18 Rules relating to pleading generally

(1) A combined summons, and every other pleading except a summons, shall be signed by both an advocate and an attorney or, in the case of an attorney who, under section 4(2) of the Right of Appearance in Courts Act, 1995 (Act No. 62 of 1995), has the right of appearance in the High Court, only by such attorney or, if a party sues or defends personally, by that party.

[Subrule (1) substituted by GN R3397 of 12 May 2023.]

(2) The title of the action describing the parties thereto and the number assigned thereto by the registrar, shall appear at the head of each pleading, provided that where the parties are numerous or the title lengthy and abbreviation is reasonably possible, it shall be so abbreviated.

(3) Every pleading shall be divided into paragraphs (including sub-paragraphs) which shall be consecutively numbered and shall, as nearly as possible, each contain a distinct averment.

(4) Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his or her claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.

[Subrule (4) substituted by GN R3397 of 12 May 2023.]

(5) When in any pleading a party denies an allegation of fact in the previous pleading of the opposite party, he or she shall not do so evasively, but shall answer the point of substance.

[Subrule (5) substituted by GN R3397 of 12 May 2023.]

(6) A party who in his or her pleading relies upon a contract shall 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 shall be annexed to the pleading.

[Subrule (6) substituted by GN R2164 of 2 October 1987, by GN R2642 of 27 November 1987 and by GN R3397 of 12 May 2023.]

(7) It shall not be necessary in any pleading to state the circumstances from which an alleged implied term can be inferred.

(8) A party suing or bringing a claim in reconvention for divorce shall, where time, date and place or any other person or persons are relevant or involved, give details thereof in the relevant pleading.

[Subrule (8) substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

(9) A party claiming division, transfer or forfeiture of assets in divorce proceedings in respect of a marriage out of community of property, shall give details of the grounds on which he or she claims that he or she is entitled to such division, transfer or forfeiture.

[Subrule (9) substituted by GN R2164 of 2 October 1987, by GN R2642 of 27 November 1987 and by GN R3397 of 12 May 2023.]

(10) A plaintiff suing for damages shall set them out in such manner as will enable the defendant reasonably to assess the quantum thereof: Provided that a plaintiff suing for damages for personal injury shall specify his or her date of birth, the nature and

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extent of the injuries, and the nature, effects and duration of the disability alleged to give rise to such damages, and shall as far as practicable state separately what amount, if any, is claimed for —

(a) medical costs, hospital costs and other similar expenses and how these costs and expenses are made up;

(b) pain and suffering, stating whether temporary or permanent and which injuries caused it;

(c) disability in respect of —

(i) the earning of income (stating the earnings lost to date and how the amount is made up and the estimated future loss and the nature of the work the plaintiff will in future be able to do);

(ii) the enjoyment of amenities of life (giving particulars) and stating whether the disability concerned is temporary or permanent; and

(d) disfigurement, with a full description thereof and stating whether it is temporary or permanent.

[Subrule (10) substituted by GN R2164 of 2 October 1987, by GN R2642 of 27 November 1987 and by GN R3397 of 12 May 2023.]

(11) A plaintiff suing for damages resulting from the death of another shall state the date of birth of the deceased as well as that of any person claiming damages as a result of the death.

(12) If a party fails to comply with any of the provisions of this rule, such pleading shall be deemed to be an irregular step and the opposite party shall be entitled to act in accordance with rule 30.

[Subrule (1) substituted by GN R873 of 31 May 1996. Subrules (11) and (12) inserted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

Commentary

General. [1] It has been held that rule 18 does not apply to affidavits. [2]

Pleadings are 'the written statements of the parties served by each party in turn upon the other which must set out in summary form the material facts on which each party relies in support of his claim or defence, as the case may be'. [3] The object of pleading is to define the issues so as to enable the other party (and the court) to know what case has to be met. [4] It is

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indeed a basic principle that a pleading should be so phrased that the other party may reasonably and fairly be required to plead thereto. [5] See further the notes to subrule (4) s v 'With sufficient particularity to enable the opposite party to reply thereto' below.

The parties are limited to their pleadings; a pleader cannot be allowed to direct the attention of the other party to one issue, and then at the trial attempt to canvass another. [6] For this reason, and to prevent surprise, pleadings must be articulate and sound; the cause of action or defence must appear clearly from the factual allegations made. [7] However, since pleadings are made for the court, not the court for pleadings, it is the duty of the court to determine what are the real issues between the parties and, provided no possible prejudice can be caused to either party, to decide the case on these real issues. [8] In this regard the court has a wide

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discretion. [9] The court must look at the substantial issue between the parties and not blindly follow the *ipsissima verba* of the pleadings. [10] It is, however, not open to the court to adjudicate the case on the basis of issues which are not cognizable or derivable from the pleadings. [11] The Appellate Division has warned that parties should not be encouraged to rely on the court's readiness to consider and deal with unpleaded issues. [12] The cardinal rules in regard to pleadings should be properly observed, and the trial should not be allowed to become a 'free for all' with a complete disregard of the issues raised on the pleadings. [13]

The court is not bound by the pleadings if the parties themselves at the trial enlarge the issues. [14] The general principle is that the parties will be held to the issues pleaded unless there has been a full investigation of a matter falling outside the pleadings and there is no reasonable ground for thinking that further examinations of the facts might lead to a different conclusion. [15]

The essence of the preceding paragraphs is contained in *Robinson v Randfontein Estates GM Co Ltd* [16] where Innes J stated:

> 'The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the Court has a wide discretion. For pleadings are made for the Court, not the Court for pleadings. And where a party has had every facility to place all the facts before the trial Court and the

investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal, merely because the pleading of the opponent has not been as explicit as it might have been.'

The above-mentioned position has remained unchanged for decades, as observed by the Supreme Court of Appeal in *M.M v MEC for Health; Eastern Cape.* [17]

Despite the fact that the validity of an agreement sued upon is not put in issue on the pleadings, the court will not enforce such an agreement if it is apparent from the plaintiff's own evidence that the agreement was not a valid one. [18] In fact, in certain circumstances the court may be obliged *mero motu* to raise the issue of the validity of an agreement sued upon. [19] If a claim is based on an overdrawn account, it cannot be expected of the plaintiff to set out the composition of his claim unless the underlying debits were placed in issue. If the parties reach an agreement during the trial and the debits are placed in dispute in clearly defined respects it is not necessary for the plaintiff to particularize the composite amount of his claim for the purposes of formulating his claim. [20]

Rule 62(2) provides that all documents filed with the court, other than exhibits or facsimiles thereof, must be clearly and legibly printed or typewritten in permanent black or blueblack ink on one side only of paper of good quality and of A4 standard size. A document is deemed to be typewritten if it is reproduced clearly and legibly on suitable paper by a duplicating, lithographic, photographic or any other method of reproduction. In terms of rule 62(6) the registrar may reject any document which does not comply with the requirements of rule 62.

Pleadings following upon a replication or a replication in reconvention, as the case may be, are, in terms of rule 25(5), to be designated by the names by which they are customarily known. See further, in this regard, the notes to rule 25(5) s v 'Designated by the names by which they are customarily known' below.

Amendments to pleadings must be done in accordance with the provisions of rule 28.

Pleadings are considered closed under the circumstances provided for in rule 29(1).

Subrule (1): 'And every other pleading except a summons.' This subrule does not require that every other pleading except a summons shall be signed by the attorney who signed the summons; all it requires is that the pleading shall be signed by an attorney. [21] In rule 1 'attorney' is defined as 'a legal practitioner as defined, admitted and enrolled as such, under the Legal Practice Act, 2014 (Act 28 of 2014)'.

If the provisions of this subrule are not complied with, application may be made to have the pleading set aside as an irregular proceeding. [22] Condonation may, however, be granted. [23]

'Shall be signed by both an advocate and an attorney.' While it is common practice for an advocate to sign a pleading on behalf of another advocate, one attorney cannot, without a proper authority, sign a summons for another. [24]

A summons signed by a person holding the general power of an attorney but who is not himself an attorney is irregular. [25]

A person who is not an attorney is not entitled to draw up for reward a summons for and on behalf of a person who sues personally. [26]

By appending his signature to a pleading, an attorney (and advocate) confirms that he has been scrupulous in preparing the pleading. [27] Consequently, pleadings drafted by an attorney (or advocate), as an officer of court, should not be a fabrication or contain allegations that are not the truth. [28] Neither should such pleadings misrepresent facts to the court. [29] An attorney (or advocate) who does not comply with the standards expected of him not only runs the risk of a costs order *de bonis propriis* being awarded against him, but also of being referred to the relevant law society (or relevant bar council) for an inquiry into his untenable and unethical conduct. [30]

'In the case of an attorney who . . . has the right of appearance in the High Court, only by such attorney.' This subrule was amended with effect from 1 July 1996 to make provision for the signing of pleadings by attorneys who have been granted the right of appearance in the High Court in terms of s 4 of the Right of Appearance in Courts Act 62 of 1995.

In *Fortune v Fortune*, [31] a case decided prior to the amendment of the subrule, it was held in the Cape Provincial Division that where an attorney, who has been granted the right of appearance, signs a pleading in the place of an advocate, a single signature which is stated to have been affixed 'as attorney certified in terms of s 4(2) of Act 62 of 1995 and as attorney' will suffice. Where the attorney signs the pleading not as an individual but on behalf of the firm representing the litigant, it would be appropriate for the attorney to sign the pleading twice, once as attorney certified in terms of s 4(2) and then again in the usual format on behalf of the firm of attorneys.

In *Zeda Car Leasing (Pty) Ltd t/a Avis Fleet Services v Pillay* [32] it has been held that an attorney who has a certificate under s 4(2) of Right of Appearance in Courts Act 62 of 1995 is entitled to carry out the functions of an advocate only within the area of jurisdiction of the registrar by whom that certificate was issued. It would, therefore, be improper for an attorney to sign pleadings in a different area of jurisdiction from where such certificate was issued and any pleadings so signed could be set aside. In *Absa Bank Ltd v Barinor New Business Venture (Pty) Ltd* [33] the court, following the *Zeda* case in this regard, held that an attorney enrolled and with right of appearance registered at High Court A, needs to be enrolled at High Court B to *practise* there, and so to sign a combined summons there. The attorney's right of appearance need not though be registered at High Court B, for him to *appear* there. In *Liberty Group Ltd v Singh* [34] it was, however, held that the certificate of a registrar under s 4(2) of the Right of Appearance in Courts Act 62 of 1995, to the effect that an attorney has the right of appearance in the High Court, confers on that attorney the right to appear before, and carry out the functions of an advocate in, all the divisions of the High Court. The certificate also entitles the attorney to sign pleadings, *qua* advocate, in all divisions of the High Court, but the attorney's right to sign pleadings *qua* attorney is limited to the division of the High Court in which he was admitted or enrolled.

The Right of Appearance in Courts Act 62 of 1995 was repealed and replaced by the Legal Practice Act 28 of 2014 with effect from 1 November 2018. [35] Section 25(3) and (4) of the Legal Practice Act 28 of 2014, read with rule 20 of the rules of the South African Legal Practice Council, [36] provides for a prescribed certificate by the registrar of the division of the High Court in which an attorney was admitted and enrolled as an attorney to the effect that the attorney has the right to appear in the High Court, the Supreme Court of Appeal and/or the Constitutional Court. In terms of rule 20.6 of the rules of the South African Legal Practice Council every attorney who, at the date of coming into effect of the rule, [37] was in possession of a certificate issued in terms of s 4(2) of the (now repealed) Right of Appearance in Courts Act 62 of 1995 must, within six months of the date of coming into effect of the rule, lodge with the Council a copy of the certificate issued to him in terms of

that Act.

'Or, if a party sues or defends personally, by such party.' The right to act in person cannot, in general, extend to a juristic person; any pleading filed on its behalf must ordinarily be signed by an attorney and an advocate or an attorney who has been granted the right of appearance in the High Court in terms of s 4 of the Right of Appearance in Courts Act 62 of 1995. [38] In *Manong & Associates (Pty) Ltd v Minister of Public Works* [39] the Supreme Court of Appeal held that in rare and exceptional or at least unusual circumstances the general rule could be relaxed. In each instance the leave of the court has to be obtained beforehand. In this regard Ponnan JA stated: [40]

> 'I have expressly refrained from formulating a test for the exercise of the court's inherent power as I believe that such cases can confidently be left to the good sense of the judges concerned. Lest this be misconstrued as a tacit or general licence to unqualified agents, it needs be emphasised that in each such instance leave must be sought by way of a properly motivated, timeously lodged formal application showing good cause why, in that particular case, the rule prohibiting non-professional representation should be relaxed. Individual cases can thus be met by the exercise of the discretion in the circumstances of that case. It would thus be impermissible for a non-professional representative to take any step in the proceedings, including the signing of pleadings, notices or heads of argument (as occurred here), without the requisite leave of the court concerned first having been sought and obtained.'

Subrule (2): 'The title of the action.' For the citation of the relevant division of the High Court in the heading of pleadings, see Directive 3/2014 issued by the Chief Justice under GN 148 of 28 February 2014 (*GG* 37390 of 28 February 2014), which is reproduced in Volume 3, Part E1.

'Abbreviation is reasonably possible.' Care should, however, be taken that it appears clearly from the body of the summons who the actual parties to the action are, and in what capacity they are being sued. [41]

Subrule (3): 'Shall be divided into paragraphs.' Though the fact that a pleading is not duly subdivided has been held fatal, [42] the courts will not be over-technical about the matter. [43]

Subrule (4): 'Every pleading shall contain a clear and concise statement.' This subrule requires that the material facts relied upon must be set out both clearly and concisely in the pleading concerned. In *Maharaj's Coach and Bus Hire CC v Dealership Middelburg Man (Pty) Ltd* [44] Koen J found it regrettable that the allegations in the plaintiff's declaration were not helpful in crisply identifying the true issues in dispute between the parties and stated: [45]

> 'The rules regarding pleadings and practice require that the plaintiff's case be pleaded in separate distinct averments setting out in clear concise statements the material facts upon which it relies for the relief claimed. Instead, the declaration reads in places like extracts from the affidavits in the application, which it was conceded during argument to be. The declaration followed a narrative form, with reference to various annexures annexed thereto, which were invariably referred to with the injunction that "the contents of [the particular annexure] be incorporated herein as though specifically averred to." That is contrary to accepted practice. It is not expected of a court, even in application proceedings, to have to trawl through annexures to try and determine which portions of the annexures are relevant, and to identify the possible *facta probanda*.'

A pleading should not include extensive excerpts from and references to other documents. [46]

Rule 67A(2)*(c)* provides that in considering all relevant factors when awarding costs, the court may have regard to unnecessary or prolix drafting and unnecessary annexures.

'Of the material facts.' The necessity to plead material facts does not have its origin in the rules of court. It is fundamental to the judicial process that the facts have to be established. The court, on the established facts, applies the rules of law and draws conclusions as regards the rights and obligations of the parties. [47] A summons that propounds the plaintiff's own conclusions and opinions instead of the material facts is defective. [48] Facts and not evidence must be pleaded, [49] and the subrule makes it clear that material facts only should be pleaded. The distinction between *facta probanda* (the facts that had to be proved) and *facta probantia* (the facts that would prove those facts) should be kept in mind. [50] For the sake of clarity it is sometimes necessary to plead history, but this should be done with caution and unless the history is clearly severed from the cause of action the pleading may be rendered vague and

embarrassing. [51] Pleadings which are a '. . . rambling preview of the evidence proposed to be adduced at the trial' fall foul of the provisions of rule 18(4) and would be vague and embarrassing. [52]

'Upon which the pleader relies for his or her claim.' While a pleader's first duty is to allege the facts upon which he relies, his second duty is to set out the conclusions of law which, he claims, follow from the pleaded facts. Facts and conclusions of law must, however, be kept separate. [53]

The facts set out must constitute the premises for the relief sought, i e they must be such that the relief prayed for flows from them, and can properly be granted. Otherwise the summons will be excipiable as disclosing no cause of action. [54]

The plaintiff must also set out details of the relief he seeks. In other words, the summons must give a sufficient indication of the remedy sought by the plaintiff, so that the defendant knows what order the court is being asked to make against him. The plaintiff having specified one remedy as being the relief sought by him, he cannot at the conclusion of his case ask for different relief. The practice of adding an additional claim for 'further or alternative relief' will not assist a plaintiff who seeks relief of quite a different nature from that asked for in the summons. [55] Such a prayer, however, can be invoked to justify or entitle a party to an order in terms other than that set out in the summons where that order is clearly indicated in the pleadings and is established by satisfactory evidence. [56]

There is nothing to prevent a plaintiff from setting up more than one claim in the alternative, provided they do not prejudice or embarrass the defendant. [57] An alternative claim must be pleaded with the same clarity as if it stood alone. [58]

There is no general rule that a plaintiff who has two or more remedies at his disposal must elect at a given time which of them he intends to pursue, and that, having elected one, he is taken to have abandoned all others. Such a situation will arise only where the choice lies between two inconsistent remedies and the plaintiff commits himself unequivocally to one or other of them. Thus, the fact that a plaintiff, with a choice of a remedy available to him under a clause in a contract and a not necessarily inconsistent common-law remedy for damages for breach of contract, has pursued his claim for the former remedy does not mean that he has exercised an election to abandon the common-law remedy, in the absence of proof that he has either expressly or by conduct abandoned it. [59]

In terms of the so-called 'double-barrelled' procedure a plaintiff may claim implementation of an agreement and obtain

judgment therefor, and in the same action ask the court, should the defendant fail to comply with the court's order, to set aside the agreement and grant consequential relief. [60]

The requirement of consistency of allegations of fact is not confined to the summons standing alone. There must be no inconsistency between the summons and the reply, [61] or between a claim in reconvention and a plea in convention. [62]

It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case. [63]

See further the notes to rule 20(2) below.

'With sufficient particularity to enable the opposite party to reply thereto.' This subrule relates to the pleading of facts which make up either a claim, a defence or an answer. Such facts must be pleaded with sufficient particularity to enable the opposite party to reply thereto (and, in the case of a plea, to enable a plaintiff who considers an application for summary judgment to determine whether or not the defence as pleaded raises any issue for trial). Its purpose and function differs from that of subrule (10) which requires a claim for damages to be set out in such a manner as will enable the defendant reasonably to assess the *quantum* thereof. [64] It is a basic principle that a pleading should be so phrased that the other party may reasonably and fairly be required to plead thereto. [65] Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action must appear clearly from the factual allegations made. [66] Failure on the part of a pleader to set out the material facts on which he relies with sufficient particularity to enable the opposite party to reply thereto may result in the pleading concerned being deemed an irregular step in the proceedings. [67]

There is no exhaustive test to determine whether a pleading contains 'sufficient particularity' for the purposes of this subrule but it is essentially an issue of fact: a pleading contains sufficient particularity if it identifies and defines the issues in such a way that it enables the opposite party to know what they are. [68]

The degree of particularity will depend upon the circumstances of each case. Thus, for example, greater particularity will be required where claims are based upon the provisions of a detailed and complex contract, such as a construction contract, in which numerous clauses confer the right to additional payment in differing circumstances. [69] In such cases a pleader may be required to identify explicitly those clauses of the contract on which the cause of action is built. [70] If the plaintiff in such a case chooses to base his cause of action on some common-law ground (breach of contract, enrichment or delict), this should be made clear in his particulars of claim. [71]

Interest. See the *excursus* to rule 17 s v 'Interest' above. See also the notes to subrule (10) s v 'Reasonably to assess quantum thereof' below.

Subrule (5): 'When . . . a party denies an allegation of fact.' A plea should be clear and unequivocal. The effect of a denial is to put the fact denied in issue between the parties, and also all the necessary implications which flow from it, and to advise the plaintiff that he will be required to prove these at the trial. [72] For this reason the subrule requires a defendant who denies an allegation of fact in a previous pleading not to do so evasively but to answer the point of substance. [73] Thus, a general denial of a paragraph containing two or more allegations of fact may be embarrassing and if so will be struck out. [74]

A too literal traverse of the plaintiff's allegations may in fact fail to deal adequately with all the allegations. What is apparently one allegation may in reality amount to two or more, and in such cases, if the defendant merely repeats the plaintiff's allegation and prefixes it with either a negative or a denial, his traverse will be ambiguous, and may result in 'a negative pregnant', i e a denial cast in such a form as to imply an affirmative statement. [75] In order that every allegation may be specifically denied, care must be taken to analyse the plaintiff's allegations into its components. If it is clear from the rest of the plea that the allegations in the summons are being denied, a 'negative pregnant' will sometimes be allowed to stand. [76]

If the plaintiff's allegation is in the conjunctive, defendant's denial should be in the disjunctive. In other words, if the plaintiff uses the word 'and', the defendant in his denial should use the word 'or'; if the plaintiff uses 'all', the defendant should use 'any'. [77] The addition of the words 'or at all' to a denial may also avoid the danger of a pregnant negative. The defendant who wishes to avoid pleading a 'negative pregnant' is sometimes faced with the prospect of having to plead a long and cumbersome denial in its stead. To obviate this, a practice has developed whereby, if the plaintiff's allegation consists of a point of substance, amplified by details, it is not necessary for the plaintiff to traverse all the details expressly. He may simply deny the point of substance, and the rest is denied by necessary implication, [78] provided that the traverse of one allegation necessarily and unmistakably traverses another as well. [79]

Another practice which has been sanctioned, and which avoids the necessity for the pleader to copy out every allegation which he denies, is for the defendant to plead that 'each and every allegation' in a particular paragraph is denied 'as specifically as if herein set out and denied'. [80] While valid in some cases, this form of pleading cannot be resorted to in those cases where it leads to ambiguity or where a denial calls for some positive averment to supplement it. [81]

See further the notes to rule 22(2) below.

Subrule (6): 'Relies upon a contract.' If a plaintiff relies upon a contract, he is bound by the requirements of the subrule and is obliged, if possible, to give the information required in precise terms. [82] In *Moosa and Others NNO v Hassam* [83] Swain J, in directing the plaintiffs to remedy an irregularity in their particulars of claim by annexing a true copy of the written agreement on which they rely to the particulars of claim, *inter alia*, stated the following:

> 'Rule 18(6) speaks of a party who in his pleading "relies" on a contract or "part" thereof. A party clearly "relies upon a contract" when he uses it as a "link in the chain of his cause of action". *South African Railways and Harbours v Deal Enterprises (Pty) Ltd* 1975 (3) SA 944 (W) at 953A; and *Van Tonder v Western Credit Ltd* 1966 (1) SA 189 (C) at 193H.
>
> Although both of these cases were decided at a time when rule 18(6) made no provision for a true copy of the written agreements to be annexed to the pleading, the views of the learned judges, as to the meaning to be attached to the phrase in question, are still relevant and instructive.
>
> In the present case the respondents base their cause of action against the applicants upon the written agreement. The written agreement is a vital link in the chain of the respondents' cause of action against the applicants. In order for the respondents' cause of action to be properly pleaded, it is necessary for the written agreement relied upon to be annexed to the particulars of claim. In the absence of the written agreement the basis of the respondents' cause of action does not appear *ex facie* the pleadings.

> An allegation that a party is not in possession of the written agreement relied upon, constitutes an acknowledgment that the basis for the cause of action advanced is lacking, or that a link in the chain of the cause of action advanced is missing. Consequently, such an allegation as made in the present case [i e that "(t)he plaintiffs are not in possession of a signed copy of the . . . agreement, which to the best of the plaintiffs' knowledge, is in the possession of the thirty-fourth defendant"] does not

constitute compliance with the requirements of rule 18(6), nor does it excuse their non-compliance. In addition an allegation that the party has taken steps to obtain a copy, without success, or to annex an incomplete, or unsigned, draft thereof, would not for the same reason constitute compliance with the demands of rule 18(6), nor would it excuse their non-compliance.

It is therefore clear that a party who bases its cause of action upon a written agreement should obtain a true copy of the agreement before advancing its claim. However, this is not to say that a failure to annex a written agreement relied upon may never be condoned in terms of rule 27(3).

Good cause would have to be shown why the party concerned is unable, at that stage, to annex a copy of the written agreement relied upon. Relevant considerations would be the steps taken to obtain a copy of the written agreement and the prospects of the written agreement being obtained in the future. That a true copy will be available before the issues arising therefrom have to be determined will be of particular importance in this regard. In addition any prejudice to the opposing party caused by the failure to annex the agreement to the pleading would have to be considered. Of significance in this regard would be whether the pleading concisely and clearly sets out the terms relied upon in the written agreement upon which the cause of action is based, and is not excipiable. The above factors are not exhaustive and each case will have to be decided upon its individual merits.'

In *Dass and Others NNO v Lowewest Trading (Pty) Ltd* [84] Tshabalala JP held that non-compliance with rule 18(6) can be condoned in the absence of prejudice to the other party. [85]

In *Absa Bank Ltd v Zalvest Twenty (Pty) Ltd* [86] the plaintiff and the defendant entered into a written mortgage loan agreement. Ultimately the defendant defaulted and the plaintiff sought judgment against it. In its particulars of claim, the plaintiff alleged that it was unable to annex a copy of the loan agreement to its pleadings resulting from the fact that the document had been destroyed in a fire and no other copy of it could be found. The defendant excepted to the particulars of claim on the basis that rule 18(6) had not been complied with. The defendant contended that the import of rule 18(6) was that the inability of the plaintiff to annex a copy of the loan agreement to its particulars of claim resulted in it having no cause of action. [87] In dismissing the exception, Traverso DJP and Rogers J, *inter alia*, stated (*per* Rogers J): [88]

'The rules of court exist in order to ensure fair play and good order in the conduct of litigation. The rules do not lay down the substantive legal requirements for a cause of action, nor in general are they concerned with the substantive law of evidence. The substantive law is to be found elsewhere, mainly in litigation and the common law. There is no rule of substantive law to the effect that the party to a written contract is precluded

from enforcing it merely because the contract has been destroyed or lost. Even where a contract is required by law to be in writing (e g a contract for the sale of land or a suretyship), what the substantive law requires is that the written contract in accordance with the prescribed formalities should have been executed; the law does not say that the contract ceases to be of effect if it is destroyed or lost.

In regard to the substantive law of evidence, the original signed contract is the best evidence that a valid contract was concluded, and the general rule is thus that the original must be adduced. But there are exceptions to this rule, one of which is where the original has been destroyed or cannot be found despite a diligent search. In such a case the litigant who relies on the contract can adduce secondary evidence of its conclusion and terms (see *Singh v Govender Brothers Construction* 1986 (3) SA 613 (N) at 616J–617D). There are in modern law no degrees of secondary evidence (i e one does not have to adduce the "best" secondary evidence). While a copy of the lost original might be better evidence than oral evidence regarding the conclusion and terms of the contract, both forms of evidence are admissible once the litigant is excused from producing the original . . .

That then is the substantive law. The rules of court exist to facilitate the ventilation of disputes arising from substantive law. The rules of court may only regulate matters of procedure; they cannot make or alter substantive law (*United Reflective Converters (Pty) Ltd v Levine* 1988 (4) SA 460 (W) at 463B–E and authority there cited). The court is, moreover, not a slave to the rules of court. As has often been said, the rules exist for the courts, not the courts for the rules . . .

A rule which purported to say that a party to a written contract was deprived of a cause of action if the written document was destroyed or lost would be ultra vires. But the rules say no such thing. Rule 18(6) is formulated on the assumption that the pleader is able to attach a copy of the written contract. In those circumstances the copy (or relevant part thereof) must be annexed. Rule 18(6) is not intended to compel compliance with the impossible . . .

Rule 27(3) provides that the court may on good cause shown condone any non-compliance with the rules. I am by no means certain that a party in the position of the plaintiff in the present case needs to rely on rule 27(3). On a proper interpretation of rule 18(6) itself, there is arguably a necessary implication that a copy need not be attached if it is impossible for the pleader to do so, though to avoid an objection to the particulars of claim the pleader should explain the inability. To say that the court could in its discretion under rule 27(3) condone the non-annexing of a copy (in circumstances where the plaintiff is unable to attach a copy) implies that the court could notionally in such circumstances *refuse* to condone the non-annexing. I rather doubt whether a rule conferring such a power would be valid.

However, I need not finally decide that point because, if it is unsound, rule 27(3) confers the necessary power of condonation . . .

The defendants' counsel placed strong reliance on the judgment of Swain J in *Moosa* . . .

The *Moosa* case is for several reasons distinguishable from the present one. Firstly, the defendants in *Moosa* did not contend by way of exception (as the defendants during the present case) that the plaintiffs lack a cause of action because they were unable to annex a copy of the written agreement; they contended that the failure to annex the agreement was an irregular step, and they launched an application on affidavit to make good that contention. The court was placed in possession of information on affidavit which indicated that the plaintiffs were indeed in possession of a copy of the agreement. Second,

the plaintiffs in *Moosa* did not, as the plaintiffs have done in the present case, seek condonation for the failure to annex a copy of the agreement. Third, the explanation offered by the plaintiffs in *Moosa* was a bald allegation that they were not in possession of a copy of the agreement, whereas in the present case the plaintiff has alleged that the mortgage loan agreement was destroyed in a fire on a specified date and that despite a diligent search the plaintiff has been unable to find a copy of the agreement. Given the nature of the exception proceedings, the plaintiff's allegation as to the destruction of the mortgage loan agreement and the inability to locate a copy must be accepted a true.

The present case can thus be distinguished from *Moosa*. The latter case is not authority for the proposition that a plaintiff is deprived of its cause of action merely because it is unable to annex a copy of the agreement to its pleading. I have no difficulty in accepting the correctness of Swain J's ultimate conclusion in the rule 30 application which served before him, having regard to the particular facts disclosed in the affidavits. However, there are passages in his judgment which suggest that rule 18(6) applies even where it is impossible for the plaintiff to annex a copy of the written agreement on which he relies; that even in such a case the plaintiff requires condonation in terms of rule 27(3); and that the court might refuse condonation if it appeared, for example, that a true copy of the agreement would not be available by the time of the trial. I respectfully consider that this is going too far. If it is impossible for the plaintiff to produce a written contract or a copy thereof, the law allows him to prove the execution and terms of the written contract by other evidence. A rule of procedure cannot deprive the plaintiff of his cause of action or of his right to adduce secondary evidence of the contract, though the rules would still require the plaintiff to plead with appropriate particularity the conclusion of the contract and its terms.

I also, with respect, disagree with the learned judge's proposition that "(i)n the absence of the written agreement the basis of the [plaintiffs'] cause of action does not appear ex facie the pleadings" (para 18). If a plaintiff pleads the conclusion of a written contract and the terms relevant to his cause of action, the cause of action will appear ex facie the particulars of claim. That, after all, is how causes of action based on written contracts were legitimately pleaded prior to the amendment of rule 18(6) in 1987, at a time when there was no procedural requirements to annex the written contract. What is true is that since

1987 a plaintiff who fails to annex the written contract will (at least in the absence of a properly pleaded explanation) be in breach of rule 18(6).

To the extent that the plaintiff requires the condonation sought in para 4.5 of the particulars of claim, that request is not before us. If the defendants consider that condonation is necessary and, if they wish to oppose condonation, a court could give procedural directions for the filing of affidavits. Alternatively the request for condonation in the particulars of claim could be tried as a separate issue in terms of rule 33(4). However, and unless the plaintiff's allegations concerning the loss of the document by way of fire are untrue, the only other persons who are likely to be in possession of a copy of the mortgage loan agreement are the defendants themselves. At this stage we do not know that the defendants do *not* have a copy of the agreement. If they do have a copy of the agreement, they would obviously receive short shrift in opposing condonation. If they, like the plaintiff, do not have a copy, I have already explained why in my view the plaintiff would not be non-suited. This would either be because rule 18(6) does not apply to such a case or because condonation in terms of rule 27(3) could not properly be refused . . .

The judges of this division (and no doubt of other divisions) will be very familiar with the allegations made by the plaintiff in the present case regarding the destruction of documents in the fire which took place on 28 August 2009. Hundreds if not

thousands of default and summary judgments have been granted in favour of this particular plaintiff where it has made similar allegations. While this does not affect the principle, it does highlight the absurdity of the defendants' contention, implying as it does that a very large part of the plaintiff's debtors book (running no doubt to billions of rands) was, overnight, rendered irrecoverable merely because the plaintiff's documents were destroyed in the fire. It is gratifying to be able to conclude that the law is not such an ass.'

In *Nedbank Ltd v Yacoob* [89] the appellant, in respect of its claim for moneys lent and advanced to the respondent, had not attached to its particulars of claim a copy of the actual credit agreement it sought to rely on; instead, explaining that it could not locate the original agreement, it attached its pro forma standard terms, and pleaded the salient terms thereof. The magistrate's court held, based on rule 6(6) of the magistrates' courts rules (which is the equivalent of rule 18(6)), that the appellant's claim, in light of the failure to attach a true copy of the agreement to its particulars of claim, was not capable of proper proof or pleading, absent condonation, and dismissed the appellant's request for default judgment. On appeal the key questions to be considered were whether a plaintiff in the predicament of the appellant could still proceed to claim under the missing contract; and if so, what processes and principles applied to the making of such a claim, including whether an application for condonation was necessary. The full bench, in upholding the appeal, held that —

(a) the substantive law of evidence prescribed that the original signed contract was the best evidence that a valid contract was concluded and the general rule was thus that the original had to be produced. But, if it was impossible for the plaintiff to produce the written contract or a copy thereof, substantive law allowed them to plead and prove the conclusion of the contract and its terms by way of secondary evidence. A rule of procedure such as rule 6(6) of the magistrates' courts rules (or rule 18(6)) could not be construed to deprive the plaintiff of their cause of action or of their right to adduce secondary evidence of the contract; [90]

(b) provided a plaintiff pleaded the conclusion of the contract and the material terms, the particulars of claim would disclose a cause of action. The failure to attach a contract would, in the absence of a properly pleaded explanation for such failure, be in breach of the procedural rules pertaining to pleadings — but this did not deprive the pleader of a cause of action. In the present case, the appellant had pleaded a cause of action; [91]

(c) the process to be adopted where the pleader was unable to attach the contract on which the claim was founded was fact-specific. At the very least, the reason for this inability should be fully pleaded. The date, place, parties and circumstances of the conclusion of the contract should also be properly set out to the extent possible as these were procedural requirements. It was important also that the salient terms relied on be properly pleaded. The manner in which the plaintiff would seek to establish the terms was also required to be fully pleaded. If this was not properly done, the pleadings might be attacked as excipiable for being vague or irregular. [92] It was not necessary for condonation to be applied for and granted for the matter to proceed. [93]

'The contract is written or oral and when, where and by whom it was concluded.' Though the subrule does not in terms refer to the case where the contract relied upon is implied or tacit, a party could hardly avoid disclosure of the fact that he is relying upon a tacit contract.

It appears to be generally accepted that a party who seeks to rely on a contract which was tacitly concluded, must specifically allege that the contract relied upon is a tacit one. [94] In the absence of such allegation, it will be assumed that the contract relied upon was expressly concluded. [95] A party who relies upon a tacit contract is obliged to set out the facts and circumstances from which the contract is inferred. [96]

'Or of the part relied on.' If a party annexes part of a document to a pleading, his opponent is entitled to assume that he will rely only on that portion. [97]

Subrule (7): 'An alleged implied term.' The expression 'implied term' is an ambiguous one in that it is often used to denote at least two distinct concepts. [98] It is, on the one hand, used to describe an unexpressed provision of a contract which the law imports therein. [99] Such a term must be pleaded but it is not necessary to plead the facts giving rise to the term because it is a legal question whether or not the term is to be implied. [100] The expression is, on the other hand, also used to denote 'an unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the court from the express terms of the contract and the surrounding circumstances'. [101] The latter is sometimes described as a 'tacit' term, a description approved by the Appellate Division. [102] In *Food and Allied Workers Union v Ngcobo NO* [103] the Constitutional Court stated the following as regards a tacit term:

'A tacit term is an unspoken provision of the contract. It is one to which the parties agree, though without saying so explicitly. The test for inferring a tacit term is whether the parties, if asked whether their agreement contained the term, would immediately say, "Yes, of course that's what we agreed." Before a court can infer a tacit term, it must be satisfied that there is a necessary implication that they intended to contract on that basis.'

It is submitted that within the present context the expression is used in the sense of a 'tacit' term — in the Afrikaans text the term 'stilswyende bepaling' is used. This subrule accordingly relates to a tacit term in an express contract. [104] In other words, whereas a plaintiff who relies upon a tacit term in an express contract need not set out the circumstances from which the alleged term can be inferred, a plaintiff who relies upon a tacit contract must set out the facts and circumstances from which the contract is inferred. [105] It has been held that whilst it is correct

that this subrule provides that it shall not be necessary in any pleadings to state the circumstances from which an alleged implied term can be inferred, this clearly cannot mean that any pleading containing a cause of action or defence based on the existence of a tacit term cannot be the subject of a successful exception and must invariably go to trial, since this would render obviously specious claims or defences in contractual disputes, exception proof. [106]

Subrule (8): 'Where time, date and place or any other person or persons are relevant.' This subrule would particularly apply to claims for divorce based on adultery in which a plaintiff is required to set out full and specific details as to times, places and partners. [107]

'Give details thereof in the relevant pleading.' Though no rule deals specifically with the procedure to be employed in divorce actions, this subrule and rules 18(9), 31(1), 43 and 44 clearly contemplate action by way of summons. [108]

Subrule (9): 'Claiming division, transfer or forfeiture of assets.' Division and transfer of assets upon divorce or dissolution of marriage by death can be claimed in terms of s 7(3)–(6) of the Divorce Act 70 of 1979; [109] forfeiture of matrimonial benefits can be claimed in terms of s 9 of the Divorce Act 70 of 1979 and s 9 of the Matrimonial Property Act 88 of 1984.

Subrule (10): 'Reasonably to assess the quantum thereof.' The requirements of this subrule, and the purpose they serve, are different from those of subrule (4) which requires the facts which make up a claim or defence to be set out with sufficient particularity to enable the opposite party to reply thereto. [110] The subrule contains a general provision which applies to all claims for damages: the claim must be set out in such a manner as will enable the defendant reasonably to assess the *quantum* thereof. The subrule stipulates the minimum particulars to be furnished by the plaintiff with regard to personal injuries to enable the defendant reasonably to estimate the *quantum* of the plaintiff's damages and plead thereto. [111] The plaintiff is not required to set his claim out in such a manner as will enable the defendant to ascertain whether or not the plaintiff's assessment of the *quantum* is correct; the defendant has

a duty himself to work out what is a reasonable assessment of the damages sustained by the plaintiff. [112] It is important that the requirements of subrule 18(10) be met, as the provisions of subrule 18(12) and rule 30 enable the defendant to apply for a pleading to be set aside if the required particulars were not furnished. [113]

A South African court has the power to give a judgment, including a judgment for delictual damages, in a foreign currency. [114] Thus, a plaintiff is entitled in its statement of claim to seek damages for loss incurred expressed in a foreign currency. [115] The court will exercise its power to do so when the loss suffered by the plaintiff either in the sense of money actually expended or in the sense of money not received was suffered in a foreign currency; i e a claimant should be able to recover damages in the currency in which the loss had been 'felt'. [116] Such an award can be satisfied in South Africa by payment in the foreign currency or by payment of its equivalent in rand when paid, as any other conversion date could render meaningless the award in foreign currency. [117]

Section 2A of the Prescribed Rate of Interest Act 55 of 1975 provides for and regulates the payment of interest on unliquidated debts. Section 2A reads as follows:

> **'Interest on unliquidated debts**
>
> 2A. (1) Subject to the provisions of this section the amount of every unliquidated debt as determined by a court of law, or an arbitrator or an arbitration tribunal or by agreement between the creditor and the debtor, shall bear interest as contemplated in section 1.
>
> (2)*(a)* Subject to any other agreement between the parties the interest contemplated in subsection (1) shall run from the date on which payment of the debt is claimed by the service on the debtor of a demand or summons, whichever date is the earlier.
>
> *(b)* In the case of arbitration proceedings and subject to any other agreement between the parties, interest shall run from the date on which the creditor takes steps to commence arbitration proceedings, or any of the dates contemplated in paragraph *(a)*, whichever date is the earlier.

> (3) The interest on that part of a debt which consists of the present value of a loss which will occur in the future shall not commence to run until the date upon which the quantum of that part is determined by judgment, arbitration or agreement and any such part determined by arbitration or agreement shall for the purposes of this Act be deemed to be a judgment debt.
>
> (4) Where a debtor offers to settle a debt by making a payment into court or a tender and the creditor accepts the payment or tender, or a court of law awards an amount not exceeding such payment or tender, the running of interest shall be interrupted from the date of the payment into court or the tender until the date of the said acceptance or award.
>
> (5) Notwithstanding the provisions of this Act but subject to any other law or an agreement between the parties, a court of law, or an arbitrator or an arbitration tribunal may make such order as appears just in respect of the payment of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which interest shall run.
>
> (6) The provisions of section 2(2) shall apply *mutatis mutandis* to interest recoverable under this section.'

The word 'demand' in s 2A(2)*(a)* of the Prescribed Rate of Interest Act 55 of 1975 means a written demand setting out the creditor's claim in such a manner as to enable the debtor reasonably to assess the *quantum* thereof. [118]

See further the *excursus* to rule 17 s v 'Interest' above.

'Provided that a plaintiff suing for damages for personal injury shall.' This subrule makes it clear that the greater particularity required in terms of the proviso applies only to claims for damages for personal injuries. [119] Though greater particularity is required, it does not mean by payment of it that a plaintiff must ignore the provisions of subrule (4) which requires every pleading to contain 'a clear and concise statement of the material facts on which the pleader relies for his claim'. [120]

Subrule (12): 'Shall be entitled to act in accordance with rule 30.' Rule 30 deals with irregular proceedings and failure to comply with the provisions of rule 18 is in terms of this subrule deemed to be an irregular step. [121] If a pleading both fails to comply with rule 18 and is vague and embarrassing, the defendant has a choice of remedies: he may either bring an application in terms of rule 30 or raise an exception in terms of rule 23(1). [122]

The complaints that the pleading fails to comply with rule 18 and is vague and embarrassing remain, however, separate and distinct complaints requiring different adjudication. [123]

If the pleading does not comply with the provisions of rule 18 requiring specified particulars to be set out therein, the prejudice required for the setting aside of the pleading in terms of rule 30 has prima facie been established. [124]

1 It lies outside the scope of this work to provide the pleader with a practical guide to the drafting of pleadings, as to which see, *inter alia*, *Amler's Precedents of Pleadings*. Examples of the citation of parties are, however, given in the *excursus* to rule 17 s v 'Parties' above.

2 *Hlophe v Freedom Under Law, and Other Matters* 2022 (2) SA 523 (GJ) (a decision of the full court) at paragraphs [17], [25], [28] and [30].

3 *Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA) at paragraph [11]; *Biyela v Minister of Police* 2023 (1) SACR 235 (SCA) at paragraph [8]; and see Jacob & Goldrein *Pleadings: Principles and Practice* 1.

4 *Benson and Simpson v Robinson* 1917 WLD 126; *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 at 198; *Durbach v Fairway Hotel Ltd* 1949 (3) SA 1081 (SR) at 1082; *Nieuwoudt v Joubert* 1988 (3) SA 84 (SE) at 89J; *FPS Ltd v Trident Construction (Pty) Ltd* 1989 (3) SA 537 (A) at 541J; *Beira v Beira* 1990 (3) SA 802 (W) at 809B; *Trope v South African Reserve Bank* 1992 (3) SA 208 (T) at 210G; *Impredfed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107C–E; *Nasionale Aartappel Koöperasie Bpk v Price Waterhouse Coopers Ing* 2001 (2) SA 790 (T) at 799D–H; *Arun Property Development (Edms) Bpk v Stad Kaapstad* 2003 (6) SA 82 (C) at 90H–91A; *Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA) at paragraph [11]; *Presidency Property Investments (Pty) Ltd v Patel* 2011 (5) SA 432 (SCA) at 440A–B; *Gusha v Road Accident Fund* 2012 (2) SA 371 (SCA) at 374C–D; *Imvula Quality Protection (Pty) Ltd v Loureiro* 2013 (3) SA 407 (SCA) at 423D–E; *Minister of Agriculture and Land Affairs v De Klerk* 2014 (1) SA 212 (SCA) at 223G–H; *Du Toit obo Dikeni v Road Accident Fund* 2016 (1) SA 367 (FB) at 381A–C; *Molusi v Voges NO* 2016 (3) SA 370 (CC) at 381H–382B; *Makhwelo v Minister of Safety and Security* 2017 (1) SA 274 (GJ) at 276G–H; *De Klerk v Ferreira* 2017 (3) SA 502 (GP) at 536F; *Flemming v MMI Group* (unreported, GP case no 73982/16 dated 2 October 2017) at paragraphs 5–9; *Annex Distribution (Pty) Ltd v Bank of Baroda* 2018 (1) SA 562 (GP) at 578F; *Phakula v Minister of Safety and Security* (unreported, SCA case no 454/19 dated 23 September 2020) at paragraph [13]; *Barnard v De Klerk* (unreported, ECPE case no 2015/2019 dated 22 October 2020) at paragraph [7]; *Bendrew Trading v Sihle Property Developers and Plant Hire* (unreported, MM case no 1857/2020 dated 13 August 2021) at paragraph [20]; *Bareon Projects Logistics CC v Ivan Stols Vervoer CC* (unreported, FB case no 2646/2021 dated 26 November 2021) at paragraph [21]; *Biyela v Minister of Police* 2023 (1) SACR 235 (SCA) at paragraph [8]; *VDN Carriers and Logistics CC v Gennao Logistics CC* (unreported, KZP case no AR13/22 dated 18 November 2022 — a decision of the full court) at paragraph [36]; *Lance Dickson Construction CC v Commissioner for the South African Revenue Service* (unreported, WCC case no A211/2021 dated 31 January 2023 — a decision of the full court) at paragraph 39; *M.M v MEC for Health; Eastern Cape* (unreported, SCA case no 580/2022 dated 12 October 2023) at paragraph [28].

5 *Trope v South African Reserve Bank* 1992 (3) SA 208 (T) at 210G.

6 *Nyandeni v Natal Motor Industries Ltd* 1974 (2) SA 274 (D) at 279B; *Kali v Incorporated General Insurances Ltd* 1976 (2) SA 179 (D) at 182A; *Nieuwoudt v Joubert* 1988 (3) SA 84 (SE) at 89J–90A; *Courtney-Clarke v Bassingthwaighte* 1991 (1) SA 684 (Nm) at 689J; *Impredfed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107G–H; *Stead v Conradie* 1995 (2) SA 111 (A) at 122F–H; *Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA) at paragraph [11]; *Minister of Agriculture and Land Affairs v De Klerk* 2014 (1) SA 212 (SCA) at 223G–H; *Du Toit obo Dikeni v Road Accident Fund* 2016 (1) SA 367 (FB) at 381A–C; *Molusi v Voges NO* 2016 (3) SA 370 (CC) at 381H–382B; *Phakula v Minister of Safety and Security* (unreported, SCA case no 454/19 dated 23 September 2020) at paragraph [13]; *Damons v City of Cape Town* 2022 (10) BCLR 1202 (CC) at paragraphs [117]–[118]; *Biyela v Minister of Police* 2023 (1) SACR 235 (SCA) at paragraph [8]; *MJK v IIK* 2023 (2) SA 158 (SCA) at paragraph [21]; *VDN Carriers and Logistics CC v Gennao Logistics CC* (unreported, KZP case no AR13/22 dated 18 November 2022 — a decision of the full court) at paragraph [36]; *Lance Dickson Construction CC v Commissioner for the South African Revenue Service* (unreported, WCC case no A211/2021 dated 31 January 2023 — a decision of the full court) at paragraph 39.

7 *Bareon Projects Logistics CC v Ivan Stols Vervoer CC* (unreported, FB case no 2646/2021 dated 26 November 2021) at paragraph [21].

8 *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 at 198; *Shill v Milner* 1937 AD 101 at 105; *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) at 433; *Ellisons Electrical Engineers Ltd v Barclay* 1970 (1) SA 158 (RA) at 161; *Koen v Baartman* 1974 (3) SA 419 (C) at 423F; *Weepner v Kriel* 1977 (4) SA 212 (C) at 217H; *Impredfed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 108C–E; *Sentrachem Bpk v Wenhold* 1995 (4) SA 312 (A) at 319D–I; *Chenia EC and Sons CC v Lamé & Van Blerk* 2006 (4) SA 574 (SCA) at 579F–580G; *Presidency Property Investments (Pty) Ltd v Patel* 2011 (5) SA 432 (SCA) at 440A–C and 440G–I; *Imvula Quality Protection (Pty) Ltd v Loureiro* 2013 (3) SA 407 (SCA) at 423D–E; *Du Toit obo Dikeni v Road Accident Fund* 2016 (1) SA 367 (FB) at 381A–C; *De Klerk v Ferreira* 2017 (3) SA 502 (GP) at 536F; *Loskop Landgoed Boerdery (Pty) Ltd v Petrus Moeleso* (unreported, SCA case no 390/2021 dated 12 April 2022) at paragraph [18]; *Advertising Regulatory Board NPC v Bliss Brands (Pty) Ltd* 2022 (4) SA 57 (SCA) at paragraphs [9]–[10], where reference is made to *Fischer v Ramahlele* 2014 (4) SA 614 (SCA) at paragraph [13] (affirmed by the Constitutional Court in *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at paragraph [234] and in *Damons v City of Cape Town* 2022 (10) BCLR 1202 (CC) at paragraph [117]); *Unit 15 Rondevoux CC t/a Done Rite Services v Makgabo* (unreported, GJ case no A3075/2021 dated 1 September 2022 — a decision of the full bench) at paragraph 18; *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd* 2023 (4) SA 325 (CC) at paragraph [277]; *M.M v MEC for Health; Eastern Cape* (unreported, SCA case no 580/2022 dated 12 October 2023) at paragraph [28].

9 *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 at 198; *Shill v Milner* 1937 AD 101 at 105; *Impredfed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 108E; *Stead v Conradie* 1995 (2) SA 111 (A) at 122B; *De Klerk v Ferreira* 2017 (3) SA 502 (GP) at 536F.

10 *Shill v Milner* 1937 AD 101 at 105; *Odendaal v Van Oudtshoorn* 1968 (3) SA 433 (T) at 436B–E; *Koen v Baartman* 1974 (3) SA 419 (C) at 423F; *Weepner v Kriel* 1977 (4) SA 212 (C) at 217H; *Bowman NO v De Souza Roldao* 1988 (4) SA 326 (T) at 331H.

11 *MJK v IIK* 2023 (2) SA 158 (SCA) at paragraph [21]; and see *Minister of Police v Gqamane* 2023 (2) SACR 427 (SCA) at paragraph [13]; *Road Accident Fund v MKM obo KM* 2023 (4) SA 516 (SCA) at paragraph [55]; *M v M* (unreported, SCA case no 022/2022 dated 26 May 2023) at paragraph [33]; *Discovery Insure Limited v Masindi* (unreported, SCA case no 534/2022 dated 14 June 2023) at paragraph [35]; *Road Accident Fund v Taylor and Related Matters* 2023 (5) SA 147 (SCA) at paragraphs [30]–[31]
Heads of argument are not evidence. They should contain argument based on the pleadings and evidence/affidavits in opposed applications. It is irregular to raise a potential defence for the first time in heads of argument, especially where the facts have not been fully canvassed (*Janse van Rensburg v Obiang* 2023 (3) SA 591 (WCC) at paragraphs [22]–[24]). See also *Montle and Neo Transport Service v Engen Petroleum Limited* (unreported, WCC case no 20420/2022 dated 18 August 2023) at paragraphs 41–45.

12 *Middleton v Carr* 1949 (2) SA 374 (A) at 386. See also *Alphedie Investments (Pty) Ltd v Greentops (Pty) Ltd* 1975 (1) SA 161 (T) at 162A; *Woodways CC v Vallie* 2010 (6) SA 136 (WCC) at 142A–B.

13 *Matambanadzo Bus Service (Pvt) Ltd v Magner* 1972 (1) SA 198 (RA) at 199H–200A; *Media 24 (Pty) Ltd v Nhleko* (unreported, SCA case no 109/22 dated 29 May 2023) at paragraph [18].

14 *Shill v Milner* 1937 AD 101; *Vos v Cronje and Duminy* 1947 (4) SA 873 (C) at 880; *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) at 433; *Van Mentz v Provident Assurance Corporation of Africa Ltd* 1961 (1) SA 115 (A) at 122; *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 45D; *Schnehage v Bezuidenhout* 1977 (1) SA 362 (O) at 367–8; *Mastlite (Pty) Ltd v Stavracopoulos* 1978 (3) SA 296 (T) at 299; *PAF v SCF* 2022 (6) SA 162 (SCA) at paragraph [31].

15 *Middleton v Carr* 1949 (2) SA 374 (A) at 386; *Kerksay Investments (Pty) Ltd v Randburg Town Council* 1997 (1) SA 511 (T) at 521B–C; *Woodways CC v Vallie* 2010 (6) SA 136 (WCC) at 142A–B; *Hanger v Regal* 2015 (3) SA 115 (FB) at 118D–E; *Du Toit obo Dikeni v Road Accident Fund* 2016 (1) SA 367 (FB) at 381A–C; *Unit 15 Rondevoux CC t/a Done Rite Services v Makgabo* (unreported, GJ case no A3075/2021 dated 1 September 2022 — a decision of the full bench) at paragraph 18; *Minister of Police v Gqamane* 2023 (2) SACR 427 (SCA) at paragraph [13]; *M.M v MEC for Health; Eastern Cape* (unreported, SCA case no 580/2022 dated 12 October 2023) at paragraph [28].

16 1925 AD 173 at 198.

17 Unreported, SCA case no 580/2022 dated 12 October 2023 at paragraph [28].

18 *Long Oak Ltd v Edworks (Pty) Ltd* 1994 (3) SA 370 (SE) at 373J–374A. Similar considerations apply in delictual claims where the plaintiff's own evidence furnishes a basis for a defence which has not been pleaded (*Stacey v Kent* 1995 (3) SA 344 (E) at 352A–B).

19 *Goodgold Jewellery (Pty) Ltd v Brevadau* 1992 (4) SA 474 (W) at 479H–480B; *Long Oak Ltd v Edworks (Pty) Ltd* 1994 (3) SA 370 (SE) at 374B.

20 *F & I Advisors (Edms) Bpk v Eerste Nasionale Bank van SA Bpk* 1999 (1) SA 515 (A) at 524H.

21 *Gcezengana v SA Eagle Insurance Co Ltd* 1995 (2) SA 69 (TkGD) at 70F–G.

22 Rule 18(12); and see *Suliman v Karodia* 1926 WLD 102; *Barclays Bank v Pitje* 1958 (4) SA 670 (T); *Western Bank Bpk v De Beer* 1975 (3) SA 772 (T); *Zeda Car Leasing (Pty) Ltd t/a Avis Fleet Services v Pillay* 2007 (3) SA 89 (D).

23 *Plascon-Evans Paints (Transvaal) Ltd v Virginia Glass Works (Pty) Ltd* 1983 (1) SA 465 (O); and see *Minister van Wet en Orde v Molaolwa* 1986 (3) SA 900 (NC).

24 *Bowness v Du Preez* (1889) 3 SAR 74. Under rule 7(1) a power of attorney need not be produced but if his authority is challenged the attorney will have to satisfy the court that he is authorized to act.

25 *Schewe v Schewe* 1909 TH 149. See also *Donovan v Bevan* 1909 TS 723; *Estate Amod Jeewa v Kharwa* (1911) 32 NLR 371.

26 Section 33(1)*(b)* of the Legal Practice Act 28 of 2014; and see *Meyer v Meyer* 1993 (1) SA 704 (SE).

27 *Motswai v Road Accident Fund* 2013 (3) SA 8 (GSJ) at 14H.

28 *Motswai v Road Accident Fund* 2013 (3) SA 8 (GSJ) at 15B–I and the authorities there referred to.

29 *Motswai v Road Accident Fund* 2013 (3) SA 8 (GSJ) at 15E.

30 *Motswai v Road Accident Fund* 2013 (3) SA 8 (GSJ) at 15I–J and 25C–E.

31 1996 (2) SA 550 (C) at 551H–I. See also rule 23(O) of the Joint Rules of Practice for the High Courts of the Eastern Cape in Volume 3, Part F2.

32 2007 (3) SA 89 (D) at 94D–G.
33 2011 (6) SA 225 (WCC) at 227B–D, 228E–229B and 230F–I.
34 2012 (5) SA 526 (KZD) at 532F–H, 533E–G, 534B, 535G–536H and 537B–E. See also Vuyo Mkwibiso 'Right of attorneys to appear in court: What rights have been extended?' 2012 (September) *De Rebus* 18–19.
35 Proc R31 published in *GG* 42003 of 29 October 2018.
36 The rules were published under GenN 401 in *GG* 41781 of 20 July 2018 and amended by GenN 812 in *GG* 42127 of 21 December 2018.
37 The rules were dated 20 July 2018, published under GenN 401 in *GG* 41781 of 20 July 2018 and amended by GenN 812 in *GG* 42127 of 21 December 2018.
38 *Yates Investments (Pty) Ltd v Commissioner for Inland Revenue* 1956 (1) SA 364 (A); *Ramsey v Fuchs Garage (Pty) Ltd* 1959 (3) SA 949 (C) at 950E; *SA Cultivators (Pty) Ltd v Flange Engineering Co (Pty) Ltd* 1962 (3) SA 156 (T); *Dormehl's Garage (Pty) Ltd v Magagula* 1964 (1) SA 203 (T); *Arma Carpet House (Johannesburg) (Pty) Ltd v Domestic & Commercial Carpet Fittings (Pty) Ltd* 1977 (3) SA 448 (W); *Hallowes v The Yacht Sweet Waters* 1995 (2) SA 270 (D).
39 2010 (2) SA 167 (SCA) at 172G–H; and see *Investec Securities (Pty) Ltd v Corwil Investments Holdings (Pty) Ltd* (unreported, GJ case no 2021/11126 dated 20 July 2022).
40 *Manong & Associates (Pty) Ltd v Minister of Public Works* 2010 (2) SA 167 (SCA) at 174C–E.
41 See, for example, such cases as *Geerdts v Crawford* 1953 (2) SA 759 (N); *Bassett v Platt* 1954 (1) SA 264 (N).
42 *Knott v Union Government* (1912) 33 NLR 48.
43 See *Lind v Spicer Bros (Africa) Ltd* 1917 AD 147.
44 Unreported, KZP case no 14058/2018P dated 10 August 2022.
45 At paragraph [15] (footnotes omitted).
46 See *Heugh v Gubb* 1980 (1) SA 699 (C) at 702A–E and *Doyle v Sentraboer (Co-operative) Ltd* 1993 (3) SA 176 (SE) at 181E (where eight medical reports running to some 52 pages annexed to a particulars of claim could not be described as 'clear and concise'). In *Grindrod (Pty) Ltd v Delport* 1997 (1) SA 342 (W) an auditor's report of 32 pages was held to be necessary for the purposes of rule 18(10) (at 343G–347A).
47 See *Mtwazi v MEC for Education* (unreported, ECB case no 472/2020 dated 5 December 2023) at paragraph [14] where this view is referred to with approval.
48 *Buchner v Johannesburg Consolidated Investment Co Ltd* 1995 (1) SA 215 (T) at 216I; *Scheffer Supplier CC v Alorin International (Pty) Ltd* (unreported, GP case no 71836/2016 dated 3 August 2018) at paragraph [7]; *Mtwazi v MEC for Education* (unreported, ECB case no 472/2020 dated 5 December 2023) at paragraph [14].
49 *Jones v Hamilton & Haw* (1886) 5 EDC 222 at 224; *Moaki v Reckitt & Colman (Africa) Ltd* 1968 (3) SA 98 (A) at 102A.
50 *Nasionale Aartappel Koöperasie Bpk v Price Waterhouse Coopers Ing* 2001 (2) SA 790 (T) at 797G–I and 798C–D; *Deltamune (Pty) Ltd v Tiger Brands Limited* [2022] 2 All SA 26 (SCA) at paragraph [25]. On the importance of the distinction, see also *King's Transport v Viljoen* 1954 (1) SA 133 (C) at 138A–139G, cited with approval in *Makgae v Sentraboer (Koöperatief) Bpk* 1981 (4) SA 239 (T) at 244F–H; *Minister of Law and Order v Thusi* 1994 (2) SA 224 (N) at 226G–I. On the distinction, see also the notes to rule 23(1) s v 'Or lacks averments which are necessary to sustain an action' below.
51 *Myburgh, Krone en Kompagnie Bpkt (in liquidation) v Ko-operatieve Wijnbouwers Vereeniging van Zuid-Afrika Bpkt* 1923 CPD 389; *Secretary for Finance v Esselmann* 1988 (1) SA 594 (SWA) at 597H.
52 *Moaki v Reckitt and Colman (Africa) Ltd* 1968 (3) SA 98 (A) at 102A–B; *Sukdev v Sheriff Inanda Area 1* (unreported, KZD case no D918/2019 dated 14 June 2023) at paragraph [18].
53 *Prinsloo v Woolbrokers Federation Ltd* 1955 (2) SA 298 (N) at 299E.
54 *Buchner v Johannesburg Consolidated Investment Co Ltd* 1995 (1) SA 215 (T) at 217E; and see *Stephens v Liepner* 1938 WLD 30 at 35; *Graham v McGee* 1949 (4) SA 770 (D) at 778; *Palmer v President Insurance Co Ltd* 1967 (1) SA 673 (O) at 679A–E; *Trope v South African Reserve Bank* 1992 (3) SA 208 (T) at 210H.
55 *Queensland Insurance Co Ltd v Banque Commerciale Africaine* 1946 AD 272 at 286; *Hirschowitz v Hirschowitz* 1965 (3) SA 407 (W) at 409A; *Port Nolloth Municipality v Xhalisa; Luwalala v Port Nolloth Municipality* 1991 (3) SA 98 (C) at 112D–F; and see *Somali Association of South Africa v Refugee Appeal Board* 2022 (3) SA 166 (SCA) at paragraph [97] (a case concerning substantive relief not foreshadowed in the notice of motion in the court *a quo*, sought on appeal). In *Johannesburg City Council v Bruma Thirty-Two (Pty) Ltd* 1984 (4) SA 87 (T) at 93F Coetzee J stated that, in modern practice, the prayer for alternative relief is 'redundant and mere verbiage'. See, however, *Luzon Investments (Pty) Ltd v Strand Municipality* 1990 (1) SA 215 (C) at 215H; *Port Nolloth Municipality v Xhalisa; Luwalala v Port Nolloth Municipality* 1991 (3) SA 98 (C) at 112D–G.
56 *Port Nolloth Municipality v Xhalisa; Luwalala v Port Nolloth Municipality* 1991 (3) SA 98 (C) at 112D–G; *Combustion Technology (Pty) Ltd v Technoburn (Pty) Ltd* 2003 (1) SA 265 (C) at 268B–G. See also *Luzon Investments (Pty) Ltd v Strand Municipality* 1990 (1) SA 215 (C) at 229H; and see *Somali Association of South Africa v Refugee Appeal Board* 2022 (3) SA 166 (SCA) at paragraph [97] (a case concerning substantive relief not foreshadowed in the notice of motion in the court *a quo*, sought on appeal).
57 See, for example, *Glenn v Bickel* 1928 TPD 186; *Classen v Friedman* 1929 TPD 829; *Middeldorf v Zipper NO* 1947 (1) SA 545 (SR); *United Dominions Corporation (Rhodesia) Ltd v Van Eyssen* 1961 (1) SA 53 (SR); *Pillay v Pillay* 1962 (3) SA 867 (D) at 870; *Credit Corporation of South Africa Ltd v Brown* 1970 (1) SA 18 (C); *Barclays National Bank Ltd v Pretorius* 1978 (3) SA 885 (O); *Marney v Watson* 1978 (4) SA 140 (C). See also *Kragga Kamma Estates CC v Flanagan* 1995 (2) SA 369 (A) at 374.
58 *Heydenrych v Colonial Mutual Life Assurance Co Ltd* 1920 CPD 67; *Bertram v Baris* 1926 AD 307; *Malcomess Ltd v Landry's Estate* 1933 EDL 41; *Hopday v Adams* 1949 (2) SA 645 (C); *Credit Corporation of South Africa Ltd v Brown* 1970 (1) SA 18 (C).
59 *Montesse Township and Investment Corporation (Pty) Ltd v Gouws* 1965 (4) SA 373 (A).
60 *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 470D–E; *Nel v Silicon Smelters (Edms) Bpk* 1981 (4) SA 792 (A) at 800H–801A. This form of procedure would appear to have its origin in the case of *Ras v Simpson* 1904 TS 254. See also *Dennill v Atkins & Co* 1905 TS 282; *Duckett v Ochberg* 1931 CPD 493; *Gordon v Moffet* 1934 EDL 154; *Walters v Andre* 1934 TPD 341; *Clark v Cloete* 1944 WLD 134; *Griesel v Du Toit* 1948 (2) SA 562 (T); *Evans v Hart* 1949 (4) SA 30 (C); *Leaman v Kieswetter* 1949 (4) SA 38 (C); *Clark Bros & Brown (1913) Ltd v Truck & Car Co Ltd* 1952 (3) SA 479 (W); *Nieuwoudt NO v Els* 1953 (3) SA 642 (O); *Bedford v Uys* 1971 (1) SA 549 (C).
61 *Raupert v Henckert* 1920 SWA 75.
62 *Florence v Criticos* 1954 (3) SA 392 (N); such contradiction may make the one or the other excipiable.
63 *Molusi v Voges NO* [2015] 3 All SA 131 (SCA) at paragraphs [20] and [39], and the cases there referred to, reversed on appeal (but not on this point) in *Molusi v Voges NO* 2016 (3) SA 370 (CC).
64 *Grindrod (Pty) Ltd v Delport* 1997 (1) SA 342 (W) at 346G.
65 *Trope v South African Reserve Bank* 1992 (3) SA 208 (T) at 210G; *Phakula v Minister of Safety and Security* (unreported, SCA case no 454/19 dated 23 September 2020) at paragraph [13]; *Lance Dickson Construction CC v Commissioner for the South African Revenue Service* (unreported, WCC case no A211/2021 dated 31 January 2023 — a decision of the full court) at paragraph 38. See further the notes to rule 18 s v 'General' above.
66 *Trope v South African Reserve Bank* 1992 (3) SA 208 (T) at 210H.
67 Rule 18(12). See also the remarks of McCreath J in *Trope v South African Reserve Bank* 1992 (3) SA 208 (T) at 210I and the majority decision in *HAL obo MML v MEC for Health, Free State* 2022 (3) SA 571 (SCA) at paragraphs [189]–[198] where the following was stated in conclusion:
'[199] The remedy is straightforward. In any case where the pleadings and pre-trial procedures have not resulted in a clear statement of the issues, the trial judge should require the parties to deliver a statement of the issues in accordance with rule 37A(9)*(a)*, that is, a statement of what is not in dispute and a statement of what is in dispute, setting out the parties' respective contentions on those issues. If the matter is subject to judicial case management under that rule such a detailed statement is a requirement. If it is not, it is within the judge's powers, under rule 38(8)*(c)* [*Author's note:* Evidently this should be a reference to rule 37(8)*(c)* of the Uniform Rules of Court.] and their inherent power to regulate the proceedings, to require that such a statement be provided.'
68 *Nasionale Aartappel Koöperasie Bpk v Price Waterhouse Coopers Ing* 2001 (2) SA 790 (T) at 798F–799J; *Phakula v Minister of Safety and Security* (unreported, SCA case no 454/19 dated 23 September 2020) at paragraph [13].
69 *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107E.
70 *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107G; *Nasionale Aartappel Koöperasie Bpk v Price Waterhouse Coopers Ing* 2001 (2) SA 790 (T) at 803–5.
71 *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107F; *Nasionale Aartappel Koöperasie Bpk v Price Waterhouse Coopers Ing* 2001 (2) SA 790 (T) at 803–5.
72 *Builders Ltd v Union Government (Minister of Finance)* 1928 AD 46 at 53; *Nyandeni v Natal Motor Industries Ltd* 1974 (2) SA 274 (D) at 278A–F.

73 See *SA Railways and Harbours v Landau & Co* 1917 TPD 485; *Dhlamini v Jooste* 1925 OPD 223 at 234; *Hillman Bros Ltd v Kelly and Hingle* 1926 WLD 153; *Mostert v Bleden* 1927 CPD 89; *Yallop v Wilkins* 1927 CPD 161 at 163; *Fourie v Fourie* 1928 CPD 90; *Du Plessis v SA Railways and Harbours* 1930 TPD 50 at 67; *Hlongwane v Methodist Church of South Africa* 1933 WLD 165 at 169; *Stephens v Liepner* 1938 WLD 30; *Parow Lands (Pty) Ltd v Schneider* 1952 (1) SA 150 (SWA); *Beira v Beira* 1990 (3) SA 802 (W) at 809D.

74 *Peninsula Cricket League v Hewson* 1922 CPD 165; *Hlongwane v Methodist Church of South Africa* 1933 WLD 165 at 169; *Stephens v Liepner* 1938 WLD 30.

75 *Crosbie v Estate Halgryn* 1916 CPD 664; *SA Railways and Harbours v Landau & Co* 1917 TPD 485; *Peninsula Cricket League v Hewson* 1922 CPD 165; *Dhlamini v Jooste* 1925 OPD 223 at 234–5; *Fourie v Fourie* 1928 CPD 90; *Stephens v Liepner* 1938 WLD 30; *Britz v Weideman* 1946 OPD 144; *Snyman v Monument Assurance Corporation Ltd* 1966 (4) SA 376 (W) at 379H–380A; *Marais v Steyn* 1975 (3) SA 479 (T) at 483.

76 *Pretoria Town Council v Wolhuter* 1930 TPD 761 at 766.

77 Jacob & Goldrein *Pleadings: Principles and Practice* 124.

78 See *Dhlamini v Jooste* 1925 OPD 223 at 233–4 and 237; and see *Hlongwane v Methodist Church of South Africa* 1933 WLD 165 at 169; *Britz v Weideman* 1946 OPD 144.

79 On the negative pregnant problem, see further Jacob & Goldrein *Pleadings: Principles and Practice* 129–30.

80 See Jacob & Goldrein *Pleadings: Principles and Practice* 125–6.

81 *Dhlamini v Jooste* 1925 OPD 223; *Van Zyl v Barclays Bank* 1933 OPD 23 at 25; *Schultz v Nel* 1947 (2) SA 1060 (C) at 1066; *Nyandeni v Natal Motor Industries Ltd* 1974 (2) SA 274 (D) at 278D.

82 *Vorster v Herselman* 1982 (4) SA 857 (O) at 861F.

83 2010 (2) SA 410 (KZP) at 413B–414B; followed and applied in *Fourie N.O. v The Land and Agricultural Development Bank of South Africa; Fourie v The Land and Agricultural Development Bank of South Africa; Saunderson N.O. v The Land and Agricultural Development Bank of South Africa; Saunderson v The Land and Agricultural Development Bank of South Africa* (unreported, NCK case nos 1425/2020; 1426/2020; 1427/2020 and 1428/2020 dated 8 April 2022) at paragraphs 23–27.

84 2011 (1) SA 48 (KZD) at 53B–H.

85 Tshabalala JP pointed out (at 53G–H) that the defendant could have relied on the provisions of rule 35(12) and (14) to call for a copy of the contract.

86 2014 (2) SA 119 (WCC). See also *Van Baalen v ABSA Bank* (unreported, GP case no 22652/2022 dated 3 January 2024).

87 At 121B–F, 121I–122B and 124D–F.

88 At 122D–F, 122F–G, 123C–127D and 127H–128A.

89 2022 (2) SA 230 (GJ).

90 At paragraph [20].

91 At paragraph [23].

92 At paragraph [25].

93 At paragraphs [27]–[29].

94 *Chenia EC and Sons CC v Lamé & Van Blerk* 2006 (4) SA 574 (SCA) at 578F. See also *Buffalo City Metropolitan Municipality v Nurcha Development Finance (Pty) Ltd* 2019 (3) SA 379 (SCA).

95 *Chenia EC and Sons CC v Lamé & Van Blerk* 2006 (4) SA 574 (SCA) at 578F–G. See also *Buffalo City Metropolitan Municipality v Nurcha Development Finance (Pty) Ltd* 2019 (3) SA 379 (SCA).

96 *Goodwood Municipality v Joyce and McGregor* 1945 CPD 424 at 428; *Roberts Construction Co Ltd v Dominion Earthworks (Pty) Ltd* 1968 (3) SA 255 (A) at 261F; *Triomf Kunsmis (Edms) Bpk v AE & CI Bpk* 1984 (2) SA 261 (W) at 266H–267F. Failure to state whether a contract is written or oral would naturally lead to disclosure of the reason, and describing 'when, where and by whom it was concluded' would, in most cases, entail the setting out of the facts and circumstances from which the tacit contract is inferred (*Roberts Construction Co Ltd v Dominion Earthworks (Pty) Ltd* 1968 (3) SA 255 (A) at 262B).

97 *Stern NO v Standard Trading Co (Pty) Ltd* 1955 (3) SA 423 (A) at 429H.

98 *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531D.

99 *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531D.

100 *Amler's Precedents of Pleadings* 109.

101 *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531H.

102 *Minister van Landbou-tegniese Dienste v Scholtz* 1971 (3) SA 188 (A) at 197A–D; *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 532D.

103 2014 (1) SA 32 (CC) at 43F–44A and the cases there referred to. See also *City of Cape Town (CMC Administration) v Bourbon-Leftley and Another NNO* 2006 (3) SA 488 (SCA) at 494H–495C; *Airports Company South Africa Ltd v Airport Bookshops (Pty) Ltd t/a Exclusive Books* 2017 (3) SA 128 (SCA) at 144A.

104 *Roberts Construction Co Ltd v Dominion Earthworks (Pty) Ltd* 1968 (3) SA 255 (A) at 261E.

105 See the notes to subrule (6) s v 'The contract is written or oral and when, where and by whom it was concluded' above.

106 *Origin Global Holdings Ltd v Acorn Agri (Pty) Ltd* (unreported, WCC case no 10317/2019 dated 30 July 2021) at paragraph [30].

107 *Louw v Louw* 1965 (3) SA 852 (E) at 856F; *Born v Born* 1970 (4) SA 560 (C) at 563E. If the plaintiff does not rely on specific acts of adultery but on the fact that the parties cohabited as man and wife, the period and place must be given (*Van der Walt v Viviers* 1955 (4) SA 10 (T)).

108 *Ex parte Inkley and Inkley* 1995 (3) SA 528 (C) at 530I–531A.

109 In EB v ER NO and a Similar Matter 2024 (2) SA 1 (CC) the Constitutional Court, in confirming the constitutional invalidity of ss 7(3) and 7(3)*(a)* of the Divorce Act 70 of 1979, made the following orders:

'[149] The following order is made in case CCT 364/21:

1. The High Court's order of constitutional invalidity is confirmed.
2. Subsection 7(3) of the Divorce Act 70 of 1979 is declared inconsistent with the Constitution and invalid to the extent that it fails to include the dissolution of marriage by death.
3. The declaration of invalidity is suspended for a period of 24 months from the date of this order to enable Parliament to take steps to cure the constitutional defects identified in this judgment.
4. Pending any remedial legislation as contemplated in para 3 above, and pursuant to this court's conclusions in the present case and in case CCT 158/22, *KG v Minister of Home Affairs and Others*, which has been decided simultaneously with the present case, the Matrimonial Property Act 88 of 1984 is to be read as including, as s 36A, the following provision:

"(1) Where a marriage out of community of property as contemplated in paras *(a)*, *(b)* or *(c)* of ss 7(3) of the Divorce Act, 1979 (Act 70 of 1979), is dissolved by the death of a party to the marriage, a court may, subject *mutatis mutandis* to the provisions of ss (5) and (6) of the said Divorce Act, and on application by a surviving party to the marriage or by the executor of the estate of a deceased spouse to the marriage as the case may be (hereinafter referred to as the claimant), and in the absence of agreement between the claimant and the other spouse or the executor of the deceased estate of the other spouse (hereinafter referred to as the respondent), order that such assets, or such part of the assets, of the respondent as the court may deem just, be transferred to the claimant.

(2) For purposes of ss (1), para *(a)* of ss 7(3) is to be read as excluding the following words: 'before the commencement of the Matrimonial Property Act, 1984'."

5. The order in para 4 shall have no effect on the validity of any acts performed in respect of the administration of a deceased estate that has been finally wound up by the date of this order, and no claim as contemplated in para 4 may be made by or against the executor of a deceased estate that has been finally wound up by the date of this order.
6. The second respondent must pay the applicant's costs in this court, excluding the costs of the appearance on 11 August 2022, such costs to include the costs of two counsel.

[150] The following order is made in case CCT 158/22:

1. The High Court's order of constitutional invalidity is confirmed.
2. Paragraph *(a)* of ss 7(3) of the Divorce Act 70 of 1979 (Divorce Act) is declared inconsistent with the Constitution and invalid to the extent that it fails to include marriages concluded on or after the commencement of the Matrimonial Property Act 88 of 1984 (Matrimonial Property Act).
3. The declaration of invalidity is suspended for a period of 24 months from the date of this order to enable Parliament to take steps to cure the constitutional defects identified in this judgment.
4. Pending any remedial legislation as contemplated in para 3 above, para *(a)* of ss 7(3) of the Divorce Act is to be read as excluding the words in strike-out text below:
5. The order in para 4 above shall not affect the legal consequences of any act done or omission or fact existing before this order was made in relation to a marriage concluded on or after 1 November 1984.

6. Pending any remedial legislation as contemplated in para 3 above, and pursuant to this court's conclusions in the present case and in case CCT 364/21, *EB (Born S) v ER (Born B) NO and Others*, which has been decided simultaneously with the present case, the Matrimonial Property Act is to be read as including, as s 36A, the following provision:

7. The order in para 6 shall have no effect on the validity of any acts performed in respect of the administration of a deceased estate that has been finally wound up by the date of this order and no claim as contemplated in para 6 may be made by or against the executor of a deceased estate that has been finally wound up by the date of this order.

8. The second respondent must pay the applicant's costs in this court, such costs to include the costs of two counsel.'

A claim in terms of s 7(3) of the Divorce Act 70 of 1979 is a personal claim that arises not from delict or injury, but from the provisions of the Act. Divorce proceedings are personal to the parties and it is, accordingly, not competent for a party to a divorce action to pursue a claim in terms of s 7(3) if the marriage is already dissolved by the death of one of the spouses. This is so irrespective of whether *litis contestatio* has taken place (*YG v Executor, Estate Late CGM* 2013 (4) SA 387 (WCC) at 393F–I). In *EB (Born S)* (case no CCT 364/21) referred to above, the High Court, not following *YG*, held that because *litis contestatio* had been reached before the husband died, the wife could pursue her claim for a redistribution order to finality even if ordinarily s 7(3) of the Divorce Act 70 of 1979 did not apply to marital dissolution before death. The High Court's decision in that regard was not before the Constitutional Court in *EB (Born S)* (case no CCT 364/21) as there was no appeal against it.

110 *Grindrod (Pty) Ltd v Delport* 1997 (1) SA 342 (W) at 346F–G.

111 *Minister van Wet en Orde v Jacobs* 1999 (1) SA 944 (O) at 952I–953C.

112 *Reid NO v Royal Insurance Co Ltd* 1951 (1) SA 713 (T); *Coop v Motor Union Insurance Co Ltd* 1959 (4) SA 273 (W); *Du Plessis Diamante v De Bruyn Broers* 1967 (3) SA 255 (GW); *Rondalia Versekeringskorporasie van SA Bpk v Mavundla* 1969 (2) SA 23 (N) at 28C; *Cete v Standard General Insurance Co Ltd* 1973 (4) SA 349 (W) at 353H–354G; *Durban Picture Frame Co (Pty) Ltd v Jeena* 1976 (1) SA 329 (D) at 337F; *Thonar v Union and South West Africa Insurance Co Ltd* 1981 (3) SA 545 (W) at 551C; *Minister van Wet en Orde v Jacobs* 1999 (1) SA 944 (O) at 952I–953C.

113 In *Minister van Wet en Orde v Jacobs* 1999 (1) SA 944 (O) the court held (at 954D–F) that the necessity to meet the requirements of rule 18(10) was further supported by the fact that it was no longer possible to supplement an incomplete or defective statement by a request for and supply of further particulars.

114 *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 774C–775A; *Radell v Multilateral Motor Vehicle Accidents Fund* 1995 (4) SA 24 (A) at 29H. See also *Murata Machinery Ltd v Capelon Yarns (Pty) Ltd* 1986 (4) SA 671 (C); *Elgin Brown and Hamer (Pty) Ltd v Dampskibsselskabet Torm Ltd* 1988 (4) SA 671 (N); *Makwindi Oil Procurement (Pvt) Ltd v National Oil Co of Zimbabwe (Pvt) Ltd* 1989 (3) SA 191 (ZS); *Barclays Bank of Swaziland Ltd v Mnyeketi* 1992 (3) SA 425 (W).

115 In *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) the plaintiff formulated its claim for damages in the alternative (see 780D–E).

116 *Elgin Brown and Hamer (Pty) Ltd v Dampskibsselskabet Torm Ltd* 1988 (4) SA 671 (N) at 674I–J; *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 775C–777B; *Macs Maritime Carrier AG v Keeley Forwarding & Stevedoring (Pty) Ltd* 1995 (3) SA 377 (D) at 389H–390C.

117 *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 777C–D (but see the dissenting judgment of Harms JA, concurred in by Van den Heever JA, at 780C–784C); *Radell v Multilateral Motor Vehicle Accidents Fund* 1995 (4) SA 24 (A) at 29I.

118 See s 4(ii) of the Prescribed Rate of Interest Act 55 of 1975.

119 As to the uncertainty which prevailed prior to the substitution of the subrule in 1987, see *Du Plessis Diamante v De Bruyn Broers* 1967 (3) SA 255 (GW); *Rondalia Versekeringskorporasie van SA Bpk v Die Ongevallekommissaris* 1968 (4) SA 755 (N) at 758H–759A; *Rondalia Versekeringskorporasie van SA Bpk v Mavundla* 1969 (2) SA 23 (N) at 27G.

120 *Doyle v Sentraboer (Co-operative) Ltd* 1993 (3) SA 176 (SE).

121 *Minister van Wet en Orde v Jacobs* 1999 (1) SA 944 (O) at 945D–F.

122 *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a L H Marthinusen* 1992 (4) SA 466 (W) at 469F–J; *Scorpion Legal Protection v Mahlaba* (unreported, GJ case no 53273/2021 dated 17 November 2022) at paragraphs [5]–[6].

123 *ABSA Bank Ltd v Boksburg Transitional Local Council (Government of the Republic of South Africa, Third Party)* 1997 (2) SA 415 (W) at 418F–H.

124 *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a L H Marthinusen* 1992 (4) SA 466 (W) at 470H–I.