand the court wishes to assist a plaintiff whose right to relief is being balked by the delaying tactics of a defendant who has no defence, on the other hand it is reluctant to deprive the defendant of his normal right to defend, except in a

clear case. [14] This is why the courts have often emphasized the need for strict compliance with the rule, [15] but this does not mean that technical defects in procedure will not be condoned. [16]

It has been pointed out by Van den Heever J in *Edwards v Menezes* [17] that the courts have approached rule 32 from diametrically opposite points of view. On the one hand it has been stressed that the defendant must show, not that he is bona fide, but that he has a good defence: that the defendant must show a defence which, assuming the alleged facts to be true, is good in law; thus the defendant's duty under rule 32(3)*(b)* has been emphasized. On the other hand it has been stressed that it is only where the court has no reasonable doubt that the plaintiff is entitled to judgment as prayed, that the plaintiff has an unanswerable case, that summary judgment will be granted. Van den Heever J has expressed, with good reasons therefor, a preference for the latter approach. [18] The author is in respectful agreement with this view. [19]

Although the remedy is regarded as stringent or extraordinary in that it effectively closes the door of the court on the defendant without affording an opportunity to ventilate the case by way of trial, [20] the situation is different in circumstances where the defence raised by the defendant is in the nature of a counterclaim instead of a plea. In that case, even where summary judgment has been granted for that part of the claim that would be extinguished by the counterclaim, the defendant can still pursue the counterclaim by issuing summons in a separate action. [21]

On 1 July 2019 material amendments to rule 32 came into operation. [22] In *Raumix Aggregates (Pty) Ltd v Richter Sand CC, and Similar Matters* [23] the full court held, and ordered, [24] that the amended rule 32 does not apply retrospectively to pending summary judgment applications initiated before 1 July 2019 and that the unamended rule 32 shall apply to such pending applications. In regard to the purpose of rule 32, the full court stated: [25]

> 'The purpose of a summary judgment application is to allow the court to summarily dispense with actions that ought not to proceed to trial because they do not raise a genuine triable issue, thereby conserving scarce judicial resources and improving access to justice. Once an application for summary judgment is brought, the applicant obtains a substantive right for that application to be heard, and, bearing in mind the purpose of summary judgment, that hearing should be as soon as possible. That right is protected under section 34 of the Constitution.'

In terms of rule 32 in its amended form:

(a) the plaintiff may only apply for summary judgment after the defendant has delivered a plea (subrule (1));

(b) the plaintiff must, in the affidavit in support of the application for summary judgment, verify the cause of action and the amount, if any, claimed, and identify any point of law relied upon and the facts upon which the plaintiff's claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial (subrule (2)*(b)*);

(c) the defendant may, in order to avoid summary judgment, give security to the satisfaction of the court, and no longer to the satisfaction of the registrar, for any judgment including costs which may be given (subrule (3)*(a)*);

(d) the defendant may satisfy the court by affidavit, or, with the leave of the court, by oral evidence of such defendant, or of any other person who can swear positively to the fact that the defendant has a bona fide defence to the action, which affidavit or evidence must disclose fully the nature and grounds of the defence and the material facts relied upon therefor (subrule (3)*(b)*).

The amendments to rule 32 were preceded by an investigation by the Superior Courts Task Team of the Rules Board for Courts of Law.

The Task Team concluded that the summary judgment procedure was unsatisfactory for a number of reasons and, in particular, the following: [26]

3.1 deserving plaintiffs were frequently unable to obtain expeditious relief because of an inability to expose bogus defences (either in their founding affidavit or in any further affidavit — further affidavits not being permitted);

3.2 opportunistic plaintiffs were able to use the procedure to get the defendant to commit to a version on oath and thus obtain a tactical advantage for a trial in due course; [27] and

3.3 a burden of proof was arguably shifted to the defendant which was not only unfair but led to the kinds of constitutional challenges which have emanated in the High Court. [28]

The Task Team accordingly recommended amendments to rule 32 on the following basis: [29]

> '8. By way of a brief overview of the Task Team's reasoning: [30]
>
> 8.1 A plaintiff at present does not have to indicate what exactly its cause of action is, or what facts it relies on, or why a defendant does not have a defence. Instead, the plaintiff is merely required (and permitted) to file a brief

affidavit, taken from a template, "verifying the cause of action" in the vaguest possible way, opining that the defendant has no bona fide defence, and stating that "a notice of intention to defend has been delivered solely for the purpose of delay" (rule 32(2). This formulaic affidavit is unsatisfactory in many respects.

8.1.1 The plaintiff, when deposing to its affidavit under the current rule, may well not be aware what defence the defendant is intending to advance.

8.1.2 The deponent of the affidavit (who could, for example, be an accounts manager in a bank) is also likely to have little idea as to why exactly the defendant is opposing: the defendant could for example believe (wrongly) that it has a viable defence, or that there is some impediment to the plaintiff succeeding irrespective of the merits (e.g. prescription, jurisdiction or lack of standing), or that the equities are such that a court could well be minded not to grant judgment for the plaintiff.

8.1.3 The current founding affidavit in summary judgment proceedings therefore invariably involves speculation on the part of the plaintiff's deponent. The lack of specificity as to the plaintiff's claim, and the complete lack of detail as to why the defendant's envisaged defence is bogus, coupled with the absence of any replying affidavit, also means that the plaintiff can easily be frustrated by a defendant who is prepared to construct or contrive a defence, or rely on technical points.

8.2 The best way of addressing these shortcomings would seem to be to require the founding affidavit in support of summary judgment to be filed at a time when the defendant's defence to the action is apparent, by virtue of having been set out in a plea. This course is better than allowing a replying affidavit to be filed (as was suggested by a report prepared a few decades ago by the Galgut Commission). Merely including provision for a replying affidavit would not

address the problems with the formulaic nature of the founding affidavit, and the speculation inevitably contained therein.

8.3 In the event of a plaintiff applying for summary judgment after the delivery of a defendant's plea, the plaintiff would be able to explain briefly in its founding affidavit why the defences proffered by the defendant do not raise a triable issue; and should indeed be required to do so in order that the question of whether there is a bona fide defence which is capable of being sustained could be considered by the Court in a meaningful way. Requiring the plaintiff to set out why, in its view, it has a valid claim and why the defendant's defence is unsustainable, would also remove the criticism that the defendant is being required to commit itself to a version when the plaintiff is not similarly burdened. Obliging the plaintiff to engage meaningfully with the case in its founding affidavit would moreover have the added benefit of reducing the temptation for a plaintiff to seek summary judgment as a tactical move (and as a way of forcing the defendant to commit to a version on oath, which can be subsequently used in cross-examination to discredit a witness of the defendant). [31]

8.4 A stipulation that a plaintiff can only apply for summary judgment after delivery of a plea (rather than a notice of intention to defend) would also mean that the summary judgment application would be adjudicated on the basis of the defendant's pleaded defence and thus hopefully avoid a situation (such as not infrequently occurs under the current rule) where a defendant's version in its opposing summary judgment application diverges materially from its subsequently-delivered plea. The summary judgment debate will thus hopefully be a more informed, and less artificial, one, and engage with the real issues in the matter.

8.5 Although foreign practice must be viewed with caution given the differences between countries and their procedural systems, it is notable, too, that the other jurisdictions considered by the Task Team — the United Kingdom, Canada, Australia and the U.S.A. — all permit summary judgment only after a plea has been filed (and indeed after pleadings have closed). The summary judgment procedure was seemingly introduced in South Africa on the basis of its use in England and Scotland. The fact that summary judgment is only competent in those jurisdictions after at least a plea has been filed (and would thus be premature after merely a notice of intention to defend has been delivered) is thus reassuring, and indicative of the merits of the proposed change. [32]

8.6 If the summary judgment procedure is changed as proposed, the Task Team does not believe that a replying affidavit would either be necessary or appropriate. A plaintiff would have had a chance to address the averments in the defendant's plea in its founding affidavit in support of summary judgment. If the defendant has a further rebuttal in its answering affidavit, then, if that is credible, the summary judgment application would be defeated; but that is not necessarily inappropriate as the matter would then presumably have complexities which render it ill-suited to the summary judgment remedy. For a similar reason, a referral to oral evidence (also mooted in the Galgut Commission report) seems inadvisable.

8.7 The Task Team debated whether, as in the comparative jurisdictions consulted, summary judgment should potentially be available for any kind of claim (including illiquid claims for damages). It was concluded that this would not be appropriate, and that summary judgment could justifiably be confined to the kinds of matters referred to in section 32(1).

8.8 The Task Team also debated whether, if summary judgment should no longer be brought after delivery of a notice of intention to amend, it should be allowed only after close of pleadings. It was however decided against requiring a plaintiff to wait until after any replication, rejoinder or rebuttal had been filed. While such a rule would ensure that the debate was fully informed, and based on all pleaded defences and ripostes, it was thought that the speediness of the remedy could be compromised, and also that, as the objective behind summary judgment was to allow judgment to be obtained expeditiously in clearly deserving cases, a matter in which there were replications, rebuttals and the like was probably one ill-suited to summary judgment.

9. An issue floated, but not finally decided, at the meeting of the Task Team was whether there should be a limit on the length of a founding affidavit in a summary judgment application brought under the proposed amended rule. (There could be no limit on a defendant's answering affidavit, as the defendant is, after all, facing final judgment. By contrast, the plaintiff would, if unsuccessful, merely be required to proceed with its action in the normal course.) The Task Team's chair was of the view that there is something to be said for a page limit (of, say, ten or fifteen pages) in a summary judgment founding affidavit; for otherwise there is a danger that an action could involve a lengthy application in which the plaintiff seeks immediate (or summary) relief, followed, if that is unsuccessful, by a trial; and that could impose an intolerable burden on the administration of justice, and also drive up costs for the parties. However, other Task Team members were not convinced that such a restriction should be imposed.'

Rule 32 in its amended form is not a model of clarity [33] and will probably increase the workload of judges as well as the costs for parties. [34] This is unsatisfactory. Furthermore, the fact

that under the new procedure the merits of a defendant's pleaded defence in an action would be subjected to judicial scrutiny, in what in effect is an opposed motion and not in the normal course of a trial, raises the issue of constitutionality of the procedure. [35] Only time will tell whether the amended rule is constitutional and does in fact promote access to justice. Be

that as it may, it has been held that rule 32 in its amended form is directed at the avoidance of speculative summary judgment applications. [36]

As pointed out above, the application for summary judgment is supported by an affidavit which must comply with rule 32(2)*(b)*. The plaintiff must confine himself to what the rule allows; [37] nor may he file replying affidavits [38] or cross-examine the defendant or any other person who gives evidence. [39] These restrictions upon the plaintiff make it clear that an application for summary judgment is in no sense a preliminary trial of the issues involved. [40] The procedure is intended neither to give the plaintiff a tactical advantage in the trial [41] nor to provide a preview of the defendant's evidence or to limit the defences to those raised by the defendant. [42] Furthermore, the rule is not intended to replace the exception as a test of one or the other party's legal contentions or in effect to shift the onus (on claims based on an open account). [43]

An application for summary judgment cannot be deferred by delivery of a notice in terms of rule 35(12) and/or (14). [44]

Subrule (1): 'The defendant.' If the identity of the defendant is uncertain, for example, where there is more than one defendant and the plaintiff does not know which one concluded a certain contract with him, that uncertainty would operate to defeat the plaintiff's right to sue any particular one of them for summary judgment. [45]

'Delivered.' In terms of rule 1 this means to serve copies on all parties and file the original with the registrar.

'A plea.' Prior to the amendment of rule 32 with effect from 1 July 2019 [46] the delivery of a notice of intention to defend was a prerequisite to an application for summary judgment under rule 32(1). It has been held that once appearance to defend had been entered (i e a notice of intention to defend had been delivered) and the plaintiff thereafter filed a declaration or took a further procedural step, he thereby waived his right to apply for summary judgment, but not in a case where the declaration was attached to the summons for the sake of convenience only and before appearance to defend was entered. [47] The delivery of a plea is now a prerequisite to an application for summary judgment under rule 32(1) in its amended form. See further the notes to subrule (3)*(b)* s v 'Disclose fully the nature and grounds of the defence and the material facts relied upon therefor' below.

In *Nogoduka-Ngumbela Consortium (Pty) Ltd v Rage Distribution (Pty) Ltd t/a Rage* [48] the court held [49] that the amendment to rule 32 had not affected the rules regarding pleadings — the difference between *facta probanda* and *facta probantia* remained pertinent. The court held, further, that under the amended rule a defendant was not required to plead its defences in the same detail as it would have been entitled to do in an affidavit resisting summary judgment. A defendant was entitled in its affidavit to elaborate on its plea and the defences pleaded. [50]

'The plaintiff.' The wording of the rule would appear clearly to limit the right to apply for summary judgment to a plaintiff in convention. It is furthermore submitted that to allow a plaintiff in reconvention to claim summary judgment against the defendant in reconvention might well result in frustration of the principle that the parties' claims should be set off, one against the other. The same reasoning leads to the conclusion that a plaintiff in convention cannot claim summary judgment against a defendant who has no defence to his claim, but only a claim in reconvention. [51]

'Apply.' This means apply on motion. [52]

'To court.' As to the meaning of 'court', see the notes to rule 1 s v 'Court' above.

By permitting a co-trustee to depose to an affidavit opposing summary judgment in which the court's jurisdiction is not challenged, the other co-trustee representing the trust is regarded to have submitted to the jurisdiction of the court in whose area of jurisdiction the latter trustee is not resident. [53]

'Each of such claims in the summons as is only.' It is a condition precedent to an application for summary judgment that the claim(s) upon which the application is based shall be one or more of those listed in subrule (1). If the claim is not one listed, the procedure of rule 32 does not apply. [54] If the summons contains several claims, some of which are not within the terms of rule 32(1), summary judgment can be applied for in respect of those claims which are of

the nature specified in the rule. [55] The remainder of the claims will proceed to trial in the ordinary manner. In *Malcomess Scania (Pty) Ltd v Vermaak*, [56] Coetzee J held that a claim for rectification of an acknowledgement of debt (and for payment in terms of the acknowledgement of debt as rectified) is not susceptible to summary judgment. In *PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd* [57] the Supreme Court of Appeal disagreed with that judgment 'to the extent that it suggests that summary judgment is incompetent, even where both parties are *ad idem* as to the respects in which their written contract does not correctly reflect the agreement between them'.

Subrule (1)*(a)*: 'Liquid document.' The action underlying summary judgment proceedings under this subrule is based, not on a liquid claim, but on a liquid document. The term 'liquid document' in this subrule has the same meaning as in provisional sentence proceedings. See further the notes to rule 8 s v 'Where by law any person may be summoned to answer a claim made for provisional sentence' above for instances of liquid documents.

It is submitted that whether or not a document is properly describable as a liquid document is not always of great importance for an application under rule 32, for if the document is not liquid it will in any event more often than not support a claim for summary judgment under subrule (1)*(b)*. [58]

It has been held that the attachment of a liquid document is required only when the plaintiff's claim is based on it. [59] See further the notes to rule 32(2)*(c)* s v 'If the claim is founded on a liquid document a copy . . . shall be annexed' below.

Certificate of indebtedness. A provision in a deed of suretyship that 'the indebtedness of the said debtor . . . shall at any time be determined and proved by a written certificate . . . and such certificate shall be binding upon me and be conclusive proof of the amount of my indebtedness' does not ouster the court's jurisdiction under the deed of suretyship. If such a certificate

is filed by the plaintiff in a summary judgment application, judgment can be granted. [60] The Supreme Court of Appeal has, in regard to High Court practice under rule 32(4), held that certificates of balance 'handed in' at the hearing perform a useful function and are not hit by the provisions of that subrule. [61]

Subrule (1)*(b)*: 'Liquidated amount in money.' Under rule 31(2)*(a)* default judgment may be granted upon claims for a 'debt or liquidated demand' in the event of the defendant failing to deliver a notice of intention to defend. Care must be taken in applying decisions upon such applications to applications for summary judgment, for a 'liquidated demand' relating to default judgment covers much more than the words 'liquidated amount in money' in this subrule.

A liquidated amount in money is an amount which is either agreed upon or which is capable of speedy and prompt ascertainment. [62] Implied terms in a contract of sale that a reasonable price (i e a price ordinarily charged by persons who

deal in articles such as the one sold at the time and place of sale) is intended to be paid, normally do not present difficulties of proof and the *quantum* can usually be ascertained speedily and promptly. [63]

There has been conflict of opinion on the question whether a claim founded on a *quantum meruit* should be treated as a liquidated amount of money. In the Transvaal Provincial Division a claim for a specific sum of money 'in respect of work done and material supplied . . .' was held to be a debt or liquidated demand within the meaning of the then Transvaal rule 42 [64] (now rule 31). The decision of the court rested on the view that the factors necessary for the ascertainment of the sum due were actually in existence: the current reasonable remuneration for the work done and the current market price for the materials supplied were known and from this information the sum due could be readily ascertained; [65] and the decision as to whether the amount of a debt is capable of speedy and prompt ascertainment is a matter left to the discretion of the court in each particular case. [66] The approach of the Transvaal

Provincial Division has been followed by the courts of several other divisions, [67] but in certain Cape decisions and in Natal a narrower test has been adopted, viz that a claim for a 'liquidated amount in money' is a claim based on an obligation to pay an agreed sum of money or is so expressed that the ascertainment of the amount is a mere matter of calculation. [68] However, it has now been stated by Diemont J [69] that he 'can find no fault with the conclusions' reached in *Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd* [70] and he held that a claim for an amount for work and labour done and materials supplied should be treated as a liquidated amount of money. [71] In the exercise of its discretion under the wider test, the court must not look only at the summons in order to decide whether a claim is for a liquidated amount of money; the defence as disclosed in the defendant's opposing affidavit must also be taken into account. [72]

The following have been held to be liquidated amounts in money: an ordinary shop account; [73] the purchase price of goods sold, though not delivered, provided the plaintiff tenders delivery; [74] rent at definite sums per week; [75] board and lodging; and definite sums expended for clothes and medicine; [76] an amount shown on a balance sheet agreed to by the defendant; [77] an amount shown on a promissory note which the defendant has agreed to pay, even though, since defendant is not a party to the note, it is not a liquid document against him; [78] the purchase price and cost of erection of a fence which should have been erected

by the defendant but which was erected by the plaintiff on the defendant's failure to erect it; [79] a claim for a specific balance overpaid in connection with payment of the full amount agreed to for delivery of a specific number of articles, where a number short of the stipulated quantity has been delivered but the whole agreed number has been paid for; [80] the price paid for a house from which the plaintiff was evicted by action, and the cost of defending the action at the defendant's request; [81] a claim upon a bill of exchange against a defendant who had taken over the liabilities of a firm on whose behalf acceptance had been made; [82] a claim under s 81(1) of the Bills of Exchange Act 34 of 1964 by the true owners of a stolen cheque for the amount of the cheque; [83] a claim by the government for income tax assessed and due; [84] insurance premiums; [85] interest; [86] arrear maintenance for a child; [87] a claim for the forfeiture of executors' fees; [88] a claim for the value of property misappropriated, lost or mislaid by the defendant; [89] a taxed bill of costs; [90] a specific, known sum of money alleged to have been stolen; [91] a foreign judgment for money, if final and not superannuated; [92] a claim for the amount of a stolen cheque, the amount of the loss being the face value of the cheque. [93]

The following have been held not to be liquidated amounts in money: an account containing some items which the defendant contends to be overcharged for, and other items for goods sold which he contends were not of the quality guaranteed; [94] a disputed partnership account extending over two years, the determination whereof required evidence to be taken on commission in a foreign country; [95] an account guaranteed by the defendant, where the defendant's liability depended upon the contingency of the principal's failing to pay; [96] a

claim for interest against the defendant, where the defendant had never agreed to pay any interest; [97] an untaxed bill of costs; [98] the costs of transfer of a property, where transfer had not yet been passed; [99] an uncertain claim for money alleged to have been stolen. [100] It has been said that by common consent a claim for damages constituted an unliquidated claim. [101] As a general rule this is undoubtedly correct, but it is clear that where the amount claimed has been ascertained, by agreement [102] or by other means, [103] the claim is a liquidated one.

Subrule (1)*(c)*: 'Delivery of specified movable property.' The summons must specify the movable property with sufficient particularity to enable it to be identified from the description given in the summons. [104] If there is an alternative claim for the value of the property, or for damages in lieu of the return of the property, then, since both these alternatives are unliquidated claims, [105] the court may grant the prayer for delivery of the property but will refuse to grant the alternative(s). [106]

A claim for cancellation of an instalment sale agreement falling under the National Credit Act 34 of 2005, the return of the movable property concerned, and costs is susceptible to summary judgment. [107]

It has been held [108] that a claim for the statement of account could not be considered as a claim for a liquidated amount of money and that such claim is not susceptible to summary judgment. Cases [109] in which an order for the delivery of a statement of account was granted on default judgment are not applicable as the relief sought had been found to be a liquidated demand which is a concept different from a liquidated amount of money.

Subrule (1)*(d)*: 'Ejectment.' An owner is in law entitled to possession of his property and to an ejectment order against a person who unlawfully occupies the property [110] except if that right is limited by the Constitution of the Republic of South Africa, 1996, another statute, a contract, or on some or other legal basis. [111]

The High Court has no equitable jurisdiction to refuse or stay an order for ejectment. [112] It has, however, been held that the High Court retained a residual common-law power to stay or suspend an eviction order. [113] A stay of proceedings for ejectment can be granted if the proceedings are vexatious or an abuse of the process of court but not merely to avoid injustice or inequity. [114]

In *Ndlovu v Ngcobo; Bekker and Bosch v Jika* [115] the Supreme Court of Appeal, in a majority judgment, held that the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 ('PIE') disposed of certain common-law rights relating to eviction. The rights disposed of do not include a landlord's common-law rights in respect of buildings or structures that do not perform the function of a form of dwelling or shelter for humans (e g commercial property) or occupied by juristic persons. In other words, such buildings and structures are not protected by PIE. See further Part D9 below.

Form E is a specimen of a writ of ejectment. [116]

'Together with . . . interest and costs.' It has been held [117] (albeit in provisional sentence proceedings) that interest is a legal corollary to the principal indebtedness forming a separate and distinct indebtedness of its own. [118] In terms of subrule (1) the court is empowered to grant any claim for interest and the ancillary claim of costs. [119]

Subrule (2)*(a)*: 'Within 15 days after the date of delivery of the plea.' This means court days falling within the definition of 'court day' in rule 1. [120]

In *Mncube v Wesbank a Division of FirstRand Bank Limited* [121] the defendant gave notice of intention to amend his plea within the time period allowed for the bringing of an application for summary judgment. The amendments to the plea were effected after that period expired. The plaintiff delivered its application for summary judgment within 15 days after the amendments to the plea were effected. In a subsequent opposed application brought by the defendant to set aside the summary judgment application as an irregular step in terms of rule 30 because it allegedly was delivered out of time, the court held that the plaintiff had 15 days from the date on which the amendments to the plea were effected to deliver its application for summary judgment. Consequently, the application was not an irregular step. [122] See also the notes to subrule (3)*(b)* s v 'Disclose fully the nature and grounds of the defence and the material facts relied upon therefor' below.

The question arises whether a plaintiff who takes a further procedural step after the defendant has delivered a plea, i e a replication or exception, thereby waives his right to apply for summary judgment or is precluded from exercising that right under rule 32 in its amended form. In *Quattro Citrus (Pty) Ltd v F & E Distributors (Pty) Ltd t/a Cape Crops* [123] the plaintiff delivered a replication simultaneously with its application for summary judgment. Gibson AJ held that by delivering its replication, the plaintiff did not waive its right to apply for summary judgment:

> '[8] There is a seductive simplicity and elegance in a litigant being compelled to make a choice between bringing an application for summary judgment or filing a replication: in picking a course of action and having to bring an application for condonation if the chosen course of action were to be a failed application for summary judgment. If the application for summary judgment were to be successful, there would be no need to file the replication. This approach could also potentially relieve the court of the pressure of opportunistic applications for summary judgment.
>
> [9] In my opinion, however, the Task Team's silence on the issue leaves the door open to the plaintiff to file a replication without waiving its rights to apply for summary judgment, as long as it files both the replication and the application timeously and in accordance with the rules of court. Both of these processes must be filed within 15 days of delivery of the plea. Accordingly, the filing of a replication will in no way compromise

> the speediness of the remedy afforded by rule 32, which was the issue of consideration for the Task Team when deliberating the timing of bringing the application. In my opinion, Mr Steyn is correct in arguing that, if the Task Team had intended for the applicant to be compelled to pick a course of action, a provision would have been incorporated dealing with the issue.'

Gibson AJ also found that the defendant had suffered no prejudice as the replication was filed timeously. Summary judgment was accordingly granted.

In *Arum Transport CC v Mkhwenkwe Construction CC* [124] the plaintiff first delivered a replication to the defendant's plea and some days later, within the 15-day period provided for in this subrule, delivered its application for summary judgment. In other words, the facts differed from those in the *Quattro* case. Bezuidenhout AJ disagreed with the findings of Gibson AJ and held that the plaintiff's replication constituted a further procedural step whereby the plaintiff had waived its right to apply for summary judgment. [125] In this regard Bezuidenhout AJ referred to cases decided under rule 32 prior to its amendment on 1 July 2019 [126] and mainly found support [127] in the judgment of Froneman J in *Steeledale Reinforcing (Cape) v Ho Hup Corporation SA (Pty) Ltd* [128] where the following was said: [129]

> 'It appears to me, with respect, that the past underlying justification for allowing amplification of the summons (either in the verifying affidavit, or by delivering a declaration, or by delivering further particulars for the purposes of pleading), namely that it allows for a more comprehensive exposition of the case the defendant has to meet, and thus leads to a better assessment of whether a defendant has disclosed a bona fide defence, is countenanced neither by the wording of rule 32(2) and (4), nor by present binding authority. Summary judgment has repeatedly been described as an extraordinary and stringent remedy (see *Maharaj*, above, at 425H; *Tesven CC and Another v South African Bank of Athens* 2000 (1) SA 268 (SCA) ([1999] 4 All SA 396) at 277H — J; *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd* 2004 (6) SA 29 (SCA) ([2004] 2 All SA 366) at 35C — D), and there seems to me to be little remaining reason for extending its scope by allowing amplification, in whatever form, of the cause of action as set out in either form of the summons.'

In *Ingenuity Property Investments (Pty) Ltd v Ignite Fitness (Pty) Ltd* [130] the plaintiff, as in the *Quattro* case referred to above, also delivered its replication and application simultaneously. The defendant subsequently applied for an order that the summary judgment application be set aside as an irregular step in terms of rule 30. Van Zyl AJ held that he was bound by the findings in the *Quattro* case, [131] and after an extensive textual interpretation of rule 32 in its amended form, a consideration of the Task Team's Report, an analysis of the judgment in the *Arum* case [132] and a consideration of the case law concerning rule 30 and waiver, [133] ultimately concluded that the summary judgment application was not an irregular step and that the rule 30 application therefore fell to be dismissed. [134] On 15 August 2023 Van Zyl AJ

dismissed the defendant's application for leave to appeal against the order dismissing the rule 30 application. [135]

It is submitted that under rule 32 in its amended form, and contrary to what was decided in the *Arum* case, a plaintiff is entitled to deliver a replication before the delivery of an application for summary judgment (provided both are delivered within the time periods stipulated in the rules) and does not thereby waive its right to apply for summary judgment for, amongst others, the following reasons:

(a) The requirements of rule 32(2)*(b)* are peremptory, [136] and includes the requirement that the plaintiff in its affidavit in support of summary judgment must explain briefly why the defence in the plea does not raise any issue for trial.

(b) The aforementioned requirement in effect means that the plaintiff must 'reply' to the defence raised in the plea, although not with the precision required of a replication under rule 25, and explain why the defence does not raise any triable issue. In this sense the plaintiff's replication and affidavit essentially perform similar functions. [137]

(c) It is therefore conceivable that the plaintiff could deliver a replication and in its subsequent application for summary judgment incorporate the replication by reference in its affidavit. [138] The critical questions in such instance would be whether the replication and explanation of the plaintiff are in harmony with each other and comply with the requirement that the plaintiff has to explain 'briefly' why the defence in the plea does not raise any issue for trial. [139]

(d) A replication delivered before an application for summary judgment, and incorporated by reference in the plaintiff's affidavit, cannot be regarded as a waiver of the plaintiff's right to apply for summary judgment. As demonstrated, it is part and parcel of the plaintiff's explanation as to why the defence in the plea does not raise any triable issue. [140]

(e) The defendant is required to deal with the plaintiff's explanation as to why the defence in the plea does not raise any

issue for trial. A failure by the defendant to do so in its opposing affidavit is done at its peril. [141] The defendant is, in effect, required to reply to the plaintiff's explanation in the sense of a rejoinder under rule 25(5), but not with the precision required of a rejoinder according to the standards of pleadings. Thus, there is

nothing in rule 32 in its amended form which prohibits a defendant from delivering a rejoinder before or simultaneously with its opposing affidavit (provided both are delivered within the time periods stipulated in the rules) and incorporating the rejoinder by reference in the opposing affidavit. Ultimately, the well established position concerning opposing affidavits still prevails. [142]

To the extent that the *Quattro* and *Ingenuity* cases did not deal with the reasons set out in the notes above, those reasons also apply to the situation where a plaintiff intends to deliver a replication simultaneously with an application for summary judgment.

The position regarding the delivery by the plaintiff of an exception to the defendant's plea, whether before or simultaneously with its application for summary judgment, appears to be more complicated than the one regarding the delivery of a replication to the plea. In principle there appears to be nothing in rule 32 in its amended form to preclude the plaintiff from delivering an exception and contending, for example, with reference to the exception in its affidavit supporting summary judgment, that the plea does not disclose a valid defence and that no triable issue arises. Each case will have to be determined on its own facts. What is clear, however, is that the plaintiff should, if necessary, timeously seek an extension of time to deliver its application for summary judgment or seek a postponement of the application, as the case may be, in the event of the defendant either opposing the exception or giving notice of its intention to amend the plea or be given leave by the court to amend the plea. It might also become necessary for the plaintiff, in the event that the plea is amended, to seek leave to file a supplementary affidavit in support of summary judgment.

The above-mentioned notes illustrate that rule 32 in its amended form will probably increase the workload of judges as well as the costs for parties. [143]

'Deliver.' In terms of rule 1 this means to serve copies on all parties and file the original with the registrar. In *FirstRand Bank Ltd t/a Wesbank v Maenetja Attorneys* [144] the plaintiff did not serve its affidavit in support of summary judgment in accordance with the provisions of rules 4(1)*(a*A) and 4A. It uploaded the affidavit on CaseLines, to which the defendant's attorneys of record were invited. The defendant opposed the application for summary judgment for want of proper service of the affidavit. The issue for determination was whether an invitation to CaseLines for purposes of service was compatible with this subrule. [145] The court held that CaseLines was not a platform for service. [146] In the absence of any agreement between the parties to effect service in any manner other than that prescribed by the Uniform Rules of Court, and in the absence of 'a substantive application' by the plaintiff for condonation for non-compliance with the rules relating to service as provided for in paragraph 200 of the Judge President's Practice Directive dated 18 September 2020, which was then in force, the affidavit had not been properly served. [147] The application for summary judgment was accordingly dismissed with costs. [148]

'Notice of application.' This means the short form of notice. The notice must state that the application will be set down for hearing on a stated day not being less than 15 days from the date of delivery of the application. [149]

'Together with an affidavit.' The notice of application for summary judgment must be accompanied by an affidavit which meets the requirements of the subrule [150] and which complies with the requirements for the making of an affidavit set out in regulation 3(1) of the Regulations Governing the Administering of an Oath or Affirmation. [151] The Regulations are reproduced in Part D3 below.

The burden of proof to show that the document is in fact an affidavit lies on the applicant who seeks summary judgment. [152]

The subrule makes provision for the filing of 'an' affidavit, which seems to indicate that only one is allowed. There is, however, nothing wrong in a plaintiff filing two (or more) affidavits when one person cannot swear positively to the facts. [153]

If the claim is founded on a liquid document, a copy of the document must be annexed to the affidavit. [154]

'By the plaintiff or by any other person.' Any person who can swear positively to the facts may make an affidavit in support of the application; the subrule does not require that the supporting affidavit be made by the plaintiff himself. It has been held that no special authority by the plaintiff is required for the validity or effectiveness of the affidavit made by another person. [155] The essential requirement is that such other person should state, at least, that the facts are within his personal knowledge. [156] If the plaintiff's authority were required, such authority might, in the absence of an express allegation that the deponent was duly authorized, be properly inferred from the affidavit and other documents properly before the court, [157] the principle being that, in deciding whether or not to grant summary judgment, the court should look at the matter on all the documents which are properly before it. [158]

Just as the deponent to an affidavit in motion proceedings need not be authorized by the party concerned to depose to the affidavit, so it is that the deponent to the verifying affidavit filed in terms of this subrule need not be authorized by the plaintiff to depose to the affidavit. [159]

'Who can swear positively.' Subrule (2)*(a)* contemplates the affidavit being made by the plaintiff himself or by some other person 'who can swear positively to the facts'. [160] In the latter event, such person's ability to swear positively to the facts is essential to the effectiveness

of the affidavit as a basis for summary judgment; and the court entertaining the application therefore must be satisfied, prima facie, that the deponent is such a person. Generally speaking, before a person can swear positively to facts in legal proceedings, they must be within his personal knowledge. [161] For this reason the practice has been adopted, both in regard to rule 32 and some of its provincial predecessors, of requiring that a deponent to an affidavit in support of summary judgment, other than the plaintiff himself (who is not required to do more than assert that he can positively swear to the facts), [162] should state, at least, that the facts are within his personal knowledge (or make some averment to that effect), unless such knowledge appears from other facts stated. [163] The mere assertion by a deponent that he 'can swear positively to the facts' (an assertion which merely reproduces the wording of the subrule) is not sufficient, unless there are good grounds for believing that the deponent fully appreciated the meaning of these words. [164] 'Information and belief' on the part of a deponent is insufficient to ground an order for summary judgment. [165]

It has been held that although a court has the power to condone mere technical non-compliance with the provisions of rule 32(2), it cannot condone non-compliance with the safeguards built into that subrule for the benefit of defendants, for instance regarding hearsay evidence and the doing away with or the relaxation of the test to be applied by every court considering an application for summary judgment to be able, on the evidence adduced in the affidavit supporting such application, to make a factual finding that the deponent was a qualified deponent. [166]

If the plaintiff is a company and the deponent is authorized by the company to swear the affidavit, and the deponent does not state in his affidavit the grounds, indicating only that the facts deposed to by him are within his personal knowledge, the court will none the less not hold the affidavit to be defective for that reason, as long as the deponent is someone who would ordinarily be presumed to have personal knowledge of the matter. Thus, it has been held that the managing director of a company is presumed to be familiar with the facts in an affidavit deposed to by him and dealing with the affairs of the company; [167] but where the facts deposed to by a managing director cast doubt on the question as to whether he has in fact the requisite personal knowledge, summary judgment will be refused. [168] An affidavit by a director of a company is not sufficient, for it does not follow that a director knows anything about the dealings of the company of which he is a director, [169] unless it appears from the affidavit as a whole or from all the other documents relating to the proceedings, that he 'can swear positively to the facts'. [170] Affidavits by the following persons have been held to be sufficient: *(a)* the

manager of a branch of a plaintiff bank, [171] *(b)* the branch manager's assistant, [172] *(c)* the manager of the regional credit department of the plaintiff's bank, [173] and *(d)* a provisional liquidator. [174] It has been held that the affidavit by a legal adviser of a plaintiff bank, in which it is stated that the facts deposed to fall within the knowledge of the deponent and that the deponent can swear positively to these facts and confirms them, is sufficient. [175] In *Potpale Investments (Pty) Limited v Zondi* [176] the affidavit deposed to by a legal manager of the plaintiff was found to be sufficient for the following reasons: [177]

> 'The deponent to the affidavit describes herself as a legal manager employed by SA Taxi Development Finance (Pty) Ltd (SA Taxi). She states that she is duly authorised by the plaintiff, Potpale Investments (Pty) Limited, to represent it in the summary judgment proceedings. She explains that the plaintiff and SA Taxi are part of the same group of companies and that SA Taxi renders several management functions to the group, including the plaintiff, most significantly that it undertakes a credit vetting process which follows on a potential customers application (such as the defendant's application for finance) and administers the credit agreements concluded between the plaintiff (as credit provider) and various credit receivers such as the defendant. Her allegations in this regard are also consistent with the express terms of clause 31.5 of the credit agreement. She further confirms having the plaintiff's files and records relevant to the matter and to the defendant's relationship with the plaintiff in her possession and under her control, and that she is well acquainted with the contents of the files and the records of the plaintiff relevant to the defendant, has perused all the files and records relevant to the matter prior to deposing to the affidavit, that she therefore has personal knowledge of the facts and can confirm that she is a person who can, as she does, swear positively to the facts.'

On the other hand, it has been held that a deponent who made the following allegations falls squarely into the category of persons of which it cannot be merely assumed that they have personal knowledge of the facts in question and, accordingly, that the affidavit is not sufficient:

> '1. I am an adult female, Legal Advisor, employed by Old Mutual Property (Pty) Ltd, being the duly authorised managing agents of the Plaintiff.

> 2. I am duly authorised to depose to this affidavit for and on behalf of the Plaintiff.
> 3. The facts herein deposed to are both true and correct and fall within my personal knowledge, as my position [*sic*] as Legal Advisor I am tasked to have personal knowledge and interaction with matters of this kind (being matters where tenants default with their lease obligation) and to which this specific matter relates [*sic*].
> 4. I have all the relevant documentation in my possession. I have perused same and I have satisfied myself that it [*sic*] is true and correct.
> 5. I have full personal knowledge of the facts as set out in the Plaintiffs' Particulars of Claim.
> 6. I can and do swear positively to the facts contained in this affidavit. I hereby verify the cause of action and the amount claimed in the Summons.' [178]

In *Absa Bank Ltd v Le Roux* [179] the plaintiff instituted action against the defendants on the basis of their suretyships. The deponent to the affidavit in support of summary judgment, *inter alia*, stated:

> '1. I am a manager of the plaintiff, employed at Wholesale Credit Restructuring and Advisory Group.
> 2. All the data and records relating to this action are under my control and I have acquainted myself therewith. The facts contained herein are within my personal knowledge and are both true and correct and I am duly authorised to make this affidavit.
> 3. I have read the summons and verify the cause of action and the indebtedness to the plaintiff in the amounts and on the grounds stated in the summons.'

In dismissing the application for summary judgment, Binns-Ward J, *inter alia*, stated (footnotes omitted):

> '[9] The supporting affidavit falls materially short of what the subrule requires. The defendants did not bind themselves as sureties and co-principal debtors in the stipulated amounts as the affidavit read with the summons suggests. In the case of the first and third defendants they bound themselves subject to a limitation that "the amount that the Bank shall be entitled to recover from me/us under this suretyship shall be limited to the maximum of R7 500 000 together with such further amounts in respect of interest and costs as have already accrued or which will accrue until the date of payment of the amount". In the case of the second defendant liability in terms of the annexed deed of suretyship was unlimited. The deponent carelessly purported to confirm the inaccurate content of a carelessly drafted summons. Moreover, the supporting affidavit was deposed to in Johannesburg, which is the seat of the plaintiff's registered office, and the place, one may assume, in the absence of any indication to the contrary, where the deponent is based. Two of the suretyships were executed in Hermanus, in July 2005 and August 2007, respectively, and the other in Bruma in August 2007. It is not evident from any of the content of the affidavit on what basis the deponent would have had personal knowledge of the execution of these deeds of suretyship in disparate places and different times, or of the principal debt to which the defendants' alleged liability is accessory. It appears from the "Certificate of Balance" annexed to the summons, which was signed by the same person who deposed to the supporting affidavit in the summary judgment application, that the principal debt relates to the debit balance of a specified account in the bank's books in the name of the principal debtor. It does not appear at which branch

> of the plaintiff bank the account is operated, or on what basis the deponent made the certification. It is inherently improbable on the information before the court that the deponent has direct knowledge of most of the salient facts. Indeed, all that he expressly professes personal knowledge of is "the facts contained herein", i e the facts described in the supporting affidavit. The only facts set out in the affidavit are the deponent's position in the plaintiff's employ and his control of and reference to the data and records relating to the action. By itself that is not good enough.'

An affidavit by an employee of a commercial bank describing the deponent as 'Manager Arrears — Legal' and in which it is stated, *inter alia*, that 'I have personal knowledge of the facts and records relating to this matter, the cause of action as well as the amount owing by the respondent to the applicant' is also not sufficient. [180]

In *FirstRand Bank Ltd v Huganel Trust* [181] the bank official who deposed to the affidavit in support of the application for summary judgment on behalf of the plaintiff was employed by the plaintiff as a litigation administrator. In his affidavit he not only stated that he had knowledge of the facts set out in the summons and in the particulars of claim, but also stated:

'3.1 All the records, documentation and files are under my control.

3.2 I have studied and examined all the aforesaid documentation and have personal knowledge of the contents thereof.

3.3 The aforesaid matters were allocated to me by the applicant/plaintiff by virtue that I am personally in control thereof.'

Davis J, after a careful analysis of the relevant cases, [182] found that the bank official's averment of sufficient knowledge fell short of the requirements of subrule (2), and, *inter alia*, stated: [183]

'What is one to make of these conflicting judgments which all followed from that of *Maharaj*? It appears to me that there are at least three important points that should be emphasised.

1. While summary judgment is an order which will prevent a defendant from having his day in court, there are many cases where the plaintiff is entitled to relief on the basis that, ex facie the papers which have been filed, there is no justification for concluding that opposition can be regarded as anything other than a delaying tactic.
2. As Corbett JA emphasised in *Maharaj*, excessive formalism should be eschewed. Hence the substance of the dispute, together with the purpose of summary judgment, needs to be taken into account during the evaluation of the papers which have been placed before court in order to determine whether the summary form of relief should be justified.
3. While a measure of commercial pragmatism needs to be taken into account, in that many of these summary judgment applications are brought by large corporations and, accordingly, it may well be that first-hand knowledge of every fact cannot and should not be required, each case must be assessed on the facts which were placed before the court. It follows therefore that the nature of the defence becomes the starting point. For example, in *Maharaj*'s case Corbett JA found that it was a borderline case but one which fell on the right side of the border insofar as the plaintiff/applicant was concerned. On an evaluation of both the claim and the defence, it

could be concluded with justification that the deponent had sufficient knowledge to depose to the affidavit, which formed the basis of the factual matrix to sustain an application for summary judgment.

By contrast, there will be cases where, given the defence raised, some further knowledge is required beyond an examination of the documentation. In other words, knowledge of a personal nature may be required if it is relevant to the contractual relationship as alleged by the defendant and, if the defendant's version is proved, could constitute an adequate defence to the claim.'

In *Absa Bank Ltd v Le Roux* [184] Binns-Ward J doubted the correctness of the approach followed by Davis J in *FirstRand Bank Ltd v Huganel Trust* [185] referred to above. He, *inter alia*, stated (footnotes omitted):

'[13] It seems to me, with respect, that, although there might be something to be said from a pragmatic perspective of the approach commended in *Huganel Trust* (and it is the words in the last part of the quoted passage that are of particular interest), it is nevertheless not one that accords either with the wording of the subrule or the approach to the application of the subrule explained in *Maharaj*. The judgment in *Maharaj* held that the court could obtain assurance that the deponent to the supporting affidavit had the requisite direct knowledge of the facts from the content of the papers as a whole, and not just from the content of the affidavit read on its own. That is evident from the following dictum at 423 in fine of the judgment: "Where the affidavit fails to measure up to these requirements [i e where it fails to comply strictly with the requirements of the subrule], the defect may, nevertheless, be cured by reference to other documents relating to the proceedings which are properly before the Court (see *Sand and Co Ltd v Kollias*, supra at p 165). The principle is that, in deciding whether or not to grant summary judgment, the Court looks at the matter at the end of the day on all the documents that are properly before it (ibid at p 165)." The judgment did not hold, however, that direct knowledge by the deponent to the supporting affidavit was not necessary, or might be overlooked, unless the defendant's answering affidavit raised an issue that made his apparent lack of direct knowledge relevant. It is not the allegations which the defendant puts in issue that determine the extent of the knowledge that the deponent to the supporting affidavit must have. The deponent must have direct knowledge of most, if not all, of the facts that the plaintiff will have to prove to establish its claim in the action.

[14] In noting the policy of the courts to eschew undue formalism, Corbett JA did not intend to suggest that substantive non-compliance with the requirements of the subrule could be overlooked; on the contrary, the learned judge of appeal emphasised that "in substance, the plaintiff should do what is required of him by the Rule". As apparent from the passage from the judgment quoted in para [5], above, he went on to state, "The grant of the remedy is based upon the supposition that the plaintiff's claim is unimpeachable and that the defendant's defence is bogus or bad in law. One of the aids to ensuring that this is the position is the affidavit filed in support of the application; and to achieve this end it is important that the affidavit should be deposed to either by the plaintiff himself or by someone who has personal knowledge of the facts." (The learned judge of appeal had no cause to consider whether reliance by a deponent on admissible hearsay evidence might in certain circumstances qualify the deponent to swear "positively" to the facts evinced by such evidence, something about which I shall say more later.)

[15] In the result it follows on the construction of the subrule given in *Maharaj* that, unless it appears from a consideration of the papers as a whole that the deponent to the supporting affidavit probably did have sufficient direct knowledge of the salient facts to be able to swear positively to them and verify the cause of action, the application for summary judgment is fatally defective and the court will not even reach the question whether the defendant has made out a bona fide defence. That is why a contention by a defendant that the supporting affidavit in a summary judgment application is non-compliant with the requirements of subrule 32(2) is properly characterised and dealt with as a point in limine in such applications.'

In *Rees v Investec Bank Ltd* [186] the combined summons issued by Investec Bank Ltd against the sureties (described by the court *a quo* as a 'work of epic proportions'), [187] ran to some 250 pages, consisting of 14 claims supported by annexures (running to some 770 pages), consisting of loan agreements, mortgage bonds, deeds of suretyship, certificates of balance, etc. The deponent to the affidavit in support of summary judgment stated: [188]

'1. I am an adult female Recoveries Officer employed as such by the applicant at 100 Grayston Drive, Sandton.

2. I am duly authorised to bring this application and depose to this affidavit on behalf of the applicant. I refer in this regard to the resolution of the applicant annexed hereto marked A.

3. In my capacity as Recoveries Officer, I have in my possession and under my control all of the applicant's records, accounts and other documents relevant to the claims forming the subject matter of the action instituted against the respondents under the above case number (the action).

4. In the ordinary course of my duties as Recoveries Officer and having regard to the applicant's records, accounts and other relevant documents in my possession and under my control, I have acquired personal knowledge of the respondents' financial standing with the applicant and I can swear positively to the facts alleged and the amounts claimed in the applicant's particulars of claim.

5. I hereby verify —

5.1 the causes of action set out in the applicant's particulars of claim;

5.2 that, on the grounds set out therein, the respondents are indebted to the applicant in the amounts claimed by it.

6. In my opinion, the respondents —

6.1 do not have a bona fide defence to the action; and

6.2 they have delivered a notice of intention to defend the action solely for purpose of delay.'

In response the sureties filed an affidavit resisting summary judgment. In the affidavit the deponent, *inter alia*, stated: [189]

'8. It is clear from the affidavit in support of summary judgment that Ms Ackermann derives her knowledge of the case solely from files, books of account and other documents in her possession.

9. I am advised and accept the advice that it has been held that where a deponent acquires her knowledge solely from documents to which she had access, she cannot swear positively to the facts.

10. I deny that Ms Ackermann has personal knowledge of the financial standing of the Respondents with the Applicant.

11. I submit further that Ms Ackermann did not, during any of the times when the various suretyships in this matter were concluded, have any dealings with the Respondents.

12. Ms Ackermann also did not sign any of the certificates of indebtedness upon which the Applicant bases its claims.

13. Having regard to the case law on this issue, I am advised and submit that the Applicant has failed to comply with the requirements of Rule 32(2) of the Uniform Rules of Court as the deponent to the affidavit in support of the application for summary judgment does not have personal knowledge of the facts of the matter and cannot verify the causes of action and the amounts claimed.

14. Importantly, Ms Ackermann is also unable to affirm that the Respondents have no bona fide defence to the action.

15. For these reasons alone I submit that the application for summary judgment ought to be dismissed with costs and the Respondents granted leave to enter into the merits of the action.'

The court *a quo* granted summary judgment in favour of Investec Bank Ltd in respect of 13 of the 14 claims. [190]

On appeal, the primary contention advanced on behalf of the sureties was that Ms Ackermann was not a person who could 'swear positively to the facts' as envisaged in rule 32(2). [191]

In dismissing the appeal, the Supreme Court of Appeal stated: [192]

'[10] In *Maharaj* Corbett JA, in considering the requirement that the affidavit should be made by the plaintiff himself "or by any other person who can swear positively to the facts", stated:

"Concentrating more particularly on requirement *(a)* above, I would point out that it contemplates the affidavit being made by the plaintiff himself or some other person who can swear positively to the facts. In the latter event, such other person's ability to swear positively to the facts is essential to the effectiveness of the affidavit as a basis for summary judgment; and the Court entertaining the application therefor must be satisfied, prima facie, that the deponent is such a person. Generally speaking, before a person can swear positively to facts in legal proceedings they must be within his personal knowledge. For this reason the practice has been adopted, both in regard to the present Rule 32 and in regard to some of its provincial predecessors (and the similar rule in the magistrates' courts), of requiring that a deponent to an affidavit in support of summary judgment, other than the plaintiff himself, should state, at least, that the facts are within his personal knowledge (or make some averment to that effect), unless such direct knowledge appears from other facts stated. . . . The mere assertion by a deponent that he can swear positively to the facts (an assertion which merely reproduces the wording of the Rule) is not regarded as being sufficient, unless there are good grounds for believing that the deponent fully appreciated the meaning of these words. . . . In my view, this is a salutary practice. While undue formalism in procedural matters is always to be eschewed, it is important in summary

judgment applications under Rule 32 that, in substance, the plaintiff should do what is required of him by the Rule. The extraordinary and drastic nature of the remedy of summary judgment in its present form has often been judicially emphasised. . . . The grant of the remedy is based upon the supposition that the plaintiff's claim is unimpeachable and that the defendant's defence is bogus or bad in law. One of the aids to ensuring that this is the position is the affidavit filed in support of the application; and to achieve this end it is important that the affidavit should be deposed to either by the plaintiff himself or by someone who has personal knowledge of the facts.

Where the affidavit fails to measure up to these requirements, the defect may, nevertheless, be cured by reference to other documents relating to the proceedings which are properly before the Court. . . . The principle is that, in deciding whether or not to grant summary judgment, the Court looks at the matter at the end of the day on all the documents that are properly before it. . . ."

[11] In *Barclays National Bank Ltd v Love* (quoted with approval in *Maharaj* at 424B–D) the following is said:

"We are concerned here with an affidavit made by the manager of the very branch of the bank at which overdraft facilities were enjoyed by the defendant. The nature of the deponent's office in itself suggests very strongly that he would in the ordinary course of his duties acquire personal knowledge of the defendant's financial standing with the bank. This is not to suggest that he would have personal knowledge of every withdrawal of money made by the defendant or that he personally would have made every entry in the bank's ledgers or statements of account; indeed, if that were the degree of personal knowledge required it is difficult to conceive of circumstances in which a bank could ever obtain summary judgment."

[12] Since *Maharaj* the requirements of rule 32(2) have from time to time occupied the attention of our courts. In *Shackleton Credit Management v Microzone Trading* it was held in para 13 that:

"(F)irst-hand knowledge of every fact which goes to make up the applicant's cause of action is not required, and . . . where the applicant is a corporate entity, the deponent may well legitimately rely on records in the company's possession for their personal knowledge of at least certain of the relevant facts and the ability to swear positively to such facts."

Did the Ackermann affidavit meet the requirements of rule 32?

[13] Here Investec had issued a combined summons annexed to which were comprehensive particulars of claim setting out the cause of action against the appellants, supported by written agreements concluded with the principal debtors in each instance and suretyship agreements concluded with sureties on the terms set out in the agreements. Investec thus had either obtained judgment against the principal debtor or the principal debtor had been wound up at the instance of Mr Rees. Those occurrences operated as the trigger for Investec to proceed on the suretyship agreements against the appellants. Moreover, the suretyships provided for a certificate of balance to be issued by the relevant bank manager of Investec, which would either serve as a liquid document or constitute prima facie proof of the sureties' indebtedness. It is against that backdrop that Ms Ackermann's affidavit must be viewed.

[14] Ms Ackermann relied on the information at her disposal which she obtained in the course of her duties as the bank's recoveries officer, to swear positively to the contents of her affidavit. It is not in dispute that in the discharge of her duties as such she would

have had access to the documents in question and upon a perusal of those documents she would acquire the necessary knowledge of the facts to which she deposed in her affidavit on behalf of Investec. Prior to the institution of the action Ms Ackermann had been corresponding with the appellants' attorney in regard to the principal debtors' delinquent accounts and

had also addressed letters of demand to them, receiving letters in response which canvassed the appellants' defences. She could thus "swear positively to the facts", "verify the cause of action and the amount claimed" and assert that in her opinion the appellants did "not have a *bona fide* defence to the action" and had entered an appearance to defend "solely for the purpose of delay". These factors show that the requirements set out in *Maharaj* are met.

[15] The fact that Ms Ackermann did not sign the certificates of indebtedness nor was present when the suretyship agreements were concluded is of no moment. Nor should these be elevated to essential requirements, the absence of which is fatal to the respondent's case. As stated in *Maharaj*, "undue formalism in procedural matters is always to be eschewed" and must give way to commercial pragmatism. At the end of the day, whether or not to grant summary judgment is a fact-based enquiry. Many summary judgment applications are brought by financial institutions and large corporations. First-hand knowledge of every fact cannot and should not be required of the official who deposes to the affidavit on behalf of such financial institution or large corporation. To insist on first-hand knowledge is not consistent with the principles espoused in *Maharaj*.

[16] The fact that leave to defend was granted in respect of claim does not mean as was suggested in argument that Ms Ackermann was untruthful and that her affidavit must be rejected in its entirety. It is clear that Ms Ackermann acquired her knowledge from documents under her control. She thus had the requisite knowledge as required by rule 32(2). In making such a finding Hutton AJ did not err.

. . .

[24] Looking at the matter at the "end of the day on all the documents that [were] properly before it", it cannot be said that the high court erred in granting summary judgment against the appellants.'

In *Absa Bank Ltd v Future Indefinite Investments 201 (Pty) Ltd* [193] the plaintiff's claim was founded on the first defendant's outstanding obligations in terms of a loan agreement concluded on 7 November 2008. A copy of the agreement was annexed to the combined summons. The deponent to the affidavit in support of summary judgment stated, *inter alia*:

'1 I am a Manager in the Absa Corporate and Business Bank, Support and Recovery Department of the abovenamed Applicant. In my aforesaid capacity I am duly authorised to depose to this affidavit on behalf of Applicant.

2. Unless the contrary is clearly indicated, I have knowledge of the facts hereinafter stated as a result of my access to and regard of [*sic*] all the relevant documents and data which the Applicant has electronically captured and stored which pertain to the cause of action against the Respondents.

3. In the light of the aforesaid, I can and do hereby swear positively to the facts verifying the cause of action and the amount as claimed in the summons and confirm that the Respondents are indebted to the Applicant in the amount of R617 597,47 plus interest thereon as set out in the Applicant's Particulars of Claim.'

In refusing the application for summary judgment, Binns-Ward J held: [194]

'[5] . . . It will be noted that the qualification at the beginning of paragraph 2 is purposeless, as there is nothing to the contrary indicated anywhere in the affidavit, whether "clearly", or at all. Moreover, there are no "facts hereinafter stated" and there is nothing to indicate definitively which documents and data the deponent considered to be relevant. She does not say positively that she has read the summons.

[6] The sloppy drafting of affidavits made in support of applications for summary judgment is to be deprecated. If a deponent has shown herself to be willing to sign a deposition that is so vacuous in obvious respects, how seriously is the court meant to take her word? Why should the court not be concerned that she has been just as careless in her consideration of "all the relevant documents and data" and the summons referred to in her averments? Slapdash supporting affidavits in summary judgment applications give cause for concern about their bona fides, and parties, such as the plaintiff in this case, who rely on them should not be surprised if their applications are refused in the exercise of the judge's discretion on this basis alone. Improper attention to the drafting of supporting affidavits in these cases can not only stultify the procedure to the detriment of the plaintiffs, but can also be prejudicial to the efficient disposal of cases in the court system.

[7] Corbett JA made it clear 40 years ago in *Maharaj v Barclays National Bank Limited* 1976 (1) SA 418 (A) at 423D–E, that "[t]he mere assertion by a deponent that he 'can swear positively to the facts' (an assertion that merely reproduces the wording of the Rule) is not regarded as being sufficient, unless there are *good grounds* for believing that the deponent *fully appreciated* the meaning of these words" (my emphasis). As mentioned, in the current case, the affidavit gives no indication of what the deponent considered to be "all the relevant documents and data" and the court thus has no basis to qualitatively assess the cogency of the averment. The averments amount to "mere assertion".

[8] However, as the judgment in *Maharaj* also indicated (at p. 423H), "Where the affidavit fails to measure up to [the] requirements [of rule 32(2)], the defect may, nevertheless, be cured by reference to other documents relating to the proceedings which are properly before the Court (see *Sand and Co. Ltd. v Kollias* [1962 (2) SA 162 (W)] . . . at p.165). The principle is that, in deciding whether or not to grant summary judgment, the Court looks at the matter 'at the end of the day' on all the documents before it".

[9] The affidavit was deposed to in Johannesburg and it may be inferred that the deponent employee is based there. The relevant transactions took place in the Western Cape. It may therefore also be inferred, as indeed indicated in the affidavit, that the deponent's knowledge of the facts germane to the cause of action, such as it was, was derived entirely from her consideration of "all of the relevant documents and data" that the plaintiff has electronically captured. It is now established that that is, in principle, unexceptionable in a case like this; see *Trustees for the time Being of the Delsheray Trust and Others v ABSA Bank Limited* [2014] 4 All SA 748 (WCC) and also the provisions of s 15 of the Electronic Communications and Transactions Act 25 of 2002 (to which, curiously in the circumstances, no reference was made in the Full Court's judgment).

[10] *Delsheray* does not, however, stand as authority that bald averments of the nature made in this case are sufficient to satisfy the requirements of rule 32(2). The founding affidavit in *Delsheray* read as follows:

"1) I am a Specialist employed at the Retail Bank Collection Division of the Plaintiff / Applicant. I am duly authorised to depose of this Affidavit. All the data and records, relating to the Applicant's/Plaintiff's action against the Defendant are under my control and I deal with this account on a day to day basis. The facts contained herein are within my personal knowledge and are both true and correct.

2) Unless the contrary appears, I have knowledge of the facts hereinafter stated, either personally or as a result of my access to all relevant computer data and documents pertaining to the Trust's mortgage loans, account number 4056939083.

3) I hereby verify the facts and cause of action stated in the Summons and the Particulars of Claim to the Summons as true and correct and verify in particular, that the Respondents/Defendants jointly and severally the one to pay the other to be absolved are indebted to the Plaintiff in the sum of R1 588 208,61 on the grounds stated in the Summons.

4) In my opinion the Respondents/Defendants, jointly and severally, the one paying the other to be absolved, do not have a *bona fide* defence to the Applicant's/Plaintiff's claim and their appearance to defend has been entered solely for purpose of delay." (Underlining supplied.)

The affidavit was not a model of draftmanship and quite thin on substance, but the deponent in that matter did make it clear that he dealt with the account in question on a day to day basis and thereby gave the court reason to believe that he had read the summons and particulars of claim on an informed basis. The distinguishing features of the supporting affidavit in *Delsheray* show that the submission by the plaintiff's counsel that I was bound by the principle of *stare decisis* to accept the supporting affidavit in the current case as sufficiently compliant with the requirements of rule 32(2) was misconceived. The *ratio decidendi* of *Delsheray* concerned the admissibility of evidence adduced on the basis of a deponent's reference to computerised records, as

distinct from his first-hand knowledge of the underlying facts. Whether what the deponent states on the basis of such records is adequate for the purposes of rule 32(2) will depend on the content of the affidavit. Each case will have to be individually assessed.

[11] The judgments of the appeal court in *Rees and Another v Investec Bank Ltd* 2014 (4) SA 220 (SCA) and *Stamford Sales & Distribution (Pty) Limited v Metraclark (Pty) Limited* [2014] ZASCA 79 (29 May 2014), which the plaintiff's counsel invoked to support his attempt to defend the adequacy of the supporting affidavit in this case, in point of fact both serve to demonstrate that more was required.

[12] It is evident upon a proper reading of the judgment in *Rees* that the appeal court was persuaded to accept the supporting affidavit in that particular case as sufficient on the basis of the cumulative effect of a number of considerations. The affidavit in that matter went as follows:

> "1. I am an adult female *Recoveries Officer* employed as such by the applicant at 100 Grayston Drive, Sandton.
> 2. I am duly authorised to bring this application and depose to this affidavit on behalf of the applicant. I refer in this regard to the resolution of the applicant annexed hereto marked A.
> 3. *In my capacity as Recoveries Officer*, I have in my possession and under my control all of the applicant's records, accounts and other documents relevant to the claims forming the subject matter of the action instituted against the respondents under the above case number (the action).

> 4. *In the ordinary course of my duties as Recoveries Officer and having regard to the applicant's records, accounts and other relevant documents* in my possession and under my control, I have acquired personal knowledge of the respondents' financial standing with the applicant and I can swear positively to the facts alleged and the amounts claimed in the applicant's particulars of claim.
> 5. I hereby verify —
> 5.1 the causes of action set out in the applicant's particulars of claim;
> 5.2 that, on the grounds set out therein, the respondents are indebted to the applicant in the amounts claimed by it.
> 6. In my opinion, the respondents —
> 6.1 do not have a bona fide defence to the action; and
> 6.2 they have delivered a notice of intention to defend the action solely for purpose of delay."

[Emphasis with italicisation provided in the appeal court's judgment.]

The supporting affidavit in *Rees* was fuller in material respects than the affidavit in the current case. The appeal court also regarded it as material that the contract documents on which the claim was based had been annexed to the summons and that the deponent appeared to have had access to the other relevant documentation in *the ordinary course of her duties* (rather like the bank manager in *Maharaj*).

[13] It was also apparent on the papers before the court in *Rees* that the deponent to the supporting affidavit "had been corresponding with the appellants' attorney in regard to the principal debtors' delinquent accounts and had also addressed letters of demand to them, receiving letters in response which canvassed the appellants' defences". It is particularly the latter consideration that seems to have satisfied the appeal court that the deponent had been in a position sufficiently to swear positively to the facts verifying the cause of action. The approach of the appeal court in *Rees* was thus in all respects reconcilable with that adopted by the court in *Maharaj* (at pp. 422–424) in dealing with the point raised *in limine* in that case concerning non-compliance by the plaintiff with rule 32(2). It was also in line with the approach of Miller J in *Barclays Bank Ltd v Love* 1975 (2) SA 514 (D) at 516–7, referred to with approval in *Maharaj* at 424A–D.

[14] There was plainly material of substance before the court in *Rees* to satisfy it that the deponent to the supporting affidavit had sufficient knowledge of the facts. In the current matter the court is required to assume that by the "relevant documents" the deponent meant the documents attached in copied form to the summons. The affidavit does not expressly state as much. The court is also not informed what the deponent considered to be the relevant electronic data. One might assume that the captured data concerns the transactional history of the loan account, but the opacity of the entirely generic references by the deponent to the material that she had regard to means that making that assumption requires educated guesswork rather than reliance on evidence adduced. That is unsatisfactory.

[15] In *Stamford Sales & Distribution (Pty) Limited v Metraclark (Pty) Limited* [2014] ZASCA 79 (29 May 2014), it was pointed out that where the supporting affidavit is deficient by reason of a failure to comply punctiliously with the letter of rule 32, the deficiency might be cured by a consideration of the contents of the verifying affidavit together with the other documents properly before the court "at the end of the day". As apparent from what has been said earlier in this judgment, that echoed what had been said in *Maharaj*. As Swain AJA explained "The object is to decide whether the positive affirmation of the

facts forming the basis for the cause of action, by the deponent to the verifying affidavit, is *sufficiently reliable* to justify the grant of summary judgment." (Emphasis supplied.) The learned judge did not purport to depart from the judgment of Corbett JA in *Maharaj*, in which, approving the statement of the requirements of rule 32(2) by Theron J in this court in *Fischereigesellschaft F. Busse & Co. Kommanditgesellschaft v. African Frozen Products (Pty.) Ltd.*, 1967 (4) SA 105 (C) at p. 108, it was emphasised that "[w]hile undue formalism in procedural matters is always to eschewed [*sic*], *it is important in summary judgment applications under Rule 32 that, in substance, the plaintiff should do what is required of him by the Rule*". Corbett JA went on to state "The grant of the remedy is based upon the supposition that the plaintiff's claim is unimpeachable and that the defendant's defence is bogus or bad in law. One of the aids to ensuring that this is the position is the affidavit filed in support of the application; and *to achieve this end it is important that the affidavit should be deposed to either by the plaintiff himself or by someone who has personal knowledge of the facts*" (emphasis supplied).

[16] The reiterated use by Corbett JA of the word "important" in this passage (at p.423B–H) also illustrates that plaintiffs such as banks that are not in a position to support their applications for summary judgment with affidavits by any one person who has direct personal knowledge of all the material facts, but which do have comprehensive electronic records of all the pertinent documents and transactional evidence, would be well advised to avail of the Electronic Communications and Transactions Act in the manner advised in *Absa Bank Ltd v Le Roux* 2014 (1) SA 475 (WCC), rather than hoping, that in an opposed application like the current matter where the defendants take the point of non-compliance with rule 32, a judge might be persuaded, on a conspectus of all the papers after the opposing affidavit has been delivered, that there is enough to go on. Use of the relevant provisions of the Act would entail the deponent identifying the "data messages" (i.e. electronic records) to which reference is made with specificity.

[17] The supporting affidavit in *Stamford Sales* was quoted at para 8 of the appeal court's judgment. It went as follows:

> "I, the undersigned
>
> JANE WILLIS-SCHOEMAN
>
> do hereby make oath and state:
>
> 1 I am the National Credit Manager of the Applicant herein and I am duly authorised to depose to this affidavit on behalf of the Applicant.
> 2. The facts contained herein are both true and correct and are within my personal knowledge and belief.
> 3. The Applicant's file pertaining to the above-captioned matter which contains, *inter alia,* a cession of book debts in favour of the Applicant, proof of the Applicant's claim against Quali Cool CC and all correspondence entered into by the Applicant and/or its attorney with the Respondent, is currently in my possession and under my control and I am fully conversant with the content thereof.

4. I have read the Combined Summons in this action and can and hereby do swear positively to the facts and verify all the causes of action and the total amount claimed by the Applicant therein.
5. I verily believe that the Respondent does not have a *bona fide* defence/defences to any of the Applicant's causes of action, and that Notice of Intention to Defend has been entered solely for the purposes of delay.

RS 22, 2023, D1 Rule 32-40

WHEREFORE I pray that the Court will grant Summary Judgment against the Respondent in favour of the Applicant in terms of the Notice to which this Affidavit is annexed."

It is evident that it contained a more detailed account and, thereby, provided a much firmer basis for the court to have inferred sufficient knowledge by the deponent of the facts of the case than does the supporting affidavit in the current matter. He stated that he had the plaintiff's file pertaining to the matter in his possession and under his control. His averments conveyed enough to confirm that he had indeed read and was *au fait* with its contents. They did this by making express reference to certain of the contents of the file that were germane to the claim. He also expressly stated that he had read the summons.

[18] The affidavit in the current matter, by contrast, is more closely comparable to that which I found to be inadequate in *Le Roux* supra. It does not escape notice that the plaintiff in the current matter was also the plaintiff in that matter, which suggests that little notice appears to have been taken of what was said there.

[19] I think it bears emphasis that the judgment in *Stamford Sales* should not be misread as having suggested that it is no longer "important", as Corbett JA put it, for an applicant for summary judgment to comply with rule 32(2). What *Stamford Sales* did hold, consistently with *Maharaj*, was that it was not necessary for the deponent to the founding affidavit to have first-hand knowledge of all the material facts. Swain AJA used the term "personal knowledge" at para 11, but I think it is quite clear from the context that by that the learned judge meant first-hand knowledge, as distinct from knowledge derived from relevant and prima facie reliable sources.

[20] The potential for uncertainty arising out of the use interchangeably in *Maharaj* of the terms "personal knowledge" and "direct knowledge" (to which might have been added "first-hand knowledge") when the rule does not employ any of those expressions was remarked upon in *Delsheray* at para 54. The rule requires the deponent to be able to "swear positively" to the facts.

[21] Corbett JA held that for a person to be able to swear positively to the facts they had, "generally speaking", to be within his "personal knowledge". The learned judge of appeal's quotation with approval of the extract from Miller J's judgment in *Love* supra, *loc. cit.*, made it apparent, however, that he did not equate "personal knowledge" with knowledge necessarily based on actual personal involvement in, or first-hand experience of, the underlying transactions. Thus, evidence predicated on personal knowledge derived from reference to records, which in the circumstances a court might reasonably accept would have been kept reliably and accurately, would be admissible for the purposes of compliance with rule 32(2).

[22] The judgment in *Stamford Sales* did no more than confirm that incidence of the judgment in *Maharaj*. It was in that context that it pointed out that "[t]hose high court decisions which have required personal knowledge of all of the material facts on the part of the deponent to the verifying affidavit are accordingly not in accordance with the principles laid down by this court in *Maharaj*" and further "[t]o insist on personal knowledge by the deponent to the verifying affidavit on behalf of the cessionary of all of the material facts of the claim of the cedent against the debtor, emphasises formalism in procedural matters at the expense of commercial pragmatism".

[23] The axiom that adequate compliance with rule 32(2) is important is also confirmed in the Full Court's judgment in *Delsheray* supra, where at para 33, the court disapproved the approach adopted in *FirstRand Bank Ltd v Huganel Trust* 2012 (3) SA 167 (WCC), on

---

RS 23, 2024, D1 Rule 32-41

the basis of its inconsistency with the reasoning of Wallis J at para 25 of *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC* 2010 (5) SA 112 (KZP). On the approach in *Huganel Trust*, non-compliance with rule 32(2) could never be raised by a defendant as a self-sufficient basis for opposing an application for summary judgment. It is, of course, quite apparent from the judgment in *Maharaj* that an allegation of substantial non-compliance with the requirements of rule 32(2) was treated as a point *in limine*, quite distinct from the allegations in the opposing affidavit set forth in terms of rule 32(3). Adequate compliance by the plaintiff with rule 32(2) is a juristic prerequisite to a court's ability to entertain an application for summary judgment. The supporting affidavit is, after all, the evidence adduced by the plaintiff in support of its case. Indeed, that is the reason why it was necessary for the appeal court in *Maharaj* first to dispose of the question as a point *in limine* before it engaged with the question whether a defence had been made out prima facie. Were the legal effect of non-compliance with rule 32(2) different, *Maharaj* could have been decided solely on the basis that the defendant had not made out a sustainable defence; a determination of the adequacy of the plaintiff's compliance with the sub-rule would not have been necessary.'

An affidavit by a trustee was held to be insufficient where the particulars of claim related to a period of time prior to the appointment of the trustee in the plaintiff's insolvent estate and in respect whereof the plaintiff had had no dealings whatsoever. [195] If the cessionary of a debt sued the debtor on the debt and applied for summary judgment on the strength of an affidavit signed by a director of the cessionary company, and there was nothing in the affidavit to indicate that he had any connection with the cedent of the claim and, consequently, that the facts relating to the claim were within his knowledge, summary judgment was refused. [196]

Where the secretary of a government department was the plaintiff, an affidavit by the deputy-secretary of the department was held to be sufficient explicitly despite the fact that the deponent had not stated that he had personal knowledge of the facts. [197] If the affidavit is made by the attorney of record for the plaintiff, the court should satisfy itself that the deponent has personal knowledge of the facts and is not merely repeating information given to him by his client. [198]

If the claim is for a balance due and in arrear on an open account over a stated period, it is generally looked upon as a combined cause of action and an affidavit verifying the cause of action 'based on the grounds referred to in the summons', or words to that effect, is sufficient compliance with the rule. [199]

RS 23, 2024, D1 Rule 32-42

'To the facts.' In High Court practice the cause of action is set out in a declaration or in a combined summons, depending upon the nature of the claim. [200] The 'facts' referred to in this subrule must clearly relate to facts on which the cause of action is based, viz those facts in the declaration or particulars of claim. The deponent is not required to have personal knowledge of the facts on which a defendant might seek to base a defence. [201]

Subrule (2)*(b)*: 'Verify the cause of action . . . identify any point of law relied upon and the facts upon which the plaintiff's claim is based . . . explain briefly why the defence as pleaded does not raise any issue for trial.' In order to comply with subrule (2)*(b)*, the affidavit must contain:

(a) a verification of the cause of action and the amount, if any, claimed;

(b) an identification of any point of law relied upon;

(c) an identification of the facts upon which the plaintiff's claim is based; and

(d) a brief explanation as to why the defence as pleaded does not raise any issue for trial. [202]

It is submitted that the court will have to be satisfied that each of these requirements has been fulfilled before it can hold that there had been proper compliance with subrule (2)*(b)*. [203]

In *Hennie Ehlers Boerdery CC v APL Cartons (Pty) Ltd* [204] the defendant brought an application in terms of rule 30 to set aside the plaintiff's affidavit in support of summary judgment as an irregular step, contending that *(a)* instead of providing a brief explanation as to why the defence pleaded did not raise an issue for trial, the plaintiff's affidavit was 20 pages long (which evidently had already been condensed in spacing to reduce the number of pages), consisting of no less than 76 paragraphs and containing 16 pages of annexures; and *(b)* the plaintiff sought to introduce new evidence, either by way of emails which it had attached to its affidavit (which emails were not attached to its particulars of claim) or by way of allegations made in its affidavit (which were not made in its particulars of claim). The rule 30 application raised the following issues for determination:

(i) whether rule 30 was the appropriate procedural mechanism to challenge an affidavit supporting an application for summary judgment for its alleged want of compliance with 32(2)(*b*); and

(ii) if so, did the plaintiff's supporting affidavit fall to be declared irregular and set aside for want of such application?

The first issue, in turn, raised the question whether the requirements set out in subrule (2)*(b)* were formal or substantive in nature. Ronaasen AJ held that the requirements were substantive in nature, rather than formal, for the following reasons:

> '25.1 the intention with the amended rule was to do away with a formulaic supporting affidavit;
>
> 25.2. the plaintiff, in a lucid manner, is required to identify any point of law relied upon, as well as the facts upon which the plaintiff's claim is based and to furnish a brief explanation as to why the defence as pleaded does not raise any issue for trial — clearly these requirements are substantive rather than merely formal. The intention of the procedure is to expose both the claim and the defence to the scrutiny of the court for it to be in a position to determine whether the defendant has raised a triable issue;
>
> 25.3. the necessity of dealing with the defence raised and furnishing an explanation as to why it does not raise a triable issue cannot but be a substantive requirement. It obliges the plaintiff to come to grips with the substantive elements of the pleaded defence and set out why, having regard to those substantive elements, the defence does not constitute a *bona fide* defence; and
>
> 25.4. the brevity qualification attached to the explanation is relative and the extent of the explanation will in the first place be dependent on the extent and nature of the substantive elements of the defence raised in the plea. Compliance with the brevity requirement cannot therefore necessarily be judged solely on the number of pages or paragraphs the explanation encompasses. Each case will depend on its own circumstances.
>
> [26] . . .
>
> [27] . . .
>
> [28] The court in the matter of *T–Systems (Pty) Ltd v BDM Technology Services (Pty)* Ltd 2020 JDR 2086 (GJ) also had to deal with an application in terms of rule 30, where it was sought to set aside a summary judgment application, *inter-alia* [*sic*], on the basis that the affidavit supporting the application for summary judgment had exceeded its permissible ambit. In dismissing the application, the court expressed itself as follows:
>
> "[38] I disagree that the Rule 30 application is a suitable means of addressing the irregularities complained about. Although dressed up as procedural issues, the objections are substantial in nature. I do not believe the approach is consistent with the purpose of Rule 30. It would undermine the essence of the summary judgment procedure. I would discourage this approach, which delays the resolution of summary judgment applications in real-time."
>
> [29] I agree with the finding in the *T–Systems* matter. In associating myself with the remarks in the above-quoted passage, I add the following:
>
> 29.1. the *T–Systems* judgment fortifies my conclusion that the requirements of sub rule 32(2)(b) are substantive requirements and not merely formal;
>
> 29.2. rule 30 is therefore not the appropriate procedural mechanism to address complaints that affidavits supporting summary judgment applications exceed the ambit of what is the permissible content of such affidavits;
>
> 29.3. complaints as to whether the supporting affidavits in summary judgment proceedings have exceeded the permissible ambit are more appropriately addressed when the summary judgment application is argued. It would be open to a defendant to apply for allegedly offensive portions of the founding affidavit to be struck out alternatively to submit to the court hearing the summary judgment application that they be ignored;

> 29.4. the overriding consideration that a defendant in summary judgment proceedings must demonstrate the existence of a *bona fide* defence remains unaltered by the amended summary judgment procedure. This requires a defendant to deal even with argumentative material in the plaintiff's supporting affidavit. This should not occasion a problem for a defendant with a *bona fide* defence. If it fails to do so, it does so at its peril. *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) at [41];
>
> 29.5. the court hearing the summary judgment application is equally, if not better, able to discern whether the plaintiff's supporting affidavit amounts to an abuse of the process of the court and exceeds the permissible ambit of the sub-rule;
>
> 29.6. as a matter of policy, applications brought in terms of rule 30 to address substantive shortcomings in a summary judgment application must be discouraged. Such applications will interminably delay the completion of summary judgment applications and frustrate the purpose of summary judgment proceedings which, in appropriate circumstances, is to bring a speedy conclusion to litigation in cases where defendants have no prospects of avoiding the plaintiff's claim and have entered an appearance to defend merely to delay. In the context of the present matter and from the litigation history set out above it is apparent that more than a year after the plaintiff instituted its action the matter remains bogged down in an opposed interlocutory dispute;
>
> 29.7. the relief the defendant proposes in the rule 30 application (no doubt so framed to address the concern expressed in paragraph [37] of the *T–Systems* judgment, where the defendant sought to bring an end to the summary judgment application by means of a rule 30 application) is not assured of achieving a speedy resolution of the summary judgment application. It is quite possible that the defendant may again object to the re-formulated supporting affidavit, leading to yet more delays.'

It was accordingly found that rule 30, which applies only to irregularities of form and not to matters of substance, was not the appropriate procedural mechanism to address complaints regarding the substantive requirements of subrule (2)(*b*). [205] No opinion was expressed on whether the plaintiff's supporting affidavit met the substantive requirements of subrule (2)*(b)* or on the merits of the defendant's complaints and contentions that the affidavit did not meet those requirements. Those issues were left for the determination of the court hearing the summary judgment application. [206]

In *ABSA Bank Ltd v Coventry* [207] it was held in regard to a verifying affidavit made under the former rule 32(2) that if *ex facie* the affidavit the requisite verification has not occurred, the court would have no jurisdiction to grant summary judgment. In *Standard Bank of South Africa Ltd v Roestof* [208] it was, however, held that if 'the papers are not technically correct due to some obvious and manifest error which causes no prejudice to the defendant, it is difficult to justify an approach that refuses the application, especially in a case . . . where a reading of the defendant's affidavit opposing summary judgment makes it clear beyond doubt that

he knows and appreciates the plaintiff's case against him'. The *Standard Bank* decision was criticized and not followed in *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC*: [209]

> 'Insofar as the learned judge suggested that a defective application can be cured because the defendant or defendants have dealt in detail with their defence to the claim set out in the summons, that is not in my view correct. That amounts to saying that defects will be overlooked if the defendant deals with the merits of the defence. It requires a defendant who wishes to contend that the application is defective to confine themselves to raising that point, with the concomitant risk that if the technical point is rejected, they have not dealt with the merits. It will be a bold defendant that limits an opposing affidavit in summary judgment proceedings to technical matters when they believe that they have a good defence on the merits. The fact that they set out that defence does not cure the defects in the application, and to permit an absence of prejudice to the defendant to provide grounds for overlooking defects in the application itself seems to me unsound in principle. The proper starting point is the application. If it is defective, then *cadit quaestio.* Its defects do not disappear because the respondent deals with the merits of the claim set out in the summons.'

It is submitted that the approach in the *Schackleton* case is to be preferred and to be applied if the occasion arises in regard to an affidavit made under subrule (2)*(b)* of rule 32 in its amended form.

In *Cohen NO v D* [210] the deponent verified a defective cause of action under circumstances where reliance in the particulars of claim was placed on an incorrect trust deed. The High Court, however, granted summary judgment on the basis that the defendants had failed to advance a reasonable and bona fide defence. On appeal against the order of the High Court, the Supreme Court of Appeal held [211] that, in the light of the facts of the case, it was immaterial whether one followed the *Standard Bank* (referred to as '*Roestoff*') or the *Shackleton* approach. [212] Rather, it had to be determined whether the defendants had raised a sustainable bona fide defence (footnotes omitted):

> '[28] . . . Whether under the old rule 32 or the amended rule 32, what has not changed is that a defendant, to successfully oppose a summary judgment application, has to disclose a *bona fide* defence.
>
> [29] The only decision to trace the history and reasoning behind the amended procedure for summary judgment in detail is *Tumileng Trading CC v National Security and Fire (Pty) Ltd*; *E & D Security Systems CC v National Security and Fire (Pty) Ltd (Tumileng*). As observed by Binns-Ward J in *Tumileng*, most of the old authorities still apply in determining whether a defendant has disclosed a *bona fide* defence. All the defendant is required to do is disclose a genuine defence, as opposed to "a sham" defence. Prospects of success are irrelevant and as long as the defence is legally cognisable in the sense that it amounts to a valid defence if proven at trial, then an application for summary judgment must fail.

> [30] Be it the original trust deed or the amended trust deed which is applicable, both require a court to interpret the extent of the trustees' discretion and when vesting takes place. The defence of the trustees that, prior to the date of vesting, their discretion when to make actual payment is absolute and unfettered, cannot be considered as unreasonable and *male fides*. It is certainly not a "sham defence" in any sense of the word.
>
> [31] The high court failed to consider the test to be applied in deciding whether to grant summary judgment. This was, and remains, whether the facts put up by the defendants raise a triable issue and a sustainable defence in the law, deserving of their day in court. The defendants must fully disclose the nature and grounds of their defence and the material facts on which it is founded. All a defendant has to do is set out facts which if proven at trial will constitute a good defence to the claim.
>
> [32] On the facts so disclosed, the trustees have put up a sustainable defence which is *bona fide*, namely that until vesting occurs the decision to make payment is solely within their discretion. In the context of summary judgment, all the trustees are asking for is their day in court. They have met this threshold and summary judgment should accordingly be refused.'

The order of the High Court was accordingly set aside and substituted by an order refusing summary judgment. [213]

***(a)* Verification of the cause of action.** Verification is done simply by referring to the facts alleged in the summons; it is unnecessary to repeat the particulars. [214] All the facts supporting the cause of action must be verified. [215] It is hardly necessary to add that what the deponent must verify must be a completed (perfected) cause of action; a deponent cannot be said to 'verify' a cause of action which is not a complete cause of action. [216] If there are two or more claims in the summons and summary judgment is sought on all of them, all must be verified;

if only one is verified, the court can grant summary judgment on the verified claim. [217] It has also been held that it is in order in a verifying affidavit to verify a cause of action based on alternative claims; what is objectionable is verifying a cause of action based on two mutually destructive alternative versions. [218] If it is uncertain which of two defendants sued in the alternative is liable, summary judgment cannot be granted. [219] If a summons is capable of two constructions, either of which discloses a cause of action, a defence that it does not disclose a cause of action will fail. [220]

If *ex facie* the document upon which the claim is founded there appears a defect in the cause of action (and the issue has not been dealt with by way of an exception), the court must refuse to enter summary judgment whether or not the defendant has filed an affidavit to oppose it. [221]

***(b)* Identification of any point of law relied upon.** [222] This, it is submitted, refers to an identification of a point of law in relation to the plaintiff's claim upon which summary judgment is sought and not in relation to the defence as pleaded by the defendant. This view is fortified by the wording of the third requirement, viz 'and the facts upon which the plaintiff's claim is based'. Furthermore, it is well established that a pleader's duty includes the duty to set out separately the conclusions of law which the pleader claims follow from the pleaded facts. [223]

In *Absa Bank Ltd v Mphahlele N.O* [224] it was held [225] that the identification requirement does not include the identification of evidence in support of the point of law concerned. See further the notes s v 'Identification of the facts upon which the plaintiff's claim is based' below.

***(c)* Identification of the facts upon which the plaintiff's claim is based.** Whereas verification of the cause of action does not require that the facts upon which the cause of action is based must be repeated in the plaintiff's affidavit, the provision in subrule (2)*(b)* that the facts upon which the plaintiff's claim is based must be identified seems to require that such facts must indeed be repeated in the affidavit or, at least, must be identified with cross-reference to the facts set out in the declaration or particulars of claim. [226] Subrule (2)*(b)* itself does not,

however, provide for 'amplification' of the cause of action as set out in the declaration or particulars of claim, in the plaintiff's affidavit. [227] The reasons for this seem to be obvious:

(i) in terms of rule 18(3) a plaintiff's declaration or particulars of claim must contain a clear and concise statement of the material facts upon which the plaintiff relies for his claim, with sufficient particularity to enable the defendant to reply thereto;

(ii) as is pointed out under paragraph *(b)* above, it is well established that a pleader's duty includes the duty to set out separately the conclusions of law which the pleader claims follow from the pleaded facts. Thus, a plaintiff's particulars of claim must, apart from the material facts upon which the plaintiff relies for his claim, contain the relevant conclusions of law;

(iii) in terms of rule 20(2) a plaintiff's declaration must set forth the nature of the claim, the conclusions of law which the plaintiff shall be entitled to deduce from the facts stated therein, and a prayer for the relief claimed;

(iv) in terms of rule 18(6) a plaintiff who in his pleading (whether it be a declaration or particulars of claim) relies upon a contract must state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written, a true copy thereof or of the part relied on in the pleading must be annexed to the pleading. [228]

Support for the view set out above is to be found in *Tumileng Trading CC v National Security and Fire (Pty) Ltd* [229] in which Binns-Ward J held: [230]

> '[18] It is by no means obvious what was sought to be achieved by inserting the requirement that the deponent to the supporting affidavit must identify any point of law relied upon and the facts upon which the plaintiff's claim is based. After all, now that summary judgment applications fall to be brought after the plea has been delivered, there will always be either a combined summons or a simple summons and declaration already on record. The particulars of claim or declaration are required to comply with the requirements for pleading set out in rule 18. Accordingly, they must contain a clear and concise statement of the material facts upon which the plaintiff relies for its claim with sufficient particularity to enable the defendant to plead thereto. If the allegations in the pleaded claim do not make out a cause of action that is cognisable in law, it is amenable to exception, and if the pleading does not comply with rule 18, it is liable to be struck out as an irregular step. If the plaintiff's cause of action depends on a "legal point" that is not evident on the alleged facts, the point should therefore already be apparent in the summons or declaration. One must assume therefore that a claim to which a plea is delivered should be neither excipiable nor non-compliant with the requirements of rule 18 as to particularity.
>
> [19] Is the deponent to the supporting affidavit then required to repeat in narrative form what should already be apparent from the plaintiff's pleadings? Or is he or she expected to set out the facta probantia in elaboration of the facta probanda alleged in the pleadings? Having regard to the purpose of summary judgment proceedings, which is to prevent matters in which the defendant does not appear to have a bona fide defence having to go to trial, no obvious point is served by an elaborate supporting affidavit concerning the merits of the *plaintiff*'s pleaded *claim*.
>
> [20] I think that it would be desirable therefore if plaintiffs were encouraged to confirm what should already be apparent from their pleaded case as succinctly as possible. No purpose will be served by a laborious repetition of what the judge and the defendant should be able to discern independently from the pleaded claim. No harm will be done by using a "formulaic" mode of expression if it serves the purpose; which, it seems to me, it would do in most matters.'

In *FirstRand Bank Limited v Badenhorst NO* [231] Q Leech AJ, however, expressed doubt as to whether the requirement to identify the facts upon which the claim is based, refers only to the facts constituting the cause of action and why, for example, the facts to be set out in a replication yet to be delivered cannot be set out in the supporting affidavit. [232] By way of analogy, *(a)* in rule 32(3)*(b)* the phrase 'the material facts relied upon' is not understood to refer to the facts set out in the plea only; and *(b)* the word 'facts' in the phrase is not to be understood to mean only the *facta probanda* or pleaded facts in the context of rule 32. The word 'facts' in the context of the rule includes *facta probantia*. Thus, the Rules Board may have intended, 'the facts upon which the plaintiff's claim is based', to include *facta probantia*. [233] This does not mean that there is no limit to the material that is permissible in the supporting affidavit. The parties should not conduct summary judgment applications as opposed motions and deal

exhaustively with the facts and evidence relied upon in their affidavits. [234] Generally, documents should not be attached to the supporting affidavit. However, undue formalism in procedural matters is always to be eschewed and courts may and do have regard to documents properly placed before them. [235]

In paragraph [18] of *Tumileng* above it is stated that '[o]ne must assume therefore that a claim to which a plea is delivered should be neither excipiable nor non-compliant with the requirements of rule 18 as to particularity'. It is respectfully submitted that this is a correct reflection of the law. Thus, for example, in *Weavind & Weavind Incorporated v Manley NO* [236] the full bench held [237] that 'an inherently defective summons or particulars of claim cannot sustain a summary judgment or be corrected of its defectiveness by overlooking or disregarding the defect'. This approach was reaffirmed by the full bench in *Shabalala v Bixoflo t/a Blue Clover N.O.* [238]

***(d)* Brief explanation as to why the defence as pleaded does not raise any issue for trial.** In *Standard Bank v Rahme and Similar Cases* [239] Siwendu J, in considering the new requirement that the plaintiff must briefly explain why the defence as pleaded does not raise any issue for trial, held: [240]

> 'The amended rule appears to raise the bar and onus for securing summary judgment. By implication, a plaintiff must satisfy the court that the defendant has no defence on the merits when under the old rule, it was enough to show a defendant lacks a *bona fide* defence.'

The approach of Siwendu J was followed in *Liberty Group Ltd v LA Kandyan Trading (Pty) Ltd t/a Mayur Indian Cuisine,* [241] *MMK Khumalo Trading & Projects (Pty) Ltd v Maopeng Electrical (Pty) Ltd*, [242] *Nedbank v Richardson* [243] and *Tractor World v Mzwali*. [244]

In *Tumileng Trading CC v National Security and Fire (Pty) Ltd* [245] it was, however, held that the words 'brief explanation as to why the defence as pleaded does not raise any issue for trial' cannot be taken literally, for a plea that does not raise any issue for trial would be excipiable. [246] Binns-Ward J accordingly adopted a 'reading-in' approach to give meaning to the words: [247]

> '[21] . . . I consider that the amended rule 32(2)*(b)* makes sense only if the word "genuinely" is read in before the word "raise" so that the pertinent phrase reads "explain briefly why the defence as pleaded does not *genuinely* raise any issue for trial". In other words, the plaintiff is not required to explain that the plea is excipiable. It is required to explain why it is contended that the pleaded defence is a sham. That much is implicit in what the Task Team said in para. 8.3 of its memorandum. The position would have been made clearer had the words "does not make out a bona fide defence" been used. That would have made for a more clearly discernible connection between the respective requirements of subrules (2)*(b)* and (3)*(b)*. That there be such a connection is necessary if the amended rule as a whole is to be workable.
>
> [22] What the amended rule does seem to do is to require of a plaintiff to consider very carefully its ability to allege a belief that the defendant does not have a bona fide defence. This is because the plaintiff's supporting affidavit now falls to be made in the context of the deponent's knowledge of the content of a delivered plea. That provides a plausible reason for the requirement of something more than a "formulaic" supporting affidavit from the plaintiff. The plaintiff is now required to engage with the content of the plea in order to substantiate its averments that the defence is not bona fide and has been raised merely for the purposes of delay.

[23] It seems to me, however, that the exercise is likely to be futile in all cases other than those in which the pleaded defence is a bald denial. This is because a court seized of a summary judgment application is not charged with determining the substantive merit of a defence, nor with determining its prospects of success. It is concerned only with an assessment of whether the pleaded defence is genuinely advanced, as opposed to a sham put up for purposes of obtaining delay. A court engaged in that exercise is not going to be willing to become involved in determining disputes of fact on the merits of the principal case. As the current applications illustrate, the exercise is likely therefore to conduce to argumentative affidavits, setting forth as averments assertions that could more appropriately be addressed as submissions by counsel from the bar. In other words, it is likely to lead to unnecessarily lengthy supporting affidavits, dealing more with matters for argument than matters of fact.

. . .

[40] However, does the fact that the bones of a triable defence have been made out in the plea mean that summary judgment must be refused? The answer is clearly "no"! The reason for the negative answer is that the enquiry is not whether the plea discloses "an issue for trial" in the literal sense of those words, it is whether the ostensible defence that has been pleaded is bona fide or not. As discussed earlier, that that is the relevant enquiry in a summary application follows from the rule-maker's decision to leave subrule 32(3) substantively unamended. If one were to apply the amended rule differently, it would be impossible to marry the requirement of a plaintiff apparently posited by subrule [*sic*] 32(2)*(b)* (viz showing that "the defence as pleaded does not raise any issue for trial") with what is demanded of a defendant in terms of subrule [*sic*] 32(3)*(b)* (viz showing that its defence to the action is bona fide; i e that its ostensible defence is not a sham). The respective supporting and opposing affidavits would pass each other like ships in the night if one were to understand the notion of "issue for trial" in subrule [*sic*] 32(2)*(b)* as denoting something different from a 'bona fide defence' within the meaning of subrule [*sic*] 32(2)*(b)*.'

It is submitted that the decision of Siwendu J in the *Rahme* case should be treated with circumspection in the light of the clear and legally justifiable approach of Binns-Ward J in the *Tumileng* case set out above. The decision in the *Rahme* case was, with reference to the *Tumileng* case, not followed by PC Bezuidenhout J in *Bridgement (Pty) Ltd v VHA Accounting Solutions*. [248]

In *Guardrisk v Life Limited FML Life (Pty) Ltd* [249] it was held [250] that the new requirement gives rise to the question whether the plaintiff has demonstrated that the defence raised in the plea is not genuinely advanced. In other words, 'it is critical to any assessment of the question that the person who deposes to the affidavit in support of summary judgment is in a position to say whether or not the defence advanced in the plea is genuine and sustainable on facts known to them'.

Subrule (2)*(b)* imposes a duty on the plaintiff to explain *briefly* why the defence as pleaded does not raise any issue for trial. Lengthy explanations may frustrate the object of the summary procedure envisaged by the rule and may for that reason amount to an abuse of the process, as such resulting in an appropriate costs order being made against the plaintiff. [251] Thus, for example, if the defendant raises a defence of reckless credit in an action based on a credit agreement falling under the National Credit Act 34 of 2005, and resists an application for summary judgment on the basis of such a defence, the plaintiff will in terms of subrule (2)*(b)* be entitled to set out facts, supported by the necessary documents, to briefly explain why the defence as pleaded does not raise any issue for trial. [252]

In *ABSA Bank Limited v Mashinini NO* [253] the following was stated:

'3.11 The Rule as amended clearly did not envisage a mini-trial by the production of extensive *facta probantia*, but where, as in the present instance that which would have been a bare or bald denial can be refuted or, in the imprecise words of the amended Rule, "briefly" be explained by way of an annexed document or documents, that [*sic*] should in my view be allowed. To not do so would be to revert to the unsatisfactory position which was in existence prior to the amendment of the Rule.

To give a further example: say a plaintiff has pleaded payment of an agreed purchase price and the pleaded defence is a bare denial. Surely the Rule envisaged that the production of proof of payment or a receipt would indicate that the denial did not raise any "issue for trial". Such production should be allowed. The use of the word "briefly" in Rule 32(2)(b) however indicates that the instances and extent where use can be made of such allegations and instances should be limited . . . and each case will have to be judged on its own facts and merits.'

See further the notes to subrule (2)*(b)* s v 'Verify the cause of action . . . identify any point of law relied upon and the facts upon which the plaintiff's claim is based . . . explain briefly why the defence as pleaded, does not raise any issue for trial' above and, in particular, the discussion of *Hennie Ehlers Boerdery CC v APL Cartons (Pty) Ltd*. [254]

The 'defence as pleaded' should comply with the provisions of rules 18(4) and 22(2), i e it should clearly and concisely state all the material facts relied upon for the defence in order to put the plaintiff in a position to assess whether or not 'the defence as pleaded' raises any issue for trial. Thus, a plea of bare denial would, generally speaking, not raise any issue for trial. See further, in this regard, and in regard to the effect of proposed amendments to the plea, the notes to subrule (3)*(b)* s v 'Disclose fully the nature and grounds of the defence and the material facts relied upon therefore' below.

Apart from the facts referred to in *(a)*, *(c)* and *(d)* above, [255] the affidavit by the plaintiff or other person who can swear positively to the facts should therefore not set out other evidence. Rule 32(4) clearly provides that no evidence may be adduced by the plaintiff 'otherwise than by the affidavit referred to in subrule (2)'. The inclusion of other evidence in the affidavit will not invalidate the application; such evidence will simply be ignored by the court. [256]

In *Gauteng Refinery (Pty) Ltd v Eloff* [257] it was held by the full bench that a failure by the plaintiff to deal with the defendant's counterclaim in its affidavit in support of summary judgment, and to briefly explain why the counterclaim did not raise any issue for trial, was not fatal to the application for summary judgment. The full bench motivated its decision as follows (footnotes omitted):

'[14] The existing authority allows a counterclaim to be considered in the same way as a plea, for the court to consider whether the counterclaim is frivolous, unsubstantial and intended only to delay. To require as a formal requirement an explanation why the counterclaim does not raise an issue for trial is inconsistent with the purpose of the summary judgment rule. The counterclaim ought rather to be considered when the merits of the summary judgment application are considered, and a plaintiff who does not include an explanation of why the counterclaim does not raise a triable issue and therefore is a bar to summary judgment, runs the risk of failing on the merits.

[15] In all the authorities to which we have been referred, the fatal non-compliance has been along the lines of whether the correct allegations are contained, whether it is clear that the deponent has knowledge, and so on. These are formal requirements which go directly to validity and compliance. An explanation, as required by the new rule, is of a different character, and falls into the elements that must be considered when the decision-maker is determining whether there is a triable issue.

---

[16] This is particularly the case where a counterclaim is based on facts other than those on which the main claim is based, and a plaintiff's knowledge may not be as comprehensive as that of the defendant. To prevent a court from even considering whether the counterclaim constitutes a bona fide defence simply because a plaintiff has not explained why it does not, seems to me highly inequitable, and errs on the side of the highly, and unnecessarily, technical. The proper place for the consideration of the plaintiff's failure is in the consideration of the merits of the summary judgment application.'

The effect of the requirement in this subrule is to require the defendant to deal with the plaintiff's explanation in its opposing affidavit. [258]

Subrule (2)*(c)*: 'If the claim is founded on a liquid document a copy . . . shall be annexed.' The object of the provision that a copy of the liquid document must be annexed to the affidavit is to ensure that a defendant against whom summary judgment is sought should be allowed at least to see a copy of the document which forms a vitally important part of the case which is being made against him. [259] The need to annex a document to the affidavit exists only in the event of that document being a liquid document. A plaintiff who believes that his claim is not founded on a liquid document can draw his application without annexing any document unless the nature of the document or the allegations which appear in the summons prima facie indicate that the claim is based on a liquid document. [260]

If an endorsement has been crossed out on the original document, there is no need to reproduce the crossed-out endorsement on the copy served, and if a signature is illegible there is no need to reproduce the indecipherable hieroglyph: a few question marks are commonly used to indicate, on a copy, the fact that on the original the signature is illegible. [261] In the latter case, however (where a signature is illegible), it is preferable to serve a photostat copy or exhibit the original, [262] for as a general rule the omission of vital signatures (e g those of the Registrar of Deeds and the conveyancer from a copy of a bond or those of certain sureties and co-principal debtors from a copy of a promissory note) [263] completely destroy the liquidity of the document sued upon.

In an application for summary judgment on a cheque a notarial certificate of presentment is not required, provided due presentment does appear from the documents before the court. [264]

'Notice of application . . . on a stated day not being less than 15 days from the date of the delivery thereof.' The days referred to in the subrule are court days falling within the definition of 'court day' in rule 1, to be computed with the exclusion of the date of delivery and the inclusion of the day before the stated date of set-down, so as to allow the full prescribed number of days to run.

Subrule (3): General. The defendant can attack an application for summary judgment on any ground, including the admissibility of evidence in the plaintiff's affidavit. [265] An affidavit should be filed even if only legal objections to the application for summary judgment are raised. [266] If the plaintiff fails to verify his cause of action with clarity and exactitude, it is defective and his claim will fail. [267]

In terms of this subrule the defendant may *(a)* satisfy the court by affidavit or, with the leave of the court, by oral evidence that he has a bona fide defence to the action; or *(b)* give security to the plaintiff to the satisfaction of the court for any judgment, including costs, which may be given.

If the plaintiff's claim does not fall within the categories laid down in subrule (1), but he nevertheless applies for summary judgment thereon, the defendant is not required to comply with the procedure laid down in this subrule, but may simply raise the point in argument that the plaintiff has no right to apply for summary judgment upon his claim. [268]

In *Weavind & Weavind Incorporated v Manley NO* [269] the appellant raised certain points *in limine* in regard to defects in the plaintiff's particulars of claim and affidavit in support of summary judgment for the first time in its heads of argument in the appeal. After an analysis of the case law [270] the full bench, in allowing the issues to be raised in argument, stated:

> '[18] However for the reason that an inherently defective summons or particulars of claim cannot sustain a summary judgment or be corrected of its defectiveness by overlooking or disregarding the defect, I am not persuaded that there is justification for not allowing the raising of these *limine* [*sic*] issues for the first time on appeal and for them to be considered. They have been adequately responded to by the Respondent. Any prejudice that may be suffered by the Respondent if the *in limine* complaints are upheld may be compensated by an appropriate order for costs . . .'

In *Shabalala v Bixoflo t/a Blue Clover N.O.* [271] the defendant's attorney, shortly after the commencement of an opposed summary judgment application hearing in the magistrate's court, announced that he intended placing in issue the plaintiff's non-compliance with the 15 days' time limit prescribed by rule 14(2) of the magistrates' courts rules. This resulted in

a strenuous debate between the parties as to whether the defendant was entitled to raise such point *in limine* for the first time during the course of the opposed summary judgment application hearing. The magistrate entertained the point *in limine* and availed the parties' legal representatives the opportunity of arguing the issue, although he omitted to address and make a ruling thereon in his judgment. On appeal against the order of the magistrate, the full bench entertained the point *in limine* on the basis that It was to be expected that the issue of the necessity to give notice to raise a point *in limine* would again arise and, seized with it, the appeal court had to charter a course that found the balance between the right to raise such points *in limine* and the duty to give prior notice thereof to the opposition. [272] The full bench adopted the following approach (*per* Khan AJ):

> '[17] Should prior notice be obligatory, it will prejudice a party who discovers a material point *in limine*, for the first time during the course of argument. Therefore, the balance, to my mind, lies in the author of such point *in limine* not being obstructed from raising it, despite there having been no prior notice thereof, but the opposition being afforded an adjournment ranging from a few hours, subject to the discretion of the court, to a few days, to enable him to prepare adequately to meet the challenge. It would be prudent to reserve the determination of the issue of costs occasioned by such adjournment jointly with the determination of the summary judgment application as there exists prospects of such costs order being determined in favour of either one of the parties.'

A defendant, after filing an affidavit, may change his mind and offer security. [273] In such a case summary judgment will be refused.

A defendant resisting an application for summary judgment is not confined to the issues raised in his opposing affidavit. [274]

If, pursuant to this subrule, the defendant files an affidavit in opposition to an application for summary judgment, the court is not entitled to ignore such affidavit and it cannot be said that the defendant is in default because he (or his counsel) fails to appear when the application is heard. [275]

Subrule (3)*(a)*: 'Give security.' The words 'give security' in this subrule mean that the security must be sufficient to meet the demands set out in the summons. [276] The defendant must also give security for costs in terms of this subrule. The security must be given to the satisfaction of the court.

There is no reason in principle why a defendant who has initially elected to file an affidavit deposing to a bona fide defence should not be allowed to change his mind at the hearing of the application and give security instead under this subrule. [277]

'To the satisfaction of the court.' Prior to its amendment which came into operation on 1 July 2019 [278] this subrule provided that the defendant could provide security to the satisfaction of the *registrar* for any judgment and costs which might be given. That was in line with a general trend to require of the registrar to determine an amount of security as illustrated by, for example, *(a)* rule 47(3) which provides in regard to security for costs that 'if the amount of security only is contested the registrar shall determine the amount to be given and his decision shall be final'; and *(b)* rule 49(13)*(b)* which provides in regard to security for the costs of an appeal that '[i]n the event of failure by the parties to agree on the amount of security, the registrar shall fix the amount and the appellant shall enter into security in the amount so fixed'. It is submitted that the subrule as currently framed will require of a defendant to file an affidavit and appear at the hearing of an application for summary judgment in order to satisfy the court that the security provided is sufficient, and to address any questions raised by the court. This will not only increase the workload of the courts but will also increase costs for the defendant. The position under the subrule in its amended form is therefore unsatisfactory.

Subrule (3)*(b)*: 'Satisfy the court by affidavit.' The defendant's affidavit must be made by the defendant himself or by any other person who can swear positively to the fact that the defendant has a bona fide defence to the action. [279] The court must ascertain that an affidavit is not filed on behalf of the defendant by a person not authorized to do so. [280]

'Satisfy' does not mean 'prove'. What the rule requires is that the defendant set out in his affidavit facts which, if proved at the trial, will constitute an answer to the plaintiff's claim. [281] Only facts which the court can take account of must be alleged. Thus, for example, it was held that secondary evidence as to documents [282] and hearsay evidence are inadmissible. [283] If the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons are disputed or new facts are alleged constituting a defence, the court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. [284]

The defence must be put before the court on affidavit and not merely orally from the bar with reference to the plea. It is submitted that where all conditions have been fulfilled by the plaintiff entitling him to summary judgment, a mere statement from the bar that the defendant has a defence on the merits as demonstrated by the plea, is insufficient to stay judgment. [285]

The defendant's affidavit should set out material facts and particulars. [286] It is not sufficient for a defendant to state that he has no knowledge of the allegations in the plaintiff's summons, [287] nor to state that the plaintiff's allegations must be subject to grave suspicion, when he has had ample time to test whether the suspicion is well founded or not. It seems that he must take positive steps to confirm his suspicions, for a suspicion by itself is not sufficient ground upon which to refuse summary judgment. [288]

While it is not incumbent upon the defendant to formulate his opposition to the summary judgment application with the precision that would be required of a plea (or for the court to examine the opposing affidavit by the standards of pleadings), [289] none the less when he advances his contentions in resistance to the plaintiff's claim he must do so *(a)* with a sufficient degree of clarity to enable the court to ascertain whether he has deposed to a defence which, if proved at the trial, would constitute a good defence to the action; [290] and *(b)* with reference to the plea that was delivered. [291] Affidavits in summary judgment proceedings are customarily treated with a certain degree of indulgence, [292] and even a tersely stated defence may be a sufficient indication of a bona fide defence for the purpose of the rule. [293] If, however, the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the court to consider in relation to the

requirement of bona fides. [294] If a defendant had difficulty in dealing with pleadings because they were not technically correct, that had to be stated in his affidavit filed as a justification for his inability to present an affidavit disclosing the nature and grounds of the defence and the material facts relied upon therefor as required by the subrule. [295] This does not, on the other hand, mean that lengthy and prolix affidavits are required in summary judgment cases. [296] It is not the intention of the subrule to provide the plaintiff with the unilateral advantage of a preview of the defendant's evidence, [297] especially not where, under rule 32 in its amended form since 1 July 2019, an application for summary judgment may only be made after the delivery of the defendant's plea. It has also been recognized that what a defendant can reasonably be expected to set out in his affidavit depends, to some extent, upon the manner in which the plaintiff's claim, to which he is seeking an answer, has been formulated. [298] If the affidavit lacks particularity regarding the material facts relied upon and falls short of the requirements of the subrule, the court may not be able to assess the defendant's bona fides but it may still, in an appropriate case, exercise its discretion in favour of the defendant if there is doubt whether the plaintiff's case is unanswerable. [299]

'Delivered five days before the day on which the application is to be heard.' To deliver means to serve copies on all parties and file the original with the registrar. [300]

The days referred to in the subrule are court days falling within the definition of 'court day' in rule 1, to be computed with the exclusion of the date of delivery and the inclusion of the day before the stated date of hearing of the application, so as to allow the full prescribed number of days to run.

The court can condone the late filing by the defendant of an affidavit. [301]

'Or with the leave of the court by oral evidence.' The subrule allows the defendant, by leave of the court, to present oral evidence as an alternative to an opposing affidavit, not in addition to it. [302]

[This page contains footnotes only in print]

'*Bona fide* defence.' All that the court enquires into, in deciding whether the defendant has set out a bona fide defence, is: *(a)* whether the defendant has disclosed the nature and grounds of his defence; and *(b)* whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is bona fide and good in law. [303]

Bona fides in the subrule cannot be given its literal meaning; [304] the subrule does not require the defendant to establish his bona fides; it is the *defence* which must be bona fide, [305] and whether it is bona fide or not depends upon the merits of that defence as raised in the defendant's affidavit. [306] The subrule does not require the defendant to satisfy the court that his allegations are believed by him to be true. [307] It will be sufficient if the defendant swears to a defence, valid in law, in a manner which is not inherently or seriously unconvincing; [308] or, put differently, if his affidavit shows that there is a

reasonable possibility that the defence he advances may succeed on trial. [309] If, for example, the defendant omits facts upon which a defence can be based, or sets out the facts upon which he does rely in such a manner that the court is unable to say that if they are established they will constitute a defence to their action or some part of it, [310] he will fail in his defence. [311]

If it is apparent from his affidavit that the *defendant* is not bona fide, he will fail in his defence because in such a case his *defence*, too, cannot be bona fide in the sense set out in the previous paragraph. A defendant will therefore fail if it is clear from his affidavit that he is advancing a defence simply to delay the obtaining of a judgment to which the defendant well knows that the plaintiff is justly entitled. [312] So too where the defences raised in the affidavit are inconsistent with the plea in the absence of a reasonable explanation. [313] In *Van Eeden v Sasol Pensioenfonds* [314] the defendant averred that he had a bona fide defence to the plaintiff's claim

on the ground that, *inter alia*, the cession of the lease sued upon was void, as on the date of the cession the cessionary (a company) did not exist. It was held that the fact that the defendant did not in his affidavit deal with the question whether he had knowledge of the non-existence of the company resulted in his bona fides and that of his defence being placed under suspicion. [315]

The defendant is not at this stage required to persuade the court of the correctness of the facts stated by him or, where the facts are disputed, that there is a preponderance of probabilities in his favour, [316] nor does the court at this stage endeavour to weigh or decide disputed factual issues or to determine whether or not there is a balance of probabilities in favour of the one party or another. [317] The court merely considers whether the facts alleged by the defendant constitute a good defence in law and whether that defence appears to be bona fide. [318] In order to enable the court to do this, the court must be apprised of the facts upon which the defendant relies with sufficient particularity and completeness as to be able to hold that if these statements of fact are found at the trial to be correct, judgment should be given for the defendant. [319]

The subrule does not require that a defendant, who relied on the excipiability of the claim, had to have filed the exception in terms of rule 23. He merely needed to base his opposition on the excipiability of the claim as formatted. [320]

The defendant is entitled to attack the application on any aspect, including the jurisdiction of the court, [321] the *locus standi in judicio* of the plaintiff [322] or the admissibility of the evidence tendered in the plaintiff's affidavit. [323] In general the defence raised must comply with the following principles:

(i) The defence must go to the merits of the application and not consist merely of an attack on the language of the summons and the plaintiff's affidavit, [324] nor is it sufficient for a defendant merely to state that he has no knowledge of the allegations in the plaintiff's summons or that he cannot comment on the plaintiff's claim. [325]

(ii) The defence raised must be valid in law, [326] not merely an unenforceable moral right [327] or inability to pay. [328] However, the procedure for summary judgment is not intended to replace the exception as a test of one or other of the parties' legal contentions. [329] It has been held [330] that when a real difficulty as to a matter of law arises, the court should grant summary judgment only if it is satisfied that the point is really unarguable, [331] and also that it is not depriving the defendant of the right he would have had, in an appropriate case, had the point of law been decided against him on exception, of amending his pleadings. [332] A different view holds that a court hearing the summary judgment application is in just as good a position as the trial court to consider a matter of law. [333]

(iii) The defendant is not required to disclose the whole of his defence; it is sufficient if he discloses the 'nature and grounds' of a bona fide defence and the 'material facts relied upon therefor'. [334]

(iv) Purely technical defences are not permitted. [335]

An order rescinding default judgment is not an automatic 'defence' in a subsequent summary judgment application, even where the court had granted the defendant leave to defend. While the existence of a bona fide defence is part of the 'good cause' enquiry for rescission, it is not its primary focus and does not automatically confer a bona fide defence in a subsequent summary judgment application. [336]

The defendant may rely on a claim in reconvention ('counterclaim') in an unliquidated amount which exceeds the plaintiff's claim [337] and must state the extent of such counterclaim. [338] This defence is also available to a surety/co-principal debtor under circumstances where it is alleged that the principal debtor has a counterclaim exceeding the plaintiff's claim and set-off is invoked. [339] In the event of the counterclaim being less than the plaintiff's claim, the defendant will have a defence if he pays the difference into court. [340] Because the counterclaim is less than the plaintiff's claim, it cannot be said that a defence to the whole of the plaintiff's claim has been established. A defendant who fails to pay the balance into court runs the risk that summary judgment may be granted for the balance together with the costs resulting from the summary judgment application. [341] In order to avoid this risk a defendant may be well advised by paying the balance into court. [342] The counterclaim need not arise from the same set of facts as the claim in convention.

If the plaintiff claims the delivery of specified movable property which at all times was his own property (although handed over to the defendant in terms of a contract since cancelled) and the defendant has no legal right to retain the property, the mere fact that the defendant has an unliquidated counterclaim for damages against the plaintiff affords him no defence to an application for summary judgment. [343] If the defendant fails to set out his counterclaim fully the court may be unable to deduce a bona fide defence therefrom and

may grant summary judgment against him. [344] Although a counterclaim in an unliquidated amount which exceeds the sum claimed by a plaintiff can be a defence to an application for summary judgment, the defendant must set out the grounds of his defence with sufficient particularity to satisfy the court that the defence is bona fide. [345] Where a defendant simply states that he does not know what amount is owing, the bona fides of the defendant is tested by contextualising the averments in their totality, rather than simply selecting a particular averment and then characterizing it as bald, vague or laconic. [346]

Summary judgment was refused where the plaintiff's claim arose from a cession intended to frustrate the debtor's counterclaim against the cedent. [347]

If a defendant counterclaims for the payment of usurious interest pursuant to a money-lending transaction, the disputed averment that the transactions were money-lending ones must be established in a proper trial and summary judgment should accordingly be refused. [348]

It has been held that the obligation of a defendant in terms of this subrule to disclose a bona fide defence does not infringe

his right not to be compelled to give self-incriminating evidence in terms of s 35(3)*(j)* of the Constitution of the Republic of South Africa, 1996. [349] The fact that criminal charges had been preferred against the defendant does not justify the stay of the application pending the conclusion of the criminal proceedings as the provisions of the subrule did not compel a defendant to show his hand before the criminal trial had been concluded. [350] In such case the defendant can also avoid summary judgment being taken against him by furnishing security for the plaintiff's claim in terms of subrule 32(3)*(a)*. [351]

If the defendant admits part of the plaintiff's claim but discloses a bona fide defence to the balance thereof, the plaintiff is entitled to summary judgment in respect of the part admitted. [352]

In *Alphera Financial Services, a Division of BMW Financial Services (South Africa) (Pty) Ltd v Lemmetjies* [353] an action was instituted in the Gauteng Division of the High Court, Pretoria, for:

(a) confirmation of termination of an instalment sale agreement;

(b) return of the vehicle concerned;

(c) an order authorizing the plaintiff to apply to the court on the same papers, supplemented insofar as may be necessary, for judgment in respect of any damages and further expenses incurred by the plaintiff in the repossession of the vehicle, which amount could only be determined once the vehicle has been repossessed by the plaintiff and had been sold.

Subsequently an application for summary judgment was brought. Two defences were raised by the defendant:

(i) that in terms of s 29(1)*(e)* of the Magistrates' Courts Act, the relevant magistrate's court would have jurisdiction in all actions arising out of any credit agreement as defined in s 1 of the NCA. The defendant contended that, based on the majority decision in

---

Nedbank Ltd v Gqirana NO, and Similar Matters, [354] the amounts pertaining to the vehicle and the amounts referred to in the plaintiff's particulars of claim, fell within the jurisdiction of the magistrate's court and that in line with *Nedbank Ltd v Thobejane and Similar Matters*, [355] the action ought to have been instituted in the relevant magistrate's court which had jurisdiction, and not in the High Court. It was further contended that the plaintiff should have sought leave from the High Court before instituting the action in the High Court and that such failure constituted an abuse of the court process;

(ii) that because the instalment sale agreement was concluded within the area of jurisdiction of the local seat of the High Court, Johannesburg, the plaintiff ought to have instituted the action in the nearest division of the High Court to the debtor, which would be the local seat in Johannesburg. By instituting its action in the main seat in Pretoria, the plaintiff had deliberately chosen a division of the High Court that was inconvenient to the defendant, which amounted to an abuse of the court process.

As a result, it was contended that the defendant had a bona fide defence against the action and that the summary judgment application had to fail.

In rejecting both defences and granting summary judgment, the court held, amongst other things, that:

(i) the High Court had been correctly approached to adjudicate on the matter by virtue of the lack of jurisdiction of the magistrate's court, in terms of s 46(2)*(c)* of the Magistrates' Courts Act 32 of 1944, to grant specific performance in the absence of a claim for damages;

(ii) the defendant must have foreseen that the plaintiff could resort to litigation in the High Court in the light of the instalment sale agreement which contained the following clause:

> 'You consent to the jurisdiction of the Magistrate's Court having jurisdiction over any proceedings that may arise from this Agreement, irrespective of the amount in dispute. The seller may choose to institute action in the High Court';

(iii) the institution of the action in the High Court did not amount to an abuse of the court process;

(iv) the defendant did not suffer any prejudice.

It is submitted that the judgment did not only fly in the face of the *Gqirana* and *Thobejane* decisions, [356] both of which were decisions of a full court, but was also probably founded upon

---

an incorrect interpretation of s 46(2)*(c)* of the Magistrates' Courts Act 32 of 1944, which provides, in paragraph (iii) thereof, that matters of specific performance without an alternative of payment of damages for the delivery of specified movable property exceeding the monetary jurisdiction of the magistrate's court fall within its jurisdiction where the consent of both parties has been obtained in terms of s 45 of the Act (and the said magistrate's court has jurisdiction over the person of the defendant).

'Disclose fully the nature and grounds of the defence and the material facts relied upon therefor.' The defendant must disclose fully the 'nature' and the 'grounds' of his defence and the 'material facts relied upon therefor'. [357] In this regard the defendant must engage meaningfully with the material in the plaintiff's affidavit supporting the application for summary judgment. [358] It is submitted that the 'nature' of the defence relates to the character or essential qualities of the defence; [359] it is submitted, further, that 'grounds' as the word is used in the subrule relates to the facts upon which the defence is based. [360] Thus, in order to meet the requirements laid down in the subrule, there must be a sufficiently full disclosure of the material facts to persuade the court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff's claim. [361] On the one hand, it is not required of the defendant to give a complete or exhaustive account of the facts, in the sense of giving a preview of all the evidence; on the other hand, the defence must not be averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy. [362]

In an application for summary judgment for an order to declare immovable residential property specially executable, there is — provided the plaintiff has complied with the requirements of rule 46A — an onus on the defendant, at the very least, to provide the court with information concerning whether the property is his personal residence; whether it is a primary residence; whether there are other means available to discharge the debt; and whether there is a disproportionality between the execution and other possible means to exact payment of the judgment debt. [363] While the High Court has the duty to investigate a defendant's position if it involved an unrepresented litigant, or the loan is not exclusively of a commercial nature, or where at least some evidence suggests that the execution is in respect of the defendant's primary residence, the defendant's complete failure to avail himself of rights that were expressly drawn to his attention in the summons dictates the contrary. [364] Imposing an obligation on a court to exercise judicial oversight under such circumstances would also cause significant uncertainty, and arguably serious damage, to the efficient provision of credit in the economy. [365]

In *NPGS Protection & Security Services CC v FirstRand Bank Ltd* [366] the Supreme Court of Appeal remarked: [367]

> 'The ever increasing perception that bald averments and sketchy propositions are sufficient to stave off summary judgment is misplaced and not supported by the trite general

> principles developed over many decades by our courts. See for example, the well-known judgment of this court in *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) where the proper approach to applications for summary judgments is stated.'

It is submitted that in the light of the requirements of the subrule it is insufficient for a defendant to merely refer to the plea that has been delivered without, in its affidavit, disclosing fully the nature and grounds of its defence and the material facts relied upon therefor *with reference to the plea*. [368] In other words, the nature and grounds of the defence and the material facts relied upon therefore in the affidavit should be in harmony with the allegations in the plea. [369] In this regard the plea should comply with the provisions of rules 18(4) and 22(2), i e it should clearly and concisely state all the material facts relied upon for the defence in order for the plaintiff, in the context of summary judgment proceedings, to consider whether or not the defence as pleaded raises any issue for trial. [370] Otherwise the purpose of rule 32 in its amended form would be defeated. If the plea is, for example, one of bare denial which does not raise any issue for trial, the defendant should not be allowed, in the absence of a notice to amend the plea in order to properly set out its defence to the action, to rely on an affidavit resisting summary judgment in which the nature and grounds of a bona fide defence and the material facts relied upon therefor, which are unrelated to the bare

denial in the plea, are set out. [371] A defendant who intends to disclose a bona fide defence in its affidavit which is not raised in its plea, should, first, deliver a notice of intention to amend the plea in terms of rule 28(1). [372] Thereafter the defendant should deliver an affidavit in which the nature and grounds of the bona defence and the material facts relied upon are fully stated *with reference to the notice of intention to amend the plea*. In other words, in such event the affidavit should be in harmony with the notice of intention to amend the plea. If the affidavit is not in harmony with the plea or the notice of intention to amend the plea, as the case may be, summary judgment should be granted. It is submitted that the court hearing a summary judgment application is not entitled, in the absence of an affidavit as contemplated in subrule (3)*(b)*, to give leave to defend on the basis of purely the plea or a notice of intention to amend it. Rule 32 simply does not provide for such a procedure. [373]

The critical question is therefore whether the opposing affidavit, *with reference to the plea or any notice of intention to amend the plea*, complies with the provisions of subrule (3)*(b)*. [374]

The question arises as to what should transpire in the event of the defendant giving notice of an intention to amend its plea after an application for summary judgment was delivered and to which proposed amendment the plaintiff has raised an objection as contemplated in rule 28(2). It is submitted that, as contended above, the defendant should deliver an affidavit which is in harmony with the notice to amend its plea, failing which summary judgment should be granted. However, if the defendant delivers an affidavit which is in harmony with the proposed amendment of the plea and which complies with the provisions of subrule (3)*(b)*, the application for summary judgment should be postponed *sine die* in order for the defendant to bring an application to amend its plea, and that such an application could be dealt with first. [375]

If such application is refused, the application for summary judgment could be re-enrolled and be dealt with in the light of the defendant's original (unamended) plea. If the application to amend is granted and the defendant effects the amendment in terms of rule 28(7), and the plea in its amended form raises a triable issue, the plaintiff should consent to leave to defend the action and the costs of the application for summary judgment should stand over in order to be dealt with by the trial court. [376] What, however, if the plaintiff is of the view that the plea

in its amended form (whether resulting without objection from the plaintiff or pursuant to an application to amend it) still does not raise a triable issue? Having regard to the report of the Task Team of the Rules Board for Courts of Law referred to in the notes to rule 32 s v 'General' above, the position when a defendant intends to amend its plea/has amended its plea after an application for summary judgment was delivered had not even been considered by the Task Team. Neither has the Rules Board for Courts of Law addressed the issue when the amendments to rule 32 were framed. [377] This would seem to violate the plaintiff's protection, under s 34 of the Constitution of the Republic of South Africa, 1996, of its substantive right to have the application for summary judgment properly heard. [378] In *Belrex 95 CC v Barday* [379] the court concluded [380] that a *lacuna* existed in rule 32. Consequently, the court gave leave to the plaintiff to bring a fresh application for summary judgment in accordance with the plea as amended. [381] In *City Square Trading 522 (Pty) Ltd v Gunzenhauser Attorneys (Pty) Ltd* [382] the court, in adopting 'a more benign view of the assiduity of the drafters of the amendments to rule 32', held that consequent upon an amendment of the plea after an application for summary judgment had been brought, the plaintiff was entitled to make any consequential adjustment to the 'documents filed by him' as contemplated in rule 28(8), which adjustment would include a supplementary affidavit to demonstrate that the defence in the amended plea did not raise any issue for trial. [383] The court accordingly declared that the plaintiff's supplementary affidavit supporting summary judgment was properly filed. [384] The court concluded by stating: [385]

> 'To my mind, rule 32(4) should not be read to deprive the plaintiff of its rights under rule 28(8) but rather as a prohibition against introducing factual matter which is of the nature of a reply or rejoinder to the defendant's case and which is not consequential on the amendment of the plea.'

In *Mncube v Wesbank a Division of FirstRand Bank Limited* [386] the defendant gave notice of intention to amend his plea within the time period allowed for the bringing of an application for summary judgment. The amendments to the plea were effected after that period had expired. The plaintiff delivered its application for summary judgment within 15 days after the amendments to the plea had been effected. In a subsequent opposed application brought by the defendant to set aside the summary judgment application as an irregular step in terms of rule 30 because it allegedly was delivered out of time, the court held that the plaintiff had 15 days from the date on which the amendments to the plea were effected to deliver its application for

summary judgment. Consequently, the application was not an irregular step. [387]

The defendant in its opposing affidavit must deal with the plaintiff's explanation as to why the defence as pleaded does not raise any issue for trial. A failure to do so is done at the defendant's peril. [388] This would mean that if the defendant amended its plea during summary judgment proceedings, and the plaintiff filed a supplementary affidavit to its founding affidavit consequential to the amendment of the plea (in line with the approach adopted by the court in the *City Square Trading* case

referred to above), the defendant would be entitled to supplement its opposing affidavit in order to answer the plaintiff's supplementary affidavit. [389] In High Court practice a defendant has been allowed to supplement his affidavit by a further affidavit where, for instance, the first affidavit was defective, even though the supplementary affidavit was out of time. [390] It is submitted that there must be some basis for granting leave to file a supplementary affidavit, for example, an adequate explanation by the defendant for the deficiencies in his opposing affidavit, and at least some indication that the proposed supplementary affidavit is likely to clear the deficiencies. [391]

In an application for condonation for the late filing of the opposing affidavit in summary judgment proceedings, an applicant would normally file an affidavit in support of such application. The introduction in such affidavit of additional evidential material, which did not appear in the affidavit filed in opposition to the summary judgment application, was held to be impermissible on the ground that it was irrelevant. The prospects of success in such condonation application had to be determined with reference to what was contained in the

affidavit opposing summary judgment to ward off the granting of summary judgment read with the affidavit in support of summary judgment. [392]

The court should ignore any matters referred to in argument which are not included in the statement of facts. [393]

Subrule (4): 'No evidence may be adduced by the plaintiff.' This is an absolute prohibition and the plaintiff must stand or fall by his affidavit delivered in terms of subrule (2). [394]

The inclusion of evidence in the affidavit will not invalidate the application; such evidence will simply be ignored by the court. [395] In *Rossouw v FirstRand Bank Ltd* [396] the Supreme Court of Appeal, however, held that a certificate of balance handed up to a court in summary judgment proceedings performs a useful function and is not hit by the provisions of this subrule.

The court may take judicial notice of any Government Notice, or of any other matter which has been published in the *Gazette*. [397]

'Otherwise than by the affidavit referred to in subrule (2).' The plaintiff is not entitled to file a further affidavit or to present oral evidence.

'Nor may either party cross-examine . . . may elucidate the matter.' Neither party may under this subrule cross-examine any person who gives evidence orally or on affidavit. [398]

A defendant may require the plaintiff to give oral evidence in terms of s 169(1) of the National Credit Act 34 of 2005 and may cross-examine the plaintiff under that section. [399]

Subrule (5): 'The court may enter summary judgment.' The word 'may' in this subrule confers a discretion on the court, so that even if the defendant's affidavit does not measure up fully to the requirements of subrule (3)*(b)*, the court may nevertheless refuse to grant summary judgment if it thinks fit. [400]

The discretion, clearly, is not to be exercised capriciously, so as to deprive a plaintiff of summary judgment when he ought to have that relief. [401] From the decided cases the following principles governing the exercise of the discretion, can be distilled:

(a) In considering an opposed summary judgment application, there are three questions to be answered:
  (i) Are the defendant's defences good in law?
  (ii) Are the defendant's defences bona fide? It is in relation to this question that the fullness (or lack thereof) of the disclosure of the material facts relied upon by the defendant are relevant.
  (iii) If either or both of the aforesaid questions are answered against the defendant, the next question is whether the court's discretion should be exercised in the defendant's favour. At this stage the enquiry is whether there is a reasonable possibility that the defendant's defence may be good. [402]

(b) If it is reasonably possible that the plaintiff's application is defective or that the defendant has a good defence, the issue must be decided in favour of the defendant. [403]

(c) If it is clear that the defence carries no reasonable possibility of eventually succeeding, the discretion should not be exercised against granting summary judgment. [404]

(d) The discretion should not be exercised on the basis of mere conjecture or speculation; it should be exercised on the basis of the material before the court. [405] The court should have regard to the nature of the cause of action and of the defence as disclosed in the documents before it, and to the peculiar nature of the facts involved in the case. [406]

(e) If, on the material before it, the court sees a reasonable possibility that an injustice *may* be done if summary judgment is granted, that is a sufficient basis on which to exercise its discretion in favour of the defendant. [407]

(f) If the defendant raises a claim in reconvention for a lesser amount than the plaintiff's claim as a defence, the court's overriding discretion pertains not only to that part of the claim which would be extinguished by the claim in reconvention, but also to the balance of the claim. [408]

Subrule (6)*(b)*(i): 'The court shall give leave to defend.' It has been held that in terms of this subrule a superior court has no discretion to grant summary judgment if the defendant is otherwise entitled to defend; there is only a discretion to refuse. [409]

Subrule (6)*(b)*(ii): The purpose of this subrule is that the plaintiff's claim is not to be defeated by what is only a partial defence.

The affidavit by a defendant resisting a claim to summary judgment should set out the amount by which the plaintiff's claim should be reduced. The plaintiff will then be entitled to summary judgment for the undisputed balance. [410]

Subrule (7): 'If the defendant finds security or satisfies the court as provided in subrule (3).' The court is empowered to give leave to defend in both cases, i e whether the defendant finds security *or* satisfies the court of his bona fide defence by way of affidavit. [411]

'The court shall give leave to defend.' It is clear from the wording of this subrule that if the defendant finds security or satisfies the court that he has a bona fide defence as provided in subrule (3), the court is bound to give him leave to defend. [412] It has been held [413] that it would be unfair and therefore improper to leave standing a summary judgment which

was given without consideration of all the relevant facts and circumstances, where those facts were not placed before the court by the defendant due to its misunderstanding of the law (a misunderstanding shared by the plaintiff and the court) apparently occasioned by its acceptance of the correctness of a judgment of the court subsequently held by the Supreme Court of Appeal to be incorrect.

If the defendant raises a defence based on s 3 of the Conventional Penalties Act 15 of 1962 and the penalty on its face does not appear to be disproportionate, it would be for the defendant to plead proportionality in its plea and to expand on the basis for its contention in any affidavit subsequently deposed to in opposing a summary judgment application. In summary judgment proceedings, such a defendant would be expected to establish the bona fides of its invocation of the provision by giving an indication of the evidence it would adduce to discharge the onus on it to prove that the penalty was disproportionate to the prejudice suffered and to what extent. Merely identifying that the claim involved the enforcement of a penalty stipulation and referring to s 3 would not be sufficient, without more, to make out a cognisable defence or establish the existence of a triable issue. [414] There is no general rule that

summary judgment proceedings are wholly inappropriate for recovering a penalty. Each case will depend on its own facts. If, for example, the issue on the facts is or could be whether the penalty is out of proportion to the prejudice suffered or to what extent the penalty should be reduced (thus necessitating a forensic investigation into the proportionality of the penalty), the court would have to give leave to defend under this subrule for summary judgment proceedings are not appropriate for deciding such issue. [415]

It is submitted that if leave to defend is given unconditionally in terms of subrule (8), it means that the date of such leave to defend is the operative date of the defendant's plea, i e the periods provided for in other rules within which other steps are to be taken (for example, delivery of a replication or a plea to a claim in reconvention) run from the date leave to defend is given. [416]

'And the action shall proceed as if no application for summary judgment had been made.' This phrase has been held [417] to mean that the trial on the merits had to go forward in a normal manner.

Subrule (8): 'Leave . . . may be given unconditionally or . . . subject to . . . terms.' The terms imposed may include ordering the defendant to give security if there is good ground for believing that a sham defence is being set up, [418] or that the plaintiff be permitted to set the action down for trial before the close of pleadings. In terms of the subrule, the court has a discretion when granting leave to defend to make orders in regard to the delivery of further pleadings and may, for example, put the plaintiff on terms with regard to the delivery of a replication or a plea to a claim in reconvention. [419]

'As to security.' The security referred to in this subrule is not the same as the security referred to in subrule (3)*(a)* but security that a court may order as part of its general discretion when giving leave to defend. [420]

Subrule (9): 'Such order as to costs as to it may seem just.' The court hearing the application for summary judgment may make such order as to costs as to it may seem just. When summary judgment is refused and leave to defend is given, the usual order for costs is that

costs should be costs in the cause. [421] This is, however, not an inflexible rule and the court has a wide discretion to make such order as to it may seem just. [422]

Subrule (9)*(a)*: If the plaintiff applies for summary judgment in respect of a claim not falling within the terms of subrule (1), the court may order that the action be stayed until the plaintiff has paid the defendant's costs and may further order that such costs be taxed as between attorney and client. [423] Such an order may also be made if, in the opinion of the court, the plaintiff knew that the defendant relied on a contention which would entitle him to leave to defend. [424] The court ordered the plaintiff to pay the defendant's taxed costs on the scale as between attorney and client and that the main action be stayed pending taxation of such costs and payment thereof where the plaintiff had totally disregarded the defendant's right to defend the action by putting the latter through unnecessary trouble and expense to oppose the application and thereafter conceding that leave to defend had to be given. [425]

Subrule (9)*(b)*: In any case in which summary judgment was refused and in which the court after trial gives judgment for the plaintiff substantially as prayed, and the court finds that summary judgment should have been granted had the defendant not raised a defence which in its opinion was unreasonable, the court may order the plaintiff's costs of the action to be taxed as between attorney and client. [426]

The purpose of this subrule is, on the one hand, to discourage unnecessary or unjustified applications for summary judgment, and, on the other, to discourage defendants from setting up unreasonable defences. In regard to the first of these it is to be borne in mind that in many instances the object of bringing an application for summary judgment is to force the defendant to put his defence on affidavit. A plaintiff is not entitled to do this unless it is clear that there are good grounds for making the application. [427]

If it is thought that the application for summary judgment is likely to dispose of the defendant's defences for good because the issues involved do not depend on evidence which might be disputed at the trial but comprise questions of law alone, there is no reason why the plaintiff, if unsuccessful, should not pay the costs of the application. [428]

Rescission of summary judgment. A summary judgment can be rescinded under the common law. [429] A summary judgment, if erroneously granted, may be rescinded in terms of rule 42. [430] If the summary judgment application was unopposed, the judgment consequently granted in the absence of the defendant cannot be rescinded under rule 31(2)*(b)*. [431]

It has been held [432] that a court is empowered to grant on application for security for costs in terms of rule 47(1), or under s 13 of the (now repealed) Companies Act 61 of 1973, in respect of an application for the rescission of a judgment granted by agreement between the parties in summary judgment proceedings.

Appeal. The refusal of summary judgment is an interlocutory order and is not appealable. [433] The grant of summary judgment is a final order and appealable. [434] The refusal to rescind a summary judgment that was granted by default is appealable. [435]

If an appeal succeeds, the successful appellant gets his costs of appeal, and the costs of the application for summary judgment will be reserved for consideration by the trial court. [436]

Summary judgment under the National Credit Act 34 of 2005 ('the NCA'). The notes that follow are not intended to be exhaustive of summary judgment under the NCA and the reader is referred to the works on the NCA for a more comprehensive discussion of the law.

In *BMW Financial Services (South Africa) (Pty) Ltd v Dr MB Mulaudzi Inc* [437] the defendant defaulted on his rental payments for the lease of a motor vehicle from the plaintiff. The plaintiff sent it a notice in terms of s 129(1) of the NCA, notifying it of the default. After expiry of the ten-day period stipulated in the notice, the defendant paid an amount in excess of the arrears to the plaintiff. That payment notwithstanding, the plaintiff proceeded to cancel the agreement and issue a summons for payment of such additional amounts of money as might then be due. In due course, the plaintiff applied for summary judgment. In resisting

the application, the defendant raised two defences: (1) that, when it paid all of the arrears under the agreement before it was cancelled, the agreement had been reinstated; and (2) that, when it paid the arrears, the notice in terms of s 129(1) fell away and, if the plaintiff wished to claim such arrears as might have existed when it issued summons, it had to issue a new notice in terms of s 129(1). The court held that the defendant had disclosed a bona fide defence to the plaintiff's claim and the defendant was given leave to defend the action.

In *FirstRand Bank Ltd v Olivier* [438] the plaintiff sought summary judgment for the defendant's arrears on a mortgage bond. The defendant resisted the application on the basis that he was over-indebted as defined in s 79(1) of the NCA, in that he was unable to satisfy all of his obligations under the bond in a timely manner and, in terms of s 85 of the NCA, he therefore sought an order referring the matter directly to a debt counsellor with the request that the debt counsellor evaluate his circumstances and make a recommendation to the court in terms of s 86(7) of the NCA. At the hearing of the matter counsel for the plaintiff argued that it was relevant to the exercise of the court's discretion that the defendant had failed to apply to a debt counsellor in terms of s 86(1) of the NCA to have himself declared over-indebted prior to institution of the proceedings; that the defendant was required to explain that failure to the court; and that his action in awaiting legal debt enforcement by the plaintiff, rather than voluntarily taking steps to have himself declared over-indebted, amounted to an abuse of the court process.

AR Erasmus J held that —

(i) while a defendant's failure to make application in terms of s 86(1) might, in proper circumstances, influence the court in the exercise of its discretion, in the present matter the defendant could not be faulted for not acting timeously in terms of s 86(1). The relevant portions of the NCA commenced on 1 June 2007. Summons was served on the defendant on 23 October 2007. There was no indication of how long before that date the s 129(1) notice was served on the defendant. It was not clear whether the defendant had sufficient time before receiving the s 129(1) notice to act in terms of s 86(1). That procedure was, at the time, still very new and not generally known;

(ii) it was also relevant to the exercise of the court's discretion in terms of s 85 that the defendant had failed to act upon receipt of the s 129(1) notice and that he furthermore failed to explain or ask for condonation of his failure;

(iii) the defendant's alleged over-indebtedness was due largely to his maintenance of the credit agreement with the plaintiff. If he sold the property, he would no longer be over-indebted;

(iv) in the circumstances, the defendant had failed to show good and sufficient reasons for the granting of the relief sought by him.

In *Standard Bank of South Africa Ltd v Panayiotts* [439] Masipa J declined to follow *FirstRand Bank Ltd v Olivier*. [440] In the *Standard Bank* case the plaintiff sought summary judgment in the amount of the arrears on a mortgage bond, plus an order declaring the immovable property over which the bond was held to be specifically executable. The defendant admitted his indebtedness to the plaintiff, but in resisting the application raised his 'over-indebtedness' as intended in s 79(1) of the NCA as defence to the plaintiff's application for summary judgment. The defendant counter-applied for a referral of the matter to a debt counsellor as intended in s 85*(a)* of the NCA, alternatively for a declaration of over-indebtedness as intended in s 85*(b)* of the NCA.

Masipa J held that —

(i) a consumer who raised a defence of over-indebtedness had to plead and prove that this was indeed the case;

(ii) in exercising its discretion under s 85, the court had to bear in mind the rules governing the summary judgment process, in particular the provisions of rule 32;

(iii) the application in terms of s 85 had to be bona fide and not raised solely as a delaying tactic. The debtor had to provide sufficient information to support his allegation of over-indebtedness. That meant such a consumer had to plead and prove, on a balance of probabilities, that he was over-indebted as intended in s 79;

(iv) the bona fide requirement meant that the defendant's allegations could not be inherently and seriously unconvincing;

(v) the defendant had not shown that he was over-indebted as intended in s 79. Such facts as had been disclosed were so vague and bald that they did not amount to a bona fide defence; the NCA did not envisage that a consumer could claim to be over-indebted while he retained possession of the goods which formed the subject matter of the agreement. The goods had to be sold to reduce the defendant's indebtedness;

(vi) the longer the property remained in the hands of the defendant, the more likely it was that the plaintiff would suffer prejudice. Considerations of fairness required that the circumstances of both the defendant and the plaintiff be given equal consideration. Where it was clear that the credit provider was likely to be greatly prejudiced if the protection measures provided by the provisions of the NCA were implemented, courts should be reluctant to assist the defendant;

(vii) the defendant had failed to show that he was over-indebted or make out a case for the relief sought.

Summary judgment was accordingly granted against the defendant.

In *FirstRand Bank Ltd v Carl Beck Estates* [441] the plaintiff sought summary judgment for the first defendant's arrears on a mortgage bond, as against both the first defendant and its surety (the second defendant), jointly and severally. In resisting the application, the defendants alleged three defences: (1) the plaintiff had failed to comply with the provisions of the NCA by failing to give notice to each of them in terms of s 129 of the NCA prior to commencement of legal proceedings; (2) the amount claimed by the plaintiff was incorrect inasmuch as it failed to take into account a single payment made by the first defendant after issue of summons; and (3) the plaintiff had given no advance warning of changes in the variable interest rates agreed to be levied on the capital amount of the first defendant's indebtedness.Satchwell J held —

(i) as to (1), that the NCA did not apply to the credit agreement entered into between the parties. The first defendant, a juristic person, had entered into a large credit agreement, and thus one of the exemptions in s 4 had to apply to it —

either the value or turnover exceeded the threshold and s 4(1)*(a)* exempted the application of the NCA to the agreement, or the value or turnover was below the threshold and s 4(1)*(b)* exempted the application of the NCA;

(ii) accordingly, that the plaintiff was not obliged to provide the first defendant with notice in terms of s 129 before instituting legal proceedings;

(iii) that while a suretyship agreement did fall within the definition of 'credit agreement' in the guise of a 'credit guarantee', s 8(5) required the credit guarantee to apply to the obligations of another consumer in terms of 'a credit transaction to which this Act applies'. Since the first defendent's obligations to the plaintiff were not incurred in terms of a

'credit transaction' to which the NCA applied, the second defendant could not claim that the NCA applied to him on the basis that his obligations arose in terms of a 'credit guarantee' as intended in s 8(5);

(iv) as to (2), that the first defendant had disclosed a defence in respect of part of the plaintiff's claim, namely the payment after issue of summons and before filing of the application for summary judgment. There was no reason why the court could not itself reduce the amount in respect of which summary judgment was granted where it was apparent from the papers that there had been a reduction in the amount claimed in the summons;

(v) as to (3), that there was no merit in the submission: properly construed the relevant clause did not mean that the mortgagor was entitled to advance notification of a variation in interest rates before it became effective.

Judgment was accordingly granted in favour of the plaintiff for that part of the claim that had been proved, and the defendant given leave to defend the balance of the claim. [442]

In *Standard Bank of South Africa Ltd v Van Vuuren* [443] the court, in dismissing an application for summary judgment and granting leave to defend, stated: [444]

> 'Although the respondent did not raise this defence initially, it is clear as a matter of law that a s 129(1)*(b)* notice is a mandatory requirement. A reference to such a notice was included in the summons and it is stated that it was served upon the respondent. The notice was handed to a sheriff and he affixed the notice, according to his return of service, to the main gate of the premises. The problem is, however, that he attached it to the main gate of a property other than the mortgaged property. There is, accordingly, no evidence that the notice in terms of s 129 reached the respondent. This is a bona fide defence.'

In *Nelson Mandela Bay Metropolitan Municipality v Nobumba NO* [445] the court, in reviewing and setting aside a decision of a magistrate to strike an application for summary judgment from the roll, summarized its findings as follows: [446]

> 'This judgment has made three principal findings. They are: first, that, as the power of a municipality to levy rates is derived from s 2(1) of the Rates Act [i e the Local Government: Municipal Property Rates Act 6 of 2004], and the obligation on the part of a property owner to pay arises from this source and not from an agreement, the NCA, being concerned only with credit agreements, does not apply to proceedings instituted by a municipality to recover due but unpaid rates; secondly, as the entitlement of a municipality to claim interest on due but unpaid rates also arises from legislation, the NCA does not apply to the municipality's claim for interest *a tempora* [*sic*] *morae*; and thirdly, because the municipality has not established that its standard form service agreement meets the requirement of s 4(6)*(b)*(ii) of the NCA, it consequently did not establish that the agreement is exempted by s 4(6)*(b)* from the definition of a credit facility and that the NCA did not apply to claims for due but unpaid service charges.
>
> In striking the matter from the roll and not granting summary judgment for the claim of R28 708,45 in respect of due but unpaid rates, as well as interest on that amount, the magistrate committed a gross irregularity. He was, however, entitled to conclude as he did that, in respect of the claim for due but unpaid service charges and interest

> thereon, the municipality had not established that the NCA did not apply. He committed a gross irregularity in striking the matter from the roll, rather than dismissing the application for summary judgment in relation to this claim.'

In *Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd and Another (No 1)* [447] the plaintiff applied for summary judgment on four mortgage bonds and an order declaring the immovable property specially executable. The defendants resisted the application on the ground, *inter alia*, that paragraphs *(a)*, *(b)* and *(c)* of s 4(1) of the NCA were unconstitutional in so far as they provided that the NCA does not apply to a juristic person. The court held that these paragraphs are constitutional and valid, and granted summary judgment. In *Standard Bank of South Africa Ltd v Hunkydory Investments 188 (Pty) Ltd and Others (No 2)* [448] the National Credit Regulator and the Minister of Trade and Industry filed affidavits in opposition to a constitutional challenge in the summary judgment proceedings. The court observed [449] that affidavits should not have been filed and that if interested parties wished to be heard, their contribution should be confined to making legal submissions on the papers filed in accordance with rule 32.

In *Carter Trading (Pty) Ltd v Blignaut* [450] the defendant opposed an application for summary judgment on the basis *(a)* that the acknowledgment of debt in question was a credit agreement described in s 8(4)*(f)* of the NCA and *(b)* that the plaintiff had failed to comply with the provisions of ss 129 and 130 of the NCA. The court held [451] that the acknowledgment of debt was indeed a credit agreement as envisaged in the NCA, and because of the plaintiff's failure to comply with the provisions of ss 129 and 130, the summons had to be regarded as having been prematurely issued, and so summary judgment could not be considered. It was further held [452] that the provisions of s 130(4) of the NCA could in the circumstances find application, since, bearing in mind that the merits of the case were not in dispute, the plaintiff might resume its application for summary judgment after the remedies referred to in s 129(1)*(a)* (if resorted to) had been exhausted. The application was accordingly postponed *sine die* with costs and it was ordered that the plaintiff may not set the application down until it has:

(i) complied with the provisions of ss 129(1)*(a)* and 130 of the NCA; and

(ii) become entitled to resume the application upon completion of the remedies referred to in s 129(1)*(a)* of the NCA (if resorted to or otherwise).

In *Standard Bank of South Africa Ltd v Rockhill* [453] Epstein AJ held that s 129(1)*(a)* of the NCA requires the credit provider to draw the default to the notice of the consumer in writing and does not require the consumer to receive the notice. A credit provider will therefore discharge its obligation of *delivering* the notice (as required by s 129) by sending it to the postal address selected by the consumer. The court further held [454] that non-compliance with s 129(1)*(a)* does not constitute a bona fide defence for purposes of summary judgment. The following order was made:

> '1. The application for summary judgment is adjourned *sine die*.

> 2. The plaintiff is afforded an opportunity to provide a notice to the defendants as contemplated in ss 129 and 130 of the NCA. If such notice is sent by registered mail to the defendants it shall be deemed to have been delivered to them 14 days after posting by the plaintiff.
>
> 3. The plaintiff may set down the application for summary judgment on notice to the defendants not less than 10 days

after the notice in terms of s 129 has been delivered.

4. Save for the direction herein given relating to the sending of the notice contemplated in s 129, the defendants' rights in terms of the NCA remain unaffected.

5. The plaintiff is directed to pay the defendants' wasted costs caused by the adjournment of the application for summary judgment.'

In *Amardien v Registrar of Deeds* [455] the Constitutional Court unanimously held [456] the following in regard to 'default':

'[60] Section 129(1) of the NCA refers to a situation where the consumer is "in default" Section 129(1)*(a)* and *(b)* explain the obligations that the creditors must fulfil before moving to enforce their debt. The text explicitly refers to "the default" that must be drawn to the notice of the consumer by the creditor — and not just the fact that the consumer is "in default". Read in conjunction with s 130(4) which provides an opportunity to the debtor to remedy the default, s 129(1) should be interpreted to include the amount so that the debtor knows how much to pay to avoid cancellation. The same applies to the notice under s 19 of the ALA. [457] In addition, in order to "[provide] consumers with adequate disclosure of standardised information in order to make informed choices" [458] they must be informed of the extent of their arrears in the s 129 NCA notice so as to decide how to move forward regarding the management of their debt.

[61] It is thus a necessary requirement to specify the amount and nature of the default in the s 129 NCA notice. As s 129(1) specifically requires the credit provider to "draw the default to the attention of the consumer" it is clear that this will only be met if the amount of arrears is specified in the notice, since the consumer's attention will not have been drawn to the amount of the default otherwise. If the basis of the default is that the debtor has fallen into arrears, it must follow axiomatically that "drawing the default to the attention of the consumer" entails that the consumer should be advised of the amount in arrears. It is only when this has been done that it can be said that notice of the "default" has been drawn to the attention of the consumer.

[62] If the consumer is not advised of the arrear amount she will be left none the wiser. The referral by the consumer of the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction presupposes that the consumer has been apprised of the facts to enable her to, amongst others, develop and agree on a plan to bring the payments under the agreement up to date. One may rhetorically ask: how is the consumer to agree on a plan to bring payments under the agreement up to date if she is not notified of the amount in arrears?

[63] This court in *Nkata* [459] held that the onus is on the credit provider to take appropriate steps if it wants to recover the cost for enforcing an agreement with the consumer. The creditor is in a better position to determine the amount of the debt and must be required to stipulate the amount owed by the debtor. The burden of determining the amount

is an onerous one to place upon the consumer, as the consumer may not be aware of complex calculations that are to be taken into account while calculating interest. On the other hand, it will be significantly easier for the creditor to state the amount concerned. After all, it is the credit provider itself that claims that the consumer is in arrears with her payments.

[64] In the result, a s 129 NCA notice must specify the default — that is, the actual amount of the arrears. The High Court thus erred in its conclusion that it was not essential that the s 129 NCA notices set out the amounts in which the applicants were in arrears.

[65] Since the cancellation of the instalment sale agreements and the cancellation of the recordals are invalid, it follows that the instalment sale agreements are extant and the applicants have payment obligations pursuant thereto, arising from the date of recordal. The fifth respondent will have to calculate the amounts and inform the applicants accordingly.'

In *Rossouw v FirstRand Bank Ltd* [460] the Supreme Court of Appeal laid down that:

(i) there is compliance with the provisions of s 129(1)*(a)* of the NCA if the credit provider *despatches* the required notice to the consumer in the manner chosen by the latter (e g, by sending it to the consumer's last known address by registered mail);

(ii) actual receipt of the notice is the consumer's responsibility;

(iii) for purposes of summary judgment, the summons must contain sufficient allegations regarding the method employed in delivering the notice in accordance with the provisions of s 65(2) of the NCA and the agreement.

The Supreme Court of Appeal further held [461] that:

(i) s 130(2) of the NCA does not limit a credit provider's claim under a mortgage agreement to only the proceeds of the sale of the mortgaged property;

(ii) a certificate of balance handed up to a court in summary judgment proceedings perform a useful function and is not hit by the provisions of rule 32(4).

In *Sebola v Standard Bank of South Africa Ltd* [462] the Constitutional Court qualified the decision of the Supreme Court of Appeal in the *Rossouw* case and laid down that:

[This page contains footnotes only in print]

'The requirement that a credit provider provide notice in terms of s 129(1)(*a*) to the consumer must be understood in conjunction with s 130, which requires delivery of the notice. The statute, though giving no clear meaning to "deliver", requires that the credit provider seeking to enforce a credit agreement aver and prove that the notice was delivered to the consumer. Where the credit provider posts the notice, proof of registered

despatch to the address of the consumer, together with proof that the notice reached the appropriate post office for delivery to the consumer, will in the absence of contrary indication constitute sufficient proof of delivery. If, in contested proceedings the consumer avers that the notice did not reach him, the court must establish the truth of the claim. If it finds that the credit provider has not complied with s 129(1), it must in terms of s 130(4)(*b*) adjourn the matter and set out the steps the credit provider must take before the matter may be resumed.'

In *Kubyana v Standard Bank of South Africa Ltd* [463] the Constitutional Court finally laid the matter concerning notice of default to a consumer to rest, albeit not in respect of proceedings that originated as an application for summary judgment. Having considered the relevant provisions of the NCA and the judgment in *Sebola*, the Constitutional Court came to the following conclusion: [464]

'[39] In sum, the Act does not require a credit provider to bring the contents of a section 129 notice to the subjective attention of a consumer. Rather, delivery consists of taking certain steps, prescribed by the Act, to apprise a reasonable consumer of the notice. Thus, a credit provider's obligation may be to make the section 129 notice available to the consumer by having it delivered to a designated address. When the consumer has elected to receive notices by way of the postal service, the credit provider's obligation to deliver generally consists of dispatching the notice by registered mail, ensuring that the notice reaches the correct branch of the Post Office for collection and ensuring that the Post Office notifies the consumer (at her designated address) that a registered item is awaiting her collection. This is subject to the narrow qualification that, if these steps would not have drawn a reasonable consumer's attention to the section 129 notice, delivery will not have been effected. The ultimate

question is whether delivery as envisaged in the Act has been effected. In each case, this must be determined by evidence.

[54] The Act prescribes obligations that credit providers must discharge in order to bring section 129 notices to the attention of consumers. When delivery occurs through the postal service, proof that these obligations have been discharged entails proof that —

(a) the section 129 notice was sent via registered mail and was sent to the correct branch of the Post Office, in accordance with the postal address nominated by the consumer. This may be deducted from a track and trace report and the terms of the relevant credit agreement;

(b) the Post Office issued a notification to the consumer that a registered item was available for her collection;

(c) the Post Office's notification reached the consumer. This may be inferred from the fact that the Post Office sent the notification to the consumer's correct postal address, which inference may be rebutted by an indication to the contrary as set out in [52] above; and

(d) a reasonable consumer would have collected the section 129 notice and engaged with its contents. This may be inferred if the credit provider has proven *(a)–(c)*, which inference may, again, be rebutted by a contrary indication: an explanation

of why, in the circumstances, the notice would not have come to the attention of a reasonable consumer.'

In *Nedbank Ltd v Wizard Holdings (Pty) Ltd* [465] it was, *inter alia*, held that the NCA does not apply to a suretyship only if the principal debt does not arise from a credit agreement which falls within the scope of the NCA. Summary judgment was accordingly granted against the defendants.

In *Nedbank Limited v Mokhonoana* [466] it was held that, for purposes of summary judgment proceedings, it will suffice if the ten business day-period required by s 130(1)*(a)* of the NCA for the delivery of the notice contemplated in s 129(1)*(b)* thereof, has elapsed between delivery of the said notice and service of the summons.

In *FirstRand Bank Ltd v Collett* [467] the court, in granting summary judgment, held that a credit provider is entitled to give notice to terminate a debt review after the debt counsellor's proposal had been referred to a magistrate's court, and pending a declaration of reckless credit, or an order of rearrangement in terms of the NCA. After such termination the credit provider may issue summons and, if a notice of intention to defend is delivered, [468] apply for summary judgment. In *FirstRand Bank Ltd t/a First National Bank v Seyffert and three similar cases* [469] and *FirstRand Bank Ltd v Mvelase* [470] summary judgment was granted on the basis of similar conclusions.

In *FirstRand Bank Ltd v Fillis* [471] it was held that —

(i) once the credit review process has commenced in terms of the NCA, s 88(3) of the NCA prevents a credit provider from exercising or enforcing, by litigation or other judicial process, any right or security under any credit agreement until —

'*(a)* the consumer is in default under the credit agreement; and

(b) one of the following has occurred: (i) an event contemplated in subsection (1)*(a)* through *(c)*; or (ii) the consumer defaults on any obligation in terms of a re-arrangement agreed between the consumer and credit providers, or audit by a court or the Tribunal';

(ii) it follows, as a matter of interpretation, that once the jurisdictional requirement set out in s 88(3)*(a)* coexists with any of the jurisdictional requirements set out in s 88(3)*(b)*, the credit provider is at liberty to proceed and to exercise and enforce, by litigation or other judicial process, any right or security under his credit agreement without further notice;

(iii) the restraint placed upon a credit provider in consequence of a credit review process and a rearrangement order in terms of s 86(7)*(c)* of the NCA does, where the consumer has defaulted on the debt rearrangement order, fall away on the express authority of s 88(3).

Summary judgment was accordingly granted.

In *SA Taxi Securitisation (Pty) Ltd v Mbatha and two similar cases* [472] it was held that since the enactment of the NCA, there seemed to be a tendency for defendants, in opposing applications for summary judgment, to make bland allegations that they were 'over-indebted' or that there had been 'reckless credit'. These allegations, like any other allegations made in a defendant's affidavit opposing summary judgment, should not, in view of the principles enunciated in *Breitenbach v Fiat* [473] be 'inherently and seriously unconvincing', should contain a reasonable amount of verificatory detail, and should not be 'needlessly bald, vague or sketchy'. Consequently, a bald allegation that there was 'reckless credit' or there is 'over-indebtedness' would not suffice. It was held [474] that the NCA does not permit a consumer to retain the security (i e vehicle), while at the same time suspending the consumer's obligations under the credit agreement in anticipation of an order setting and suspending the credit agreement on the basis of recklessness. Consequently, the applications for summary judgment were granted and the defendants ordered to return the respective vehicles in question.

In *Collett v FirstRand Bank Ltd*, [475] the Supreme Court of Appeal, however, held the following:

'Overindebtedness is not a defence on the merits. However, because of its extraordinary and stringent nature, a court has an overriding discretion to refuse an application for summary judgment. It would be proper for a defendant to raise termination of the debt review by reason of the credit provider's failure to participate or its bad faith in participating when application for summary judgment is made. These issues may be raised, not as a defence to the claim, but as a request to the court not to grant summary judgment in the exercise of its over-riding discretion. Of course, sufficient information on which the request for a resumption of the debt review is based must be placed before the court.'

For a case where the allegations in regard to reckless credit were held to be insufficient, see *ABSA Bank Limited (Pty) Ltd v Irene*. [476]

In *Mercedes Benz Financial Services South Africa (Pty) Ltd v Dunga* [477] the court, in exercising its residual discretion whether to grant or refuse summary judgment, refused it on the basis that:

(i) the plaintiff's termination of the debt review in terms of s 86(10) of the NCA was valid;

(ii) in terms of s 86(11) of the NCA, the defendant would still be able to ask for an order, in the present proceedings, that the debt review resume;

(iii) in summary judgment proceedings, therefore, the defendant would have been able to raise the defence that he intends to ask for such an order;

(iv) in order to show that he has a bona fide defence, the defendant would presumably have to allege that he has reasonable prospects of obtaining a favourable order in the debt review application;

(v) it was apparent from the defendant's opposing affidavit, that he did not have in mind a defence based on s 86(11) of the NCA;

(vi) the defendant may yet be able to make out a defence based on the provisions of s 86(11), and should accordingly be afforded an opportunity to do so.

In *FirstRand Bank Ltd v Adams* [478] it was held that a court may, during summary judgment proceedings initiated by a credit provider, on application by the consumer in terms of s 86(11) of the NCA, order an adjournment to allow the consumer an opportunity to argue that the debt-review process should be resumed so as to provide an opportunity for further negotiations between the parties. In order to decide whether there would be any benefit in so postponing the summary judgment application, the court must strike a balance between the interests of the parties, taking into consideration the nature of the dispute, whether the parties acted in good faith during their negotiations, and the prospect of a rearrangement that, within the parameters of the NCA, will ensure the discharge of the consumer's obligations. Any proposal in this regard by the consumer has to fall within the parameters of the NCA, so that it may not be based on a reduction of the contracted interest rate.

In *Hattingh v Hattingh* [479] the plaintiff and defendant had for many years conducted business. In 2009 they decided to terminate their commercial relationship and common business interests by means of a written termination agreement which, *inter alia*, provided that the defendant would pay to the plaintiff an amount of R6.6 million by means of annual instalments of R734 000. In default of timeous payment the entire unpaid balance would become due together with interest calculated at the overdraft rate. In an application for summary judgment in an action subsequently instituted by the plaintiff against the defendant for payment of the unpaid balance together with interest, the defendant argued that the agreement amounted to an acknowledgement of debt and that the plaintiff should have served a notice under s 129 of the NCA before issuing summons. The plaintiff contended that the agreement was not governed by the NCA. The court held that, although the plaintiff prima facie fell within the definition of a 'credit provider' as intended in s 1 of the NCA, the relationship between the parties was not governed by the NCA and, accordingly, notice under s 129 was not required. Summary judgment was therefore granted.

In *Hardenberg v Nedbank Ltd* [480] the appellants, in an appeal against summary judgment granted against them pursuant to the credit provider's termination of their debt review in terms of s 86(10) of the NCA, advanced as the sole ground of appeal that they had not been in default of the credit agreement concerned at the time that they applied for debt review, and therefore that the credit provider had not been entitled to terminate the debt review. They based their appeal on the *dictum* in *Collett v FirstRand Bank Ltd* [481] that '(i)f the consumer applies for debt review before he is in default the credit provider may not terminate the process'. The full court, however, held [482] that nothing in the formulation of s 86(10) suggested that the default must exist at the time that the consumer applied to be declared over-indebted. The

court held [483] that in the context of what the SCA was asked to decide in *Collett*, it was not the intention to hold that the default must exist at the time that the consumer applied for debt review, in order for a credit provider to be entitled to exercise the right of termination conferred by s 86(10), and even if it were, such a finding could not be regarded as part of the *ratio* of the judgment of the SCA. The appeal accordingly fell to be dismissed.

In *Land and Agricultural Development Bank v Chidawaya* [484] it was held that for the purposes of compliance with the notice requirements in terms of s 129 of the NCA, the service of a s 129 notice by means of attaching it to the summons does not suffice. It is clear from the wording of the NCA that a s 129 notice is a pre-litigation step and must accordingly precede litigation. If litigation is embarked upon without compliance with s 129 then s 130(4) of the NCA provides the procedural mechanism to remedy this defect. To hold otherwise, and dispense with the requirement of the pre-litigation notice, would render s 130(4) irrelevant and would ignore the directives of the legislature, as well as undermine the purpose of the NCA as set out in s 3, namely to address issues such as overindebtedness and debt restructuring.

The application for summary judgment was accordingly postponed *sine die* and the plaintiff was directed to serve s 129(1)*(a)* notices on the defendants.

In *FirstRand Bank Ltd v Davel (University of the Free State Law Clinic Amicus Curiae)* [485] concern was raised about the ridiculously low prices that vehicles were sold for after having been repossessed in terms of a court order under the NCA (i e a summary judgment order for the return of the vehicle to the credit provider after an order confirming the cancellation of the credit agreement in respect of the vehicle). To prevent an abuse of the process, the following order was made: [486]

'20.2 Summary judgment is granted in favour of FirstRand Bank Limited against Nicolaas Johannes Davel as follows:

20.2.1 Cancellation of the agreement is hereby confirmed.

20.2.2 The return of the following vehicle to the credit provider, FirstRand Bank, is ordered:

2010 Volkswagen Polo 1.6 Comfortline SE, engine number CLS056389 and chassis number VWZZZ60ZBT044929.

20.2.3 The damages component of the plaintiff's claim is postponed *sine die*.

20.2.4 The defendant is ordered to pay the plaintiff's costs of suit.

20.3 Upon the return of each of the vehicles described in paragraph 20.1.2(a), 20.1.2(b) and 20.2.2 to each respective plaintiff:

20.3.1 The plaintiff shall, within 10 business days from the date of receiving return of the vehicle, give the defendant written notice:

(a) setting out the estimated value of the returned vehicle;

(b) informing the defendant that it intends to sell the returned vehicle as soon as practicable for the best price reasonably obtainable; and

(c) informing the defendant that the price obtained for the returned vehicle upon its sale may be higher or lower than the estimated value.

20.3.2 The plaintiff shall sell the returned vehicle as soon as practicable for the best price reasonably obtainable.

20.3.3 After selling the returned vehicle, the plaintiff shall:

(a) credit or debit the defendant with a payment or charge equivalent to the proceeds of the sale less any expenses reasonably incurred by the plaintiff in connection with the sale of the goods; and

(b) give the defendant a written notice stating the following:

(i) the settlement value of the agreement immediately before the sale;

(ii) the gross amount realised on the sale;

(iii) the net proceeds of the sale after deducting the plaintiff's permitted default charges, if applicable, and reasonable costs allowed under paragraph *(a)*; and

(iv) the amount credited or debited to the defendant's account.

20.3.4 The notice referred to in paragraph 20.3.3*(b)* above shall state that:

(a) If the defendant disputes the amount of the proceeds of the sale or any other charges or expenses incurred, he or she may engage directly with the credit provider in relation thereto.

(b) If the engagement referred to in *(a)* does not yield, from the defendant's perspective, the desired result, he or she may, refer the dispute to the Tribunal or submit a complaint in terms of s 136 of the National Credit Act 34 of 2005 to the National Credit Regulator.

20.3.5 If an amount falls to be credited to the defendant's account which exceeds the settlement value immediately before the sale of the returned vehicle, the plaintiff must remit such excess amount to the defendant together with the notice referred to in paragraph 20.3.3(b) above.

20.3.6 If an amount is credited to the defendant's account which is less than the settlement value before the sale, or an amount is debited to the defendant's account, the plaintiff may demand payment from the defendant of the remaining settlement value in the notice referred to in paragraph 20.3.3*(b)* above.

20.3.7 If the defendant fails to pay the amount demanded in terms of paragraph 20.3.6 above within 10 business days of receiving such demand, the plaintiff may commence proceedings against the defendant for any outstanding damages.

20.3.8 The defendant shall pay interest at the rate applicable to the credit agreement, on any outstanding amount demanded by the plaintiff in terms of paragraph 20.3.7 above, from the date of the demand until the date of payment of the outstanding amount.

20.3.9 In the notice referred to in para 20.3.4, the consumer must also be notified, if applicable, that if there is a dispute in relation to any of the matters set out in 20.3.5–20.3.8, the mechanisms referred to in 20.3.4*(a)–(b)* are at his or her or its disposal.

20.4 The respective plaintiff shall aver and prove in its action for any outstanding damages, that it has complied with the requirements set out in paragraph 20.3 above."

In *FirstRand Bank Ltd t/a First National Bank v Moonsammy t/a Synka Liquors* [487] the respondent's defence in an application for summary judgment was that the credit agreement with the plaintiff required a prior demand before the debt became payable, but no such notice had been given, and if such notice was necessary, it had to be given, and it had to be alleged as having been given, before a default notice could be given under s 129 of the NCA. Counsel for the applicant contended that there would have been proper compliance with the NCA if the s 129 default notice was attached to the summons. The agreement did contain notice terms that the plaintiff had to comply with before the loan became repayable but those terms

were not pleaded. It was held that the plaintiff did not plead a completed cause of action. The cause of action was not verified and the particulars of claim were therefore excipiable. In the circumstances summary judgment would be refused. However, the applicant, having alleged that it had complied with ss 129 and 130 of the NCA, could amend its particulars of claim. Therefore the court had to consider whether there was indeed compliance with those sections. It came to the conclusion [488] that non-compliance with s 129 could not be cured by attaching proof of purported compliance with s 129 to a summons, an application for default judgment or one for summary judgment. Compliance with ss 129 and 130 was not elective but compulsory. The NCA made no provision for the curing of the non-compliance with s 129, other than a stay of proceedings until a court order in terms of s 130(4) was given effect to. Therefore, the application for summary judgment had to be dismissed and the defendant was granted leave to defend. The action proceedings were stayed until 10 business days after the plaintiff, in due compliance with ss 129 and 130 of the NCA, had served a notice as contemplated in s 129(1)*(a)* on the defendant. In reaching its finding the court refused to follow a line of Gauteng cases, originating with *SA Taxi Development Finance (Pty) Ltd v Phalafala*, [489] which held that non-compliance with s 129 could be cured by attaching a s 129 default notice to the summons.

1 See RSC Ord 14; *Meek v Kruger* 1958 (3) SA 154 (T) at 156–8; *Edwards v Menezes* 1973 (1) SA 299 (NC) at 303; and see Hoppenstein (1958) 75 *SALJ* 211; *Sekretaris van Landboukrediet en Grondbesit v Loots* 1973 (3) SA 296 (NC) at 298.

2 *Eisenberg's v OFS Textile Distributors (Pty) Ltd* 1949 (3) SA 1047 (O) at 1054; *Lombard v Van der Westhuizen* 1953 (4) SA 84 (C) at 89; *Shingadia v Shingadia* 1966 (3) SA 24 (R) at 25–6; *Chrismar (Pvt) Ltd v Stutchbury* 1973 (4) SA 123 (R) at 124–5; *Barclays National Bank Ltd v Smith* 1975 (4) SA 675 (D) at 684; *Bonnet v Snaar Dorpsontwikkelaars (Edms) Bpk* 1978 (4) SA 212 (D) at 217; *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) at 11C–G. See also *Dane v Mortgage Insurance Corp* [1894] 1 QB 54 (CA); *Robinson & Co v Lynes* [1894] 2 QB 577; *Roberts v Plant* [1895] 1 QB 597 (CA).

3 In *Anglo-Italian Bank v Wells & Davis* 38 LT 197 (CA) at 199 it was held that the procedure 'is intended to prevent a man clearly entitled to money from being delayed, where there is no fairly arguable defence to be brought forward'; and see *Meek v Kruger* 1958 (3) SA 154 (T) at 156 and 158; *Edwards v Menezes* 1973 (1) SA 299 (NC) at 303; *Sekretaris van Landboukrediet en Grondbesit v Loots* 1973 (3) SA 296 (NC) at 298F; *Paul v Peter* 1985 (4) SA 227 (N) at 230E; *First National Bank of South Africa Ltd v Myburgh* 2002 (4) SA 176 (C) at 180C; *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) at 11C–G; *Majola v Nitro Securitisation 1 (Pty) Ltd* 2012 (1) SA 226 (SCA) at 232F–G; *Eclipse Systems v He & She Investments (Pty) Ltd and A Related Matter* 2020 (6) SA 497 (WCC) at paragraph [10]; *Absa Bank Ltd v Meiring* 2022 (3) SA 449 (WCC) at paragraph [8]; *IPH Finance Proprietary Limited v Agrizest Proprietary Limited* (unreported, WCC case no 21771/2021 dated 28 February 2023) at paragraph 9.

4 1958 (3) SA 154 (T).

5 At 157. In *Hennie Ehlers Boerdery CC v APL Cartons (Pty) Ltd* 2024 (1) SA 149 (ECGq) Ronaasen AJ, referring to the quotation in the text, in the context of rule 32 after its amendment on 1 July 2019, stated:
'[4] Rule 32, as amended, is intended to be a refinement made in a continued effort to achieve the goal set out in the above-mentioned quotation namely, to establish whether a defendant has disclosed a bona fide defence to a plaintiff's claim in the form of a triable issue.'

6 *Meek v Kruger* 1958 (3) SA 154 (T) at 159–60; *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) at 11C–G; *Majola v Nitro Securitisation 1 (Pty) Ltd* 2012 (1) SA 226 (SCA) at 232F–G; *Eclipse Systems v He & She Investments (Pty) Ltd and A Related Matter* 2020 (6) SA 497 (WCC) at paragraph [10]; *Velocity Finance (RF) Limited v Desert Fox Investments (Pty) Ltd t/a Desert Fox Investments* (unreported, ECMk case nos 1206/2022; 1511/2022 dated 23 May 2023) at paragraph [16]. How this came about is clearly stated by Van den Heever J in *Edwards v Menezes* 1973 (1) SA 299 (NC) at 303. See also *Sekretaris van Landboukrediet en Grondbesit v Loots* 1973 (3) SA 296 (NC) at 298.

7 See *Jacobs v Booth's Distillery Co* 85 LT 262 (HL) in which case Lord James of Hereford said that there was a fair issue to be tried; and see the authorities referred to in n 1 above.
In *Majola v Nitro Securitisation 1 (Pty) Ltd* 2012 (1) SA 226 (SCA) the following was stated (at 232F–G):
'It is a procedure that is intended "to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights".'
In *FirstRand Bank Ltd t/a Wesbank v Maenetja Attorneys* (unreported, GP case no 8557/2021 dated 17 September 2021) at paragraph [2] the court held:
'Naturally, summary judgment cannot be granted where it is clear that some ventilation of evidence is required in order for the Court to come to a decision. Adopting this approach, the successful defendant who demonstrates a triable defence is not excised from further anticipated litigation. Thus the defendant retains (all) his Constitutional Rights to access justice, as enshrined in section 34 of the Constitution.'
See also *Velocity Finance (RF) Limited v Desert Fox Investments (Pty) Ltd t/a Desert Fox Investments* (unreported, ECMk case nos 1206/2022; 1511/2022 dated 23 May 2023) at paragraph [16].

8 See, for example, *Eisenberg's v OFS Textile Distributors (Pty) Ltd* 1949 (3) SA 1047 (O) at 1054; *Skead v Swanepoel* 1949 (4) SA 763 (T) at 767; *Mowschenson & Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W) at 366; *Edwards v*

Menezes 1973 (1) SA 299 (NC) at 303; *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 304–5; *Shepstone v Shepstone* 1974 (2) SA 462 (N) at 467; *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 423; *Fourlamel (Pty) Ltd v Maddison* 1977 (1) SA 333 (A) at 347; *Van Wyngaardt NO v Knox* 1977 (2) SA 636 (T); *Border Concrete Engineering Co (Pty) Ltd v Knickelbein* 1982 (2) SA 648 (E) at 651; *Gulf Steel (Pty) Ltd v Rack-Write Bop (Pty) Ltd* 1998 (1) SA 679 (O) at 683G–H; *Tesven CC v South African Bank of Athens* 2000 (1) SA 268 (SCA) at 275H–I; *Marsh v Standard Bank of SA Ltd* 2000 (4) SA 947 (W) at 950A; *First National Bank of South Africa Ltd v Myburgh* 2002 (4) SA 176 (C) at 180C–D; *Mercantile Bank Ltd v Star Power CC* 2003 (3) SA 309 (T) at 312G; *Absa Bank Ltd v Le Roux* 2014 (1) SA 475 (WCC) at 476H–477J and 478I–J; *He & She Investments (Pty) Ltd v Brand NO* 2019 (5) SA 492 (WCC) at 496B–H. In *Dowson & Dobson Industrial Ltd v Van der Werf* 1981 (4) SA 417 (C) it is said at 419:

'An ever increasing reluctance to grant summary judgment in the face of opposition is evident from the more recent decisions in the South African Courts.'

See also *District Bank Ltd v Hoosain* 1984 (4) SA 544 (C) at 550; *Standard Krediet Korporasie v Botes* 1986 (4) SA 946 (SWA) and 1987 *De Rebus* 163–7.

9 2009 (5) SA 1 (SCA) at 11G–12D.

10 At 11G–D. See also *Rees v Investec Bank Ltd* 2014 (4) SA 220 (SCA) at 227I–228E; *Gold Reef City Mint (Pty) Ltd v Bruni* (unreported, GJ case no A5030/2020 dated 26 March 2021 — a decision of the full court) at paragraph [59]; *FirstRand Bank Ltd t/a Wesbank v Maenetja Attorneys* (unreported, GP case no 8557/2021 dated 17 September 2021) at paragraph [1]; *MMK Khumalo Trading & Projects (Pty) Ltd v Maopeng Electrical (Pty) Ltd* (unreported, GJ case no 2021/38362 dated 6 December 2022) at paragraph [30].

11 In *Absa Bank Ltd v Le Roux* 2014 (1) SA 475 (WCC) Binns-Ward J observed (at 477I–J and 478I–J):

'The judgment of the Supreme Court of Appeal in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA), in which it was suggested (at paragraph 33) that perhaps the time had come to stop describing summary judgment as a "drastic" remedy, did not purport to derogate from the explanation of the proper application of rule 32 set out in *Maharaj*. On the contrary, Navsa JA coupled that suggestion with the enjoinder to defendants that, instead of seeking refuge under the labels that suggest a draconian character to the remedy, in the hope of making the courts reluctant to grant summary judgment, they should "concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the *Maharaj* case at 425G–426E". (Corbett JA was treating of subrule 32(3) at the passage referred to by Navsa JA. Rule 32(3) prescribes the requirement that must be satisfied by a defendant that delivers an affidavit in opposition to an application for summary judgment.)'

See also *Sasfin Bank Ltd v Motors Hoogland Bethlehem CC* (unreported, FB case no 3719/2020 dated 4 November 2021) at paragraph [11].

In *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) Corbett JA said (at 425G–426E):

'Under Rule 32(3), upon the hearing of an application for summary judgment, the defendant may either give security to the plaintiff for any judgment which may be given, or satisfy the Court by affidavit or, with the leave of the Court, by the oral evidence of himself or any other person who can swear positively to the fact that he has a *bona fide* defence to the action.

Such affidavit or evidence must disclose fully the nature and grounds of the defence and the material facts relied upon therefor. If the defendant finds security or satisfies the Court in this way, then, in terms of Rule 32(7), the Court is bound to give leave to defend and the action proceeds in the ordinary way. If the defendant fails either to find security or to satisfy the Court in this way, then, in terms of Rule 32(5), the Court has a discretion as to whether to grant summary judgment or not (see *Gruhn v M Pupkewitz & Sons (Pty) Ltd* 1973 (3) SA 49 (A) at p.58). If on the hearing of the application it appears that the defendant is entitled to defend as to part of the claim, then, in terms of Rule 32(6), the Court is bound to give him leave to defend as to that part and to enter judgment against him for the balance of the claim, unless he has paid such balance into Court.

Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a *bona fide* defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: *(a)* whether the defendant has "fully" disclosed the nature and grounds of his defence and the material facts upon which it is founded, and *(b)* whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both *bona fide* and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be. The word "fully", as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a *bona fide* defence. (See generally *Herb Dyers (Pty) Ltd v Mohamed* 1965 (1) SA 31 (T); *Caltex Oil (SA) Ltd v Webb and Another*, 1965 (2) SA 914 (N); *Arend v Astra Furnishers (Pty) Ltd*, *supra* at pp. 303–4; *Shepstone v Shepstone* 1974 (2) SA 462 (N)). At the same time the defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea; nor does the Court examine it by the standards of pleading. (See *Estate Potgieter v Elliott* 1948 (1) SA 1084 (C) at p. 1087; *Herb Dyers* case, *supra* at p. 32.)'

12 *Maisel v Strul* 1937 CPD 128; *Mowschenson & Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W); *Gruhn v M Pupkewitz & Sons (Pty) Ltd* 1973 (3) SA 49 (A); *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C); *Shepstone v Shepstone* 1974 (2) SA 462 (N); *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A); *Bank van die Oranje Vrystaat Bpk v OVS Kleiwerke (Edms) Bpk* 1976 (3) SA 804 (O) at 806–7; *District Bank Ltd v Hoosain* 1984 (4) SA 544 (C) at 550; *Pansera Builders Suppliers (Pty) Ltd v Van der Merwe (t/a Van der Merwe's Transport)* 1986 (3) SA 654 (C) at 669; *SA Bank of Athens Ltd v Van Zyl* 2005 (5) SA 93 (SCA) at 102E; *Nair v Chandler* 2007 (1) SA 44 (T) at 46H–47B; *Nedbank Limited v Uys* (unreported, GP case no 52341/2020 dated 8 June 2023) at paragraph [14]; *J.E.M v G.P.J.V.N* (unreported, NWM case no 1791/2021 dated 18 October 2023) at paragraph [30]. In *Gulf Steel (Pty) Ltd v Rack-Hire Bop (Pty) Ltd* 1998 (1) SA 679 (O) it was held (at 683H–684B) that, before even considering whether the defendant has established a bona fide defence, the court must be satisfied that the plaintiff's claim has been clearly established and that his pleadings are technically in order; if either of these two requirements is not met, the court is obliged to refuse summary judgment, even if the defendant has failed to put up any defence or has put up a defence which did not meet the standard required to resist summary judgment. In *Buttertum Property Letting (Pty) Ltd v Dihlabeng Local Municipality* [2016] 4 All SA 895 (FB) Moloi J and Daffue J held (at paragraph [31]) that the *Gulf Steel* case 'has put the bar a bit too high for a plaintiff' and (at paragraphs [31]–[34] and the cases there referred to) that prejudice to a defendant resulting from a defective application is a material factor to be taken into account by a court in deciding to refuse summary judgment. In *Velocity Finance (RF) Limited v Desert Fox Investments (Pty) Ltd t/a Desert Fox Investments* (unreported, ECMk case nos 1206/2022; 1511/2022 dated 23 May 2023) Laing J stated (footnote omitted):

'[19] [I]t could well be said that wherever a court focuses its enquiry, be it on either the plaintiff's case or the defendant's defence, there is no reason to exclude the basic principle that the plaintiff's case must properly disclose a cause of action. His or her pleadings cannot be excipiable. This assumes even more importance within the context of a procedure that does not allow the benefit of a reply or the advantages of cross-examination.'

13 *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 227D–H; *Marsh v Standard Bank of SA Ltd* 2000 (4) SA 947 (W) at 950A–B; *J.E.M v G.P.J.V.N* (unreported, NWM case no 1791/2021 dated 18 October 2023) at paragraph [29].

14 *Maisel v Strul* 1937 CPD 128; *Skead v Swanepoel* 1949 (4) SA 763 (T) at 767; *J.E.M v G.P.J.V.N* (unreported, NWM case no 1791/2021 dated 18 October 2023) at paragraph [27]; and see *Standard Bank of SA Ltd v Naude* 2009 (4) SA 669 (E) at 672C–676D. See also *Sekretaris van Landboukrediet en Grondbesit v Loots* 1973 (3) SA 296 (NC) at 298.

15 *Mowschenson & Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W); *Misid Investments (Pty) Ltd v Leslie* 1960 (4) SA 473 (W) at 474; *Fischereigesellschaft F Busse & Co KG v African Frozen Products (Pty) Ltd* 1967 (4) SA 105 (C) at 111; *Pillay v Andermain (Pty) Ltd* 1970 (1) SA 531 (T) at 534; *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C); *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 423; *Lohrman v Vaal Ontwikkelingsmaatskappy (Edms) Bpk* 1979 (3) SA 391 (T) at 394–6; *Bill Troskie Motors v Motor Spares Centre (Edms) Bpk* 1980 (2) SA 961 (O) at 963; *District Bank Ltd v Hoosain* 1984 (4) SA 544 (C); *Pansera Builders Supplies (Pty) Ltd v Van der Merwe (t/a Van der Merwe's Transport)* 1986 (3) SA 654 (C).

16 *W M Mentz & Seuns (Edms) Bpk v Katzake* 1969 (3) SA 306 (T) at 311–12; *Charsley v Avbob (Begrafnisdiens) Bpk* 1975 (1) SA 891 (E) at 893; *Van den Bergh v Weiner* 1976 (2) SA 297 (T); *Bank van die Oranje Vrystaat Bpk v OVS Kleiwerke (Edms) Bpk* 1976 (3) SA 804 (O) at 807; *Lohrman v Vaal Ontwikkelingsmaatskappy (Edms) Bpk* 1979 (3) SA 391 (T) at 395–6; *Visser v De la Rey* 1980 (3) SA 147 (T) at 149; *Joubert, Owens, Van Niekerk Ing v Breytenbach* 1986 (2) SA 357 (T) at 359–60; *Standard Bank of South Africa Ltd v Roestof* 2004 (2) SA 492 (W) at 497C–F; *Coetzee v Nassimov* 2010 (4) SA 400 (WCC) at 402B–403A. See, however, *ABSA Bank Ltd v Coventry* 1998 (4) SA 351 (N) at 353D–F and *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC* 2010 (5) SA 112 (KZP) at 122F–G, 122I and 123C–D; *Dass and Others NNO v Lowewest Trading (Pty) Ltd* 2011 (1) SA 48 (KZD) at 53C–F; *Velocity Finance (RF) Limited v Desert Fox Investments (Pty) Ltd t/a Desert Fox Investments* (unreported, ECMk case nos 1206/2022; 1511/2022 dated 23 May 2023) at paragraph [18].

17 1973 (1) SA 299 (NC) at 304–5.

18 *Edwards v Menezes* 1973 (1) SA 299 (NC) at 304–5, followed by the full bench in *Mallett v FirstRand Bank Ltd t/a First National Bank* (unreported, FB case no A128/2022 dated 7 June 2023) at paragraph [16].

19 Commenting on this paragraph, Laing J in *Velocity Finance (RF) Limited v Desert Fox Investments (Pty) Ltd t/a Desert Fox Investments* (unreported, ECMk case nos 1206/2022; 1511/2022 dated 23 May 2023) stated (footnote omitted):

'[19] From the above, it could well be said that wherever a court focuses its enquiry, be it on either the plaintiff's case or the defendant's defence, there is no reason to exclude the basic principle that the plaintiff's case must properly disclose a cause of action. His or her pleadings cannot be excipiable. This assumes even more importance within the context of a procedure that does not allow the benefit of a reply or the advantages of cross-examination.'

20 In *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) the Supreme Court of Appeal held (at 12C–D) that the time had perhaps come to discard labels such as 'drastic' and 'extraordinary' and rather to concentrate on the proper application of rule 32.

21 *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd* 2004 (6) SA 29 (SCA) at 35D–F.

22 GN R842 published in *GG* 42497 of 31 May 2019. See Thino Bekker 'Summary judgment — *Quo vadis*' (2020) 1381.1 *SALJ* 88 for a discussion of the historical development of the procedure of summary judgment and a critical evaluation of the amendments to rule 32.

23 2020 (1) SA 623 (GJ).

24 At 631C–E.

25 At 627E–F; and see *MMK Khumalo Trading & Projects (Pty) Ltd v Maopeng Electrical (Pty) Ltd* (unreported, GJ case no 2021/38362 dated 6 December 2022) at paragraph [31].

26 Paragraph 3 of the Task Team's Memorandum to Role-Players in Respect of Proposed Changes to the Summary Judgment Rule (Rule 32), distributed to role-players under cover of a letter of the Secretary of the Rules Board for Courts of Law dated 27 June 2016.

27 In *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) the following was observed in this regard (at paragraph [14] — footnotes omitted):
'The Task Team's concern about the use by plaintiffs of the procedure for "tactical advantage" is also difficult to understand as a basis for the amendments to the rule that have been introduced. Litigation is not a game. And in the modern era, the general tendency in litigation worldwide is for courts to require litigants to make full disclosure of their cases as early as possible so as to facilitate effective case management and promote the most efficient and cost effective disposal of cases by the avoidance of unnecessary trials and the shortening of those that do proceed to hearing. A plaintiff that applied for summary judgment when it knew or reasonably should have appreciated that the defendant had a bona fide defence, and was therefore abusing the procedure, was always, and remains, exposed to an adverse costs order. The amended rule provides for even stricter sanctions against abuse, by providing expressly for the making of orders that the proceedings be suspended until the delinquent plaintiff has paid any costs awarded against it for abusing the procedure.'

28 Paragraph 3 of the Task Team's Memorandum to Role-Players in Respect of Proposed Changes to the Summary Judgment Rule (Rule 32), distributed to role-players under cover of a letter of the Secretary of the Rules Board for Courts of Law dated 27 June 2016; and see *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) at paragraph [7]).

29 Paragraphs 8 and 9 of the Task Team's Memorandum to Role-Players in Respect of Proposed Changes to the Summary Judgment Rule (Rule 32), distributed to role-players under cover of a letter of the Secretary of the Rules Board for Courts of Law dated 27 June 2016.

30 *Author's note:* In *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) it was observed that '[t]he reasoning is, with respect, not as helpful as might have been hoped in giving meaningful insight into the rationale for, and intent behind, the rule changes' (at paragraph [9]). The court also correctly pointed out that the constitutional challenges reportedly mounted against the established rule 32 were not identified by the Task Team in its Memorandum (at paragraphs [10]–[11]).

31 *Author's note:* See the notes to rule 32(2)*(b)* s v 'Brief explanation as to why the defence as pleaded does not raise any issue for trial' below.

32 *Author's note:* In *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) the court correctly pointed out that the procedure in jurisdictions such as England and Australia differs starkly from that in place in South Africa (at paragraphs [12]–[13]). See also *Belrex 95 CC v Barday* 2021 (3) SA 178 (WCC) at paragraphs [27]–[29].

33 See, for example, the notes to subrule (3)*(b)* s v 'Disclose fully the nature and grounds of the defence and the material facts relied upon therefor' below; and see *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) at paragraph [5]. In *Hennie Ehlers Boerdery CC v APL Cartons (Pty) Ltd* 2024 (1) SA 149 (ECGq) Ronaasen AJ associated himself with the author's view that rule 32 in its amended form is not a model of clarity (at paragraph [6]).

34 In *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) the position was stated even stronger by Binns-Ward J (footnotes omitted):
'[5] Why it was thought desirable to bring in changes that will inevitably delay the ability of, and increase the cost to, deserving plaintiffs to obtain summary judgment is less than clear. It is also not self-evident how the courts are expected to deal with the extra material, in many cases disputatious material, that will now be put before it in such applications, in determining whether a defendant has shown that it has a bona fide defence. . . .
. . .
[11] . . . The change undoubtedly comes at a cost, both in time and expense. The evident effect of these considerations on plaintiff litigants has been notable. There has been a significant drop in the number of summary judgment applications on the court rolls. The reduced numbers would suggest that if ever the procedure were genuinely regarded by litigators as ineffective before the amendments, it might now regarded as even more so. Time will tell.'
See also AT Dzinouya 'Has the summary judgment remedy lost its purpose following the amendments to Uniform R 32?' 2020 (April) *De Rebus* 12.
In *Propell Specialised Finance (Pty) Ltd v Point Bay Body Corporate SS 493/2008* (unreported, WCC case no 14191/2019 dated 26 May 2020) Binns-Ward J identified the following factors which necessitated a different approach to the allocation of opposed summary judgment applications brought under rule 32 in its amended form (at paragraphs [2]–[7]):
(a) It had been the long-established practice, prior to the coming into effect of the amendments, for opposed summary judgment applications in the Western Cape Division of the High Court, Cape Town, to be heard on the Third Division roll in the court that is ordinarily reserved for the hearing of unopposed matters. The reason for this was manifest: summary judgment was intended to afford a quick and cost-effective route to final judgment in a confined category of cases in which a plaintiff's entitlement to relief was amenable to easy and ready proof and when it was demonstrable that a defendant had entered appearance to defend only as delaying tactic.
(b) The fact that an application for summary judgment may be brought only after the delivery of the defendant's plea, no longer provides for the degree of expedition contemplated in terms of the pre-amendment regime. If the initially delivered plea were to be the object of an exception or rendered the subject of amendment for any other reason, which is by no means unusual, especially when a defendant seeks to advance dubious defences, the ripeness of a claim for summary judgment for hearing could actually be very considerably delayed beyond the time within which the rules provide for the delivery of a plea in the ordinary course.
(c) The effect of the amendments has been to render availing of the remedy materially less cost-effective. In most cases the application can be brought only after the pleadings have closed, for it is only in a minority of cases that the exchange of pleadings continues after a plea has been delivered. A plaintiff contemplating making application for summary judgment now not only has to consider the defendant's plea before instituting the application, it also has to support the application with a more elaborate affidavit than was previously required, dealing not only with a motivated reiteration of the grounds of its own case, but also engaging with the content of the defendant's plea. Quite apart from the possibility of supervening interventions such as exceptions or applications to amend the originally delivered plea, the additional input required from legal representatives before an opposed application for summary judgment is ready for hearing means that the attendant expense will be appreciably higher than it used to be in respect of such applications brought prior to the rule amendments; in some cases, such as those in which exceptions and amendments intervene, very considerably higher.
(d) The time and costs factors that militated in favour of the exceptional treatment of opposed summary judgment applications by permitting their hearing on the unopposed motion court roll have consequently been negated in large measure.
(e) The papers in opposed summary judgment applications may now be expected to often be more voluminous than used to be the case. This is because of the new requirements introduced in terms of the amendments concerning the content of the papers. This effect needs to be considered in the context of the generally increased reading burden on judges sitting in the Third Division.
(f) Sending an opposed summary judgment application off to be heard on the opposed motion roll would involve a delay of at best a number of weeks, often months, and also entail the incurrence of materially increased costs. It would therefore be a course that would tend to thwart the achievement of some of the primarily intended advantages of the procedure.
Regard being had to the cumulative effect of all of the aforementioned factors, Binns-Ward J ordered opposed summary judgment applications brought in terms of the amended rule 32 to be heard and determined on the semi-urgent roll in the Fourth Division, and no longer in the Third Division.
In *FirstRand Bank Limited v Badenhorst NO* (unreported, GJ case no 2022/5936 dated 10 July 2023) Q Leech AJ stated (footnotes omitted):
'1. I received the file in this application for summary judgment at the end of a motion court week on the day prior to the hearing. This case delivered the expectation in *Propell Specialised Finance (Pty) Ltd v Point Bay Body Corporate SS493/2008 and Another*, that, "the papers in opposed summary judgment applications may now be expected to often be more voluminous than used to be the case", and the prediction by the authors of Erasmus, Superior Court Practice, that, "[r]ule 32 in its amended form . . . will probably increase the workload of judges as well as the costs for parties." The difficulties experienced by practitioners in understanding the requirements of the amended rule 32 resulted, in this matter, in papers in excess of 950 pages.'
In *Hennie Ehlers Boerdery CC v APL Cartons (Pty) Ltd* 2024 (1) SA 149 (ECGq) Ronaasen AJ associated himself with the author's view set out

in the text and held that the matter before him was no exception (at paragraph [6]).
See also HCJ Flemming 'Summary judgment queries' 2021 (April) *Advocate* 49.

35 In *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) the court did not share this view (at paragraph [5]).

36 *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) at paragraph [15].

37 See *Venter v Cassimjee* 1956 (2) SA 242 (N).

38 Rule 32(4).

39 Rule 32(4).

40 This view was endorsed in *Belrex 95 CC v Barday* 2021 (3) SA 178 (WCC) at paragraph [25].

41 *Uranovsky v Pascal* 1964 (2) SA 348 (C); *Hodgetts Timbers (East London) (Pty) Ltd v HBC Properties (Pty) Ltd* 1972 (4) SA 208 (E); *Howff (Pvt) v Tromp's Engineering (Pvt) Ltd* 1977 (2) SA 267 (R); *Flamingo General Centre v Rossburgh Food Market* 1978 (1) SA 586 (D); *Belrex 95 CC v Barday* 2021 (3) SA 178 (WCC) at paragraph [25].

42 See *Edwards v Menezes* 1973 (1) SA 299 (NC) at 304; *Belrex 95 CC v Barday* 2021 (3) SA 178 (WCC) at paragraph [25].

43 *Edwards v Menezes* 1973 (1) SA 299 (NC) at 304, where some of the authorities reflecting the opposing attitudes are collected; *Belrex 95 CC v Barday* 2021 (3) SA 178 (WCC) at paragraph [25]. See also *Sekretaris van Landboukrediet en Grondbesit v Loots* 1973 (3) SA 296 (NC) at 298; *Shepstone v Shepstone* 1974 (2) SA 462 (N) at 462; *Ronnie Reed & Co (OFS) (Pty) Ltd v Kimberley Brake & Clutch (Pty) Ltd* 1977 (3) SA 364 (NC) at 367.

44 *Business Partners Ltd v Trustees, Riaan Botes Family Trust* 2013 (5) SA 514 (WCC) at 519F–G; *Absa Bank Ltd v Expectra 423 (Pty) Ltd* 2017 (1) SA 81 (WCC) at 85G–88C; *Ozmik Property Investments v Staracom (Pty) Ltd* (unreported, GP case no 93172/2019 dated 28 May 2021) at paragraphs [21]–[24] and [34].

45 *Cape Business Bureau (Pty) Ltd v Van Wyk* 1981 (4) SA 433 (C) at 439.

46 By GN R842 in *GG* 42497 of 31 May 2019.

47 *Esso Standard South Africa (Pty) Ltd v Virginia Oils and Chemical Co (Pty) Ltd* 1972 (2) SA 81 (O) at 83.

48 Unreported, GJ case no 37587/2020 dated 19 October 2021.

49 At paragraph [7].

50 At paragraph [7].

51 *Weinkove v Botha* 1952 (3) SA 178 (C). See also *Abbott v Nolte* 1951 (2) SA 419 (C); *Du Toit v De Beer* 1955 (1) SA 469 (T); *H I Lockhat (Pty) Ltd v Domingo* 1979 (3) SA 696 (T); *Standard Bank of SA Ltd v SA Fire Equipment (Pty) Ltd* 1984 (2) SA 693 (C).

52 See the notes to rule 32(2)*(a)* s v 'Notice of application' below.

53 *Bonugli v Standard Bank of South Africa Ltd* 2012 (5) SA 202 (SCA) at 208E–210B.

54 *Rief v Hofmeyr* (1924) 45 NLR 375; and see *Hugo Franco (Pty) Ltd v Gordon* 1956 (4) SA 482 (SR); *Van Wyngaardt NO v Knox* 1977 (2) SA 636 (T) at 639. See also *Allied Building Society v Malic Construction and Development Co CC* 1991 (4) SA 432 (T) where Heyns J held (at 436D) that rule 32(1) does not permit summary judgment to be granted for an order declaring property specially hypothecated to be executable. It is respectfully submitted that this judgment should not be followed: an order declaring property specially hypothecated to be executable is ancillary relief to the main claim, which must, of course, fall within the ambit of rule 32(1). See also *Nedperm Bank Ltd v Verbri Products CC* 1993 (3) SA 214 (W) at 218–9; *First National Bank of SA Ltd v Ngcobo* 1993 (3) SA 490 (D) at 491–2; *Entabeni Hospital Ltd v Van der Linde* 1994 (2) SA 422 (N) at 424G–I; *Erf 1382 Sunnyside (Edms) Bpk v Die Chipi BK* 1995 (3) SA 659 (T) at 661H–I; *Nedcor Bank Ltd v Lisinfo 61 Trading (Pty) Ltd* 2005 (2) SA 432 (C) at 438H–439D; *Standard Bank of SA Ltd v Snyders and Eight Similar Matters* 2005 (5) SA 610 (C) at 620A, overruled on appeal (but not on this point) in *Standard Bank of South Africa Ltd v Saunderson* 2006 (2) SA 264 (SCA); *Ivoral Properties (Pty) Ltd v Sheriff, Cape Town* 2005 (6) SA 96 (C) at 110B–D; *Nedbank Ltd v Mortinson* 2005 (6) SA 462 (W) at 469J–470A; *Absa Bank Ltd v Ntsane* 2007 (3) SA 554 (T) at 557G; *FirstRand Bank Ltd v Lenea* 2008 (3) SA 491 (E) at 492F–493D; *NPGS Protection & Security Services CC v FirstRand Bank Ltd* 2020 (1) SA 494 (SCA); *Koegelenberg NO v Praia Rocha 122 Investments (Pty) Ltd* (unreported, NCK case no 152/2019 dated 26 November 2021) at paragraph 44. See further the notes to rule 46(1)*(a)*(ii) s v 'Immovable property has been declared to be specially executable by the court' and to rule 46A(1) s v 'This rule applies whenever' below.

55 *Spilhaus & Co Ltd v Coreejees* 1966 (1) SA 525 (C) at 528; *Evelyn Haddon & Co Ltd v Leojanko (Pty) Ltd* 1967 (1) SA 662 (O); *Nichas & Son (Pty) Ltd v Papenfus* 1970 (2) SA 316 (O); *All Purpose Space Heating Co of SA (Pty) Ltd v Schweltzer* 1970 (3) SA 560 (D) at 562–3; *Leymac Distributors (Pty) Ltd v Hoosen* 1974 (4) SA 524 (D) at 528. A claim for the delivery and transfer of immovable property is outside the scope of summary judgment (*Van Wyngaardt NO v Knox* 1977 2 SA 636 (T)). A claim for delivery of specific movable property or alternatively for payment therefor does not fall within the rule (cf *Hugo Franco (Pty) Ltd v Gordon* 1956 (4) SA 482 (SR) at 483; *All Purpose Space Heating Co of SA (Pty) Ltd v Schweltzer* 1970 (3) SA 560 (D) at 562).

56 1984 (1) SA 297 (W) at 299E.

57 2009 (4) SA 68 (SCA) at 70I–71A. See also *Standard Bank of SA Ltd v Trumpie* (unreported, GP case no 21321/2020 dated 11 May 2021) at paragraphs [10]–[11]. In *Standard Bank of South Africa v Phillip* (unreported, GP case no 43590/2019 dated 30 October 2023) the plaintiff sought summary judgment for, amongst other things, rectification of the loan agreement that was part of its cause of action to correctly reflect the defendants' *domicilium citandi et executandi*, and payment in terms of the loan agreement as rectified. The plaintiff contended that incorrect recordal of the address was the result of a common mistake between the parties. On behalf of the defendants it was contended that the prayer for rectification fell outside the purview of rule 32, and that the incorrect recordal of the address was the result of a unilateral mistake on the part of the plaintiff. It was the defendants' contention, further, that the plaintiff ought to have sought the rectification of the loan agreement, the mortgage bond and the amended particulars of claim to reflect the correct *domicilium* address. Thus, the summary judgment application was premature. The court disagreed with the contentions of the defendants and granted summary judgment as sought by the plaintiff. It would appear as if the decision is incorrect in the light of the decision of the Supreme Court of Appeal in *PCL Consulting* referred to in the text to this footnote, as the parties were purportedly not *ad idem* as to the respects in which the loan agreement (and the mortgage bond as well as the plaintiff's particulars of claim) had to be rectified.

58 Cf *Wolhuterskop Beleggings (Edms) Bpk v Bloemfontein Engineering Works (Pty) Ltd* 1965 (2) SA 122 (O).

59 *Nedcor Bank Ltd v Hennop* 2003 (3) SA 622 (T) at 626A–C.

60 *Nedbank Ltd v Van der Berg* 1987 (3) SA 449 (W), applying the *dicta* in *Astra Furnitures (Pty) Ltd v Arend* 1973 (1) SA 446 (C) at 450. See further *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A); *Nedbank Ltd v Abstein Distributors (Pty) Ltd* 1989 (3) SA 750 (T); *Donelly v Barclays National Bank Ltd* 1990 (1) SA 375 (W); *Interland Durban (Pty) Ltd v Walters NO* 1993 (1) SA 223 (C).

61 *Rossouw v FirstRand Bank Ltd* 2010 (6) SA 439 (SCA) at 454C; and see *ABSA Bank Ltd v Tebeila N.O.* (unreported, GJ case no 2019/14019 dated 29 November 2022) at paragraph 8 (where it is observed that paragraph 10.17(4) of the Johannesburg *Practice Manual* of the High Court provides for the handing in of a certificate of indebtedness).

62 *Lester Investments (Pty) Ltd v Narshi* 1951 (2) SA 464 (C); *Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd* 1962 (1) SA 736 (T). In *Botha v W Swanson & Company (Pty) Ltd* 1968 (2) PH F85 (CPD) Corbett J put the test as follows:
'[A] claim cannot be regarded as one for "a liquidated amount in money" unless it is based on an obligation to pay an agreed sum of money or is so expressed that the ascertainment of the amount is a mere matter of calculation.'
See also *Commercial Bank of Namibia Ltd v Trans Continental Trading (Namibia)* 1992 (2) SA 66 (NmHC) at 72–3; *First National Bank of South Africa Ltd v Myburgh* 2002 (4) SA 176 (C) at 186E–H; *Nedcor Bank Ltd v Lisinfo 61 Trading (Pty) Ltd* 2005 (2) SA 432 (C) at 437H; *Tredoux v Kellerman* 2010 (1) SA 160 (C) at 166D–E; *Blakes Maphanga Inc v Outsurance Insurance Co Ltd* 2010 (4) SA 232 (SCA) at 240D–241C.

63 *Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd* 1962 (1) SA 736 (T) at 739; and see *Erasmus v Arcade Electric* 1962 (3) SA 418 (T) at 419; *Lombard v Pongola Sugar Milling Co Ltd* 1963 (4) SA 119 (D) at 128; *Adcorp Spares PE (Pty) Ltd v Hydromulch (Pty) Ltd* 1972 (3) SA 663 (T) at 665 and 668.

64 *Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd* 1962 (1) SA 736 (T), disapproving of *Kark v Proctor* 1961 (1) SA 752 (W), in which a doctor's claim for a specified sum 'in respect of professional services rendered . . . at defendant's special instance and request' was not allowed.

65 At 738–9.

66 At 738, relying on *Whelan v Oosthuizen* 1937 TPD 304 at 311 and *Lester Investments (Pty) Ltd v Narshi* 1951 (2) SA 464 (C) at 470. In *Standard Bank of South Africa Ltd v Renico Construction (Pty) Ltd* 2015 (2) SA 89 (GJ) at 91I–94B Sutherland J found it 'hard to admire or to genuinely appreciate' the fact that a critical dimension of the concept of 'liquidity' is 'an intrinsically uncertain and unavoidable variable component: a randomly selected judge's discretion'. According to Sutherland J liquidity ought, ideally, to be a hard fact, and a judicial discretion about a fact provoked some misgivings. Nevertheless, he considered himself bound by the weight of authority that the decision as to whether the amount of a debt is capable of speedy and prompt ascertainment is a matter left to the discretion of the court in each particular case.

67 *Conradie v Landro en Van der Hoff (Edms) Bpk* 1965 (2) SA 304 (GW); *Windsor Diesels (Pvt) Ltd v Shangani Sawmills (Pvt) Ltd* 1969 (3) SA 145 (R); *International Harvester v Ferreira* 1975 (3) SA 831 (SE) applied in *Border Concrete Engineering Co (Pty) Ltd v Knickelbein* 1982

(2) SA 648 (E); *Quality Machine Builder v M I Thermocouples (Pty) Ltd* 1982 (4) SA 591 (W) (criticizing the conflicting judgment in *Oos-Randse Bantoesakeadministrasieraad v Santam Versekeringsmaatskappy Bpk (2)* 1978 (1) SA 164 (W)); *Deeb v Pinter; Shane & Stoler v Munro-Scott t/a House of Bernardi* 1984 (2) SA 507 (W); and see *Kleynhans v Van der Westhuizen NO* 1970 (1) SA 565 (O).

68 *Consolidated Fish Distributors (Pty) Ltd v Sargeant, Jones, Valentine & Co* 1966 (4) SA 427 (C), following *SA Fire and Accident Insurance Co Ltd v Hickman* 1955 (2) SA 131 (C); *Botha v W Swanson & Co (Pty) Ltd* 1968 (2) PH F85 (CPD); *Leymac Distributors (Pty) Ltd v Hoosen* 1974 (4) SA 524 (D); but see the earlier Cape decision in *Lester Investments (Pty) Ltd v Narshi* 1951 (2) SA 464 (C).

69 In *S Dreyer & Sons Transport v General Services* 1976 (4) SA 922 (C) at 923.

70 1962 (1) SA 736 (T).

71 In *S Dreyer & Sons Transport v General Services* 1976 (4) SA 922 (C) Diemont J distinguished the *Consolidated Fish Distributors (Pty) Ltd v Sargeant, Jones, Valentine & Co* 1966 (4) SA 427 (C) on the ground that the former case was concerned with a business contract between two commercial firms and there was nothing to suggest that the charges were vague or flexible, whereas in the latter case the problem related to what a reasonable fee would be for an audit. With respect, the distinction appears to be highly artificial, but it appears likely (especially in view of what is said at 924 *in fine*) that in future the Western Cape Division of the High Court will follow the decision in the *Fatti's Engineering* case.

72 *Neves Builders & Decorators v De la Cour* 1985 (1) SA 540 (C) at 543C–544F; *Tredoux v Kellerman* 2010 (1) SA 160 (C) at 166G; *Nedbank Ltd v TIS Invest (Pty) Ltd* (unreported, GP case no 44366/2021 dated 9 April 2021) at paragraphs [13]–[16]. If from the defence as disclosed it appears to the court that proof of the claim may be protracted and difficult rather than prompt, that is a factor which may be taken into account in deciding whether or not the claim is liquidated (*Neves's* case at 544G and *Tredoux's* case at 166G–167A).

73 *Paver Bros v De Beer* 1916 OPD 236. See also *Mahomed Essop (Pty) Ltd v Sekhukhulu & Son* 1967 (3) SA 728 (D) and *Jacobsen Van den Berg SA (Pty) Ltd v Triton Yachting Supplies* 1974 (2) SA 584 (O).

74 *Highman & Marks v Graham & Smith* (1903) 13 CTR 219.

75 *Oblewitz v Cortis* (1902) 19 SC 162.

76 *Becker v Forster; Karsten v Forster* 1913 CPD 962.

77 *Rooknadien v Khan* 1915 CPD 394.

78 *Paver Bros v De Beer* 1916 OPD 236. See also *Ermelo Mills (Pty) Ltd v Federated Farmers Agency* 1956 (2) SA 24 (D).

79 *Bester v Wheeler* 1913 OPD 37.

80 *Lundy v Carter* (1881) 2 NLR 132.

81 *Wilson v Power* (1886) 7 NLR 165.

82 See *Arkell & Douglas v Hoffman* (1905) 22 SC 1.

83 *Meddent Medical Scheme v Avalon Brokers (Pty) Ltd* 1995 (4) SA 862 (D).

84 *Colonial Government v Rosenberg* (1906) 16 CTR 34.

85 *London & Lancashire Insurance Co v De Wet* 1938 CPD 577.

86 If interest is claimed at a rate above the legal rate (prescribed under s 1(2) of the Prescribed Rate of Interest Act 55 of 1975) or from a date prior to the date of summons, the summons must allege the ground justifying such claim, e g agreement or customary dealing (*Shuster v Von Alvensleben* 1922 SWA 47; *Renaults v Mayekiso* 1922 EDL 89; *Cape Town Board of Executors v Van Eeden* 1922 CPD 168; *Standard Bank of South Africa Ltd v Lotze* 1950 (2) SA 698 (C); *Borten v Peninsula Construction Co (Pty) Ltd* 1959 (4) SA 366 (C); *Hendricks v Barnett* 1975 (1) SA 765 (N) at 771).

87 *Martin v Le Vatte* 1914 CPD 212.

88 *Boezak v Calvert's Executor* (1906) 23 SC 57. See also *Saayman v Grady* (1900) 10 CTR 588.

89 *Warmsley v James* (1889) 15 SC 120; *Union Government (Minister of Railways & Harbours) v Saayman* 1914 CPD 612; *Berringer v Berringer* 1953 (1) SA 38 (E); *Standwin Investments (Pvt) Ltd v Helfer* 1961 (4) SA 470 (SR); *Belingwe Stores (Pvt) Ltd v Munyembe* 1972 (4) SA 460 (R); and see *Supreme Diamonds (Pty) Ltd v Du Bois; Regent Neckware Manufacturing Co (Pty) Ltd v Ehrke* 1979 (3) SA 444 (W).

90 *Wolhuterskop Beleggings (Edms) Bpk v Bloemfontein Engineering Works (Pty) Ltd* 1965 (2) SA 122 (O).

91 *Brown Bros & Taylor (Pty) Ltd v Smeed* 1957 (2) SA 498 (C); *Kleynhans v Van der Westhuizen NO* 1970 (2) SA 742 (A); *International Hardware Corp (Rhod) (Pvt) Ltd v Appleton* 1971 (1) SA 404 (R); *S Polwarth & Co (Pvt) Ltd v Zanombairi* 1972 (2) SA 688 (R); *Colrod Motors (Pty) Ltd v Bhula* 1976 (3) SA 836 (W). In a claim for summary judgment for money allegedly stolen, the fact of a conviction or acquittal is highly relevant. If the defendant was granted leave to appeal against his conviction of theft, summary judgment proceedings may be instituted against him only after the appeal or after the lapsing of the time for appealing (*Tomes v Sithole* 1982 (1) SA 62 (Z)). See also (1982) 99 *SALJ* 355; *Nedcor Bank Ltd v Behardien* 2000 (1) SA 307 (C) at 311G.

92 *National Milling Co Ltd v Mohamed* 1966 (3) SA 22 (R).

93 *Meddent Medical Scheme v Avalon Brokers (Pty) Ltd* 1995 (4) SA 862 (D) at 865F–G.

94 *Ford Bros v Clayton* 1906 TS 2025.

95 *Hughes v Johnston* 1 LLR 339.

96 *Per* Ward J in *Paver Bros v De Beer* 1916 OPD 236. An allegation that a principal is dead and has left no estate liquidates the debt.

97 *Rief v Hofmeyr* (1924) 45 NLR 375.

98 *National Bank v Marx & Aaronson* 1923 TPD 69, overruled in *LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd* 1974 (1) SA 747 (A), but not on this point. In a more recent decision, however, default judgment was granted on a client's untaxed bill. The court held that in order to establish a liquidated claim for the purposes of default judgment, an attorney suing for fees and disbursements need not allege that the amount of his client's untaxed bill of costs is fair and reasonable, or usual or normal, as these allegations will be implied from the averment that the attorney's mandate has been duly performed and that the fees are due (*Deeb v Pinter; Shane & Stoler v Munro-Scott t/a House of Bernardi* 1984 (2) SA 507 (W) at 509B–C, cited with approval in *Chapman Dyer Miles & Moorhead Inc v Highmark Investment Holdings CC* 1998 (3) SA 608 (D) at 612 (C)). In *Tredoux v Kellerman* 2010 (1) SA 160 (C) (cited with approval in *Blakes Maphanga Inc v Outsurance Insurance Co Ltd* 2010 (4) SA 232 (SCA) at 240D–241C) the full court held (at 166D–167E) that claims for payment of their untaxed professional fees instituted by an advocate and an attorney against a lay client were not for liquidated amounts of money and did not fall within the ambit of rule 32(1). It was also held (at 167E–G) that neither the advocate nor the attorney could recover fees in the absence of prior agreement with the client or taxation.

99 *Lucke v Luyt* (1899) 16 SC 268, not followed in *Cloete v Boshoff* 1924 GWL 4, where costs of transfer in similar circumstances were ordered to be paid.

100 *Du Toit v Grobler* 1947 (3) SA 213 (SWA), but see the criticism of this decision in *Colrod Motors (Pty) Ltd v Bulha* 1976 (3) SA 836 (W).

101 *SA Fire and Accident Insurance Co Ltd v Hickman* 1955 (2) SA 131 (C).

102 See *Leymac Distributors (Pty) Ltd v Hoosen* 1974 (4) SA 524 (D); *Oos-Randse Bantoesakeadministrasieraad v Santam Versekeringsmaatskappy Bpk (2)* 1978 (1) SA 164 (W) at 168; *Probert v Baker* 1983 (3) SA 229 (D); *Pick 'n Pay Retailers (Pty) Ltd h/a Hypermarkets v Dednam* 1984 (4) SA 673 (O).

103 *Kleynhans v Van der Westhuizen NO* 1970 (2) SA 742 (A) at 750–1. See also the judgment of the court *a quo* in the *Kleynhans* case (1970 (1) SA 565 (O) at 567–8), and *Gratus & Gratus (Prop) Ltd v Jackelow* 1930 WLD 226; *Ex parte Sustor Manufacturing Industries (Pty) Ltd* 1983 (4) SA 364 (E).

104 *All Purpose Space Heating Co of SA (Pty) Ltd v Schweltzer* 1970 (3) SA 560 (D) at 564–5.

105 *Lewis and Sachs v Meyer* 1904 TS 898; *Kelhor v Samuels* (1890) 7 *CLJ* 52; *Van der Vyver v Gee* (1908) 25 SC 632; *Lansdell v Sam* 1912 CPD 335.

106 *Werdmuller v Joubert* (1900) 14 EDC 164. See also the notes to subrule (1) s v 'Such claims in the summons as is only' above.

107 See, for example, *Nedbank Ltd v Niemann* (unreported, GJ case no 4132/2019 dated 26 July 2021) at paragraphs [2], [4] and [5]; *FirstRand BankLtd t/a Wesbank v Pillay* (unreported, GP case no 6615/2021 dated 10 August 2021) at paragraphs [1] and [21]; *Firstrand Auto Receivables (RF) Ltd v Makgobatlou* (unreported, GJ case no 12908/2020 dated 8 September 2021) at paragraphs [1], [5] and [48]–[51]; *Wesbank, a division of FirstRand Bank Ltd v Mazel Foods (Pty) Ltd t/a Ocean Basket* (unreported, GJ case no 2020/9286 dated 21 September 2021); *Nedbank Ltd (MFC Division) v Van Rensburg* (unreported, GJ case no 2020/17846 dated 19 October 2021) at paragraphs [1], [2] and [16]; *Volkswagen Financial Services South Africa (Pty) Ltd v Pillay* 2022 (5) SA 639 (KZP) at paragraphs [1] and [43]; *Potpale Investments (Pty) Limited v Zondi* (unreported, KZP case no 8843/21P dated 30 August 2022) at paragraphs [1] and [22]–[23]; *Wesbank, a division of Firstrand Bank v Silver Solutions 3138 CC* (unreported, KZP case no 8400/2022P dated 7 March 2023) at paragraphs [1] and [25].

108 *Smit Kruger Inc v Benvenuti Tiles (Pty) Ltd* [1999] 1 All SA 242 (C).

109 *Field NNO v Compuserve* 1991 (4) SA 490 (Z); *Smit Kruger Inc v Benvenuti Tiles (Pty) Ltd* [1999] 1 All SA 242 (C).

110 One of the common-law incidents of ownership is that the owner 'may claim his property wherever found from whomsoever holding it' (*Chetty v Naidoo* 1974 (3) SA 13 (A) at 20A–E; *Yarram Trading CC t/a Tijuana Spur v Absa Bank Ltd* 2007 (2) SA 570 (SCA) at 577F).

111 *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at 21D–F; *Wormald NO v Kambule* 2006 (3) SA 562 (SCA) at 568E.

112 *Belmont House (Pty) Ltd v Gore and Another NNO* 2011 (6) SA 173 (WCC) at 178A and 178D–F; *AJP Properties CC v Sello* 2018 (1) SA 535 (GJ) at 539D; *Winprop (Pty) (Ltd) v Bahlekazi* (unreported, GJ case no 28781/2021 dated 13 December 2022) at paragraph 32.

113 *AJP Properties CC v Sello* 2018 (1) SA 535 (GJ) at 539D–541E. See also *Lovius and Shtein v Sussman* 1947 (2) SA 241 (O); *Van Reenen v Kruger* 1949 (4) SA 27 (W) at 29; and see *Voortrekker Pers Bpk v Rautenbach* 1947 (2) SA 47 (A); *EP du Toit Transport (Pty) Ltd v Windhoek Municipality* 1976 (3) SA 818 (SWA)178B–D; *Belmont House (Pty) Ltd v Gore and Another NNO* 2011 (6) SA 173 (WCC) at 178B–C.

114 *Belmont House (Pty) Ltd v Gore and Another NNO* 2011 (6) SA 173 (WCC) at 178D–F; *Winprop (Pty) (Ltd) v Bahlekazi* (unreported, GJ case no 28781/2021 dated 13 December 2022) at paragraph 32.

115 2003 (1) SA 113 (SCA).

116 See Forms–47 below.

117 *Wedge Steel (Pty) Ltd v Wepener* 1991 (3) SA 444 (W).

118 If interest is claimed at a rate above the legal rate (prescribed under s 1(2) of the Prescribed Rate of Interest Act 55 of 1975) or from a date prior to the date of summons, the summons must allege the ground justifying such claim, e g agreement or customary dealing (*Shuster v Von Alvensleben* 1922 SWA 47; *Renaults v Mayekiso* 1922 EDL 89; *Cape Town Board of Executors v Van Eeden* 1922 CPD 168; *Standard Bank of South Africa Ltd v Lotze* 1950 (2) SA 698 (C); *Borten v Peninsula Construction Co (Pty) Ltd* 1959 (4) SA 366 (C); *Hendricks v Barnett* 1975 (1) SA 765 (N) at 771).

119 See *All Purpose Space Heating Co of SA (Pty) Ltd v Schweltzer* 1970 (3) SA 560 (D) at 562–3.

120 In *First National Bank v MMD Fitment Centre CC* (unreported, GP case no 633/18 dated 1 March 2023) the plaintiff's entitlement to apply for summary judgment arose when the second respondent filed its appearance to defend on 1 February 2018. The plaintiff had 15 days from that date to bring the application for summary judgment in terms of rule 32 prior to its amendment with effect from 1 July 2019. Its failure to do so timeously was due to the negligent failure to diarize its file at the offices of its attorneys. The court held that it was impermissible for the plaintiff to seek to derive a benefit from its inordinate delay and to rely on the amendment of rule 32 more than four years after its entitlement to summary judgment had lapsed. The plaintiff was bound by the provisions of rule 32 prior to its amendment and had to seek and be successful in an application for the condonation to set the platform for the hearing of the summary judgment hearing. It failed to do so. The application for summary judgment was accordingly dismissed (at paragraphs [1], [21] and [23]). In *Mobile Telephone Networks (Pty) Ltd v Sugarberry Trading 239 CC* (unreported, NWM case no 1503/2021 dated 19 January 2023) it was held (at paragraphs [21]–[30]) that the *dies non* period provided for in paragraph *(aa)* of the proviso to rule 6(5)*(b)*(iii) is applicable to the period within which the plaintiff must deliver its application for summary judgment. It is submitted that, having regard to the specific purpose of the proviso, its clear and unambiguous wording, and the proper interpretation thereof, the judgment is wrong. Condonation/an extension of time under rule 27 can be applied for by a plaintiff who has delivered its application for summary judgment out of time.

121 Unreported, GJ case no 2022/9750 dated 10 August 2023.

122 At paragraphs [33]–[34].

123 [2021] JOL 49833 (WCC).

124 2022 (2) SA 503 (KZP).

125 At paragraph [24].

126 At paragraphs [11]–[14].

127 At paragraph [15].

128 2010 (2) SA 580 (ECP).

129 At paragraph [9].

130 2023 (5) SA 439 (WCC).

131 At paragraphs [10]–[12].

132 It is submitted that in the light of the material distinction between the facts in the *Quattro* and *Ingenuity* cases, on the one hand, and the *Arum* case on the other hand, Van Zyl AJ's findings concerning the *Arum* case constitute *obiter dicta*.

133 At paragraphs [14]–[116]

134 At paragraph [117].

135 *Ingenuity Property Investments (Pty) Ltd v Ignite Fitness (Pty) Ltd — Leave to Appeal* (unreported, WCC case no 9845/2022 dated 15 August 2023).

136 *Cohen NO v D* (unreported, SCA case no 368/2022 dated 20 April 2023) at paragraph [20].

137 *Ingenuity Property Investments (Pty) Ltd v Ignite Fitness (Pty) Ltd* 2023 (5) SA 439 (WCC) at paragraph [50].

138 Cf *Ingenuity Property Investments (Pty) Ltd v Ignite Fitness (Pty) Ltd* 2023 (5) SA 439 (WCC) at paragraph [50]. In *FirstRand Bank Limited v Badenhorst NO* (unreported, GJ case no 2022/5936 dated 10 July 2023) Q Leech AJ expressed doubt as to whether the requirement to 'identify' the facts upon which the claim is based, as required by subrule (2)*(b)*, refers only to the facts constituting the cause of action and why, for example, the facts to be set out in a replication yet to be delivered cannot be set out in the supporting affidavit (at paragraphs 8–12); but see *Wesbank, a Division of Firstrand Bank Limited v Dependable Aluminium (Pty) Ltd* (unreported, KZP case no 10086/2022P dated 10 August 2023) where it was remarked, in the context of the facts of that case, that it 'is unusual for the replication to be contained in the affidavit supporting summary judgment' (at paragraph [11.1]. The nature of the replication and explanation would, of course, be determined by the defences raised. See, in this regard, the notes to rule 25 s v 'General' below.

139 See further the notes to subrule (2)*(b)* s v 'Brief explanation as to why the defence as pleaded does not raise any issue for trial' below.

140 Cf *Ingenuity Property Investments (Pty) Ltd v Ignite Fitness (Pty) Ltd* 2023 (5) SA 439 (WCC) at paragraph [101].

141 *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) at paragraphs [41]–[50]. In this regard the defendant must engage meaningfully with the material in the plaintiff's affidavit supporting the application for summary judgment (*Standard Bank Ltd v Five Strand Media (Pty) Ltd* (unreported, ECPE case no 745/2020 dated 7 September 2020) at paragraph [12]; *Saglo Auto (Pty) Ltd v Black Shades Investments (Pty) Ltd* 2021 (2) SA 587 (GP) at paragraph [55]; *SA Taxi Finance Solutions (Pty) Limited v Mokobi* (unreported, GJ case no 2021/12537 dated 30 June 2023) at paragraph [59]).

142 See further the notes to rule 32(3)*(b)* below.

143 See further the notes to rule 32 s v 'General' above.

144 Unreported, GP case no 8557/2021 dated 17 September 2021.

145 At paragraph [21].

146 At paragraph [58].

147 At paragraphs [53] and [61]–[63].

148 At paragraph [76].

149 Rule 32(2)*(c)*. See *Papenfus v Nichas & Son (Pty) Ltd* 1969 (4) SA 234 (O), not following and reversing *Nichas & Son (Pty) Ltd v Papenfus* 1969 (2) SA 494 (O). As to improper set-down, see *BMW Financial Services South Africa (Pty) Ltd v Mpane* (unreported, GP case no 91617/2019 dated 11 October 2022).

150 *FirstRand Bank Ltd v Beyer* 2011 (1) SA 196 (GNP) at 200D.

151 *Absa Bank Ltd v Botha NO* 2013 (5) SA 563 (GNP) at 564D–565B, 565H–566E, 567B–E, 568C–H and 570D–E. On the question of compliance with the regulations governing the administration of an oath or affirmation, see *Lohrman v Vaal Ontwikkelingsmaatskappy (Edms) Bpk* 1979 (3) SA 391 (T) at 396–8; *Cape Sheet Metal Works (Pty) Ltd v J J Calitz Builder (Pty) Ltd* 1981 (1) SA 697 (O); *Standard Bank of SA Limited v Redmond* (unreported, GP case no 80438/2015 dated 2 June 2016). In *Macsteel Service Centres SA (Pty) Ltd v Profin Trading 35 CC* (unreported, GP case no 96119/2015 dated 17 June 2016) the affidavit opposing summary judgment was deposed to by a male person but the certificate of the commissioner of oaths read as if the deponent were a female. In allowing an affidavit by the commissioner of oaths explaining the error, the court (at paragraphs [5]–[9]) distinguished *Absa Bank Ltd v Botha (supra)* and was not prepared to adopt 'a highly technical approach to the affidavit' (at paragraph [9]). In *FirstRand Bank Limited t/a Fnb Home Loans v Freddie* (unreported, FB case no 4075/2016 dated 16 November 2016) it was held (at paragraphs [5]–[14]) that the plaintiff was entitled to file supplementary affidavits of the deponent to the plaintiff's affidavit in support of its application for summary judgment and the commissioner of oaths before whom the deponent appeared, explaining that the deponent in fact appeared before the commissioner at Johannesburg (as stated in the commissioner's certificate) despite the latter's stamp having reflected her business address as being at Boksburg.

152 *Engineering Requisites (Pty) Ltd v Adam* 1977 (2) SA 175 (O); *Nkondo v Minister of Police* 1980 (2) SA 362 (O).

153 *International Shipping Co (Pty) Ltd v F C Bonnet (Pty) Ltd* 1975 (1) SA 853 (D).

154 Rule 32(2)*(c)*. See *W M Mentz & Seuns (Edms) Bpk v Katzake* 1969 (3) SA 306 (T); *Western Bank Bpk v De Beer* 1975 (3) SA 772 (T); *Credcor Bank Ltd v Thomson* 1975 (3) SA 916 (D); *Bank van die Oranje Vrystaat Bpk v OVS Kleiwerke (Edms) Bpk* 1976 (3) SA 804 (O). If the cause of action is founded in part on a liquid document, a copy of such document must still be annexed to the affidavit (*Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A)).

155 *Sand & Co Ltd v Kollias* 1962 (2) SA 162 (W) at 164–5; *Barclays National Bank Ltd v Love* 1975 (2) SA 514 (D) at 515. See also *Forhat*

Stud Farm (Edms) Bpk v Barclays Nasionale Bank Bpk 1978 (3) SA 118 (T) at 120–1.

156 See the notes to this subrule s v 'Who can swear positively' below.

157 *Sand & Co Ltd v Kollias* 1962 (2) SA 162 (W) at 165; *Barclays National Bank Ltd v Love* 1975 (2) SA 514 (D) at 515; *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 423. See also *Forhat Stud Farm (Edms) Bpk v Barclays National Bank Bpk* 1978 (3) SA 118 (O) at 120–1.

158 *Sand & Co Ltd v Kollias* 1962 (2) SA 162 (W) at 165; *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 423H; and see *Trust Bank van Afrika Bpk v Haarhoff* 1986 (4) SA 446 (NC).

159 *FirstRand Bank Ltd v Fillis* 2010 (6) SA 565 (ECP) at 569C–G.

160 This requirement precludes the affidavit being deposed to by someone whose knowledge of the facts is purely a matter of hearsay (*Mowschenson & Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W) at 366D; *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC* 2010 (5) SA 112 (KZP) at 115F–G; *FirstRand Bank Ltd v Mvelase* 2011 (1) SA 470 (KZP) at 487E–F; *Old Mutual Life Assurance Co (SA) Ltd v Simtrade 4 CC t/a OBC Chicken* 2013 (6) SA 571 (GSJ) at 573A–B). In *Absa Bank Ltd v Le Roux* 2014 (1) SA 475 (WCC) Binns-Ward J observed that s 15(4) of the Electronic Communications and Transactions Act 25 of 2002 could have been of assistance to the plaintiff in that case. He stated the following (at 484E–486A):

'[19] The requirements of subrule 32(2) might, on the basis of the approach explained in *Maharaj*, and applied in cases such as *Shackleton Credit Management* and *Han-Rit Boerdery*, appear on their face to place an impossible burden on institutional plaintiffs such as banks, particularly in the modern age in which much of their business is conducted facelessly on computer networks and recorded electronically. This much was in fact suggested in so many words by Monama J in *FirstRand Bank Ltd t/a Wesbank v Ego Specialised Services CC* [2012] ZAGPJHC 47 (3 April 2012) in paras 8–11. I do not believe, however, that this is necessarily so. Electronically stored data falling within the defined meaning of "data message" in s 1 of the Electronic Communications and Transactions Act 25 of 2002 is admissible in evidence in terms of s 15 of the Act. Section 15(4) of the Act provides:

"A data message made by a person in the ordinary course of business, or a copy or printout of or an extract from such data message certified to be correct by an officer in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self regulatory organisation or any other law or the common-law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract."

Section 15(4) has a twofold effect. It creates a statutory exception to the hearsay rule and it gives rise to a rebuttable presumption in favour of the correctness of electronic data falling within the definition of the term "data message".

[20] Ordinarily, only a witness with direct knowledge of the facts is competent to testify to their existence. It was for that reason that the word "positively" has generally been construed in the manner explained in the passage from *Maharaj* quoted earlier. But what is the position when, by way of an exception to the general rule, hearsay evidence is admissible to prove the facts in issue? If the hearsay evidence would be admissible to prove the facts at the trial, why should a deponent who is qualified to produce the hearsay evidence not be able to depose to an affidavit in support of summary judgment on the basis of such evidence? Provided that he is appropriately qualified to give the evidence, why should he be regarded as disabled from swearing positively to the facts? After all, the evidence he could produce at the trial would, notwithstanding its hearsay character, nevertheless positively establish the facts, subject, of course, to the effect of any rebutting evidence adduced by the defendant. In my view, on a proper construction thereof, subrule 32(2) does not preclude the deponent to the supporting affidavit from relying on hearsay evidence to swear positively to the facts when he could permissibly, as a matter of law, adduce such hearsay evidence for the purpose of proving the facts at a trial of the action. The case in support of such a construction is made even stronger when there is a statutory presumption in favour of the correctness of such evidence. Thus, if the deponent to a supporting affidavit in summary judgment proceedings were to be able to aver that he is (i) an officer in the service of the plaintiff, (ii) that the salient facts — which should be particularised — are electronically captured and stored in the plaintiff's records, (iii) that he had regard thereto, (iv) that he is authorised to certify and has executed a certificate certifying the facts contained in such record to be correct, and (v) on the basis thereof is able to swear positively that the plaintiff will — having regard to the provisions of s 15(4) of Act 25 of 2002 — be able to prove the relevant facts at the trial of the action by producing the electronic record or an extract thereof, the requirements of subrule 32(2) would be satisfied. I think that it would be salutary for the deponent to any such affidavit also to explain why the evidence is not being adduced by means of the affidavit of someone with direct personal knowledge of the facts.

[21] It is not necessary, however, to determinatively decide whether the Electronic Communications and Transactions Act could have been of assistance to the plaintiff in the current matter. The supporting affidavit did not identify the nature and content of the records to which the deponent had reference. It did not identify the facts established by reference to the records, or contain any averments that would indicate the admissibility of their content in terms of s 15 of Act 25 of 2002. As a result it was inadequate on any approach; its content did not assure the court that the deponent could swear positively to the facts and verify the cause of action and the amount claimed.

[22] In the circumstances the application for summary judgment falls to be dismissed by reason of the plaintiff's non-compliance with subrule 32(2). Counsel were agreed that in that event it would not be necessary to deal with the second defendant's application in terms of s 165 of the Companies Act, or the first defendant's application for the postponement thereof. The point in limine holds good for all three defendants. The application for a postponement of the summary judgment application in respect of the third defendant therefore obviously falls away.'

161 *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 423A–B; *Standard Bank of SA Ltd v Secatsa Investments (Pty) Ltd* 1999 (4) SA 229 (C) at 234B; *Absa Bank Ltd v Le Roux* 2014 (1) SA 475 (WCC) at 477B–H and 478A–B.

162 *Kurz v Ainhirn* 1995 (2) SA 408 (D) at 410B.

163 *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 423; *Joel's Bargain Store v Shorkend Bros (Pty) Ltd* 1959 (4) SA 263 (E) at 266; *Misid Investments (Pty) Ltd v Leslie* 1960 (4) SA 473 (W); *Sand & Co Ltd v Kollias* 1962 (2) SA 162 (W); *Fischereigesellschaft F Busse & Co KG v African Frozen Products (Pty) Ltd* 1967 (4) SA 105 (C) at 109–10; *Flamingo Knitting Mills (Pty) Ltd v Clemans* 1972 (3) SA 692 (D) at 694–5; *Sekretaris van Landboukrediet en Grondbesit v Loots* 1973 (3) SA 296 (NC); *Barclays National Bank Ltd v Love* 1975 (2) SA 514 (D) at 515–16; *Jeffrey v Andries Zietsman (Edms) Bpk* 1976 (2) SA 870 (T) at 871; *Bank van die Oranje Vrystaat Bpk v OVS Kleiwerke (Edms) Bpk* 1976 (3) SA 804 (O) at 808; *Bowman NO v Howe* 1980 (2) SA 226 (W) at 228; *Paddy's Investments (Pty) Ltd v Moolman Bros Construction Co (Pty) Ltd* 1982 (1) SA 249 (D) at 250–1; *Mmabatho Food Corporation (Pty) Ltd v Fourie* 1985 (1) SA 318 (T) at 320–1; *Kurz v Ainhirn* 1995 (2) SA 408 (D) at 410C; *Kaplan Estates (Pty) Ltd v Eastern Metropolitan Substructure* 1999 (2) SA 1017 (W) at 1020–2; *Velocity Finance (RF) Limited v Desert Fox Investments (Pty) Ltd t/a Desert Fox Investments* (unreported, ECMk case nos 1206/2022; 1511/2022 dated 23 May 2023) at paragraph [28].

164 *Fischereigesellschaft F Busse & Co KG v African Frozen Products (Pty) Ltd* 1967 (4) SA 105 (C) at 109–10; *Barclays National Bank Ltd v Love* 1975 (2) SA 514 (D) at 515–16; *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 423; *Standard Bank of SA Ltd v Secatsa Investments (Pty) Ltd* 1999 (4) SA 229 (C) at 234C; *Cape Town Transitional Metropolitan Substructure v Ilco Homes Ltd* 1996 (3) SA 492 (C) at 496A–498F.

165 *Lagos v Grunwaldt* [1910] 1 KB 41 (CA), followed in *Fischereigesellschaft F Busse & Co KG v African Frozen Products (Pty) Ltd* 1967 (4) SA 105 (C); and see *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC* 2010 (5) SA 112 (KZP) at 115E–F. In *Jeffrey v Andries Zietsman (Edms) Bpk* 1976 (2) SA 870 (T) the deponent stated that he was 'under the impression' ('onder die indruk') that the defendant had no bona fide defence. The affidavit was held to be sufficient.

166 *FirstRand Bank Ltd v Beyer* 2011 (1) SA 196 (GNP) at 202D–F.

167 *Conradie v Landro en Van der Hoff (Edms) Bpk* 1965 (2) SA 304 (GW) at 309; and see *Joel's Bargain Store v Shorkend Bros (Pty) Ltd* 1959 (4) SA 263 (E) at 266. These decisions have been criticized on the ground that, especially in the case of a big company with branch offices, the probabilities are that the managing director or general manager will not necessarily have personal knowledge of all transactions entered into by his firm, and that the deponent has to be a person who would be a competent *viva voce* witness to the facts were he to be called (*Pinepipe (Pty) Ltd v Nolec (Pty) Ltd* 1975 (4) SA 932 (W); *Jeffrey v Andries Zietsman (Edms) Bpk* 1976 (2) SA 870 (T)).

168 *Northern Cape Scrap & Metals (Edms) Bpk v Upington Radiators & Motor Graveyard (Edms) Bpk* 1974 (3) SA 788 (NC); *Jeffrey v Andries Zietsman (Edms) Bpk* 1976 (2) SA 870 (T); *Meddent Medical Scheme v Avalon Brokers (Pty) Ltd* 1995 (4) SA 862 (D) at 866I–867A.

169 *Joel's Bargain Store v Shorkend Bros (Pty) Ltd* 1959 (4) SA 263 (E); *Misid Investments (Pty) Ltd v Leslie* 1960 (4) SA 473 (W); *Trekker Investments (Pty) Ltd v Wimpy Bar* 1977 (3) SA 447 (W).

170 *Sand & Co Ltd v Kollias* 1962 (2) SA 162 (W); *Pick 'n Pay Retailers (Pty) Ltd h/a Hypermarkets v Dednam* 1984 (4) SA 673 (O) at 679; *Trust Bank van Afrika Bpk v Haarhoff* 1986 (4) SA 446 (NC) at 449. A deponent who elects not to state that he has personal knowledge of the facts, but relies on an inference to be drawn from the facts that he has such personal knowledge, is the author of his own misfortune if such inference cannot be drawn (*Pinepipe (Pty) Ltd v Nolec (Pty) Ltd* 1975 (4) SA 932 (W)). In *HPROP (Pty) Ltd v Venn and Muller Incorporated* (unreported, GP case no 53599/2021 dated 9 November 2022) the deponent, a director of the plaintiff, neither stated that he had personal knowledge of the facts nor alleged that he represented the plaintiff when the tacit agreement on which the plaintiff relied for summary judgment was concluded or negotiated. It was found that he had not provided the court with material information to enable the court to ascertain how he had personal knowledge to enable him to swear positively to the facts of the matter (at paragraph 22). In *Celanubusi (Pty) Ltd v Amanzi Ahlo Bile Trading 25 (Pty) Ltd t/a Trisch Industries* (unreported, FB case no 1715/2022 dated 3 February 2023) the following allegations by the sole director of the plaintiff company were found to be sufficient:

'2. Being sole director of the Plaintiff, I have personal knowledge of the matter, I had personally represented the Plaintiff when entering into the agreement with the Defendant, which agreement forms the subject matter of the action launched by the Plaintiff under the aforesaid case number.

3. I am also in charge of and manage the accounts department of the Plaintiff, and as a result I have in depth detailed knowledge pertaining to the Plaintiff's debtors.'

In *Talksure Trading (Pty) Ltd v Naidoo* (unreported, KZD case no D4630/2021 dated 28 July 2023) the deponent to the affidavit in support of summary judgment stated that —

(i) he was a director of the plaintiff and authorized by the plaintiff to institute the action and to prosecute the summary judgment application;

(ii) '[i]n the ordinary course of my duties as a Director of the Plaintiff, I have acquired personal knowledge of the Defendant's dealings, as well as the Plaintiff's claims against the Defendant' and that 'at all material times I have been involved with that which forms the subject of the Plaintiff's claims against the Defendant';

(iii) he had perused the content of the plaintiff's file and records with reference to the defendants and could consequently swear positively, and verify as true and correct, the grounds and facts contained in the plaintiff's summons and particulars of claim.

The allegations were found to be sufficient (at paragraphs [29]–[30] and [35]).

171 *Barclays National Bank Ltd v Love* 1975 (2) SA 514 (D) (see especially the remarks of Miller J at 516–17, which have been approved by the Appellate Division in *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 424); *Barclays Western Bank Ltd v Bill Jonker Factory Services (Pty) Ltd* 1980 (1) SA 929 (SE) at 936.

172 *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A), a 'borderline case' (at 424). See also *Trust Bank van Afrika Bpk v Haarhoff* 1986 (4) SA 446 (NC), a case falling 'aan die verkeerde kant van die draad' (at 451).

173 *Standard Bank of SA Ltd v Secatsa Investments (Pty) Ltd* 1999 (4) SA 229 (C) at 234H–235C.

174 *Millman NO v Klein* 1986 (1) SA 465 (C).

175 *Nedcor Bank Ltd v Behardien* 2000 (1) SA 307 (C) at 310F–311C. See, however, *BOE (NBS) Bank Ltd v Baccarella Investments (Pty) Ltd* (unreported, CPD case no 6348/2001 dated 7 September 2001) where Ngwenya J, in refusing summary judgment, held that *ex facie* the affidavit in support of summary judgment, which was deposed to by the provincial manager of the plaintiff's legal department, it did not appear that the facts of the matter fell within the personal knowledge of the deponent and that he could swear positively to the facts as contemplated by this subrule. It was held that, at the very least, it must be apparent from the facts set out in the affidavit that by nature of his position within an enterprise, the deponent had access to the documents and records upon which the cause of action is founded. In *Absa Bank Ltd v Motsepe* (unreported, GP case no 25761/2021 dated 22 November 2022) summary judgment was granted despite the court's concern that the deponent to the founding affidavit (a 'senior legal counsel' in the employ of the plaintiff) 'merely had regard, on her version, to the records without stating why the contents of those records are within her personal knowledge' (at paragraph 17).

176 Unreported, KZP case no 8843/21P dated 30 August 2022.

177 At paragraph [6].

178 *Old Mutual Life Assurance Co (SA) Ltd v Simtrade 4 CC t/a OBC Chicken* 2013 (6) SA 571 (GSJ) at 574A–575H.

179 2014 (1) SA 475 (WCC).

180 *FirstRand Bank Ltd v Beyer* 2011 (1) SA 196 (GNP) at 199B–F and 200A–C, not following *Wright v McGuinness* 1956 (3) SA 184 (C). See also the unreported cases referred to in *FirstRand Bank Ltd v Huganel Trust* 2012 (3) SA 167 (WCC) at 175H–176H.

181 2012 (3) SA 167 (WCC).

182 *FirstRand Bank Ltd v Huganel Trust* 2012 (3) SA 167 (WCC) at 171F–176H.

183 *FirstRand Bank Ltd v Huganel Trust* 2012 (3) SA 167 (WCC) at 178A–C.

184 2014 (1) SA 475 (WCC).

185 2012 (3) SA 167 (WCC).

186 2014 (4) SA 220 (SCA).

187 See *Rees v Investec Bank Ltd* 2014 (4) SA 220 (SCA) at 221I.

188 *Rees v Investec Bank Ltd* 2014 (4) SA 220 (SCA) at 222E–223B.

189 *Rees v Investec Bank Ltd* 2014 (4) SA 220 (SCA) at 223C–G.

190 *Rees v Investec Bank Ltd* 2014 (4) SA 220 (SCA) at 223G–H.

191 *Rees v Investec Bank Ltd* 2014 (4) SA 220 (SCA) at 223H–I.

192 *Per* Saldulker JA at 224B–228E.

193 Unreported, WCC case no 20266/2015 dated 12 September 2016. See also *Absa Bank Limited v Smith* (unreported, WCC case no 014508/2016 dated 21 October 2016).

194 At paragraphs [5]–[23] (footnotes omitted).

195 *Bowman NO v Howe* 1980 (2) SA 226 (W). See also *Millman NO v Klein* 1986 (1) SA 465 (C) at 470.

196 *Trekker Investments (Pty) Ltd v Wimpy Bar* 1977 (3) SA 447 (W); *Paddy's Investments (Pty) Ltd v Moolman Bros Construction Co (Pty) Ltd* 1982 (1) SA 249 (D) at 250–1. See also *Shell Zimbabwe (Pvt) Ltd v Webb* 1981 (4) SA 749 (Z) at 751–2.

197 *Sekretaris van Landboukrediet en Grondbesit v Loots* 1973 (3) SA 296 (NC). The decision was based on the fact that the defendant's liability to the state could be deposed to only by persons with control over and access to the relevant files of the department concerned, and the defendant had not denied that the deponent had such control and access.

198 *Raphael & Co v Standard Produce Co (Pty) Ltd* 1951 (4) SA 244 (C) at 245; *Fischereigesellschaft F Busse & Co KG v African Frozen Products (Pty) Ltd* 1967 (4) SA 105 (C) at 110; *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC* 2010 (5) SA 112 (KZP) at 115F–117I; and see *Mowschenson & Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W); *Old Mutual Life Assurance Co (SA) Ltd v Simtrade 4 CC t/a OBC Chicken* 2013 (6) SA 571 (GSJ) at 575A–H.

199 *Raphael & Co v Standard Produce Co (Pty) Ltd* 1951 (4) SA 244 (C) at 245; *Fischereigesellschaft F Busse & Co KG v African Frozen Products (Pty) Ltd* 1967 (4) SA 105 (C) at 110; and see *Mowschenson & Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W); *Meddent Medical Scheme v Avalon Brokers (Pty) Ltd* 1995 (4) SA 862 (D) at 866B–G.

200 See rule 17(2) and the notes thereto above.

201 *Barclays Western Bank Ltd v Bill Jonker Factory Services (Pty) Ltd* 1980 (1) SA 929 (SE); *Standard Merchant Bank Ltd v Rowe* 1982 (4) SA 671 (W) at 680.

202 For a critical application of these requirements, see *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) at paragraphs [29]–[41]. See also *Mpfuni v Segwapa Inc* (unreported, GJ case no 2021/6574 dated 14 March 2022) at paragraph 5; *Nissan Finance, a product of Wesbank, of FirstRand Bank Limited v Gusha Holdings and Enterprises (Pty) Ltd* (unreported, GJ case no 2022/9914 dated 5 April 2023) at paragraph 12; *Hennie Ehlers Boerdery CC v APL Cartons (Pty) Ltd* 2024 (1) SA 149 (ECGq) at paragraph [8].

203 This view was endorsed in *Absa Bank Ltd v Mphahlele N.O* (unreported, GP case nos 45323/2019 and 42121/2019 dated 26 March 2020) at paragraph [15]; in *Mpfuni v Segwapa Inc* (unreported, GJ case no 2021/6574 dated 14 March 2022) at paragraph 6; in *DB Fine Chemicals (Pty) Ltd v Sparta Pharmaceuticals CC* (unreported, GJ case no 2022/26447 dated 5 October 2023) at paragraphs [48]- [61]; and in *Liberty Group Limited v S Surtee Esquire (Pty) Ltd t/a Grays* (unreported, GP case no 003603/2023 dated 31 August 2023) at paragraphs 16–20. In *Cohen NO v D* (unreported, SCA case no 368/2022 dated 20 April 2023) the Supreme Court of Appeal held that the requirements of rule 32(2)*(b)* were peremptory (at paragraph [20]). See also *Nissan Finance, a product of Wesbank, of FirstRand Bank Limited v Gusha Holdings and Enterprises (Pty) Ltd* (unreported, GJ case no 2022/9914 dated 5 April 2023) at paragraphs 25–26, cited with approval in *ABSA Bank Limited v BCCN Projects (Pty) Ltd* (unreported, GJ case no 12250/2022 dated 20 October 2023) at paragraph [23].

204 2024 (1) SA 149 (ECGq).

205 At paragraph [31].

206 At paragraph [32].

207 1998 (4) SA 351 (N) at 353D–E; and see *Mowschenson & Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W) at 366C–D. In *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC* 2010 (5) SA 112 (KZP) at 123I–J doubt was expressed as to whether it is entirely correct to say that the court would have no jurisdiction if the required verification has not occurred.

208 2004 (2) SA 492 (W) at 496F–H, followed in *Coetzee v Nassimov* 2010 (4) SA 400 (WCC) at 402B–403A and *DB Fine Chemicals (Pty) Ltd v Sparta Pharmaceuticals CC* (unreported, GJ case no 2022/26447 dated 5 October 2023) at paragraphs [34]–[44].

209 2010 (5) SA 112 (KZP) at 122F–I, followed in *Gauteng Refinery (Pty) Ltd v Eloff* 2023 (2) SA 223 (GJ) at paragraph [10] (a decision of the full bench) and *Nedbank Limited v Kruger* (unreported, GP case no 6307/2022 dated 2 June 2023) at paragraphs 11–12.

210 Unreported, SCA case no 368/2022 dated 20 April 2023.

211 At paragraph [27].

212 At paragraph [27]. It was not even necessary to determine what was required to verify a cause of action under rule 32 in its amended form or what had to be contained in the affidavits of a plaintiff and a defendant, respectively. So too the question whether reliance could be placed on facts not pleaded but which emerged during argument (at paragraph [28]).

213 At paragraph [34].

214 *Strydom v Kruger* 1968 (2) SA 226 (GW); *All Purpose Space Heating Co of SA (Pty) Ltd v Schweltzer* 1970 (3) SA 560 (D); *Trust Bank of Africa Ltd v Hansa* 1988 (4) SA 102 (W); *Absa Bank Ltd v Mphahlele N.O* (unreported, GP case nos 45323/2019 and 42121/2019 dated 26 March 2020) at paragraph [17]; *Saglo Auto (Pty) Ltd v Black Shades Investments (Pty) Ltd* 2021 (2) SA 587 (GP) at paragraph [50]; *Mpfuni v Segwapa Inc* (unreported, GJ case no 2021/6574 dated 14 March 2022) at paragraph 6; *FirstRand Bank Limited v Badenhorst NO* (unreported, GJ case no 2022/5936 dated 10 July 2023) at paragraphs 6–8 and 12. In *Van den Bergh v Weiner* 1976 (2) SA 297 (T) the full court held (at 299G) that the following words appearing in an affidavit in support of an application for summary judgment substantially complied with the provisions of the former rule 32(2):
'(T)he first defendant is truly and lawfully indebted to the plaintiff on the grounds as set out in the summons'.
This decision has been referred to with approval in, *inter alia*, *Lohrman v Vaal Ontwikkelingsmaatskappy (Edms) Bpk* 1979 (3) SA 391 (T) at 395; *Joubert, Owens, Van Niekerk Ing v Breytenbach* 1986 (2) SA 357 (T) at 359; *Kruger v Standard Krediet Korporasie Bpk* 1988 (1) SA 570 (T) at 573. In *Standard Bank of SA Ltd v Secatsa Investments (Pty) Ltd* 1999 (4) SA 229 (C) at 235H–236H Van Reenen J distinguished that case on the facts from *Van den Bergh v Weiner (supra)*.

215 *All Purpose Space Heating Co of SA (Pty) Ltd v Schweltzer* 1970 (3) SA 560 (D) at 563; and see *Northern Cape Scrap & Metals (Edms) Bpk v Upington Radiators & Motor Graveyard (Edms) Bpk* 1974 (3) SA 788 (NC); *Dowson & Dobson Industrial Ltd v Van der Werf* 1981 (4) SA 417 (C) at 426–8; *FirstRand Bank Limited v Badenhorst NO* (unreported, GJ case no 2022/5936 dated 10 July 2023) at paragraphs 6–8 and 12.

216 *Caltex Oil (SA) Ltd v Crescent Express (Pty) Ltd* 1967 (1) SA 466 (D); *LS Enterprises (Pty) Ltd v Couck* 1971 (1) SA 438 (T); *Dowson & Dobson Industrial Ltd v Van der Werf* 1981 (4) SA 417 (C) at 423; *Trust Bank of Africa Ltd v Hansa* 1988 (4) SA 102 (W); *Saglo Auto (Pty) Ltd v Black Shades Investments (Pty) Ltd* 2021 (2) SA 587 (GP) at paragraph [50]; *Mpfuni v Segwapa Inc* (unreported, GJ case no 2021/6574 dated 14 March 2022) at paragraph 6; *Velocity Finance (RF) Limited v Desert Fox Investments (Pty) Ltd t/a Desert Fox Investments* (unreported, ECMk case nos 1206/2022; 1511/2022 dated 23 May 2023) at paragraphs [30]–[39]; *Liberty Group Limited v S Surtee Esquire (Pty) Ltd t/a Grays* (unreported, GP case no 003603/2023 dated 31 August 2023) at paragraph 20.

217 *Pillay v Andermain (Pty) Ltd* 1970 (1) SA 531 (T). This decision is consistent with the approach followed by Watermeyer J in *Spilhaus & Co Ltd v Coreejees* 1966 (1) SA 525 (C), that under the rule as it stands today the plaintiff no longer has to stand or fall by his summons as a whole, but can pick out those claims which fall within the rule and ask for summary judgment on them, to the exclusion of those that do not come within the ambit of the rule.

218 *Diesel Power Plant Hire CC v Master Diggers (Pty) Ltd* 1992 (2) SA 295 (W). See also *Freeball Construction (Pty) Ltd v Lipschitz* 1987 (2) SA 633 (D); *Visser v Incorporated General Insurances Ltd* 1994 (1) SA 472 (T) at 475A–D.

219 *Cape Business Bureau (Pty) Ltd v Van Wyk* 1981 (4) SA 433 (C).

220 *Astra Furnishers (Pty) Ltd v Arend* 1973 (1) SA 446 (C) at 450–1; this decision was overruled on appeal to the full court (see 1974 (1) SA 298 (C)) but not on the principles stated in the text.

221 *Transvaal Spice Works & Butchery Requisites (Pty) Ltd v Conpen Holdings (Pty) Ltd* 1959 (2) SA 198 (W) at 200; and see *Geyer v Geyer's Transport Services (Pty) Ltd* 1973 (1) SA 105 (T).

222 The view expressed in the first paragraph under this heading was endorsed in *Absa Bank Ltd v Mphahlele N.O* (unreported, GP case nos 45323/2019 and 42121/2019 dated 26 March 2020) at paragraph [18]. See also *Standard Bank Ltd v Five Strand Media (Pty) Ltd* (unreported, ECPE case no 745/2020 dated 7 September 2020) at paragraph [9]; *Saglo Auto (Pty) Ltd v Black Shades Investments (Pty) Ltd* 2021 (2) SA 587 (GP) at paragraphs [44] and [51].

223 *Prinsloo v Woolbrokers Federation Ltd* 1955 (2) SA 298 (N) at 299E.

224 Unreported, GP case nos 45323/2019 and 42121/2019 dated 26 March 2020, cited with approval in *ABSA Bank Limited v BCCN Projects (Pty) Ltd* (unreported, GJ case no 12250/2022 dated 20 October 2023) at paragraphs [17]–[18].

225 At paragraph [18].

226 Cf *Saglo Auto (Pty) Ltd v Black Shades Investments (Pty) Ltd* 2021 (2) SA 587 (GP) at paragraph [45]. Rule 14(2)*(b)* of the magistrates' courts rules, which is the equivalent of Uniform Rule of Court 32(2)*(b)*, and was amended with effect from 9 March 2020, in this regard requires that the facts upon which the plaintiff's claim is based must be *stated* in the affidavit. The reason why the Rules Board for Courts of Law framed the two rules differently is not clear.

227 This view, and the reasons therefor, were endorsed in *Absa Bank Ltd v Mphahlele N.O* (unreported, GP case nos 45323/2019 and 42121/2019 dated 26 March 2020) at paragraph [19]. In *Morgan Cargo (Pty) Ltd v Zakharov* (unreported, WCC case no 11850/20 dated 4 July 2022) the court, in granting summary judgment, simply ignored new evidence which was introduced by the plaintiff in its affidavit in support of summary judgment (at paragraph [20]). In *Hennie Ehlers Boerdery CC v APL Cartons (Pty) Ltd* 2024 (1) SA 149 (ECGq) it was pointed out that in the *Absa* (referred to as '*Mphahlele*') and *Morgan* cases the disputes as to the precise ambit of what was permissible content in the affidavits supporting summary judgment were all determined by the courts hearing the applications for summary judgment and not as part of a separate procedure as to the regularity of the affidavits (at paragraph [27]). For a discussion of the *Hennie Ehlers* case, see the notes to rule 32(2)*(b)* s v 'Verify the cause of action . . . identify any point of law relied upon and the facts upon which the plaintiff's claim is based . . . explain briefly why the defence as pleaded does not raise any issue for trial' above.

228 In *Absa Bank Ltd v Jenzen and a Similar Case* (unreported, GJ case nos 2014/877 and 2014/7728 dated 2 August 2021) Absa issued summons against the defendants for, amongst other things, payment of monies lent and advanced to them in terms of loan agreements. True copies of the loan agreements were not, as required by rule 18(6), attached to the particulars of claim. Absa pleaded that the documents had been lost or destroyed in a fire, and were forever unavailable to be attached. In opposing Absa's application for summary judgment in each of the cases, the respective defendants, amongst other defences, advanced non-compliance with rule 18(6) as a reason why summary judgment had to be refused. Sutherland J identified the 'real point of controversy that non-compliance with Rule 18(6) carries' as the issue that had to be determined by him (at paragraph 3). After an analysis of certain cases, Sutherland J, came to the following conclusions in regard to the 'critical point':
(i) it remains open to a defendant in summary judgment proceedings to 'merely demonstrate that the plaintiff's averments, where facts are peculiarly within the knowledge of the plaintiff, need to be proven and an opportunity to test the substance of those averments is appropriate' (at paragraph 14);
(ii) the terms of the loan agreements needed to be proven by secondary evidence to fill the gap left by the missing documents under circumstances where these terms were in dispute (at paragraphs 15, 16 and 17);
(iii) assuming that the allegations on which the defendants relied for disputing the terms of the loan agreements eventually, at the trial, turned out to be spurious, the only way that such outcome was possible, was after evidence in that regard had been presented at the trial and the meritlessness of the allegations had been proved (at paragraph 18);
(iv) although it would be inappropriate to pre-judge the merits of the defendants' allegations referred to in (iii) above, in the summary judgment proceedings that were before the court, every case had to be determined on its own facts (at paragraph 19).
Leave to defend was accordingly granted in each of the cases.

229 2020 (6) SA 624 (WCC).

230 At paragraphs [18]–[20] (emphasis added by the court).

231 Unreported, GJ case no 2022/5936 dated 10 July 2023.

232 At paragraphs 8–12.

233 At paragraphs 13–32.

234 At paragraph 33.

235 At paragraph 40. In this case the supporting affidavit exceeded the bounds envisaged by the court:
'41. The supporting affidavit in this matter goes well beyond the permissible bounds. The supporting affidavit has over a hundred pages of attachments, most of which are bank statements, correspondence and tracking receipts. In my view, the applicant could have made the points it wished to make in the affidavit without attaching the documents which add nothing to the debate.'

236 Unreported, GP case no A213/18 dated 6 December 2019.

237 At paragraph [18].

238 Unreported, KZP case no AR 325/21 dated 10 March 2023 at paragraphs [28] and [43].

239 Unreported, GJ case nos 17/46904; 27740/2018; 27741/2018; 3765/2019; 11912/2018 dated 3 September 2019.

240 At paragraph [8].

241 Unreported, GJ case no 2020/44118 dated 13 September 2021 at paragraph [15].

242 Unreported, GJ case no 2021/38362 dated 6 December 2022 at paragraph [29].

243 Unreported, ECMk case no 2184/2021 dated 12 December 2022 at paragraphs [8] and [11].

244 Unreported, ECMk case no CA 105/2022 dated 14 March 2023 — a decision of the full bench) at paragraph [8].

245 2020 (6) SA 624 (WCC). See also *Jovan Projects (Pty) Ltd v ICB Property Investments (Pty) Ltd* (unreported, GJ case no 2020/32427 dated 20 December 2021) at paragraphs [140]–[143]; *Nedbank v Richardson* (unreported, ECMk case no 2184/2021 dated 12 December 2022) at paragraph [7]; *Standard Bank of South Africa v Mokoena* (unreported, FB case no 4150/2021 dated 3 February 2023) at paragraph

[10]; *J.E.M v G.P.J.V.N* (unreported, NWM case no 1791/2021 dated 18 October 2023) at paragraph [28].

246 At paragraph [21].

247 At paragraphs [21]–[23] and [40] (emphasis added by the court, footnotes omitted). See also *Saglo Auto (Pty) Ltd v Black Shades Investments (Pty) Ltd* 2021 (2) SA 587 (GP) at paragraph [46]; *Standard Bank of South Africa v Mokoena* (unreported, FB case no 4150/2021 dated 3 February 2023) at paragraph [10]; *Nedbank Limited v Kruger* (unreported, GP case no 6307/2022 dated 2 June 2023) at paragraphs 14–15; *Mallett v FirstRand Bank Ltd t/a First National Bank* (unreported, FB case no A128/2022 dated 7 June 2023 — a decision of the full bench) at paragraph [23].

248 Unreported, KZP case no 16473/2022 dated 17 October 2023 at paragraphs [14]–[16].

249 Unreported, GJ case no 9859/2020 dated 15 February 2023.

250 At paragraph [12].

251 Cf *FirstRand Bank Limited v Badenhorst NO* (unreported, GJ case no 2022/5936 dated 10 July 2023) at paragraphs 39–40.

252 The example is quoted, apparently with approval, in *FirstRand Bank Limited v Badenhorst NO* (unreported, GJ case no 2022/5936 dated 10 July 2023) at paragraph 18. In *Absa Bank Ltd v Mphahlele N.O* (unreported, GP case nos 45323/2019 and 42121/2019 dated 26 March 2020) at paragraph [22] the example was found to be incorrect on the basis of a purported contradiction of the views set out in the notes under this heading. It is submitted that the finding is based on a misinterpretation of the notes and that no contradiction is to be found in the notes:

(a) The notes deal with the requirement of a brief explanation by the plaintiff as to why the defence as pleaded does not raise any issue for trial and not with the requirement of an identification of any points of law relied upon by the plaintiff in relation to his claim upon which summary judgment is sought.

(b) The explanation should therefore not be confused with the requirement of the identification of points of law relied upon by the plaintiff. That requirement neither calls for an explanation nor for a verification of facts or for the attachment of documents to explain the point of law: the phrase 'identification of any points of law relied upon' is clear and means exactly what it says. There is accordingly no room for confusion or contradiction in the notes and the court's view that 'it must be accepted that what the learned authors [*sic*] wished to convey is that when a deponent to an affidavit in support of summary judgment identifies any point of law relied upon, it is permissible to attach the necessary documents to support the facts put forward in respect of that point of law' is therefore incorrect.

Apart from the aforegoing there is in any event nothing in rule 32(2)*(b)* which prohibits the attachment of documents in support of the explanation as to why the defence as pleaded does not raise any issue for trial.

253 Unreported, GP case nos 32016/2019; 32014/2019 dated 22 November 2019.

254 2024 (1) SA 149 (ECGq).

255 See the footnote at the end of the first paragraph under this heading above.

256 Cf *Venter v Kruger* 1971 (3) SA 848 (N) at 851; *AE Motors (Pty) Ltd v Levitt* 1972 (3) SA 658 (T); *Rossouw v FirstRand Bank Ltd* 2010 (6) SA 439 (SCA) at 453I–J; *Absa Bank Ltd v Mphahlele N.O* (unreported, GP case nos 45323/2019 and 42121/2019 dated 26 March 2020) at paragraph [14]; *Nissan Finance, a product of Wesbank, of FirstRand Bank Limited v Gusha Holdings and Enterprises (Pty) Ltd* (unreported, GJ case no 2022/9914 dated 5 April 2023) at paragraph 29.

257 2023 (2) SA 223 (GJ).

258 *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) at paragraph [41]; *SA Taxi Finance Solutions (Pty) Limited v Mokobi* (unreported, GJ case no 2021/12537 dated 30 June 2023) at paragraph [59].

259 *Credcor Bank Ltd v Thomson* 1975 (3) SA 916 (D) at 919G. In *Firstrand Bank Limited t/a First National Bank v Mica Foods CC* (unreported, KZP case no 1465/2022P dated 23 August 2023) copies of the relevant liquid documents were attached to the summons but not to the affidavit in support of the application for summary judgment. It was held that the plaintiff was not required to reattach copies of the liquid documents to its affidavit (at paragraph [12]).

260 *Bank van die Oranje Vrystaat Bpk v OVS Kleiwerke (Edms) Bpk* 1976 (3) SA 804 (O); *Dowson & Dobson Industrial Ltd v Van der Werf* 1981 (4) SA 417 (C) at 420E.

261 *Venter v Cassimjee* 1956 (2) SA 242 (N) at 245.

262 *Fouché v Ehlers* 1957 (4) SA 35 (T), where the signatures of the Registrar of Deeds and the responsible conveyancer were omitted from the copy of the bond served in provisional sentence proceedings. A postponement was allowed in order to effect proper service.

263 See *De Waal v Benson* 1939 OPD 159; *Fouché v Ehlers* 1957 (4) SA 35 (T); *Harding & Parker Ltd v Beukes & Papenfus Ondernemings (Edms) Bpk* 1959 (3) SA 965 (O).

264 *Abraham v Du Plessis* 1962 (3) SA 162 (T); *Van Zyl v Wheeler* 1964 (3) SA 758 (O); *Finansbank Bpk v Klopper* 1981 (1) SA 106 (T) at 113; *Nampak Products Ltd t/a Nampak Flexible Packaging v Sweetcor (Pty) Ltd* 1981 (4) SA 919 (T) at 927.

265 *Raphael & Co v Standard Produce Co (Pty) Ltd* 1951 (4) SA 244 (C); *Mowschenson & Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W) at 366; *H K Gokal (Pty) Ltd v Muthambi* 1967 (3) SA 89 (T) at 89H–90A; *Northern Cape Scrap & Metals (Edms) Bpk v Upington Radiators & Motor Graveyard (Edms) Bpk* 1974 (3) SA 788 (NC) at 793; *Cape Business Bureau (Pty) Ltd v Van Wyk* 1981 (4) SA 433 (C) at 439; *Millman NO v Klein* 1986 (1) SA 465 (C) at 469.

266 *H K Gokal (Pty) Ltd v Muthambi* 1967 (3) SA 89 (T) at 90G–H; but see *Northern Cape Scrap & Metals (Edms) Bpk v Upington Radiators & Motor Graveyard (Edms) Bpk* 1974 (3) SA 788 (NC) at 793–4 and the cases there referred to; *Cape Business Bureau (Pty) Ltd v Van Wyk* 1981 (4) SA 433 (C) at 439.

267 *Visser v De la Rey* 1980 (3) SA 147 (T) at 150.

268 *Rief v Hofmeyer* (1924) 45 NLR 375. It is submitted that it is good practice to give notice thereof to the applicant/plaintiff. Where *ex facie* the document upon which the claim is founded there appears a defect in the cause of action, the court may refuse to enter summary judgment whether or not the defendant has filed an affidavit to oppose it (*Transvaal Spice Works and Butchery Requisites (Pty) Ltd v Conpen Holdings (Pty) Ltd* 1959 (2) SA 198 (W) at 200; and see *Geyer v Geyer's Transport Services (Pty) Ltd* 1973 (1) SA 105 (T)).

269 Unreported, GP case no A213/18 dated 6 December 2019.

270 At paragraphs [15]–[17].

271 Unreported, KZP case no AR 325/21 dated 10 March 2023.

272 At paragraph [16].

273 *Spring and Van den Berg Construction (Pty) Ltd v Banfrevan Properties (Pty) Ltd* 1968 (1) SA 326 (D). See also *Bank van die Oranje Vrystaat Bpk v OVS Kleiwerke (Edms) Bpk* 1976 (3) SA 804 (O). In the former case the defendant was ordered to pay the costs of the application for summary judgment, in the latter costs were reserved for determination in the main action.

274 *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C). The judgment leaves open the question whether there is any duty on such a defendant to give notice of his intention to raise such an issue. It is submitted that the giving of such notice to the applicant constitutes good practice.

275 *Morris v Autoquip (Pty) Ltd* 1985 (4) SA 398 (W) at 399C–400G. See also *Verrijdt v Honeydew Tractors & Implements (Pty) Ltd* 1981 (1) SA 787 (T) at 789E–H; *Slabbert v Volkskas Bpk* 1985 (1) SA 141 (T) at 145F–146C; *BP Southern Africa (Pty) Ltd v Mega Burst Oils and Fuels (Pty) Ltd and a Similar Matter* 2022 (1) SA 162 (GJ) at paragraph [17.2]; *SA Taxi Development (Pty) Ltd v Johnson* (unreported, GJ case no 2021/0031 dated 28 July 2023) at paragraphs [2]–[3].

276 *Mervis Bros v Schmidt t/a Programmed Language Course* 1991 (1) SA 313 (W). See further *Cinemark (Pty) Ltd v Alfetta Tune-Up Centre* 1979 (4) SA 802 (W).

277 *Spring and Van den Berg Construction (Pty) Ltd v Banfrevan Properties (Pty) Ltd* 1968 (1) SA 326 (D). See also *Bank van die Oranje Vrystaat Bpk v OVS Kleiwerke (Edms) Bpk* 1976 (3) SA 804 (O). In the former case the defendant was ordered to pay the costs of the application for summary judgment, in the latter costs were reserved for determination in the main action.

278 GN R842 published in *GG* 42497 of 31 May 2019.

279 *Oos-Randse Bantoesakeadministrasieraad v Santam Versekeringsmaatskappy Bpk (2)* 1978 (1) SA 164 (W). It is submitted that the defendant may file affidavits by more than one person when one person alone cannot depose to the facts constituting a bona fide defence to the claim. See in this regard the reasoning in *International Shipping Co (Pty) Ltd v F C Bonnet (Pty) Ltd* 1975 (1) SA 853 (D) at 854, where it is stated that a plaintiff may file more than one affidavit if one person alone cannot swear positively to the facts verifying the cause of action and the amount claimed.

280 *Slabbert v Volkskas Bpk* 1985 (1) SA 141 (T) at 144.

281 *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T); *Gilinsky v Superb Launderers and Dry Cleaners* 1978 (3) SA 807 (C); *District Bank Ltd v Hoosain* 1984 (4) SA 544 (C); *Standard Bank of SA Ltd v Friedman* 1999 (2) SA 456 (C); *Marsh v Standard Bank of South Africa Ltd* 2000 (4) SA 947 (W) at 949C; *Charisma Properties (Pty) Ltd v Woodstar & Co (Pty) Ltd* (unreported, GJ case no 41129/2019 dated 29 July 2021) at paragraph [6]; *Nedbank Ltd v Peterson* (unreported, GP case no 61659/2020 dated 20 August 2021) at paragraph [46]; *IPH Finance Proprietary Limited v Agrizest Proprietary Limited* (unreported, WCC case no 21771/2021 dated 28 February 2023) at paragraph 11; *J.E.M v G.P.J.V.N* (unreported, NWM case no 1791/2021 dated 18 October 2023) at paragraph [27].

282 *Standard Merchant Bank Ltd v Rowe* 1982 (4) SA 671 (W) at 676–7; *Nedbank Ltd v Peterson* (unreported, GP case no 61659/2020 dated 20 August 2021) at paragraph [46].

283 *Nedbank Ltd v Van der Berg* 1987 (3) SA 449 (W) at 452G; *Chairperson, Independent Electoral Commission v Die Krans Ontspanningsoord (Edms) Bpk* 1997 (1) SA 244 (T) at 247F–249G; and see *Mayibuye Centre –CD-Rom Publications v Workgroup Holdings (Pty) Ltd* [1998] All SA 105 (A) at 109*d*; *Nedbank Ltd v Peterson* (unreported, GP case no 61659/2020 dated 20 August 2021) at paragraph [46]. See, however, *Johnstone v Wildlife Utilisation Services (Pvt) Ltd* 1966 (4) SA 685 (R).

284 *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426; and see *Die Afrikaanse Pers Beperk v Neser* 1948 (2) SA 295 (C) at 297; *Mowschenson & Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W) at 366; *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 303; *Venter v Kruger* 1971 (3) SA 848 (N) at 852; *Nedbank Ltd v Peterson* (unreported, GP case no 61659/2020 dated 20 August 2021) at paragraph [46].

285 Cf *Stofberg v Lochner* 1946 OPD 333 and *Loots v Van Staden* 1962 (1) SA 152 (O); and see *Nedbank Ltd v Peterson* (unreported, GP case no 61659/2020 dated 20 August 2021) at paragraph [46].

286 See the notes s v 'Disclose fully the nature and grounds' below.

287 *Hendricks v Saacks* 1945 CPD 270; *Van Zyl v Wheeler* 1964 (3) SA 758 (O) at 760; *Herb Dyers (Pty) Ltd v Mahomed* 1965 (1) SA 31 (T) at 32; *Border Concrete Engineering Co (Pty) Ltd v Knickelbein* 1982 (2) SA 648 (E) at 651; *Nedbank Ltd v Peterson* (unreported, GP case no 61659/2020 dated 20 August 2021) at paragraph [46].

288 *Hendricks v Saacks* 1945 CPD 270; *Western Province Hardware & Timber Co (Pty) Ltd v Frank Fletcher* 1971 (2) PH F77; *Nedbank Ltd v Peterson* (unreported, GP case no 61659/2020 dated 20 August 2021) at paragraph [46].

289 *Estate Potgieter v Elliott* 1948 (1) SA 1084 (C) at 1087; *Wright v Van Zyl* 1951 (3) SA 488 (C) at 492; *Herb Dyers (Pty) Ltd v Mahomed* 1965 (1) SA 31 (T) at 32; *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426; *First National Bank of South Africa Ltd v Myburgh* 2002 (4) SA 176 (C) at 184C–D; *Nedbank Ltd v Peterson* (unreported, GP case no 61659/2020 dated 20 August 2021) at paragraph [46]. See further the notes to this subrule s v 'Disclose fully the nature and grounds of the defence and the material facts relied upon therefor' below.

290 See, *inter alia*, *Wright v Van Zyl* 1951 (3) SA 488 (C); *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A); *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T); *Gilinsky v Superb Launderers and Dry Cleaners* 1978 (3) SA 807 (C); *Barclays Western Bank Ltd v Bill Jonker Factory Services (Pty) Ltd* 1980 (1) SA 929 (SE); *District Bank Ltd v Hoosain* 1984 (4) SA 544 (C); *Nedbank Ltd v Peterson* (unreported, GP case no 61659/2020 dated 20 August 2021) at paragraph [46]; *J.E.M v G.P.J.V.N* (unreported, NWM case no 1791/2021 dated 18 October 2023) at paragraph [27].

291 See further the notes to this subrule s v 'Fully disclose the nature, grounds of defence and the material facts relied upon therefor' below.

292 *Koornklip Beleggings (Edms) Bpk v Allied Minerals Ltd* 1970 (1) SA 674 (C) at 678; *Nedbank Ltd v Peterson* (unreported, GP case no 61659/2020 dated 20 August 2021) at paragraph [46].

293 *Von Zahn v Credit Corporation of South Africa Ltd* 1963 (3) SA 554 (T); *Nedbank Ltd v Peterson* (unreported, GP case no 61659/2020 dated 20 August 2021) at paragraph [46]; and see *Herbert v Steele* 1953 (3) SA 271 (T) at 274; *Evelyn Haddon & Co Ltd v Leojanko (Pty) Ltd* 1967 (1) SA 662 (O).

294 *Chambers v Jonker* 1952 (4) SA 635 (C) at 638; *Herb Dyers (Pty) Ltd v Mahomed* 1965 (1) SA 31 (T) at 33; *Edwards v Menezes* 1973 (1) SA 299 (NC) at 304; *Van Eeden v Sasol Pensioenfonds* 1975 (2) SA 167 (O) at 178; *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 228; *Neuhoff v York Timbers Ltd* 1981 (4) SA 666 (T); *Standard Merchant Bank Ltd v Rowe* 1982 (4) SA 671 (W) at 678; *District Bank Ltd v Hoosain* 1984 (4) SA 544 (C) at 548; *Joubert, Owens, Van Niekerk Ing v Breytenbach* 1986 (2) SA 357 (T) at 361–2; *Standard Bank of SA Ltd v Friedman* 1999 (2) SA 456 (C) at 462G–H; confirmed in *Friedman v Standard Bank of SA Ltd* 1999 (4) SA 928 (SCA) at 938D–H; *Muller v Botswana Development Corporation Ltd* 2003 (1) SA 651 (SCA) at 656C–657G; *Standard Bank of South Africa Ltd v Roestof* 2004 (2) SA 492 (W) at 499C–E; *Nedbank Ltd v Peterson* (unreported, GP case no 61659/2020 dated 20 August 2021) at paragraph [46].

295 *Standard Bank of South Africa Ltd v Roestof* 2004 (2) SA 492 (W) at 497H–I; *Nedbank Ltd v Peterson* (unreported, GP case no 61659/2020 dated 20 August 2021) at paragraph [46].

296 *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 229; *Nedbank Ltd v Peterson* (unreported, GP case no 61659/2020 dated 20 August 2021) at paragraph [46].

297 *Edwards v Menezes* 1973 (1) SA 299 (NC) at 304; *Nedbank Ltd v Peterson* (unreported, GP case no 61659/2020 dated 20 August 2021) at paragraph [46].

298 *Gruhn v M Pupkewitz & Sons (Pty) Ltd* 1973 (3) SA 49 (A). See also *Jacobsen Van den Berg SA (Pty) Ltd v Triton Yachting Supplies* 1974 (2) SA 584 (O); *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 229; *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 427; *Nedbank Ltd v Peterson* (unreported, GP case no 61659/2020 dated 20 August 2021) at paragraph [46].

299 *Tesven CC v South African Bank of Athens* 2000 (1) SA 268 (SCA); *Nedbank Ltd v Peterson* (unreported, GP case no 61659/2020 dated 20 August 2021) at paragraph [46].

300 See the definition of 'deliver' in rule 1 above.

301 See *Terry's Motors Ltd v Seeck* 1962 (2) SA 262 (SWA); *Badenhorst v Poultides* 1963 (1) SA 471 (T); *Van Aswegen v Kruger* 1974 (3) SA 204 (O); *South African Breweries Ltd v Rygerpark Props (Pty) Ltd* 1992 (3) SA 829 (W); *Klipton Industries Ltd v Kersten* 1995 (1) SA 182 (W); *Maloney's Eye Properties BK v Bloemfontein Board Nominees Bpk* 1995 (3) SA 249 (O).

302 In *Nedbank Ltd v Braganza Pretorius Beleggings (Pty) Ltd* (unreported, WCC case no 8343/2020 dated 1 December 2020), a case under rule 32 in its amended form, the defendants delivered a plea and an affidavit opposing summary judgment. Application was then made at the hearing of the application for summary judgment for leave to present oral evidence in terms of this subrule. In granting leave, Lekhuleni AJ referred to the passage in the text and stated (at paragraphs [10]–[12]:

'[10] It should be stressed that this Court did not understand the author to be suggesting that a defendant who has filed an opposing affidavit resisting summary judgment is precluded to lead oral evidence in a summary judgment application to clarify certain technical or relevant aspects of his defence detailed in an opposing affidavit resisting summary judgment. If the suggestion is that the rule is inflexible to the effect that once a defendant has filed an opposing affidavit he cannot be allowed to lead any evidence in any manner whatsoever, with respect, I do not agree with that proposition. Such an interpretation in my view leads to an absurdity . . .

[11] From the reading of this subrule, it is abundantly clear that the court has an unfettered discretion to allow a defendant or any person to give oral evidence to prove that the defendant has a bona fide defence to the plaintiff's claim. The subrule is not rigid and peremptory. The leading of oral evidence can only be allowed by the court in the exercise of its discretion. That discretion must be exercised judicially bearing in mind the constitutional imperatives envisaged in section 34 of the Constitution. In my view, the literal interpretation of the subrule allows the defendant, by leave of the court, to present oral evidence as an alternative to an opposing affidavit, not in addition to it. However, the subrule does not preclude a court in the exercise of its discretion and after considering all the relevant facts to allow the leading of oral evidence to supplement the affidavit resisting summary judgment. In my considered view, this subrule has to be given a purposive interpretation which should be congruent with the right of access to courts envisaged in section 34 of the Constitution.

[12] What is intended by the subrule is that at the hearing of an application for summary judgment, the defendant may satisfy the court by delivering an affidavit five days before the day on which the application is to be heard which affidavit may with the permission of the court (after considering all relevant facts) be supplemented by oral evidence to the effect that the defendant has a bona fide defence to the claim on which summary judgment is sought. (See *Phillips v Phillips and Another* (292/2018) [2018] ZAECGHC 40 (22 May 2018) at para 21).'

It is submitted that the aforesaid pronouncements are incorrect for the following reasons:

(a) Subrule (3) expressly, and without any hint of absurdity, provides for the following alternatives, instructed by the word 'or' (which bears its ordinary meaning and does not mean 'and'):

(i) security; or
(ii) an affidavit; or
(iii) oral evidence.

(b) A defendant cannot, for example, give security, in addition file an affidavit and then apply for leave to present oral evidence. Any such interpretation is simply absurd. Even more absurd would be the situation where the defendant, not having filed an affidavit, is granted leave to present oral evidence but then, during the course of such evidence, applies for leave to file an affidavit dealing with certain relevant evidence.

(c) It is trite law that a defendant has been allowed to supplement his affidavit by a further affidavit under certain proven circumstances. See, in this regard, the notes to this subrule s v 'Disclose fully the nature and grounds of the defence and the material facts relied upon therefor' below. The circumstances under which a defendant has been allowed to do so are in line with the constitutional imperatives of s 34 of the Constitution. In fact, the subrule in its ordinary grammatical meaning and in the context of the provisions of the rules relating to summary judgment (and as applied by the superior courts over many years), are in perfect harmony with these constitutional imperatives.

(d) The absurdity alluded to in paragraph [11] of the judgment was neither identified nor discussed in the judgment, and no reasons to support its purported existence were given.

(e) The discretion afforded to the court by the subrule is one in regard to leave to present oral evidence in the absence of an opposing affidavit — the wording of the subrule does not extend the discretion to one of leave to present oral evidence in addition to an opposing

affidavit. Had the Rules Board for Courts of Law intended the latter to be the position, it would have been easy for the Board to insert or substitute the word 'and' for the word 'or' in the phrase 'or with the leave of the court by oral evidence'.

(f) In the *Phillips* case referred to in paragraph [12] of the judgment, the question of the interpretation of rule 32(3)*(b)* of the Uniform Rules of Court, and more in particular whether it allows the defendant, by leave of the court, to present oral evidence only as an alternative to an opposing affidavit, was neither in issue nor decided by Toni AJ. It therefore presents no authority for the pronouncement that the opposing 'affidavit may with the permission of the court (after considering all relevant facts) be supplemented by oral evidence to the effect that the defendant has a bona fide defence to the claim on which summary judgment is sought'.

Herbstein & Van Winsen *Civil Practice* state (at 533) that the courts 'have on occasion allowed a defect in the defendant's affidavit to be cured by supplementary evidence given either orally or in a further affidavit' and, in this regard, refer to *Standard Merchant Bank Ltd v Rowe* 1982 (4) SA 671 (W) at 426; *Nedbank [sic] v Van der Berg* 1987 (3) SA 449 [*sic*] at 452; *Chairperson, Independent Electoral Commission v Krans Ontspanningsoord (Edms) Bpk* 1997 (1) SA 244 (T) and *Mayibuye Centre — CD-Rom Publications v Workgroup Holdings (Pty) Ltd* [1998] 2 All SA 105 (A) at 109. None of the cases referred to support the authors' statement. In *Nedbank Ltd v Van der Berg* 1987 (3) SA 449 (W) Goldblatt AJ did not allow the filing of a supplementary affidavit where the allegations in the defendant's affidavit opposing summary judgment were hearsay, stating (at 852F–H):

'Counsel for the first defendant, in an endeavour to meet the evidential problem, applied for leave to file a supplementary affidavit which, so he said, would cure the defects. I may have been persuaded to grant such leave. However, in the light of the views expressed earlier in this judgment it seems to me that the filing of a supplementary affidavit would be a futile exercise.'

In *Herbstein & Van Winsen* 6 ed vol 1 at 16–48 it is also stated that the courts 'have on occasion allowed a defect in the defendant's affidavit to be cured by supplementary evidence given either orally or in a further affidavit' and reference is made to *Gani v Crescent Finance Corporation (Pty) Ltd* 1961 (1) SA 222 (W); *Berks v Birjou Investment Co (Pty) Ltd* 1961 (1) SA 225 (W); *Hugh Holdings (Pvt) Ltd v Gamberini* 1968 (3) SA 157 (R); *Koornklip Beleggings (Edms) Bpk v Allied Minerals Ltd* 1970 (1) SA 674 (C) and *Juntgen t/a Paul Juntgen Real Estate v Nottbusch* 1989 (4) SA 490 (W). With the exception of *Hugh Holdings (Pvt) Ltd v Gamberini* 1968 (3) SA 157 (R), none of the cases referred to support the authors' statement that a defect in the defendant's affidavit could be cured by evidence given orally. In the *Hugh Holdings* case Beadle CJ interpreted rule 3*(c)* of the Rhodesian rules of court (which read: 'The defendant may satisfy the Court by affidavit or oral evidence of himself, or of any other person who can swear positively to the facts, that he has a good *prima facie* defence to the action.') and held (at 158):

'In the normal course the practice is for the defendant to file an affidavit. But our Rules differ from those in South Africa, and do not make it obligatory for him to do so in the first instance. It is perfectly open to him to file no affidavit, and come to Court and rely solely on the oral evidence which he then gives. This procedure would be greatly to the disadvantage of the plaintiff, because he would not know what the defendant's defence was until the evidence was given; and, as I have said, the plaintiff has no right to cross-examine. I cannot see that the plaintiff would be prejudiced if the defendant first files an affidavit that gives a broad outline of what his defence is, and then later applies for leave to give oral evidence to elucidate it. The plaintiff in these circumstances is actually in a better position than he would be if the defendant had filed no affidavit at all; because he has been given some prior warning of what the defence is, and he also has the affidavit with which to test any oral evidence which the defendant may give.

I consider, therefore, that the Rule must be interpreted as giving the Court a discretion in a proper case to allow oral evidence to be led to supplement an imperfect affidavit, in order to elucidate what the defence actually is. I am reinforced in this view by two decisions in the Witwatersrand Local Division of the Supreme Court of South Africa, where a somewhat similar question was decided in favour of the defendant, who was given leave to file a supplementary affidavit: see *Gani v Crescent Finance Corporation (Pty.) Ltd.*, 1961 (1) SA 222 (W), and *Berks v Birjou Investment Co. (Pty.) Ltd.*, at p. 225 of the same volume.'

It is submitted that the decision of Beadle CJ is wrong for the same reasons advanced earlier in this footnote in respect of *Nedbank Ltd v Braganza Pretorius Beleggings (Pty) Ltd* (unreported, WCC case no 8343/2020 dated 1 December 2020).

As pointed out in *(c)* above, it is well-established law that a defendant has been allowed to supplement his opposing affidavit by a further affidavit under certain proven circumstances.

303 *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426; *Standard Bank of SA Ltd v Friedman* 1999 (2) SA 456 (C) at 461G–H, confirmed in *Friedman v Standard Bank of SA Ltd* 1999 (4) SA 928 (SCA); *He & She Investments (Pty) Ltd v Brand NO* 2019 (5) SA 492 (WCC) at 496B–H; *SS Profiling (Pty) Ltd v Terblanche* (unreported, GP case no 65745/2019 dated 25 January 2021) at paragraph [8]. In *Jacobsen Van den Berg SA (Pty) Ltd v Triton Yachting Supplies* 1974 (2) SA 584 (O) Erasmus J said (at 587) that the defence must not merely 'appear' to be bona fide, and disapproved of the formulation adopted by Corbett J in *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 303 and 304. It is submitted with respect that the test was put too high by Erasmus J. In *Maharaj*'s case (*supra*) the Appellate Division stated that it is sufficient if on the facts disclosed the defendant 'appears' to have a bona fide defence. See also *District Bank Ltd v Hoosain* 1984 (4) SA 544 (C) at 547–8 and *Nedbank Ltd v Zevoli 208 (Pty) Ltd* 2017 (6) SA 318 (KZP) at 323F–323A. In *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) it was held that under rule 32, after its amendment with effect from 1 July 2019, the 'classical formulations' of what is expected of a defendant seeking to successfully oppose an application for summary judgment as laid down in *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) and *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) still apply, in other words, nothing has changed, and the defendant still has to disclose a bona fide defence (at paragraphs [13] and [24]). The *Tumileng* decision was followed in *Bridgement (Pty) Ltd v VHA Accounting Solutions* (unreported, KZP case no 16473/2022 dated 17 October 2023) at paragraph [16]. See also *Standard Bank Ltd v Five Strand Media (Pty) Ltd* (unreported, ECPE case no 745/2020 dated 7 September 2020) at paragraphs [13]–[14]; *Saglo Auto (Pty) Ltd v Black Shades Investments (Pty) Ltd* 2021 (2) SA 587 (GP) at paragraph [48]; *Jovan Projects (Pty) Ltd v ICB Property Investments (Pty) Ltd* (unreported, GJ case no 2020/32427 dated 20 December 2021) at paragraphs [144]–[149]; *Volkswagen Financial Services South Africa (Pty) Ltd v Pillay* 2022 (5) SA 639 (KZP) at paragraph [18]; *Nedbank v Richardson* (unreported, ECMk case no 2184/2021 dated 12 December 2022) at paragraphs [8]–[11]; *IPH Finance Proprietary Limited v Agrizest Proprietary Limited* (unreported, WCC case no 21771/2021 dated 28 February 2023) at paragraph 14; *Nissan Finance, a product of Wesbank, of FirstRand Bank Limited v Gusha Holdings and Enterprises (Pty) Ltd* (unreported, GJ case no 2022/9914 dated 5 April 2023) at paragraph 13.

304 *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T); *He & She Investments (Pty) Ltd v Brand NO* 2019 (5) SA 492 (WCC) at 497B.

305 *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 227.

306 *Silverleaf Pastry & Confectionery Co (Pty) Ltd v Joubert* 1972 (1) SA 125 (C) at 129; *He & She Investments (Pty) Ltd v Brand NO* 2019 (5) SA 492 (WCC) at 497B.

307 As Colman J points out in *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 228, there is no magic whereby the veracity of an honest deponent can be made to shine out of his affidavit.

308 *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T); *Standard Bank of SA Ltd v Friedman* 1999 (2) SA 456 (C) at 462G; confirmed in *Friedman v Standard Bank of SA Ltd* 1999 (4) SA 928 (SCA) at 938D–H; *Marsh v Standard Bank of South Africa Ltd* 2000 (4) SA 947 (W) at 954E–F; *He & She Investments (Pty) Ltd v Brand NO* 2019 (5) SA 492 (WCC) at 497B; *South African Securitisation Programme (RF) Ltd v Cellsecure Monitoring and Response (Pty) Ltd* (unreported, GP case no 21647/2021 dated 25 November 2022) at paragraph [33]. See, in general, *Flugel v Swart* 1979 (4) SA 493 (E) at 497–8.

309 See, *inter alia*, *Wright v Van Zyl* 1951 (3) SA 488 (C); *Lombard v Van der Westhuizen* 1953 (4) SA 84 (C); *Soorju v Pillay* 1962 (3) SA 906 (N); *Shepstone v Shepstone* 1974 (2) SA 462 (N) at 467; *Citibank NA, South Africa Branch v Paul NO* 2003 (4) SA 180 (T) at 200J–201A; *He & She Investments (Pty) Ltd v Brand NO* 2019 (5) SA 492 (WCC) at 497B–C; *South African Securitisation Programme (RF) Ltd v Cellsecure Monitoring and Response (Pty) Ltd* (unreported, GP case no 21647/2021 dated 25 November 2022) at paragraph [33].

310 See *Border Concrete Engineering Co (Pty) Ltd v Knickelbein* 1982 (2) SA 648 (E) at 651; *He & She Investments (Pty) Ltd v Brand NO* 2019 (5) SA 492 (WCC) at 497C.

311 *Trust Bank of Africa Ltd v Wassenaar* 1972 (3) SA 139 (D) at 144, following *Caltex Oil (SA) Ltd v Webb* 1965 (2) SA 914 (N) at 916–17. See also *Van Eeden v Sasol Pensioenfonds* 1975 (2) SA 167 (O) at 178 and the authorities there referred to; *Steynberg v Labuschagne* [1998] 3 All SA 384 (O) at 389*h*–390*a*.

312 *Skead v Swanepoel* 1949 (4) SA 763 (T) at 766–7.

313 *Nogoduka-Ngumbela Consortium (Pty) Ltd v Rage Distribution (Pty) Ltd t/a Rage* (unreported, GJ case no 37587/2020 dated 19 October 2021) at paragraph [7].

314 1975 (2) SA 167 (O).

315 At 174 and 179, where it is pointed out that 'die afwesigheid van enige sodanige verduideliking agterdogwekkend [is]'.

316 *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 303–4. In *Evelyn Haddon & Co Ltd v Leojanko (Pty) Ltd* 1967 (1) SA 662 (O) at 667G Erasmus J said:

'By die beoordeling van die posisie sal ek ook in gedagte hou dat ek nie op 'n oorwig van waarskynlikhede moet oordeel of die verweerder suksesvol sal wees nie.'

See also *Nair v Chandler* 2007 (1) SA 44 (T) at 47B–C; *South African Securitisation Programme (RF) Ltd v Cellsecure Monitoring and Response (Pty) Ltd* (unreported, GP case no 21647/2021 dated 25 November 2022) at paragraph [34].

317 *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426; and see *Die Afrikaanse Pers Beperk v Neser* 1948 (2) SA 295 (C) at 297; *Mowschenson & Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W) at 366; *Venter v Kruger* 1971 (3) SA 848 (N) at 852; *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 303; *Marsh v Standard Bank of South Africa Ltd* 2000 (4) SA 947 (W) at 949C–H. The court is not called upon to consider whether the defence is likely or unlikely to succeed (*Davis v Terry* 1957 (4) SA 98

(SR); *South African Securitisation Programme (RF) Ltd v Cellsecure Monitoring and Response (Pty) Ltd* (unreported, GP case no 21647/2021 dated 25 November 2022) at paragraph [34]). In *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) it was held that under rule 32, after its amendment with effect from 1 July 2019, it is still not required of a defendant to show that its defence is likely to prevail, and that the defendant's prospects of success are irrelevant (at paragraph [13]). The *Tumileng* decision was followed in *Bridgement (Pty) Ltd v VHA Accounting Solutions* (unreported, KZP case no 16473/2022 dated 17 October 2023) at paragraph [16].

318 *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 303 and 304; *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426; *Cronjé v Cooper* 1978 (1) SA 268 (N); *District Bank Ltd v Hoosain* 1984 (4) SA 544 (C) at 547–8; *South African Securitisation Programme (RF) Ltd v Cellsecure Monitoring and Response (Pty) Ltd* (unreported, GP case no 21647/2021 dated 25 November 2022) at paragraph [34]; *IPH Finance Proprietary Limited v Agrizest Proprietary Limited* (unreported, WCC case no 21771/2021 dated 28 February 2023) at paragraph 12.

319 *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426; and see *Die Afrikaanse Pers Beperk v Neser* 1948 (2) SA 295 (C) at 297; *Mowschenson & Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W) at 366; *Venter v Kruger* 1971 (3) SA 848 (N) at 852; *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 303; *Marsh v Standard Bank of South Africa Ltd* 2000 (4) SA 947 (W) at 949I–J; *First National Bank of South Africa Ltd v Myburgh* 2002 (4) SA 176 (C) at 180A–B; *Gold Reef City Mint (Pty) Ltd v Bruni* (unreported, GJ case no A5030/2020 dated 26 March 2021) at paragraph [60]; *Lancaster Group (Pty) Ltd v Capital Creation Partners Africa (Pty) Ltd* (unreported, GJ case nos 054476/2022; 054457/2022 dated 17 January 2024) at paragraphs 17–18. For the position where the defendant admits portion of the claim, see *Gralio (Pty) Ltd v D E Claassen (Pty) Ltd* 1980 (1) SA 816 (A).

320 *South African Bureau of Standards v GGS/AU (Pty) Ltd* 2003 (6) SA 588 (T) at 592E–H.

321 It has been held that if the defendant raises a special plea of lack of jurisdiction, the court should first decide the special plea (*Absa Homeloans Guarantee Company (RF) (Pty) Ltd v Watermeyer* (unreported, MM case no 1072/2019 dated 14 January 2022) at paragraphs [6]–[8]).

322 See, for example, *Round v Klopper* 1957 (4) SA 688 (T); *Joel's Bargain Store v Shorkend Bros (Pty) Ltd* 1959 (4) SA 263 (E).

323 *Raphael & Co v Standard Produce Co (Pty) Ltd* 1951 (4) SA 244 (C); *Mowschenson & Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W) at 366–7; *Northern Cape Scrap & Metals (Edms) Bpk v Upington Radiators & Motor Graveyard (Edms) Bpk* 1974 (3) SA 788 (NC) at 793; *Cape Business Bureau (Pty) Ltd v Van Wyk* 1981 (4) SA 433 (C) at 439; *Millman NO v Klein* 1986 (1) SA 465 (C) at 469. This passage is authority for the proposition that the *plaintiff's* affidavit can be assailed on the ground that it contains hearsay evidence.

324 *Caxton Ltd v Barrigo* 1960 (4) SA 1 (T); and see *H K Gokal (Pty) Ltd v Muthambi* 1967 (3) SA 89 (T).

325 *Hendricks v Saacks* 1945 CPD 270; *Van Zyl v Wheeler* 1964 (3) SA 758 (O) at 760; *Herb Dyers (Pty) Ltd v Mahomed* 1965 (1) SA 31 (T); *Western Province Hardware & Timber Co (Pty) Ltd v Frank Fletcher* 1971 (2) PH F77. See also *Border Concrete Engineering Co (Pty) Ltd v Knickelbein* 1982 (2) SA 648 (E) at 651.

326 See, *inter alia*, *Soorju v Pillay* 1962 (3) SA 906 (N) at 908; *Edwards v Menezes* 1973 (1) SA 299 (NC) at 304; *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 303; *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426; *Jarrosson Estates (Edms) Bpk v Oosthuizen* 1985 (3) SA 550 (NC) at 552; *Handel v Josi* 1986 (4) SA 838 (D) at 842.

327 *Wilson v Bained WN* (76) 74.

328 *Desart v Townsend* 22 LR Ir 389.

329 *Edwards v Menezes* 1973 (1) SA 299 (NC) at 304; and see *Shingadia v Shingadia* 1966 (3) SA 24 (R).

330 *Shingadia v Shingadia* 1966 (3) SA 24 (R) at 25H, 26A; *Hollandia Reinsurance Co Ltd v Nedcor Bank Ltd* 1993 (3) SA 574 (W) at 576H–I.

331 *Nkungu v Johannesburg City Council* 1950 (4) SA 312 (T) at 314; *Shingadia v Shingadia* 1966 (3) SA 24 (R). See *Ebrahim v Kahn* 1979 (2) SA 498 (N) in which it was held that there does not seem to be an objection in principle to the use of the procedure for summary judgment with the object of testing the defendant's defences where it is thought that the application is likely to dispose of them for good because the issues involved do not depend on evidence which might be disputed at the trial, but comprise questions of law alone. Indeed, it may sometimes be appropriate so to use the summary judgment procedure. There is, however, no reason, when this is done, why the unsuccessful plaintiff should not share the fate of an unsuccessful excipient and pay for his failure.

332 *Skead v Swanepoel* 1949 (4) SA 763 (T) at 768; *Edwards v Menezes* 1973 (1) SA 299 (NC) at 305. See also *Barclays National Bank Ltd v Brownlee* 1981 (3) SA 579 (D) at 581. It is submitted that this consideration is overlooked in *Lovemore v White* 1978 (3) SA 254 (E).

333 *One Nought Three Craighall Park (Pty) Ltd v Jayber (Pty) Ltd* 1994 (4) SA 320 (W) at 323A–B.

334 *Venter v Cassimjee* 1956 (2) SA 242 (N); *Venter v Kruger* 1971 (3) SA 848 (N); *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426.

335 *W M Mentz & Seuns (Edms) Bpk v Katzake* 1969 (3) SA 306 (T) at 311; and see *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 278; *Teale & Sons (Pty) Ltd v Vrystaatse Plantediens (Pty) Ltd* 1968 (4) SA 371 (O); *Jacobsen Van den Berg SA (Pty) Ltd v Triton Yachting Supplies* 1974 (2) SA 584 (O); *Charsley v Avbob (Begrafnisdiens) Bpk* 1975 (1) SA 891 (E); *Van den Bergh v Weiner* 1976 (2) SA 297 (T); *Lohrman v Vaal Ontwikkelingsmaatskappy (Edms) Bpk* 1979 (3) SA 391 (T); *Liberty Group Ltd v Singh* 2012 (5) SA 526 (KZD) at 537G–538G; *SA Taxi Finance Solutions (Pty) Limited v Mokobi* (unreported, GJ case no 2021/12537 dated 30 June 2023) at paragraph [17].

336 *Peterson NO v CPLM Exports CC* 2023 (5) SA 555 (GJ) at paragraphs [21]–[28].

337 *Weinkove v Botha* 1952 (3) SA 178 (C); *Herb Dyers (Pty) Ltd v Mahomed* 1965 (1) SA 31 (T); *Spilhaus & Co Ltd v Coreejees* 1966 (1) SA 525 (C); *AE Motors (Pty) Ltd v Levitt* 1972 (3) SA 658 (T); *Credé v Standard Bank of SA Ltd* 1988 (4) SA 786 (E); and see *Abbott v Nolte* 1951 (2) SA 419 (C); *Du Toit v De Beer* 1955 (1) SA 469 (T); *H I Lockhat (Pty) Ltd v Domingo* 1979 (3) SA 696 (T). See, however, *Trotman v Edwick* 1950 (1) SA 376 (C). It is not a defence if the unliquidated counterclaim is less than the plaintiff's claim (*Citibank NA South Africa Branch v Paul NO* 2003 (4) SA 180 (T) at 196I).

338 See *Caltex Oil (SA) Ltd v Webb* 1965 (2) SA 914 (N); *Jacobsen Van den Berg SA (Pty) Ltd v Triton Yachting Supplies* 1974 (2) SA 584 (O).

339 *Standard Bank of SA Ltd v SA Fire Equipment (Pty) Ltd* 1984 (2) SA 693 (C).

340 See *Koornklip Beleggings (Edms) Bpk v Allied Minerals Ltd* 1970 (1) SA 674 (C); *Stassen v Stoffberg* 1973 (3) SA 725 (C); and see *Wilson v Hoffman* 1974 (2) SA 44 (R); *Citibank NA South Africa Branch v Paul NO* 2003 (4) SA 180 (T).

341 *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd* 2004 (6) SA 29 (SCA) at 34F–H.

342 *Koornklip Beleggings (Edms) Bpk v Allied Minerals Ltd* 1970 (1) SA 674 (C).

343 *Spilhaus & Co Ltd v Coreejees* 1966 (1) SA 525 (C).

344 *Traut v Du Toit* 1966 (1) SA 69 (O). See also *Barclays Western Bank Ltd v Bill Jonker Factory Services (Pty) Ltd* 1980 (1) SA 929 (SE) at 933; *Credé v Standard Bank of SA Ltd* 1988 (4) SA 786 (E).

345 See *A E Motors (Pty) Ltd v Levitt* 1972 (3) SA 658 (T); and see *Stassen v Stoffberg* 1973 (3) SA 725 (C); *Globe Engineering Works Ltd v Ornelas Fishing Co (Pty) Ltd* 1983 (2) SA 95 (C) at 102.

346 *Mercantile Bank Ltd v Star Power CC* 2003 (3) SA 309 (T) at 311I–J.

347 *Beukes v Claassen* 1986 (4) SA 495 (O).

348 *Trinity Engineering (Pvt) Ltd v Anglo African Shipping Co (Pvt) Ltd* 1986 (1) SA 700 (ZS), applying *Tucker v Ginsburg* 1962 (2) SA 58 (W) at 65–6.

349 *Nedcor Bank Ltd v Behardien* 2000 (1) SA 307 (C).

350 *Davis v Tip NO* 1996 (1) SA 1152 (W); *Nedcor Bank Ltd v Behardien* 2000 (1) SA 307 (C).

351 *Nedcor Bank Ltd v Behardien* 2000 (1) SA 307 (C).

352 *Brand House Ltd v Sasfin Bank Ltd; Brandhouse Beverages (Pty) Ltd v Sasfin Bank Ltd* [2009] 1 All SA 22 (SCA); and see 2010 (July) *De Rebus* 23.

353 Unreported, GP case no 6380/2020 dated 8 March 2021.

354 2019 (6) SA 139 (ECG), subsequently overruled on appeal in *Standard Bank of South Africa Ltd v Mpongo* 2021 (6) SA 403 (SCA) (dated 25 June 2021), 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* 2023 (3) SA 36 (CC).

355 2019 (1) SA 594 (GP), subsequently overruled on appeal in *Standard Bank of South Africa Ltd v Mpongo* 2021 (6) SA 403 (SCA) (dated 25 June 2021), 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* 2023 (3) SA 36 (CC).

356 Both were subsequently overruled on appeal in *Standard Bank of South Africa Ltd v Mpongo* 2021 (6) SA 403 (SCA) (dated 25 June 2021), 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* 2023 (3) SA 36 (CC).

357 The provisions of the rule are peremptory (*PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd* 2009 (4) SA 68 (SCA) at 73B–C; *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) at paragraph [24]). The word 'fully' causes difficulty (see *Lombard v Van der Westhuizen* 1953 (4) SA 84 (C); *Herb Dyers (Pty) Ltd v Mahomed* 1965 (1) SA 31 (T); *Caltex Oil (SA) Ltd v Webb* 1965 (2) SA 914 (N); *Shepstone v Shepstone* 1974 (2) SA 462 (N); *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T); *Gilinsky v Superb Launderers & Dry Cleaners* 1978 (3) SA 807 (C)). As to what a surety should state in his affidavit when he raises the defence that the deed of suretyship, or certain clauses thereof, are contrary to public policy, see *Pangbourne Properties Ltd v Nitor Construction (Pty) Ltd* 1993 (4) SA 206 (W) at 217G–J. As to the defence of fraud raised in the opposing affidavit, see *Nedperm Bank Ltd v Verbri Products CC* 1993 (3) SA 214 (W). See the discussion of the legal principles in *Mnweba v Maharaj* [2001] All SA 265 (C) at 271–4.

358 *Standard Bank Ltd v Five Strand Media (Pty) Ltd* (unreported, ECPE case no 745/2020 dated 7 September 2020) at paragraph [12]; *Saglo Auto (Pty) Ltd v Black Shades Investments (Pty) Ltd* 2021 (2) SA 587 (GP) at paragraph [55]; *SA Taxi Finance Solutions (Pty) Limited v Mokobi* (unreported, GJ case no 2021/12537 dated 30 June 2023) at paragraph [59].

359 According to *The Oxford English Dictionary* and *Chambers' Dictionary*, the word 'nature' denotes, *inter alia*, the essential qualities of anything, for example, the 'nature' of the defence may be illegality of a contract or unenforceability of a claim by reason of usury. The defendant is therefore not required to set out its defence with the same degree of exactitude as would be required in a pleading (*Eclipse Systems v He & She Investments (Pty) Ltd and A Related Matter* 2020 (6) SA 497 (WCC) at paragraph [20]).

360 See *Chairperson, Independent Electoral Commission v Die Krans Ontspanningsoord (Edms) Bpk* 1997 (1) SA 244 (T) at 249G–250F. As to the difference in meaning between 'grounds' and 'material facts', see *Lurlev (Pty) Ltd v Unifreight General Services (Pty) Ltd* 1978 (1) SA 74 (D) at 77.

361 See *Shepstone v Shepstone* 1974 (2) SA 462 (N) at 467; *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426; *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 228, and the numerous other decisions referred to in these judgments; *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) at paragraphs [13] and [24]–[25]; *IPH Finance Proprietary Limited v Agrizest Proprietary Limited* (unreported, WCC case no 21771/2021 dated 28 February 2023) at paragraph 11; *Wesbank, a division of Firstrand Bank v Silver Solutions 3138 CC* (unreported, KZP case no 8400/2022P dated 7 March 2023) at paragraph [14]; *Nissan Finance, a product of Wesbank, of FirstRand Bank Limited v Gusha Holdings and Enterprises (Pty) Ltd* (unreported, GJ case no 2022/9914 dated 5 April 2023) at paragraphs 14–15; *J.E.M v G.P.J.V.N* (unreported, NWM case no 1791/2021 dated 18 October 2023) at paragraph [27]. See also *Handel v Josi* 1986 (4) SA 838 (D) at 842.

362 The following are examples of cases in which the defence was held to have been inadequately set out: *Cassim Bros (Pvt) Ltd v Cassim* 1964 (1) SA 651 (SR): bare denial of the authority of the person who had brought the proceedings on behalf of a company; *Herb Dyers (Pty) Ltd v Mahomed* 1965 (1) SA 31 (T): no comment in respect of plaintiff's claim for services rendered due to lack of details, but see *Border Concrete Engineering Co (Pty) Ltd v Knickelbein* 1982 (2) SA 648 (E) at 651; *Nichas & Son (Pty) Ltd v Papenfus* 1969 (2) SA 494 (O): bare denial of correctness of amounts claimed; *Trust Bank of Africa Ltd v Wassenaar* 1972 (3) SA 139 (D): facts upon which defence founded not set out; *Petlen Properties (Pty) Ltd v Boland Construction Co (Pty) Ltd* 1973 (4) SA 557 (C): bare statement that amount of indebtedness unknown to defendant; *Appliance Hire (Natal) (Pty) Ltd v Natal Fruit Juices (Pty) Ltd* 1974 (2) SA 287 (D): facts upon which defence founded not set out; *Jacobsen Van den Berg SA (Pty) Ltd v Triton Yachting Supplies* 1974 (2) SA 584 (O): bare statement of payment; *Premier Finance Corporation (Pty) Ltd v Rotainers (Pty) Ltd* 1975 (1) SA 79 (W): failure to make necessary averments to establish that the lease was a disguised money-lending transaction; *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T): bare statement of payment; *Bank of Lisbon v Botes* 1978 (4) SA 724 (W): bare statement that detailed account not received and accordingly amount claimed disputed; *Pansera Builders Suppliers (Pty) Ltd v Van der Merwe (t/a Van der Merwe's Transport)* 1986 (3) SA 654 (C): failure to allege that option to renew lease for further period exercised; *Standard Bank of SA Ltd v Friedman* 1999 (2) SA 456 (C): details with regard to counterclaim for damages or extent thereof not stated and failure to state unequivocally that counterclaim will be filed; *First National Bank of SA Ltd v Myburgh* 2002 (4) SA 176 (C) at 184D–F: failure to deal with clear and express terms of suretyship; *Citibank NA, South Africa Branch v Paul NO* 2003 (4) SA 180 (T) at 205G–206C: doubtful, unliquidated counterclaims which would not wipe out the plaintiff's claims and failure to disclose the nature of the defence and the material facts relied upon; *He & She Investments (Pty) Ltd v Brand NO* 2019 (5) SA 492 (WCC) at 498H–500J: lack of particularity and incompleteness; *NPGS Protection & Security Services CC v FirstRand Bank Ltd* 2020 (1) SA 494 (SCA) at 498B–499C: bare statement that it was not clear how the amount claimed was made up; *Nissan Finance, a product of Wesbank, of FirstRand Bank Limited v Gusha Holdings and Enterprises (Pty) Ltd* (unreported, GJ case no 2022/9914 dated 5 April 2023) at paragraph 32: the defendants succeeded in warding off summary judgment on a technical basis in circumstances where any triable defences were not shown to be bona fide. In *Fourlamel (Pty) Ltd v Maddison* 1977 (1) SA 333 (A) the Appellate Division held that a defence raised by a surety that what he *signed* was not a written agreement or undertaking of suretyship in favour of the plaintiff, but a 'blank form' constitutes a bona fide defence. In *Jurgens v Volkskas Bank Ltd* 1993 (1) SA 214 (A) the Appellate Division held that the court in the *Fourlamel* case had been solely concerned with the situation where the creditor, after the document in question had been delivered to him by the surety in blank, had unilaterally completed it by filling in some of the contractual terms. Accordingly the court was at liberty to state its view untrammelled by what was said in the *Fourlamel* case. The court thus held that the relevant time for considering whether a suretyship is complete is the time of *delivery* thereof and not the time of signature. Consequently, the affidavit resisting summary judgment should deal with the position as at the time of delivery of the suretyship. If there is no suggestion that a suretyship was at that stage in any respect incomplete, the defence should fail. The decision in *Standard Bank of SA Ltd v Jaap de Villiers Beleggings (Edms) Bpk* 1978 (3) SA 955 (W) was accordingly approved.

363 *NPGS Protection & Security Services CC v FirstRand Bank Ltd* 2020 (1) SA 494 (SCA) at 509F–G.

364 *NPGS Protection & Security Services CC v FirstRand Bank Ltd* 2020 (1) SA 494 (SCA) at 512D–I.

365 *NPGS Protection & Security Services CC v FirstRand Bank Ltd* 2020 (1) SA 494 (SCA) at 512G–I.

366 2020 (1) SA 494 (SCA).

367 At 498I–499A (footnote omitted).

368 See also *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) at paragraphs [22], [24] and [26]–[27].

369 See also *Jovan Projects (Pty) Ltd v ICB Property Investments (Pty) Ltd* (unreported, GJ case no 2020/32427 dated 20 December 2021) at paragraph [67]; *Vukile Property Fund Limited v True Ruby Trading 1002 (CC) trading as PostNet* (unreported, GJ case no 2020/9705 dated 21 May 2021) at paragraphs [6]–[13]; *Nedbank Ltd v Uphuhliso Investments and Projects (Pty) Ltd* [2022] 4 All SA 827 (GJ) at paragraph 24; *South African Securitisation Programme (RF) Ltd v Cellsecure Monitoring and Response (Pty) Ltd* (unreported, GP case no 21647/2021 dated 25 November 2022) at paragraph [28]. In *AHMR Hospitality (Pty) Ltd Winelands Venue v Da Silva* 2024 (3) SA 100 (WCC) the full bench (*per* Kusevitsky) remarked that a defendant is required to set out a defence with reasonable clarity and when the defence raised in the affidavit resisting summary judgment is inconsistent with the plea, it cannot in the absence of an explanation for the inconsistency be said to be bona fide.

370 In *Nogoduka-Ngumbela Consortium (Pty) Ltd v Rage Distribution (Pty) Ltd t/a Rage* (unreported, GJ case no 37587/2020 dated 19 October 2021) the court held (at paragraph [7]) that the amendment to rule 32 had not affected the rules regarding pleadings — the difference between *facta probanda* and *facta probantia* remained pertinent. The court held, further, that under the amended rule a defendant was not required to plead its defences in the same detail as it would have been entitled to do in an affidavit resisting summary judgment. A defendant was entitled in its opposing affidavit to elaborate on its plea and the defences pleaded (at paragraph [7]). In *Absa Bank Ltd v Meiring* 2022 (3) SA 449 (WCC) (followed in *Izikhova Security Services CC v Durban University of Technology* (unreported, KZD case no D1946/2023 dated 23 November 2023) at paragraph [13]) the court, in dealing with an application for summary judgment where the defendant raised a special plea of extinctive prescription, but failed to plead over on the merits of the case, interpreted rule 22 to require of a defendant to plead all its defences (i e special pleas and pleading over on the merits) when delivering a plea (at paragraph [19]). In the result, and essentially by agreement between the parties, the application for summary judgment was postponed for three months upon directions to the defendant to deliver his plea on the merits and for the exchange thereafter of supplementary supporting and opposing affidavits on the issue of summary judgment. The postponement was necessary because the plaintiff was not called upon to deal in a supporting affidavit in terms of rule 32(2)*(b)* with any defences that had not been pleaded (at paragraph [5]). The court summarized the position as follows (at paragraph [20]):

'It follows that a defendant in a summary judgment application which has failed to plead all its defences will be required to apply to amend its plea if it seeks to add any for the purposes of its opposition to summary judgment. A defendant's failure to have pleaded such defences initially will be material and, in addition to all the usual requirements to obtain the indulgence of being granted leave to amend, will require convincing explanation if it is to exclude the possibility that a court might infer delaying tactics and a lack of bona fides. An additional effect will be that such a defendant will ordinarily have to bear the wasted costs of the application for leave to amend and those occasioned by any attendant postponement of the summary judgment application.'

371 In *AHMR Hospitality (Pty) Ltd Winelands Venue v Da Silva* 2024 (3) SA 100 (WCC) the full bench stated (*per* Kusevitsky J — footnote omitted):

'[14] [I]t would thus be the natural course of progression for a defendant, in the face of a summary judgment application, to expand upon the defence or defences so raised in its plea — in its affidavit. But the cart cannot be put before the horse. In other words, in my view, a

defendant cannot for the first time raise defences in its affidavit opposing summary judgment, where no such defences exist in its plea. In the new summary judgment formulation, rule 32(2)*(b)* sets out, inter alia, that a plaintiff must "explain briefly why the defence 'as pleaded' does not raise any issue for trial". This presupposes that, in the normal acceptable course of pleadings — and which are presumably non-excipiable — the matter would be adjudicated on the defendant's pleaded defence. This, to my mind, was perhaps one of the reasons that the requirement of the plea was introduced before summary judgment could be applied for, so that, by the time that a defendant filed its opposing affidavit, that he would be committed to the version expressed in his plea, as opposed to a situation where a defence as contained in the affidavit is materially divergent from that which was contained in its plea. As an aside, a defendant is in any event required to set out a defence with reasonable clarity and, when the defence raised in the affidavit resisting summary judgment is inconsistent with the plea, it cannot in the absence of an explanation for the inconsistency be said to be bona fide.'

372 In *Belrex 95 CC v Barday* 2021 (3) SA 178 (WCC) it was held that in terms of rule 28(10) the court could, at any stage before judgment, grant leave to a party to amend any pleading or document. The provisions of the amended rule 32 consequently did not prevent a defendant from amending its plea. The rule did not state so, and any interpretation that a defendant could not do so was in conflict with the provisions of rule 28(10) (at paragraph [30]). The court also stated (at paragraph [31]:

'The mere fact that, in terms of the amended rule, a plaintiff can only proceed with summary judgment after the defendant has delivered the plea, does not preclude the defendant from amending his plea after the plaintiff has proceeded with an application for summary judgment. This is a lacuna which can be used as a stratagem by a defendant wishing to frustrate a plaintiff in proceeding with summary judgment. It is also clearly something which the task team of the Rules Board may not have considered.'

See also *Vukile Property Fund Limited v True Ruby Trading 1002 (CC) trading as PostNet* (unreported, GJ case no 2020/9705 dated 21 May 2021) at paragraph [13]; *Nedbank Ltd v Uphuhliso Investments and Projects (Pty) Ltd* [2022] 4 All SA 827 (GJ) at paragraph 30; *SA Taxi Development Finance (Pty) Ltd v Moleko* (unreported, FB case no 2655/2022 dated 16 February 2023) at paragraphs [2]–[6].

373 See also *Belrex 95 CC v Barday* 2021 (3) SA 178 (WCC) at paragraph [32]; *Vukile Property Fund Limited v True Ruby Trading 1002 (CC) trading as PostNet* (unreported, GJ case no 2020/9705 dated 21 May 2021) at paragraph [13]; *Nedbank Ltd v Uphuhliso Investments and Projects (Pty) Ltd* [2022] 4 All SA 827 (GJ) at paragraph 30.

374 If it is apparent from his affidavit that the defendant is not bona fide, he will fail in his defence because in such a case his defence, too, cannot be bona fide. This will be the case where the defences raised in the opposing affidavit are inconsistent with the plea (*Vukile Property Fund Limited v True Ruby Trading 1002 (CC) trading as PostNet* (unreported, GJ case no 2020/9705 dated 21 May 2021) at paragraph [10]; *Nogoduka-Ngumbela Consortium (Pty) Ltd v Rage Distribution (Pty) Ltd t/a Rage* (unreported, GJ case no 37587/2020 dated 19 October 2021) at paragraph [7]; *Nedbank Ltd v Uphuhliso Investments and Projects (Pty) Ltd* [2022] 4 All SA 827 (GJ) at paragraphs 24 and 36).

In *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at Corbett JA stated the following, amongst other things, in regard to the affidavit resisting summary judgment under rule 32 of the Uniform Rules of Court as it then read (at 426E):

'At the same time the defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea; nor does the Court examine it by the standards of pleading.'

In *Bridgement (Pty) Ltd v VHA Accounting Solutions* (unreported, KZP case no 16473/2022 dated 17 October 2023) PC Bezuidenhout J, with reference to the aforementioned quotation, held:

'[13] In the present Rule 32 application for summary judgment can only be made after a plea has been filed. Accordingly the portion in the judgment in *Maharaj* to which I have just referred where the precision of a plea is not required can accordingly no longer, in my view, be applicable. The precision of a plea is now vital in assessing summary judgment because it is in terms of what is stated in the plea that the court has to exercise its discretion whether to grant summary judgment or not. One would expect the correct defence to be pleaded and to be done in detail.'

It appears that the approach of PC Bezuidenhout J is incorrect for, amongst others, the following reasons:

(a) whilst it is correct that the plea should comply with the standards required of pleadings, rule 32(3)*(b)* provides for the standards required of an affidavit in opposition to summary judgment. These standards and the case law concerning them are well established. Thus, in *Cohen NO v D* (unreported, SCA case no 368/2022 dated 20 April 2023) the Supreme Court of Appeal stated:

'[29] The only decision to trace the history and reasoning behind the amended procedure for summary judgment in detail is Tumileng Trading CC v National Security and Fire (Pty) Ltd; E & D Security Systems CC v National Security and Fire (Pty) Ltd (Tumileng). As observed by Binns-Ward J in Tumileng, most of the old authorities still apply in determining whether a defendant has disclosed a bona fide defence. All the defendant is required to do is disclose a genuine defence, as opposed to "a sham" defence. Prospects of success are irrelevant and as long as the defence is legally cognisable in the sense that it amounts to a valid defence if proven at trial, then an application for summary judgment must fail.'

The relevant standards and cases nowhere require the affidavit to be formulated with the precision required of a plea. To include such a requirement in the standards would be raising the bar, which seemingly was not the intention of the Rules Board for Courts of Law;

(b) the affidavit should, of course, refer to the plea, and as explained in the notes to subrule (3)*(b)* above, disclose fully the nature and grounds of the defence and the material facts relied upon therefor with reference to the plea. In this regard the affidavit and the plea should be in harmony with each other. Otherwise the purpose of rule 32, and rule 14, as amended, would be defeated;

(c) the affidavit must engage meaningfully with the 'brief' explanation in the plaintiff's affidavit in support of summary judgment as to why the defence as pleaded does not raise any issue for trial. The 'brief' explanation in the plaintiff's affidavit need not be as precise as a pleading. It is submitted that the opposing affidavit in this regard should also briefly deal with the plaintiff's explanation, but not with the precision required of a plea. To require such precision would also amount to a raising of the bar, which seemingly was not the intention of the Rules Board for Courts of Law.

375 See also *Belrex 95 CC v Barday* 2021 (3) SA 178 (WCC) (at paragraph [33]; *Absa Bank Limited v Sirovha* (unreported, GP case no 45290/21 dated 15 August 2022) at paragraphs [4]–[5].

376 In *Lizinex (Pty) Limited v FPC Solutions (Pty) Limited* (unreported, GJ case no 2022/17136 dated 3 November 2023) it was held that the defendants could not be precluded from amending their plea based on a substantive defence and that the fact that the amendment might cause the plaintiff to fail at summary judgment stage was not 'prejudice', as the claim remained extant and would be determined at trial (at paragraphs [31] and [38]–[39]).

377 See also *Absa Bank Ltd v Meiring* 2022 (3) SA 449 (WCC) at paragraph [9] and the cases there referred to.

378 As to which, see *Raumix Aggregates (Pty) Ltd v Richter Sand CC, and Similar Matters* 2020 (1) SA 623 (GJ) at 627E–F; *Nedbank Ltd v Uphuhliso Investments and Projects (Pty) Ltd* [2022] 4 All SA 827 (GJ) at paragraph 37.

379 2021 (3) SA 178 (WCC).

380 At paragraph [31].

381 At paragraph [34].

382 2022 (3) SA 458 (GJ).

383 At paragraphs [16]–[29], followed in *Compensation Solutions (Pty) Ltd v Compensation Commissioner* (unreported, GP case nos 56219/2021; 49156/2021 dated 18 July 2023) at paragraphs [22]–[25].

384 At paragraph [31]. In *ABSA Home Loans Guarantee Company (RF) (Pty) Ltd v ERF 1404 Dainfern CC* (unreported, GJ case no 41403/2019 dated 28 July 2022) the court aligned itself with this approach and allowed the plaintiff to rely on its supplementary affidavit which was filed in response to the defendant's amended plea (at paragraphs [15]–[18]). This approach was also followed in *SA Taxi Development Finance (Pty) Ltd v Moleko* (unreported, FB case no 2655/2022 dated 16 February 2023) at paragraphs [2]–[6]. In *Absa Bank Ltd v Meiring* 2022 (3) SA 449 (WCC) the application for summary judgment was, by agreement between the parties, postponed for three months upon directions to the defendant to deliver his plea on the merits (i e an amended plea) and for the exchange thereafter of supplementary supporting and opposing affidavits on the issue of summary judgment (at paragraphs [5] and [21]). See also *Liberty Group Ltd v A & O Imports and Exports (Pty) Ltd* (unreported, GJ case no 2021/4380 dated 14 September 2022) at paragraph [14].

385 At paragraph [29].

386 Unreported, GJ case no 2022/9750 dated 10 August 2023.

387 At paragraphs [33]–[34].

388 *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) at paragraphs [41]–[50]; *SA Taxi Finance Solutions (Pty) Limited v Mokobi* (unreported, GJ case no 2021/12537 dated 30 June 2023) at paragraph [59].

389 See, for example, *Absa Bank Ltd v Meiring* 2022 (3) SA 449 (WCC) at paragraphs [2]–[5] and [21] and *Liberty Group Ltd v A & O Imports and Exports (Pty) Ltd* (unreported, GJ case no 2021/4380 dated 14 September 2022) at paragraph [14]. This all demonstrates the unsatisfactory position that rule 32 in its amended form is not a model of clarity and will probably increase the workload of judges as well as the costs for parties.

390 *Gani v Crescent Finance Corporation (Pty) Ltd* 1961 (1) SA 222 (W), not following *Meek v Kruger* 1958 (3) SA 154 (T); *Berks v Birjou Investment Co (Pty) Ltd* 1961 (1) SA 225 (W); and see *Hugh Holdings (Pvt) Ltd v Gamberini* 1968 (3) SA 157 (R) and *Central News Agency Ltd v Cilliers* 1971 (4) SA 351 (NC). The court has a discretion in an appropriate case to allow an additional affidavit by the defendant in order to improve a defective attempt to set out a defence to the plaintiff's claim or to prove his bona fides (*Juntgen t/a Paul Juntgen Real Estate v Nottbusch* 1989 (4) SA 490 (W); and see *Bank of Lisbon v Botes* 1978 (4) SA 724 (W); *Empire Fresh Meat Supply (Pty) Ltd v*

Ilic 1980 (4) SA 23 (W); *Pansera Builders Suppliers (Pty) Ltd v Van der Merwe (t/a Van der Merwe's Transport)* 1986 (3) SA 654 (C) at 660. However, see *Joubert, Owens, Van Niekerk Ing v Breytenbach* 1986 (2) SA 357 (T)). A defendant who asks for a postponement so that he can, for example, search for evidence or file an affidavit, has to make out a case for postponement. He must, among other considerations, touch upon the question as to why evidence was not timeously produced and what special circumstances exist for the court to grant an indulgence (*Empire Fresh Meat Supply (Pty) Ltd v Ilic* 1980 (4) SA 23 (W); *Juntgen t/a Paul Juntgen Real Estate v Nottbusch* 1989 (4) SA 490 (W)). See also *James Brown & Hamer (Pty) Ltd (previously named Gilbert Hamer & Co Ltd) v Simmons NO* 1963 (4) SA 656 (A). In *Macsteel Service Centres SA (Pty) Ltd v Profin Trading 35 CC* (unreported, GP case no 96119/2015 dated 17 June 2016) the defendant was allowed to file an affidavit by the commissioner of oaths who attended to the commissioning of the defendant's affidavit opposing summary judgment, explaining an error in the commissioning of the affidavit. In *Nissan Finance, a product of Wesbank, of FirstRand Bank Limited v Gusha Holdings and Enterprises (Pty) Ltd* (unreported, GJ case no 2022/9914 dated 5 April 2023) a supplementary affidavit in which the defendant provided documentary proof of a payment alluded to in its original affidavit was allowed after the hearing but before judgment was delivered on the basis that the evidence tendered was relevant (at paragraphs 28–30).

391 See *Trust Bank of Africa Ltd v Wassenaar* 1972 (3) SA 139 (D) at 144 and *Juntgen t/a Paul Juntgen Real Estate v Nottbusch* 1989 (4) SA 490 (W). In *Mahomed Essop (Pty) Ltd v Sekhukhulu & Son* 1967 (3) SA 728 (D) the plaintiff was ordered to file a declaration in clarification of the details of his claim, and the defendant was granted leave to file a further affidavit in reply thereto. The procedure of allowing a plaintiff to file a declaration has been criticized and not followed in *Steeledale Reinforcing (Cape) v Ho Hup Corporation SA (Pty) Ltd* 2010 (2) SA 580 (ECP) at 584C–585F.

392 *Stocks & Stocks Properties (Pty) Ltd v City of Cape Town* 2003 (5) SA 140 (C) at 144–5.

393 *Thirion v Upington Trust Maatskappy (Edms) Bpk* 1966 (1) SA 401 (A). However, where the documents sued upon clearly disclose a defence, summary judgment should not be granted, even though the matter has not been raised by the defendant (*Geyer v Geyer's Transport Services (Pty) Ltd* 1973 (1) SA 105 (T)).

394 *Nepet (Pty) Ltd v Van Aswegen's Garage* 1974 (3) SA 441 (O); and see *MAN Truck & Bus (SA) (Pty) Ltd v Singh (1)* 1976 (4) SA 264 (N); *Rossouw v FirstRand Bank Ltd* 2010 (6) SA 439 (SCA) at 451A–B and 453E–J.

395 Cf *Venter v Kruger* 1971 (3) SA 848 (N) at 851; *A E Motors (Pty) Ltd v Levitt* 1972 (3) SA 658 (T); *Rossouw v FirstRand Bank Ltd* 2010 (6) SA 439 (SCA) at 453I–J.

396 2010 (6) SA 439 (SCA) at 454A–C; and see *Nedbank Limited v Pavati Trading 146 (Pty) Ltd* (unreported, FB case no 3908/2021 dated 14 March 2022) at paragraph [24].

397 Section 5(1) of the Civil Proceedings Evidence Act 25 of 1965. In terms of s 5(2) a copy of the *Gazette* or a copy of such Government Notice or other matter purporting to be printed under the superintendence or authority of the government printer, shall, on its mere production, be evidence of the contents of such law, notice or other matter, as the case may be.

398 See *Janirae (Pty) Ltd v Stretch* 1978 (4) SA 920 (N) at 922.

399 For a discussion of s 169(1), see the notes to rule 14(5) s v 'Evidence under the National Credit Act 34 of 2005' in Jones & Buckle *Civil Practice* vol II.

400 *Gruhn v M Pupkewitz & Sons (Pty) Ltd* 1973 (3) SA 49 (A) at 58 and the authorities there referred to, to which may be added *Spring and Van den Berg Construction (Pty) Ltd v Banfrevan Properties (Pty) Ltd* 1968 (1) SA 326 (D); *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 304; *Jacobsen Van den Berg SA (Pty) Ltd v Triton Yachting Supplies* 1974 (2) SA 584 (O) at 589–90; *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 229; *Sylko Paper Co (Pty) Ltd v Castle Supermarket* 1977 (3) SA 698 (N) at 700; *Gilinsky v Superb Launderers and Dry Cleaners* 1978 (3) SA 807 (C); *Standard Bank National Industrial Credit Corp Ltd v Postmasburg Metal & Mining Supplies (Pty) Ltd* 1978 (3) SA 812 (NC); *Barclays Western Bank Ltd v Bill Jonker Factory Services (Pty) Ltd* 1980 (1) SA 929 (SE) at 935; *Neuhoff v York Timbers Ltd* 1981 (4) SA 666 (T) at 682–3; *Border Concrete Engineering Co (Pty) Ltd v Knickelbein* 1982 (2) SA 648 (E) at 652; *Pansera Builders Suppliers (Pty) Ltd v Van der Merwe (t/a Van der Merwe's Transport)* 1986 (3) SA 654 (C) at 659; *Handel v Josi* 1986 (4) SA 838 (D) at 842–3; *Diesel Power Plant Hire CC v Master Diggers (Pty) Ltd* 1992 (2) SA 295 (W); *Wonder Flooring v Northwest Development Corporation Ltd* 1997 (1) SA 476 (BSC) at 482A; *Tesven CC v South African Bank of Athens* 2000 (1) SA 268 (SCA) at 277H–I; *First National Bank of South Africa Ltd v Myburgh* 2002 (4) SA 176 (C) at 180D–E.

401 *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T); *Jili v FirstRand Bank Ltd* 2015 (3) SA 586 (SCA) at 591B and the authorities there referred to.

402 *Mnweba v Maharaj* [2001] All SA 265 (C) at 272*c*–*e*.

403 The words in the text are based on the oft-cited *dictum* of Marais J in *Mowschenson & Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W) at 366. While this formulation has not always met with unqualified approval (see, for example, *W M Mentz & Seuns (Edms) Bpk v Katzake* 1969 (3) SA 306 (T) at 310–11; *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 227), it has nevertheless been held that the *dictum* gives 'positive guidance as to the manner in which the court should exercise the discretion vested in it' (*Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 305), and that it 'embodies a necessary and important warning for the guidance of the courts which have to determine the rights of litigants in applications for summary judgment' (*Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T)). See *Lohrman v Vaal Ontwikkelingsmaatskappy (Edms) Bpk* 1979 (3) SA 391 (T) where the various authorities are discussed. See also *Trekker Investments (Pty) Ltd v Wimpy Bar* 1977 (3) SA 447 (W); *Barclays Western Bank Ltd v Bill Jonker Factory Services (Pty) Ltd* 1980 (1) SA 929 (SE) at 935; *Bowman NO v Howe* 1980 (2) SA 226 (W) at 227–8; *District Bank Ltd v Hoosain* 1984 (4) SA 544 (C) at 550; *Tesven CC v South African Bank of Athens* 2000 (1) SA 268 (SCA) at 277H–278A; *First National Bank of South Africa Ltd v Myburgh* 2002 (4) SA 176 (C) at 180D–E and 184G–H; *Mercantile Bank Ltd v Star Power CC* 2003 (3) SA 309 (T) at 312G–H; *Jeany Industrial Holdings (Pty) Ltd v Zungu-Elgin Engineering (Pty) Ltd* 2020 (2) SA 504 (KZD) at paragraph [8]; *FirstRand Bank Ltd t/a Wesbank v Maenetja Attorneys* (unreported, GP case no 8557/2021 dated 17 September 2021) at paragraphs [63]–[64] and [66]; *IPH Finance Proprietary Limited v Agrizest Proprietary Limited* (unreported, WCC case no 21771/2021 dated 28 February 2023) at paragraph 16.

404 *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 229E; *Jili v FirstRand Bank Ltd* 2015 (3) SA 586 (SCA) at 591B–C.

405 *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T); *Jili v FirstRand Bank Ltd* 2015 (3) SA 586 (SCA) at 591C–D; and see *Vitamax (Pty) Ltd v Executive Catering Equipment CC* 1993 (2) SA 556 (W); *First National Bank of South Africa Ltd v Myburgh* 2002 (4) SA 176 (C) at 184H.

406 *Jacobsen Van den Berg SA (Pty) Ltd v Triton Yachting Supplies* 1974 (2) SA 584 (O).

407 *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) in which Colman J does not approve of the formulation adopted in *Jacobsen Van den Berg SA (Pty) Ltd v Triton Yachting Supplies* 1974 (2) SA 584 (O) at 589, viz that the discretion should be exercised only when the court feels that an injustice *would* be done if it does not exercise its discretion; *First National Bank of South Africa Ltd v Myburgh* 2002 (4) SA 176 (C) at 184H; *Meridian Hygiene (Pty) Ltd v The Head of the Department of Health, Mpumalanga* (unreported, MM case no 3411/2020 dated 7 September 2021) at paragraphs [12]–[13].

408 *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd* 2004 (6) SA 29 (SCA) at 34I–J.

409 *A E Motors (Pty) Ltd v Levitt* 1972 (3) SA 658 (T) at 660. See also *Gralio (Pty) Ltd v D E Claassen (Pty) Ltd* 1980 (1) SA 816 (A) at 827; *IPH Finance Proprietary Limited v Agrizest Proprietary Limited* (unreported, WCC case no 21771/2021 dated 28 February 2023) at paragraph 17.

410 *J N O G Teale & Sons (Pty) Ltd v Vrystaatse Plantediens (Pty) Ltd* 1968 (4) SA 371 (O). Cf *Skead v Swanepoel* 1949 (4) SA 763 (T) at 768–9.

411 *Kgatle v Metcash Trading Ltd* 2004 (6) SA 410 (T) at 417J–418E.

412 *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 425G–426E.

413 *SA Bank of Athens Ltd v Van Zyl* 2005 (5) SA 93 (SCA) at 102E–G.

414 *Pendigo Trade and Investment (Pty) Ltd t/a ITEC Finance v Potgieter* (unreported, WCC case no 9928/2022 dated 22 May 2023) at paragraph [31]. In this case Binns-Ward J, not having had argument on the point, assumed for the purposes of his judgment that the authorities that have construed s 3 to impose a duty on the court in appropriate cases to apply the provision *mero motu* (which appeared to 'imply an inquisitorial approach'), were correctly decided but pointed out that such a construction was, however, not easy to reconcile with the appeal court authority (*National Sorghum Breweries Ltd (t/a Vivo Africa Breweries) v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA) at paragraph [8] and *Steinberg v Lazard* 2006 (5) SA 42 (SCA) at paragraph [7], citing *Smit v Bester* 1977 (4) SA 937 (A) at 942D–G) that s 3 placed a true onus on a debtor seeking to mitigate the effect of a penalty stipulation to prove that the penalty was disproportionate to the prejudice suffered and to what extent, which appeared to imply a strictly adversarial approach. However, insofar as the defendant would apparently nevertheless seek to persuade a trial court that the penalty was disproportionate, the defendant would bear the onus of proving that the penalty is disproportionate to the prejudice suffered and to what extent (at paragraphs [21] and [23]); but see *Western Credit Bank Ltd v Kajee* 1967 (4) SA 386 (N) at 391; *Western Bank Ltd v Meyer* 1973 (4) SA 697 (T) at 699. See also *Plumbago Financial Services (Pty) Ltd t/a Toshiba Rentals v Janap Joseph t/a Project Finance* 2008 (3) SA 47 (C) at 43A–C.

415 *Pendigo Trade and Investment (Pty) Ltd t/a ITEC Finance v Potgieter* (unreported, WCC case no 9928/2022 dated 22 May 2023) at paragraphs [22]–[33], where Binns-Ward J carefully analysed the decicions in *Premier Finance Corp (Pty) Ltd v Steenkamp* 1974 (3) SA 141 (D) and *Peters v Janda NO* 1981 (2) SA 339 (Z), and came to the conclusion that they were not intended to imply that a defendant has only to refer to s 3 of the Conventional Penalties Act 15 of 1962 to ward off a summary judgment application or that a plaintiff seeking to exact a

penalty was in every case precluded from applying for summary judgment.

416 See *Van Heerden v Samarkand Motion Picture Productions* 1979 (3) SA 786 (T) at 789C–790B; *Khayzif Amusement Machines CC v Southern Life Association Ltd* 1998 (2) SA 958 (D); *Dass and Others NNO v Lowewest Trading (Pty) Ltd* 2011 (1) SA 48 (KZD) at 51D–H and 52I.

417 *Kgatle v Metcash Trading Ltd* 2004 (6) SA 410 (T) at 417–418E.

418 *Maisel v Strul* 1937 CPD 128.

419 See *Khayzif Amusement Machines CC v Southern Life Association Ltd* 1998 (2) SA 958 (D) at 961E.

420 *Kgatle v Metcash Trading Ltd* 2004 (6) SA 410 (T) at 417J–418E.

421 *Ebrahim v Kahn* 1979 (2) SA 498 (N) at 505; *Tredoux v Kellerman* 2010 (1) SA 160 (C) at 165E–F.

422 *Tredoux v Kellerman* 2010 (1) SA 160 (C) at 165F. In appropriate circumstances each party may be ordered to pay its own costs (see, for example, the costs order made in *Thembani Wholesalers (Pty) Ltd v September* 2014 (5) SA 51 (ECG) at 58C–E).

423 *Tredoux v Kellerman* 2010 (1) SA 160 (C) at 165F.

424 Subrule (9)*(a)*. See, for example, *Meek v Kruger* 1958 (3) SA 154 (T) at 159G; *Nelson v Hodgetts Timbers (East London) (Pty) Ltd* 1973 (3) SA 37 (A) at 46G–47A; *Floridar Construction Co (SWA) (Pty) Ltd v Kriess* 1975 (1) SA 875 (SWA) at 878E; *Spes Bona Bank v Portals Water Treatment* 1981 (1) SA 618 (W) at 636E–H; *Absa Bank Ltd (Volkskas Bank Division) v S J du Toit & Sons Earthmovers (Pty) Ltd* 1995 (3) SA 265 (C); *Citibank NA, South Africa Branch v Paul No* 2003 (4) SA 180 (T) at 190A–E; *Tredoux v Kellerman* 2010 (1) SA 160 (C) at 165F–166A; *Senekal Motor Ingenieurs BK v Setsoto Local Municipality* (unreported, FB case no 1083/2017 dated 12 October 2017). See also *H H Robertson (Africa) (Pty) Ltd v N L Builders and Construction Co (Pty) Ltd* 1974 (3) SA 776 (N) at 777C–D. The suggestion in *Flamingo General Centre v Rossburgh Food Market* 1978 (1) SA 586 (D) that the court should be reluctant to award attorney and client costs under this rule because it would, *inter alia*, be a strong indication that the court favoured the defendant's case on the merits, has not met with approval (see *Absa Bank Ltd (Volkskas Bank Division) v S J du Toit & Sons Earthmovers (Pty) Ltd* 1995 (3) SA 265 (C) at 268E–G).

425 *South African Bureau of Standards v GGS/AU (Pty) Ltd* 2003 (6) SA 588 (T) at 592I–593D.

426 Subrule (9)*(b)*.

427 This paragraph, which appeared in the predecessor of this work, was cited with approval in *Floridar Construction Co (SWA) (Pty) Ltd v Kriess* 1975 (1) SA 875 (SWA) at 878A and in *Absa Bank Ltd (Volkskas Bank Division) v S J du Toit & Sons Earthmovers (Pty) Ltd* 1995 (3) SA 265 (C) at 267J–268A. See also *Evelyn Haddon & Co Ltd v Leojanko (Pty) Ltd* 1967 (1) SA 662 (O); *Koornklip Beleggings (Edms) Bpk v Allied Minerals Ltd* 1970 (1) SA 674 (C).

428 *Ebrahim v Kahn* 1979 (2) SA 498 (N) at 505.

429 *Louis Joss Motors (Pty) Ltd v Riholm* 1971 (3) SA 452 (T) at 455A–B; *Nyingwa v Moolman NO* 1993 (2) SA 508 (Tk) at 511B–512B; *Saxum Group (Pty) Ltd v Dalefern Properties (Pty) Ltd* 2011 (1) SA 230 (GSJ) at 232I; and see *Sundra Hardware v Mactro Plumbing* 1989 (1) SA 474 (T) at 476I.

430 *Nyingwa v Moolman NO* 1993 (2) SA 508 (Tk) at 510B–511A. In *Louis Joss Motors (Pty) Ltd v Riholm* 1971 (3) SA 452 (T) it was held (at 454G–H) that in an application under rule 42 the grounds are limited to those set out in subrule (1)*(a)* and *(b)*. In *ZD Investment CC v Council for Geoscience* (unreported, GP case no 15396/14) dated 6 December 2022) summary judgment was obtained by consent of the defendants' legal representatives in terms of a settlement agreement concluded with the plaintiff. The order was subsequently rescinded in terms of rule 42(1) at the instance of the defendants on the basis that their attorney had no mandate to enter into the settlement agreement and consent to summary judgment.

431 *Louis Joss Motors (Pty) Ltd v Riholm* 1971 (3) SA 452 (T) at 454A–I. See also *Tlholoe v Maury (Edms) Bpk h/a Franelle Gordyn Boutique* 1988 (3) SA 922 (O) at 925G–H; and see Horn 1992 (55) *THRHR* 87. The position in magistrates' courts practice under s 36 of the Magistrates' Courts Act 32 of 1944 and rule 49(1) is different. See the notes to rule 14 s v 'Rescission of summary judgment' in Jones & Buckle *Civil Practice* vol II.

432 *Saxum Group (Pty) Ltd v Dalefern Properties (Pty) Ltd* 2011 (1) SA 230 (GSJ) at 232A–233I.

433 *Polliack & Co Ltd v Pennink* 1936 TPD 167; *Kgatle v Metcash Trading Ltd* 2004 (6) SA 410 (T) at 416C. See also *Sekgala v Steve's Auto Clinic (Pty) Ltd* (unreported, GP case no 56238/2016 dated 3 February 2017); *South African Securitisation Programme (RF) Ltd v Valucorp 105 CC t/a Agrisolar* (unreported, NCK case no 374/2022 dated 10 November 2023) at paragraphs [9]–[27].

434 *Arend v Astra Furnishers (Pty) Ltd* 1973 (1) SA 849 (C); *Van Wyngaardt NO v Knox* 1977 (2) SA 636 (T). In regard to the grant of leave to appeal in cases where summary judgment has been granted, it should be borne in mind that the purpose of summary judgment is to 'enable a plaintiff with a clear case to obtain swift enforcement of a claim against a defendant who has no real defence to that claim'. It is a procedure that is intended 'to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights'. If a court hearing an application for summary judgment is satisfied that the defendant has no bona fide defence to a plaintiff's claim and grants summary judgment as a consequence, it should be slow thereafter to grant leave to appeal, lest it undermine the very purpose of the procedure (*Majola v Nitro Securitisation 1 (Pty) Ltd* 2012 (1) SA 226 (SCA) at 232F–H).

435 Cf *Mopicon Construction CC v Van Jaarsveld & Heyns* 2004 (3) SA 215 (T).

436 *Venter v Kruger* 1971 (3) SA 848 (N).

437 2009 (3) SA 348 (BPD).

438 2009 (3) SA 353 (SE).

439 2009 (3) SA 363 (W).

440 2009 (3) SA 353 (SE).

441 2009 (3) SA 384 (T).

442 See also *Bell Equipment Sales S.A. Ltd v Dongastro Emperio (Pty) Ltd* (unreported, GJ case no 2021/51795 dated 1 December 2022) where a similar order was made (at paragraph [10]).

443 2009 (5) SA 557 (T).

444 At 562B–D.

445 2010 (1) SA 579 (ECG).

446 At 594C–G.

447 2010 (1) SA 627 (C).

448 2010 (1) SA 634 (C).

449 At 638B–E.

450 2010 (2) SA 46 (ECP). See also 2010 (August) *De Rebus* 45.

451 At 521D.

452 At 52I–53B.

453 2010 (5) SA 252 (GSJ) at 255D and 255F, applying *Munien v BMW Financial Services (SA) (Pty) Ltd* 2010 (1) SA 549 (KZD).

454 At 258E–F.

455 2019 (3) SA 341 (CC)

456 At 359C–360E (footnotes omitted).

457 *Author's note:* The Alienation of Land Act 68 of 1981.

458 *Author's note:* See s 3*(e)*(ii) of the NCA.

459 *Author's note: Nkata v FirstRand Bank Ltd* 2016 (4) SA 257 (CC).

460 2010 (6) SA 439 (SCA) at 450C–D, 450G–451G and 454I–457D.

461 *Rossouw v FirstRand Bank Ltd* 2010 (6) SA 439 (SCA) at 444F–447A, 452B–E and 454A–C.

462 2012 (5) SA 142 (CC) at 159H–168F. In *Nedbank Ltd v Binneman and 13 Similar Cases* 2012 (5) SA 569 (WCC) the court, in dealing with applications for default judgment, held that the *Sebola* case did not overrule the principles confirmed in the *Rossouw* case, but what it did was to clarify that 'despatch' per se was insufficient; there should, in addition, be proof that the notice had reached the appropriate post office. Once such proof is provided, the fact that the s 129 letter had been returned to the sender is of no consequence to the credit provider, the risk of non-receipt resting squarely with the defendant. In *Absa Bank Ltd v Mkhize and Another and Two Similar Cases* 2012 (5) SA 574 (KZD) a different conclusion was reached. The court held (at 585E–G, 587I–588I, 589G–590B, 590C–D, 591F–G, 592C–F and 593E–G) that it might be concluded from paragraphs 57 and 60 of the *Sebola* case that the Constitutional Court had held that actual notice to the consumer was indeed the standard set by s 129(1) of the NCA; and that paragraph 79 of the *Sebola* case put it beyond doubt that the Constitutional Court had not endorsed the decision in the *Rossouw* case that the risk of non-delivery rested with the defendant (consumer). Accordingly, if in contested proceedings the consumer asserted that the notice to the consumer went astray after reaching the post office, or had not been collected or attended to once collected, the court had to make a finding whether, despite the credit provider's proven efforts, the consumer's allegations were true, and, if so, had to adjourn the proceedings in terms of s 130(4)(*b*) of the NCA. The discretion given to the court by s

130(4)(*b*)(ii) of the NCA was wide enough to permit an order which appeared to the court to offer a reasonable prospect to the credit provider of achieving compliance with s 129(1) in order to generate proof, upon a balance of probabilities, that there had been compliance with that section. For that purpose the credit provider had to provide information on oath which would enable the court to decide which of the options furnished by s 65(2) of the NCA were likely to generate the decision that, on the probabilities, the notice had reached the consumer. As regards actions instituted after the *Sebola* case, the court stated:

'However, as the precursor to actions instituted after *Sebola*, it might be a good idea for the credit provider not only to send the s 129 notice by registered post — that being compulsory in the light of the decision in *Sebola* and probably mandatory also by virtue of the provisions of most credit agreements — but also, and at the same time, to send the same notice by ordinary post to the selected address and to any other address which may appear to hold out a prospect of delivery to the consumer. The summons could then be endorsed with words drawing the consumer's attention to the fact that the litigation instituted by service of the summons is only permissible in the event of the annexed s 129 notice having come to the consumer's attention, and to the consumer's right to defend the action upon the basis that the notice was not received, even if the consumer otherwise admits liability for the claim. If that is done, then, despite a negative track and trace report eventuating, the credit provider may be able to persuade the court that it ought to be satisfied that there was compliance with s 129(1) in the light of —

(a) an explanation on oath as to the significance of the address or addresses to which the notice was directed by ordinary post, coupled with evidence of posting, and

(b) the quality of service achieved which together may point to a probability that the absence of opposition supports a conclusion that the notice did reach the consumer.'

In *Balkind v Absa Bank* 2013 (2) SA 486 (ECG) it was common cause that the s 129(1) notice was sent by registered mail to the applicant's (for rescission of default judgment) chosen *domicilium* address, that the 'track and trace' report showed that it reached the correct post office, and also that the notice never came to the applicant's attention because he had moved from the *domicilium* address without notifying the respondent thereof. In issue was whether, as the respondent contended, these facts constituted compliance with the requirements laid down in the *Sebola* case. In finding that they did not, the court, *inter alia*, stated:

'Effectively, on my understanding of *Sebola*, it ruled that the s 129 notice must either be brought to the attention of the consumer or have reached the consumer (paras 74, 75, 76, 77, 83, 85, 86, 87). Since the Act does not require proof of actual receipt or proof of actual delivery to the address, averments must be made in the combined summons, "that will satisfy the court from which enforcement is sought that notice, on balance of probabilities, reached the consumer" (para 74). Hence, mere dispatch is not enough. Not only is registered mail essential, but averments must be made "that will satisfy a court that the notice probably reached the consumer, as required by s 129(1)" (para 75).' (at 494G–H); 'The essence is therefore that the court must be satisfied on averments made by the credit provider that the notice in fact reached the consumer (para 74). The proof is secondary. Proof is established, on balance of probability, on averments in the papers, and those averments will depend on the facts of each case. (Except, of course, where delivery by mail is the chosen manner of communication, in which case proof of dispatch by registered mail and receipt by the correct post office are essential averments . . .)' (at 495B–C); '*Rossouw* held that receipt of the notice is the responsibility of the consumer, and once the notice is dispatched by registered mail then the requirement of s 129 had been satisfied. On my interpretation of the *Sebola* judgment, it established the principle that the notice must reach the consumer or be brought to his or her attention. The jurisdictional requirements of s 129 are therefore only satisfied once this principle is proved. And this principle is "ordinarily" established by registered mail coupled with proof that the notice was delivered to the correct post office. However, if there are indications to the contrary, the court must make a factual finding and, if not satisfied that the notice came to the attention of the consumer, the claim cannot be enforced.' (at 496E–G); 'The difference between *Rossouw* and *Sebola* is this: *Rossouw* established that the jurisdictional requirements of s 129 are satisfied on proof that the notice was dispatched to the consumer by registered post. *Sebola* established that the jurisdictional requirements of s 129 are satisfied only on proof on a balance of probability that the notice either reached the consumer or came to the attention of the consumer. So, on the test in *Rossouw*, the credit provider was required to allege in the summons and prove dispatch of the notice by registered post. On the test in *Sebola*, the credit provider is required to allege and prove on balance of probability that the notice reached the consumer or at least came to the attention of the consumer.' (at 496I–497A).

The court therefore did not follow the decision in the *Binneman* case, and held that the *Mkhize* case was correctly decided (at 497H–I).

Lastly, the court held (at 497J–498D) that the degree of proof required in the *Sebola* case leaves room for a finding of fictional fulfilment of the principle that the s 129 notice had come to the attention of the consumer. Where, for instance, a recalcitrant debtor deliberately avoids the notification to collect a registered item, or having received the notification, deliberately avoids collecting it, he cannot hide behind non-receipt of the notice or be heard to say that it did not come to his attention. If the facts show that the consumer was residing at the chosen *domicilium* and was in residence at the time the notification to collect the registered item was posted to that address from the correct post office, or that he was telephonically informed by a bank official to collect the item and was supplied with the correct tracking number, then in the absence of a satisfactory explanation why he did not collect same, the *Sebola* judgment permits a finding of fictional fulfilment of the principle, notwithstanding that the notice may have been returned to the bank without being collected by the consumer.

In *Standard Bank of South Africa Ltd v Van Vuuren* (unreported, GSJ case no 32847/2012 dated 26 February 2013), the court held (at paragraph 5) that the judgment in the *Mkhize* case correctly interpreted the *Sebola* case, and that actual service of the s 129 notice on the consumer was required. It was further held (at paragraphs 9 to 18) that the identification of the post office, serving the address where the s 129 notice was sent, could sufficiently be proved by an official letter issued by a responsible employee of the South African Post Office confirming that the particular post office served the consumer's address.

In *Benson v Standard Bank of South Africa (Pty) Ltd* 2019 (5) SA 152 (GJ) the full court, on appeal against the refusal of an application for rescission of a default judgment, held (at 156B–157B — footnotes omitted):

'[15] The appellants contend that the s 129 notice they received with the Standard Bank application is a nullity because s 129(1)*(b)* does not permit a credit provider to commence any legal proceedings to enforce an agreement before it has given notice to the credit receiver of the options that are set out in s 129(1)*(a)*. The appellants rely upon the decision of the Constitutional Court in *Sebola* [*Author's note: Sebola v Standard Bank of South Africa Ltd* 2012 (5) SA 142 (CC)] and the *Kgomo* [*Author's note: Kgomo v Standard Bank of South Africa* 2016 (2) SA 184 (GP)] decision.

[16] In *Sebola* the Constitutional Court made the following clear. First, the commencement of proceedings without prior notice does not render the proceedings a nullity, but simply requires an adjournment of proceedings so as to permit the credit provider to give notice before the proceedings may be resumed. A failure to give notice does not invalidate the proceedings but is simply dilatory. (See para 53.) Second, the delivery of the notice in terms of ss 129 and 130 requires the credit provider to aver and prove that the notice in s 129 was delivered to the consumer. Where the post is used, it will suffice to show delivery if there is proof of registered dispatch to the address of the consumer, together with proof that the notice reached the appropriate post office for delivery to the consumer, in the absence of proof to the contrary. (See para 87.)

[17] In *Sebola* it was accepted that the defendants were unaware of the summons and that the notice sent by registered mail was not sent to the correct post office, and rescission was granted. In *Kgomo* the s 129 notice was annexed to the particulars of claim, but the "track and trace" report from the post office did not reflect the applicants' correct address. Dodson AJ held in *Kgomo* that the judgment granted by default was erroneously granted because the use of an incorrect address for the delivery of the s 129 notice was apparent when comparing that address with the address in the particulars of claim, and accordingly the court hearing the application for default judgment was required to adjourn the proceedings and direct the steps the credit provider was to take before the proceedings could be resumed in terms of s 130(4)*(b)*(i) and (ii) of the NCA. Dodson AJ went on to hold that, even if the error was not apparent, if there was non-compliance with ss 129 and 130 to deliver the notice, rescission is an available remedy. (See para 56.)

[18] What the *Sebola* decision did not have to decide is whether any non-compliance with the provisions of the NCA that is cured prior to the hearing of the application for judgment by default nevertheless requires an adjournment of the application. The answer to this question flows from the provisions of s 130(4)*(b)*(ii). If there are no further steps that are required of the credit provider, there can be no purpose served in adjourning the proceedings. Further delay would serve no purpose, and, as *Sebola* makes plain, any non-compliance does not invalidate the proceedings but simply delays their finalisation to ensure that due process is followed and the credit receiver can enjoy his or her rights. Of course, the non-compliance must be properly cured, and the credit receiver must be given the statutory time to consider his or her position. But if that is done between the time that the non-compliance is cured and the time that the matter is heard in court, to require an adjournment for its own sake has no point and is inconsistent with the scheme of ss 129 and 130. Insofar as the decision in *Kgomo* suggests otherwise, I am in respectful disagreement with it.'See also *SA Taxi Finance Solutions (Pty) Limited v Mokobi* (unreported, GJ case no 2021/12537 dated 30 June 2023) at paragraphs [38]–[57].

463 2014 (3) SA 56 (CC).

464 At 71G–72D and 76C–G, distinguished on the facts in *ABSA Bank Ltd v Van der Walt* (unreported, GJ case no 8817/2022 dated 9 June 2023) (in which the court adjourned the summary judgment proceedings in order for Absa to provide the respondent with due and proper notice in terms of ss 129 and 130 of the NCA). In *FirstRand Bank Ltd t/a First National Bank v Allie* (unreported, WCC case no 9410/2020 dated 19 April 2021) default judgment (not in a summary judgment context) was granted against the defendant under circumstances where the s 129 notice was sent to him per email in Dubai to an email address he had chosen for receiving notices from the bank on the renewal of his credit facility.

465 2010 (5) SA 523 (GSJ) at 526H–I.

466 2010 (5) SA 551 (GNP) at 554E–G.

467 2010 (6) SA 351 (ECG) at 353E and 363A–D, confirmed on appeal *sub nomine Collett v FirstRand Bank Ltd* 2011 (4) SA 508 (SCA). See

also *Hardenberg v Nedbank Ltd* 2015 (3) SA 470 (WCC) at 472G–477I where the full court, after an analysis of the judgment in *Collett v FirstRand Bank Ltd (supra*):

(a) rejected the appellants' argument, based on the *dictum* in *Collett*'s case, that they had not been in default of the credit agreement concerned at the time that they applied for debt review, that Nedbank Ltd was therefore not entitled to terminate the debt review, and that summary judgment should not have been granted against them;

(b) held that nothing in the formulation of s 86(10) of the NCA suggested that the default of the consumer must have existed at the time that the consumer applied to be declared overindebted;

(c) held, further, that in the context of what the Supreme Court of Appeal was asked to decide in *Collett*'s case, it was not the intention to hold that the default must exist at the time that the consumer applied for debt review in order for a credit provider to be entitled to exercise the right of termination conferred by s 86(10) of the NCA;

(d) dismissed the appeal against the granting of summary judgment.

468 Since 1 July 2019 an application for summary judgment may only be made after the delivery of a plea. See the notes to rule 32 s v 'General' above.

469 2010 (6) SA 429 (GSJ) at 436B, confirmed on appeal *sub nomine Seyffert v FirstRand Bank Ltd t/a First National Bank* 2012 (6) SA 581 (SCA).

470 2011 (1) SA 470 (KZP) at 480C–481D and 483G–487D. In this case it was also held (at 487G–488A) that a defendant who opposes an application for summary judgment on the basis that the credit agreement on which a summary judgment application is based, is subject to debt review, either before a debt counsellor or a magistrate, must allege sufficient facts to satisfy the court that the debt review is bona fide and not a tactic to delay final judgment for payment of the debt. In addition, failure to disclose sufficient information to persuade the court that a proposed scheme for repayment of a debt is reasonable, and capable of meeting the purpose of the NCA, to prioritise consumers satisfying their obligations, will fall short of the requirement of good faith.

471 2010 (6) SA 565 (ECP) at 569J–570C and 570F.

472 2011 (1) SA 310 (GSJ) at 315E–G.

473 1976 (2) SA 226 (T).

474 *SA Taxi Securitisation (Pty) Ltd v Mbatha and two similar cases* 2011 (1) SA 310 (GSJ) at 320H.

475 2011 (4) SA 508 (SCA) at 518G.

476 Unreported, GJ case no 2022/00750 dated 2 March 2023) at paragraphs 30–37.

477 2011 (1) SA 374 (WCC) at 387G–388C.

478 2012 (4) SA 14 (WCC) at 18G–I, 19B–C and 19I–20E.

479 2014 (3) SA 162 (VB) at 174A–G and 175G.

480 2015 (3) SA 470 (WCC).

481 2011 (4) SA 508 (SCA) at 516C–E.

482 At 475C.

483 At 476H–477I.

484 2016 (2) SA 115 (GP) at 120B–E.

485 [2020] 1 All SA 303 (SCA).

486 At paragraph [24].

487 2021 (1) SA 225 (GJ).

488 At paragraphs [47] and [49].

489 2013 JDR 688 (GSJ).