

## 8 Provisional sentence

RS 23, 2024, D1 Rule 8-1

(1) Where by law any person may be summoned to answer a claim made for provisional sentence, proceedings shall be instituted by way of a summons as near as may be in accordance with Form 3 of the First Schedule calling upon such person to pay the amount claimed or, failing such payment, to appear personally or by counsel or by 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 upon a day named in such summons, not being less than 10 days after the service upon him or her of such summons, to admit or deny his or her liability.

[Subrule (1) amended by GN R2410 of 30 September 1991, substituted by GN R1746 of 25 October 1996 and by GN R3397 of 12 May 2023.]

(2) Such summons shall be issued by the registrar and the provisions of subrules (3) and (4) of rule 17 shall *mutatis mutandis* apply.

(3) Copies of all documents upon which the claim is founded shall be annexed to the summons and served with it.

(4) The plaintiff shall set down the case for hearing before noon on the court day but one preceding the day upon which it is to be heard.

(5) Upon the day named in the summons the defendant may appear personally or by an advocate or by 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 to admit or deny his or her liability and may, not later than noon of the court day but one preceding the day upon which he or she is called upon to appear in court, deliver an affidavit setting forth the grounds upon which he or she disputes liability in which event the plaintiff shall be afforded a reasonable opportunity of replying thereto.

[Subrule (5) substituted by GN R1746 of 25 October 1996 and by GN R3397 of 12 May 2023.]

(6) If at the hearing the defendant admits his or her liability or if he or she has previously filed with the registrar an admission of liability signed by himself or herself and witnessed by an attorney acting for him or her and not acting for the opposite party, or, if not so witnessed, verified by affidavit, the court may give final judgment against him or her.

[Subrule (6) substituted by GN R3397 of 12 May 2023.]

(7) The court may hear oral evidence as to the authenticity of the defendant's signature, or that of his or her agent, to the document upon which claim for provisional sentence is founded or as to the authority of the defendant's agent.

[Subrule (7) substituted by GN R235 of 18 February 1966 and by GN R3397 of 12 May 2023.]

(8) Should the court refuse provisional sentence it may order the defendant to file a plea within a stated time and may make such order as to the costs of the proceedings as to it may seem just. Thereafter the provisions of these rules as to pleading and the further conduct of trial actions shall *mutatis mutandis* apply.

(9) The plaintiff shall on demand furnish the defendant with security *de restituendo* to the satisfaction of the registrar, against payment of the amount due under the judgment.

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(10) Any person against whom provisional sentence has been granted may enter into the principal case only if he or she shall have satisfied the amount of the judgment of provisional sentence and taxed costs, or if the plaintiff on demand fails to furnish due security in terms of subrule (9).

[Subrule (10) substituted by GN R3397 of 12 May 2023.]

(11) A defendant entitled and wishing to enter into the principal case shall, within two months of the grant of provisional sentence, deliver notice of his or her intention to do so, in which event the summons shall be deemed to be a combined summons and he or she shall deliver a plea within 10 days thereafter. Failing such notice or such plea the provisional sentence shall *ipso facto* become a final judgment and the security given by the plaintiff shall lapse.

[Subrule (11) amended by GN R2410 of 30 September 1991 and substituted by GN R3397 of 12 May 2023.]

### Commentary

**Forms.** Summons: Provisional Sentence, 3; Writ of execution — movable property, provisional sentence, 'A'; Writ of attachment — provisional sentence — immovable property declared executable, 'B'; *De restituendo* bond after levy of a provisional sentence, when the defendant intends to go into the principal case, 'C'; Notice of agreement or opposition to mediation, 27.

**General.** <sup>1</sup> Provisional sentence (*namptissement* or *handvulling*) is an extraordinary, summary and interlocutory remedy <sup>2</sup> designed to enable a creditor who has liquid proof of his claim to obtain a speedy judgment therefor without resorting to the more expensive and dilatory machinery of an illiquid action. <sup>3</sup> Provisional sentence precludes a defendant with no valid defence from 'playing for time'. <sup>4</sup> Apart from the fact that provisional sentence is only available to a plaintiff who is armed with a liquid document, two further inherent characteristics of provisional sentence have always rendered it distinguishable from other remedies. The one is that it only leads to a provisional or interlocutory order. Final judgment is still to be considered in the principal case. In the final instance, the claim against the defendant can still be dismissed. The other is that, while on the one hand it entitles the plaintiff to payment of the judgment immediately, that is, before entering into the principal case, on the other hand it affords the defendant to insist on security for repayment pending the final outcome. <sup>5</sup>

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Although the judgment so obtained is, initially, provisional only and does not prevent the defendant from entering into the principal case, in the vast majority of cases no further steps are taken, and the provisional sentence automatically becomes a final judgment. <sup>6</sup> Although provisional sentence is intended to be a speedy remedy, it is undesirable that highly technical objections thereto should readily be allowed and the parties should be given adequate opportunity of putting their cases before the court, even if this necessitates allowing a further set of affidavits. <sup>7</sup>

In *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank* <sup>8</sup> the Constitutional Court found that the provisional sentence procedure constituted a limitation of the defendant's right to a fair trial in terms of [s 34](#) of the Constitution of the Republic of South Africa, [1996](#), in cases where:

- (i) the nature of the defence raised did not allow the defendant to show a balance of success in his favour without the benefit of oral evidence;
- (ii) the defendant was unable to satisfy the judgment debt; and
- (iii) the court had no discretion, in the absence of narrowly defined 'special circumstances', to refuse provisional sentence.

The court stated: <sup>9</sup>

'I must make it clear, though, that the limitation occurs only where two lines intersect on the defendant's case. The first line is that the nature of the defence raised does not allow the defendant to show a balance in his or her favour, without the benefit of oral evidence. The second line is that the defendant is unable to satisfy the judgment debt. Absent either one of these lines, the provisional sentence procedure will not limit the defendant's right to present his or her case, and thus the right to a fair hearing, in any way. If the nature of the defence allows a balance in favour of the defendant to be shown on affidavit, inability to pay the judgment debt does not matter, since provisional sentence will be refused. If, on the other hand, the defendant can pay, it does not matter that the defence can be established only with the benefit of oral evidence. The defendant will have that opportunity, after paying, when he or she presents the defence during the principal case. The defendant will be no worse off than the plaintiff whose application for provisional sentence is refused. Though it may give rise to inconvenience, his or her right to a fair hearing will eventually be given effect to in the principal case.'

The court held <sup>10</sup> that the common law had to be developed so that courts would in future have a discretion to refuse provisional sentence only in circumstances where the defendant demonstrates:

- (i) an inability to satisfy the judgment debt;
- (ii) an even balance of success in the main case on the papers; and

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- (iii) a reasonable prospect that oral evidence might tip the balance of success in the defendant's favour.

The following order was made: [11](#)

- '1. The application for leave to appeal is granted.
2. The appeal is upheld to the extent described in this order.
3. The procedure for provisional sentence is declared to be inconsistent with the Constitution and invalid to the extent that it does not give to courts a discretion to refuse provisional sentence where:
  - (a) the nature of the defence raised does not allow the defendant to show a balance of success in his or her favour without the benefit of oral evidence;
  - (b) the defendant is unable to satisfy the judgment debt; and
  - (c) outside "special circumstances", the court has no discretion to refuse provisional sentence.
4. The common law is developed so that courts will in future have a discretion to refuse provisional sentence only in circumstances where the defendant demonstrates:
  - (a) an inability to satisfy the judgment debt;
  - (b) an even balance of prospects of success in the main case on the papers; and
  - (c) a reasonable prospect that oral evidence may tip the balance of prospective success in his or her favour.
5. The declaration of invalidity in paragraph 3 of this order will not affect any claim for provisional sentence that has been finally determined as at the date of this order by judgment at first instance or by settlement.'

**Subrule (1): 'Where by law any person may be summoned to answer a claim made for provisional sentence.'** A person may only be summoned to answer a claim made for provisional sentence where the claim is founded upon a liquid document. [12](#) The theory behind provisional sentence is that

'it is granted on the presumption of the genuineness and the legal validity of the documents produced to the Court. The Court is provisionally satisfied that the creditor will succeed in the principal suit. The debt disclosed in the documents must therefore be unconditional and liquid (zuiver en klaar of liquid)'. [13](#)

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If a document 'upon a proper construction thereof, evidences by its terms, and without resort to evidence extrinsic thereto, . . . an unconditional acknowledgment of indebtedness in an ascertained amount of money, the payment of which is due to the creditor' it is one upon which provisional sentence may properly be granted. [14](#)

In order to qualify as a liquid document which will sustain a claim for provisional sentence, a document must, therefore, contain the following essential elements:

1. The document must reflect an acknowledgment of indebtedness. [15](#) A document in which the acknowledgment of indebtedness is given in consideration of an undertaking by the creditor to advance monies in the future is liquid provided an unconditional obligation to pay money is undertaken: a debt at once comes into existence, and the existence of the debt is not put in abeyance by reason of the fact that the consideration for which the undertaking was given is a promise by the other party to perform an act in the future. [16](#)
2. The acknowledgment of *indebtedness* must be unconditional. [17](#) If a document does no more than 'evidence a potential liability, the existence of which is dependent upon the happening of some future state of affairs', the document is not a liquid document and the simplicity or otherwise of the condition upon which liability will arise is irrelevant. [18](#) If a document expresses *payment* of a debt to be subject to a simple event or condition, extrinsic proof of the happening of the event or compliance with the condition is permitted, [19](#) provided the act or event is indeed simple in the sense that it is inherently capable of speedy proof by means of affidavit evidence. [20](#) Examples of 'simple' conditions

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are the delivery or transfer of scrip; [21](#) the giving of notice; [22](#) the failure to pay interest on due date; [23](#) the consent of a building society to a cession. [24](#) The court must in each case inquire into the nature of the performance upon which payment is conditional in order to determine whether or not the case falls within the ambit of the exception to the general rule. [25](#)

3. The acknowledgment of indebtedness must be for an ascertained amount of money. [26](#) A claim sounding in foreign currency is a money claim on which provisional sentence may be granted. [27](#) An instrument which contains an acknowledgment of indebtedness, but not in a specific sum, is not a liquid document [28](#) and a certificate specifying the actual amount of indebtedness cannot turn it into a liquid document. [29](#)

A covering bond which provides for future advances, or a deed of suretyship in respect of debts which may become owing in the future, accompanied by a certificate certifying the amount due at any given time is, therefore, not a liquid document. [30](#)

A liquid document need not record the underlying *causa debiti*, and a document containing a misstated *causa debiti* does not thereby lose its liquidity. [31](#)

Any document which evidences two or more separate liabilities, one of which is liquid and the other or others illiquid, is capable of sustaining a claim for provisional sentence in respect of the liquid liability. The document in so far as it is proof of the liquid liability, is a liquid document. [32](#)

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In an action for provisional sentence on a liquid document the plaintiff may claim less than the face value thereof without offering any explanatory evidence. [33](#) If the plaintiff sues for an amount which is less than the full amount of the debt, the difference between the full amount of the debt and the amount claimed need not be abandoned. [34](#)

The types of liquid document that are most frequently met with in practice are the following:

**Acknowledgment of debt.** A simple acknowledgment of debt without a specific undertaking to pay will support a claim for provisional sentence, notwithstanding that the *causa debiti* is not recited therein. [35](#) If a plaintiff alleges a *causa debiti* he is confined thereto. [36](#) If no date for repayment is stipulated, it is not essential to allege that reasonable notice has been given demanding payment. [37](#) The fact that the consideration in an acknowledgment of debt is stated to be executory does not per se destroy its certainty and liquidity for purposes of provisional sentence. [38](#)

**Architect's/Engineer's certificate.** An architect's certificate given under the usual form of building contract is a liquid

document which will found a claim for provisional sentence if the architect, in issuing the certificate, acted as agent on behalf of the owner.<sup>39</sup> The summons must contain an allegation that in certifying the architect acted as the defendant's duly authorized agent.<sup>40</sup> There have been conflicting decisions on the question whether, if the authority of the architect derives from the building contract, it is necessary to annex a copy of the contract to the summons.<sup>41</sup> If the certificate contains no indication that the amount certified as being payable is in fact payable by the defendant, the certificate is not a liquid document, nor can it be made liquid by having regard to the provisions of the building construction contract between the parties.<sup>42</sup> Provisional sentence will not be granted on an engineer's progress or

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final certificate where there is a genuine dispute which in terms of the contract between the parties, has to be referred to arbitration.<sup>43</sup>

**Bill of costs.** A taxed party and party bill of costs, unsupported by anything to show that the party alleged to be liable for the costs was actually so liable, and accompanied merely by the taxing master's allocatur, is not a liquid document.<sup>44</sup>

Provisional sentence can be granted on a taxed attorney and client bill of costs (i.e. an attorney's bill of costs against his client) in conjunction with the relevant power of attorney.<sup>45</sup> The whole bill of costs need not be attached to the summons, but the taxing master's *allocatur* is essential in that it constitutes proof of the amount of the debt.<sup>46</sup> In *Ramsay Webber Incorporated v Anastassopoulos*<sup>47</sup> the plaintiff revised its bill of costs and upon being granted a higher allocator in respect of its revised bill of costs, sought provisional sentence against the defendant. One main defence was pursued, namely that the plaintiff was not, as a matter of law and fact, entitled to redraw its bill of costs (and so replace its last bill) for purposes of taxation, there being no agreement between the parties allowing the plaintiff to increase its charges in an amended bill, and further, on the basis that the contents of the revised bill remained in dispute for reasons given in the opposing papers where various anomalies in the revised bill were demonstrated. Provisional sentence was refused.

**Covering bond and deed of suretyship.** Provisional sentence can be granted on a covering bond and a deed of suretyship provided the bond or deed contains an acknowledgement by the debtor of an indebtedness in a definite amount.<sup>48</sup> A covering bond which provides for future advances, or a deed of suretyship in respect of debts which may become owing in the future, accompanied by a certificate certifying the amount due at any given time, is not a liquid document.<sup>49</sup>

**Engineer's certificate.** See the notes s v 'Architect's certificate' above.

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**Foreign judgment.**<sup>50</sup> A foreign judgment is liquid<sup>51</sup> and provisional sentence will be granted thereon provided the judgment appears *ex facie* the record to be final<sup>52</sup> and has not become superannuated.<sup>53</sup> The question of finality of a judgment, particularly a default judgment, is

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complex. It has been held<sup>54</sup> that a common-sense approach rather than rigid rules ought to be applied. South African law, following English law, holds that the possibility of an appeal does not necessarily prevent a judgment from being final.<sup>55</sup> The mere possibility of rescission of a foreign default judgment does therefore not preclude it from being final.<sup>56</sup> In such a case an affidavit by a foreign lawyer as to the finality of the judgment is not necessary.<sup>57</sup>

The court that pronounced the judgment must have had jurisdiction to entertain the case according to the principles recognized by our law with reference to the jurisdiction of foreign courts (sometimes referred to as 'international jurisdiction or competence').<sup>58</sup> The onus is on the plaintiff to prove that the foreign court from which the judgment emanates, had jurisdiction according to the principles recognized by South African law with reference to foreign judgments.<sup>59</sup> Such onus has to be discharged on a balance of probabilities.<sup>60</sup>

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In *Government of the Republic of Zimbabwe v Fick*<sup>61</sup> the Constitutional Court developed the common law<sup>62</sup> to extend to the enforcement of judgments and orders of international courts and tribunals based on international agreements that are binding on South Africa. The application of such development was, however, limited to the case under consideration and future matters. Pursuant to the judgment of the Constitutional Court, the common-law concept of a 'foreign court' therefore now extends to the Tribunal created in terms of the Treaty of the South African Development Community.

A certified copy of the foreign judgment must be annexed to the summons<sup>63</sup> and, if the judgment is in a foreign language, a due and proper translation thereof.<sup>64</sup> All foreign documentation must be duly authenticated in terms of rule 63.<sup>65</sup>

If provisional sentence is sought on a foreign judgment for an amount in a foreign currency, the court is entitled to enter provisional sentence in the foreign currency in which the foreign judgment quantified the debt.<sup>66</sup> At the same time the defendant should be left free to make payment in South African currency.<sup>67</sup> The applicable rate of exchange is that prevailing at the time of payment.<sup>68</sup>

The use of the provisional sentence procedure to enforce a foreign judgment concerning the question of a plaintiff's status (i.e. the names by which she is entitled to be known as) is inappropriate.<sup>69</sup> So too, in general, the use of the provisional sentence procedure to enforce a foreign judgment not comprising a money judgment.<sup>70</sup>

**Interest.** In provisional sentence proceedings the liquidity of a claim for interest has to be determined quite apart from the determination of the liquidity of the principal debt.<sup>71</sup> An undertaking to pay interest 'at the usual banking rates'<sup>72</sup> or to pay 'interest and bank charges'

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or to pay interest 'teen die prima uitleenkoers van Absa Bank min 1%' is not liquid, because extrinsic evidence is necessary in regard to the amount thereof.<sup>73</sup>

Though interest forms a separate and distinct indebtedness of its own, it is a legal corollary to the principal indebtedness. Hence, if a capital sum is not liquid the interest thereon can also not be liquid, but if the capital sum is duly liquid, the illiquidity of an interest claim does not assail the liquidity of the capital claim.<sup>74</sup>

**Lease.** Provisional sentence can be granted on a lease duly signed by the defendant agreeing to a fixed rental.<sup>75</sup> Before provisional sentence can be granted for rental due under a lease, the terms of the lease must be examined to see whether such terms alter the *prima facie* position that the rent is not payable unless the lessor on his side has performed (or tendered to perform) all his obligations in terms of the lease.<sup>76</sup> The fact that the lease contains a provision for increasing the rental in the event of rates and taxes rising does not destroy the liquidity of the document in so far as the fixed rental is concerned.<sup>77</sup>

**Mortgage bond.** A mortgage bond, if it contains an unconditional acknowledgement of liability in a fixed and determinate amount, is a liquid document upon which provisional sentence can be granted.<sup>78</sup> In a mortgage bond the mortgagor's liability to make payment is usually subject to the happening of a 'simple event', namely the default in a periodic payment of interest and capital. The happening of this 'simple event' to which payment is conditional may be proved by extrinsic evidence, if put in issue, but unless put in issue is proved by the simple allegation in the summons without affecting the liquidity of the document.<sup>79</sup> The fact that the mortgagor has to perform his part of the contract at a future date, for example pay the amount of the loan only on registration of the bond, does not in itself make the mortgagee's indebtedness conditional and thereby affect the liquidity of the bond. The existence of the debt is not put in abeyance by reason of the fact that the plaintiff has to perform his part of the contract in future.<sup>80</sup> Non-performance by the plaintiff would be a matter of defence, but would not affect the liquidity of the document.<sup>81</sup>

It commonly happens that in an action for provisional sentence founded upon a mortgage bond, the plaintiff claims less than the amount of the bond. This he can do without explaining whether the mortgagor has made payments in reduction of the capital amount of the bond or whether there is some other reason for claiming less than the bond warrants.<sup>82</sup> The difference between the full amount of the bond and the amount claimed need not be abandoned.<sup>83</sup>

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It is submitted that the practice of granting provisional sentence on 'adjunct'<sup>84</sup> claims, such as claims for rates, taxes and insurance premiums paid<sup>85</sup> or legal costs<sup>86</sup> incurred by a mortgagee, upon production of the original receipts or a certificate quantifying the amount of legal costs, cannot be sustained. Such claims are not liquid, and cannot be made liquid by the production of the receipts or the certificate.<sup>87</sup>

A mortgage bond can serve a dual purpose, and if it fails for some reason to provide security, it can still be used as a liquid document to found an action for provisional sentence.<sup>88</sup>

The records kept by the Registrar of Deeds are conclusive evidence of the identity of the mortgagee in the case of a cession of the mortgagee's rights.<sup>89</sup>

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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 in regard to provisional sentence proceedings in conjunction with a claim to declare immovable property specially executable.

**Negotiable instruments.** Whether bills of exchange, cheques and promissory notes are liquid documents which can found an action for provisional sentence depends on whether they meet all the requirements of a liquid document. Reference to the definitions of bills of exchange, promissory notes and cheques in the Bills of Exchange [Act 34 of 1964](#) shows that these instruments comply with the requisites of liquid documents. Failure to comply with the Bills of Exchange Act may destroy the negotiability of a document but does not necessarily destroy its liquidity.<sup>90</sup> If a document does not qualify as a cheque due to disqualification under [s 9\(2\)](#) of the Bills of Exchange [Act 34 of 1964](#), it may still be a liquid document.<sup>91</sup>

In an action for provisional sentence on a bill of exchange, the summons must contain an allegation that the plaintiff is the legal holder of the instrument sued on, unless this is apparent from the document itself, which forms part of the summons.<sup>92</sup> Where under a bills of exchange statute certain acts by the holder, such as presentment for payment or notice of dishonour, are conditions precedent to the plaintiff's right to succeed, such acts must be alleged in the summons.<sup>93</sup> Some of the requirements for liability under the Bills of Exchange [Act 34 of 1964](#) which have to be alleged in a summons are set out in *Trust Bank van Afrika Bpk v Bendor Properties Ltd.*<sup>94</sup>

In actions based on negotiable instruments it is, in most divisions of the High Court, no longer required that proof of presentment be handed up in the form of a notarial certificate. In most divisions of the High Court proof of presentment is not necessary in undefended cases unless there is reason to believe that it was never presented, and proof of presentment (by affidavit) is required only if it is placed in dispute.<sup>95</sup>

In *Navidas (Pty) Ltd v Essop; Metha v Essop*<sup>96</sup> it was held that the so-called 'clearing house system' followed by some of the commercial banks with a view to the rapid processing and collection of cheques does not provide for presentment in accordance with the requirements for due presentment contained in the Bills of Exchange [Act 34 of 1964](#). [Section 43A\(1\)](#) of the Bills of Exchange [Act 34 of 1964](#), which came into operation on 1 March 2001, now provides that, provided the provisions of [s 43\(2\)\(a\), \(b\) and \(3\)](#) are met, a cheque may be presented for payment to the drawee by a collecting bank on behalf of the holder (a) at a place designated in the rules of any clearing house of which both the drawer bank and the collecting bank are members; (b) at a place of payment designated by the drawee bank; or (c) by means of

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data transmitted in terms of an agreement to which both the drawee bank and the collecting bank are party by, or on behalf of, the collecting bank to the drawee bank, identifying the cheque with reasonable certainty.<sup>97</sup>

A cheque, given in advance as repayment for monies lent and advanced under Muslim practice, and which is dishonoured, does not fall within the provisions of the National Credit [Act 34 of 2005](#). Provisional sentence can accordingly be granted on the basis of such dishonoured cheque without complying with the requirements of [s 129](#) of the National Credit [Act 34 of 2005](#).<sup>98</sup>

**'Shall be instituted by way of a summons.'** A provisional sentence summons is in essence a composite document which serves a twofold purpose: (i) it serves to institute an action for a definitive judgment (i.e it initiates the principal case); and (ii) at the same time it serves to institute proceedings for interim relief.<sup>99</sup> The composite nature of the summons may have masked the essential nature of provisional sentence as a form of interim relief.<sup>100</sup>

The summons must allege all the facts necessary to sustain a cause of action.<sup>101</sup> The cause of action set out in the summons must accord with the document relating to the cause of action.<sup>102</sup> A misdescription of the nature of the document will not be fatal.<sup>103</sup>

The facts that must be alleged will depend upon the nature of the plaintiff's right or title to sue. The necessary averments to be made in the case of different kinds of document have been considered in a number of cases:

- (a) bills, cheques and promissory notes: some of the requirements for liability under the Bills of Exchange [Act 34 of 1964](#) which have to be alleged in a summons are set out in *Trust Bank van Afrika Bpk v Bendor Properties Ltd.*<sup>104</sup>
- (b) in an agreement of sale where delivery is a precondition to payment, an allegation of delivery is essential;<sup>105</sup>
- (c) in a claim based upon an acknowledgement of debt which had been ceded to the plaintiff by the original creditor in whose favour it was made, the cession to the plaintiff must be alleged in the summons;<sup>106</sup>

- (d) if the document provides that payment by the defendant is dependent upon the happening of a 'simple event' or the fulfilment of a 'simple condition', occurrence or fulfilment must be alleged in the summons; [107](#)
- (e) in a claim based upon an architect's certificate where the architect purported to act as agent of the building owner, the summons must contain an allegation that in certifying the architect acted as the defendant's duly authorized agent; [108](#)

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- (f) in a claim based upon a foreign judgment it must be alleged that the judgment is final and made by a court of competent jurisdiction. [109](#)

The defendant must in the summons be informed of the consequence of his failure to pay the amount claimed and of his right to demand security for the restitution thereof if he should pay the amount. This is material requirement which embraces 'the very essence of a claim for provisional sentence'. [110](#)

The court has wide powers to amend a summons for provisional sentence. The applicable principles have been stated as follows: [111](#)

- '(1) A distinction must be drawn between the amendment of a summons, including its annexures, and the amendment of the documents on which the plaintiff sues. The latter documents must disclose a cause of action at the date of the summons and they are, therefore, not a fit subject for amendment.
- (2) There is no difference between the court's powers of amending provisional sentence summonses and its powers of amending summonses of pleadings in illiquid cases.
- (3) Formal amendments, i e, amendments of defects that do not deprive the plaintiff of the right to obtain provisional sentence, are strictly unnecessary but are generally granted as of course in order to regularize the proceedings.
- (4) The court's power to allow material amendments, i e, those that are necessary before the plaintiff can obtain provisional sentence, is limited only by considerations of prejudice or injustice to the defendant.
- (5) Where the defendant would be no worse off if the amendment were granted with a suitable order as to costs than if provisional sentence were refused and proceedings were commenced afresh there is no prejudice or injustice to the defendant in granting the amendment. The mere loss of the opportunity of gaining time is not in law prejudice or injustice.
- (6) Where there is a real doubt whether or not prejudice or injustice will be caused to the defendant if the amendment is allowed it should be refused.
- (7) An amendment should not be refused merely in order to punish the plaintiff for his neglect.'

If a summons is in several respects so defective that it requires substantial amendments to bring it within the rules, the court may, in an appropriate case, refuse the amendments on the ground that the prejudice suffered by the defendant will not be cured by a postponement and a suitable order as to costs. [112](#)

**Notice of mediation.** In every new action, the plaintiff must, together with the summons or combined summons, serve on each defendant a notice indicating whether such plaintiff

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agrees to or opposes referral of the dispute to mediation. [113](#) The notice must substantially be in accordance with Form 27 of the First Schedule. [114](#) The notice must not be filed with the registrar. [115](#) If the parties agree on mediation, and a joint minute to that effect is signed, the time limits prescribed by the rules for the delivery of pleadings and notices or the taking of any step is suspended for every party to the dispute from the date of signature of the minute to the time of conclusion of mediation: Provided that any party to the proceedings who considers that the suspension of the prescribed time limits is being abused, may apply to the court for the upliftment of the suspension of the prescribed time limits. [116](#) See further the provisions of rule 41A below.

**'Upon a day named in such summons.'** A notice of set down must be filed in terms of subrule (4). If a claim for provisional sentence has not been set down for hearing on the day stated in the summons, a court will not grant judgment on any subsequent day, even though notice has been given to the defendant, unless the summons has been duly amended. [117](#) Failure to set the matter down for hearing on the date named in the summons does not, however, result in the summons becoming a nullity. [118](#) If an amendment of the day stated in the summons has been allowed or the defendant has waived his right to insist on the summons being amended, the summons can sustain a judgment for provisional sentence. [119](#)

**'Not being less than 10 days after the service upon him or her of such summons.'** Care must be taken to ensure that the date named in the summons will not be less than ten days after service upon the defendant. For the computation of time, see the notes to rule 1 s v 'Court day' above.

If service is to be effected outside the jurisdiction of the court the *dies induciae* prescribed in [s 24](#) of the Superior Courts [Act 10 of 2013](#) apply. The computation of the periods prescribed in that section is dictated by the provisions of [s 4](#) of the Interpretation [Act 33 of 1957](#) and not by the definition of 'court day' in rule 1. [120](#)

**'To admit or deny his or her liability.'** The subrule prescribes a form of summons which must call upon the defendant, if he denies liability for the claim and files an opposing affidavit, to admit or deny his signature, or that of his agent, and the authority of his agent. [121](#) It has been held that a plaintiff is not entitled to provisional sentence on a summons which does not call upon the defendant to admit or deny his signature; the words are 'absolutely vital as they represent the whole theory and practice on which provisional sentence is based'. [122](#) The reason is that '[w]ithout his signature there can be no *prima facie* proof in writing of his admission of indebtedness'. [123](#)

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The signature of a natural person which forms part of a composite signature is not the signature of an agent but forms an integral part of the signature of the company. It is, therefore, unnecessary in a provisional sentence summons to call upon the defendant to admit or deny the authority of that person. [124](#)

If an acknowledgment of debt has been ceded to the plaintiff, the summons need not call upon the defendant to admit or deny the signature of the cedent or of the cedent's agent or of the agent's authority to cede or of the validity of the cession. [125](#)

It is not necessary that in a provisional sentence summons a surety be called upon to admit or deny the correctness of the signature of the principal debtor. [126](#)

**Subrule (2): 'The provisions of subrules (3) and (4) of rule 17 shall mutatis mutandis apply.'** In terms of rule 17(3)(a) the summons must be signed by the attorney acting for the plaintiff and must include an address for service of documents. In terms of rule 17(4) the summons must contain a proper description of the plaintiff and the defendant. The court may, in the exercise of its discretion under rule 27(2), condone non-compliance with this provision. [127](#)

The plaintiff's title and the defendant's liability must appear *ex facie* the summons and the document upon which the claim is founded without resort to extrinsic evidence.<sup>128</sup> This means that for purposes of provisional sentence the identity of the parties has necessarily to emerge from the instrument sued upon read together with the summons.<sup>129</sup> If the difference between the name of the party cited in the summons and the name of the person mentioned in the document in question is slight, there may be a sufficient link to grant provisional sentence. If the difference is so great that it can only be cleared up by extrinsic evidence, provisional sentence cannot be granted.<sup>130</sup> It has, however, been held that in order to determine the plaintiff's title to sue the defendant it is permissible, by way of exception to the general rule that the plaintiff's title must be determined without recourse to extrinsic evidence, to have regard to the allegations contained in the summons and the defendant's response thereto.<sup>131</sup>

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The rationale of this exception (which has not found general acceptance<sup>132</sup>) seems to be business efficacy. In *Chamani v St Ives Trading Co (Pty) Ltd*<sup>133</sup> it is pointed out that it is customary to conclude a contract using a firm's name, or to acknowledge liability in favour of a firm in a liquid document. The nominal beneficiary referred to in the instrument is not a legal *persona*: the rights vest in the proprietor, or in the case of a partnership in the partners.<sup>134</sup> Similar considerations apply when provisional sentence is claimed against a defendant on a liquid document signed by it in a trade name differing markedly from the defendant's real name. If the name, which appears on the liquid document, is set out in the summons and the defendant is called upon to admit or deny its signature, it would be formalistic not to have regard to what is set out in the answering affidavit in regard thereto.<sup>135</sup>

Another exception to the general rule is that of the successor in title by operation of law to rights conferred in a liquid document (e.g. the executor in a deceased estate) and the holder of a cheque payable to bearer. In such cases the title of the claimant to sue does not appear *ex facie* the liquid document. The generally accepted practice is that in such cases the provisional sentence summons contains an appropriate averment identifying the plaintiff which, if denied, may then be proved.<sup>136</sup>

**Subrule (3): 'Copies of all documents upon which the claim is founded shall be annexed to the summons.'** It is to be noted that this subrule does not enjoin that only liquid documents be attached.<sup>137</sup> In determining whether or not a document is one upon which the plaintiff's claim is founded, the following test is to be applied:<sup>138</sup>

'Whether it is necessary to determine the defendant's liability; or material to the plaintiff's cause of action; or whether the action is so dependent on it that it cannot proceed without a consideration of it; or whether it forms a vitally important part of the plaintiff's claims against the defendant'.

All documents which constitute an essential element of the plaintiff's cause of action must, therefore, be annexed to the summons. Such documents would include a written consent to a cession<sup>139</sup> and a written agreement of cession.<sup>140</sup> See further the notes s v 'Architect's certificate' above.

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The practice in the case of mortgage bonds is to grant provisional sentence without the power of attorney authorizing the execution of the bond on behalf of the mortgagor being annexed to the summons.<sup>141</sup>

The copies of the documents annexed to the summons must be true copies and correspond with the originals in all material respects.<sup>142</sup> If the copy differs materially from the original, provisional sentence may be refused.<sup>143</sup> In an appropriate case, the court may postpone the matter to enable the plaintiff to serve a proper copy and order the plaintiff to pay the wasted costs.<sup>144</sup>

Foreign documents must be duly authenticated in terms of rule 63.<sup>145</sup>

The general practice is to hand the original documents up from the bar when the plaintiff moves for provisional sentence.<sup>146</sup>

**Subrule (4): 'The plaintiff shall set down the case for hearing.'** A notice of set down must be filed. A provisional sentence summons, unlike a notice of motion, does not contain a request to place the matter on the roll.<sup>147</sup> It is submitted that when service of a summons was defective or the *dies induciae* insufficient, the matter cannot be postponed on the date on which it is set down, even if this is the date which appears on the summons. In such cases the matter must, it is submitted, be removed from the roll and the summons, with a fresh date of hearing, must be re-served.

The plaintiff's claims must all be set out in the summons for provisional sentence and not in the notice of trial or set-down.<sup>148</sup>

See further the notes to subrule (1) s v 'Upon a day named in such summons' above.

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**Subrule (5): 'Deliver an affidavit.'** In terms of the subrule the time for the delivery of the affidavit is not later than noon of the court day but one preceding the day on which the defendant is called upon to appear in court. If the defendant does deliver an affidavit, the subrule provides that the plaintiff shall be afforded a reasonable opportunity of replying thereto. This almost inevitably means that the matter will have to be postponed.

**Notice of mediation.** Rule 41A(2)(b) provides that a defendant must, when delivering a notice of intention to defend an action, or at any time thereafter, but not later than the delivery of a plea, serve on each plaintiff or the plaintiff's attorneys, a notice indicating whether such defendant agrees to or opposes referral of the dispute to mediation. The notice must be substantially in accordance with Form 27 of the First Schedule and must clearly and concisely indicate the reasons for the defendant's belief that the dispute is or is not capable of being mediated.<sup>149</sup> The notice must not be filed with the registrar.<sup>150</sup> It is submitted that in provisional sentence proceedings the required notice must be served by the defendant as soon as possible after receipt of the summons, but in any event not later than delivery of the affidavit contemplated in rule 8(5). See further the provisions of rule 41A below.

**'Setting forth the grounds upon which he or she disputes liability.'** The subrule prescribes a form of summons which calls upon the defendant, if he denies liability for the claim and files an opposing affidavit, to admit or deny his signature, or that of his agent, and the authority of his agent.<sup>151</sup> See further the notes to subrule (1) s v 'To admit or deny his or her liability' above.

The defendant may take an objection *in limine* on the ground of non-compliance with the rules notwithstanding the fact that he had filed an affidavit dealing exclusively with the merits of the matter,<sup>152</sup> and the fact that he has filed an affidavit on the merits does not constitute a waiver of the defendant's right to take a technical objection.<sup>153</sup> A defendant should not take a preliminary point in the expectation that, should the point fail, he will be given leave to file an opposing affidavit.<sup>154</sup> If the defendant relies on a defence which appears *ex facie* the summons or the documents sued on, he need not file an affidavit

dealing with his objection. [155](#)

There is no closed category of defences that can be raised against claims for provisional sentence. [156](#) Such claims are 'based on agreements, whether unilateral or bilateral, and many, if not most, of the defences available to defendants confronted with illiquid claims *ex contractu* can assuredly be raised by defendants faced with claims for provisional sentence'. [157](#)

A defendant who relies on a defence which goes beyond the liquid document is required to produce sufficient proof of that defence to satisfy the court that the probability of success in the principal case is against the plaintiff before provisional sentence can be refused. If there is no balance of probabilities either way with regard to the principal case, the court will grant provisional sentence. It follows that if there is a balance in favour of the plaintiff,

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provisional sentence will also be granted. [158](#) Examples in practice of defences going behind the liquid document are numerous. [159](#) They include the defence: (a) that the plaintiff never advanced the amount claimed; [160](#) (b) that the liquid document was tainted with illegality; [161](#) or (c) that the document had been obtained by fraud. [162](#)

A defendant may raise a liquid or illiquid counterclaim as a defence. [163](#) On the question of onus in such cases, see the notes to subrule (8) s v 'Should the court refuse provisional sentence' below.

A defendant who believes that it will not be possible for him to discharge the onus he bears, need file no affidavit but can simply wait until provisional sentence has been granted against him before satisfying the claim in terms of subrule (10) and then delivering a notice of intention to defend. [164](#)

A defendant cannot avoid the grant of provisional sentence by the adoption of the hybrid procedure of a denial of liability coupled with a tender to make provisional payment against the furnishing of security *de restituendo* by the plaintiff. [165](#)

On the joinder of a third party by the defendant in provisional sentence proceedings, see the notes to rule 13(1) s v 'In any action' below.

**'Afforded a reasonable opportunity of replying thereto.'** In most cases this would entail a postponement of the matter.

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If the plaintiff does not file a replying affidavit, it does not necessarily mean that the defendant's version must be accepted and that provisional sentence cannot be granted before the plaintiff in a replying affidavit denies the defendant's allegations. [166](#)

The subrule makes provision for two sets of affidavits only, those of the defendant in opposition to the summons and those of the plaintiff in reply. The court may, in the exercise of its discretion, allow additional affidavits in appropriate circumstances. [167](#) A further set of affidavits may be allowed where considerations of justice and fairness require it and where it is shown that the defendant will not suffer any prejudice that could not be remedied by an appropriate order for costs. [168](#)

If the *causa debiti* is misstated in the document concerned and the plaintiff discloses the real *causa debiti* in his replying affidavit, it cannot be said that he is thereby impermissibly making out his case for the first time in reply: the case the defendant was required to meet was that he had signed a document in which he acknowledged his unconditional indebtedness to the plaintiff. [169](#)

Appropriate circumstances are 'special or exceptional circumstances, having regard to the nature and purpose of provisional sentence'. [170](#) Whether or not appropriate circumstances in this sense are present depends upon the facts of each particular case. [171](#)

**Subrule (6): 'At the hearing.'** At the hearing of an action for provisional sentence the plaintiff surrenders the original document upon which the claim is founded to the court and moves for judgment on it. [172](#)

**'The defendant admits his or her liability.'** There are three courses open to a defendant in provisional sentence proceedings: (i) a final and unconditional payment (*solutio*) which would normally result in his indebtedness being discharged; (ii) an admission by him of liability in which event final judgment may be given against him in terms of this subrule, and (iii) a denial of liability under subrule (5). [173](#)

**Subrule (7): 'The court may hear oral evidence.'** The court has the power to hear oral evidence as to the authenticity of the defendant's signature, or that of his agent or as to the authority of the defendant's agent. The court has no inherent powers to order the hearing of oral evidence on other issues. [174](#) The court may possibly hear oral evidence on issues other than those provided for in the subrule where the parties have consented thereto. [175](#) However, having regard to the nature and purpose of provisional sentence proceedings, a court would exercise such a power only in very exceptional circumstances. [176](#)

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If the facts speak so cogently as to create a balance of probabilities in favour of the plaintiff, the plaintiff can discharge the onus resting on him without calling evidence. [177](#)

If the genuineness of the signature on the document or the authority of the signatory to bind the defendant is disputed, the plaintiff is not allowed, either orally or by means of an affidavit, to introduce evidence to establish an estoppel. [178](#)

**Evidence under the National Credit Act 34 of 2005.** A defendant may require the plaintiff to give oral evidence in terms of [s 169\(1\)](#) of the National Credit [Act 34 of 2005](#). [179](#) If a defendant requests an inquiry under the section and at the same time sets up other defences which, if successful, would render unnecessary an enquiry under the section, it is convenient and desirable that the court should first dispose of such defences. [180](#)

**Subrule (8): 'Should the court refuse provisional sentence.'** At the provisional sentence stage of the proceedings, the plaintiff and the defendant bear the onus of proof in respect of different issues.

The plaintiff bears the onus of proving on a balance of probabilities:

- (i) the authenticity of the defendant's signature on the document; [181](#)
- (ii) the authenticity of the defendant's agent's signature; [182](#)
- (iii) the authority of the defendant's agent; [183](#)
- (iv) the fulfilment of any condition; [184](#)
- (v) the entitlement of the plaintiff to the claim evidenced by the liquid document; [185](#) and

(vi) all other facts necessary to sustain a cause of action on the document concerned. [186](#)

On all these matters the onus may be discharged by the allegations in the summons and the fact that they are not denied by the defendant. [187](#) In respect of some of these issues the plaintiff is entitled to attempt to discharge the onus by oral evidence under subrule (7). On all other issues the onus must be discharged on the papers.

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The court will refuse to grant provisional sentence where the plaintiff fails to discharge on a balance of probabilities the onus resting on him. [188](#)

In *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank t/a The Land Bank* [189](#) the Constitutional Court has developed the common law so that courts now have a discretion to refuse provisional sentence only in circumstances where the defendant demonstrates:

- (i) an inability to satisfy the judgment debt;
- (ii) an even balance of prospects in the main case on the papers; [190](#) and
- (iii) a reasonable prospect that oral evidence may tip the balance of prospective success in his or her favour.

In this regard the Constitutional Court stated: [191](#)

'If the nature of the defence allows a balance in favour of the defendant to be shown on affidavit, inability to pay the judgment debt does not matter, since provisional sentence will be refused. If, on the other hand, the defendant can pay, it does not matter that the defence can be established only with the benefit of oral evidence. The defendant will have that opportunity, after paying, when he or she presents the defence during the principal case. The defendant will be no worse off than the plaintiff whose application for provisional sentence is refused. Though it may give rise to inconvenience, his or her right to a fair hearing will eventually be given effect to in the principal case.'

The onus can be discharged only upon facts raised on affidavit and not on inferences from the facts. [192](#) In provisional sentence proceedings the court has, as in all other cases, a discretion to grant an adjournment of the proceedings on good cause shown. No hard and fast rules in regard to the circumstances in which a postponement will be granted can be laid down; each case must necessarily depend upon its own facts. [193](#) As to postponements in general, see the excursus to rule 41 s v 'Postponement' below.

**'May order the defendant to file a plea.'** The use of the word 'may' in the subrule indicates that the court's power to order a defendant to file a plea is discretionary and that the right to deliver a plea is exercisable if the court makes an order to that effect. [194](#) If provisional sentence is refused and no order is made in terms of which the defendant is permitted to file a plea, the provisional sentence is dismissed and the proceedings are at an end. [195](#) The court clearly will exercise its discretion to order a plea to be filed by the defendant where the defendant

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has discharged the onus of showing that the probabilities in the principal case are in his favour. [196](#) The court will, so it seems, not exercise its discretion to order the defendant to file a plea where the plaintiff's claim for provisional sentence is refused on the ground that the document sued on is not liquid: '[w]here he sues for provisional sentence upon an illiquid document and his action is dismissed, it is finally dismissed'. [197](#)

It is not clear whether or not a judgment refusing provisional sentence renders the matter *res judicata* and precludes the plaintiff from issuing an illiquid summons to prosecute his claim to final judgment. It has, on the one hand, been suggested that the word 'provisional' in the phrase 'provisional sentence' relates to the sentence only if it is granted and not to the unqualified refusal thereof. [198](#) On the other hand, it has been stressed that proceedings for provisional sentence are interlocutory in their nature [199](#) and that the composite nature of a provisional sentence summons may have masked the essential nature of provisional sentence as a form of interim relief. [200](#) It is submitted [201](#) that where a plaintiff is barred from entering the principal case on a provisional sentence summons after provisional sentence was refused and no order was made as to the future conduct of the proceedings, the plaintiff is entitled to prosecute his claim by way of an illiquid action.

**'Make such order as to the costs of the proceedings as to it may seem just.'** This provision merely confirms the general discretion of the court in matters of costs. This means that the ordinary principles which govern awards of costs also apply in provisional sentence proceedings. [202](#) Thus, a successful action for provisional sentence will generally carry costs and an unsuccessful action will generally be dismissed with costs. [203](#) If provisional sentence is refused the court may, in the exercise of its discretion, reserve the question of costs for decision at the trial of the principal case. [204](#)

**Subrule (9): 'The plaintiff shall on demand furnish . . . security de restituendo.'** Once provisional sentence has been granted the plaintiff is entitled to immediate payment or, failing that, to issue a writ of execution against the defendant's property. [205](#) The plaintiff's right is a qualified one: the plaintiff is entitled to *solutio fiduciaria*, payment under security. [206](#) If the plaintiff cannot find acceptable security, he is not entitled to provisional relief and must wait for his money until (and if) he can obtain a final judgment in the principal case. [207](#)

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The rule envisages that the two acts provided for in this subrule, namely 'demand' and 'payment', should take place simultaneously. It does not require that payment precede the demand. [208](#) The phrase 'on demand' has been interpreted to mean within a reasonable time of the demand, taking the surrounding circumstances into account. [209](#)

The plaintiff does not have unlimited time to furnish security. It has been held [210](#) that unless the plaintiff failed to deliver security timeously to enable the defendant to make payment within the period allowed by subrule 8(9), that is within two months of the date of the provisional order, it cannot be said to have 'failed' to deliver security in terms of rule 8(10).

**Subrule (10): 'Any person against whom provisional sentence has been granted.'** If a provisional sentence judgment is given by default it can be rescinded either in terms of rule 42(1) or under the common law but not under rule 31(2)(b). [211](#)

**'He or she shall have satisfied the amount of the judgment . . . and taxed costs.'** The provisions of this subrule are peremptory. [212](#) Payment or satisfaction of the provisional judgment cannot take place in a manner other than payment to the plaintiff under security *de restituendo* or upon levy of execution of a writ issued by the registrar. [213](#) In the latter event payment to the sheriff would be satisfaction of the provisional judgment. [214](#)

A stay of execution where provisional sentence has been obtained is subversive of the doctrine of provisional sentence and will only be granted in very exceptional circumstances where its refusal would probably lead to a grave injustice to the defendant. [215](#)

**'Or if the plaintiff on demand fails to furnish due security.'** If a defendant files a notice which mirrors the wording of

subrule 8(9) and the plaintiff fails to furnish security pursuant thereto, such failure is a failure as contemplated in subrule 8(10) and the defendant is entitled to enter into the principal case. [216](#)

**Subrule (11): 'Within two months of the grant of provisional sentence.'** The court has the power to condone the failure to deliver a notice of intention to enter into the principal case (and thereafter to plead) within the two-month period. [217](#)

**Appeal.** Neither the granting [218](#) nor the refusal [219](#) of provisional sentence is appealable.

[1](#) For step-by-step practice guidelines, see 2003 (June) *De Rebus* 29–31.

[2](#) *Kent v Transvaalsche Bank* 1907 TS 765; *Dickinson v South African General Electric Co (Pty) Ltd* [1973 \(2\) SA 620 \(A\)](#) at 641B; *Ndamase v Functions 4 All* [2004 \(5\) SA 602 \(SCA\)](#) at 608B; *Osmans Spice Works CC v Corporate International (Pty) Ltd* [2005 \(6\) SA 494 \(W\)](#) at 499H-I; *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank* [2011 \(3\) SA 1 \(CC\)](#) at 7E-8B; *Super Steel LDA v Machava Trading CC* (unreported, GJ case no 2023/008088 dated 19 February 2024) at paragraph 8.

[3](#) See, for example, *Barclays National Bank Ltd v Serfontein* [1981 \(3\) SA 244 \(W\)](#) at 249H; *Ashersons v Panache World (Pty) Ltd* [1992 \(4\) SA 611 \(C\)](#) at 613A; *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank* [2011 \(3\) SA 1 \(CC\)](#) at 9D-F; *Wile v MEC, Department of Public Works, Gauteng* [2017 \(1\) SA 125 \(WCC\)](#) at 125F-H; *Garden to Floors (Pty) Limited v Black Civils (Pty) Limited* (unreported, EL case no 1188/2021 dated 1 July 2022) at paragraph [7]; *Lindsey v Conteh* [2024 \(3\) SA 68 \(SCA\)](#) at paragraph [19]. See also *Zamazulu Nkubungu* 'Are provisional sentence proceedings constitutional?' 2012 (October) *De Rebus* 30–32; *Frederik van Dyk* 'Provisional sentence proceedings – tailored for liquid documentary debts' 2024 (January/February) *De Rebus* 18.

[4](#) *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank* [2011 \(3\) SA 1 \(CC\)](#) at 9E-F; *Garden to Floors (Pty) Limited v Black Civils (Pty) Limited* (unreported, EL case no 1188/2021 dated 1 July 2022) at paragraph [7].

[5](#) *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank* [2011 \(3\) SA 1 \(CC\)](#) at 9A; *Abner Engineering and Supplies (Pty) Ltd vs Thaver* (unreported, GJ case no 2019/41714 dated 11 May 2022) at paragraph [11]; *Lindsey v Conteh* [2024 \(3\) SA 68 \(SCA\)](#) at paragraph [19].

[6](#) This statement was cited with approval in *Barclays National Bank Ltd v Serfontein* [1981 \(3\) SA 244 \(W\)](#) at 249H. See also *Lesotho Diamond Works (1973) (Pty) Ltd v Lurie* [1975 \(2\) SA 142 \(O\)](#) at 144G; *Ashersons v Panache World (Pty) Ltd* [1992 \(4\) SA 611 \(C\)](#) at 613A; *Sanford v Haley NO* [2004 \(3\) SA 296 \(C\)](#) at 299 A-D. On the history and origin of provisional sentence, see *CGE Rhoode Construction Co (Pty) Ltd v Provincial Administration, Cape* [1976 \(4\) SA 925 \(C\)](#); *Harrowsmith v Ceres Flats (Pty) Ltd* [1979 \(2\) SA 722 \(T\)](#); *Wollach v Barclays National Bank Ltd* [1983 \(2\) SA 543 \(A\)](#); *Basil Read (Pty) Ltd v Beta Hotels (Pty) Ltd* [2000] 1 All SA 1 (C) at 4F-h; *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank* [2011 \(3\) SA 1 \(CC\)](#) at 8E. See, in general, *Malan Provisional Sentence*.

[7](#) *First National Bank Ltd v Avtjoglou* [2000 \(1\) SA 989 \(C\)](#) at 993D-G. See also *Navidas (Pty) Ltd v Essop*; *Metha v Essop* [1994 \(4\) SA 141 \(A\)](#) at 154I-J; *Basil Read (Pty) Ltd v Beta Hotels (Pty) Ltd* [2000] 1 All SA 1 (C) at 6g-h.

[8](#) [2011 \(3\) SA 1 \(CC\)](#) at 22H-J.

[9](#) Per Brand AJ at 18E-I.

[10](#) At 23A-B.

[11](#) At 24C-I; and see *Garden to Floors (Pty) Limited v Black Civils (Pty) Limited* (unreported, EL case no 1188/2021 dated 1 July 2022) at paragraph [9].

[12](#) Van der Linden Koopmans Handboek 3.1.2.12 says that provisional sentence (*provisie* or *nampstissement*) will not be granted — 'ten zij de Eischer voorzien is van een liquide bewijs zijn verordering: bv een erkende handtekening van den Gedaagden, onder een obligatie of andere schuldbekentenis staande; een koopmans-register, wanneer koop en leverantie niet ontkend worden; doch verklaringen, en andere soorten van illiquide bewijzen, zijn daartoe onvoldoende.'

See also *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank* [2011 \(3\) SA 1 \(CC\)](#) at 8B-D; *Abner Engineering and Supplies (Pty) Ltd vs Thaver* (unreported, GJ case no 2019/41714 dated 11 May 2022) at paragraph [11].

[13](#) *Harrowsmith v Ceres Flats (Pty) Ltd* [1979 \(2\) SA 722 \(T\)](#) at 728C; *Van der Walt v Eiendomsreg (Edms) Bpk* [1986 \(2\) SA 461 \(T\)](#) at 465D-H; *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* [2009 \(5\) SA 1 \(SCA\)](#) at 10B-C; *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank* [2011 \(3\) SA 1 \(CC\)](#) at 8C-D; *Lindsey v Conteh* [2024 \(3\) SA 68 \(SCA\)](#) at paragraph [20].

[14](#) *Rich v Lagerwey* [1974 \(4\) SA 748 \(A\)](#) at 754H, followed in, *inter alia*, *Reichlin v Efthimiou* [1979 \(2\) SA 445 \(W\)](#) at 448C; *Jenkins v De Jager* [1993 \(4\) SA 534 \(N\)](#) at 538B-C; *Basil Read (Pty) Ltd v Beta Hotels (Pty) Ltd* [2000] 1 All SA 1 (C) at 4F-h; *Nedcor Bank Ltd v Lisinfo 61 Trading (Pty) Ltd* [2005 \(2\) SA 432 \(C\)](#). Other definitions, in similar terms, are given in *Inter-Union Finance Ltd v Franskraalstrand (Edms) Bpk* [1965 \(4\) SA 180 \(W\)](#) at 181F (followed in *Randon (Natal) (Pty) Ltd v Florida Twin Estates (Pty) Ltd* [1973 \(4\) SA 181 \(D\)](#) at 183G and *Salakoff v Ajoodha* [1975 \(1\) SA 750 \(W\)](#) at 753G); *Western Bank Ltd v Pretorius* [1976 \(2\) SA 481 \(T\)](#) at 483H; *GATX-Fuller (Pty) Ltd v Trade and Project Management Services (Pty) Ltd t/a TPMS (Projects) (Pty) Ltd* [1984 \(3\) SA 38 \(W\)](#) at 41G; *Jones v Krok* [1995 \(1\) SA 677 \(A\)](#) at 685J-686A; *Integritas Ouditeure Ingelyf v Crous* [2002] 1 All SA 583 (T) at 586g; *Ndamase v Functions 4 All* [2004 \(5\) SA 602 \(SCA\)](#) at 606I-607B; *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* [2009 \(5\) SA 1 \(SCA\)](#) at 10C-D; *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank* [2011 \(3\) SA 1 \(CC\)](#) at 8C-D; *Abner Engineering and Supplies (Pty) Ltd vs Thaver* (unreported, GJ case no 2019/41714 dated 11 May 2022) at paragraph [12]; *Lindsey v Conteh* [2024 \(3\) SA 68 \(SCA\)](#) at paragraph [21].

[15](#) *Harrowsmith v Ceres Flats (Pty) Ltd* [1979 \(2\) SA 722 \(T\)](#) at 743G. Documents which for this reason do not qualify as liquid documents include a company balance sheet (*Kopke v Ship and Tank Services (Pty) Ltd* [1972 \(4\) SA 339 \(C\)](#)); certain engineers' certificates (*Fraser & Chalmers South Africa (Pty) Ltd v Tuckers Land & Development Corporation (Pty) Ltd* [1977 \(2\) SA 465 \(W\)](#)); *Axton Matrix Construction (Pty) Ltd v Mbombela Local Municipality* (unreported, MM case no 1062/2022 dated 2 February 2024) at paragraphs [9]-[19]; and see *Moraitis v De Canha* [1984 \(1\) SA 420 \(W\)](#) at 428D-H); minutes of a directors' meeting (*Du Plessis NO v Bloemfontein Township Developers (Edms) Bpk* [1980 \(1\) SA 461 \(O\)](#)); a draft bond (*Reichlin v Efthimiou* [1979 \(2\) SA 445 \(W\)](#)).

[16](#) *Inglestone v Pereira* 1939 WLD 55 at 65, confirmed by the full court in *Pereira v Inglestone* 1939 TPD 357, and universally followed despite the strong criticism it elicited from Mulligan (1951) 68 SALJ 384 (see *Caltex (Africa) Ltd v Trade Fair Motors (Pvt) Ltd* [1963 \(1\) SA 36 \(SR\)](#)). In *Wollach v Barclays National Bank Ltd* [1983 \(2\) SA 543 \(A\)](#) at 555A-556D it was found neither necessary nor desirable to consider the validity of such criticism. See also *HVD Investments (Pty) Ltd v Neffke* [1984 \(2\) SA 368 \(W\)](#) at 370A-371G.

[17](#) *Harrowsmith v Ceres Flats (Pty) Ltd* [1979 \(2\) SA 722 \(T\)](#) at 728C; *Van der Walt v Eiendomsreg (Edms) Bpk* [1986 \(2\) SA 461 \(T\)](#) at 465D-H; *Joosub v Edelson* [1998 \(3\) SA 534 \(W\)](#) at 538D-G, 539A-D; *Ndamase v Functions 4 All* [2004 \(5\) SA 602 \(SCA\)](#) at 606J; *Nedcor Bank Ltd v Lisinfo 61 Trading (Pty) Ltd* [2005 \(2\) SA 432 \(C\)](#) at 434I-J.

[18](#) *Joosub v Edelson* [1998 \(3\) SA 534 \(W\)](#) at 538E-G.

[19](#) This is a departure from the principle that the debt must be due *ex facie* the instrument, and if a debt still hangs suspended on a day or a condition it is not due (*Harrowsmith v Ceres Flats (Pty) Ltd* [1979 \(2\) SA 722 \(T\)](#) at 729H).

[20](#) *Pepler v Hirschberg* 1920 CPD 438 at 442; *Union Share Agency and Investment Ltd v Spain* [1928 AD 74](#) at 78; *Inter-Union Finance Ltd v Franskraalstrand (Edms) Bpk* [1965 \(4\) SA 180 \(W\)](#) at 181H-182D; *Rich v Lagerwey* [1974 \(4\) SA 748 \(A\)](#) at 755A-756C; *Western Bank Ltd v Pretorius* [1976 \(2\) SA 481 \(T\)](#) at 487F-H.

[21](#) *Rich v Lagerwey* [1974 \(4\) SA 748 \(A\)](#) at 755D.

[22](#) *Pepler v Hirschberg* 1920 CPD 438 at 443; *Rich v Lagerwey* [1974 \(4\) SA 748 \(A\)](#) at 755D; *Wedge Steel (Pty) Ltd v Wepener* [1991 \(3\) SA 444 \(W\)](#) at 447B-C; *Brivik v Lang* [1999 \(3\) SA 984 \(W\)](#) at 987B-I.

[23](#) *Rich v Lagerwey* [1974 \(4\) SA 748 \(A\)](#) at 755E.

[24](#) *Garb v Leoper Investment (Pty) Ltd* [1969 \(4\) SA 534 \(W\)](#).

[25](#) *Rich v Lagerwey* [1974 \(4\) SA 748 \(A\)](#) at 761D. See, for example, *Frötscher v Swangola Investments (Pty) Ltd* [1973 \(1\) SA 48 \(SWA\)](#) and *Banco Standard Toita de Mocambique v Corbett Enterprises (Pty) Ltd* [1976 \(2\) SA 196 \(N\)](#) (official approval of a transaction); *Lambrechts v Lambrechts* [1981 \(2\) SA 97 \(C\)](#) (sale of farm and availability of funds); *TV and Radio Guarantee Co (Pty) Ltd v Du Preez* [1986 \(3\) SA 866 \(W\)](#) (liquidation of principal debtor). The latter case was in *Joosub v Edelson* [1998 \(3\) SA 534 \(W\)](#) at 537G-I held to have been wrongly decided.

[26](#) A claim sounding in money is an essential component of a liquid document and provisional sentence cannot be granted on a claim *ad factum praestandum* (*Van Wyngaardt NO v Knox* [1977 \(2\) SA 636 \(T\)](#) at 638G).

[27](#) *Barclays Bank of Swaziland Ltd v Mnyeketi* [1992 \(3\) SA 425 \(W\)](#); *Friedrich Kling GmbH v Continental Jewellery Manufacturers* [1993 \(3\) SA 76 \(C\)](#); and see *Malan Provisional Sentence* 228–35. See further the notes s v 'Foreign judgment' below.

- 28 See, for example, *Advance Seed Co (Pty) Ltd v De Lange* [1972 \(4\) SA 712 \(NC\)](#); *Volkskas Bpk v Scott* [1981 \(2\) SA 471 \(E\)](#).
- 29 *Harrowsmith v Ceres Flats (Pty) Ltd* [1979 \(2\) SA 722 \(T\)](#); *Barclays Western Bank Ltd v Pretorius* [1979 \(3\) SA 637 \(N\)](#); *Wollach v Barclays National Bank Ltd* [1980 \(4\) SA 133 \(C\)](#); *Wollach v Barclays National Bank Ltd* [1983 \(2\) SA 543 \(A\)](#), overruling a series of earlier cases beginning with *Bro-Trust Finance (Pty) Ltd v Pieters* [1973 \(3\) SA 520 \(T\)](#) (see Malan Provisional Sentence 19–21).
- 30 *Harrowsmith v Ceres Flats (Pty) Ltd* [1979 \(2\) SA 722 \(T\)](#); *Barclays Western Bank Ltd v Pretorius* [1979 \(3\) SA 637 \(N\)](#); *Wollach v Barclays National Bank Ltd* [1980 \(4\) SA 133 \(C\)](#); *Wollach v Barclays National Bank Ltd* [1983 \(2\) SA 543 \(A\)](#); *Nedcor Bank Ltd v Lisinfo 61 Trading (Pty) Ltd* [2005 \(2\) SA 432 \(C\)](#) at 435F–437G; *Solum Civils (Pty) Ltd v Tiger Business Enterprises CC* (unreported, GJ case no 55947 /2022 dated 14 December 2023) at paragraph 15.
- 31 *Jenkins v De Jager* [1993 \(4\) SA 534 \(N\)](#) at 538D–H and 539F; *Marlboro Transport Services CC v Google* [1998 \(3\) SA 683 \(W\)](#). In the latter case it is pointed out (at 688E) that the judgment in *Wustrow v Wustrow* [1980 \(2\) SA 308 \(W\)](#) (that if a plaintiff alleges a *causa debiti*, he is confined thereto) relates to the particular facts of the case and does not lay down any general principle. The *Wustrow* case was followed in *Abner Engineering and Supplies (Pty) Ltd vs Thaver* (unreported, GJ case no 2019/41714 dated 11 May 2022) at paragraph [16].
- 32 *Ochberg Robinson (Pty) Ltd v Cash Wholesale* [1932 CPD 168](#); *F JK Syndicate v Du Preez and Smit* [1943 WLD 116](#); *Da Costa v Da Silva* [1958 \(1\) SA 662 \(T\)](#) at 666C; *Chequers Outfitters (Bloemfontein) (Pty) Ltd v Sussman* [1959 \(3\) SA 55 \(O\)](#) at 57G; *Wedge Steel (Pty) Ltd v Wepener* [1991 \(3\) SA 444 \(W\)](#) at 446H–447A; *Grainco (Pty) Ltd v Broodryk NO* [2012 \(4\) SA 517 \(FB\)](#) at 522I–523B.
- 33 *African Credit and Investment Corporation Ltd v Hyde* [1930 WLD 146](#) at 149–50.
- 34 *Western Bank Ltd v Packery* [1977 \(3\) SA 137 \(T\)](#) at 138C–H.
- 35 *Barclays Bank v McCall* [1927 TPD 512](#).
- 36 *Wustrow v Wustrow* [1980 \(2\) SA 308 \(W\)](#).
- 37 *Jammie v Emil* [1951 \(4\) SA 460 \(T\)](#); *Deary v Mathew* [1964 \(4\) SA 102 \(C\)](#).
- 38 *Caltex (Africa) Ltd v Trade Fair Motors (Pvt) Ltd* [1963 \(1\) SA 36 \(SR\)](#).
- 39 *Randcon (Natal) (Pty) Ltd v Florida Twin Estates (Pty) Ltd* [1973 \(4\) SA 181 \(D\)](#) at 185D; and see *Smith v Mouton* [1977 \(3\) SA 9 \(W\)](#) at 13A; [1977 \(3\) SA 5 \(A\)](#) at 5D–E; *Rocade Developments (Pty) Ltd v Van Vuren & Trathen (Pty) Ltd* [1977 \(3\) SA 494 \(W\)](#) at 503A–E; *Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* [1986 \(4\) SA 510 \(N\)](#) at 562E–F; *Shelagatha Property Investments CC v Kellywood Homes (Pty) Ltd; Shelfaerie Property Holdings CC v Midrand Shopping Centre (Pty) Ltd* [1995 \(3\) SA 187 \(A\)](#) at 193A–C; *Basil Read (Pty) Ltd v Beta Hotels (Pty) Ltd* [2002] 1 All SA 1 (C) at 7b–d; *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* [2009 \(5\) SA 1 \(SCA\)](#) at 10E–G.
- 40 *Longtill Construction Ltd v Lirhobern (Pty) Ltd* [1978 \(2\) SA 240 \(W\)](#) at 244E.
- 41 The decision in *Longtill Construction Ltd v Lirhobern (Pty) Ltd* [1978 \(2\) SA 240 \(W\)](#) in which it was held that in such a case the building contract is a document on which the claim is founded and must therefore be attached to the summons, was not approved and not followed in *LTA Construction Ltd v KwaZulu-Natal Provincial Administration* [1997 \(1\) SA 633 \(N\)](#). In *Fraser & Chalmers South Africa (Pty) Ltd v Tuckers Land Development Corporation (Pty) Ltd* [1977 \(2\) SA 465 \(W\)](#), followed in *Moraitis v De Canha* [1984 \(1\) SA 420 \(W\)](#), it was held (at 468A–E) that no reference could be made to the main contract between the parties for the purpose of determining whether an engineer's certificate was a liquid document or not although such contract formed part of the papers. In *Randcon (Natal) (Pty) Ltd v Florida Twin Estates (Pty) Ltd* [1973 \(4\) SA 181 \(D\)](#) it was held (at 185C–H) that the court could look at a contract, that formed part of the papers, to ascertain in what capacity an architect's certificate was signed under circumstances where the certificate contained an allegation that the amount certified to be due and payable was due and payable by the defendant to the plaintiff. Such an allegation was not contained in the certificate under consideration in the *Fraser & Chalmers* case (*supra*) thus distinguishing it from the *Radcon* case (*supra*).
- 42 *Fraser & Chalmers SA (Pty) Ltd v Tuckers Land & Development Corporation Ltd* [1977 \(2\) SA 465 \(W\)](#); *Axton Matrix Construction (Pty) Ltd v Mbombela Local Municipality* (unreported, MM case no 1062/2022 dated 2 February 2024) at paragraphs [9]–19]; and see *Moraitis v De Canha* [1984 \(1\) SA 420 \(W\)](#) at 428C–H.
- 43 *Concor Construction (Cape) (Pty) Ltd v Simonstown Municipality* [1978 \(4\) SA 414 \(C\)](#).
- 44 *Martens v Rand Share and Broking Finance Corporation (Pty) Ltd* [1939 WLD 159](#); *Wolhuterskop Beleggings (Edms) Bpk v Bloemfontein Engineering Works (Pty) Ltd* [1965 \(2\) SA 122 \(O\)](#); *Dyason v Main Pretoria Road Properties (Edms) Bpk* [1977 \(3\) SA 177 \(T\)](#).
- 45 *Morris and Berman v Cowan* (1) [1940 WLD 1](#) and the authorities referred to therein; *Levinson v Batten & Co Ltd* [1940 TPD 41](#) at 47–8; *Dyason v Main Pretoria Road Properties (Edms) Bpk* [1977 \(3\) SA 177 \(T\)](#); *Truter, Crous, Wiggl & Vos v Udwin* [1981 \(4\) SA 68 \(T\)](#) at 73E; *Gelb, Benjamin & Kaplan v Melzer* [1987 \(1\) SA 917 \(T\)](#). In the latter case the decision in *Van der Walt v Eiendomsreg (Edms) Bpk* [1986 \(2\) SA 461 \(T\)](#) that provisional sentence can no longer be granted on a taxed bill of costs in conjunction with a power of attorney, is rejected as being in conflict with earlier authority which was binding upon the court.
- 46 *Martens v Rand Share and Broking Finance Corporation (Pty) Ltd* [1939 WLD 159](#) at 164; *Morris and Berman v Cowan* (1) [1940 WLD 1](#) at 6; *Pretorius v Cohen* [1953 \(3\) SA 639 \(O\)](#) at 640H.
- 47 Unreported, GJ case no 2020/30563 dated 25 July 2022.
- 48 *Wollach v Barclays National Bank Ltd* [1983 \(2\) SA 543 \(A\)](#), approving *Harrowsmith v Ceres Flats (Pty) Ltd* [1979 \(2\) SA 722 \(T\)](#); *Barclays Western Bank Ltd v Pretorius* [1979 \(3\) SA 637 \(N\)](#); *Wollach v Barclays National Bank Ltd* [1980 \(4\) SA 133 \(C\)](#); *Dowson & Dobson Industrial Ltd v Van der Werf* [1981 \(4\) SA 417 \(C\)](#).
- 49 *Harrowsmith v Ceres Flats (Pty) Ltd* [1979 \(2\) SA 722 \(T\)](#); *Barclays Western Bank Ltd v Pretorius* [1979 \(3\) SA 637 \(N\)](#); *Wollach v Barclays National Bank Ltd* [1980 \(4\) SA 133 \(C\)](#); *Wollach v Barclays National Bank Ltd* [1983 \(2\) SA 543 \(A\)](#); *Solum Civils (Pty) Ltd v Tiger Business Enterprises CC* (unreported, GJ case no 55947 /2022 dated 14 December 2023) at paragraph 15.
- 50 The recognition and enforcement of a foreign judgment can also be obtained by means of the ordinary application procedure (see, for example, *Wile v MEC, Department of Public Works, Gauteng* [2017 \(1\) SA 125 \(WCC\)](#) and *Danielson v Human* [2017 \(1\) SA 141 \(WCC\)](#)). Broadly speaking, the requirements for the recognition and enforcement of a foreign judgment are that the foreign court had 'international competency' according to South African law; that the judgment is final and conclusive in its effect and has not become superannuated; that its recognition and enforcement would not be contrary to public policy; that it was not obtained by fraudulent means; does not involve the enforcement of a penal or revenue law of the foreign state; and is not precluded by the provisions of the Protection of Businesses [Act 99 of 1978 \(Lindsey v Conteh 2024 \(3\) SA 68 \(SCA\)\)](#) at paragraph [18], referring to *Jones v Krok* [1995 \(1\) SA 677 \(A\)](#) at 685B–D). A foreign judgment can also be impeached on other grounds under the common law. Before its judgment will be recognized, certain minimum standards of justice must have been observed by the foreign court in its proceedings, including that court's impartiality, reasonable notice to affected persons and an application of the *audi alteram partem* principle (*Wile v MEC, Department of Public Works, Gauteng* [2017 \(1\) SA 125 \(WCC\)](#) at 133D–G). As to the requirements for the recognition and enforcement of a foreign judgment, see further, in general, the notes to [s 29\(1\)\(g\) of the Magistrates' Courts Act 32 of 1944](#) s v 'Foreign judgments' in *Jones & Buckle Civil Practice* vol I.
- 51 In *Lindsey v Mohamed* (unreported, GJ case no 0022649/2017 dated 9 May 2022) there was ambiguity on whether the foreign judgment itself created the debt claimed in the provisional sentence proceedings under circumstances where various procedures under Californian law were followed after the judgment was granted. That called for extrinsic evidence on the relevant foreign law in order to determine whether the debt concerned was one in monetary terms. In refusing to grant provisional sentence, the High Court held that it was not for the court to pronounce on a matter of procedures of a foreign court, which were unknown to it, after the fact of the foreign judgment (at paragraph [65], referring to *Society of Lloyd's v Price; Society of Lloyd's v Lee* [2006 \(5\) SA 393 \(SCA\)](#)). The High Court found that the foreign judgment did not constitute *prima facie* proof of a debt enforcement and dismissed the application for provisional sentence. An appeal against the order of the High Court was dismissed by the Supreme Court of Appeal *sub nomine Lindsey v Conteh 2024 (3) SA 68 (SCA)*. The Supreme Court of Appeal did, however, state (footnotes between [ ]):
- '[22] Generally, the need for extrinsic evidence nullifies liquidity. However, the situation has evolved over time, and there has been a move away from the stringent principle of "the document must speak for itself". [*Barlow Rand Ltd t/a Barlow Noordelik Masjinerie Maatskappy v Self-Arc (Pty) Ltd* [1986 \(4\) SA 488 \(T\)](#) at 490E–F.] As Jones [Jones v Krok 1995 (1) 677 (A) fn 3 at 687–688.] made plain, provisional sentence is one of the recognised procedures by recourse to which the enforcement of a foreign judgment in our courts may be effected. In order to make out a cause of action, the summons may need to traverse aspects of the law of the jurisdiction in which the judgment was given. There may thus be a need for some greater flexibility as to what evidence extrinsic to the foreign judgment itself may be permissible. . . .
- [36] The High Court was correct to refuse provisional sentence. However, we reach this conclusion for different reasons. In our view, it is not the recourse of the appellants to extrinsic evidence that rendered provisional sentence unavailable to them. Rather, the foreign judgment they relied upon is not a money judgment, and hence not a liquid document. The appeal must accordingly fail, and there is no reason why costs should not follow the result.'
- 52 *Lipman and Herman v Kohler* (1887) 5 SC 420; *Dougherty v Dougherty* 1907 TH 1; *Cosenza & Co v Webb* (1909) 30 NLR 407; *Scorgie v Munich* 1912 EDL 422; *Martens v Rand Share and Broking Finance Corporation (Pty) Ltd* [1939 WLD 159](#); *Morris and Berman v Cowan* (1) [1940 WLD 1](#) at 9; *Coluflanders Ltd v Scandia Industrial Productions Ltd* [1969 \(3\) SA 551 \(R\)](#); *Corona v Zimbabwe Iron & Steel Co Ltd* [1985 \(2\) SA 423 \(TKA\)](#) at 425I; *Jones v Krok* [1995 \(1\) SA 677 \(A\)](#) at 689C–F; *Jones v Krok* [1996 \(1\) SA 504 \(T\)](#) at 507H–508C; *C Hoare & Co v Runewitsch* [1997 \(1\) SA 338 \(W\)](#); *Society of Lloyd's v Price; Society of Lloyd's v Lee* [2006 \(5\) SA 393 \(SCA\)](#) at 408A. See also (2005) 17 SA Merc LJ 125 at 131–4. A judicially recorded foreign settlement (called in German a 'Prozessvergleich') which gives the right to execute is not

a final judgment on which provisional sentence can be claimed (*Holz v Harksen* [1995 \(3\) SA 521 \(C\)](#) in which the decision to the contrary in *Gabelsberger v Babil* [1994 \(2\) SA 677 \(T\)](#) was not approved).

[53 Garlick v Broido](#) (1897) 7 CTR 159; *Kennie v Mustard* (1897) 7 CTR 270; *Coppens v Coppens* (1908) 29 NLR 416; *Scorgie v Munnich* 1912 EDL 422; *National Milling Co Ltd v Mohamed* [1966 \(3\) SA 22 \(R\)](#). See also *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* [1986 \(3\) SA 509 \(D\)](#) at 531G; *Jones v Krok* [1995 \(1\) SA 677 \(A\)](#); *Jones v Krok* [1996 \(1\) SA 504 \(T\)](#). In *Society of Lloyd's v Price*; *Society of Lloyd's v Lee* [2006 \(5\) SA 393 \(SCA\)](#), the Supreme Court of Appeal, in overruling *Society of Lloyd's v Price*; *Society of Lloyd's v Lee* [2005 \(3\) SA 549 \(T\)](#) and distinguishing *Laconian Maritime Enterprises (supra)* and *Minister of Transport, Transkei v Abdul* [1995 \(1\) SA 366 \(N\)](#), held (at 406F) that the English law of prescription (i.e. the *lex causae*) and not the South African law of prescription (i.e. the *lex fori*) should be applied in deciding a defence of prescription raised in provisional sentence proceedings.

[54 Blanchard, Krasner & French v Evans](#) [2004 \(4\) SA 427 \(W\)](#) at 434F-H.

[55 Elan Boulevard \(Pty\) Ltd v Fnyn Investments \(Pty\) Ltd](#) [2019 \(3\) SA 441 \(SCA\)](#) at 446B-447A and the cases there referred to; *Hahlo* (1969) 86 SALJ 354 at 357-8. See also (2005) 17 SA Merc LJ 125 at 131-4; *International Fruit Genetics LLC v Redelinghuys and Others* NNO [2019 \(4\) SA 174 \(WCC\)](#); *S v S* (unreported, WCC case no 19109/2020 dated 2 November 2021) at paragraphs [8]-[13].

[56 Blanchard, Krasner & French v Evans](#) [2004 \(4\) SA 427 \(W\)](#) at 435B.

[57 Coluflandres Ltd v Scandia Industrial Products Ltd](#) [1969 \(3\) SA 551 \(R\)](#) at 557A.

[58 Jones v Krok](#) [1995 \(1\) SA 677 \(A\)](#) at 685C; *Purser v Sales* [2001 \(3\) SA 445 \(SCA\)](#) at 450D; *Society of Lloyd's v Price*; *Society of Lloyd's v Lee* [2006 \(5\) SA 393 \(SCA\)](#) at 407H-408A. A judgment sounding in money, given by a foreign court, will be recognized and enforced by our courts if, *inter alia*, at the time of the commencement of the action, the defendant was either (i) physically present in the foreign country, or (ii) resident or domiciled in that country, whether or not he was physically present there at the time, or the defendant has submitted to the jurisdiction of the foreign court (*Reiss Engineering Co Ltd v Insamcor (Pty) Ltd* [1983 \(1\) SA 1033 \(W\)](#) at 1037H-1038A; *Erskine v Chinatex Oriental Trading Co* [2001 \(1\) SA 817 \(C\)](#) at 820J-821B; *Blanchard, Krasner & French v Evans* [2001 \(4\) SA 86 \(W\)](#) at 89H-90A, reversed on appeal, but not on this point, in *Blanchard, Krasner & French v Evans* [2002 \(4\) SA 144 \(W\)](#); *Richman v Ben-Tovim* [2007 \(2\) SA 283 \(SCA\)](#) at 287D-F and 289A-D). Submission to the jurisdiction of a foreign court could be express or implied (i.e orally or in writing, or tacitly, by conduct) (*Richman v Ben-Tovim* [2006 \(2\) SA 591 \(C\)](#) at 600F-601G, reversed on appeal, but not on this point, in *Richman v Ben-Tovim* [2007 \(2\) SA 283 \(SCA\)](#), and the cases there referred to). In the case of submission by conduct it must be clear that the defendant has accepted the jurisdiction of the foreign court unconditionally (i.e that the defendant has acquiesced therein) (*Richman v Ben-Tovim* [2006 \(2\) SA 591 \(C\)](#) at 601G-602A, reversed on appeal, but not on this point, in *Richman v Ben-Tovim* [2007 \(2\) SA 283 \(SCA\)](#)). See also *Du Preez v Philip-King* [1963 \(1\) SA 801 \(W\)](#) at 803B-F; *Spiro 'Jurisdiction by Consent'* (1967) 84 SALJ 295 at 306. In *Blanchard, Krasner & French v Evans* [2002 \(4\) SA 144 \(W\)](#) the full court held (at 148F-H) that 'clear' (as per the *dictum* of *Van Dijkhorst J in Reiss Engineering Co Ltd v Insamcor (Pty) Ltd* [1983 \(1\) SA 1033 \(W\)](#) at 1038E) means that submission must be proved on a balance of probabilities by the party bearing the onus.

[59 Reiss Engineering Co Ltd v Insamcor \(Pty\) Ltd](#) [1983 \(1\) SA 1033 \(W\)](#) at 1036E and 1037C; *Zwyssig v Zwyssig* [1997 \(2\) SA 467 \(W\)](#) at 472J; *Erskine v Chinatex Oriental Trading Co* [2001 \(1\) SA 817 \(C\)](#) at 820D-I; *Blanchard, Krasner & French v Evans* [2001 \(4\) SA 86 \(W\)](#) at 89B-I, reversed on appeal, but not on this point, in *Blanchard, Krasner & French v Evans* [2002 \(4\) SA 144 \(W\)](#); *Maschinen Frommer GmbH & Co KG v Trisave Engineering & Machinery Supplies (Pty) Ltd* [2003 \(6\) SA 69 \(C\)](#) at 76E-G; *Blanchard, Krasner & French v Evans* [2004 \(4\) SA 427 \(W\)](#) at 433E-435A; *Richman v Ben-Tovim* [2006 \(2\) SA 591 \(C\)](#) at 599B-C, reversed on appeal, but not on this point, in *Richman v Ben-Tovim* [2007 \(2\) SA 283 \(SCA\)](#); *Pollak on Jurisdiction* 158-179; (2005) 17 SA Merc LJ 125 at 127-31. The general principles and rules which South African courts should apply in regard to proceedings for the enforcement of a foreign judgment that is subject to an appeal are set out in *Jones v Krok* [1995 \(1\) SA 677 \(A\)](#) at 692B-G. See also *Erskine v Chinatex Oriental Trading Co* [2001 \(1\) SA 817 \(C\)](#) at 820C-G.

[60 Maschinen Frommer GmbH & Co KG v Trisave Engineering & Machinery Supplies \(Pty\) Ltd](#) [2003 \(6\) SA 69 \(C\)](#) at 76F-G; *Richman v Ben-Tovim* [2006 \(2\) SA 591 \(C\)](#) at 599D, reversed on appeal, but not on this point, in *Richman v Ben-Tovim* [2007 \(2\) SA 283 \(SCA\)](#).

[61 2013 \(5\) SA 325 \(CC\)](#) at 343B-C and 348A-D.

[62](#) Which thus far had only provided for the execution of judgments or orders made by courts of foreign states.

[63 Westdeutsche Landesbank Girozentrale \(Landesbausparkasse\) v Horsch](#) [1993 \(2\) SA 342 \(NmH\)](#) at 344B.

[64 Westdeutsche Landesbank Girozentrale \(Landesbausparkasse\) v Horsch](#) [1993 \(2\) SA 342 \(NmH\)](#) at 344B. In this case it was said that it is undesirable that the attorney of record of the plaintiff should translate documents to be used on behalf of his client in the action, even though the attorney is a sworn translator of the court.

[65 Westdeutsche Landesbank Girozentrale \(Landesbausparkasse\) v Horsch](#) [1993 \(2\) SA 342 \(NmH\)](#) at 344C.

[66 Barclays Bank of Swaziland Ltd v Mnyeketi](#) [1992 \(3\) SA 425 \(W\)](#) at 436E. See also *Elgin Brown and Hamer (Pty) Ltd v Dampskilbsselskab Torm Ltd* [1988 \(4\) SA 671 \(N\)](#); *Friedrich Kling GmbH v Continental Jewellery Manufacturers* [1993 \(3\) SA 76 \(C\)](#) at 87H-J; *Gabelsberger v Babil* [1994 \(2\) SA 677 \(T\)](#); *Ullman Sails (Pty) Ltd v Jannie Reeuvers Sails (Pty) Ltd*; *Ullman Sails International Incorporated v Reeuvers*; *Ullman Sails International Incorporated v Reeuvers* [2022] 3 All SA 290 (WCC) at paragraphs [35] and [63]. The decision to the contrary in *Voest Alpine Intertrading Gesellschaft mbh v Burwill and Co SA (Pty) Ltd* [1985 \(2\) SA 149 \(W\)](#) has not found approval. On the power of the court to give judgment in foreign currency, see *Standard Chartered Bank of Canada v Nedperm Bank Ltd* [1994 \(4\) SA 747 \(A\)](#); *Jones v Krok* [1996 \(1\) SA 504 \(T\)](#) and the notes to rule 18(10) below.

[67 Barclays Bank of Swaziland Ltd v Mnyeketi](#) [1992 \(3\) SA 425 \(W\)](#) at 436F.

[68 Barclays Bank of Swaziland Ltd v Mnyeketi](#) [1992 \(3\) SA 425 \(W\)](#). In this case the court ordered the plaintiff, when suing out a writ of execution, to provide an affidavit sworn by an authorized dealer in foreign exchange, stating the relevant rate of exchange immediately prior to the suing out of the writ. Such an affidavit serves not only to fix the rate of exchange to be used in calculating the amount in South African rand that the sheriff must realize in terms of the writ, but also to guide the registrar in fixing the amount of security *de restituendo* in terms of subrule (9). This form of order was followed in *Friedrich Kling GmbH v Continental Jewellery Manufacturers* [1993 \(3\) SA 76 \(C\)](#) at 87I-J and 90A-C.

[69 Wile v MEC, Department of Public Works, Gauteng](#) [2017 \(1\) SA 125 \(WCC\)](#) at 125F-H.

[70 Lindsey v Conte](#) [2024 \(3\) SA 68 \(SCA\)](#) at paragraphs [33]-[36].

[71 Wedge Steel \(Pty\) Ltd v Wepener](#) [1991 \(3\) SA 444 \(W\)](#) at 446I; *Grainco (Pty) Ltd v Broodryk NO* [2012 \(4\) SA 517 \(FB\)](#) at 522I-523B.

[72](#) See *Standard Bank of South Africa Ltd v Bairstowe* 1921 WLD 15 in which provisional sentence was granted for interest at the legal rate and not at the bank rate.

[73](#) See, for example, *Moosa v Mahomed* 1938 TPD 473; *FJK Syndicate v Du Preez and Smit* 1943 WLD 116; *Hamman v Van der Merwe* [1947 \(1\) SA 631 \(SWA\)](#); *Grainco (Pty) Ltd v Broodryk NO* [2012 \(4\) SA 517 \(FB\)](#) at 521G-H and 522I-H.

[74 Wedge Steel \(Pty\) Ltd v Wepener](#) [1991 \(3\) SA 444 \(W\)](#) at 446J-447A; *Grainco (Pty) Ltd v Broodryk NO* [2012 \(4\) SA 517 \(FB\)](#) at 522I-523B.

[75 Covaco \(Pty\) Ltd v Mohawk Industries \(Pty\) Ltd](#) [1969 \(1\) SA 409 \(D\)](#).

[76 Basinghall Investments \(Pty\) Ltd v Figure Beauty Clinics \(SA\) \(Pty\) Ltd](#) [1976 \(3\) SA 112 \(W\)](#); *Woolfson's Credit (Pty) Ltd v Holdt* [1977 \(3\) SA 720 \(N\)](#).

[77 Chequers Outfitters \(Bloemfontein\) \(Pty\) Ltd v Sussman](#) [1959 \(3\) SA 55 \(O\)](#).

[78 Wollach v Barclays National Bank Ltd](#) [1983 \(2\) SA 543 \(A\)](#).

[79 Inter-Union Finance Ltd v Franskraalstrand \(Edms\) Bpk](#) [1965 \(4\) SA 180 \(W\)](#) at 181H-182D; *Western Bank Ltd v Pretorius* [1976 \(2\) SA 481 \(T\)](#) at 487F-H.

[80 Inglestone v Pereira](#) 1939 WLD 55; *Inter-Union Finance Ltd v Franskraalstrand (Edms) Bpk* [1965 \(4\) SA 180 \(W\)](#) at 182H-183B; *HVD Investments (Pty) Ltd v Neffke* [1984 \(2\) SA 368 \(W\)](#) at 370A-371H; *African Bank Ltd v Mgedezi* [1991 \(4\) SA 300 \(TK\)](#) at 302H.

[81 Inglestone v Pereira](#) 1939 WLD 55 at 65; *Anastassiades v Daniel* [1947 \(1\) SA 298 \(W\)](#); *HVD Investments (Pty) Ltd v Neffke* [1984 \(2\) SA 368 \(W\)](#) at 371G; *African Bank Ltd v Mgedezi* [1991 \(4\) SA 300 \(TK\)](#) at 302H.

[82 African Credit and Investment Corporation Ltd v Hyde](#) 1930 WLD 146 at 149-50.

[83 Western Bank Ltd v Packery](#) [1977 \(3\) SA 137 \(T\)](#) at 138C-H.

[84 See Rich v Lagerwey](#) [1974 \(4\) SA 748 \(A\)](#) at 760E; *Industrial Units (Natal) (Pty) Ltd v Platberg Quarries (Pty) Ltd* [1979 \(2\) SA 312 \(O\)](#) at 314E-G.

[85 Southern Life Association v Bezuidenhout](#) 1926 TPD 185; *Prudential Building Society v Reynders* 1941 WLD 29; *United Building Society v Penzhorn* [1949 \(2\) SA 943 \(O\)](#); *Century Insurance Co Ltd v Postles* [1958 \(1\) SA 168 \(SR\)](#); *Centenary Building Society v Ellis* [1960 \(2\) SA 682 \(SR\)](#).

[86 West Rand Building Society v Behrens](#) 1928 WLD 110; *United Building Society v Ninow* 1928 WLD 193; but see *Prudential Building Society v Reynders* 1941 WLD 29; *United Building Society v Penzhorn* [1949 \(2\) SA 943 \(O\)](#); *Centenary Building Society v Ellis* [1960 \(2\) SA 682 \(SR\)](#); *Industrial Units (Natal) (Pty) Ltd v Platberg Quarries (Pty) Ltd* [1979 \(2\) SA 312 \(O\)](#).

[87 See Charlton v Bacus](#) 1932 NPD 383; *Prudential Building Society v Reynders* 1941 WLD 29; *Alliance Building Society v Dry* [1949 \(2\) SA 160 \(O\)](#); *Industrial Units (Natal) (Pty) Ltd v Platberg Quarries (Pty) Ltd* [1979 \(2\) SA 312 \(O\)](#).

[88 Thienhaus NO v Metje & Ziegler Ltd](#) [1965 \(3\) SA 25 \(A\)](#) at 31H-32E; *Reichlin v Efthimiou* [1979 \(2\) SA 445 \(W\)](#) at 448E-449G.

- 89 *Barclays National Bank Ltd v Chaldon Investments (Pty) Ltd* [1975 \(2\) SA 344 \(W\)](#).
- 90 *FJK Syndicate v Du Preez and Smit* 1943 WLD 116 at 119; *Brazil v Henderson & Henderson* 1946 WLD 270 at 278; and see *Moosa v Mahomed* 1938 TPD 473 at 477.
- 91 See *Rawjee v Michaelides* [1989 \(4\) SA 605 \(W\)](#) at 609A.
- 92 *Marcuson v Botha* 1913 TPD 650; *Patel v Rajah* 1919 WLD 34; *Jackson v Van Zyl* 1928 CPD 21; *Atid Investment Co (Pty) Ltd v Loshuco (Pty) Ltd* [1976 \(1\) SA 192 \(W\)](#); *Trust Bank van Afrika Bpk v Bendor Properties Ltd* [1977 \(2\) SA 632 \(T\)](#) at 634G and 635G.
- 93 *Burtin v Roth* 1915 TPD 76; *Fradin v Reichman* 1917 TPD 573; *Herbstein & Van Winsen Civil Practice* vol 2 1345.
- 94 [1977 \(2\) SA 632 \(T\)](#) at 634F-635H. See further Malan *Provisional Sentence* 34-123 where the substantive requirements for provisional sentence on bills, cheques and promissory notes are discussed.
- 95 See, in this regard, *Greeff v Myers* [1948 \(3\) SA 943 \(E\)](#); *Tod v Els* [1952 \(3\) SA 832 \(N\)](#); Court Notice [1981 \(1\) SA 389 \(O\)](#); *Alvern Cables (Pty) Ltd v Dynamis (Pty) Ltd* [1989 \(3\) SA 916 \(C\)](#) at 919H. As to the said practice in the Gauteng Division of the High Court, Pretoria, see paragraph 15.11 of the *Practice Manual* of that division in [Volume 3, Part H2](#). As to the said practice in the Gauteng Local Division (i.e local seat) of the High Court, Johannesburg, see paragraph 10.10 of the *Practice Manual* of that division in [Volume 3, Part H3](#).
- 96 [1994 \(4\) SA 141 \(A\)](#) at 147F.
- 97 See further Gering *Commentary* 44-7.
- 98 *Essa v Asmal* [2012 \(2\) SA 576 \(KZP\)](#) at 585D-586A.
- 99 *C G E Rhoode Construction Co (Pty) Ltd v Provincial Administration, Cape* [1976 \(4\) SA 925 \(C\)](#) at 928B; *Aarwater (Edms) Bpk v Venter* [1982 \(3\) SA 974 \(T\)](#) at 975B-D.
- 100 *C G E Rhoode Construction Co (Pty) Ltd v Provincial Administration, Cape* [1976 \(4\) SA 925 \(C\)](#) at 928A.
- 101 See, for example, *Millman NO v Goosen* [1975 \(3\) SA 141 \(O\)](#).
- 102 *Barclays National Bank Ltd v Chaldon Investments Ltd* [1974 \(1\) SA 131 \(W\)](#).
- 103 *Pötter v Kagan* [1976 \(4\) SA 21 \(W\)](#) at 22D-E.
- 104 [1977 \(2\) SA 632 \(T\)](#) at 634F-635H. See further Malan *Provisional Sentence* 34-123 where the substantive requirements for provisional sentence on bills, cheques and promissory notes are discussed.
- 105 *Millman NO v Goosen* [1975 \(3\) SA 141 \(O\)](#).
- 106 *Climax Floors (Pty) Ltd v Du Toit Construction Co (Pty) Ltd* [1980 \(3\) SA 731 \(C\)](#) at 734G.
- 107 See, for example, *Pepler v Hirschberg* 1920 CPD 438 at 443; *Union Share Agency and Investment Ltd v Spain* [1928 AD 74](#) at 78; *Inter-Union Finance Ltd v Franskraalstrand (Edms) Bpk* [1965 \(4\) SA 180 \(W\)](#) at 182A-C; *Rich v Lagerwey* [1974 \(4\) SA 748 \(A\)](#) at 755A-H; *Leyland South Africa (Pty) Ltd v Booysen and Clark Motors (Pty) Ltd* [1984 \(3\) SA 480 \(W\)](#) at 483B.
- 108 *Longtill Construction Ltd v Lirhobern (Pty) Ltd* [1978 \(2\) SA 240 \(W\)](#) at 244E.
- 109 *Reiss Engineering Co Ltd v Insamcor (Pty) Ltd* [1983 \(1\) SA 1033 \(W\)](#). See also *Westdeutsche Landesbank Girozentrale (Landesbausparkasse) v Horsch* [1993 \(2\) SA 342 \(NmH\)](#).
- 110 *De Beer v Gedye & Gedye* 1916 WLD 53 at 55; *Wiehahn NO v Wouda* [1957 \(4\) SA 724 \(W\)](#) at 725C; *Kent v Ramnarain* [1964 \(1\) SA 789 \(D\)](#).
- 111 In *Union Bank of South Africa Ltd v Woolf; Union Bank of South Africa Ltd v Shipper* 1939 WLD 222 at 224-5. These principles have been applied in many cases; see, for example, *Jaffer v Nell* [1958 \(3\) SA 497 \(C\)](#) at 498G-H; *Trustees African Explosives Pension Fund v New Hotel Properties (Pty) Ltd* [1961 \(3\) SA 245 \(W\)](#) at 247B-F; *Barclays National Bank Ltd v Chaldon Investments Ltd* [1974 \(1\) SA 131 \(W\)](#) at 132D; *Pötter v Kagan* [1976 \(4\) SA 21 \(W\)](#) at 22E; *Standard Mineral Water Works (Pty) Ltd v Grobler* [1977 \(4\) SA 66 \(T\)](#) at 68D; *Investors Club Ltd v Jaap de Villiers Beleggings (Edms) Bpk* [1978 \(3\) SA 960 \(W\)](#) at 964; *Vigushin v Smart Brides (Pty) Ltd* [1979 \(2\) SA 798 \(W\)](#) at 802E-G; *Blanchard, Krasner & French v Evans* [2004 \(4\) SA 427 \(W\)](#) at 431I-432A.
- 112 *Barclays National Bank Ltd v Chaldon Investments Ltd* [1974 \(1\) SA 131 \(W\)](#) at 132H; *Standard Mineral Water Works (Pty) Ltd v Grobler* [1977 \(4\) SA 66 \(T\)](#) at 68F.
- 113 Rule 41A(2)(a).
- 114 Rule 41A(2)(c).
- 115 Rule 41A(2)(d).
- 116 Rule 41A(4)(c).
- 117 *Rigby Engineering v Rockboring & Drilling (Pty) Ltd* [1981 \(1\) SA 328 \(O\)](#) at 331B.
- 118 *Rigby Engineering v Rockboring & Drilling (Pty) Ltd* [1981 \(1\) SA 328 \(O\)](#) at 331H.
- 119 *Rigby Engineering v Rockboring & Drilling (Pty) Ltd* [1981 \(1\) SA 328 \(O\)](#) at 331H.
- 120 See the notes to [s 24](#) of the Superior Courts *Act 10 of 2013* in Volume 1 third edition, Part D.
- 121 Subrule (1) of rule 8 read with paragraph 3 of Form 3. See *Gordon NO v McDonald* [1958 \(1\) SA 713 \(N\)](#).
- 122 *Van Rensburg v De Lange* [1947 \(1\) SA 664 \(T\)](#) at 665; *Chain v Hertaig* [1956 \(2\) SA 283 \(W\)](#) at 284B; *Gordon NO v McDonald* [1958 \(1\) SA 713 \(N\)](#); *CRC Engineering (Pty) Ltd v J C Dunbar & Sons (Pty) Ltd* [1977 \(1\) SA 710 \(W\)](#) at 712B; *Standard Mineral Water Works (Pty) Ltd v Grobler* [1977 \(4\) SA 66 \(T\)](#); *Climax Floors (Pty) Ltd v Du Toit Construction Co (Pty) Ltd* [1980 \(3\) SA 731 \(C\)](#) at 735A-H.
- 123 *Climax Floors (Pty) Ltd v Du Toit Construction Co (Pty) Ltd* [1980 \(3\) SA 731 \(C\)](#) at 735F.
- 124 *Cardboard Packing Utilities (Pty) Ltd v Delta Associates (Pty) Ltd* [1961 \(4\) SA 551 \(W\)](#); *Investors Club Ltd v Jaap de Villiers Beleggings (Edms) Bpk* [1978 \(3\) SA 960 \(W\)](#) at 962A-B; *GATX-Fuller (Pty) Ltd v Trade and Project Management Services (Pty) Ltd t/a TPMS (Projects) (Pty) Ltd* [1984 \(3\) SA 38 \(W\)](#) at 44I-45E.
- 125 *Climax Floors (Pty) Ltd v Du Toit Construction Co (Pty) Ltd* [1980 \(3\) SA 731 \(C\)](#) at 736A.
- 126 *Finansbank Bpk v Klopper* [1981 \(1\) SA 106 \(T\)](#).
- 127 *McGill v Vlakplaats Brickworks (Pty) Ltd* [1981 \(1\) SA 637 \(W\)](#) at 643C-E where it was held that the court may condone the irregularity without requiring a substantive application for such relief.
- 128 *Bank of Africa v Harpur* (1884) 4 EDC 252 at 255; *Coetzee & Solomon Real Estate (Pty) Ltd v Texeira* [1970 \(1\) SA 94 \(D\)](#) at 96D; *African Lumber Co (Pvt) Ltd v Katz* [1978 \(4\) SA 432 \(C\)](#) at 455H; *Bowfam Leasing (Pty) Ltd t/a Metropole Finance (Pty) Ltd v Muller* [1982 \(2\) SA 759 \(C\)](#) at 762G; *Morgenster Development and Finance v Metelerkamp* [1986 \(2\) SA 453 \(C\)](#) at 455A-E; *Oosthuizen 1983 De Rebus* 593; Malan *Provisional Sentence* 170.
- 129 *F J Mitrie (Pty) Ltd v Silver Hardware & Timber Co* [1975 \(4\) SA 913 \(D\)](#) at 914F; Malan *Provisional Sentence* 170.
- 130 See, for example, *F J Mitrie (Pty) Ltd v Silver Hardware & Timber Co* [1975 \(4\) SA 913 \(D\)](#) at 915A-E; *Rovic Noordkaap v Roux* [1980 \(4\) SA 59 \(O\)](#) at 61E-F; *Bowfam Leasing (Pty) Ltd t/a Metropole Finance (Pty) Ltd v Muller* [1982 \(2\) SA 759 \(C\)](#) at 762E; *Karoo Vleisbeurs Bpk v Nortje* [1984 \(2\) SA 31 \(T\)](#) at 32F; *Morgenster Development and Finance v Metelerkamp* [1986 \(2\) SA 453 \(C\)](#) at 456A-E.
- 131 *Coetze & Solomon Real Estate (Pty) Ltd v Texeira* [1970 \(1\) SA 94 \(D\)](#) at 95H; *Randon (Natal) (Pty) Ltd v Florida Twin Estates (Pty) Ltd* [1973 \(4\) SA 181 \(D\)](#) at 186A-D; *Coberg Television Services (Pty) Ltd v Cooperman* [1981 \(3\) SA 919 \(W\)](#) at 920H-921E; *Chamani v St Ives Trading Co (Pty) Ltd* [1982 \(2\) SA 638 \(D\)](#) at 640D-H; *Karoo Vleisbeurs Bpk v Nortje* [1984 \(2\) SA 31 \(T\)](#) at 33H-34E; *Morgenster Development and Finance v Metelerkamp* [1986 \(2\) SA 453 \(C\)](#) at 457A-C; *Barlow Rand Ltd t/a Barlow Noordelik Masjinerie Maatskappy v Self-Arc (Pty) Ltd* [1986 \(4\) SA 488 \(T\)](#); *Amalgamated Beverage Industries Ltd v Pillay* [1992 \(2\) SA 163 \(D\)](#); *Navidas (Pty) Ltd v Essop; Metha v Essop* [1994 \(4\) SA 141 \(A\)](#) at 154A-155A. In *Hendrik Sebothana v Andrew Tladi* (unreported, TPD case no 26040/94 dated 3 February 1995) the owner of the cheque was 'Andy's Motors and Filling Station' whereas the defendant was cited as 'Andrew Tladi'. Kirk-Cohen J held that the cases where limited intrinsic evidence is allowed are confined to the situation where it is alleged in the summons that the signatory 'trades as . . .' and where there is no denial of the signature. *In casu* there was no allegation in the summons that the defendant traded as 'Andy's Motors and Filling Station' or that he was the sole owner thereof. Furthermore there was no admission as to the signature. Provisional sentence was accordingly refused.
- 132 See *African Lumber Co (Pvt) Ltd v Katz* [1978 \(4\) SA 432 \(C\)](#) at 437F-438F; *Rovic Noordkaap v Roux* [1980 \(4\) SA 59 \(O\)](#) at 61H; *Bowfam Leasing (Pty) Ltd t/a Metropole Finance (Pty) Ltd v Muller* [1982 \(2\) SA 759 \(C\)](#) at 762G-763D; and see *Chamani v St Ives Trading Co (Pty) Ltd* [1982 \(2\) SA 638 \(D\)](#) at 641E-642A.
- 133 [1982 \(2\) SA 638 \(D\)](#) at 641A.
- 134 *Oosthuizen 1983 De Rebus* 593 points out that in everyday usage cheques are often made payable to the trade name of a business, and not to the proprietor thereof. He further points out that where a business has a particularly long and cumbersome name, some acceptable abbreviation is often used for cheque purposes and that it would surely not make sense to refuse provisional sentence in these cases, especially where it can be easily established that the payee and the plaintiff are one and the same person. See also his remarks on the 'startling result' of the decision in *Rovic Noordkaap v Roux* [1980 \(4\) SA 59 \(O\)](#), a case in which 'an unduly strict approach' had been adopted (Malan *Provisional Sentence* 172).
- 135 *Coberg Television Services (Pty) Ltd v Cooperman* [1981 \(3\) SA 919 \(W\)](#) at 920G-921D; *GATX-Fuller (Pty) Ltd v Trade and Project Management Services (Pty) Ltd t/a TPMS (Projects) (Pty) Ltd* [1984 \(3\) SA 38 \(W\)](#) at 44A-D.

- 136 *Chamani v St Ives Trading Co (Pty) Ltd* [1982 \(2\) SA 638 \(D\)](#) at 640H–641A.
- 137 *Longtill Construction Ltd v Lirhobern (Pty) Ltd* [1978 \(2\) SA 240 \(W\)](#) at 243A.
- 138 *Longtill Construction Ltd v Lirhobern (Pty) Ltd* [1978 \(2\) SA 240 \(W\)](#) at 244C.
- 139 *Garb v Leoper Investment (Pty) Ltd* [1969 \(4\) SA 534 \(W\)](#).
- 140 *Vigushin v Smart Brides (Pty) Ltd* [1979 \(2\) SA 798 \(W\)](#); *Climax Floors (Pty) Ltd v Du Toit Construction Co (Pty) Ltd* [1980 \(3\) SA 731 \(C\)](#) at 734H.
- 141 *Longtill Construction Ltd v Lirhobern (Pty) Ltd* [1978 \(2\) SA 240 \(W\)](#) at 246H–247A.
- 142 *Estate Jacobs v Jacobs* 1914 CPD 204; *De Waal v Benson* 1939 OPD 159; *Combrink v Kruger* [1950 \(2\) SA 783 \(O\)](#); *Munitz v Glynnville Investments (Pty) Ltd* [1951 \(2\) SA 24 \(C\)](#); *Harding & Parker Ltd v Beukes & Papenfus Ondernemings (Edms) Bpk* [1959 \(3\) SA 965 \(O\)](#).
- 143 *Harding & Parker Ltd v Beukes & Papenfus Ondernemings (Edms) Bpk* [1959 \(3\) SA 965 \(O\)](#).
- 144 *Munitz v Glynnville Investments (Pty) Ltd* [1951 \(2\) SA 24 \(C\)](#).
- 145 *Westdeutsche Landesbank Girozentrale (Landesbausparkasse) v Horsch* [1993 \(2\) SA 342 \(NmH\)](#) at 344C.
- 146 See, for example, paragraph 15.11.2 of the *Practice Manual* of the Gauteng Division of the High Court, Pretoria, in [Volume 3, Part H2](#). In *Sebenza Shipping & Forwarding (Pty) Ltd v Passenger Rail Agency of South Africa SOC* [2019 \(2\) SA 318 \(G\)](#) the defendant resisted payment claimed in a provisional sentence summons on the basis, amongst other things, that the plaintiff failed to hand up to court the original document on which the claim was based as required by the then *Practice Manual* of the Gauteng Local Division (i e local seat) of the High Court. The plaintiff was unable to produce such document that had been sent to it by electronic means, and it was perceived that the original document remained with the sender. Wepener J regarded the document that had been electronically received by the plaintiff as an original document (at 320A–321C) and, with regard to the provisions of [s 15](#) of the Electronic Communications and Transactions [Act 25 of 2002](#), held that the document should be given due evidential weight (at 321C–322C). As far as the *Practice Manual* was concerned, Wepener J stated (at 320B–321B — footnotes omitted):  
 '[3] . . . I am of the view that the practice manual fails to take into account the modern-day practice of electronic communications and left a lacuna by not providing for a situation where documents are electronically transmitted. In this regard, where the practice manual purports to narrow the ambit of rule 8, which does not require an original document to be produced, I am of the view that I should apply the provisions of [s 173](#) of the *Constitution*.  
 [4] This court is enjoined to protect and regulate its own process and the practice manual rather restricts a process which, in my view, it should not; and nor have I been shown any reasoning why a plaintiff's rights should be limited in circumstances such as those prevailing in this matter.'
- The new *Practice Manual* of the Gauteng Local Division (i e local seat) of the High Court, Johannesburg, which came into operation on 1 March 2018, no longer requires that the original liquid document be handed up from the bar when the plaintiff moves for provisional sentence.
- 147 *Malan Provisional Sentence* 183 n114.
- 148 *Ficksburg Ko-operasie Bpk v Le Roux* [1974 \(3\) SA 433 \(O\)](#).
- 149 Rule 41A(2)(c).
- 150 Rule 41A(2)(d).
- 151 Subrule (1) of rule 8 read with paragraph 3 of Form 3.
- 152 *Bowfam Leasing (Pty) Ltd t/a Metropole Finance (Pty) Ltd v Muller* [1982 \(2\) SA 759 \(C\)](#) at 761F.
- 153 *Munitz v Glynnville Investments (Pty) Ltd* [1951 \(2\) SA 24 \(C\)](#); *Choonora v Rahim* [1960 \(2\) SA 504 \(W\)](#) at 505H–506C; *Bay Loan Investment (Pty) Ltd v Bay View (Pty) Ltd* [1971 \(4\) SA 538 \(C\)](#); *Bowfam Leasing (Pty) Ltd t/a Metropole Finance (Pty) Ltd v Muller* [1982 \(2\) SA 759 \(C\)](#) at 761G.
- 154 *Moskowitz v Meteor Records (Pty) Ltd* [1978 \(3\) SA 996 \(C\)](#) at 1000.
- 155 *Aarwater (Edms) Bpk v Venter* [1982 \(3\) SA 974 \(T\)](#) at 976E.
- 156 *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank* [2011 \(3\) SA 1 \(CC\)](#) at 10E–11A; *Abner Engineering and Supplies (Pty) Ltd vs Thaver* (unreported, GJ case no 2019/41714 dated 11 May 2022) at paragraphs [13] and [15].
- 157 *Lesotho Diamond Works (1973) (Pty) Ltd v Lurie* [1975 \(2\) SA 142 \(O\)](#) at 145H; *Abner Engineering and Supplies (Pty) Ltd vs Thaver* (unreported, GJ case no 2019/41714 dated 11 May 2022) at paragraphs [13] and [15].
- 158 *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank* [2011 \(3\) SA 1 \(CC\)](#) at 10D–E; *Abner Engineering and Supplies (Pty) Ltd vs Thaver* (unreported, GJ case no 2019/41714 dated 11 May 2022) at paragraph [13]. In *Super Steel LDA v Machava Trading CC* (unreported, GJ case no 2023/008088 dated 19 February 2024) Wilson J held:  
 '8 Provisional sentence proceedings are interlocutory in nature. Accordingly, the inherent probabilities test set out in *Webster v Mitchell* [1948 \(1\) SA 1186 \(W\)](#), at 1189, is likely the appropriate method by which to choose between the parties' competing versions. However, even if I were to apply the test for the resolution of factual disputes in applications for final relief set out in *Plascon-Evans Paints Ltd v van Riebeek Paints (Pty) Ltd* [1984] ZASCA 51; [1984 \(3\) SA 623 \(A\)](#), at 635A–C, which is inherently more generous to Machava, my conclusion would be the same.'  
 It is difficult to understand, having regard to the fact that Wilson J correctly acknowledged that provisional sentence proceedings are interlocutory in nature, why the test for final relief laid down in *Plascon Evans*, was of any relevance. In any event, the correct approach was established in *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank* [2011 \(3\) SA 1 \(CC\)](#) at 10D–E and 24C–I, to which Wilson J did not refer.
- 159 *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank* [2011 \(3\) SA 1 \(CC\)](#) at 10E; *Abner Engineering and Supplies (Pty) Ltd vs Thaver* (unreported, GJ case no 2019/41714 dated 11 May 2022) at paragraph [13].
- 160 *Trust Bank van Suid-Afrika Beperk v Eastview Chalet Estates (Pty) Ltd* [1971 \(3\) SA 928 \(D\)](#) at 933D–F; *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank* [2011 \(3\) SA 1 \(CC\)](#) at 10F; *Abner Engineering and Supplies (Pty) Ltd vs Thaver* (unreported, GJ case no 2019/41714 dated 11 May 2022) at paragraph [13].
- 161 *Joseph v Hein* [1975 \(3\) SA 175 \(W\)](#) at 178G–H; *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank* [2011 \(3\) SA 1 \(CC\)](#) at 10E–11A; *Abner Engineering and Supplies (Pty) Ltd vs Thaver* (unreported, GJ case no 2019/41714 dated 11 May 2022) at paragraph [13].
- 162 *Abraham v Du Plessis* [1962 \(3\) SA 162 \(T\)](#) at 169F–H; *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank* [2011 \(3\) SA 1 \(CC\)](#) at 11A; *Abner Engineering and Supplies (Pty) Ltd vs Thaver* (unreported, GJ case no 2019/41714 dated 11 May 2022) at paragraphs [13]–[14].
- 163 *Pretorius v Weedon* [1961 \(3\) SA 702 \(N\)](#) at 711B; *Ottico Meccanica Italiana v Photogrammetric Engineering (Pty) Ltd* [1965 \(2\) SA 276 \(D\)](#); *Dunlop South Africa Ltd v Orkaz (Pty) Ltd* [1975 \(1\) SA 912 \(W\)](#); *Lesotho Diamond Works (1973) (Pty) Ltd v Lurie* [1975 \(2\) SA 142 \(O\)](#) at 145H; *Kanderssen (Pty) Ltd v Medical Property Holdings Ltd* [1977 \(3\) SA 445 \(W\)](#); *Mao-Cheia v Neto* [1981 \(3\) SA 829 \(C\)](#); *Reichenberg v Röntgen* [1983 \(3\) SA 745 \(W\)](#) at 750H; *HVD Investments (Pty) Ltd v Neffke* [1984 \(2\) SA 368 \(W\)](#) at 372A. Cases such as *King Bros v Harris & Co* 1903 TS 389, *De Villiers v Michaelaetos* 1937 TPD 71 and *United Building Society v Lamsley* [1961 \(3\) SA 815 \(D\)](#) in which it was held that a prima facie claim in reconvention was no defence, were expressly dissented from in *Pretorius v Weedon* [1961 \(3\) SA 702 \(N\)](#) at 710B.
- 164 Cf *Allied Building Society v Wolmarans* [1976 \(2\) SA 782 \(O\)](#) at 783E–F.
- 165 *Aarwater (Edms) Bpk v Venter* [1982 \(3\) SA 974 \(T\)](#) at 976F–G.
- 166 *Makhuvhva v Ramakulukusha* [1982 \(4\) SA 644 \(V\)](#) at 648E.
- 167 *Milne NO v Fabric House (Pty) Ltd* [1957 \(3\) SA 63 \(N\)](#) at 65A; *Ebrahim (Pty) Ltd v Mahomed* [1962 \(1\) SA 90 \(D\)](#); *Highfield Milling Co (Pty) Ltd v A E Wormald & Sons* [1966 \(2\) SA 463 \(E\)](#) at 465–6; *Jones v John Barr & Co (Pty) Ltd* [1967 \(3\) SA 292 \(W\)](#) at 297; *De Bruin v Munro* (1) [1971 \(4\) SA 624 \(O\)](#); *Janira (Pty) Ltd v Stretch* [1978 \(4\) SA 920 \(N\)](#); *Stein Brothers Ltd v Dawood* [1980 \(3\) SA 275 \(W\)](#) at 281; *Sadler v Nebraska (Pty) Ltd* [1980 \(4\) SA 718 \(W\)](#) at 720–1; *Wilson-Yelverton v Sharman t/a Wanga Investments* [1992 \(1\) SA 80 \(T\)](#). The decision in *Western Bank Ltd v Packery* [1977 \(3\) SA 137 \(T\)](#) has in this respect been effectively overruled.
- 168 *First National Bank Ltd v Avtjoglou* [2000 \(1\) SA 989 \(C\)](#) at 993E–G.
- 169 *Jenkins v De Jager* [1993 \(4\) SA 534 \(N\)](#) at 539G–J.
- 170 *Wilson-Yelverton v Sharman t/a Wanga Investments* [1992 \(1\) SA 80 \(T\)](#) at 85I–J.
- 171 *Wilson-Yelverton v Sharman t/a Wanga Investments* [1992 \(1\) SA 80 \(T\)](#) at 85J. The order in *Hirschowitz v Van der Merwe* [1981 \(1\) SA 806 \(W\)](#) undoubtedly 'amounts virtually to the high-water mark of the exercise of the court's discretion in favour of a defendant' (at 810B).
- 172 *Malan Provisional Sentence* 188.
- 173 *Aarwater (Edms) Bpk v Venter* [1982 \(3\) SA 974 \(T\)](#) at 976D.
- 174 *Rich v Lagerwey* [1974 \(4\) SA 748 \(A\)](#) at 756D.
- 175 See *Williamson v Dragon Mountain Inn (Pty) Ltd* [1962 \(3\) SA 447 \(N\)](#) at 457D–F; *Rich v Lagerwey* [1974 \(4\) SA 748 \(A\)](#) at 756F.
- 176 *Rich v Lagerwey* [1974 \(4\) SA 748 \(A\)](#) at 756F.

- 177 *Maketa v Limbada* [1998 \(4\) SA 143 \(W\)](#) at 148F-G. See also *Malan Provisional Sentence* 67.
- 178 *Colee Investments (Pty) Ltd v Papageorge* [1985 \(3\) SA 305 \(W\)](#) at 307F-309A. See also *Scala Café v Rand Advance (Pty) Ltd* [1975 \(1\) SA 28 \(N\)](#) and *Soref Bros (SA) (Pty) Ltd v Khan Brothers Wholesale* [1976 \(3\) SA 339 \(D\)](#).
- 179 The wording of which is similar to that of s 11 of the (now repealed) Usury Act 73 of 1968. See further the notes to rule 14(5) s v 'Evidence under the National Credit [Act 34 of 2005](#)' in Jones & Buckle Civil Practice vol II.
- 180 *Condor Industries (Pty) Ltd v African Gate Holdings Ltd* [1979 \(1\) SA 540 \(T\)](#) at 546H, following the procedure adopted in *Bhamjee (Pty) Ltd v Mothe (Pty) Ltd* [1952 \(4\) SA 500 \(T\)](#).
- 181 *Allied Holdings Ltd v Myerson* [1948 \(2\) SA 961 \(W\)](#) at 967; *Sonfred (Pty) Ltd v Papert* [1962 \(2\) SA 140 \(W\)](#) at 143C.
- 182 *Inglestone v Pereira* 1939 WLD 55 at 71.
- 183 *Inglestone v Pereira* 1939 WLD 55 at 71; *Scala Café v Rand Advance (Pty) Ltd* [1975 \(1\) SA 28 \(N\)](#) at 31H; *Millman NO v Goosen* [1975 \(3\) SA 141 \(O\)](#) at 143E; *CRC Engineering (Pty) Ltd v J C Dunbar & Sons (Pty) Ltd* [1977 \(1\) SA 710 \(W\)](#).
- 184 *Union Share Agency and Investment Ltd v Spain* [1928 AD 74](#) at 78-9; *Allied Holdings Ltd v Myerson* [1948 \(2\) SA 961 \(W\)](#) at 968; *Sonfred (Pty) Ltd v Papert* [1962 \(2\) SA 140 \(W\)](#) at 143F; *Inter-Union Finance Ltd v Franskraalstrand (Edms) Bpk* [1965 \(4\) SA 180 \(W\)](#) at 187A; *Rich v Lagerwey* [1974 \(4\) SA 748 \(A\)](#) at 759H-760B; *Harrowsmith v Ceres Flats (Pty) Ltd* [1979 \(2\) SA 722 \(T\)](#) at 731B; *Boonzaier v Kiley* [1981 \(2\) SA 618 \(W\)](#) at 621B; *Reiss Engineering Co Ltd v Insamcor (Pty) Ltd* [1983 \(1\) SA 1033 \(W\)](#) at 1036F; *Moraitsis v De Canha* [1984 \(1\) SA 420 \(W\)](#) at 426C; *Leyland South Africa (Pty) Ltd v Booysen and Clark Motors (Pty) Ltd* [1984 \(3\) SA 480 \(W\)](#) at 483B.
- 185 *Malan Provisional Sentence* 37; *Millman NO v Goosen* [1975 \(3\) SA 141 \(O\)](#) at 143B; *Barlow Rand Ltd t/a Barlow Noordelik Masjinerie Maatskappy v Self-Arc (Pty) Ltd* [1986 \(4\) SA 488 \(T\)](#) at 490E; *Lindsey v Conteh* [2024 \(3\) SA 68 \(SCA\)](#) at paragraph [21].
- 186 See, for example, *Millman NO v Goosen* [1975 \(3\) SA 141 \(O\)](#).
- 187 *Pepler v Hirschberg* 1920 CPD 438 at 443; *Union Share Agency and Investment Ltd v Spain* [1928 AD 74](#) at 79; *Rich v Lagerwey* [1974 \(4\) SA 748 \(A\)](#) at 755H-756A; *Harrowsmith v Ceres Flats (Pty) Ltd* [1979 \(2\) SA 722 \(T\)](#) at 731B; *Van der Walt v Eiendomsreg (Edms) Bpk* [1986 \(2\) SA 461 \(T\)](#) at 466A-D; *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank* [2011 \(3\) SA 1 \(CC\)](#) at 10B-C.
- 188 *Inglestone v Pereira* 1939 WLD 55 at 71; *Rich v Lagerwey* [1974 \(4\) SA 748 \(A\)](#) at 760F-H; *Scala Café v Rand Advance (Pty) Ltd* [1975 \(1\) SA 28 \(N\)](#) at 31H-32A.
- 189 [2011 \(3\) SA 1 \(CC\)](#) at 24E-G. This also seems to be the position where the defendant raises a counterclaim as a defence.
- 190 For such a case, see *D-Kon Developments CC v Nwedamutswu NO* (unreported, GJ case no 23508/16 dated 28 October 2021) at paragraph [4].
- 191 *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank* [2011 \(3\) SA 1 \(CC\)](#) at 18G-I.
- 192 *Israelstam v Pillemer* 1911 TPD 781 at 786; *Inter-Union Finance Ltd v Franskraalstrand (Edms) Bpk* [1965 \(4\) SA 180 \(W\)](#) at 192G; *Syfrets Mortgage Nominees Ltd v Cape St Francis Hotels (Pty) Ltd* [1991 \(3\) SA 276 \(SE\)](#) at 286E.
- 193 *Ottico Meccanica Italiana v Photogrammetric Engineering (Pty) Ltd* [1965 \(2\) SA 276 \(D\)](#) at 288F-289C; *Antonie v Koekoe* [1966 \(2\) SA 610 \(O\)](#) at 614D-E; *Vally v Moosa* [1973 \(2\) SA 204 \(W\)](#) at 206F-H; *Hirschowitz v Van der Merwe* [1981 \(1\) SA 806 \(W\)](#).
- 194 *Barclays National Bank Ltd v Wollach* [1986 \(1\) SA 355 \(C\)](#) at 358H. In this case *Oliff v Minnie* [1952 \(4\) SA 369 \(A\)](#) was distinguished and not followed on the ground that it was decided under differently worded rules which obtained in the OFS Provincial Division before the Uniform Rules of Court were brought into operation.
- 195 *Barclays National Bank Ltd v Wollach* [1986 \(1\) SA 355 \(C\)](#) at 358H-I. There is no express or implied provision in the rule for the filing of a declaration, or for the ordering by the court on its refusing provisional sentence, for a declaration to be delivered.
- 196 Cf *Barclays National Bank Ltd v Wollach* [1986 \(1\) SA 355 \(C\)](#) at 358J-359A.
- 197 *Barclays National Bank Ltd v Wollach* [1986 \(1\) SA 355 \(C\)](#) at 359D-G.
- 198 *Barclays National Bank Ltd v Wollach* [1986 \(1\) SA 355 \(C\)](#) at 359G.
- 199 *Oliff v Minnie* [1952 \(4\) SA 369 \(A\)](#) at 374G; *De Vos* 1986 TSAR 233-5; *Malan Provisional Sentence* 196.
- 200 *C G E Rhoode Construction Co (Pty) Ltd v Provincial Administration, Cape* [1976 \(4\) SA 925 \(C\)](#) at 928A.
- 201 The submission is also made by *De Vos* 1986 TSAR 233-5 and *Malan Provisional Sentence* 196.
- 202 *Lionel Tobias & Co v Golden Disc (Pty) Ltd* [1987 \(4\) SA 682 \(C\)](#) at 684C. See, in general, *Cilliers Costs* paragraph 12.12 and, further, Part D5 below.
- 203 See, for example, *Slater v McBrien* (1883) 3 EDC 144; *Jacobs v Tatham and African Mines Corporation* 1908 TH 87; *Allied Holdings Ltd v Myerson* [1948 \(2\) SA 961 \(W\)](#) at 970; *Caltex (Africa) Ltd v Trade Fair Motors (Pvt) Ltd* [1963 \(1\) SA 36 \(SR\)](#) at 41F; *Dickinson v South African General Electric Co (Pty) Ltd* [1973 \(2\) SA 620 \(A\)](#) at 640H; *Cilliers Costs* paragraph 12.12.
- 204 See *Cohen v Louis Blumberg (Pty) Ltd* [1949 \(2\) SA 849 \(W\)](#) at 852-3; *Williamson v Dragon Mountain Inn (Pty) Ltd* [1962 \(3\) SA 447 \(N\)](#) at 460G-H; *Lesotho Diamond Works* (1973) (Pty) Ltd v *Lurie* [1975 \(2\) SA 142 \(O\)](#) at 149A; *Lionel Tobias & Co v Golden Disc (Pty) Ltd* [1987 \(4\) SA 682 \(C\)](#).
- 205 *Kent v Transvaalsche Bank* 1907 TS 765 at 768.
- 206 *Kent v Transvaalsche Bank* 1907 TS 765 at 768; *Oliff v Minnie* [1952 \(4\) SA 369 \(A\)](#) at 374G; *C G E Rhoode Construction Co (Pty) Ltd v Provincial Administration, Cape* [1976 \(4\) SA 925 \(C\)](#) at 927G-929C; *Van der Merwe v Bonaero Park (Edms) Bpk* [2000 \(4\) SA 329 \(SCA\)](#) at 334I-J; *Osmans Spice Works CC v Corporate International (Pty) Ltd* [2005 \(6\) SA 494 \(W\)](#) at 499H-I.
- 207 *C G E Rhoode Construction Co (Pty) Ltd v Provincial Administration, Cape* [1976 \(4\) SA 925 \(C\)](#) at 929B; *Osmans Spice Works CC v Corporate International (Pty) Ltd* [2005 \(6\) SA 494 \(W\)](#) at 500H-501A.
- 208 *Van der Merwe v Bonaero Park Edms (Bpk)* [2000 \(4\) SA 329 \(A\)](#) at 334C-F.
- 209 *Osmans Spice Works CC v Corporate International (Pty) Ltd* [2005 \(6\) SA 494 \(W\)](#) at 499J-500J.
- 210 *Osmans Spice Works CC v Corporate International (Pty) Ltd* [2005 \(6\) SA 494 \(W\)](#) at 500H-J.
- 211 *Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd* [1977 \(2\) SA 576 \(W\)](#); *Munshi v Naicker* [1978 \(1\) SA 1093 \(D\)](#).
- 212 *Super Eight Promotions (Pty) Ltd v Dial Picture Productions (Pty) Ltd* [1976 \(2\) SA 748 \(T\)](#) at 750D.
- 213 *Light Wall Erection (Pty) Ltd v De Tweedespruit Farm (Pty) Ltd* [1976 \(1\) SA 944 \(W\)](#) at 947G. See also *Botha v Jacob* [1962 \(4\) SA 454 \(T\)](#).
- 214 *Light Wall Erection (Pty) Ltd v De Tweedespruit Farm (Pty) Ltd* [1976 \(1\) SA 944 \(W\)](#) at 947C.
- 215 *Bowman v Nurse* 1936 NPD 26 at 30; *Katzeff Bros (Pty) Ltd v Berman* [1953 \(2\) SA 231 \(C\)](#) at 235A; *Strategic Mineral Mines (Pvt) Ltd v Mitchell* [1959 \(1\) SA 762 \(SR\)](#) at 765A-D.
- 216 *Van der Merwe v Bonaero Park Edms (Bpk)* [2000 \(4\) SA 329 \(A\)](#) at 334C-F.
- 217 *F O Kollberg (Pty) Ltd v Atkinsons's Motors Ltd* [1970 \(1\) SA 660 \(C\)](#); *Kemp v Booyse* [1979 \(4\) SA 34 \(T\)](#), overruling *Antares (Pty) Ltd v Chenille Corporation of SA (Pty) Ltd* [1976 \(4\) SA 140 \(W\)](#); *Light Wall Erection (Pty) Ltd v De Tweedespruit Farm (Pty) Ltd* [1976 \(1\) SA 944 \(W\)](#) at 948H; *Mahabro Investments (Pty) Ltd v Kara* [1980 \(2\) SA 772 \(D\)](#).
- 218 *Scott-King (Pty) Ltd v Cohen* [1999 \(1\) SA 806 \(W\)](#), approved in *Avtjoglou v First National Bank of Southern Africa Ltd* [2004 \(2\) SA 453 \(SCA\)](#) at 457B-458D; *Smit v Scania South Africa (Pty) Ltd* [2004 \(3\) SA 628 \(SCA\)](#) at 629F-H; *Chater v Meyer* (unreported, GNP case no A881/07 dated 23 March 2010). In the latter case the full court held that the finding of the full court in *Maketha v Limbada* [1998 \(4\) SA 143 \(W\)](#) that the provisional sentence granted by the court *a quo* was appealable, is clearly wrong.
- 219 *Scott-King (Pty) Ltd v Cohen* [1999 \(1\) SA 806 \(W\)](#).