28 Amendments to pleadings and documents

(1) Any party desiring to amend any pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.

(2) The notice referred to in subrule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected.

(3) An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded.

(4) If an objection which complies with subrule (3) is delivered within the period referred to in subrule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend.

(5) If no objection is delivered as contemplated in subrule (4), every party who received notice of the proposed amendment shall be deemed to have consented to the amendment and the party who gave notice of the proposed amendment may, within 10 days of the expiration of the period mentioned in subrule (2), effect the amendment as contemplated in subrule (7).

(6) Unless the court otherwise directs, an amendment authorized by an order of the court may not be effected later than 10 days after such authorization.

(7) Unless the court otherwise directs, a party who is entitled to amend shall effect the amendment by delivering each relevant page in its amended form.

(8) Any party affected by an amendment may, within 15 days after the amendment has been effected or within such other period as the court may determine, make any consequential adjustment to the documents filed by him, and may also take the steps contemplated in rules 23 and 30.

(9) A party giving notice of amendment in terms of subrule (1) shall, unless the court otherwise directs, be liable for the costs thereby occasioned to any other party.

(10) The court may, notwithstanding anything to the contrary in this rule, at any stage before judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit.

[Rule 28 substituted by GN R181 of 28 January 1994.]

Commentary

General. This rule makes provision for the following distinct situations:

(a) the amendment of any pleading or document other than a sworn statement filed in connection with any proceedings consequent upon a party who intends such pleading or document having given notice of such intention to amend (subrules (1) to (9));

(b) the court, other than in circumstances contemplated in subrules (1) to (9), at any stage before judgment granting leave to amend any pleading or document (subrule (10)).

In *De Kock v Middelhoven* [1] the plaintiff served a notice to amend on the defendant. The latter, in response, served a notice of objection. Without responding to the objections, and without lodging an application for leave to amend in terms of rule 28(4), the plaintiff set down the intended amendment for hearing. The issue was as follows: Rule 28(4) provided that if an objection to a notice of amendment was timeously served, the party wishing to amend 'may', within ten days, lodge an application for leave to amend. Did this mean that, as

the defendant insisted, an amendment-seeking party served with an objection, who wished to proceed with such amendment, was obliged to formally lodge a substantive application for leave to amend? Or was it sufficient for it, as occurred here, to simply apply orally for leave from the court to amend on the day of hearing? The court held [2] that rule 24(8) postulated two procedures by which a party seeking an amendment may approach a court for leave to amend. One was oral: by this method, all that the applicant had to do after receiving the notice of objection was to set such a matter down for hearing and on the date of hearing simply walk into court and orally apply for leave to amend. The other was to lodge a formal application for leave to amend as enjoined by the provisions of rule 28(4). It was left entirely to the discretion of the applicant to decide with which course to proceed. Accordingly, the matter was properly before the court. Rule 1 was substituted with effect from 22 November 2019, [3] and now includes a definition of 'application', viz 'a proceeding commenced by notice of motion or other forms of applications provided for by rule 6'. Rule 6(11) and (14) makes specific provision for interlocutory and other applications incidental to other proceedings. It is submitted that in the light of the aforegoing an application to amend as contemplated in rule 28(4) should comply with the relevant provisions of rule 6 and cannot be made orally from the bar. To this extent the decision in the *De Kock* case should therefore not be followed.

Once a court has pronounced the final judgment or order, it is *functus officio* and has itself no authority thereafter to grant any amendment of the pleadings or documents in the proceedings. See further, in this regard, the notes to rule 28(10) s v 'At any stage before judgment' below.

A court of appeal will in exceptional circumstances allow the amendment of pleadings on appeal. See further, in this regard, the notes to s 19*(d)* of the Superior Courts Act 10 of 2013 s v 'Power to amend pleadings on appeal' in Volume 1 third edition, Part D.

The general approach to an amendment of a notice of motion is the same as to a summons or pleading in an action. [4]

An affidavit or sworn statement is a document by means of which sworn evidence is put before a court in written form. [5] An amendment of an affidavit would amount to a change of evidence which had been given on oath and amendment thereof cannot be allowed by way of mere notice under the subrule: a party who wishes to change his evidence given on oath must do so on oath, if necessary by way of a further affidavit. [6] A respondent should not be ambushed by an applicant. An intended amendment of its case by an applicant which is not borne out by the facts in the papers amounts to an abuse of process which should not be tolerated. The prejudice to a respondent in such a case, should the amendment be granted, could not be cleared by an appropriate costs order. [7]

Subrule (1): 'Any party desiring to amend.' It is for the party desiring an amendment to ask for it, not for the court to make it without being asked or *mero motu* to direct a party to amend. [8]

'Any pleading or document other than a sworn statement, filed in connection with any proceeding.' A pleading or document may be amended under this subrule only if it has been filed in connection with any proceeding.

If the Road Accident Fund had, in an agreement concluded between it and the plaintiff before the issue of summons, accepted liability for all the damages suffered by the plaintiff in consequence of injuries the plaintiff sustained in a motor vehicle accident, the Road Accident Fund's unqualified concession of liability rendered it both impermissible and opportunistic for it to attempt to introduce the plaintiff's alleged contributory negligence by means of an amendment to its plea in an action instituted subsequent to the agreement. [9]

As to the amendment of a notice of motion and an affidavit or sworn statement, see the notes to rule 28 s v 'General'

above.

'Shall notify all other parties.' Subrule (2) adverts to 'delivery' of the notice, i e in terms of rule 1 copies of the notice must be served on all parties and the original filed with the registrar.

If a new cause of action is introduced by amendment, prescription is interrupted by, and on the date of delivery of, the notice of intention to amend under this subrule. [10]

'Shall furnish particulars of the amendment.' This subrule makes it clear that the party desiring to amend must set out in his notice particulars of the proposed amendment. Unless particulars of the proposed amendment are so set out the party receiving the notice would not be able to object to the amendment under subrules (2) and (3): the latter subrule requires the grounds of objection to be clearly and concisely stated. This is in accordance with the general rule that a court will not grant leave to amend until the amendment is formulated; courts are averse to the procedure of granting leave to amend within the limits laid down by an order, for the amendment when it is ultimately formulated may be found to be excipiable or may unduly restrict the applicant, or confer upon his amended pleading an immunity from exception that might work an injustice to the respondent. [11] If the particulars are not set out in the notice, a party receiving the notice may invoke the provisions of rule 30.

If the substitution of a plaintiff is intended, the notice of intention to amend must make it clear that such a substitution is intended. [12]

Subrule (2): 'Unless written objection to the proposed amendment is delivered.' In *Sasol South Africa Ltd t/a Sasol Chemicals v Penkin* [13] the respondent, a lay person, gave notice of his intention to amend his plea without complying with this subrule. Sasol subsequently brought an application to strike out the notice as an irregular step. In dismissing the application, Pullinger AJ, on this point, stated (footnote omitted):

> '[51] Rule 28 affords a person wishing to object to a proposed amendment 10 days in which to do so. I cannot fathom how the absence of a statement to that effect deprives the person receiving a notice of intention to amend from exercising that procedural right, much less creates the sort of prejudice that rule 30 is intended to overcome.'

A party may object to a proposed amendment on any of the grounds on which the court would refuse an amendment to a pleading. See further the notes to subrule (4) s v 'Lodge an application for leave to amend' below.

The fact that a party gives notice of his intention to apply for an amendment on the date of trial does not prevent his opponent from objecting thereto under this subrule within ten days of delivery of the notice, and the party seeking the amendment will thereupon have to make a substantive application under subrule (4). [14]

'Within 10 days.' During this period there is nothing the party who gave notice of his intention to amend a pleading or document can do regarding the amendment or the protection of his rights with regard thereto. [15]

Subrule (3): 'Shall clearly and concisely state the grounds.' This subrule enables a party who wishes to amend a pleading to know the basis upon which objection to such a proposed amendment is made and to avoid a situation where such party has to endeavour to deal with every conceivable complaint when applying for an amendment. [16] In terms of subrule (2) any

objection to a proposed amendment must be in writing, and in terms of this subrule such objection must state clearly and concisely the grounds upon which it is founded. [17]

Subrule (4): 'Lodge an application for leave to amend.' An application under this subrule is an interlocutory application as contemplated in rule 6(11) and need not be brought on notice of motion supported by affidavit. [18] However, it is well established that an application for an amendment seeking to withdraw an admission must be supported by affidavit. [19]

A court hearing an application for an amendment has a discretion whether or not to grant it, a discretion which must be exercised judicially. [20]

The primary object of allowing an amendment is to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done. [21]

The general approach to be adopted in applications for amendment has been set out in numerous cases. [22] The practical rule is that an amendment will not be allowed if the application to amend is made *male fide* or if the amendment will cause the other party such prejudice as cannot be cured by an order for costs and, where appropriate, a postponement. [23] The following statement by Watermeyer J in *Moolman v Estate Moolman* [24] has frequently been relied upon: [25]

> '[T]he practical rule adopted seems to be that amendments will always be allowed unless the application to amend is *mala fide* or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed.'

The power of the court to allow material amendments is, accordingly, limited only by considerations of prejudice or injustice to the opponent. [26]

In *Moolman v Estate Moolman* [27] it was stated that an amendment would cause an injustice to the other side which could not be compensated by costs if —

> 'the parties cannot be put back for the purpose of justice in the same position as they were when the pleading it is sought to amend was filed'. [28]

Prejudice 'embraces prejudice to the rights of a party in regard to the subject matter of the litigation, provided there is a causal connection which is not too remote between the amendment of the pleading and the prejudice to the other party's rights'. [29]

Prejudice in this context has been interpreted as follows:

(i) Where a party would be no worse off if the amendment were granted with a suitable order as to costs than if his adversary's application or summons were dismissed unamended and proceedings were commenced afresh, there is no prejudice in granting the amendment: the mere loss of the opportunity of gaining time is not in law prejudice or injustice. [30]

(ii) The fact that the granting of the amendment would necessitate the reopening of the case for further evidence to be led is no ground for refusing the amendment where the reason for the failure to lead that evidence was the state of the pleadings, and not a deliberate failure on the part of the applicant. [31]

(iii) If a party makes a mistake in his pleadings by, for example, demanding too little when more is owing, or by admitting that the defendant has paid portion when in fact he has not, he gives his opponent an advantage which justice and fair dealing could not commend. If the opponent is then deprived of this unjust advantage by an amendment, the parties are put back for the purposes of justice in the same position as they were when the pleading it is sought to amend was filed. The opposing party suffers no injustice and is not prejudiced, for he is in no worse position than he would have been if the pleading in its amended form had been filed in the first instance. [32]

(iv) If a party makes a tactical blunder by, for example, admitting an allegation which can only be proved by a particular witness, who is then released by his opponent and leaves the country, his opponent may be prejudiced by an amendment withdrawing the admission. If the witness were not capable of recall or evidence could not be obtained from him on commission, then even though the admission might have been made bona fide, withdrawal of the admission would probably not be allowed. [33]

(v) If, as a result of an admission in a plea, a party had not used rights that he had at the time when the pleadings were originally filed and these rights had in the meantime lapsed, an amendment withdrawing the admission will not be allowed. [34]

(vi) The fact that an amendment may cause the other party to lose his case against the party seeking the amendment is not of itself 'prejudice' of the sort which will dissuade the court from granting it. [35] Thus, the fact that the effect of allowing of an amendment to a plea might be to defeat the plaintiff's claim is not what is meant by 'prejudice' which cannot be remedied by an appropriate order as to costs. [36] There may, however, be cases where no terms would overcome the prejudice which the amendment would cause to the other party. [37] For example, an amendment will not be allowed where it is applied for at such a late stage in the proceedings and not timeously raised to enable proper investigation and response thereto. [38]

The onus is on the party seeking the amendment to establish that the other party will not be prejudiced by it. [39]

Application of principles. The court will exercise its discretion whether or not to grant an amendment in the light of the following guidelines:

***(a)* Formal amendments.** Formal amendments are usually allowed unless precluded by some rule of court. Thus, arithmetical and clerical errors have been corrected [40] and misdescription of parties rectified. [41]

***(b)* Issues obscured by pleadings.** If the real issue in a case is imperfectly or ambiguously expressed in the pleadings, an amendment designed to place on record the true issue will be allowed. [42]

***(c)* Amendment of prayers.** The court will allow the amendment of a prayer if the main issue between the parties remains the same, [43] but will not readily do so if the addition of a prayer also entails the introduction of a new cause of action. [44] The court may grant leave to amend a summons by the insertion of a prayer for costs [45] or interest. [46]

***(d)* Adding a new cause of action.** The courts have recognized that in many cases it may be convenient to incorporate fresh causes of action in original proceedings. [47] An amendment which introduces a new cause of action will only be allowed if no prejudice is occasioned

thereby. [48] There is no objection in principle to a new cause of action or defence being added by way of amendment, even though it has the effect of changing the character of the action and necessitating the reopening of the case for fresh evidence to be led, if that is necessary to determine the real issue between the parties. [49] The amendment must be bona fide [50] and if it is, it will be granted, especially where the effect of refusing it would again bring the same parties before the same court on the same issue. [51]

If there is a valid cause of action upon the summons the court may allow the plaintiff to add a new cause of action which has accrued or been perfected since the issue of the summons. [52] Except in special or exceptional circumstances a summons may not be amended so as to include a cause of action not existing at the time of its issue. [53] It has further been held [54] that in terms of its inherent powers the court may grant an amendment of a fatally defective summons so as to cure the defect where such amendment will occasion no prejudice and will prevent waste of costs. [55]

It is important to distinguish between an amendment introducing a new cause of action (i e right of action) [56] and one which merely introduces fresh and alternative facts supporting the original right of action as set out in the cause of action. [57] An amendment which introduces a new claim will not be allowed if it would resuscitate a prescribed claim or defeat a statutory limitation as to time. [58]

In *Sentrachem Ltd v Prinsloo* [59] the Appellate Division laid down the test as follows: [60]

> 'Die eintlike toets is om te bepaal of die eiser nog steeds dieselfde, of wesentlik dieselfde skuld probeer afdwing. Die skuld of vorderingsreg moet minstens uit die oorspronklike dagvaarding kenbaar wees, sodat 'n daaropvolgende wysiging eintlik sou neerkom op die opklaring van 'n gebrekkige of onvolkome pleitstuk waarin die vorderingsreg, waarop daar deurgaans gesteun is, uiteengesit word . . . So 'n wysiging sal uiteraard nie 'n ander vorderingsreg naas die oorspronklike kan inbring nie, of 'n vorderingsreg wat in die oorspronklike dagvaarding prematuur of voorbarig was [kan] red nie, of . . . 'n nuwe party tot die geding [kan] voeg nie.'

Where a plaintiff seeks by way of amendment to augment his claim for damages, he will be precluded from doing so by prescription if the new claim is based upon a new right of action and the relevant prescriptive period has run, but not if it was part and parcel of the original right of action and merely represents a fresh quantification of the original claim, or the addition of a further item of damages. [61]

***(e)* New facts discovered.** If a new ground for defence comes to a defendant's knowledge for the first time after he has filed his plea, he will be allowed to amend his plea, and provided the application be bona fide and not prejudicial to the opponent such amendment will be allowed. [62] It seems that the onus of showing that a new defence sought to be advanced is *mala fide* rests upon the respondent. [63]

***(f)* Withdrawal of admissions.** An admission is an unequivocal agreement by one party with a statement of fact by the other. [64] The effect of an admission is to render it unnecessary for the

plaintiff to prove the admitted fact. [65] In the exercise of its discretion the court may grant an amendment involving the withdrawal of an admission in a pleading. The court's discretion is not fettered by the necessity to find that there has been an error before it can allow such an amendment. [66] It has been stressed [67] that an amendment involving a withdrawal of an admission is not put on a basis different from any other amendment:

> 'The approach is the same, but the withdrawal of an admission is usually more difficult to achieve because (i) it involves a change of front which requires full explanation to convince the court of the *bona fides* thereof, and (ii) it is more likely to prejudice the other party, who had by the admission been led to believe that he need not prove the relevant fact and might, for that reason, have omitted to gather the necessary evidence.'

The court will, therefore, in the exercise of its discretion, require an explanation of the circumstances under which the admission was made and the reasons for now seeking to withdraw it. [68]

An allegation of fact in a pleading is not an admission of that fact and can be readily withdrawn. [69] Withdrawal of an admission of a fact which is common cause will not be permitted. [70]

A court is not obliged to consider prejudice to the other side where an amendment to a pleading retracting an incorrectly admitted legal consequence is being sought, for only the law would be prejudiced if cases were to be decided on what parties might in ignorance have agreed the law to be. [71]

The discretion of the court to relieve a party from the consequences of an admission made in error in a pleading should not be exercised in any other way than by granting an amendment of that pleading. [72]

***(g)* Tardiness.** Delay in bringing forward an amendment is in itself, in the absence of prejudice, no ground for refusing an amendment. [73] In the absence of prejudice to the other party, leave to amend may be granted 'at any stage, however careless the mistake or omission may have been, and however late may be the application for amendment'. [74]

The Appellate Division has stressed that a litigant who seeks to add new grounds of relief at the eleventh hour does not claim such an amendment as a matter of right but rather seeks an indulgence. [75] The applicant has to prove that he did not delay the application after he became aware of the material upon which he proposes to rely. He must explain the reason for the amendment and show prima facie that he has something deserving of consideration: a triable issue. [76] A triable issue is *(a)* a dispute, which, if it is proved on the basis of the evidence foreshadowed by the applicant in his application, will be viable or relevant; or *(b)* a dispute, which will probably be established by the evidence thus foreshadowed. [77] The greater the disruption caused by the amendment, the greater the indulgence sought and the burden upon the applicant to convince the court to accommodate him. [78]

***(h)* Where excipiability would result.** Save in exceptional cases, where the balance of convenience or some such reason might render another course desirable, an amendment ought not be allowed where its introduction into the pleading would render such pleading excipiable. [79]

In other words, the issue proposed to be introduced by the amendment must be a triable issue. [80] A triable issue is one *(a)* which, if it can be proved by the evidence foreshadowed in the application for the amendment, will be viable or relevant; or *(b)* which, as a matter of probability, will be proved by the evidence so foreshadowed. [81] If the plaintiff's particulars of claim do not disclose a cause of action, an amendment of the defendant's plea thereto would be an exercise in futility. [82] If the proposed amendment raised a point of law which would dispose of the case in whole or in part, the court should determine that point of law. [83] If a plaintiff seeks to amend its particulars of claim to the effect that it is the 'successor in title to' a creditor to whom the defendant has bound itself as surety and co-principal debtor, it must state the basis on which it became the successor in title to the creditor. Failure to do so would render the particulars excipiable and the amendment sought would be disallowed. [84]

In *R M van de Ghinste & Co (Pty) Ltd v Van de Ghinste* [85] it was held that where an objection is raised to a proposed amendment to a pleading on the ground that the pleading as amended would be excipiable, the court should not confine itself to an inquiry as to whether or not the question of excipiability is arguable — the court should decide on the question and if it finds that the pleading as amended would be excipiable, the application for amendment should be refused.

***(i)* Where the debt on which the claim is based, is prescribed.** An amendment seeking to introduce a claim in respect of which the underlying debt has clearly become prescribed or is known to have become prescribed, and which is objected to on that basis in terms of rule 28(3), [86] will not be allowed. [87] If the elemental facts (*facta probanda*) making out the cause

of action would, however, remain unaltered if the amendment were allowed, the amended pleading would set out precisely the same elemental facts as those set out in the pleading in its current state. The effect of allowing the proposed amendment would under such circumstances therefore not affect the elemental facts necessary to be proved to establish the originally pleaded claim. If the debt underlying the claim in the current pleading had not become prescribed, it follows that the debt underlying the claim sought to be introduced by means of the amendment had also not become prescribed, and the amendment would be allowed. [88] An amendment will be granted if it appears to the court that it is only possible and not definite that prescription is the full answer to the plaintiff's case. [89]

Where a new cause of action (i e debt) is introduced by amendment, prescription is interrupted by, and on the date of delivery of, the notice of intention to amend under rule 28(1). [90]

The service of a notice of application for the joinder of a third party as a co-defendant in an action in terms of rule 10(3) does not interrupt the running of prescription. [91] A 'joinder order' granted and served on debtors, joining them as defendants in the main action whereby the plaintiff is claiming payment of a debt before the claim prescribed, constitutes a process for purposes of s 15(1) read with s 15(6) of the Prescription Act 68 of 1969, and service of the order interrups prescription. [92]

***(j)* Where the court will have no jurisdiction.** Where it is proposed to introduce by way of amendment a cause of action in respect of which the court will not have jurisdiction, the amendment will be refused. [93] If, however, the question of jurisdiction is doubtful or arguable, it is submitted that the amendment should be allowed and that it should be left to the defendant to raise the issue of jurisdiction by way of special plea. [94]

In *Akoodie v Organi Mark (Pty) Ltd* [95] the defendants' application to amend their plea by the inclusion of a special plea as to jurisdiction was allowed because the proposed amendment raised a triable issue. [96]

***(k)* Payment into court not bar to amendment.** An unconditional payment into court by the defendant under rule 34 does not deprive the plaintiff of the opportunity to amend his particulars of claim. [97]

***(l)* Where an appeal is pending.** The court will not grant an amendment if an appeal is pending, the decision in which may render the amendment unnecessary. [98]

***(m)* On appeal.** The court will not allow an amendment on appeal if it is a new point raised for the first time on appeal, unless it was covered by the pleadings. [99] A party will not be permitted to introduce such amendment if it would be unfair and prejudicial to his opponent, which could be the case if the issue sought to be introduced, was not fully canvassed or investigated at the trial. [100] See also the notes to s 19*(d)* of the Superior Courts Act 10 of 2013 s v 'Power to amend pleadings on appeal' in Volume 1 third edition, Part D.

***(n)* Substitution of parties.** The courts have by way of amendment under this subrule allowed the substitution of one entity as plaintiff by another entity in order to ensure that the true plaintiff is before the court. [101] Such substitution by way of amendment was, however, refused where the initial plaintiff was not a legal *persona*. [102] The test to be applied in each instance is whether the application is bona fide and whether any prejudice may be occasioned to the defendant as a result thereof. [103] In such instance the notice of amendment must make it clear that a substitution was intended. This is not meaningfully conveyed through the phrases 'deletion of the words' and 'replacement of the words' which may be understood by the defendant to indicate that it was simply a misnomer that was being corrected. [104]

Where it is sought to introduce a new party to cure a nullity, [105] the *nunc pro tunc* rule probably applies, i e the new party takes the place of the former party for all purposes *nunc pro tunc*.

If the result is that a defendant is denied its right to raise the defence of prescription, a new plaintiff having stepped into the shoes of the old, the substitution will not be allowed. [106] The real question in such a case is whether the plaintiff's claim against the defendant has in fact already prescribed, or whether the running of prescription has been interrupted in terms of s 15(1) of the Prescription Act 68 of 1969. [107] If an amendment is sought to change the name of a plaintiff, then prescription will have been interrupted only if the facts show that it is by or on behalf of the creditor concerned, the one whose correct description is sought to be introduced by way of the amendment, that the process had been served on the defendant (as required by s 15(1) of the Prescription Act 68 of 1969). [108] If the wrong name had simply been a misdescription of the correct creditor it should not stand in the way of an amendment. [109] If, however, it is a case of having to replace the wrong party that had sued with the correct creditor after the expiry of the prescription period, then prescription will not have been interrupted. [110] Service of the original process in such a case cannot interrupt prescription. [111]

If an application to substitute a plaintiff is not a bona fide attempt at placing the true case before the court, but simply a device to circumvent a statutory provision (e g the provisions of the Prescription Act 68 of 1969), the application will not be granted. [112]

An amendment will not be granted if a summons had been issued in the name of a plaintiff who was no longer alive at the time that the summons was issued. [113]

An amendment substituting the trustees of a trust in their capacities as such for the trust as plaintiff is permissible unless the application is *male fide* or would cause injustice or prejudice to the other party which could not be compensated for by an order for costs. [114]

If a plaintiff seeks to amend its particulars of claim to the effect that it is the 'successor-in-title to' a creditor to whom the defendant had bound himself as surety and co-principal debtor, it must state the basis on which it became the successor-in-title to the creditor. Failing that,

the amended particulars of claim would be excipiable on the ground that there would be lacking therefrom averments necessary to constitute a valid cause of action. Under such circumstances the amendment will not be granted. [115]

If the court is satisfied that the summons has been duly served on it, and that it knows that the summons is intended for it, a misdescription of the defendant ought not to be held fatal to the summons. The court has ample powers of amendment and ought not to scruple to exercise them in such a case. [116]

In *MEC for Safety and Security, Eastern Cape v Mtokwana* [117] the plaintiff served a notice of intention to amend the summons on the attorneys acting for the existing defendant, and when they did not object, the plaintiff effected the amendment which had the effect of substituting the defendant. The new defendant was, however, never a party to the action and the summons was never served upon that defendant. The Supreme Court of Appeal held that the substitution of a defendant by way of an amendment of the summons, which was never served on the correct defendant, was a wholly inappropriate procedure. [118] Had there been a proper application for joinder of the new defendant, that defendant might very well have provided numerous grounds for resisting such an application. Not least of all would have been a defence of prescription which, having regard to the chronology of events, was startlingly obvious. [119]

In *Essence Lading CC v Infiniti Insurance Ltd* [120] the plaintiff applied, in terms of rule 28, for leave to amend its combined summons by changing the name of the second defendant from 'Mediterranean Shipping Company (Pty) Ltd' ('Mediterranean') to MSC Logistics (Pty) Ltd

('MSC'). These were separate companies and Mediterranean was wrongly cited instead of MSC. After service of the summons on Mediterranean, it raised an exception to the particulars of claim on the basis that it did not disclose a cause of action against Mediterranean, which gave rise to the intended amendment of the summons. The application for leave to amend was delivered to Mediterranean but not served on MSC. In dismissing the application, Dawid Marais AJ, held that —

(a) in the correction of a mistake in the citation of a defendant, the essential question is how the mistake can be corrected in a manner which complies with the constitutional imperative of a fair and just process embodied in s 34 of the Constitution; [121]

(b) attempting to amend a summons through rule 28 where the summons containing the incorrect citation had not been served on the correct defendant, but on the incorrectly cited defendant, who then entered an appearance to defend, seemed to be a completely abortive process: A notice of intended amendment could not be served on the correct defendant on whom the summons had not been served previously. There was no action pending against such a person. Neither could the notice of amendment be served on the incorrect party on whom the summons had been served or its legal representatives. Such a process would lead to an entire failure of fairness and justice, with the most basic of requirements for justice, being proper notice, being absent; [122]

(c) an appropriate procedure, which was compatible with the constitutional requirement of a fair hearing, and justice being done, and which would prevent an incurable injustice, would have been for the plaintiff to either apply, on proper notice to MSC (by way of service by sheriff of the notice of motion), for the joinder or substitution of MSC, together with prayers for ancillary relief which could include leave to effect the appropriate amendment, or to do so in future. [123]

In *Ngqeleni v Outsurance (Pty) Ltd* [124] the defendant was cited as 'OUTSURANCE (Pty) Ltd' in the summons. The summons was served on 'OUTsurance' at its address in Gqeberha. A notice of intention to defend was delivered on behalf of 'the Defendant', recording the latter's address as being at '1[. . .] E[. . .] Rd, S[. . .], Centurion, Gauteng'. The defendant subsequently delivered an exception [*sic*] to the summons and particulars of claim, raising, amongst other things, a complaint that the plaintiff had instituted action against a non-entity, alternatively against the incorrect defendant. The exception prompted the plaintiff to give notice of his intention to amend the summons and particulars of claim by changing the description of the defendant to 'OUTsurance Company Limited [*sic*], an insurance company . . .'. The intended amendment was met with an objection by the defendant going to both process and effect. From the point of view of process, the defendant complained that the proposed amendment was tantamount to an irregular step. In its opinion the plaintiff sought to circumvent the provisions of rules 10 and 41: rule 10 because he purported to substitute the defendant with another party, which could not be countenanced under the auspices of rule 28 as the correct procedure would have been to join the 'new' defendant under rule 10; and rule 41 because the plaintiff ought to have withdrawn the action against the defendant as originally named and described, and instituted a fresh action against the 'new' defendant. The plaintiff could therefore not succeed in the intended amendment as the current appellation of the defendant could not be deemed to be a mere misnomer of 'OUTsurance Insurance Company Ltd'. Hartle J, however, had a different view in allowing the amendment:

> '[21] To my mind the objection to the proposed amendment is nothing more than an opportunistic attempt to frustrate the plaintiff's claim and should not be countenanced. What appears is that OUTsurance Insurance Company Limited has been spearheading the opposition to the present application under the guise of one or other of Outsurance's similar monikers (or in between the two private companies forming part of its group) as suits its convenience and changing the basis for its objection as the tide goes.
>
> [22] This is however a classic case of a misnomer due to less than fastidious pleading, which to my mind must be corrected to do proper justice between the parties.
>
> [23] In my opinion the proposed amendment causes Outsurance Insurance Company Limited no prejudice. The company was served, and although the header may have momentarily occasioned some doubt as to which 'Outsurance' the action is concerned with, any person reading the particulars of claim in context would have understood exactly who the real McCoy is. Further and in any event, the absence in the unamended particulars of claim of a reference one way or the other to a public or a private company was not going to deflect attention away from the fact that the plaintiff clearly on the face of it contracted for his insurance requirements with Outsurance Insurance Company Limited and intended to cite it as the responsible defendant in the main action.'

A summons which names no defendant is an invalid document and cannot be amended by inserting the defendant's name. [125]

The cases are not harmonious as to whether a court has the power to replace by way of an amendment to a summons a defendant by a person who is not a party to the dispute without the latter's consent. [126]

If an amendment is sought to change the name of a defendant, prescription will have been interrupted [127] only if the facts show that the summons had been served on the party whose name is sought to be introduced in place of the existing name of the defendant. [128] In such an event the wrong description of the defendant would be nothing but a mere misdescription of the correct debtor and the amendment would serve no more than to correct a misdescription of the already existing defendant. [129] If, however, it is a case of having to replace the wrong party that had been sued with the correct debtor, then prescription will not have been interrupted. [130]

***(o)* Where merits conceded.** A court will not allow an amendment introducing a new defence on the merits where the parties have agreed that the merits and the *quantum* are to be separately determined and the defendant afterwards concedes the merits which concession is accepted by the plaintiff. By compromising the merits the defendant precludes himself from being able to revisit the merits as surely as if a judgment had been given thereon. [131]

***(p)* Grounds for refusal of amendment.** The essential ground for the refusal of an amendment is prejudice to the other party. An amendment should not be refused merely in order to punish the applicant for some mistake or neglect on his part; his punishment is in his being mulcted in the wasted costs. [132]

The court has on various occasions refused to allow an amendment where, even if it were allowed, the amending party would still have no prospect of success on the amended pleading. An amendment was refused where the new ground of action sought to be imported could be proved only by evidence which would have been inadmissible. [133] Nor will the court allow an amendment to a plea which has the effect of raising a defence of set-off where the plaintiff's claim is not liquidated; there can be no plea of set-off to an unliquidated claim, and an amendment which effects such an incompetent plea can be of no use to a defendant. [134]

Subrule (5): 'Shall be deemed to have consented to the amendment.' If a party does not object to a proposed amendment of which he has been given notice in terms of subrules (1) and (2), he is deemed in terms of this subrule to have consented to the amendment. The party seeking the amendment thereby acquires the right to amend but the actual amendment of the pleading takes place only when the amendment is effected within the stipulated time in accordance with subrule (7). [135]

A party who had consented to an amendment and allowed it to be incorporated into the pleadings is not entitled thereafter to argue that the court should disregard it. [136]

'Within 10 days of the expiration of the period mentioned in subrule (2).' A party who has been given notice by another party of the latter's intention to amend is under subrule (2) entitled to object to the proposed amendment within ten days of delivery of the notice of intention to amend. If no objection is raised, the party wishing to amend may effect his amendment in accordance with subrule (7) within ten days after the expiration of this initial period of ten days. In *Standard Bank of South Africa Ltd v Cloud 9 Skylights and Patio Systems CC* [137] it was held that it did not follow that amended pages delivered outside the 10-day period were a nullity and that the amending party had to start the rule 28 process for amendment afresh. The following *dictum* of Goosen J in *Becker v MEC for the Department of Economic Development & Environmental Affairs* [138] was approved and followed:

> 'In my view the failure by a litigant to act in accordance with its intention to amend pleadings within the stipulated time period does not *ipso facto* preclude such party from

thereafter filing its amendment. All that may be said is that a litigant who conducts himself in that manner exposes himself or herself to the possibility that a party may object on the basis that such constitutes an irregular step.'

In *Sasol South Africa Ltd t/a Sasol Chemicals v Penkin* [139] a different approach was adopted. Pullinger AJ, in observing that 'I could not find any authority, one way or another, on this issue' and 'that it seems to me that there is no good reason to meddle with long-standing practice', held that if a party who desires to make an amendment gives notice of the amendment but thereafter fails, as required by rule 28, to bring an application for leave to amend or to deliver the amended pages, as the case may be, the intended amendment, as a matter of practice, lapses. The notice of intention to amendment is therefore of no force or effect. In these circumstances, notice of the proposed amendment would have to be given afresh, and the process prescribed by rule 28 would then follow. [140]

Subrule (6): 'An amendment authorized by an order of the court may not be effected later than 10 days after such authorization.' The present wording of this subrule supersedes the finding in *Fiat SA (Pty) Ltd v Bill Troskie Motors* [141] that an amendment ordered by the court has immediate effect. The subrule makes it clear that the court merely authorizes an amendment, and the amendment only takes effect when the steps prescribed in subrule (7) have been taken within the applicable time limit. The court may, however, under its powers in terms of this subrule, order an amendment which takes immediate effect, or allow a period of more than ten days within which the amendment is to be effected in accordance with subrule (7).

The cases are not harmonious as to the effect of a failure to comply with the stated time limit. See, in this regard, the notes to rule 28(5) s v 'Within 10 days of the expiration of the period mentioned in subrule (2)' above.

Subrule (7): 'A party who is entitled to amend.' A party may be entitled to amend (i) by reason of no objection being raised to his proposed amendment (subrule (5)), or (ii) by an order of court authorizing the amendment (subrule (6)). See further the notes to subrules (5) and (6) above.

'Shall effect the amendment by delivering each relevant page.' A party who is in terms of subrule (5) or (6) entitled to amend, must effect the amendment in the manner prescribed in this subrule. An amendment accordingly takes effect when the steps prescribed in the subrule have been taken within the applicable time limit. See the notes to subrules (5) and (6) above.

A pleading into which words have been incorporated by amendment must, as a matter of interpretation, be regarded as if the incorporated words had been in it when it was originally filed. [142] The granting of an amendment does not, however, have retrospective effect in the proper sense, and prescription is not interrupted, in respect of a cause of action *introduced* by an amendment, from the date when the summons was originally served. [143] In other words, if the right which is sought to be enforced and the relief claimed in the amendment is different from the right sought to be enforced and the relief claimed in the original claim, the service of the summons does not interrupt prescription in respect of the claim introduced by the

amendment. [144] If the right that is sought to be enforced and the relief claimed in the amended claim is the same or substantially the same as the right of action and the relief in the original claim, prescription is interrupted by the service of the summons. [145]

Where a new cause of action is introduced by amendment, prescription is interrupted by, and on the date of delivery of, the notice of intention to amend under subrule (1) of this rule. [146]

Subrule (8): 'Any party affected by an amendment.' It is submitted that a party 'affected by an amendment' denotes a party to whom each relevant page in its amended form is delivered as contemplated in subrule (7); it does not include the party who effects the amendment as contemplated in that subrule. [147] Despite its amendment in 1994, this subrule therefore still does not meet the objections raised by Coetzee J in *Van Heerden v Van Heerden*. [148] See further the notes s v 'May also take the steps contemplated in rules 23 and 30' below.

'May within 15 days.' In *Nqabeni Attorneys Incorporated v God Never Fails Revival Church* [149] it was held that: [150]

(a) When a plaintiff accomplishes an amendment to a declaration, and no plea has yet been filed, the defendant is put on terms to comply with rule 22(1) and thereby file a plea within 20 days (failing which a notice of bar would have to follow in order to compel delivery of the plea).

(b) The scope of subrule (8) is limited to circumstances where an amendment creates the risk of a ripple effect on pleadings already filed, which risks rendering those pleadings non-responsive to the amended pleading, and for that reason may be in need of an adjustment to render them responsive. The 15-day period therefore applies only under such circumstances.

'May . . . make any consequential adjustment.' A party is entitled to make 'adjustments' to any pleading already filed by him which are 'consequential' upon the amendment that has been made. He may not invoke the subrule for the purpose of amending his pleadings in other respects — for such amendment he will be obliged to proceed under subrule (1).

'May also take the steps contemplated in rules 23 and 30.' Rule 23 deals with exceptions and applications to strike out; rule 30 provides for steps which may be taken in the case of irregular proceedings. Only the party to whom each relevant page in its amended form is

delivered is entitled to take these steps. [151] Where a defendant failed to respond to the amendments effected by the plaintiff, it was held [152] that, in terms of the provisions of rule 22(3), '[e]very allegation of fact . . . which is not stated in the plea to be denied or to be admitted, shall be deemed to be admitted'. It is submitted that where a pleading is excipiable as a result of a failure to make consequential adjustments to such pleading as contemplated in this subrule, the party who has effected the amendment should, under an extension of time in terms of rule 27, deliver an exception thereto. [153]

Subrule (9): 'Unless the court otherwise directs, be liable for the costs thereby occasioned.' There is no obligation on a party giving notice of its intention to amend in terms of subrule (1) to make a tender for costs occasioned by the amendment. [154]

It is clear that the court, in accordance with the basic rule governing awards of costs, has a discretion.

The grant of an amendment is an indulgence to the party requiring it, which entails that such a party is generally liable for all the costs occasioned by or wasted as a result of the amendment. [155] Costs caused by an amendment are either additional costs resulting from a postponement caused by an amendment, if these costs would otherwise not have been incurred, or costs previously incurred which have become useless by reason of the amendment. [156]

Costs occasioned by an amendment have often been held to include the costs of such opposition as is in the circumstances reasonable and not vexatious or frivolous. [157] In other cases the costs of unsuccessful opposition were not so included and the unsuccessful objector was ordered to pay the costs of his opposition even though it was not considered unreasonable or

vexatious or frivolous. [158]

It has, however, been stressed that in deciding whether the party to whom an indulgence is granted is to pay the costs of opposition, the recognition of a single criterion for liability (such as the reasonableness of the opposition) tends to hamper the exercise of the unfettered discretion which the court has in its awards of costs, the exercise of that discretion being

essentially a matter of fairness to both sides. [159] Though reasonableness of the opposition is an important criterion in cases where an indulgence is sought, it need not necessarily be the only criterion. [160] A criterion which may be useful in one case may in other cases not have the desired fair effect. [161] Each case must, therefore, depend upon its own facts. [162]

It has been held that the test in regard to the awarding of costs of unsuccessful opposition has not been altered by the introduction of this rule in 1965. [163] The procedure introduced by the rule does, however, make a difference in one respect. The rule was clearly designed to obviate the necessity of applying to court whenever an amendment of a pleading is sought: an amendment can now be obtained without incurring the costs of an application, an application being necessary only in the event of the other side objecting. It seems to be implicit in the procedure under the rule that any objection to a notice of intention to amend must be reasonably and responsibly taken. [164]

Costs on amendment are, as with all costs, within the discretion of the court and a court of appeal is loath to interfere in a matter of this nature unless some wrong principle has been applied. [165]

Subrule (10): 'The court.' In terms of rule 1 this means the High Court as referred to in s 6 of the Superior Courts Act 10 of 2013. See, in this regard, the notes to rule 1 s v 'Court' above.

'At any stage before judgment.' This subrule is in the widest possible terms and does not envisage any period before judgment during which the possibility of making an application for an amendment is precluded. [166] Once a court has pronounced a final judgment or order, it is *functus officio* and has itself no authority thereafter to grant any amendment of the pleadings. [167] Applications for amendments have been entertained and allowed after both sides have closed their cases, during the hearing of an application for absolution and in certain cases

even after the conclusion of argument. [168] So too during trial. [169] However, in *Kali v Incorporated General Insurances Ltd* [170] an amendment at the trial raising an entirely new issue after both parties had closed their case was not allowed.

If the issue of liability had been determined by judgment at an earlier hearing, the court, while dealing with the question of the *quantum* of damages, will not grant an amendment of a plea which would bring about a reopening of the issues which had been finalized at the earlier hearing. [171]

1 2018 (3) SA 180 (GP).
2 At 189C–192G.
3 By GN R1343 of 18 October 2019 (*GG* 42773 of 18 October 2019).
4 *Devonia Shipping Ltd v MV* Luis *(Yeoman Shipping Co Ltd Intervening)* 1994 (2) SA 363 (C) at 369F–I; *Sebenza Forwarding & Shipping Consultancy (Pty) Ltd v Petroleum Oil and Gas Corporation of SA (Pty) Ltd t/a Petro SA* 2006 (2) SA 52 (C) at 57H–I; *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at 261C–D; *Just Agronomics Group (Pty) Ltd v Afropulse 466 (Pty) Ltd* (unreported, GJ case no 24535/2020 dated 8 January 2021) at paragraphs [11]–[13]; *Webber NO v Hein* (unreported, ECG case no CA 221/2020 dated 10 August 2021) — a decision of the full court) at paragraph [18]; *East London Jewish Helping Hand and Burial Society v Galperin* (unreported, ECG case no 1770/2020 dated 2 December 2021) at paragraph [37]; *Hyve Events S.A. Limited v African Energy Chamber NPC* (unreported, GJ case no 20141/2022 dated 14 February 2023) at paragraph [10]; and see *EL IDZ Fibre Maintenance Venture v East London Industrial Development Zone Soc Ltd* (unreported, EL case no 395/2021 dated 22 November 2022). In *Vinpro NPC v President of the Republic of South Africa* (unreported, WCC case no 1741/2021 dated 3 December 2021) the full court summarized the position as follows (at paragraph [25]):
'On this score, it is trite law: that a court is vested with a discretion as to whether to grant or refuse an amendment: that an amendment cannot be granted for the mere asking thereof: that some explanation must be offered therefor: that this explanation must be in the founding affidavit filed in support of the amendment application: that if the amendment is not sought timeously, some reason must be given for the delay: that that party seeking the amendment must show *prima facie* that the amendment has something deserving of consideration: that the party seeking the amendment must not be mala fide: that the amendment must not be the cause an injustice to the other side which cannot be compensated by costs: that the amendment should not be refused simply to punish the applicant for neglect and that mere loss of time is no reason, in itself, for refusing the application.'
If, by agreement between the parties, an application was referred to trial and the notice of motion stands as a simple summons, followed by a declaration, it is no longer open to the applicant to amend its notice of motion. The correct procedure is to seek an amendment of the declaration (*Geeco Investments (Pty) Ltd v Gourmet Cape Distributors (Pty) Ltd* (unreported, WCC case no 11008/2019 dated 25 November 2022) at paragraphs [4]–[9]).
As to the general approach, see the notes to subrule (4) s v 'Lodge an application for leave to amend' below.
5 *S v Opperman* 1969 (3) SA 181 (T) at 184F.
6 See *Brummund v Brummund's Estate* 1993 (2) SA 494 (NmHC) at 498E; *Motaung v Government Employees Pension Fund* (unreported, GP case no B39013/2022 dated 9 October 2023) at paragraph [14], where the text to this footnote is cited with approval; *Altech Radio Holdings (Pty) Ltd v Aeonova360 Management Services (Pty) Ltd* (unreported, GJ case no 2023/032374 dated 5 June 2023) at paragraph [75].
7 *Proxi Smart Services (Pty) Ltd v Law Society of South Africa* 2018 (5) SA 644 (GP) at 657B–F.
8 *Bam's Executors v Haupt* (1891) 8 SC 253; *The Master v Deedat* 2000 (3) SA 1076 (N) at 1090D–E. In *Keely v Heller* 1904 TS 101 at 103 Innes CJ stated that if a party 'does not . . . choose to apply for leave to amend, and goes on, he does so at his own risk'.
9 *Gusha v Road Accident Fund* 2012 (2) SA 371 (SCA) at 376H–377A and 377C–E.
10 *Mias de Klerk Boerdery (Edms) Bpk v Cole* 1986 (2) SA 284 (N) in which the decision in *Miller v H L Shippel & Co (Pty) Ltd* 1969 (3) SA 447 (T) was distinguished on the basis that it was decided under the provisions of s 6(1)*(b)* of the 'old' Prescription Act 18 of 1943, the wording of which differs materially from that of s 15(1) of the Prescription Act 68 of 1969. See further the notes to subrule (7) s v 'Shall effect the amendment by delivering' below.
11 *Cross v Ferreira* 1950 (3) SA 443 (C) at 452.
12 *Luxavia (Pty) Ltd v Gray Security Services (Pty) Ltd* 2001 (4) SA 211 (W) at 216F–G. See further the notes to subrule (4) s v 'Lodge an application for leave to amend' below.
13 2024 (1) SA 272 (GJ).
14 *Nel v Mathews* 1973 (1) SA 184 (T) at 185D–E.
15 *Hart v Nelson* 2000 (4) SA 368 (E) at 372J–373A.
16 *Squid Packers (Pty) Ltd v Robberg Trawlers (Pty) Ltd* 1999 (1) SA 1153 (SE) at 1157E–G. In this case it was held (at 1158A–C) that, on the basis of the wording of subrule (3), an objection not included in the notice of objection could not be entertained. See also *Cornelissen Incorporated v Nama Khoi Local Municipality* (unreported, NCK case no 2754/2016 dated 15 June 2023) at paragraphs 23–24.
17 The requirement that the grounds of objection must be stated was introduced by the amendment of the subrule in 1987, probably as a result of the remarks in *Jacobsz v Fall* 1981 (4) SA 871 (C) at 872G. See also *Squid Packers (Pty) Ltd v Robberg Trawlers (Pty) Ltd* 1999 (1) SA 1153 (SE).
18 *Swartz v Van der Walt t/a Sentraten* 1998 (1) SA 53 (W) at 56I–J and 57G–J. See further the notes to rule 28 s v 'General' above.
19 *Swartz v Van der Walt t/a Sentraten* 1998 (1) SA 53 (W) at 57C.

20 *Robinson v Randfontein Estates Gold Mining Company Ltd* 1921 AD 168 at 243; *Viljoen v Baijnath* 1974 (2) SA 52 (N) at 53H; *Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd (1)* 1976 (1) SA 93 (W) at 96D; *Hwedhanga v Cabinet for the Territory of South West Africa* 1988 (2) SA 746 (SWA) at 749G; *Caxton Ltd v Reeva Forman (Pty) Ltd* 1990 (3) SA 547 (A) at 565G; *YB v SB* 2016 (1) SA 47 (WCC) at 50H–J and the authorities there referred to; *Brocsand (Pty) Ltd v Tip Trans Resources (Pty) Ltd* 2021 (5) SA 457 (SCA) at paragraph [15]; *Dreyer v Metsimaholo Local Municipality* (unreported, FB case no 5899/2017 dated 23 August 2021) at paragraph [33]; *Desert Oil (Pty) Ltd v Griekwaland Wes Korporatief BPK t/a Vaalrivier Dienstasie* (unreported, NCK case no 1193/2020 dated 5 November 2021) at paragraphs 17–20; *Vinpro NPC v President of the Republic of South Africa* (unreported, WCC case no 1741/2021 dated 3 December 2021 — a decision of the full court) at paragraph [25]; *Macsteel Tube and Pipe, a division of Macsteel Service Centres SA (Pty) Ltd v Vowles Properties (Pty) Ltd* (unreported, SCA case no 680/2020 dated 17 December 2021) at paragraph [24]; *Man In One CC v Zyka Trading 100 CC* (unreported, FB case no 5335/2014 dated 3 March 2022) at paragraph [13]; *Meyer v McGeer* (unreported, ECMk case no CA 67/2023 dated 6 February 2023 — a decision of the full bench) at paragraph [13].

21 *Rosenberg v Bitcom* 1935 WLD 115 at 117; *Cross v Ferreira* 1950 (3) SA 443 (C) at 447; *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D) at 638A; *Viljoen v Baijnath* 1974 (2) SA 52 (N) at 53H; *Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd (1)* 1976 (1) SA 93 (W) at 96A–C; *Kirsh Industries Ltd v Vosloo and Lindeque* 1982 (3) SA 479 (W) at 484G; *Hwedhanga v Cabinet for the Territory of South West Africa* 1988 (2) SA 746 (SWA) at 749H; *Matloga v Minister of Law and Order* 1989 (3) SA 440 (B) at 443D; *Benjamin v SOBAC South African Building and Construction (Pty) Ltd* 1989 (4) SA 940 (C) at 957H–958C; *J R Janisch (Pty) Ltd v W M Spilhaus & Co (WP) (Pty) Ltd* 1992 (1) SA 167 (C) at 169I–170B; *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd* [2004] 1 All SA 129 (SCA) at 133 *h-i*; *Four Tower Investments (Pty) Ltd v André's Motors* 2005 (3) SA 39 (N) at 43G–H; *Thekweni Properties (Pty) Ltd v Picardi Hotels Ltd (and Others as Third Parties)* 2008 (2) SA 156 (D) at 158D, overruled on appeal, but not on this point, in *Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd* 2009 (1) SA 493 (SCA); *Randa v Radopile Projects CC* 2012 (6) SA 128 (GSJ) at 140G–I; *YB v SB* 2016 (1) SA 47 (WCC) at 51C–D; *RGT Smart Operations (Pty) Ltd v Verlag Automobil Wirtschaft (Pty) Ltd* (unreported, ECPE case no 2446/2013 dated 25 August 2016) at paragraph [11]; *Ergo Mining (Pty) Ltd v Ekurhuleni Metropolitan Municipality* [2020] 3 All SA 445 (GJ) at paragraph [8]; *Nedbank Ltd v RVI Consulting CC* (unreported, GJ case no 2015/24887 dated 28 October 2020) at paragraph [11]; *Dreyer v Metsimaholo Local Municipality* (unreported, FB case no 5899/2017 dated 23 August 2021) at paragraph [5]; *Media24 (Pty) Ltd v Nhleko* (unreported, WCC case no 4126/2019 dated 16 September 2021) at paragraph [32]; *East London Jewish Helping Hand and Burial Society v Galperin* (unreported, ECG case no 1770/2020 dated 2 December 2021) at paragraph [34]; *Macsteel Tube and Pipe, a division of Macsteel Service Centres SA (Pty) Ltd v Vowles Properties (Pty) Ltd* (unreported, SCA case no 680/2020 dated 17 December 2021) at paragraph [24]; *Man In One CC v Zyka Trading 100 CC* (unreported, FB case no 5335/2014 dated 3 March 2022) at paragraph [16]; *Heafield v Rodel Financial Services (Pty) Ltd* (unreported, KZD case no 11680/2012 dated 15 June 2022) at paragraph [28]; *Nedbank Ltd v Centurion Townhouses (Pty) Ltd* (unreported, GP case no 26051/2011 dated 25 August 2022) at paragraph [3]; *Kaap Agri Bedryf Limited v Melaplastics Proprietary Limited; In re Kaap Agri Bedryf Limited v Melaplastics Proprietary Limited* (unreported, WCC case no 12310/2021 dated 19 January 2023) at paragraph 13; *Media 24 (Pty) Ltd v Nhleko* (unreported, SCA case no 109/22 dated 29 May 2023) at paragraph [16]; *A.S v Member of the Executive Council for the Department of Health KwaZulu-Natal* (unreported, KZP case no 7630/2013P dated 28 November 2023) at paragraphs [24]–[29].

22 Comprehensive reference to the earlier cases is made by Caney J in *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D). The applicable principles are summarized in *Commercial Union Assurance Co Ltd v Waymark NO* 1995 (2) SA 73 (Tk) at 77F–I, cited with approval in *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at 261C. See also *Kasper v Andrè Kemp Boerdery CC* 2012 (3) SA 20 (WCC) at 34C–G; *Randa v Radopile Projects CC* 2012 (6) SA 128 (GSJ) at 141C–G; *Botha v Uniqon Wonings (Pty) Ltd* (unreported, GP case no 97510/16 dated 13 October 2021) at paragraphs [13]–[14]. In *Vinpro NPC v President of the Republic of South Africa* (unreported, WCC case no 1741/2021 dated 3 December 2021) the full court summarized the position as follows:

'[25] On this score, it is trite law: that a court is vested with a discretion as to whether to grant or refuse an amendment: that an amendment cannot be granted for the mere asking thereof: that some explanation must be offered therefor: that this explanation must be in the founding affidavit filed in support of the amendment application: that if the amendment is not sought timeously, some reason must be given for the delay: that that party seeking the amendment must show *prima facie* that the amendment has something deserving of consideration: that the party seeking the amendment must not be mala fide: that the amendment must not be the cause [of] an injustice to the other side which cannot be compensated by costs: that the amendment should not be refused simply to punish the applicant for neglect and that mere loss of time is no reason, in itself, for refusing the application.'

23 See the remarks of Schreiner J in *Union Bank of South Africa Ltd v Woolf* 1939 WLD 222 at 225, cited with approval in *Myers v Abramson* 1951 (3) SA 438 (C) at 451B–D; *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D) at 638H–639C; *Amod v SA Mutual Fire & General Insurance Co Ltd* 1971 (2) SA 611 (N) at 618A; *Euroshipping Corporation of Monrovia v Minister of Agriculture* 1979 (2) SA 1072 (C) at 1087C; *Ergo Mining (Pty) Ltd v Ekurhuleni Metropolitan Municipality* [2020] 3 All SA 445 (GJ) at paragraph [8]. See also *ABSA Bank Ltd and related matters v Public Protector* [2018] 2 All SA 1 (GP) at paragraph [119]; *Heafield v Rodel Financial Services (Pty) Ltd* (unreported, KZD case no 11680/2012 dated 15 June 2022) at paragraph [30]; *Hyve Events S.A. Limited v African Energy Chamber NPC* (unreported, GJ case no 20141/2022 dated 14 February 2023) at paragraph [15]; *Media 24 (Pty) Ltd v Nhleko* (unreported, SCA case no 109/22 dated 29 May 2023) at paragraph [16].

24 1927 CPD 27 at 29.

25 See, for example, *Fish Hoek Village Management Board v Romain* 1932 CPD 304 at 307; *Frenkel, Wise & Co Ltd v Cuthbert* 1947 (4) SA 715 (C) at 718; *Cross v Ferreira* 1950 (3) SA 443 (C) at 447E–F; *Greyling v Nieuwoudt* 1951 (1) SA 88 (O) at 91H–92A; *Cornelius & Sons v McClaren* 1961 (2) SA 604 (E); *Zarug v Parvathie NO* 1962 (3) SA 872 (D) at 880H; *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D) at 639D; *Crawford-Brunt v Kavnat* 1967 (4) SA 308 (C) at 311A; *Amod v SA Mutual Fire & General Insurance Co Ltd* 1971 (2) SA 611 (N) at 614A; *Euroshipping Corporation of Monrovia v Minister of Agriculture* 1979 (2) SA 1072 (C) at 1085H–1086A; *Hwedhanga v Cabinet for the Territory of South West Africa* 1988 (2) SA 746 (SWA) at 749J–750A; *Meyerson v Health Beverages (Pty) Ltd* 1989 (4) SA 667 (C) at 675C; *Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd intervening)* 1994 (2) SA 363 (C) at 369G; *Commercial Union Assurance Co Ltd v Waymark NO* 1995 (2) SA 73 (Tk) at 76E–F; *Rosner v Lydia Swanepoel Trust* 1998 (2) SA 123 (W) at 127D–G; *Four Tower Investments (Pty) Ltd v André's Motors* 2005 (3) SA 39 (N) at 43G–H; *Airconditioning Design & Development (Pty) Ltd v Minister of Public Works, Gauteng* 2005 (4) SA 103 (T) at 107H–I; *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at 261C; *Thekweni Properties (Pty) Ltd v Picardi Hotels Ltd (and Others as Third Parties)* 2008 (2) SA 156 (D) at 158E, overruled on appeal, but not on this point, in *Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd* 2009 (1) SA 493 (SCA); *Holdenstedt Farming v Cederberg Organic Buchu Growers (Pty) Ltd* 2008 (2) SA 177 (C) at 183C–D; *YB v SB* 2016 (1) SA 47 (WCC) at 51A–D; *Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation* 2020 (1) SA 327 (CC) at paragraph [89]; *Ergo Mining (Pty) Ltd v Ekurhuleni Metropolitan Municipality* [2020] 3 All SA 445 (GJ) at paragraph [8]; *Webber NO v Hein* (unreported, ECG case no CA 221/2020 dated 10 August 2021 — a decision of the full court) at paragraph [18]; *Dreyer v Metsimaholo Local Municipality* (unreported, FB case no 5899/2017 dated 23 August 2021) at paragraph [37]; *Botha v Uniqon Wonings (Pty) Ltd* (unreported, GP case no 97510/16 dated 13 October 2021) at paragraphs [13]–[14]; *Desert Oil (Pty) Ltd v Griekwaland Wes Korporatief BPK t/a Vaalrivier Dienstasie* (unreported, NCK case no 1193/2020 dated 5 November 2021) at paragraph 15; *Macsteel Tube and Pipe, a division of Macsteel Service Centres SA (Pty) Ltd v Vowles Properties (Pty) Ltd* (unreported, SCA case no 680/2020 dated 17 December 2021) at paragraph [9]; *Man In One CC v Zyka Trading 100 CC* (unreported, FB case no 5335/2014 dated 3 March 2022) at paragraph [16]; *Hyve Events S.A. Limited v African Energy Chamber NPC* (unreported, GJ case no 20141/2022 dated 14 February 2023) at paragraphs [11] and [15]; *Hawkins v Sebenza Sanitary Engineering (Pty) Limited* (unreported, GP case no 50189/2021 dated 9 March 2023) at paragraphs [11]–[13]; *Media 24 (Pty) Ltd v Nhleko* (unreported, SCA case no 109/22 dated 29 May 2023) at paragraph [16]. See also *Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH* 2024 (1) SA 331 (CC) at paragraphs [64]–[67] and [87].

26 This is stressed in, for example, *Media 24 (Pty) Ltd v Nhleko* (unreported, SCA case no 109/22 dated 29 May 2023) at paragraph [16]; *Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd intervening)* 1994 (2) SA 363 (C) at 369G, cited with approval in *Rosner v Lydia Swanepoel Trust* 1998 (2) SA 123 (W) at 127D–G. See also *Heafield v Rodel Financial Services (Pty) Ltd* (unreported, KZD case no 11680/2012 dated 15 June 2022) at paragraph [29]. This common-law rule has in magistrates' courts practice been given statutory effect in the proviso to s 111(1) of the Magistrates' Courts Act 32 of 1944.

27 1927 CPD 27 at 29.

28 Cited with approval in *South British Insurance Co Ltd v Glisson* 1963 (1) SA 289 (D) at 295H; *YB v SB* 2016 (1) SA 47 (WCC) at 51A; *Media24 (Pty) Ltd v Nhleko* (unreported, WCC case no 4126/2019 dated 16 September 2021) at paragraph [31]; *Heafield v Rodel Financial Services (Pty) Ltd* (unreported, KZD case no 11680/2012 dated 15 June 2022) at paragraph [27]. See also *Randa v Radopile Projects CC* 2012 (6) SA 128 (GSJ) and T Bekker 'The late amendment of pleadings — time for a new approach? *Randa v Radopile Projects CC* 2012 (6) SA 128 (GSJ)' (2017) 38.1 *Obiter* 181.

29 *South British Insurance Co Ltd v Glisson* 1963 (1) SA 289 (D) at 296A–C, cited with approval in *GMF Kontrakteurs (Edms) Bpk v Pretoria City Council* 1978 (2) SA 219 (T) at 222H–223A.

30 See the remarks of Schreiner J in *Union Bank of South Africa Ltd v Woolf; Union Bank of South Africa Ltd v Shipper* 1939 WLD 222 at 225, cited with approval in *Myers v Abramson* 1951 (3) SA 483 (C) at 451A–B; *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D) at 638H–639C; *Amod v SA Mutual Fire & General Insurance Co Ltd* 1971 (2) SA 611 (N) at 617H–618A; *Thekweni Properties (Pty) Ltd v Picardi Hotels Ltd (and Others as Third Parties)* 2008 (2) SA 156 (D) at 158E; *YB v*

SB 2016 (1) SA 47 (WCC) at 51C. In *A.S v Member of the Executive Council for the Department of Health KwaZulu-Natal* (unreported, KZP case no 7630/2013P dated 28 November 2023) the court, in refusing an application to amend the plaintiff's particulars of claim after her case was closed, had regard to, amongst other things, the fact that the plaintiff was indigent; that the litigation was being conducted on her behalf on a contingency basis; and that she was in no position at that stage to meet any costs order that might be granted against her for the costs occasioned by the amendment (at paragraph [29]).

31 *Myers v Abramson* 1951 (3) SA 438 (C) at 450A–B.

32 See *Moolman v Estate Moolman* 1927 CPD 27 at 29; *Ergo Mining (Pty) Ltd v Ekurhuleni Metropolitan Municipality* [2020] 3 All SA 445 (GJ) at paragraph [8].

33 In *Clarapede & Co v Commercial Union Association* (1883) 32 WR 262 at 263 Bowen LJ stated:
'Sometimes to correct the error will lead to injustice which cannot be cured, as when a witness who could give evidence cannot be got at, or the solvency of one party is doubtful.'
See also *De Beer v Unica Iron and Steel (Pty) Ltd* (unreported, GP case no 88472/2018 dated 26 November 2021) at paragraph [4].

34 See, for example, *South British Insurance Co Ltd v Glisson* 1963 (1) SA 289 (D); *GMF Kontrakteurs (Edms) Bpk v Pretoria City Council* 1978 (2) SA 219 (T; *Heafield v Rodel Financial Services (Pty) Ltd* (unreported, KZD case no 11680/2012 dated 15 June 2022) at paragraph [32].

35 *South British Insurance Co Ltd v Glisson* 1963 (1) SA 289 (D) at 294B; *Amod v SA Mutual Fire & General Insurance Co Ltd* 1971 (2) SA 611 (N) at 615A.

36 *Stolz v Pretoria North Town Council* 1953 (3) SA 884 (T) at 886H; *Zarug v Parvathie NO* 1962 (3) SA 872 (D) at 884C; *Harnaker v Minister of the Interior* 1965 (1) SA 372 (C) at 384; *Amod v SA Mutual Fire & General Insurance Co Ltd* 1971 (2) SA 611 (N) at 615A; *GMF Kontrakteurs (Edms) Bpk v Pretoria City Council* 1978 (2) SA 219 (T) at 222F.

37 *Heeriah v Ramkissoon* 1955 (3) SA 219 (N) at 221H–222A. The application for amendment of a plea was rejected on this ground in *South British Insurance Co Ltd v Glisson* 1963 (1) SA 289 (D) and *GMF Kontrakteurs (Edms) Bpk v Pretoria City Council* 1978 (2) SA 219 (T).

38 *Tengwa v Metrorail* 2002 (1) SA 739 (C); *Ebesa Architects (Pty) Ltd v City of Cape Town* (unreported, WCC case no 11824/2022 dated 1 September 2023) at paragraph [23], where the text to this footnote is referred to with approval.

39 *Union Bank of South Africa Ltd v Woolf* 1939 WLD 222 at 225; *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D) at 640H; *Euroshipping Corporation of Monrovia v Minister of Agriculture* 1979 (2) SA 1072 (C) at 1090B; *Thekweni Properties (Pty) Ltd v Picardi Hotels Ltd (and Others as Third Parties)* 2008 (2) SA 156 (D) at 158E–F, overruled on appeal, but not on this point, in *Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd* 2009 (1) SA 493 (SCA); *Dreyer v Metsimaholo Local Municipality* (unreported, FB case no 5899/2017 dated 23 August 2021) at paragraph [32].

40 See, for example, *Meizenheimer v Dieterle* (1907) 7 CTR 490; *Strydom v Ohlsen* 1913 TPD 288; *Mullen v Nieuwoudt* 1915 EDL 318; *Malcomess & Co v Cullinan* 1916 OPD 65; *Marks & Holland v Noble* 1916 TPD 129; *Vogel v Kleineberg* 1917 TPD 222; *The Rand Indent Ltd v The Master and Owners of 'The Motherland'* (1919) 40 NLR 121; *Wigham v British Traders Insurance Co Ltd* 1963 (3) SA 151 (W).

41 See, for example, *Thompson v Barkly East Rinderpest Committee* (1897) 14 SC 393; *Yu Kwam v President Insurance Co Ltd* 1963 (1) SA 66 (T); *Schnellen v Rondalia Assurance Corporation of SA Ltd* 1969 (1) SA 517 (W); *Samente v Minister of Police* 1978 (4) SA 632 (E); *Boland Bank Ltd v Roup, Wacks, Kaminer & Kriger* 1989 (3) SA 912 (C); *Kotze NO v Santam Insurance Ltd* 1994 (1) SA 237 (C); *Friends of the Sick Association v Commercial Properties (Pty) Ltd* 1996 (4) SA 154 (D) at 156E–F; *Golden Harvest (Pty) Ltd v Zen-Don CC* 2002 (2) SA 653 (O).

42 *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 279C; *Slomowitz v Vereeniging Town Council* 1966 (3) SA 317 (A) at 329E–F; *Western Bank Ltd v Wood* 1969 (4) SA 131 (D) at 135H; *Matloga v Minister of Law and Order* 1989 (3) SA 440 (B) at 443D; *Heafield v Rodel Financial Services (Pty) Ltd* (unreported, KZD case no 11680/2012 dated 15 June 2022) at paragraph [28].

43 *Tomassini v Dos Remendos* 1961 (1) SA 226 (W).

44 *Bestenbier v Goodwood Municipality* 1955 (2) SA 692 (C).

45 An amendment to include a prayer for costs is usually granted unless there is some good reason to refuse it (*Jacobs v Joyce & McGregor* 1937 CPD 468 at 470; and see *Adamson v Vorster* 1956 (4) SA 803 (O) at 805H–806A).

46 *Alliance Building Society v Perkins* 1950 (4) SA 706 (W). Amendments introducing prayers for interest have been allowed without notice to the defendant in *Burger & Kie Bpk v De Kock* 1956 (4) SA 802 (C) and *Sportswear Specials (Pvt) Ltd v Edmays 'Ballet Centre'* 1970 (1) SA 143 (R). The practice in the Gauteng Division of the High Court, Pretoria, is not to allow an amendment inserting a prayer for interest without notice (*National Implement Co v Bouwer* 1955 (3) SA 414 (T); *Northern Burglar Proof Gate & Fence Co Ltd v Venite Construction (Pty) Ltd* 1977 (1) SA 708 (W); and see *Adamson v Vorster* 1956 (4) SA 803 (O) at 806B–C).

47 *OK Motors v Van Niekerk* 1961 (3) SA 149 (T) at 152C; *MacDonald, Forman & Co v Van Aswegen* 1963 (2) SA 150 (O) at 153H–154A; *Fiat SA (Pty) Ltd v Bill Troskie Motors* 1985 (1) SA 355 (O) at 357G–H; *Tengwa v Metrorail* 2002 (1) SA 739 (C) at 745H; *Hyve Events S.A. Limited v African Energy Chamber NPC* (unreported, GJ case no 20141/2022 dated 14 February 2023) at paragraph [14].

48 *MacDonald, Forman & Co v Van Aswegen* 1963 (2) SA 150 (O) at 153D; *Hyve Events S.A. Limited v African Energy Chamber NPC* (unreported, GJ case no 20141/2022 dated 14 February 2023) at paragraph [15].

49 *Myers v Abramson* 1951 (3) SA 438 (C) at 449H–450A; *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D) at 643A–C.

50 *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D) at 643C.

51 *Morgan & Ramsay v Cornelius & Hollis* (1910) 31 NLR 262 at 264; *Greyling v Nieuwoudt* 1951 (1) SA 88 (O).

52 *Ritch v Bhyat* 1913 TPD 589; *Pullen v Pullen* 1928 WLD 133; *Henning v Henning* 1943 TPD 177.

53 *Lebedina v Schechter and Haskell* 1931 WLD 247; *Dinath v Breedt* 1966 (3) SA 712 (T); *Western Bank Ltd v Wood* 1969 (4) SA 131 (D) at 136F; *Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd (1)* 1976 (1) SA 93 (W) at 96D–97H; *Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd (2)* 1976 (1) SA 100 (W) at 103H–104A; *De Bruyn v Centenary Finance Co (Pty) Ltd* 1977 (3) SA 37 (T) at 42A–C; *Philotex (Pty) Ltd v Snyman* 1994 (2) SA 710 (T) at 715D–717A; *Sasfin (Pty) Ltd v Jessop* 1997 (1) SA 675 (W) at 701C. In *Zeta Property Holdings (Pty) Ltd v Lefatshe Technologies (Pty) Ltd* 2013 (6) SA 630 (GSJ) the court (at 632A–E) alluded to the 'more indulgent position' regarding the introduction of causes of action which arose after the issue of summons, by means of an amendment to the summons, that was stated in *Bankkorp Ltd v Anderson-Morshead* 1997 (1) SA 251 (W) at 253C–J and in *Marigold Ice Cream Co (Pty) Ltd v National Co-operative Dairies Ltd* 1997 (2) SA 671 (W) at 677I.

54 In *Mynhardt v Mynhardt* 1986 (1) SA 456 (T).

55 See also *Erasmus v Slomowitz* (1) 1938 TPD 236 at 241; *Union Bank of South Africa Ltd v Woolf* 1939 WLD 222; *British Oak Insurance Co Ltd v Baloyi* 1941 WLD 120; *Springson v Commonwealth Trading Co Ltd* 1948 (1) SA 1165 (W); *Myers v Abramson* 1951 (3) SA 438 (C) at 450F–451D; *Smith v Williams; Smith v Kok* 1952 (2) SA 682 (W) at 686–7; *Prudential Assurance Co Ltd v Crombie* 1957 (4) SA 699 (C) at 702B–G; *Yu Kwam v President Insurance Co Ltd* 1963 (1) SA 66 (T) at 69F–H; *Bankkorp Ltd v Anderson-Morshead* 1997 (1) SA 251 (W).

56 In *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at 15B–E it was pointed out that it is preferable in the context of prescription to speak of 'a right of action' instead of a 'cause of action'. See also *Mazibuko v Singer* 1979 (3) SA 258 (W) at 265H–266A; *Ergo Mining (Pty) Ltd v Ekurhuleni Metropolitan Municipality* [2020] 3 All SA 445 (GJ) at paragraph [8].

57 *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1977 (4) SA 310 (T) at 343B–D; *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 836D; *Mabaso v Minister of Police* 1980 (4) SA 319 (W) at 324A–F; *D & D Deliveries (Pty) Ltd v Pinetown Borough* 1991 (3) SA 250 (D) at 253B; *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at 15B–16C; *Grindrod (Pty) Ltd v Seaman* 1998 (2) SA 347 (C) at 351E–J; *Tengwa v Metrorail* 2002 (1) SA 739 (C) at 744H; *Ergo Mining (Pty) Ltd v Ekurhuleni Metropolitan Municipality* [2020] 3 All SA 445 (GJ) at paragraph [8].

58 *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 279B; *Miller v H L Shippel & Co (Pty) Ltd* 1969 (3) SA 447 (T); *Dumasi v Commissioner, Venda Police* 1990 (1) SA 1068 (V) at 1071C–D; *Minister of Safety and Security v Molutsi* 1996 (4) SA 72 (A) at 84H–85C, 87C–D, 95C–D and 99D–E; *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at 15H–16C; *Associated Paint & Chemical Industries (Pty) Ltd t/a Albestra Paint and Lacquers v Smit* 2000 (2) SA 789 (SCA) at 794C–G; *Embling v Two Oceans Aquarium CC* 2000 (3) SA 691 (C) at 697J–698A; *Malinga v Road Accident Fund* 2012 (5) SA 120 (GNP) at 124C–G. See also *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd* [2004] 1 All SA 129 (SCA) at 133*g*–134*h*.

59 1997 (2) SA 1 (A). See also *Mazibuko v Singer* 1979 (3) SA 258 (W) at 265D–266C; *Associated Paint & Chemical Industries (Pty) Ltd t/a Albestra Paint and Lacquers v Smit* 2000 (2) SA 789 (SCA) at 794C–G; *Embling v Two Oceans Aquarium CC* 2000 (3) SA 691 (C) at 697F–698A; *Tengwa v Metrorail* 2002 (1) SA 739 (C) at 744I–745B; *CGU Insurance Ltd v Rumdel Construction (Pty) Ltd* 2004 (2) SA 622 (SCA) at 626H–I; *FirstRand Bank Ltd v Nedbank (Swaziland) Ltd* 2004 (6) SA 317 (SCA) at 321A–C; *Four Tower Investments (Pty) Ltd v André's Motors* 2005 (3) SA 39 (N) at 42H–47I; *Mntambo v Road Accident Fund* 2008 (1) SA 313 (W) at 318B–C; *Ergo Mining (Pty) Ltd v Ekurhuleni Metropolitan Municipality* [2020] 3 All SA 445 (GJ) at paragraph [8]; *Nedbank Ltd v RVI Consulting CC* (unreported, GJ case no 2015/24887 dated 28 October 2020) at paragraph [13]; *Cornelissen Incorporated v Nama Khoi Local Municipality* (unreported, NCK case no 2754/2016 dated 15 June 2023) at paragraphs 25–26; *Morwane v Kinnear* (unreported, NWM case no 2044/2017 dated 5 January 2024) at paragraph [19].

60 At 15H–16C.

61 *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 836D. See also *Wigham v British Traders Insurance Co Ltd* 1963 (3) SA 151 (W); *Schnellen v Rondalia Assurance Corporation of SA Ltd* 1969 (1) SA 517 (W); *Lampert-Zakiewicz v Marine & Trade Insurance Co Ltd* 1975 (4) SA 597 (C); *Dladla v President Insurance Co Ltd* 1982 (3) SA 198 (W) at 199E–G; *Frol Holdings (Pty) Ltd v Sword Contractors CC* 1996 (3) SA 1016 (O) at 1019G; *Stroud v Steel Engineering Co Ltd* 1996 (4) SA 1139 (W) at 1142C–E; *Mntambo v Road Accident Fund* 2008 (1) SA 313 (W) at 317H–321G.

62 *Flemmer v Ainsworth* 1910 TPD 81; *Combrinck v Strasburger* 1914 CPD 314; *Estate Wolpert v Hewett* 1925 (2) PH F74 (D); *Frenkel, Wise & Co Ltd v Cuthbert* 1947 (4) SA 715 (C); *Coppermoon Trading 13 (Pty) Ltd v Government, Eastern Cape Province* 2020 (3) SA 391 (ECB) at paragraphs [16] and [17]; *Dimension Data Middle East and Africa (Pty) Limited v Ngcaba: In re: Ngcaba v Dimension Data Middle East and Africa (Pty) Limited* (unreported, GJ case no 2016/22545 dated 6 December 2022) at paragraph [39].

63 *Frenkel, Wise & Co Ltd v Cuthbert* 1947 (4) SA 715 (C).

64 See, for example, *Botha v Van Niekerk* 1947 (1) SA 699 (T) at 703; *Geyser v Geyser* 1947 (4) SA 1 (T) at 4; *Thompson Kusela CC t/a Thompson Security Group v Dewald Buys t/a Masima Block Watch* (unreported, GJ case no 2017/39176 dated 13 June 2023) at paragraph [15]. The rules regarding withdrawals of admissions refer to admissions on the pleadings and not admissions *dehors* the pleadings (*Wild Sea Construction (Pty) Ltd v Van Vuuren* 1983 (2) SA 450 (C) at 452F).

65 *Gordon v Tarnow* 1947 (3) SA 525 (A) at 531; *AA Mutual Insurance Association Ltd v Biddulph* 1976 (1) SA 725 (A) at 735; *Bellairs v Hodnett* 1978 (1) SA 1109 (A) at 1150D; *Thompson Kusela CC t/a Thompson Security Group v Dewald Buys t/a Masima Block Watch* (unreported, GJ case no 2017/39176 dated 13 June 2023) at paragraph [11]; and see s 15 of the Civil Proceedings Evidence Act 25 of 1965.

66 *Amod v SA Mutual Fire & General Insurance Co Ltd* 1971 (2) SA 611 (N) at 614F–G. See also *Frenkel, Wise & Co Ltd v Cuthbert* 1946 CPD 735; *Fleet Motors (Pty) Ltd v Epsom Motors (Pty) Ltd* 1960 (3) SA 401 (D) at 403C–404A; *Zarug v Parvathie NO* 1962 (3) SA 872 (D) at 876F–877A; *South British Insurance Co Ltd v Glisson* 1963 (1) SA 289 (D) at 293H–294C. The question was, however, left open in *Levy v Levy* 1991 (3) SA 614 (A) at 622A.

67 *President Versekeringsmaatskappy Bpk v Moodley* 1964 (4) SA 109 (T) at 110H–111A; *J R Janisch (Pty) Ltd v W M Spilhaus & Co (WP) (Pty) Ltd* 1992 (1) SA 167 (C) at 170C–G; *Aguma v South African Broadcasting Corporation SOC Limited In re: South African Broadcasting Corporation SOC Limited v Lornavision (Pty) Ltd* (unreported, GJ case no 17/49514 dated 4 February 2022) at paragraph [6]. See also Fareed Moosa 'Withdrawal of an admission in a plea' 2017 (July) *De Rebus* 24.

68 *Northern Mounted Rifles v O'Callaghan* 1909 TS 174; *Frenkel, Wise & Co Ltd v Cuthbert* 1946 CPD 735; *Fleet Motors (Pty) Ltd v Epsom Motors (Pty) Ltd* 1960 (3) SA 401 (D); *Watersmeet (Pty) Ltd v De Kock* 1960 (4) SA 734 (E); *South British Insurance Co Ltd v Glisson* 1963 (1) SA 289 (D); *Bellairs v Hodnett* 1978 (1) SA 1109 (A) at 1150F–H; *J R Janisch (Pty) Ltd v W M Spilhaus & Co (WP) (Pty) Ltd* 1992 (1) SA 167 (C) at 170G; *Swartz v Van der Walt t/a Sentraten* 1998 (1) SA 53 (W) at 57C.

69 *Wild Sea Construction (Pty) Ltd v Van Vuuren* 1983 (2) SA 450 (C) at 452G–H.

70 *Levy v Levy* 1991 (3) SA 614 (A) at 622A–G. See also *Price NO v Allied-JBS Building Society* 1980 (3) SA 874 (A) at 882A–C.

71 *Potters Mill Investments 14 (Pty) Ltd v Abe Swersky & Associates* 2016 (5) SA 202 (WCC) at 205E–G, 205H–J, 207G–J and 209F–G. In this case the defendants, acting on the advice of their legal team, mistakenly admitted in their plea that the law attached certain consequences to an event. When they sought to withdraw the admission by amending their plea, the plaintiff objected, citing prejudice. The objection was rejected by the court hearing the defendants' subsequent application for leave to amend their plea, and the application was granted.

72 *Gordon v Tarnow* 1947 (3) SA 525 (A) at 532.

73 *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D) at 642C–D. See also *MacDuff & Co v Johannesburg Consolidated Investment Co Ltd* 1923 TPD 309 at 310; *SA Steel Equipment Co (Pty) Ltd v Lurelk (Pty) Ltd* 1951 (4) SA 167 (T) at 175A–F; *Heeriah v Ramkissoon* 1955 (3) SA 219 (N) at 222B–D; *Park Finance Corporation (Pty) Ltd v Van Niekerk* 1956 (1) SA 669 (T) at 676D–677G; *Kali v Incorporated General Insurances Ltd* 1976 (2) SA 179 (D) at 182A–B; *Gcanga v AA Mutual Insurance Association Ltd* 1979 (3) SA 320 (E) at 328D; *GMF Kontrakteurs (Edms) Bpk v Pretoria City Council* 1978 (2) SA 219 (T) at 224H; *Fiat SA (Pty) Ltd v Bill Troskie Motors* 1985 (1) SA 355 (O) at 357E–F; *Cordier v Cordier* 1984 (4) SA 524 (C) at 528I–529B; *Meyerson v Health Beverages (Pty) Ltd* 1989 (4) SA 667 (C) at 675A–C. Earlier decisions, such as *Oblowitz Bros v Guardian Insurance Co Ltd* 1924 CPD 64, in which applications for amendment were refused on the sole ground that there was no adequate explanation of the delay, will not be followed today.

74 *Krogman v Van Reenen* 1926 OPD 191 at 193. These words ultimately derive from a *dictum* of Brett MR in *Clarapede & Co v Commercial Union Association* (1883) 32 WR 262 at 263 which has often been cited with approval: see, for example, *Rishton v Rishton* 1912 TPD 718 at 719, *SA Steel Equipment Co (Pty) Ltd v Lurelk (Pty) Ltd* 1951 (4) SA 167 (T) at 175D and *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D) at 638F. In *Mabaso v Minister of Police* 1980 (4) SA 319 (W) at 323D Goldstone AJ said that 'even in a gross case' the court should grant an amendment unless there is a likelihood of prejudice which cannot be cured by a suitable order for costs.

75 *Minister van die SA Polisie v Kraatz* 1973 (3) SA 490 (A) at 512E–H; *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd* 1978 (1) SA 914 (A) at 928D. In both these cases the remarks of Van den Heever J in *Van Aswegen v Fechter* 1939 OPD 78 at 88 are cited with approval. See also *Dimension Data Middle East and Africa (Pty) Limited v Ngcaba: In re: Ngcaba v Dimension Data Middle East and Africa (Pty) Limited* (unreported, GJ case no 2016/22545 dated 6 December 2022) at paragraph [39] and the cases there referred to.

76 *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D) at 641A; *Magnum Simplex International (Pty) Ltd v MEC Provincial Treasury, Provincial Government of Limpopo* (unreported, SCA case no 556/17 dated 31 May 2018) at paragraph [9]; *Coppermoon Trading 13 (Pty) Ltd v Government, Eastern Cape Province* 2020 (3) SA 391 (ECB) at paragraph [17]; *Heafield v Rodel Financial Services (Pty) Ltd* (unreported, KZD case no 11680/2012 dated 15 June 2022) at paragraph [29]; *Dimension Data Middle East and Africa (Pty) Limited v Ngcaba: In re: Ngcaba v Dimension Data Middle East and Africa (Pty) Limited* (unreported, GJ case no 2016/22545 dated 6 December 2022) at paragraph [39].

77 *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd* 2005 (6) SA 23 (C) at 36I–J.

78 *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 (2) SA 447 (SCA) at 463E, 462J–463B and 464E–H.

79 *Heydenrych v Colonial Mutual Life Assurance Society Ltd* 1920 CPD 67; *Stuttaford & Co Ltd v Scher* 1931 CPD 341; *Beeton v Peninsula Transport Co (Pty) Ltd* 1934 CPD 53; *Edwards v African Guarantee and Indemnity Co Ltd* 1952 (4) SA 335 (O); *Cross v Ferreira* 1950 (3) SA 443 (C), upheld on appeal to the full court in *Cross v Ferreira* 1951 (2) SA 435 (C); *Myers v Abramson* 1951 (3) SA 438 (C); *Edwards v African Guarantee and Indemnity Co Ltd* 1952 (4) SA 335 (O) at 339; *Hochfeld (Pty) Ltd v Carmeldine Investments (Pty) Ltd* 1955 (4) SA 296 (W) at 298A; *Barkhuizen NO v Jackson* 1957 (3) SA 57 (T) at 58F; *Pieters v Pitchers* 1959 (3) SA 834 (T); *Lloyds & Co (South Africa) Ltd v Aucamp* 1961 (3) SA 879 (O); *Harnaker v Minister of the Interior* 1963 (4) SA 559 (C) at 563F; *Furstenberg v Smit* 1964 (3) SA 810 (O) at 815B; *Crawford-Brunt v Kavnat* 1967 (4) SA 308 (C) at 310G–311A; *Bedford v Uys* 1971 (1) SA 549 (C); *OK Bazaars (1929) Ltd v Universal Stores Ltd* 1972 (3) SA 175 (C) at 177H; *Van Jaarsveld v Nel* 1974 (1) SA 103 (T); *Millman NO v Goosen* 1975 (3) SA 141 (O); *Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd* (2) 1976 (1) SA 100 (W); *R M van de Ghinste & Co (Pty) Ltd v Van de Ghinste* 1980 (1) SA 250 (C) at 256H–257D; *Hwedhanga v Cabinet for the Territory of South West Africa* 1988 (2) SA 746 (SWA) at 750D; *Bowring Barclays & Genote (Edms) Bpk v De Kock* 1991 (1) SA 145 (SWA); *De Klerk v Du Plessis* 1995 (2) SA 40 (T) at 43I; *Bafokeng Tribe v Impala Platinum Ltd* 1999 (3) SA 517 (BH) at 539H–J; *Barnard v Barnard* 2000 (3) SA 741 (C) at 754F; *Nxumalo v First Link Insurance Brokers (Pty) Ltd* 2003 (2) SA 620 (T); *Alpha (Pty) Ltd v Carltonville Ready Mix Concrete CC* 2003 (6) SA 289 (W) at 293I–J; *Krischke v Road Accident Fund* 2004 (4) SA 358 (W) at 363B; *YB v SB* 2016 (1) SA 47 (WCC) at 51E–F; *Botha v Uniqon Wonings (Pty) Ltd* (unreported, GP case no 97510/16 dated 13 October 2021) at paragraph [13]; *Van Niekerk v The MV 'Madiba 1'* (unreported, WCC case no AC13/2018 dated 17 June 2022) at paragraph [9]; *Neale N.O. v Pipeflo (Pty) Ltd* (unreported, GP case no 23970/21 dated 19 September 2022) at paragraph [46]; *ACDC Dynamics (Pty) Ltd v Shrinik Retailing (Pty) Ltd t/a ACDC Express Midrand* (unreported, GJ case no 2021/21595 dated 7 November 2022) at paragraph [12].

80 *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D) at 641A; *Caxton Ltd v Reeva Forman (Pty) Ltd* 1990 (3) SA 547 (A) at 565H–J; *Barnard v Barnard* 2000 (3) SA 741 (C) at 754F.

81 *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd (2)* 2005 (6) SA 23 (C) at 36I–J.

82 *Strydom v Derby-Lewis* 1990 (3) SA 96 (T) at 102C–E; *Barnard v Barnard* 2000 (3) SA 741 (C) at 754F.

83 *Krischke v Road Accident Fund* 2004 (4) SA 358 (W) at 363F–G.

84 *Alpha (Pty) Ltd v Carltonville Ready Mix Concrete CC* 2003 (6) SA 289 (W) at 291A–B and 293I–J.

85 1980 (1) SA 250 (C) at 258H–259A. See also *De Klerk v Du Plessis* 1995 (2) SA 40 (T) at 43J–44A; *Nxumalo v First Link Insurance Brokers (Pty) Ltd* 2003 (2) SA 620 (T) at 623A–E; *Alpha (Pty) Ltd v Carltonville Ready Mix Concrete CC* 2003 (6) SA 289 (W) at 293I–J; *Krischke v Road Accident Fund* 2004 (4) SA 358 (W) at 363D–F; *Neale N.O. v Pipeflo (Pty) Ltd* (unreported, GP case no 23970/21 dated 19 September 2022) at paragraphs [46]–[53]; *ACDC Dynamics (Pty) Ltd v Shrinik Retailing (Pty) Ltd t/a ACDC Express Midrand* (unreported, GJ case no 2021/21595 dated 7 November 2022) at paragraphs [12]–[29]; *Crocodile River West Irrigation Board v Allies Farms SA (Pty) Ltd* (unreported, LP case no 4389/2019 dated 29 November 2022) at paragraphs [9]–[10]; *M-B.F.M v H.P.N.P* (unreported, KZP case no 5182/2022P dated 8 February 2024) at paragraphs [8]–[9].

86 The court cannot take the point of prescription *mero motu* (s 17(1) of the Prescription Act 68 of 1969).

87 *Park Finance Corporation (Pty) Ltd v Van Niekerk* 1956 (1) SA 669 (T) at 674G; *Miller v H L Shippel & Co (Pty) Ltd* 1969 (3) SA 447 (T) at 454D; *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 836D; *Dladla v President Insurance Co Ltd* 1982 (3) SA 198 (W); *Frol Holdings (Pty) Ltd v Sword Contractors CC* 1996 (3) SA 1016 (O) at 1019G; *Stroud v Steel Engineering Co Ltd* 1996 (4) SA 1139 (W) at 1142C–E; *Grindrod (Pty) Ltd v Seaman* 1998 (2) SA 347 (C) at 351B–F; *Associated Paint & Chemical Industries (Pty) Ltd t/a Albestra Paint and Lacquers v Smit* 2000 (2) SA 789 (SCA) at 796B–I; *Alfa Laval Agri (Pty) Ltd v Ferreira NO* 2004 (2) SA 68 (O) at 79A–80H; *Dischem Pharmacies (Pty) Ltd t/a Mondeor Pharmacy v United Pharmaceutical Distributors (Pty) Ltd t/a UPD Lea Glen* 2004 (2) SA 166 (W) at 172B–D; *Jacobs v Garlicke and Bousfield Inc* (unreported, KZD case no 1340/2011 dated 13 September 2023) at paragraphs [64]–[68].

88 *Wholesale Housing Supplies (Pty) Ltd v Rich Rewards Trading 556 (Pty) Ltd* (unreported, WCC case no 22189/2016 dated 29 October 2021) at paragraphs [7]–[17].

89 *Cordier v Cordier* 1984 (4) SA 524 (C) at 535I.

90 *Mias de Klerk Boerdery (Edms) Bpk v Cole* 1986 (2) SA 284 (N), distinguishing *Miller v H L Shippel & Co (Pty) Ltd* 1969 (3) SA 447 (T) on the basis that it was decided under the provisions of s 6(1)*(b)* of the old Prescription Act 18 of 1943, the wording of which differs materially from that of s 15(1) of the Prescription Act 68 of 1969. See, however, *Cordier v Cordier* 1984 (4) SA 524 (C) at 533C; and see *Brandon v Minister of Law and Order* 1997 (3) SA 68 (C) at 75E–F, a case dealing with a statutory limitation period under s 32 of the (now repealed) Police Act 7 of 1958. See also *Van Rensburg v Condoprops 42 (Pty) Ltd* 2009 (6) SA 539 (E) at 546B–D.

91 *Peter Taylor & Associates v Bell Estates (Pty) Ltd* 2014 (2) SA 312 (SCA) at 319B–D; distinguished in *Huyser v Quicksure (Pty) Ltd* 2017 (4) SA 546 (GP). In *Nativa Manufacturing (Pty) Ltd v Keymax Investments 125 (Pty) Ltd* 2020 (1) SA 235 (GP) the applicant sought to join the third respondent as defendant in an action for damages it had instituted against the first respondent. The third respondent resisted joinder on the ground that the claim against it had prescribed. The key question before court was whether the application for joinder had had the effect of interrupting the running of prescription. The court, after a detailed analysis of the case law (at paragraphs [10]–[40]), found that there was no ground for the distinction drawn in *Huyser* between that case and *Peter Taylor*. The same fundamental issue arose in both cases, namely, whether the service of the joinder application interrupted the running of prescription under s 15(1) of the Prescription Act 68 of 1969 and the facts were in all material respects aligned. Since the finding of the court in *Huyser* that it was not bound by *Peter Taylor* was wrong, the court was entitled to depart from the decision in *Huyser*. It was held that the service of the application for joinder did not constitute service of process whereby a creditor claimed payment of a debt as required by s 15(1) of the Act, and consequently it did not interrupt prescription (at paragraphs [41]–[42]).

92 *Ishmael v Brendan Lune Medical Practice* (unreported, GJ case no A5025/2022 dated 7 June 2023 — a decision of the full court) at paragraphs [18]–[24].

93 *Welken NO v Nasionale Koerante Bpk* 1964 (3) SA 87 (O).

94 This submission is based on the observations in regard to prescription in *Cordier v Cordier* 1984 (4) SA 524 (C) at 535G–H. See further, in general, the *excursus* to rule 22 s v 'Particular Defences' above.

95 Unreported, GP case no 11435/20 dated 4 October 2021.

96 At paragraph [11]. In *Hawkins v Sebenza Sanitary Engineering (Pty) Limited* (unreported, GP case no 50189/2021 dated 9 March 2023) the defendants' application to amend their plea by the inclusion of a special plea as to jurisdiction was refused under circumstances where the court decided the issue of jurisdiction as a point of law and held that *ex facie* its particulars of claim the plaintiff had established jurisdiction.

97 *Molete v Union National South British Insurance Co Ltd* 1982 (4) SA 178 (W).

98 *Nel v Enyati Colliery Ltd* 1976 (2) SA 466 (D).

99 *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) at 54C.

100 *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) at 54E.

101 *Page v Malcomess & Co* 1922 EDL 284 at 286–6; *Chinnian v Mphephu* 1942 NPD 142; *Mias de Klerk Boerdery (Edms) Bpk v Cole* 1986 (2) SA 284 (N); *Luxavia (Pty) Ltd v Gray Security Services (Pty) Ltd* 2001 (4) SA 211 (W) at 219B–D; *Jacobs v Baumann NO* 2009 (5) SA 432 (SCA) at 439B; *Van Rensburg v Condoprops 42 (Pty) Ltd* 2009 (6) SA 539 (E) at 546C–H; but see *Golden Harvest (Pty) Ltd v Zen-Don CC* 2002 (2) SA 653 (O). See also, in general, Fareed Moosa 'Non-existent plaintiff: Dealing with misdescriptions in citations' 2013 (September) *De Rebus* 22–4.

102 *Van Heerden v Du Plessis* 1969 (3) SA 298 (O); and see *Trust Bank Bpk v Dittrich* 1997 (3) SA 740 (C) at 744I–J and 745H–I.

103 *Airconditioning Design & Development (Pty) Ltd v Minister of Public Works, Gauteng* 2005 (4) SA 103 (T); *Tecmed (Pty) Ltd v Nissho Iwai Corporation* 2011 (1) SA 35 (SCA) at 41D–F; *Jacobs v Garlicke and Bousfield Inc* (unreported, KZD case no 1340/2011 dated 13 September 2023) at paragraph [23]. See also, in general, Fareed Moosa 'Non-existent plaintiff: Dealing with misdescriptions in citations' 2013 (September) *De Rebus* 22–4. See further the notes to rule 15 s v 'General' above.

104 *Luxavia (Pty) Ltd v Gray Security Services (Pty) Ltd* 2001 (4) SA 211 (W) at 216G–H.

105 Whether a process is a nullity or not will depend on the facts of each case, and probably on the degree to which the given process is deficient (*Four Tower Investments (Pty) Ltd v André's Motors* 2005 (3) SA 39 (N) at 45A–B). The fact, on its own, that a party happens to be a non-existent entity should not render a summons a nullity (*Four Tower Investments (Pty) Ltd v André's Motors* 2005 (3) SA 39 (N) at 45B).

106 *Barrie Marais & Seuns v Eli Lilly (SA) (Pty) Ltd: In re Barrie Marais & Seuns v Eli Lilly (SA) (Pty) Ltd* 1995 (1) SA 469 (W) at 472B; and see *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd* [2004] 1 All SA 129 (SCA). In the latter case it was held (at 133*g*–134*e*) that there is a fundamental difference in approach between applications of amendments and the determination of whether there is compliance with a statutory provision such as s 15(1) of the Prescription Act 68 of 1969, and that the principles applying to each of the two situations should not be applied willy-nilly to the other.

107 *Embling v Two Oceans Aquarium CC* 2000 (3) SA 691 (C) at 696H; *Four Tower Investments (Pty) Ltd v André's Motors* 2005 (3) SA 39 (N) at 44A–B.

108 *Four Tower Investments (Pty) Ltd v André's Motors* 2005 (3) SA 39 (N) at 44C–E. In this case it was held (at 44F–G) that in such an event the wrong description of the plaintiff would have been nothing but a mere misdescription of the correct creditor, and that the amendment would serve to achieve no more than to correct a misdescription of the already existing plaintiff.

109 *Four Tower Investments (Pty) Ltd v André's Motors* 2005 (3) SA 39 (N) at 45D–E.

110 *Associated Paint & Chemical Industries (Pty) Ltd t/a Albestra Paint and Lacquers v Smit* 2000 (2) SA 789 (SCA); *Four Tower Investments (Pty) Ltd v André's Motors* 2005 (3) SA 39 (N) at 45E–G; *Solenta Aviation (Pty) Ltd v Aviation @ Work (Pty) Ltd* 2014 (2) SA 106 (SCA) at 111B–C.

111 *Dischem Pharmacies (Pty) Ltd t/a Mondeor Pharmacy v United Pharmaceutical Distributors (Pty) Ltd t/a UPD Lea Glen* 2004 (2) SA 166 (W).

112 *Dumasi v Commissioner, Venda Police* 1990 (1) SA 1068 (V) at 1071D–E. See also *Four Tower Investments (Pty) Ltd v André's Motors* 2005 (3) SA 39 (N) at 43G–H.

113 *Van Heerden v Du Plessis* 1969 (3) SA 298 (O); and see *Trust Bank Bpk v Dittrich* 1997 (3) SA 740 (C) at 744I–J and 745H–I.

114 *Rosner v Lydia Swanepoel Trust* 1998 (2) SA 123 (W); *Tecmed (Pty) Ltd v Nissho Iwai Corporation* 2011 (1) SA 35 (SCA) at 41D–F; and see *Four Tower Investments (Pty) Ltd v André's Motors* 2005 (3) SA 39 (N) at 43G–H and 46F–G. See further the notes to rule 15 s v 'General' above.

115 *Alpha (Pty) Ltd v Carletonville Ready Mix Concrete CC* 2003 (6) SA 289 (W) at 291A–293J.

116 *Ferreira v Senekal* (unreported, FB case no 223/2020 dated 17 February 2023) at paragraph [19].

117 2010 (4) SA 628 (SCA). In *East London Industrial Development Zone (Soc) Ltd v Wild Coast Abalone (Pty) Ltd* (unreported, ECEL case no EL536/2019 dated 30 November 2023) the plaintiff instituted an action for damages, and other relief, against Wild Coast Abalone (Pty) Ltd and Mr A Bok arising from their alleged unlawful occupation of the plaintiff's property. Wild Coast denied that it occupied the property and pleaded that Aqua Management Systems (Pty) Ltd, represented by Mr Bok, was in fact the entity that occupied the property. Mr Bok pleaded that Aqua occupied the property at all relevant times. In their pleas both defendants explained their relationship with Aqua. The introduction of Aqua in the defendants' pleas caused the plaintiff to deliver a notice of intention to amend its particulars of claim by substituting Aqua, represented by Mr Bok as its sole director, for Mr Bok in his personal capacity, and pleading that Wild Coast and Aqua operated a joint venture, alternatively a partnership on the property. This was met by a notice in terms of rule 30(2)*(b)*, in which Wild Coast contended that the notice of intention to amend was an irregular step. The plaintiff disregarded the notice and delivered the amended pages. Aqua thereupon brought its rule 30 application on the basis that the substitution of one party with another could not take place by notice. In distinguishing the decision of the Supreme Court of Appeal in the *Mtokwana* case, the High Court held that although the plaintiff in effect substituted Mr Bok with Aqua, it could do so by means of an amendment:

'[34] I find that in this case it is appropriate to utilize rule 28 in the substitution of a wrong defendant, because Aqua, is represented in the action by Bok, its representative or agent and by Wild Coast, its co-partner. Therefore, service of the notice of amendment on Bok which clearly demonstrated that he was going to be replaced by Aqua was adequate in the light of the obligations that he, as a sole director has towards Aqua. In any event, from the pleadings it appears that the basis of the claim against him arose from the relationship that he had with Aqua as its representative. No incurable injustice would result, in my view. The facts of this case are distinguishable from those that applied in *MEC for Safety and Security, EC v Mtokwana* [*Author's note:* The correct reference is *MEC for Safety and Security, Eastern Cape v*

Mtokwana 2010 (4) SA 628 (SCA).], because unlike in *Mtokwana* where a wrong party, the MEC for Safety and Security, who was not vicariously liable for the delict was sued and an attempt was made to amend the summons by introducing the National Minister of Police who was not even served with the process. *In casu*, both defendants introduced Aqua in their pleas and alluded to the relationship they have with it.'

118 At paragraphs [18]–[22].

119 At paragraph [18].

120 2024 (2) SA 407 (GJ).

121 At paragraph [26].

122 At paragraph [52], distinguishing (at paragraph [47]) *Holdenstedt Farming v Cederberg Organic Buchu Growers (Pty) Ltd* 2008 (2) SA 177 (C).

123 At paragraph [77].

124 Unreported, ECEL case no 933/2022 dated 4 May 2023.

125 *Van Vuuren v Braun and Summers* 1910 TPD 950 at 954.

126 On the one hand, it is has been held that a court does not have such power (*L & G Cantamessa (Pty) Ltd v Reef Plumbers* 1935 TPD 56; *Greef v Janet* 1986 (1) SA 647 (T), in which it was held (at 657E) that if the plaintiff finds that he has sued the wrong party, he can either, in appropriate circumstances, attempt to have the right party joined, or issue anew a summons against him; *Hip Hop Clothing Manufacturing CC v Wagener NO* 1996 (4) SA 222 (C) at 230A); and see *Julius v Namaqua Wines (Pty) Ltd* (unreported, WCC case no 5399/2012 dated 9 May 2023). On the other hand, it has been held that a court does have such power (*O'Sullivan v Heads Model Agency CC* 1995 (4) SA 253 (W) at 255–6; *Airconditioning Design & Development (Pty) Ltd v Minister of Public Works, Gauteng* 2005 (4) SA 103 (T) at 106H–I).

127 In terms of s 15(1) of the Prescription Act 68 of 1969.

128 *Four Tower Investments (Pty) Ltd v André's Motors* 2005 (3) SA 39 (N) at 44E–H; *Airconditioning Design & Development (Pty) Ltd v Minister of Public Works, Gauteng* 2005 (4) SA 103 (T) at 107C–G. In *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 463 (A) it was emphasized that what must be considered when determining whether prescription has been interrupted is the substance of the process and not merely its form. An overly formal approach should be avoided (*Four Tower Investments (Pty) Ltd v André's Motors* 2005 (3) SA 39 (N) at 44H–J).

129 *Four Tower Investments (Pty) Ltd v André's Motors* 2005 (3) SA 39 (N) at 44G, applying *Mutsi v Santam Versekeringsmaatskappy Bpk* 1963 (3) SA 11 (O) and *Embling v Two Oceans Aquarium CC* 2000 (3) SA 691 (C), and not following *L & G Cantamessa (Pty) Ltd v Reef Plumbers* 1935 TPD 56 and *Hip Hop Clothing Manufacturing CC v Wagener NO* 1996 (4) SA 222 (C). See also *Holdenstedt Farming v Cederberg Organic Buchu Growers (Pty) Ltd* 2008 (2) SA 177 (C) at 183E–F.

130 *Associated Paint & Chemical Industries (Pty) Ltd t/a Albestra Paint and Lacquers v Smit* 2000 (2) SA 789 (SCA); *Four Tower Investments (Pty) Ltd v André's Motors* 2005 (3) SA 39 (N) at 45E–G.

131 *Tolstrup NO v Kwapa NO* 2002 (5) SA 73 (W).

132 *Union Bank of South Africa Ltd v Woolf; Union Bank of South Africa Ltd v Shipper* 1939 WLD 222 at 225; *Myers v Abramson* 1951 (3) SA 438 (C) at 451D; *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D) at 640H; *GMF Kontrakteurs (Edms) Bpk v Pretoria City Council* 1978 (2) SA 219 (T) at 223B.

133 *Lenferna v Jerome* 1925 (1) PH F20 (D).

134 *Esterhuizen v Holmes* 1947 (2) SA 789 (T) at 796–7. Other cases in which amendments had been refused on this ground are *Union Government v Chatwin* 1931 TPD 347 and *Horne v Hine* 1947 (4) SA 757 (SR).

135 *Van Heerden v Van Heerden* 1977 (3) SA 455 (W) at 457G–458A; *Fiat SA (Pty) Ltd v Bill Troskie Motors* 1985 (1) SA 355 (O) at 358C.

136 *Presto Parcels v Lalla* 1990 (3) SA 287 (E).

137 Unreported, WCC case no 1435/2014 dated 25 May 2022.

138 Unreported, ECPE case no 3366/2013 dated 24 June 2014 at paragraph [21]. See also *Media 24 Holdings (Pty) Ltd v ABM College SA (Pty) Ltd* (unreported, GJ case no 4215/2020 dated 6 December 2023) at paragraphs [9]–[10].

139 2024 (1) SA 272 (GJ).

140 At paragraph [43].

141 1985 (1) SA 355 (O) at 358C.

142 *Dinath v Breedt* 1966 (3) SA 712 (T) at 717B; *Cordier v Cordier* 1984 (4) SA 524 (C) at 533B; *Barrie Marais & Seuns v Eli Lilly (SA) (Pty) Ltd: In re Barrie Marais & Seuns v Eli Lilly (SA) (Pty) Ltd* 1995 (1) SA 469 (W) at 472D–F.

143 *Park Finance Corporation (Pty) Ltd v Van Niekerk* 1956 (1) SA 669 (T) at 673; *Cordier v Cordier* 1984 (4) SA 524 (C) at 533B; *Barrie Marais & Seuns v Eli Lilly (SA) (Pty) Ltd: In re Barrie Marais & Seuns v Eli Lilly (SA) (Pty) Ltd* 1995 (1) SA 469 (W) at 472G–H; *Brandon v Minister of Law and Order* 1997 (3) SA 68 (C) at 75D–F.

144 *Park Finance Corporation (Pty) Ltd v Van Niekerk* 1956 (1) SA 669 (T) at 674D; *Thompson & Stapelberg (Pty) Ltd v President Staal Korporasie (Edms) Bpk* 1963 (3) SA 293 (O) at 297C; *Miller v H L Shippel & Co (Pty) Ltd* 1969 (3) SA 447 (T) at 453; *OK Motors v Van Niekerk* 1961 (3) SA 149 (T) at 151; *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1977 (4) SA 310 (T) at 342B; *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 836D–E; *Frol Holdings (Pty) Ltd v Sword Contractors CC* 1996 (3) SA 1016 (O) at 1019J–1020A; *Improfed (Pty) Ltd v National Transport Commission* 1990 (3) SA 324 (T); *Stroud v Steel Engineering Co Ltd* 1996 (4) SA 1139 (W) at 1141J–1142C.

145 *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1977 (4) SA 310 (T) at 342C–343D; *Mazibuko v Singer* 1979 (3) SA 258 (W) at 265H–266A; *Mokoena v SA Eagle Insurance Co Ltd* 1982 (1) SA 780 (O) at 786B–D; *Frol Holdings (Pty) Ltd v Sword Contractors CC* 1996 (3) SA 1016 (O) at 1021B–F; *Wavecrest Sea Enterprises (Pty) Ltd v Elliot* 1995 (4) SA 596 (SE) at 600H–J; *Vorster v Haveman* 1996 (4) SA 308 (T) at 312F.

146 *Mias de Klerk Boerdery (Edms) Bpk v Cole* 1986 (2) SA 284 (N), distinguishing *Miller v H L Shippel & Co (Pty) Ltd* 1969 (3) SA 447 (T) on the basis that it was decided under the provisions of s 6(1)*(b)* of the 'old' Prescription Act 18 of 1943, the wording of which differs in material respects from that of s 15(1) of the Prescription Act 68 of 1969. See, however, *Cordier v Cordier* 1984 (4) SA 524 (C) at 533C. See also *Van Rensburg v Condoprops 42 (Pty) Ltd* 2009 (6) SA 539 (E) at 546B–D. See further Van Heerden (1995) 112 *SALJ* 379 at 387–9.

147 See also *Wirth v Wirth* (unreported, WCC case no 13801/2020 dated 23 August 2021) at paragraphs [21]–[24].

148 1977 (3) SA 455 (W) at 458C–D.

149 Unreported, GJ case no 40739/2017 dated 7 March 2019.

150 At paragraph [11].

151 *Wendy Machanik Property Holdings CC v Guiltwood Properties (Pty) Ltd* 2007 (5) SA 90 (W) at 93I–94C, where it is correctly pointed out that the commentary in the first edition of this work referred to was incorrect.

152 *Wendy Machanik Property Holdings CC v Guiltwood Properties (Pty) Ltd* 2007 (5) SA 90 (W) at 94D.

153 Rule 28 should, however, be amended to make provision for a party who has effected an amendment, to raise an exception to each pleading of the other party which is excipiable as a result of such party's failure to make consequential adjustments to such pleading as contemplated in this subrule. The rule in its current form still does not meet the objections raised by Coetzee J in *Van Heerden v Van Heerden* 1977 (3) SA 455 (W) at 458C–D against the rule prior to its amendment in 1994.

154 *Sasol South Africa Ltd t/a Sasol Chemicals v Penkin* 2024 (1) SA 272 (GJ) at paragraphs [52]–[53].

155 *Hart v Broadacres Investments Ltd* 1978 (2) SA 47 (N) at 51D; *Grindrod (Pty) Ltd v Delport* 1997 (1) SA 342 (W) at 347C.

156 *Konjillia v Govender* (1929) 50 NLR 189. In *Meyerson v Roome* 1936 JWR 158 a magistrate, in granting an application for the amendment of a summons which radically altered the action, ordered the plaintiff to pay the defendant's costs to date.

157 *Middeldorf v Zipper NO* 1947 (1) SA 545 (SR); *Frenkel, Wise & Co Ltd v Cuthbert* 1947 (4) SA 715 (C); *Greyling v Nieuwoudt* 1951 (1) SA 88 (O); *Myers v Abramson* 1951 (3) SA 438 (C) at 455F–456A; *Meyer NO v Netherlands Bank of SA Ltd* 1961 (1) SA 578 (GW) at 582A; *Zarug v Parvathie NO* 1962 (3) SA 872 (D) at 885B–E; *MacDonald, Forman & Co v Van Aswegen* 1963 (2) SA 150 (O) at 154H–155A; *Mutsi v Santam Versekeringsmaatskappy Bpk* 1963 (3) SA 11 (O) at 20F–G; *Harnaker v Minister of the Interior* 1965 (1) SA 372 (C) at 385F; *Kruger v Pizzicanella* 1966 (1) SA 450 (C) at 457B; *HDS Construction (Pty) Ltd v Wait* 1979 (2) SA 298 (E) at 302C; *Meintjies v Administrasieraad van Sentraal-Transvaal* 1980 (1) SA 283 (T) at 294H–295D; *Fiat SA (Pty) Ltd v Bill Troskie Motors* 1985 (1) SA 355 (O) at 359C; *Niemand v SA Eiendomsbestuur SWD (Edms) Bpk* 1985 (2) SA 710 (C) at 714F–J; *Meyerson v Health Beverages (Pty) Ltd* 1989 (4) SA 667 (C) at 679A–D; *Grindrod (Pty) Ltd v Delport* 1997 (1) SA 342 (W) at 347C–D.

158 *Wahlen v Gramowsky* 1924 SWA 50; *Moolman v Estate Moolman* 1927 CPD 27; *Kirsh Industries Ltd v Vosloo and Lindeque* 1982 (3) SA 479 (W) at 486A–C; *Cordier v Cordier* 1984 (4) SA 524 (C) at 536A; *Rabinowitz v Van Graan* 2013 (5) SA 315 (GSJ) at 324D–G.

159 *Hart v Broadacres Investments Ltd* 1978 (2) SA 47 (N) at 51G. The emphasis in this case on the unfettered discretion of the court in opposed applications for amendments is to be welcomed. As Daniels *Burgerlike Prosesreg* Deel V–18 says, the court ought to be free 'om ten spyte van redelike teenstand teen 'n aansoek om wysiging koste aan die applikant toe te ken indien daar ander faktore is wat sodanige toekenning regverdig'.

160 *Gcanga v AA Mutual Insurance Association Ltd* 1979 (3) SA 320 (E) at 329A.

161 *Hart v Broadacres Investments Ltd* 1978 (2) SA 47 (N) at 51H.

162 *Builder's Depot CC v Testa* 2011 (4) SA 486 (GSJ) at 489F–490A.

163 *Genn v Rudick Holdings (Pty) Ltd* 1983 (2) SA 69 (W) at 73A.

164 *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D) at 637H; *Gcanga v AA Mutual Insurance Association Ltd* 1979 (3) SA 320 (E) at 329H–330A; *Kirsh Industries Ltd v Vosloo and Lindeque* 1982 (3) SA 479 (W) at 486B; *Hwedhanga v Cabinet for the Territory of South West Africa* 1988 (2) SA 746 (SWA) at 760C–J.

165 *Fripp v Gibbon & Co* 1913 AD 354 at 363; *Pretorius v Herbert* 1966 (3) SA 298 (T) at 302A–B; *Cronje v Pelser* 1967 (2) SA 589 (A) at 593A–C; *Van der Merwe v Tokkies du Plooy Afslaers (Edms) Bpk* 1990 (3) SA 318 (O) at 323H–324B.

166 *Myers v Abramson* 1951 (3) SA 438 (C) at 445E–H.

167 *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 at 176, 178, 186–7 and 192; *Estate Garlick v CIR* 1934 AD 499 at 502; *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 306F; *Raydean Investments (Pty) Ltd v Rand NO* 1979 (4) SA 706 (N) at 710H; *Seatle v Protea Assurance Co Ltd* 1984 (2) SA 537 (C) at 541E–F; *Van Zyl v Van der Merwe* 1986 (2) SA 152 (NC) at 156D–E; *Sundra Hardware v Mactro Plumbing* 1989 (1) SA 474 (T) at 477B. In *S v Wells* 1990 (1) SA 816 (A) at 820A–D Joubert JA refers to this as the 'strict approach' and contrasts it with 'the more enlightened approach', which permits a judicial officer to change, amend or supplement his pronounced judgment, provided that the sense or substance of his judgment is not affected thereby. See also *Transvaal Canoe Union v Butgereit* 1990 (3) SA 398 (T) at 403F–404E; *Tshivhase Royal Council v Tshivhase; Tshivhase v Tshivhase* 1992 (4) SA 852 (A) at 862I; *First National Bank of South Africa Ltd v Jurgens* 1993 (1) SA 245 (W) at 246J–247A; *Bekker NO v Kotzé* 1996 (4) SA 1287 (Nm) at 1290H–J; *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC) at 780C–F and 781J; *Thompson v South African Broadcasting Corporation* 2001 (3) SA 746 (SCA) at 748H–749C; *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* 2002 (1) SA 82 (SCA) at 86C–D; *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 5I–G; *De Villiers and Another NNO v BOE Bank Ltd* 2004 (3) SA 459 (SCA) at 462H–463F; *Zondi v MEC, Traditional and Local Government Affairs* 2006 (3) SA 1 (CC) at 12F–G; *Minister of Social Development, Ex parte* 2006 (4) SA 309 (CC) at 318F; *Adonis v Additional Magistrate, Bellville* 2007 (2) SA 147 (C) at 154E–155A; *MEC for Economic Affairs, Environment and Tourism v Kruisenga* 2008 (6) SA 264 (CkHC) at 276A–J; *Brown v Yebba CC t/a Remax Tricolor* 2009 (1) SA 519 (D) at 524I–525A; *Freedom Stationery (Pty) Ltd v Hassam* 2019 (4) SA 459 (SCA) at 465A; *Speaker, National Assembly v Land Access Movement of South Africa* 2019 (6) SA 568 (CC) at 578A–C; *Thobejane v Premier of Limpopo Province* (unreported, SCA case no 1108/2019 dated 18 December 2020) at paragraph [6]. In *Govender v Hassim* 1994 (1) SA 304 (D) at 305G–H the decision in *Dawson and Fraser (Pty) Ltd v Havenga Construction (Pty) Ltd* 1993 (3) SA 397 (BGD), in which a summons was amended after judgment under rule 42, was not approved. See further rule 42 and the notes thereto below.

168 *Levy v Rose* (1903) 20 SC 189; *Clayton v Feitelberg* 1903 TH 99; *Vorster v Van der Walt* 1914 EDL 303; *Myers v Abramson* 1951 (3) SA 438 (C) at 445G–H. See also *Kasper v Andrè Kemp Boerdery CC* 2012 (3) SA 20 (WCC) at 34C–G; *Media 24 (Pty) Ltd v Nhleko* (unreported, SCA case no 109/22 dated 29 May 2023) at paragraph [17].

169 See, for example, *Nala Local Municipality v LFC Meule (Pty) Ltd* (unreported, FB case no 617/2018 dated 14 March 2022) and *Ferreira v Senekal* (unreported, FB case no 223/2020 dated 17 February 2023).

170 1976 (2) SA 179 (D).

171 *Schmidt Plant Hire (Pty) Ltd v Pedrelli* 1990 (1) SA 398 (D) at 404A–405E.