17 Summons

RS 22, 2023, D1 Rule 17-1

(1) Every person making a claim against any other person may, through the office of the registrar, sue out a summons or a combined summons addressed to the sheriff directing him to inform the defendant *inter alia* that, if he disputes the claim, and wishes to defend he shall —

(a) within the time stated therein, give notice of his intention to defend;

(b) thereafter, if the summons is a combined summons, within twenty days after giving such notice, deliver a plea (with or without a claim in reconvention), an exception or an application to strike out.

(2)*(a)* In every case where the claim is not for a debt or liquidated demand the summons shall be in accordance with Form 10 of the First Schedule, to which summons shall be annexed particulars of the material facts relied upon by the plaintiff in support of the claim, which particulars shall *inter alia* comply with rule 18; and

(b) In every case where the claim is for a debt or liquidated demand the summons shall be in accordance with Form 9 of the First Schedule.

(3)*(a)* Every summons shall be signed by the attorney acting for the plaintiff and shall bear an attorney's physical address, within 25 kilometres of the office of the registrar and where available, such attorney's postal, facsimile and electronic mail addresses.

[Paragraph *(a)* substituted by GN R3397 of 12 May 2023.]

(b) If no attorney is acting, the summons shall be signed by the plaintiff, who shall in addition append an address within 25 kilometres of the office of the registrar and where available, the plaintiffs postal, facsimile and electronic mail addresses at either of which addresses plaintiff will accept service of all subsequent documents in the suit.

[Paragraph *(b)* substituted by GN R3397 of 12 May 2023.]

(c) After paragraph *(a)* or *(b)* has been complied with, the summons shall be signed and issued by the registrar and made returnable by the Sheriff to the court through the registrar.

(d) The plaintiff may indicate in a summons whether the plaintiff is prepared to accept service of all subsequent documents and notices in the suit through any manner other than the physical address or postal address and, if so, shall state such preferred manner of service.

(e) If an action is defended the defendant may, at the written request of the plaintiff, deliver a consent in writing to the exchange or service by both parties of subsequent documents and notices in the suit by way of facsimile or electronic mail.

(f) If the defendant refuses or fails to deliver the consent in writing as provided for in paragraph *(e)*, the court may, on application by the plaintiff, grant such consent, on such terms as to costs and otherwise as may be just and appropriate in the circumstances.

RS 22, 2023, D1 Rule 17-2

(4) Every summons shall set forth —

(a) the surname and first names or initials of the defendant by which the defendant is known to the plaintiff, the defendant's residence or place of business and, where known, the defendant's occupation and employment address and, if the defendant is sued in any representative capacity, such capacity; and

(b) the full names, gender (if the plaintiff is a natural person) and occupation and the residence or place of business of the plaintiff, and if the plaintiff sues in a representative capacity, such capacity.

[Rule 17 amended by GN R235 of 18 February 1966, by GN R2021 of 5 November 1971, by GN R2164 of 2 October 1987, by GN R2642 of 27 November 1987, by GN R960 of 28 May 1993, by GN R1843 of 1 October 1993, by GN R464 of 22 June 2012, by GN R212 of 28 March 2014 and substituted by GN R1603 of 17 December 2021.]

Commentary

Forms. Summons, 9; Combined summons, 10; Notice of agreement or opposition to mediation, 27.

Subrule (1): 'Every person making a claim . . . may . . . sue out a summons.' A summons issued in the name of a person who was non-existent at the date of issue of the summons is a nullity. [1]

'Addressed to the sheriff.' See the notes to rule 4(1) s v 'Any process of the court directed to the sheriff' above.

Subrule (1)*(a)*: 'Within the time stated . . . give notice.' The time which a defendant is allowed within which to give notice of his intention to defend the action (the *dies induciae*) must be stated in the summons and be in accordance with the provisions of rule 19 or s 24 of the Superior Courts Act 10 of 2013, [2] as the case may be.

Subrule (2)*(a)*: 'Summons . . . in accordance with Form 10.' The combined summons in accordance with Form 10 [3] is used where the claim is not for a debt or liquidated demand. [4] Whereas the subrule prior to its amendment with effect from 1 February 2022 provided that the combined summons had to be 'as near as may be' in accordance with Form 10, it now provides that it must ('shall') be in accordance with Form 10.

'Combined summons' is defined in rule 1 as 'a summons with particulars of plaintiff's claim annexed thereto in terms of subrule (2) of rule 17'. [5] In terms of this subrule particulars

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RS 22, 2023, D1 Rule 17-3

of the material facts relied upon by the plaintiff in support of his claim, which particulars must, *inter alia*, comply with rule 18, must be annexed to the summons. As to the nature and extent of material facts, see the notes to rule 18(4) s v 'Material facts' below.

Notice of mediation. In every new action, the plaintiff must, together with the summons or combined summons, serve on each defendant a notice indicating whether such plaintiff agrees to or opposes referral of the dispute to mediation. [6] The notice must substantially be in accordance with Form 27 of the First Schedule and must clearly and concisely indicate the reasons for the plaintiff's belief that the dispute is or is not capable of being mediated. [7] The notice must not be filed with the registrar. [8] If the parties agree on mediation, and a joint minute to that effect is signed, the time limits prescribed by the rules for the delivery of pleadings and notices or the taking of any step is suspended for every party to the dispute from the date of signature of the minute to the time of conclusion of mediation: Provided that any party to the proceedings who considers that the suspension of the prescribed time limits is being abused, may apply to the court for the upliftment of the suspension of the prescribed time limits. [9] See further the provisions of rule 41A below.

'Which particulars shall . . . comply with rule 18.' See rule 18 and the notes thereto below. [10]

Subrule (2)*(b)*: 'Summons . . . in accordance with Form 9.' The simple summons [11] is intended for use in claims for a debt or liquidated demand. [12] Whereas the subrule prior to its amendment with effect from 1 February 2022 provided that the simple summons had to be 'as near as may be' in accordance with Form 9, it now provides that it must ('shall') be in accordance with Form 9.

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Form 9 requires the plaintiff to set out his cause of action 'in concise terms'. All that is required is that the claim be set out with sufficient clarity for the court to decide whether judgment should be granted and for the defendant to be made aware of what is being claimed from him. [13] In other words, the defendant must be informed of 'the nature of the claim or demand he is required to meet'. [14] It has been held that the statement of cause of action in a simple summons is 'merely a label'; [15] 'a general indication of the claim'. [16] The meaning ascribed to these phrases must, however, be determined with reference to the meaning of the words 'concise terms' as set out above. [17]

If the cause of action is founded on some document, reference thereto should be made in the simple summons and a copy should be attached to the summons and the original should be handed in at the time when application for default judgment is made. [18] If a copy of the required document is not attached to the simple summons, the summons would not disclose a cause of action. [19]

A simple summons is not a pleading and accordingly cannot be attacked by way of an exception. [20]

If the defendant fails to deliver a notice of intention to defend, the plaintiff is entitled to apply for judgment by default without leading any evidence. [21] In regard to what is a debt or liquidated demand, see the notes to rules 31(5)*(a)* and 32(1) below.

Rule 20(1) provides that a declaration has to be filed in actions in which the claim is for a debt or liquidated demand *and* the defendant has delivered notice of intention to defend.

Neither rule 17 nor rule 20 expressly permits the issue of a combined summons in actions for a debt or liquidated demand which the plaintiff has reason to believe will be defended; but this would seem to be a convenient course to adopt and in such a case no further declaration should be necessary.

Notice of mediation. In every new action, the plaintiff must, together with the summons or combined summons, serve on each defendant a notice indicating whether such plaintiff agrees to or opposes referral of the dispute to mediation. [22] The notice must substantially be in accordance with Form 27 of the First Schedule and must clearly and concisely indicate the reasons for the plaintiff's belief that the dispute is or is not capable of being mediated. [23] The notice must not be filed with the registrar. [24] If the parties agree on mediation, and a joint minute to that effect is signed, the time limits prescribed by the rules for the delivery of pleadings and notices or the taking of any step is suspended for every party to the dispute from the date of signature of the minute to the time of conclusion of mediation: Provided that any party to the proceedings who considers that the suspension of the prescribed time limits is being abused, may apply to the court for the upliftment of the suspension of the prescribed time limits. [25] See further the provisions of rule 41A below.

Contents of summons — generally. The object of a summons is not merely to bring a defendant before court but also to inform the defendant of the nature of the claim he is to meet and on what it is based. [26] The plaintiff is not only required to set out the facts upon which the claim for relief is based, i e the cause of action; the details of the relief sought must also be set out. In other words, the summons must give a sufficient indication of the remedy sought by the plaintiff so that the defendant knows that order the court is being asked to make against him. See also the notes s v 'Interest' below.

A summons (whether simple or combined) must indicate that the court has jurisdiction [27] and that the parties have *locus standi in judicio*. [28]

Orders declaring residential immovable property and primary residences specially executable. As from 22 December 2017 [29] rule 46A applies whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor, including such debtor's primary residence. The procedure to obtain an order declaring residential immovable property specially executable under rule 46A is by means of notice of motion (which must substantially be in accordance with Form 2A) supported by affidavit. In the notes that follow the position regarding allegations to be made in a summons before and after the coming into operation of rule 46A is discussed.

The position prior to 22 December 2017

As from 15 December 2005 every summons in which a plaintiff claims relief that embraces an order declaring immovable property executable must comply with the following Practice Direction issued by the Supreme Court of Appeal in *Standard Bank of South Africa Ltd v Saunderson* [30] on that date:

> 'The summons initiating action in which a plaintiff claims relief that embraces an order declaring immovable property executable shall, from the date of this judgment, inform the defendant as follows:
>
> "The defendant's attention is drawn to section 26(1) of the Constitution of the Republic of South Africa which accords to everyone the right to have access to adequate housing. Should the defendant claim that the order for execution will infringe that right it is incumbent on the defendant to place information supporting that claim before the court." '

In the Northern Cape Division of the High Court, Practice Direction 4 dated 6 July 2006 states:

> 'The summons initiating action in which a plaintiff claims relief that embraces an order declaring immovable residential property executable shall, from the date of these Practice Directions (06/07/2006), without derogating from the date fixed by the SCA in the *Saunderson* case (*supra*) (15/12/2005), inform the defendant as follows: The defendant's attention is drawn to s 26(1) of the Constitution of the Republic of South Africa which accords to everyone the right to have access to adequate housing. Should the defendant claim that the order for execution will infringe that right it is incumbent on the defendant to place information supporting that claim before the Court.'

On 24 May 2011 the full court of the North Gauteng High Court, Pretoria, laid down the following in *FirstRand Bank Ltd v Folscher and Another, and Similar Matters*: [31]

> 'When action is instituted to enforce a debt secured by a special hypothec over the debtor's primary residence or usual or ordinary residence, the debtor is entitled to be informed in the summons of his or her rights in terms of s 26 of the Constitution.
>
> A practice directive is issued that, if the issue of summons is preceded by a notice in terms of s 129 of the National Credit Act 34 of 2005, such notice is to include a notification to the debtor that, should action be instituted and judgment be obtained against him or her, execution against the debtor's primary residence will ordinarily follow and will usually lead to the debtor's eviction from such home.'

In *Nedbank Ltd v Jessa* [32] Blignault J held [33] that the Practice Direction that was stipulated in *Standard Bank of South Africa Ltd v Saunderson* [34] should be amplified to include an appropriate notification to the defendant that the defendant is entitled to place information regarding relevant circumstances within the meaning of s 26(3) of the Constitution of the Republic of South Africa, 1996, and (former) rule 46(1) before the court hearing the matter. Blignault J, however, stated that the proposed amendment of the *Saunderson* Practice Direction did not purport to have any retrospective effect. [35]

In *Standard Bank of South Africa Ltd v Dawood* [36] the full court of the Western Cape High Court, Cape Town, directed, [37] as a rule of practice in that division in all matters issued subsequent to the date of its judgment (i e 9 May 2012), that the summons should contain a notice which the full court framed in identical terms to the one suggested below in previous services of this work. [38]

> 'Take notice that:
>
> *(a)* your attention is drawn to section 26(1) of the Constitution of the Republic of South Africa, 1996, which accords to

everyone the right to have access to adequate housing. Should you claim that the order for execution will infringe that right it is incumbent on you to place information supporting that claim before the court;

(b) in terms of section 26(3) of the Constitution you may not be evicted from your home or your home may not be declared executable and sold in execution without an order of court made after considering all the relevant circumstances;

(c) in terms of rule 46(1)*(a)*(ii) of the Uniform Rules of Court, no writ of execution shall issue against your primary residence (i e your home), unless the court, having considered all the relevant circumstances, orders execution against such property;

(d) if you object to your home being declared executable, you are hereby called upon to place facts and submissions before the court to enable the court to consider them in terms of rule 46(1)*(a)*(ii) of the Uniform Rules of Court. Your failure to do so may result in an order declaring your home specially executable being granted, consequent upon which your home may be sold in execution.'

On 25 August 2011 the full court of the Western Cape High Court, Cape Town, laid down the following in *Standard Bank of South Africa Ltd v Bekker and Another and Four Similar Cases*: [39]

'It is desirable that the court should be able to know from the summons whether or not the application for an order authorising execution against immovable property concerns property that is the defendant/judgment debtor's primary residence. An appropriate allegation should therefore henceforth be included in the summons in matters in which a declaration of special executability is sought ancillary to judgment on the money claimed. In matters in which the plaintiff is unable to make such an allegation positively because of a lack of knowledge of the relevant facts that much should be stated in the summons. In cases in which the summons does not contain an allegation that the affected property is not the primary residence of the defendant the court will scrutinise the matter assuming that the property may be the defendant's primary residence unless it is clear from other indications in the papers that this is not so.'

The position as from 22 December 2017

It is expected that the Practice Directives referred to in the notes s v 'The position prior to 22 December 2017' above will in due course be reconsidered and amended to accommodate the provisions of rule 46A to the extent necessary. It is submitted that in the meantime the form of notice to be given to a debtor in a summons where an order to declare specially executable such debtor's residential immovable property or primary residence is sought could, in view of the present positive law and the provisions of rule 46A, read as follows:

'Take notice that:

(a) your attention is drawn to section 26(1) of the Constitution of the Republic of South Africa, 1996, ("the Constitution") which accords to everyone the right to have access to adequate housing;

(b) in terms of section 26(3) of the Constitution you may not be evicted from your home or your home may not be declared executable and sold in execution without an order of court made after considering all the relevant factors;

(c) in terms of rule 46A(2)*(b)* of the Uniform Rules of Court a court shall not authorise execution against your primary residence (i e your home), unless the court, having on application considered all the relevant factors, considers that such execution is warranted;

(d) in terms of rule 46A(2)(c) of the Uniform Rules of Court the registrar of this court shall not issue any writ of execution against your residential immovable property unless the court on application has made such an order;

(e) in the event of the plaintiff bringing an application for an order referred to in paragraphs *(c)* or *(d)* above, you may, in terms of rule 46A(6) of the Uniform Rules of Court, oppose the application and/or make submissions on affidavit which are relevant to the making of an appropriate order by the court.'

The National Credit Act 34 of 2005. In *Rossouw v FirstRand Bank Ltd* [40] it was held that a summons (or certificate of compliance) must contain allegations of the manner in which the s 129(1)*(a)* notice was delivered, so as to place the court in a position to determine whether there was delivery in terms of the National Credit Act 34 of 2005, i e that the alleged delivery was amongst the alternatives specified in s 65(2)*(a)* of the National Credit Act 34 of 2005.

Rules of practice in respect of actions instituted under the National Credit Act 34 of 2005 came into force in the KwaZulu-Natal Division of the High Court, the Western Cape Division of the High Court and the Gauteng Division of the High Court.

In KwaZulu-Natal Rule of Practice 28 states:

'28 Action in terms of National Credit Act No. 34 of 2005

With effect from 1 August 2007, in any action brought in terms of the National Credit Act No. 34 of 2005, the summons must allege that there has been compliance with section 129 of the Act and a certificate must be attached to the summons indicating compliance therewith.'

In the Western Cape, paragraph 33 of the Consolidated Practice Notes states: [41]

'33 National Credit Act 34 of 2005

(1) In any proceedings instituted in terms of the National Credit Act 34 of 2005 (the Act) in respect of any claim to which the provisions of sections 127, 129 or 131 of the Act apply, the summons or particulars of claim, or, in motion proceedings, the founding papers, must contain sufficient allegations or averments to enable the court to be satisfied that the procedures required by those sections, read with s 130(1) and (2) of the Act, as may be applicable to the claim had been complied with before the institution of the proceedings. (The attention of practitioners are [*sic*] drawn to the judgment in *Rossouw and Another v FirstRand Bank Ltd* 2010 (6) SA 439 (SCA), in particular at paras 33–37.)

(2) In order to satisfy the court of the matters referred to in section 130(3) of the Act, an affidavit by the credit provider must be filed when judgment is applied for.'

In the Gauteng Division of the High Court, Pretoria, Appendix III to the *Practice Manual* of that division contains a rule of practice similar to that of the Western Cape Division of the High Court.

In *Amardien v Registrar of Deeds* [42] the Constitutional Court unanimously held [43] the following in regard to the requirement in s 129(1)*(a)* of the National Credit Act 34 of 2005 that the credit provider should draw the 'default' to the notice of the consumer:

'[60] Section 129(1) of the NCA refers to a situation where the consumer is "in default". Section 129(1)*(a)* and *(b)* explain the obligations that the creditors must fulfil before moving to enforce their debt. The text explicitly refers to "the default" that must be drawn to the notice of the consumer by the creditor — and not just the fact that the consumer is "in default". Read in conjunction with s 130(4) which provides an opportunity to the debtor to remedy the default, s 129(1) should be interpreted to include the amount so that the debtor knows how much to pay to avoid cancellation. The same applies to the notice under s 19 of the ALA. [44] In addition, in order to "[provide] consumers with adequate disclosure of standardised information in order to make informed choices" [45] they must be informed of the extent of their arrears in the s 129 NCA notice so as to decide how to move forward regarding the management of their debt.

[61] It is thus a necessary requirement to specify the amount and nature of the default in the s 129 NCA notice. As s 129(1) specifically requires the credit provider to "draw the default to the attention of the consumer" it is clear that this will only be met

if the amount of arrears is specified in the notice, since the consumer's attention will not have been drawn to the amount of the default otherwise. If the basis of the default is that the debtor has fallen into arrears, it must follow axiomatically that "drawing the default to the attention of the consumer" entails that the consumer should be advised of the amount in arrears. It is only when this has been done that it can be said that notice of the "default" has been drawn to the attention of the consumer.

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

[63] This court in *Nkata* [46] held that the onus is on the credit provider to take appropriate steps if it wants to recover the cost for enforcing an agreement with the consumer. The creditor is in a better position to determine the amount of the debt and must be required to stipulate the amount owed by the debtor. The burden of determining the amount is an onerous one to place upon the consumer, as the consumer may not be aware of complex calculations that are to be taken into account while calculating interest. On the other hand, it will be significantly easier for the creditor to state the amount concerned. After all, it is the credit provider itself that claims that the consumer is in arrears with her payments.

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

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

It is submitted that the summons should properly deal with the aspect of compliance with s 129(1)*(a)* as regards the drawing of the 'default' to the notice of the consumer as laid down by the Constitutional Court.

Interest

The summons must contain a prayer for interest if an order for interest is sought and must set out the grounds upon which interest is claimed. [47]

Interest may not exceed the rates provided for in the Usury Act 73 of 1968. [48]

It has, however, been held [49] that in circumstances in which neither the National Credit Act 34 of 2005 nor the Usury Act 73 of 1968 applied, a short-term loan agreement for an advance of R5 million at an interest rate of 5–6% (or 60–78% per year) was not usurious if —

(a) the borrower had approached the lender without inducement or compulsion;

(b) the lender had made full disclosure of the applicable interest rate;

(c) the borrower was a relatively wealthy business entity;

(d) the money was borrowed to allow the borrower to exploit the business opportunity;

(e) there was no evidence to show that interest charged was incommensurate with the risk run by the lender;

(f) there was no evidence as to what the prevailing rate was for similar transactions;

(g) the borrower was unable to point to any particular circumstances to show that the transaction was not an ordinary one.

Interest may be claimed if there was an agreement to pay interest, if the defendant is in *mora* in regard to a monetary obligation in a contract, [50] or if otherwise specifically provided

for. [51] If interest is claimed by virtue of an agreement, the agreement should be alleged in the summons. In the absence of such an allegation, interest will be awarded if evidence of the agreement is led without objection. [52]

In *Davehill (Pty) Ltd v Community Development Board* [53] the position in respect of compound interest was stated as follows:

'Compound interest may be expressly stipulated by agreement, is commonplace today in commercial and financial dealings and has been sanctioned by our Courts for many years. In principle there appears to be no reason why the right to claim interest on interest should be confined to instances regulated by agreement, and why it should not extend to the right to claim *mora* interest (which is a species of damages) on unpaid interest which is due and payable.'

Interest will be allowed at the rate agreed upon between the parties. [54] If the agreement is silent as to the rate of interest provided for, and the rate of interest is not governed by any other law or a trade custom or in any other manner, interest is to be calculated at the rate provided for in s 1(1) of the Prescribed Rate of Interest Act 55 of 1975, [55] namely the rate 'contemplated in subsection (2)*(a)* as at the time when such interest begins to run, unless a court of law, on the ground of special circumstances relating to that debt, orders otherwise'. Section 1(2)*(a)* provides that such rate of interest is 'the repurchase rate as determined from time to time by the South African Reserve Bank, plus 3,5 percent per annum'. [56] The interest rate becomes effective from the first day of the second month following the month in which the repurchase rate is determined by the South African Reserve Bank. In terms of s 1(2)*(b)* the Cabinet member responsible for the administration of justice must, whenever the repurchase rate is adjusted by the South African Reserve Bank, publish the amended rate of interest by notice in the *Government Gazette*. Jennifer Smit 'Article of interest — a curious lacuna in our

law on prescribed rates of interest' dated 14 September 2022, [57] however, correctly points out that publication of the amended rate of interest is of passing interest only and what is of real interest is the repo rate, and the date it became effective, as determined by the South African Reserve Bank. [58] The interest is to be calculated at the rate contemplated in s 1(2)*(a)* of the Act as at the time when such interest begins to run, unless a court of law, on the ground of special circumstances relating to that debt, orders otherwise. [59] If interest had begun to run before any rate of interest was prescribed under s 1(2) of the Act, the rate of interest prescribed in the first notice published in the *Government Gazette* under s 1(2) shall be deemed to have been prescribed thereunder at the time when such interest began to run. [60]

The Prescribed Rate of Interest Act 55 of 1975 also applies to *mora* [61] interest. *Mora* interest is a specie of damages. [62] *Mora* interest runs from the date on which *mora* arises. *Mora* arises in the following circumstances:

(a) If a date for performance has been fixed in the agreement between the parties and the debtor fails to perform on that date, *mora ex re* arises: no prior demand is necessary and *mora* interest starts running on that date. [63] The purpose of *mora* interest is to place the

creditor in the position he would have been if the debtor had performed in terms of the undertaking. [64] If a debtor's obligation is to pay a sum of money on a stipulated date and he is in *mora* in that he failed to perform on or before the time agreed upon, the damages that flow naturally from such failure will bear interest *a tempore morae* or *mora* interest. [65] Contractual damages do not depend on fault. [66] All that the creditor is required to prove is that the debtor is in *mora*. It is not necessary to prove any fault on the part of the debtor. [67]

(b) If no time for performance has been fixed an interpellatio, a demand for performance, is necessary in order to place the debtor in *mora*. The demand serves to fix the time of performance with a sufficient degree of precision, where this has not been done in the contract itself, to give rise to *mora ex persona* [68] if performance does not take place on or before the date thus fixed. In his demand, therefore, the creditor must fix a date on or before which the debtor must perform and, provided the time given for performance is reasonable, default of performance on that date gives rise to *mora ex persona*. [69]

The demand may be extra-judicial, *interpellatio extrajudicialis*, e g by way of a letter of demand, or it may be by way of summons, *interpellatio judicialis*. [70] It is submitted that the view that a demand by way of summons places the debtor in *mora* from the date of service of the summons [71] cannot be accepted without qualification. The summons is equivalent to a demand, and in *Nel v Cloete* [72] it is made clear that in the demand the debtor must be given a reasonable time within which to perform. A summons demands immediate performance and if a demand for immediate performance is not reasonable in the circumstances, *mora* will not arise and *mora* interest will not start to run on the date of service of the summons. It seems that in such a case the court, if it gives judgment for the plaintiff, will have to determine what constituted a reasonable time in the circumstances. [73] If summons is issued without prior demand and payment is made within a reasonable time, the plaintiff must bear the costs of summons. [74]

Unless the parties have agreed otherwise, a debtor who is in *mora* in respect of a contractual obligation to pay interest is liable for the payment of *mora* interest on the unpaid interest calculated at the prescribed rate. [75]

If a creditor of a company in liquidation obtains judgment on a claim expunged by the Master at the request of the liquidators, the effect of the judgment is to reinstate the claim, so that, where the court expresses the interest on the judgment debt as running *a tempore morae*, it runs from the date of proof of the claim and not from date of judgment. [76]

The State can be held liable for *mora* interest. [77]

With effect from 11 April 1997 [78] the Prescribed Rate of Interest Act 55 of 1975 has been amended by the Prescribed Rate of Interest Amendment Act 7 of 1997 to make provision, in s 2A thereof, for the payment of interest on unliquidated debts. [79] The Prescribed Rate of Interest Amendment Act applies to unliquidated debts that arose prior to its coming into operation but which are only determined as provided for in s 2A(1) after the date of its coming into operation. [80] Section 2A(2)*(a)* of the Prescribed Rate of Interest Act 55 of 1975 provides that, subject to any other agreement between the parties and the provisions of the National Credit Act 34 of 2005, interest on an unliquidated debt shall run from the date on which payment of the debt is claimed by the service on the debtor of a demand or summons, whichever is the earlier. In terms of s 2A(5) of the Act a court, however, has a discretion to determine another date from which interest shall run.

The court has a discretion as to the rate at which interest shall accrue on an unliquidated debt which has been determined by it. [81] Although it has been held [82] that the rate prescribed under s 1(2) of the Prescribed Rate of Interest Act 55 of 1975 at the time when interest began to run fixed the rate at which interest should be calculated over the entire period, and that the provisions of s 1(2) were peremptory, [83] that would not be the case where the interest on an unliquidated debt which has been determined, is awarded under s 2A of that Act. [84] The court,

in exercising its discretion under s 2A(5), is to give effect to its own view of what is just in all the circumstances. [85] No question of onus arises. [86]

Under the common law arrear interest exceeding the amount of the capital sum cannot be recovered — in other words, interest stops running when the unpaid interest equals the outstanding amount. [87] A creditor is not prevented by the rule from collecting more than double the unpaid capital amount in interest, provided that he at no time allows the unpaid interest to reach the unpaid capital amount. [88] If a payment is made that reduces accumulated arrear interest to an amount less than the capital sum, interest begins to run again until the amount of the capital sum is reached. [89]

The purpose of the *in duplum* rule is to protect debtors. [90] It also serves to encourage plaintiffs to issue summons and claim payment of the debt speedily. [91] It does not relate only to

money-lending transactions but applies to all contracts where a capital amount that is subject to interest at a fixed rate is owing. [92] Where the interest at issue serves a purpose other than the ordinary function that interest fulfils, the rule will not apply. [93] A court will not order interest in contravention of the *in duplum* rule. [94] The *in duplum* rule does not apply to *mora* interest claimed on a liquidated debt as contemplated in s 1(1) of the Prescribed Rate of Interest Act 55 of 1975. [95]

If a defendant does not raise a defence that the *in duplum* rule has been contravened, it is not required of a court of its own accord to determine whether the rule has been contravened except if it appears *ex facie* the plaintiff's papers and if all the necessary and relevant facts were placed before the court. [96]

A debtor cannot waive his right in respect of the *in duplum* rule by prior arrangement. [97]

A debtor can, however, waive his right in respect of the *in duplum* rule by means of a compromise *ex post facto*. [98]

The *in duplum* rule is not suspended *pendente lite*. [99]

It is settled law that the *in duplum* rule permits interest to run anew from the date that the judgment debt is due and payable. [100] The usual practice for appellate courts, including the Constitutional Court, is to retain the date on which the court of first instance handed down judgment as the date on which judgment debts are due and payable. [101] In *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [102] the Constitutional Court, however, held that the date on which it handed down judgment should be the date from which the running of interest recommences. [103]

Section 103(5) [104] of the National Credit Act 34 of 2005 provides that, despite any provision of the common law or a credit agreement to the contrary, the amounts contemplated in

s 101(1)*(b)–(g)* [105] of that Act that accrue during the time that a consumer is in default under the credit agreement may not, in aggregate, exceed the unpaid balance of the principal debt under that credit agreement as at the time that the default occurs.

Loss of interest may be claimed as special damages. [106]

Subrule (3)*(a)*: 'Every summons shall be.' Despite the fact that the subrule is couched in mandatory terms, the court has, under rule 27(3), a discretion to condone any breach of its requirements. [107]

'Signed by the attorney acting for the plaintiff.' 'Attorney' is defined in rule 1 as 'a legal practitioner as defined, admitted and enrolled as such, under the Legal Practice Act, 2014 (Act 28 of 2014)'. Non-compliance with this provision may be condoned under rule 27(3). [108] See also the notes to rule 18(1) s v 'Shall be signed by both an advocate and an attorney' below.

'Shall bear an attorney's physical address.' The phrase 'an attorney's physical address' as used in this subrule bears its ordinary meaning. While it need not be the address of the attorney who signed the summons, it must be an address where an attorney is normally present. In practice this would inevitably be the office of the city correspondent of the attorney who signed the summons but practises outside the 25-km radius. [109] Non-compliance with this provision may be condoned under rule 27(3). [110]

'Where available, such attorney's postal, facsimile and electronic mail addresses.' Where an attorney's postal, facsimile and electronic mail addresses are not available the only other address allowed by the subrule for acceptance of notices by and service of documents on the attorney is the attorney's physical address within 25 kilometers of the office of the registrar. The subrule must be read together with rule 4A above, which provides, amongst other things, that service may be effected:

(a) by hand at the physical address for service provided, or

(b) by registered post to the postal address provided, or

(c) by facsimile or electronic mail to the respective addresses provided.

Subrule (3)*(b)*: 'If no attorney is acting.' See the notes to subrule (3)*(a)* s v 'Where available, such attorney's postal, facsimile and electronic mail addresses' above.

Subrule (3)*(c)*: 'After paragraph *(a)* or *(b)* has been complied with.' These provisions obviously cast a duty on the registrar to satisfy himself that subrule (3)*(a)* or subrule (3)*(b)*, as the case may be, has been fully complied with.

'The summons shall be signed by the registrar.' In terms of the definition of 'registrar' in rule 1, the word includes an assistant registrar.

As regards non-compliance with this provision, the following view has always been held in this work:

> 'It is submitted that non-compliance with this provision may be condoned under rule 27(3). [111] The view that the requirement that a summons must be signed by the registrar is so "basic" that non-compliance renders the summons a nullity, [112] is unacceptable. The requirement of signature by the registrar is one of several requirements set out in the subrule; they are all mentioned together and there is no indication that any one of them is more important or 'basic' than the other. [113] They are all requirements of rule 17 and, where rule 27(3) enables the court to condone "non-compliance with these rules", then the court is able to condone non-compliance with any requirement of rule 17, including the requirement of signature by the registrar. [114] Moreover, the distinction which this view imports between irregular proceedings that can be condoned and proceedings that are a nullity (and which cannot be condoned) is artificial and in conflict with the wide discretion conferred on the court by rule 27(3).' [115]

In *Motloung v Sheriff, Pretoria East* [116] the Supreme Court of Appeal, after an analysis of subrule (3)*(c)* and the case law, has now unanimously held [117] that the absence of the registrar's signature on a summons, as required by this subrule, does not visit the summons with nullity but may be condoned by the High Court under rule 27(3).

The copy of the summons that is served need not be signed personally by the registrar; it is sufficient if it bears his name. [118]

'. . . and issued by the registrar.' According to this subrule, 'sign' and 'issue' are separate elements standing next to one another, joined by the conjunctive 'and'. The subrule therefore requires two distinctive actions of registrars. They are required to 'sign' and 'issue' a summons. The word 'and' does not convert these into a single action. All that it does is make the word 'shall' in the subrule applicable to both actions. The two actions do not amount to one and the same thing. [119]

There is no indication in the rules of what is meant by the 'issue' of a summons by the registrar, but it would seem to signify something other than signature by the registrar. [120] It has been suggested [121] that 'issue by the registrar' probably means the steps taken by the registrar

that are not expressly stated in the rules: noting it in the records of his office, allocation of a number, stamping it with the stamp of his office and delivery for transmission to the sheriff. In *Protea Assurance Co Ltd v Vinger* [122] it was held that within this context 'issue' simply means 'to send (hand) out, publish or put in circulation'. A summons which has not been 'issued' by the registrar in this sense would be a document to which the registrar is not a party and which does not emanate from his office. [123] Such a document would not constitute a summons; it would be a 'nullity'. [124]

Subrule (4)*(a)*: 'The defendant's residence or place of business.' The subrule does not deal with the situation where the defendant has chosen a *domicilium citandi* and his actual residence or place of business is unknown to the plaintiff. Service at such a *citandi* is permissible under rule 4(1)*(a)*(iv), and it is submitted that it will be sufficient to state in the summons that the defendant's residence or place of business is unknown to the plaintiff. See further the notes to rule 4(1)*(a)*(iv) above.

'If the defendant is sued in any representative capacity.' If a summons does not make it clear whether the defendant is being sued in a representative capacity (such as executor) or in personal capacity, it may be set aside as irregular. [125] Thus, when the head of a *universitas* is sued, the summons should make it clear whether he is being sued in a representative or personal capacity. [126] See further the notes and examples in the *excursus* s v 'Parties' below.

Subrule (4)*(b)*: 'The full names.' As a matter of principle, a plaintiff must aver and prove that he has *locus standi in judicio.* [127] The object of this subrule is to require a plaintiff to furnish sufficient details to enable the court and the defendant to establish whether or not the plaintiff has the requisite *locus standi* to sue. [128] If the *persona* described in the summons was non-existent at the date of issue of summons, the summons is a nullity. [129]

In *Stassen v Stassen* [130] the court deprecated the established usage of describing parties as 'adults' ('volwassenes') and

pointed out that *locus standi* was dependent on majority, not adulthood.

'If the plaintiff sues in a representative capacity.' See the notes to subrule (4)*(a)* s v 'If the defendant is sued in any representative capacity' above, which notes apply *mutatis mutandis* to the description of a plaintiff in a summons.

Parties

General. The following matters, are briefly dealt with in this note:

(a) the selection of the proper parties to sue;

(b) the manner and, in certain cases, examples of citation of parties;

(c) persons who cannot sue or be sued, or who are under a disability; and

(d) preliminaries which have to be attended to before summons is issued against certain parties.

Special demands and statutory limitation periods are dealt with in Part D11 below.

The selection of the proper parties often raises questions of substantive, as distinct from procedural, law. [131] It has been held that the issue of standing is divorced from the substance of the case and has to be decided *in limine* before the merits are considered. [132] It lies outside the scope of this work to deal extensively with the substantive law. The notes are, therefore, not offered as complete statements on the law.

In *Atlantic Oil Inland (Pty) Ltd v Calitz* [133] the following summary of the legal principles pertaining to standing was given:

'[18] . . . *Locus standi* evinces the following legal principles:

"*(i) In Mars Incorporated v Candy World (Pty) Ltd 1991 (1) SA 567 (A) it was held that the general rule is for the party instituting proceedings to allege and prove that he or she has locus standi, the onus of establishing that issue rests upon the applicant.*

(ii) It must accordingly appear ex facie the particulars of claim (founding affidavit) that the parties thereof have the necessary locus standi in iudicio. See: Kommissaries van Binnelandse Inkomste v Van de Heever 1990 (3) SA 1051 (SCA) par 10. [134]

(iii) A person intending to institute or defend legal proceedings must have a direct and substantial interest in the right which is the subject of the litigation. Kommissaries van Binnelandse Inkomste v Van de Heever 1990 (3) SA 1051 (SCA) par 10. [135]

(iv) Locus standi concerns the 'sufficiency' and directness of the litigant's interest in proceedings which warrant his or her title to prosecute the claim asserted. Sandton Civic Precinct (Pty) Ltd v City of Johannesburg and Another [2008] ZASCA 104; 2009 (1) SA 317 (SCA)."'

As a general rule the requirements for *locus standi in judicio* are as follows:

(a) the plaintiff/applicant for relief must have an adequate interest in the subject matter of the litigation, which is not a technical concept but is usually described as a direct interest in the relief sought;

(b) the interest must not be too far removed;

(c) the interest must be actual, not abstract or academic;

(d) the interest must be a current interest and not a hypothetical one. [136]

The question whether a litigant's interest is sufficient to clothe it with *locus standi in judicio* must be determined in the light of the factual and legal circumstances of the case. [137]

The duty to allege and prove *locus standi in judicio* rests on the party instituting the proceedings. [138]

As a matter of principle, when parties are cited in legal proceedings they are entitled without more to participate in those proceedings. [139] The fact that they were cited as parties gives them that right. [140] It is not open to an applicant who has joined a respondent to contend thereafter that it was a misjoinder and on that footing to resist an adverse order for costs. [141]

As to *locus standi in judicio* in interdict proceedings, see the notes s v 'Who may interdict' in Part D6 below.

Agents. The general rule is that where an agent concludes a contract in his capacity as agent, whether or not he discloses the name of his principal, only the principal acquires rights or incurs obligations under the contract. The agent does not become either entitled or obliged, and cannot personally sue or be sued under the contract. [142] Nor can he sue or be sued in his own name, as representing his principal, unless he is given authority to represent his principal in legal proceedings. [143]

In the following exceptional cases the agent may himself acquire rights or incur obligations under a contract concluded by him for his principal, and may himself sue or be sued, not as representing his principal, but in his personal capacity:

(a) Where the contract is in such terms as to entitle or obligate the agent. An agent may expressly bind himself as surety and co-principal debtor. [144] In other cases, in order to decide whether the agent is personally liable, it is necessary to ascertain the intention of the parties as it appears from the terms of the agreement. The usual test is to enquire to whom the contracting party looked for fulfilment — *cujus fides secuta est*. [145] Thus, where a person contracts with an agent as principal, makes him his debtor and gives credit to him and not to his principal, then he can sue the agent personally on the contract. [146] Where the agent is liable to the third party under the contract, he can also sue on the contract. [147]

(b) Where, by the custom of a particular trade, an agent renders himself personally liable or entitled. [148]

(c) Where the agent has a special interest in the subject matter of the contract he has made. [149]

(d) Where an agent contracts on behalf of an unnamed principal and the principal renounces the contract, it has been held that the agent is personally liable on the contract. [150] In *Marais v Perks* [151] it is suggested that if an agent contracts as agent for an unnamed principal, there may be a presumption that he is undertaking personal liability, a presumption that can be rebutted by proof that the agent acted as agent only. The better view seems to be that the intention of the parties should be conclusive, and that the prima facie interpretation should be that an agent of an unnamed principal is not personally a party to the contract. [152]

(e) Where a person contracts on behalf of a non-existent principal, he is liable *ex contractu* only if it can be shown as a matter of construction that the agent was in fact a party to the contract. [153]

(f) An agent who does not disclose the fact that he is acting as an agent [154] is personally liable [155] and entitled on the contract. [156] The undisclosed principal may, however, declare himself, and adopt any contract entered into on his behalf, unless the contract is of so personal a character that the other contracting party would not have contracted

with the principal had his existence and name been known at the time of contracting. [157] If third parties have prior to such disclosure acquired rights against the agent, such rights are protected. When the undisclosed principal has declared himself, the third party can proceed against him, but if he has already obtained judgment against the agent, whether or not he knew of the existence of the principal, and such judgment has not been rescinded, he cannot proceed against the principal. [158]

(g) There used to be a presumption, in English law, which arose because of considerations of convenience, that an agent is personally liable on the contracts concluded by him for a foreign principal, even if his identity is disclosed. It has, however, been held that this presumption no longer exists. [159] Though there are references to this presumption in a few older cases, [160] it is submitted that the presumption forms no part of our law. However, the fact that the principal is a foreigner is a factor to be taken into account in deciding whether the agent has assumed personal liability, particularly in a case where the foreigner resides in a state where contractual obligations are not necessarily fulfilled as a matter of course. [161]

Example: The plaintiff is AB, a major [162] male businessman trading as such at 43 Vista Business Park, 123 16th Avenue, Pretoria, duly represented by CD, in his capacity as the authorized agent of AB.

Alien enemies. An alien enemy who is resident or who carries on business in the enemy's country cannot sue in our courts in time of war. [163] He can, however, be sued, [164] and in such case the court will not refuse to hear him in defence. The court may appoint a *curator ad litem* to act for such alien. [165]

An alien enemy is a person who resides or carries on business in the enemy country, and not merely a person who has enemy nationality. [166] Thus, even a South African citizen who voluntarily resides or carries on business in enemy territory is regarded as an alien enemy, [167] whereas, on the other hand, a person of enemy nationality living here lawfully is entitled to sue in our courts. [168] A company incorporated and carrying on business in an enemy-controlled country is an enemy within the rule, and cannot sue here. [169]

A defendant who raises the defence that the plaintiff is an enemy alien must show more than a mere possibility that this is so. [170]

A contract with a neutral is abrogated by war so as to prevent the neutral suing on it, if performance of the contract would assist the enemy. [171]

Applicants in interdict proceedings. See the notes to interdicts in Part D6 below.

Architects. *Example:* The plaintiff is AB, a (major) [172] female professional architect, [173] duly registered [174] in terms of the Architectural Profession's Act 44 of 2000, carrying on business at 30 Madiba Street, Pretoria. [175]

Associations. Provision is made in rule 14(2) that an association may sue or be sued in the name of the association. See further the notes to rule 14 above and the notes s v 'Voluntary associations' below.

Attorneys. *Examples:*

(i) The plaintiff is AB, a (major) [176] male attorney, [177] duly admitted and practising in terms of the Legal Practice Act 28 of 2014, at 123 Madiba Street, Pretoria.

(ii) The plaintiff is AB INCORPORATED (Registration Number: 96/05623/18), a private company with a share capital, duly registered and incorporated in terms of the Statutes of the Republic of South Africa, with registered address *alternatively* principal place of business at 123 Madiba Street, Pretoria.

The plaintiff, through its members and/or shareholders and in compliance with the provisions of s 34 of the Legal Practice Act 28 of 2014, conducts a legal practice at the aforesaid address.

(iii) The first defendant is AB INCORPORATED (Registration Number: 96/05623/18), a private company with a share capital, duly registered and incorporated in terms of the Statutes of the Republic of South Africa, with registered address *alternatively* principal place of business at 123 Madiba Street, Pretoria.

The first defendant, through its members and/or shareholders and in compliance with the provisions of s 34 of the Legal Practice Act 28 of 2014, conducts a legal practice at the aforesaid address.

The further defendants are, in terms of the provisions of s 34(7)*(c)* of the Legal Practice Act 28 of 2014 read with s 19(3) of the Companies Act 71 of 2008, all present and past directors of the first defendant who occupied office at the time the cause of action set out herein arose, and as such liable jointly and severally with each other and with the first defendant. [178] The full particulars of each such director is at present unknown to the plaintiff.

Auditors. The Independent Regulatory Board for Auditors is a juristic person. [179] An individual must apply to the Regulatory Board for registration as an auditor. [180] The only firms that may become registered auditors in terms of s 38 of the Auditing Profession Act 26 of 2005 are:

(a) partnerships of which all the partners are individuals who are themselves registered auditors;

(b) sole proprietors where the proprietor is a registered auditor; and

(c) companies which comply with the provisions of s 38(3) of the Act.

Only a registered auditor may engage in public practice or hold out as a registered auditor in public practice or use the registered auditor description 'public accountant', 'certified public accountant', 'registered accountant and auditor', 'accountant and auditor in public practice' or any other designation or description likely to create the impression of being a registered auditor in public practice. [181]

Example. The plaintiff is AB, a (major) [182] male auditor, duly registered in terms of the Auditing Profession Act 26 of 2005, practising as such in public practice as AB Public Accountants.

Auctioneers. An auctioneer can personally sue the purchaser of goods sold by him: *(a)* if the principal was not disclosed; or *(b)* if the auctioneer contracted personally; or *(c)* if this right was given to him by express agreement; or *(d)* (probably) if to the knowledge, actual or

implied, of the buyer, he warranted the price to the seller. Mere payment to the seller is not enough; there must be something in the contract, from its inception, making payment to the seller obligatory, and the purchaser must know of such obligation. [183]

Banks. 'Banks' as defined in s 1 of the Banks Act 94 of 1990 cannot be registered as such unless they are public companies and registered under the Banks Act 94 of 1990. [184] They must accordingly conform to legal procedure in litigation applicable to companies. Apart from these there are banking institutions established by special Acts which are bodies corporate capable of suing and being sued in their own names, such as the Cape of Good Hope Society, [185] the South African Reserve Bank, [186] the Land and Agricultural Development Bank of South Africa [187] and The South African Postbank Ltd. [188] See further the notes s v 'Mutual banks' below.

Examples:

The plaintiff is XY Bank Limited (registration no 1998/004893/07), a company with limited liability, duly registered and incorporated in terms of the Statutes of the Republic of South Africa, a bank duly registered in terms of the Banks Act 94 of 1990 and conducting business at Pretoria and elsewhere in the Republic of South Africa, with registered address at 123 River Road, Johannesburg.

The defendant is XY Bank Limited (registration no 1998/004893/07), a company with limited liability, duly registered and incorporated in terms of the Statutes of the Republic of South Africa, a bank duly registered in terms of the Banks Act 94 of 1990, formerly known as XYZ Bank, the latter having taken over the assets and liabilities of PM Bank on 1 February 2001 in terms of s 54 of the Banks Act 94 of 1990, conducting business at Pretoria and elsewhere in the Republic of South Africa, with registered address at 123 River Road, Johannesburg.

Bills of exchange. See the notes s v 'Negotiable instruments' below.

Building societies. See the notes s v 'Mutual banks' below.

Cession. A cession may either be an out-and-out cession or it may be made *in securitatem debiti*, i e to secure a debt. The effect of an out-and-out cession is that every right of the cedent is wiped out by the cession: while the cession stands, the cessionary is the *dominus* of the right. [189] It is settled law that unless otherwise agreed, a cession *in securitatem debiti* results

in the cedent being deprived of the right to recover the ceded debt, retaining only the bare *dominium* or a 'reversionary interest' therein. [190]

In either case, the cessionary is substituted as the creditor, and he can sue on the document for the full amount thereof. If the cession is *in securitatem debiti* the cessionary can sue for the full amount thereof, even if this is in excess of the debt secured; [191] but although he can sue for the full sum, he can retain from the proceeds recovered only the amount of the secured debt. The balance must be given to the debtor. [192] If the cession is an out-and-out cession, the cessionary can retain the full amount recovered. [193]

The cedent cannot sue in either case. [194] This is so even though no notice of the cession has been given to the debtor or, in the case of a bond, even though the cession has not been registered. [195] The parties to a cession *in securitatem debiti* may, however, vary the usual consequences of such a cession. [196]

The cedent does not become entitled to sue merely because the cessionary gives him consent to do so. [197] If it is desired to reinvest the cedent with the right to sue, then in the case of an out-and-out cession there must be a re-cession. [198] In the case of a cession *in securitatem*

debiti the cession must be cancelled, and the cedent has the right to claim the re-cession of the rights upon payment of the indebtedness. [199] In order to sue for the recovery of the ceded debts the cedent should therefore take re-cession of them. [200] If the cedent sues without being entitled to do so, and obtains judgment, such judgment will be set aside as bad *ab initio.* [201] It has been held, however, that a cedent is, if duly authorized thereto by the cessionary, entitled to proceed with an action in his own name as agent of his undisclosed principal, the cessionary. [202] The correctness of such approach was doubted in *Waikiwi Shipping Co Ltd v Thomas Barlow and Sons (Natal) Ltd* [203] and was expressly disapproved in *Sentrakoop Handelaars Bpk v Lourens*. [204]

In the event of the cession of a claim after *litis contestatio*, the cedent does not lose its *locus standi* until the cessionary has been substituted by means of an amendment to the pleadings. [205] On substitution the cessionary can pursue the action in its own name. [206] The legal effect of a cession after *litis contestatio* is to terminate the proceedings instituted by the cedent, with the corollary that the substitution of the cessionary as the plaintiff must be regarded as the institution of new proceedings. [207]

If a cessionary sues on a document, but *ex facie* the document he is not the creditor, then it is necessary that he allege the cession. [208]

A cession may be implied instead of express, and in such case the rule still operates. Thus, where C, as the owner of a business, was entitled to enforce a restraint of trade clause against E, and E carried on business contrary to this agreement after C had sold his business, together with goodwill, to A, it was held that the sale of the goodwill carried with it an implied cession to A of the right to restrain E, and that C was accordingly no longer entitled to sue E. [209]

Cession is permitted of the subject matter of an action pending the action. Such a cession may take the form of either an out-and-out cession of the cedent's interest in the claim or a cession of the cedent's interest in the result of the litigation. [210] When an out-and-out cession of the claim of a party is effected after *litis contestatio* but prior to judgment, such party does not lose his *locus standi* and may thereafter proceed with the action in his name. [211] The cessionary of a claim which is the subject matter of a pending action is entitled to have himself substituted by the court [212] for the cedent in the action if there is no prejudice to the other party to the litigation. [213]

Example: The plaintiff is XY Bank Limited (registration no 1998/004893/07), a company with limited liability, duly registered and incorporated in terms of the Statutes of the Republic of South Africa, a bank duly registered in terms of the Banks Act 94 of 1990 and conducting business at Pretoria and elsewhere in the Republic of South Africa, with registered address at 123 River Road, Johannesburg.

The defendant is CD, a major salesman, who resides at 230 Stanza Bopape Street, Arcadia, Pretoria.

On or about 25 February 2015 EF, trading as XY Plumber and doing business at 110 Stanza Bopape Street, Pretoria, rendered plumbing services to the value of R450 000 to the defendant at the latter's special instance and request. Despite demand, the defendant failed to pay the sum of R450 000, which amount is now due and payable.

On or about 25 June 2015, EF ceded his claim for R450 000 against the defendant to the plaintiff in writing. A true copy of the deed of cession is annexed hereto, marked Annexure 'A'.

In the premises the defendant is liable to pay the plaintiff the sum of R450 000 which amount the defendant has, despite demand, failed or refused to pay to the plaintiff.

Wherefore the plaintiff prays for judgment against the defendant . . .

Children. See the notes s v 'Minors' below.

Church congregations. As a general rule, a church congregation is a voluntary association, and its right to sue or be sued in its own name is governed by the rules which are to be found s v 'Voluntary associations' below. [214]

Example: The plaintiff is AB Church, an association with perpetual succession and authorized by its constitution to acquire, own and dispose of property apart from its members, [215] and to take or defend itself against legal action, with its main place of business at 543 Capital Street, Pretoria.

Close corporations. A corporation formed in accordance with the provisions of the Close Corporations Act 69 of 1984 [216] is on registration in terms of those provisions a juristic person [217] with the capacity and powers of a natural person of full capacity in so far as a juristic person is capable of having such capacity or of exercising such powers. [218] The abbreviation CC, in capital letters, or its equivalent in any other official language, must be subjoined to the name used by a close corporation. [219] A close corporation that has been deregistered cannot issue summons. Similarly, any summons issued against a deregistered close corporation cannot be enforced. [220]

In terms of s 23 of the Close Corporations Act 69 of 1984, as amended, s 32 of the Companies Act 71 of 2008, read with the changes required by the context, applies to the use and publication of names by a close corporation. This includes, *inter alia*, the following:

(a) A close corporation must provide its full registered name or registration number to any person on demand. [221]

(b) A close corporation must not misstate its name or registration number in a manner likely to mislead or deceive any person. [222]

(c) Every close corporation must have its name and registration number mentioned in legible characters in all notices and other official publications thereof, including such notices and publications in electronic format as contemplated in the Electronic Communications and Transactions Act 25 of 2002, and in all bills of exchange, promissory notes, cheques and orders for money or goods and in all letters, delivery notes, invoices, receipts and letters of credit of the close corporation. [223]

A close corporation may be converted to a company under the Companies Act 71 of 2008. [224] On the registration of a company converted from a close corporation [225] —

(a) the juristic person that existed as a close corporation before the conversion continues to exist as a juristic person, but in the form of a company;

(b) all the assets, liabilities, rights and obligations of the close corporation vest in the company;

(c) any legal proceedings instituted before the registration by or against the close corporation, may be continued by or against the company, and any other thing done by or in respect of the close corporation, is deemed to have been done by or in respect of the company;

(d) any enforcement measures that could have been commenced with respect to the close corporation in terms of the Close Corporations Act 69 of 1984, for conduct occurring before the date of registration, may be brought against the company on the same basis, as if the conversion had not occurred; and

(e) any liability of a member of the close corporation for its debts, that has arisen in terms of the Close Corporations Act 69 of 1984, and existed immediately before the date of registration, survives the conversion and continues as a liability of that person, as if the conversion had not occurred.

The liquidators of a close corporation under provisional liquidation have *locus standi in judicio* to oppose (or support) an application to place the close corporation under business rescue. [226]

The abolition of the common-law right of derivative action in s 165 of the Companies Act 71 of 2008 does not affect the common-law rights in respect of close corporations incorporated prior to the commencement of the Companies Act 71 of 2008 that were not converted to companies. The common-law right of a member of a close corporation (including an actual, unregistered owner of a member's interest) to a derivative action is still available and not affected by ss 49 and 50 of the Close Corporations Act 69 of 1984. [227]

Example: The plaintiff is AB CC (registration no CK91/123456/23), a close corporation duly registered and incorporated in terms of the Close Corporations Act 69 of 1984, with registered address and main place of business, situated at 12 Enoch Sontonga Street, Makhado.

Commissioner for the South African Revenue Service. Actions by or against the State under the Income Tax Act 58 of 1962 and the Value-Added Tax Act 89 of 1991 must be brought in the name of the Commissioner for the South African Revenue Service.

Companies. Under s 8 of the Companies Act 71 of 2008 the following types of companies may be formed and incorporated:

(i) A profit company.

(ii) A private company.

(iii) A personal liability company.

(iv) A public company.

From the date and time that the incorporation of a company is registered, as stated in its registration certificate, the company —

(a) is a juristic person, which exists continuously until its name is removed from the companies register in accordance with the provisions of the Companies Act 71 of 2008; [228]

(b) has all the legal powers and capacity of an individual, except to the extent that:

(i) a juristic person is incapable of exercising any such power, or having any such capacity; or

(ii) the company's Memorandum of Incorporation provides otherwise. [229]

Section 11(3)*(c)* of the Companies Act 71 of 2008 provides that a company name, irrespective of its form or language, must end with one of the following expressions, as appropriate for the category of the particular company:

(i) The word 'Incorporated' or its abbreviation 'Inc.', in the case of a personal liability company.

(ii) The expression 'Proprietary Limited' or its abbreviation '(Pty) Ltd.', in the case of a private company.

(iii) The word 'Limited' or its abbreviation, 'Ltd.', in the case of a public company.

(iv) The expression 'SOC Ltd.', in the case of a state-owned company.

(v) The expression 'NPC', in the case of a non-profit company.

After a company has changed its name, any legal proceedings that might have been commenced or continued by or against the company under its former name may be commenced or continued by or against it under its new name. [230]

Section 32 of the Companies Act 71 of 2008 makes provision for the use of the name and registration number of a company. See further, in this regard, the notes s v 'Close corporations' above.

Any right at common law of a person other than a company to bring or prosecute any legal proceedings on behalf of that company was abolished and substituted by the rights embodied in s 165 of the Companies Act 71 of 2008. [231]

In *Intongo Property Investment (Pty) Ltd v Groenewald* [232] the applicants (the company and one Svensson, who described himself as 'director and nominee shareholder' and 'duly authorised representative' of the company) approached the court for the setting aside of a sale of a property by the first respondent to the second respondent, on the basis that the transaction was tainted by fraud. The *locus standi* of both applicants was challenged by the second respondent. The court held that neither applicant had *locus standi* to institute the application:

(a) the company because, having regard to s 66 and the definition of 'board' in s 1 of the Companies Act 71 of 2008, it did not properly authorize the institution of the application under circumstances where the first respondent, and not Svensson, was the only director of the company; [233]

(b) Svensson because he was not a competently appointed director or nominee shareholder of the company [234] and, further, having regard to the prevailing case law, because only the company could sue in respect of loss to property owned by it. [235]

In *HR Computek (Pty) Ltd v DR WAA Gouws (Johannesburg) (Pty) Ltd* [236] the court was called upon to decide some unauthorized person, was opposing the application by the applicant to set aside a liquidation order made against it. The answering affidavit was deposed to by one Dr Gouws, who stated [237] :

> 'I am the general manager of the first respondent and am duly authorised to depose to this affidavit on its behalf as is evident from the resolution attached hereto as annexure "AA1" . . .'

Annexure AA1 purported to be a resolution of the first respondent which read as follows: [238]

> 'RESOLUTION
>
> MINUTES OF THE BOARD OF DR. WAA GOUWS (JOHANNESBURG) (PTY) LTD ("THE COMPANY") HELD AT JOHANNESBURG ON 1 OCTOBER 2021.
>
> 1. It was resolved to oppose the application of HR Computec [*sic*] (Pty) LTD to set aside the winding up order obtained by the company.
> 2. It was further resolved that Willem Andries Adrianus Gouws be authorised to sign all documents and do whatever else is required to give effect to 1. Above.
> 3. Finally, it was resolved that Malesela Ngoasheng of Mashabane & Associates be appointed as the company's attorneys of record.'

The purported resolution, which was apparently a copy, bore the signature of' 'WAA GOUWS' above the words 'Certified a true extract'. [239] It was not in dispute that the second respondent was the sole shareholder and director of the first respondent, and hence its only board member. She did not file any affidavit. [240] Dr Gouws was an unrehabilitated insolvent and disqualified from being a company director, from chairing a meeting of the first respondent's board, and from being its company secretary. [241] The court held that Dr Gouws's say so was insufficient and that it could not be concluded that he had been empowered by the first respondent to oppose the application on its behalf. Accordingly, the first respondent's opposition to the application had not been proved to be valid or authorized, nor had it been shown that the attorney for the first respondent had been properly authorized to act on its behalf. [242] The first respondent and its attorneys were, however, given an opportunity by the court to deliver a valid resolution and proper mandate. [243] As regards compliance with rule 7, the court stated: [244]

> 'Since the very existence of a valid resolution is in issue, and since the same had not been produced thus far, despite the point having been raised by the applicant in its replying affidavit that had been delivered as long ago as November 2021, and since Dr Gouws, clearly, if not, in all probability, instructed the attorneys in this matter on such purported basis, it may not have been sufficient for the applicant to have proceeded in terms of Rule 7.'

A beneficial shareholder, not being a member of a company, can neither avail himself of the remedy under s 252 of the Companies Act 61 of 1973, nor be joined with its nominee to invoke the statutory remedy provided by s 252. [245]

Under s 81 of the Companies Act 71 of 2008 a court may order the winding-up of a solvent company on application of a number of specified applicants: the company, its directors, its shareholders, its creditors [246] and its business-rescue practitioner if the company is in business rescue. Section 157(1)*(d)* of the Act makes provision for extended standing, with the leave

of the court, in respect of a person acting in the public interest. It has been held that under s 157(1)*(d)* the Minister of Environmental Affairs had standing to bring an application for the winding-up of a solvent non-profit company on the basis that it was just and equitable for the company to be wound up. [247]

Liquidators engaged in legal proceedings for the recovery of debts owed to companies in liquidation may sue in their own names *nomine officio* or in the name of the company concerned. [248]

Section 387(4) of the Companies Act 61 of 1973 gives a creditor standing to bring an application to resolve whether another creditor or the company in liquidation owed it debts in the absence of the liquidators resolving the dispute and refusing

to approach the court to do so. [249]

While a company in liquidation cannot, without the cooperation of the liquidators, use s 354(1) of the Companies Act 61 of 1973 to apply for the rescission of a liquidation order granted in its absence, the board of directors retains a residual common-law power to do so. [250]

The deregistration of a company has the effect of putting an end to the company's existence and that 'its corporate personality ends in the same way that a natural person ceases to exist on death'. [251] A company that has been deregistered therefore cannot issue summons. Similarly, any summons issued against a deregistered company cannot be enforced. [252]

After the dissolution of a company in terms of s 419 of the Companies Act 61 of 1973 the liquidator no longer functions *qua* liquidator. [253]

During business rescue proceedings, no legal proceedings against the company under business rescue may be commenced or proceeded with in any forum, except as provided for in s 133 of the Companies Act 71 of 2008. [254] Section 133 reads as follows:

> '133 General moratorium on legal proceedings against company
>
> (1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except —
>
> *(a)* with the written consent of the practitioner;
>
> *(b)* with the leave of the court and in accordance with any terms the court considers suitable;

> *(c)* as a set-off against any claim made by the company in any legal proceedings, irrespective of whether those proceedings commenced before or after the business rescue proceedings began;
>
> *(d)* criminal proceedings against the company or any of its directors or officers;
>
> *(e)* proceedings concerning any property or right over which the company exercises the powers of a trustee; or
>
> *(f)* proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner.
>
> (2) During business rescue proceedings, a guarantee or surety by a company in favour of any other person may not be enforced by any person against the company except with leave of the court and in accordance with any terms the court considers just and equitable in the circumstances.
>
> (3) If any right to commence proceedings or otherwise assert a claim against a company is subject to a time limit, the measurement of that time must be suspended during the company's business rescue proceedings.'

In *Elias Mechanicos Building & Civil Engineering Contractors (Pty) Ltd v Stedone Developments (Pty) Ltd* [255] it was found [256] that the moratorium on legal proceedings against a company has the result that leave to institute proceedings must be obtained by way of separate proceedings before the commencement of the main proceedings and not as part of the relief in the latter proceedings. A contrary position was taken in *African Bank Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd*, [257] where the requisite leave to commence proceedings was granted as part of the relief claimed in the main proceedings. In *Safari Thatching Lowveld CC v Misty Mountain Trading 2 (Pty) Ltd* [258] it was held [259] that where already commenced legal proceedings against a company have been suspended as a result of the institution of business rescue processes, leave to proceed, in terms of s 133(1)*(b)*, may competently be sought during such main proceedings themselves and that a substantive, separate application is not required. In *Booysen v Jonkheer Boerewynmakery (Pty) Ltd* [260] it was held [261] that it was not necessary that, in each and every matter in which leave of the court was required, such leave had to be sought and obtained by way of a formal application; or that such leave, of necessity, had always to be sought by way of a separate, prior application. What would be required would depend on the circumstances of each particular matter. It would in each case be a matter for the court's discretion, to be exercised judicially on the basis of considerations of fairness and the interests of justice. Where the facts of a particular matter dictated that, prior to commencing with certain legal proceedings, a court should impose certain terms and conditions, it would obviously be sensible and proper to approach the court for the necessary leave and guidance in this regard, before such proceedings were commenced. However, there might well be instances where it would be appropriate, fair and convenient to obtain the court's leave in one and the same matter, by way of an interim order, before the main application or action itself was heard, and the relief sought therein was granted. Examples would include instances where proceedings had to be launched as a matter of urgency, or where the facts and circumstances relevant to the principal application were inevitably going to have to be dealt with in any interlocutory application for leave to launch such application.

In *BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd* [262] it was held that a separate application was not required and that two sets of prayers could be included in the main application for liquidation of the company: one for leave to institute the legal proceedings, and one for the substantive relief. The prospects of the prayer for leave to institute the legal proceedings would generally be heavily reliant on the prospects of success in the main relief sought. In other words, if the merits of the main relief sought were bad, the prayer for leave to institute the legal proceedings should be refused. [263]

An applicant who seeks the leave of the court to commence legal proceedings under s 133(1)*(b)* must establish a prima facie case (in the sense of demonstrating a cause of action or a triable issue) against the company and give reasons why the proceedings are necessary and appropriate. The court hearing such an application should exercise its discretion judicially and be guided by the interests of justice. [264]

The general moratorium on legal proceedings against a company under business rescue does not encompass ejection proceedings against the company in circumstances where the lease regulating the occupation has been validly cancelled and the company failed to vacate the premises. This is apparent from the language of s 133(1) of the Companies Act 71 of 2008, which provides that the moratorium applied to legal proceedings against the company or 'in relation to any property belonging to the company, or lawfully in its possession'. [265] In its plain meaning the said phrase limits the reach of the moratorium, rendering it inapplicable to legal proceedings or enforcement action in relation to property unlawfully possessed by a company under business rescue. The failure of a lessee to vacate premises when there is an obligation to do so, which would be the case where the lease had been cancelled, renders the lessee an unlawful occupier. [266] The moratorium does not prohibit a credit provider who has cancelled an instalment sale agreement in respect of a vehicle, and obtained an order confirming the cancellation and for the return of the vehicle, to execute the order for return of the vehicle. [267] The moratorium also does not bar shareholders from compelling the return to the company of its property under circumstances where *(a)* the purpose of the s 133 of the Companies Act 71 of 2008 is to protect the company and its property from claims by third parties (it does not deal with proceedings against third parties to protect or recover the property of the company, for the company's benefit); *(b)* the interests of the business rescue practitioner are aligned with those of the third party; *(c)* the matter is urgent; *(d)* there is no defence to the claim for return of the property; and *(e)* the court, if asked, would have granted leave to the applicants

to proceed. [268] The moratorium does not apply to a deposit provisionally paid in respect of the sale of the company's assets pending conclusion of the relevant sale agreements under circumstances where the sale did not eventually materialize. The deposit is not property belonging to the company or lawfully in its possession as contemplated in s 133(1) of the Companies Act 71 of 2008. [269] Sureties cannot claim the benefit of the moratorium; it is a defence personal to the company. [270] The moratorium precludes a landlord who has a claim

for arrear rentals from taking legal action to perfect its hypothec after the commencement of the business-rescue process, unless the business-rescue practitioner or the court grants consent to the perfection. [271]

The *locus standi in judicio* of a business rescue practitioner may not be challenged as long as the resolution to commence business rescue proceedings has not been set aside by a court, and the proceedings have accordingly come to an end, in terms of s 132(2)*(a)*(i) of the Companies Act 71 of 2008, even if the resolution does not comply with the requirements of s 129(3) and (4) of the Act. [272] A director of a company under business rescue does not have *locus standi in judicio* to cause a summons to be issued in the name of the company without the prior approval of the business rescue practitioner [273] or to appoint attorneys to oppose the confirmation of a provisional restraint order that was granted against the company in terms of s 26(3) of the Prevention of Organised Crime Act 121 of 1998 [274] or, further, to oppose an application for a forfeiture order in terms of s 39 of the Prevention of Organised Crime Act 121 of 1998. [275]

In terms of s 131(2)*(a)* of the Companies Act 71 of 2008 an application for business rescue must be served on the company or close corporation. [276] Where it is already being wound up, whether provisionally or finally, that means that the persons on whom it must be served, as representing the company, are its liquidators. [277] It is apparent from the provisions of s 131 of the Companies Act 71 of 2008 that the company that is the subject of the business rescue application is entitled to oppose it. At the time the application is made in relation to a company under provisional or final winding up, its affairs will be in the hands of the liquidators. On ordinary principles it seems obvious that liquidators, whether provisional or final, faced with such an application should be entitled either to support or oppose the application depending upon their judgement as to the interests of the company and its creditors. As a matter of principle, when parties are cited in legal proceedings they are entitled without more to participate in those proceedings. The fact that they were cited as parties gives them that right. Where the liquidators were cited and decided to resist the application they were entitled to do so by the mere fact of their joinder as parties. It is not open to an applicant who has joined a respondent to contend thereafter that this was a misjoinder and on that footing to resist an adverse order for costs. Were that the case a party who took the point that they had been wrongly joined would not be entitled to recover their costs, when that argument succeeded. [278] In terms of s 165(5) of the Companies Act 71 of 2008 a person may apply to a court for leave to continue, in the name of the company, only legal proceedings that had been properly authorized at inception.

In *Larrett v Coega Development Corporation (Pty) Ltd* [279] the legal proceedings that were instituted by one of the directors had not been authorized, either by way of a court order pursuant to the bringing of a derivative action under s 165, or a resolution by the company's board of directors. Subsequently, the applicant sought an order, in terms of s 165(5) of the Companies Act 71 of 2008, authorizing her to continue with proceedings in the name of and on behalf of the company. The court held [280] that to grant leave to continue in respect of unauthorized legal proceedings — effectively ratifying them — would be to allow the avoidance of the requirements of s 165 for the bringing of a derivative action. Such conduct would be subversive of the plain and ordinary meaning of the section and its intention.

As to companies incorporated outside the Republic of South Africa, see the notes s v 'Foreign companies' below.

Example: The plaintiff is AB (Pty) Ltd (registration no 1985/116895/09), a private company, duly registered and incorporated in terms of the Statutes of the Republic of South Africa, with registered address and principal place of business at 21 Madiba Street, Pretoria.

Companies and Intellectual Property Commission. The Companies and Intellectual Property Commission ('CIPC') is a juristic person established to function as an organ of state within the public administration, but as an institution outside the public service. [281] In terms of s 185(2) of the Companies Act 71 of 2008, the CIPC —

(a) has jurisdiction throughout the Republic;

(b) is independent, and subject only to —

(i) the Constitution of the Republic of South Africa, 1996, and the law; and

(ii) any policy statement, directive or request issued to it by the Minister in terms of the Companies Act;

(c) must be impartial and perform its functions without fear, favour, or prejudice; and

(d) must exercise the functions assigned to it in terms of the Companies Act or any other law, or by the Minister, in —

(i) the most cost-efficient and effective manner; and

(ii) in accordance with the values and principles mentioned in s 195 of the Constitution.

The objectives of the CIPC are provided for in s 186 of the Companies Act 71 of 2008 and its functions in s 187 thereof.

Section 189 of the Companies Act 71 of 2008 makes provision for the appointment of a Commissioner who is the accounting authority of the CIPC.

Example: The first respondent is the Companies and Intellectual Property Commission ('CIPC'), established as a juristic person to function as an organ of state within the public administration in terms of section 185 of the Companies Act 71 of 2008, of 77 Meintjies Street, The DTI Campus, Block F, Ground Floor, Pretoria.

The second respondent is Mr X, in his official capacity as the Commissioner of the CIPC, as such employed at 77 Meintjies Street, The DTI Campus, Block F, Ground Floor, Pretoria.

Co-operatives. A co-operative is an entity *sui generis* whose purpose is to act for the benefit of its members. [282] The Co-operatives Act 14 of 2005 [283] defines, in s 1 thereof, 'co-operative' as

meaning 'an autonomous association of persons united voluntarily to meet their common economic, social or cultural needs and aspirations through a jointly owned and democratically controlled enterprise organised and operated on co-operative principles'. The Act provides for various kinds [284] and forms [285] of co-operative, all of which, once registered, [286] are endowed with juristic personality. [287] A co-operative registered in terms of the Act is, therefore, entitled to sue and be sued in its own name. [288] A co-operative must maintain a registered office in the Republic in the place set out in its constitution [289] and must, in the prescribed form, notify the Registrar of Co-operatives of the physical address of its

registered office as well as any electronic address, telephone and fax numbers. [290] A co-operative may convert into any other form of juristic person. [291] A company may convert into a co-operative. [292] Co-operative societies and co-operative companies registered in terms of the repealed Co-operative Societies Act 29 of 1939 are deemed to be co-operatives incorporated under the now repealed Co-operatives Act 91 of 1981. Despite the repeal of the latter Act, a co-operative registered in terms of that Act may continue to operate as if that Act has not been repealed. [293] Such a co-operative must, however, within a period of two years from the date of commencement of the Co-operatives Amendment Act 6 of 2013, [294] have amended its constitution to the extent necessary to comply with that Act [295] and must have submitted its constitution to the Registrar of Co-operatives for registration. [296] In case of non-compliance after the two-year transitional period, a co-operative will be deemed to be deregistered. [297]

The liability of a member of a co-operative [298] for the debts of the co-operative is limited to the nominal value of his shares in the co-operative, to the extent that such shares have not been paid up.

A person who enters into a written contract in the name of, or on behalf of, a co-operative before it is registered is personally bound by the contract, unless that contract expressly provides otherwise. [299] A co-operative may, within one month of its registration, [300] ratify the contract entered into in its name or on its behalf. [301] If the co-operative ratifies such a contract it is bound by the contract and the person who originally entered into the contract ceases to be personally bound by it. [302] If a co-operative does not ratify the contract, or is not deemed to have done so in terms of s 9(8) of the Act, the person who originally entered into the contract continues to be personally bound by the contract, unless the contract expressly provides otherwise. [303]

As an artificial person, a co-operative can, of course, act only through its agents. It has been held, by analogy with the board of a company, that the board of a co-operative is empowered to delegate the authority to involve the co-operative in litigation to an employee of the co-operative. [304]

See further the notes s v 'Companies' above.

Curators. See the notes s v 'Mentally disabled persons' and 'Minors' below.

Customs and Excise. No legal proceedings may be taken against the State, the Minister of Finance, the Commissioner for the South African Revenue Service, or a customs officer for anything done in pursuance of the Customs and Excise Act 91 of 1964 until one month after delivery of notice in writing. [305] The notice is required clearly and explicitly to state the cause of action, the name and place of abode of the person who is to institute the legal proceedings, and the name and address of his attorney or agent, if any. [306] Proceedings must be brought within one year from the date when the right of action first arose. [307]

All ships, vehicles or goods seized under any law relating to customs are deemed to be condemned, and may be disposed of in terms of the Customs and Excise Act 91 of 1964, unless within one month of the date of seizure either the person from whom the goods were seized, or the owner or his authorized agent, gives notice in writing that he claims or intends to claim the ship, vehicle or goods. [308] Proceedings to obtain the release of the goods must then be instituted within 90 days after the date of the notice, but not earlier than one month thereafter, except with the consent of the Secretary. [309] If notice is not given as required, no legal proceedings based merely on the seizure can be taken. [310]

Deceased estates. The executor is the representative of the deceased's estate and he is the party to sue [311] or be sued [312] as representing the estate. It is not possible to issue process in the name of the deceased estate itself. [313] This continues to be the position even after the executor has filed his account and distributed the assets. [314]

If there is more than one executor, all must be joined, either as co-plaintiffs or as co-defendants. [315] If one of the executors is unwilling to join his co-executors in an action, the others must obtain the leave of the court either to sue alone or to join the unwilling co-executor as co-defendant. [316] In *Webster v Webster* [317] the court granted an application by one executor for leave to give notice on behalf of the estate to defend an action in respect of a claim against the estate which his co-executor refused to defend.

If a deceased estate is that of a husband married in community of property, the executor alone should sue; the surviving spouse should not be joined. [318] If a deceased estate is sequestrated, the trustee, not the executor, represents the estate. [319]

If an executor testamentary sues, he must allege that the will has been proved and that letters of administration have been issued to him, for otherwise he will not have indicated with sufficient clarity the right in which he sues. [320] Until an executor has been appointed and letters of administration have been taken out, the estate cannot sue or be sued. [321]

If a party to proceedings dies the provisions of rule 15 become applicable. If an executor dies, the legal interest in the suit passes, not to his estate, but to his successor in office as executor. [322]

An executor should not bring an action in his personal capacity against the estate while he is an executor. He should apply to court to have himself removed from office until the action is determined. [323] An action claiming the removal of executors, or refunds, is an action against them in their personal, and not their representative, capacities. [324]

No civil legal proceedings instituted by or against any executor lapse merely because he has ceased to be an executor. [325] The court in which any such proceedings are pending may, upon receiving notice that the executor has ceased to be such, allow the name of any remaining or

new executor to be substituted for the former, and the proceedings thereupon continue as if they have originally been instituted by or against such remaining or new executor. [326]

Example: The plaintiff is AB, a female attorney duly admitted and practising in terms of the Legal Practice Act 28 of 2014, under the name and style of AB & Associates, 30 Madiba Street, Pretoria, herein acting in her capacity as executor of the deceased estate of the late XY by virtue of letters of executorship 3345/2019 issued by the Master of the Gauteng Division of the High Court, Pretoria, on 1 February 2019.

Defence Force. In terms of the Moratorium Act 25 of 1963 all civil legal remedies in respect of contractual debts incurred are suspended against citizens during the period that such persons are doing 'service' as defined in s 1 of the Act. Leave may be obtained in terms of s 2(3) from the High Court to proceed with an action in any court of competent jurisdiction [327] if the court is satisfied that there is a probability that a citizen is taking advantage of the suspension of civil legal remedies against him to carry on any trade or business without paying his creditors or to dispose of his assets to the prejudice of his creditors

or that for any reason whatsoever it would be just and equitable to allow the applicant to proceed with his action.

See further the notes s v 'Government departments' below.

Diplomatic representatives. Diplomatic representatives are immune from civil jurisdiction of the courts of the Republic. [328] Diplomatic immunity does not import immunity from legal liability, but only immunity from local jurisdiction, which may be waived with the sanction of the diplomat's sovereign or head of mission. [329] Waiver may be express or implied, as where the representative appears to defend, but does not plead to the court's jurisdiction over him.

It is an offence for any person wilfully or without the exercise of reasonable care to sue out, obtain or execute any legal process in contravention of the provisions of the Diplomatic Immunities and Privileges Act 37 of 2001, whether as party, attorney or officer concerned with issuing or executing such process. [330]

An honorary consul is not entitled to enjoy diplomatic immunities, unless these are accorded by courtesy as the result of reciprocal agreement between the two states concerned. A person may perform both diplomatic and consular functions, in which case immunity is enjoyed in respect of the former capacity only. [331]

See further the notes s v 'Foreign states' below.

Educational institutions. The various public higher education institutions (i e public universities, public university colleges and public higher education colleges) established, merged, converted, deemed to have been established or declared as a public higher education institution in terms of the Higher Education Act 101 of 1997, [332] are juristic persons. [333] They are thus capable of suing and of being sued in their own names. Private higher education institutions must be registered or recognized as juristic persons in terms of the Companies Act 71 of 2008

before they are registered or conditionally registered as a private higher education institution. [334]

Public schools are, in terms of s 15 of the South African Schools Act 84 of 1996, [335] juristic persons. In terms of s 60(1)*(a)* of the South African Schools Act 84 of 1996 the State is liable for any delictual or contractual damage or loss caused as a result of any act or omission in connection with any school activity conducted by a public school and for which such public school would have been liable but for the provisions of that section. [336] The provisions of the State Liability Act 20 of 1957 apply to any claim brought under s 60(1) of the South African Schools Act 84 of 1996. [337] Any claim for damage or loss contemplated in s 60(1)(*a*) must be instituted against the Member of the Executive Council concerned. [338] Despite the provisions of s 60(1), the State is not liable for any damage or loss caused as a result of any act or omission in connection with any enterprise or business operated under the authority of a public school for purposes of supplementing the resources of the school as contemplated in s 36 of the South African Schools Act 84 of 1996, including the offering of practical educational activities relating to that enterprise or business. [339] Any legal proceedings against a public school for any damage or loss contemplated in s 60(4), or in respect of any act or omission relating to its contractual responsibility as employer as contemplated in s 20(10) of the South African Schools Act 84 of 1996, may only be instituted after written notice of the intention to institute proceedings against the school has been given to the Head of Department for the Head's information. [340]

Examples:

(i) The plaintiff is the governing body of the Soutpansberg Primary School, [341] a public school with juristic personality in terms of the South African Schools Act 84 of 1996, of Parker Street, Sunnyvale, Pretoria; or

(ii) The plaintiff is the Soutpansberg Primary School, a public school with juristic personalivty in terms of the South African Schools' Act 84 of 1996, of Parker Street, Sunnyvale, Pretoria. [342]

Executors. See the notes s v 'Deceased Estates' above.

Firms. Provision is made in rule 14(2) that a firm may sue or be sued in the name of the firm. See further the notes to rule 14 above.

Foreign/external companies. A foreign company [343] must *(a)* continuously maintain at least one office in the Republic [344] and *(b)* register the address of its office, or its principal office if it has more than one office, in accordance with the provisions of the Companies Act 71 of 2008. [345] A foreign company may sue or be sued here, provided of course that the local court has jurisdiction over the company. [346] An external company [347] registered under the Companies Act 71 of 2008 is not a juristic person incorporated under that Act, and business rescue proceedings under s 129 of the Act are not available to such company. [348]

Foreign states. A foreign state is immune from the jurisdiction of the courts of the Republic. [349] A court is required to give effect to that immunity though the foreign state does not appear in the proceedings in question. [350] A foreign state may waive its immunity and may, in certain circumstances, be deemed to have waived its immunity. [351] A foreign state has no immunity in respect of proceedings relating to a commercial transaction [352] entered into by the foreign state, or an obligation of the foreign state which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the Republic. [353] Immunity does not extend to a contract between a foreign state and an individual if the contract was entered into in the Republic or the work is to be performed wholly or partly in the Republic; at the time when the contract was entered into the individual was a South African citizen or was ordinarily resident in the Republic; and at the time when the proceedings are brought the individual is not a citizen of the foreign state. [354]

A foreign state is not immune from the jurisdiction of the courts of the Republic in proceedings relating to the death or injury of any person or damage to or loss of tangible property caused by an act or omission in the Republic. [355] Immunity also does not extend to proceedings relating to any interest of the foreign state in, or its possession or use of, immovable property in the Republic; any obligation of the foreign state arising out of its interest in, or its possession or use of such property; or any interest of the foreign state in movable or immovable property, being an interest arising by way of succession, gift or *bona vacantia*. [356] If the property is being used for a diplomatic mission or consular post, the foreign state has immunity in respect of proceedings relating to the foreign state's title to, or its use or possession of the property. [357]

Except with the written consent of the state concerned, a court may not grant relief against a foreign state by way of interdict or order for specific performance or for the recovery of any movable or immovable property. The property of a foreign state shall not be subject to any process for its attachment in order to found jurisdiction, for the enforcement of a judgment or an arbitration award, or in an action *in rem*, for its attachment or sale. [358] The prohibition on the issue of process does not apply in respect of property which is for the time being in use or intended for use for commercial purposes. [359]

See further the notes s v 'Diplomatic representatives' above.

Fugitives from justice. In *Mulligan v Mulligan* [360] it was held [361] that at common law a fugitive from justice (i e one who is avoiding the processes of law through voluntary exile or hiding within the jurisdiction of the court) [362] is absolutely barred from bringing an action. [363] In *Harris v Rees* [364] it was held [365] that the principles enunciated in the *Mulligan* case had to be read against the background of s 34 of the Constitution which guaranteed a party the right of access to the courts, which should not be easily deviated from, and that the fact that an applicant is a fugitive was no more than a factor which a court may take into account in considering whether such applicant should be heard. This approach was echoed in *Nash v Mostert* [366] and *Courtney v Boshoff NO.* [367]

There is no objection to an action being brought against a fugitive from justice, and such a fugitive will have *locus standi in judicio* to defend a matter in which he is brought to court, by delivering pleadings and applying to amend his plea. [368] It has also been held that a fugitive from justice is entitled to apply for the rescission of a default judgment, in order to defend the action. [369]

In all matters, whether by way of action or application, the onus is on the plaintiff or applicant to allege and prove, on a balance of probabilities, that he has the requisite *locus standi* to institute the action or application. Where *locus standi* is simply denied, the onus of proof remains with the plaintiff or applicant. However, if the defendant or respondent is not satisfied with a mere denial but sets up a 'special defence', the onus of proof shifts from the plaintiff or applicant to the defendant or respondent. [370]

Government departments. In any action or other proceedings instituted against the State by virtue of the provisions of s 1 of the State Liability Act 20 of 1957, the executive authority of the department concerned must be cited as nominal defendant or respondent. [371]

Whenever any Minister or public official is cited in his official capacity in any legal proceedings in any court he must be cited by his official title and not by name. [372]

In the case of actions brought under the provisions of certain statutes, there are special officers of the State who are the proper persons to sue or be sued. Thus, under the Income Tax Act 58 of 1962 and the Value-Added Tax Act 89 of 1991 action is brought in the name of the Commissioner for the South African Revenue Service.

The Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 [373] regulates the position in regard to debt prescription periods and notice requirements in respect of causes of action against certain organs of state. The Act applies in respect of any debt which became due either before or after the commencement of the Act, [374] except if the debt had been extinguished by prescription before the commencement of the Act, or if legal proceedings had already been instituted prior to its commencement. [375] Proceedings already instituted continue as if the Act had not been passed. [376] A 'debt' for purposes of the Act is defined as any debt arising from any cause of action that arises from delictual, contractual or any other liability, including a cause of action relating to or arising from any act performed under or in terms of any law; or any omission to do anything which should have been done under or in terms of any law; and for which an organ of state is liable for the payment of damages. [377]

National and provincial government departments, municipalities, functionaries or institutions exercising a power or performing a function under the Constitution of the Republic of South Africa, 1996, or a provincial constitution, the South African Maritime Safety Authority, the South African Roads National Agency Limited and any person for whose debt an organ of state is liable, are all organs of state. [378]

Debts against an organ of state are now subject to the same rules regarding prescription as other debts. [379]

No legal proceedings for the recovery of a debt may be instituted against an organ of state unless the creditor has given the organ of state in question notice in writing of his intention to institute the legal proceedings in question. [380] However, the organ of state in question may consent in writing to the institution of the legal proceedings without notice, or upon receipt of a notice which does not comply with all the requirements set out in s 3(2). [381] The notice of intention to institute legal proceedings must be served on the organ of state within six months [382] from the date on which the debt became due [383] and it must briefly set out the facts

giving rise to the debt [384] and such particulars of such debt as are within the knowledge of the creditor. [385] A debt is not due until the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt, but the creditor must be regarded as having acquired such knowledge as soon as he could have acquired it by exercising reasonable care, unless the organ of state wilfully prevented him from acquiring such knowledge. [386]

If an organ of state relies on a creditor's failure to serve a notice, the creditor may apply for condonation of such failure. [387] The court may grant condonation if it is satisfied that the debt has not been extinguished by prescription; [388] if good cause exists for the failure by the creditor; [389] and if the organ of state was not unreasonably prejudiced by the failure. [390] If an application for condonation is granted, the court may grant leave to institute the legal proceedings in question on such conditions regarding notice to the organ of state as the court may deem appropriate. [391]

A notice of intention to institute legal proceedings must be served on an organ of state by delivering it by hand or by sending it by certified mail or by sending it by electronic mail or by transmitting it by facsimile [392] to the officer or person specified in s 4. [393] Where the notice was sent by electronic mail or facsimile, the creditor must, within seven days after the date upon which that notice was so sent, take all reasonable steps to ensure that the notice has been received by the officer or person to whom it was so sent or transmitted. [394] The creditor must also deliver by hand or send by certified mail a certified copy of the notice to the relevant officer or person, together with an affidavit indicating the date on which and the time at which, and the electronic mail address or facsimile number to which, the notice was sent and any proof that it was sent or transmitted; and setting out the steps taken to ensure that the notice had been received by the officer or person to whom it had been sent. [395] The affidavit must also state whether confirmation of the receipt of the notice has been obtained and, if applicable, the name of the officer or person who has given that confirmation. [396]

No process may be served upon an organ of state before the expiry of 60 days after the service of a notice of intention to commence legal proceedings has been served upon an organ of state, provided that if the organ of state repudiates in writing liability for the debt before the expiry of the said period, the creditor may at any time after such repudiation serve the process on the organ of state concerned. [397] However, premature service of process does not invalidate the process; it is merely regarded as having been served on the first day after the expiry of the requisite 60-day notice period. [398]

The Act makes special provision for the service of process upon the Ministers in charge of the South African Police Service,

the Correctional Services and the State Security Agency. Where the Minister of Police is the defendant or respondent, the process must be served

upon the national commissioner at the head office of the department [399] and upon the provincial commissioner of the province in which the cause of action arose. [400] A similar provision applies to process to be served upon the Minister of Correctional Services. [401] In the case of the Minister of State Security, the process must be served upon the Director-General of the State Security Agency at the head office of the department. [402]

The object of these provisions is, *inter alia,* to ensure that the organ of state is given sufficient information to enable it to investigate the question of its liability and to decide whether it should meet a claim before it is involved in the costs of legal proceedings. [403] In cases decided on similar provisions contained in the various acts and ordinances, now repealed, the courts have held that meticulous particulars are not required, nor is a meticulous setting out of the cause of action. It is sufficient that the notice sets out the facts and the damages alleged to have been sustained in such a way as to prevent the defendant from being taken by surprise and to put the defendant in a position to investigate the claim and to decide whether to compromise or to resist the claim, and the notice need not in terms set out the intention to claim such damages. [404] On the other hand it has been held that a notice that merely sets out the relief claimed is insufficient compliance because it does not give the would-be defendant the information that will enable it to decide what course to adopt. [405]

The provisions with regard to notice do not apply to proceedings designed to secure the liberty of a person unlawfully detained in police custody. [406]

Any process by which legal proceedings contemplated in s 3(1) of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 are instituted must be issued by the court in whose area of jurisdiction the cause of action arose, unless the organ of state in writing consents to the institution of legal proceedings in a different jurisdiction. [407]

The reputation of organs of state is not capable of being defamed and therefore they do not have standing to apply for an interdict prohibiting defamatory statements about them. [408]

Example: The defendant is the Minister of Home Affairs in his representative capacity, Hallmark Building, 232 Johannes Ramokhoase and Thabo Sehume Street, Pretoria.

Insolvents. An insolvent is not absolutely barred from bringing or defending actions; his rights in this connection are merely curtailed by the provisions of the Insolvency Act 24 of 1936. [409] In terms of s 23 an insolvent may personally sue or be sued in the following matters:

(a) any matter relating to status;

(b) in respect of any right in so far as it does not affect his estate, but this privilege does not entitle him to take proceedings the effect of which, if successful, might be to render abortive the sequestration; [410]

(c) actions arising after sequestration out of his following any profession or occupation, where he has entered into any service or has with his trustee's consent traded;

(d) actions for the recovery of any pension to which he may be entitled for work or service;

(e) actions for the recovery of damages for any defamation or personal injury; [411]

(f) actions arising from any delict committed by the insolvent after sequestration;

(g) actions for the review of proceedings in the insolvent estate; [412]

(h) actions against the trustee for maladministration. [413]

An insolvent may bring actions to recover for his estate assets that vest in the trustee if the trustee fails or refuses to do so, in which case the insolvent must join the trustee either as co-plaintiff, if he is willing, or as co-defendant if he is unwilling, and need not obtain the leave of the court to do so. [414] He may also, with the leave of the court, intervene to defend an action or claim which the trustee refuses to contest. [415]

The trustee is the legal representative of the insolvent estate, and is the proper person to sue or be sued in connection with matters pertaining to the estate. In such cases he should sue or be sued in his representative capacity, and not personally. [416]

When insolvency supervenes during the course of civil proceedings by or against the insolvent or while they are pending, the action must be stayed until the appointment of the trustee, [417] and then the trustee must be substituted on the record if the action is continued. [418] It is not necessary that the trustee should commence the action *de novo.* [419] This rule does not apply to such proceedings as may in terms of s 23 of the Insolvency Act be instituted by the insolvent for his own benefit, or against the insolvent.

An insolvent does not regain his full *persona standi in judicio* until he is rehabilitated. [420]

Insurers. In *Rand Mutual Assurance Co Ltd v Road Accident Fund* [421] the Supreme Court of Appeal, in criticizing the English common-law doctrine of subrogation which requires an insurer to sue in the name of the insurer, held that it does not accord with either South African constitutional values or the Roman-Dutch law of procedure. Although the judgment does not abolish the doctrine of subrogation, it makes it clear that the English rule in its stark form cannot be justified and that, unless the wrongdoer will be prejudiced in a procedural sense, courts may permit the insurer to proceed against the wrongdoer in its own name. [422]

Interdict proceedings. See the notes on interdicts s v 'Who may interdict' and 'Who may be interdicted' in Part D6 below.

Irrigation boards. Catchment management agencies, water user associations and bodies established in terms of s 102 of the National Water Act 36 of 1998 to implement international agreements relating to the management and development of water resources, are bodies corporate and may sue and be sued in their own names. [423]

Judges. Section 47(1) of the Superior Courts Act 10 of 2013 provides as follows:

> 'Except for an application made in terms of the Domestic Violence Act, 1998 (Act 116 of 1998), no civil proceedings by way of summons or notice of motion may be instituted against any judge of a Superior Court, and no subpoena in respect of civil proceedings may be served on any judge of a Superior Court, except with the consent of the head of that court or, in the case of a head of court or the Chief Justice, with the consent of the Chief Justice or the President of the Supreme Court of Appeal, as the case may be.'

Section 47(1) applies to civil proceedings by way of summons or notice of motion intended to be instituted against a judge

both in the judge's personal capacity and capacity as a judicial officer. [424]

See further the notes to s 47 in Volume 1 third edition, Part D.

Land and Agricultural Development Bank of South Africa. See the notes s v 'Banks' above.

Local authorities. In terms of s 151 of the Constitution of the Republic of South Africa, 1996, the local sphere of government consists of municipalities.

In terms of the Local Government: Municipal Systems Act 32 of 2000 municipalities are organs of state within the local sphere of government exercising legislative and executive authority within areas determined in terms of the Local Government: Municipal Demarcation Act 27 of 1998 and are accorded separate legal personality. In addition, the various provincial ordinances that deal with municipal affairs [425] have not been repealed and these provide that municipalities are corporate bodies that may sue or be sued in the name of the municipality concerned.

The Institution of Legal Proceedings against certain Organs of State Act 40 of 2002, [426] which came into operation on 28 November 2002, [427] repealed the Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970. The latter Act previously regulated the institution of all legal proceedings that had their origin in delict [428] brought against a provincial administration, local authority or an officer of any such body. [429]

In terms of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 local authorities are recognized as organs of state [430] and the procedures set out in the Act, therefore, apply in respect of all legal proceedings for the recovery of a debt against a local authority.

See further the discussion of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 s v 'Government departments' above.

Municipalities are barred from suing for damages in respect of defamatory statements alleged to have injured their reputations. [431]

Example: The defendant is the City of Johannesburg Metropolitan Municipality, a municipality as contemplated in s 2 of the Local Government: Municipal Systems Act 32 of 2000, care of the Municipal Manager, [432] Metro Centre, 158 Loveday Street, Braamfontein, Johannesburg.

Magistrates. Contrary to the position of judges of the superior courts, [433] magistrates enjoy no protection from being sued in either their personal or official capacities.

Married women. The common-law rule in terms of which a husband obtains the marital power over the person and property of his wife has been repealed. [434] The effect of the abolition of the marital power is to do away with the restrictions which the marital power placed on the capacity of a wife to contract and to litigate. [435] Both spouses in a marriage in community of property have the same powers with regard to the disposal of the assets of the joint estate, the contracting of debts which lie against the joint estate, and the management of the joint estate. [436] A spouse in a marriage in community of property may, with certain specified exceptions, [437] perform any juristic act with regard to the joint estate without the consent of the other spouse. [438] A spouse married in community of property generally [439] may not without the written consent of the other spouse institute legal proceedings against another person or defend legal proceedings instituted by another person. [440] However, a party to legal proceedings instituted or defended by a spouse may not challenge the validity of the proceedings on the ground of want of the consent of the other spouse. [441] If a debt is recoverable from a joint estate, the spouse who incurred the debt or both spouses jointly may be sued for that debt, and where a debt has been incurred for necessaries for the joint household, the spouses may be sued jointly or severally therefor. [442]

Members of Parliament. Members of the National Assembly and of the National Council of Provinces as well as members of the Cabinet are not liable to civil proceedings or damages for anything that they have said in, produced before or submitted to the Assembly or Council or any of their committees or anything revealed as a result of anything that they have said in, produced before or submitted to the Assembly or Council or any of their committees. [443]

The powers, privileges and immunities of Parliament and the National Council of Provinces, including their members, are extensively dealt with in the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004, which came into operation on 7 June 2004. [444]

Members of provincial legislatures. Members of provincial legislatures as well as the province's permanent delegates to the National Council of Provinces are not liable to civil proceedings or damages for anything that they have said in, produced before or submitted to the legislature or any of its committees or anything revealed as a result of anything that they have said in, produced before or submitted to the legislature or any of its committees. [445] The provisions of ss 2, 4, 5, 7–13, 18–22 and 25–7 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 apply *mutatis mutandis* to Provincial Legislatures and their members.

Mentally disabled persons. A person who has been declared by a competent court [446] to be of unsound mind, or to be incapable for some reason of managing his own affairs, [447] cannot sue or be sued without the assistance of a *curator ad litem.* If no *curator ad litem* has previously been appointed to him, or if a *curator* who has been appointed has not the power to bring or defend legal proceedings, application should be made for such appointment, or for the grant of the necessary powers.

Minors. [448] The Children's Act 38 of 2005 [449] repealed, *inter alia*, the Children's Act 33 of 1960, the Age of Majority Act 57 of 1972, the Children's Status Act 82 of 1987, the Guardianship Act 192 of 1993, and the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 with effect from 1 July 2007. [450]

A child, [451] whether male or female, becomes a major upon reaching the age of 18 years. [452] There is, therefore, no longer any difference in content between the concepts of 'child' and 'minor'. Both refer to a person under the age of 18 years.

In terms of s 14 of the Children's Act 38 of 2005 every child has the right to bring and to be assisted in bringing a matter to court, provided that the matter falls within the jurisdiction of that court. Section 14 does not limit a court in determining the manner in which a

child is to bring a case before it or the way in which the child should be assisted. The paramount consideration in determining such issues is the best interests of the child concerned. A request by a child to be assisted in legal proceedings by the child's own legal representative will, however, only be refused in exceptional circumstances. [453]

In legal proceedings by or against a minor, he must be assisted by a guardian. [454] If he has no guardian, a *curator ad litem* must be appointed to assist him. [455] Under the now repealed Guardianship Act 192 of 1993, the position was that where a minor had more than one guardian and the proceedings were between the minor and one of the guardians, or where there was a conflict between the minor and one of the guardians, the minor had to be assisted by the other guardian. It was only when the conflict extended to both guardians, that a *curator ad litem* had to be appointed to assist the minor. The Children's Act 38 of 2005 does not alter this principle, which, it is submitted, still applies.

The appointment of a *curator ad litem* has been dispensed with by the High Courts in a number of cases on the ground of urgency or necessity. [456] In these cases, however, the court acted in the exercise of its inherent power as upper guardian of all minors.

In terms of s 15 of the Children's Act 38 of 2005 the following persons may approach a competent court under circumstances where such person alleges that a right in the Bill of Rights [457] or that Act has been infringed or threatened: [458]

(a) a child who is affected by or involved in the matter to be adjudicated; [459]

(b) anyone acting in the interest of a child or on behalf of another person who cannot act in his own name;

(c) anyone acting as a member of, or in the interest of, a group or class of persons; and

(d) anyone acting in the public interest.

The above notes have to do with the question of how to cite a minor. The preliminary question must always arise: 'Who is the correct party to sue (or be sued)?' It is only where the minor is found to be personally entitled or obliged that the question of how to cite him arises. It may, however, be found that he is not the party entitled or obliged, and thus not the party to be sued. Thus, in certain cases, where a minor concludes a contract, he may be doing so as the agent of his father, and his father must be sued — not as representing the minor, but in his personal capacity. [460] For this reason, a father who sues as representing his minor child must make that fact clear in his summons. [461]

The citation of the minor may take either one of two forms. He may sue, or be sued,

(a) in the case of a minor above the age of seven years, in his own name 'assisted' by his guardian; [462] or

(b) in the name of his guardian 'representing him'. [463] In this latter case, it should be made perfectly clear that the guardian is acting in a representative capacity. [464]

Whichever method is adopted, the result is the same: it is the minor, not the guardian, who is the party to the suit. [465] If the minor, whether as plaintiff or as defendant, is unsuccessful, he and not his guardian is normally liable for the costs. [466]

It was formerly held that a guardian who litigated on his ward's behalf without the leave of the court would automatically have to pay the costs *de bonis propriis* if he lost the action. [467] The position today is that 'a guardian who institutes an unsuccessful action without the leave of the court will not necessarily be ordered to pay the costs *de bonis propriis*, and . . . a guardian who institutes an unsuccessful action with the leave of the court will not necessarily be exempt from such an order'. [468] Leave to litigate and liability for costs have nothing at all to do with one another, [469] and an order against a guardian to pay costs *de bonis propriis* results not from his failure in the action, but from the court's disapproval of his conduct in bringing or defending it. [470] Such an order will not be made unless the guardian acted *mala fide*, negligently or unreasonably. [471]

In terms of the Prescription Act 68 of 1969 minority no longer suspends the running of prescription. Section 13 of the Act provides that prescription is not complete before a year has elapsed after the day on which the minor attains his majority. [472] This means that where the relevant period of prescription is completed before the minor attains his majority, he will have a year within which to institute action for the recovery of the debt, calculated from the day he becomes a major. Should prescription be completed after the lapse of one year of his attaining majority, he will be afforded no further protection and his claim will lapse as from the date prescription was completed. [473] In *Shange v MEC for Education, KwaZulu-Natal* [474] it was held that: [475]

(a) in view of the provisions of s 28(2) of the Constitution of the Republic of South Africa, 1996, which protects the rights of children, the Children's Act 38 of 2008, and in particular s 17 thereof, which changed the age of majority from 21 to 18 years, must be read in such a manner as not to interfere with any accrued rights of a child;

(b) accordingly, on a proper interpretation of s 17, read with s 13(1) of the Prescription Act 68 of 1969, a child whose cause of action arose before the commencement of s 17 of the Childrens Act 38 of 2005 (i e 1 July 2007) was still entitled to the same period of time in which to institute his claim for damages as he would have had, had the age of majority not been changed.

In *Malcolm v Premier, Western Cape Government* [476] it was held that the word 'minor' in s 13(1)*(a)* of the Prescription Act 68 of 1969 means a person under the age of 18 and that the meaning applies only to claims arising after 1 July 2007.

The prescription of a minor's claim in terms of the Road Accident Fund Act 56 of 1996 is regulated exclusively by s 23 of that Act.

Examples:

(i) The plaintiff is AB, a minor female scholar born on 1 December 2007, residing at 30 Nana Sita Street, Pretoria, herein assisted by her father and natural guardian, CB, a major bank official, who resides at the said address.

(ii) The plaintiff is CB, a major bank official residing at 30 Nana Sita Street, Pretoria, herein acting in his capacity as father and natural guardian of AB, a minor female infant born on 1 December 2017, who resides at the said address.

Municipalities. See the notes s v 'Local authorities' and 'Government departments' above.

Mutual banks. Mutual banks are, in terms of the Mutual Banks Act 124 of 1993, juristic persons [477] capable of suing and being sued in their own names. The Building Societies Act 82 of 1986 and the Mutual Building Societies Act 24 of 1965 have both been repealed. [478] No person may now use in respect of any business a name or description that includes the words 'building society', or any derivative thereof, unless the business concerned is a mutual bank, a bank or a terminating mutual building society. [479] Every mutual bank is required to display in easily legible letters on every statement, notice, advertisement or letter published or issued to any member of the public by or on behalf of the mutual bank, its name and a statement of the fact that it is registered as a mutual bank under the Mutual Banks Act 124 of 1993. [480]

National House of Traditional Leaders. Members of the House are not liable to civil proceedings or damages for anything

that they have said in, produced before or submitted to the House or any of its committees or anything revealed as a result of anything that they have said in, produced before or submitted to the House or any of its committees. [481]

Negotiable instruments. Unless the plaintiff's title to sue appears *ex facie* the negotiable instrument sued upon, this fact must be alleged in the summons. [482] On the other hand, if it appears *ex facie* the instrument that the plaintiff has no title to sue, he cannot sue thereon. Thus, a party cannot sue on a promissory note if, being the payee, he has endorsed it to a bank for collection, and the endorsement remains uncancelled. [483]

Section 46 of the Bills of Exchange Act 34 of 1964 requires that notice of dishonour be given to the drawer and every indorser of a bill of exchange. The drawer and endorsers are discharged from their liability in terms of the bill upon a holder's failure to give due notice. [484] Notice of dishonour is, in certain circumstances, dispensed with. [485] In respect of bills of exchange, therefore, it is necessary to allege either that notice of dishonour has been given or that it has been dispensed with, in order to complete the cause of action. [486] If the facts alleged show that notice of honour was dispensed with in law, it is unnecessary to add these words. [487]

Parliament. In any civil proceedings against Parliament or the National Assembly or the National Council of Provinces, the provisions of the State Liability Act 20 of 1957 apply *mutatis mutandis*. [488] For the aforesaid purposes a reference in the State Liability Act to the executive authority of a department, must, where the proceedings are against —

(a) Parliament or the National Assembly or the National Council of Provinces, be construed as a reference to the Speaker or the Chairperson, or both of them, as the case requires;

(b) a committee, be construed as a reference to the chairperson of the committee. [489]

Partners. Provision is made in rule 14(2) that partners may sue or be sued in the name of the partnership. See the notes to rule 14 above, and see the second example s v 'Voluntary associations' below.

Pension Funds. Upon registration of a pension fund organization as contemplated in s 5(1)*(a)* of the Pension Funds Act 24 of 1956, such a fund becomes a body corporate capable of suing or being sued in its corporate name. [490] In *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* [491] it was held [492] that s 5(1)*(b)* of the Pension Funds Act 24 of 1956, on a proper interpretation thereof, confers legal personality on a fund contemplated in that section. The board of a pension fund established under the Pension Funds Act 24 of 1956 is not a juristic person. [493]

Police. See the notes s v 'Government departments' above.

Example: The defendant is the Minister of Police in his representative capacity, Wachthuis, 7th Floor, 231 Pretorius Street, Pretoria.

Political party. A political party has, in broad legal characterization, been described as 'a voluntary association where the relationship between the party and its members is regulated by contract, admittedly of a unique nature'. [494]

A political party that acts in the public interest, as well as the interest of its supporters who are residents and ratepayers in the area of jurisdiction of the municipality concerned, has the necessary *locus standi* under s 38 of the Constitution of the Republic of South Africa, 1996, to institute proceedings for the setting-aside of the transfer of municipal land. [495]

In *Democratic Alliance v Acting National Director of Public Prosecutions* [496] the Supreme Court of Appeal held [497] that the Democratic Alliance had *locus standi* to act in its own interests, as well as that of the public, to pursue an application for the review of a decision to discontinue the prosecution of the President of the Republic of South Africa, on the ground that the acting National Director of Public Prosecutions had unlawfully succumbed to political power in reaching that decision: it was in the public interest and of direct concern to political parties such as the Democratic Alliance to ensure, as parliamentary representatives of the public, that public institutions such as the National Prosecuting Authority acted in accordance with constitutional and legal prescripts. [498]

Post Office. South African Post Office SOC Ltd is a public company incorporated in terms of s 3 of the Post and Telecommunication-Related Matters Act 44 of 1958.

Example: The defendant is South African Post Office SOC Ltd (registration no 1991/005477/ 06), a public company incorporated in terms of s 3 of the Post and Telecommunication-Related Matters Act 44 of 1958 to conduct a postal service as defined in the Postal Services Act 124 of 1998, and which continues to exist by virtue of the provisions of s 3(1) of the South African Post Office SOC Ltd Act 22 of 2011, with its registered address at 350 Witch-Hazel Avenue, Eco Point, Eco Park Estate, Centurion, Pretoria.

Premier. There is no statute regulating the manner in which a provincial administration sues or is sued, but actions have been brought by [499] and against [500] the Premier (prior to 27 April 1994, the Administrator) acting as such on behalf of the Administration, as well as in the name of the Provincial Administration itself. [501] In any action or proceedings brought against a provincial department the executive authority of the department concerned must be cited as nominal defendant or respondent. [502] In *MEC, Western Cape Department of Social Development v BE obo JE* [503] Wallis JA stated: [504]

> 'The pleadings all refer to the MEC as the Minister, but that is an incorrect description. The executive council of a province is made up of the premier and the members appointed by the premier. See s 132 of the Constitution. The correct full title is member of the executive council, usually abbreviated to the acronym MEC. It appears to have become a practice in various provinces, including the Western Cape, to refer to the MECs as ministers, but it is legally incorrect and should not be followed in legal proceedings.'

See further the notes s v 'Government departments' above.

Prodigals. A person who has been declared to be a prodigal must be assisted in litigation. He may sue or be sued through his *curator bonis*, if one has been appointed with power to institute or defend proceedings: otherwise he must sue or be sued through a *curator ad litem* appointed for the purpose.

Professional bodies. The governing bodies of most of the professions have been incorporated by statute, and they can sue and be sued in their own names. These include: South African

Council for the Architectural Profession; [505] South African Council for the Quantity Surveying Profession; [506] South African Nursing Council; [507] South African Pharmacy Council; [508] the Health Professions Council of SA; [509] Engineering Council of SA; [510] the Property Practitioners Regulatory Authority; [511] South African Geomatics Council; [512] South African Council for Planners; [513] South African Council for the Property Valuers Profession; [514] South African Veterinary Council; [515] South African Council for the Project and Management Professions; [516] South African Council for the Architectural Profession; [517] the

Independent Regulatory Board for Auditors. [518] See further the notes s v 'Law societies' above.

Property practitioner. On 1 February 2022 the Estate Agency Affairs Act 112 of 1976 ('the old Act'), which regulated estate agents, was repealed by the Property Practitioners Act 22 of 2019 ('the new Act'). Under the new Act no one may act as a property practitioner without, amongst other things, having been issued with a Fidelity Fund certificate, [519] or receive remuneration or other payment in respect of or arising from the performance of any act referred to in s 1*(a)*(i), (ii), (iii) or (iv) of the Act without, at the time of the performance of the act, being in possession of a Fidelity Fund certificate. [520] Under the old Act no one was entitled to perform an act of an estate agent, [521] or receive remuneration or other payment for such an act, unless they had been issued with a valid fidelity fund certificate. [522] In *Signature Real Estate (Pty) Ltd v Charles Edwards Properties* [523] the appellant was not in possession of a fidelity fund certificate in its name at the time the disputed commission between it and the third respondent was earned. The appellant claimed, however, that it was entitled to be issued with the certificate, as it had complied with the requirements of the old Act, and that the reason the certificate in its possession contained a misdescription was due to an error on the part of the Board. The Board conceded this. The court *a quo*, relying on *Brodsky Trading 224 CC v Cronimet Chrome Mining SA (Pty) Ltd*, [524] held that the appellant was not entitled to claim commission in the circumstances. The court *a quo's* decision was in conflict with that in *Crous International (Pty) Ltd v Printing Industries Federation of South Africa,* [525] where Coppin J held a contrary view

in circumstances where the plaintiff estate agent company had complied with the legal requirements and the failure to issue a fidelity fund certificate was due to a technical glitch at the Board (i e in substance (though not form) the plaintiff was authorized by the Board to perform acts as estate agent for payment). The Supreme Court of Appeal, in overturning the order of the court *a quo*, held that the *Brodsky* case was clearly distinguishable and that the court *a quo*'s reliance on that decision was misconceived. [526] It held that the purpose of the old Act was served, that the public would have been protected against loss and, accordingly, that the appellant was entitled to its commission. [527]

A person who did not in any manner, directly or indirectly, hold himself out as a person who sells properties of others for commission, or advertised himself as a person who does so, did not fall within the definition of 'estate agent' in s 1*(a)* of the Estate Agency Affairs Act 112 of 1976. [528]

Provincial administration. See the notes s v 'Premier' and 'Government departments' above.

Provincial legislatures. In any civil proceedings against a provincial legislature or any of its committees, the provisions of the State Liability Act 20 of 1957 apply *mutatis mutandis*. [529] For the aforesaid purposes a reference in the State Liability Act to the executive authority of a department must, where the proceedings are against —

(a) a Provincial Legislature, be construed as a reference to the Speaker of the legislature;

(b) a committee of a provincial legislature, be construed as a reference to the chairperson of the committee. [530]

Public Service Act. See the notes s v 'Government departments' above.

Road Accident Fund. The Road Accident Fund (RAF), which was created by s 2 of the Road Accident Fund Act 56 of 1996, is a juristic person and the *ex lege* successor to the Multilateral Motor Vehicle Accidents Fund (MMF). [531] It was held that the RAF had *locus standi* to litigate as a defendant, without formally applying for its substitution as such in proceedings initiated against the MMF. [532]

Example: The defendant is the Road Accident Fund, a juristic person established in terms of s 2 of the Road Accident Fund Act 56 of 1996, with its principal place of business within the area of jurisdiction of the court situated at 38 Ida Street, Menlo Park, Pretoria. [533]

Sectional title schemes. With effect from the date on which any person other than the developer becomes an owner of a unit in a sectional title scheme, there is deemed to be established for that scheme a body corporate of which the developer and such person are members, and any person who thereafter becomes an owner of a unit in that scheme automatically becomes a member of that body corporate. [534] The body corporate of a sectional title scheme is a legal person [535] and is, subject to the provisions of the Sectional Titles Schemes Management Act 8 of 2011, responsible for the enforcement of the rules [536] of that scheme and for the control, administration and management of the common property for the benefit of all owners. [537] The body corporate has perpetual succession and is capable of suing and of being sued [538] in its corporate name [539] in respect of any contract entered into by it; [540] any damage to the common property; [541] any matter in connection with the land or building for which the body corporate is liable or for which the owners are jointly liable; [542] any matter arising out of the exercise of any of its powers or the performance or non-performance of any of its duties under the Sectional Titles Schemes Management Act 8 of 2011 or any rule; [543] and any claim against the developer in respect of the scheme if so determined by special resolution. [544] A body corporate does not have *locus standi* to act as plaintiff to recover damage caused by a wrongdoer to individual property or units in a scheme. [545]

Section 9(1) of the Sectional Titles Schemes Management Act 8 of 2011 provides that an owner may initiate proceedings on behalf of the body corporate in the manner prescribed in that section —

(a) when such owner is of the opinion that he and the body corporate have suffered damages or loss or have been deprived of any benefit in respect of a matter mentioned in s 2(7) of the Act, and the body corporate has not instituted proceedings for the recovery of such damages, loss or benefit; or

(b) when the body corporate does not take steps against an owner who does not comply with the rules.

Such owner must serve a written notice on the body corporate calling on the body corporate to institute the proceedings within one month from the date of service of the notice, and stating that if the body corporate fails to do so, an application to the High Court [546] under s 9(2)*(b)* will be made for the appointment of a *curator ad litem* for the body corporate for the purpose of instituting and conducting proceedings on behalf of the body corporate. [547]

If a creditor of a body corporate has obtained judgment against the body corporate and such judgment, notwithstanding the issue of a writ, remains unsatisfied, the judgment creditor may apply to the High Court [548] that gave the judgment, for the joinder of the members of the body corporate in their personal capacities as joint judgment debtors in respect of the judgment debt. [549] Upon such joinder the judgment creditor may recover the amount of the judgment debt still outstanding from the members who have been joined on a pro rata basis in proportion to their respective quotas or a rule made in terms of s 10(2) of the Sectional Titles Schemes Management Act 8 of 2011. [550] Any member who has paid the contributions due by him in terms of s 3(1)*(c)* of the Sectional Titles Schemes Management Act 8 of 2011 to the body corporate in respect of the same

debt prior to the judgment may, however, not be joined as a joint judgment debtor in respect of the judgment debt. [551] No debt or obligation arising from any agreement between the developer and any other person is enforceable against the body corporate. [552]

Section 8 of the Sectional Titles Schemes Management Act 8 of 2011 regulates the relationship between a trustee and body corporate. It reads as follows:

> '(1) Each trustee of a body corporate must stand in a fiduciary relationship to the body corporate.
>
> (2) Without derogating from the generality of the expression "fiduciary relationship", the provision of subsection (1) implies that a trustee —
>
> *(a)* must in relation to the body corporate act honestly and in good faith, and in particular —
>
> (i) exercise his or her powers in terms of this Act in the interest and for the benefit of the body corporate; and
>
> (ii) not act without or exceed those powers; and
>
> *(b)* must avoid any material conflict between his or her own interests and those of the body corporate, and in particular —
>
> (i) not receive any personal economic benefit, direct or indirect, from the body corporate or from any other person; and
>
> (ii) notify every other trustee of the nature and extent of any direct or indirect material interest which he or she may have in any contract of the body corporate, as soon as such trustee becomes aware of such interest.
>
> (3) A trustee of a body corporate who acts in breach of his or her fiduciary relationship, is liable to the body corporate for —
>
> *(a)* any loss suffered as a result thereof by the body corporate; or
>
> *(b)* any economic benefit received by the trustee by reason thereof.
>
> (4) Except as regards the duty referred to in subsection (2)*(a)*(i), any particular conduct of a trustee does not constitute a breach of a duty arising from his or her fiduciary relationship to the body corporate if such conduct was preceded or followed by the written approval of all the members of the body corporate where such members were or are cognisant of all the material facts.'

Example: The plaintiff is, in terms of s 2(7) of the Sectional Titles Schemes Management Act 8 of 2011, the Body Corporate of the AB Scheme, no SS444664/16, a building divided into sectional title units in terms of the Sectional Titles Act 95 of 1986, with its place of business at 30 Madiba Street, Pretoria.

Sheriff or deputy sheriff. The State cannot be held liable for any loss or damage arising out of any act or omission by a sheriff or his deputy sheriff. [553] A sheriff or his deputy sheriff may not perform any functions assigned to a sheriff by or under any law unless the sheriff is the holder of a fidelity fund certificate and he obtains professional indemnity insurance to the satisfaction of the South African Board for Sheriffs to cover any liability which he may incur in the course of the performance of his functions. [554]

South African Human Rights Commission. In terms of s 13(3)*(b)* of the South African Human Rights Commission Act 40 of 2013 the Commission is competent to bring proceedings in a competent court or tribunal in its own name, or on behalf of a person or a group or class of persons.

SPCA. The National Council of Societies for the Prevention of Cruelty to Animals, the legal successor to the SPCA National Council of Southern Africa, which was incorporated under the Companies Act 61 of 1973 as an association not for gain, [555] is a juristic person [556] whose objects include the control and co-ordination of societies for the prevention of cruelty to animals. [557] The Council is empowered to defend legal proceedings instituted against it and to institute legal proceedings connected with its functions, including proceedings to prohibit the commission by any person of a particular kind of cruelty to animals, as well as to assist a society in connection with legal proceedings against or by it. [558]

A society for the prevention of cruelty to animals registered in terms of s 8 of the Societies for the Prevention of Cruelty to Animals Act 169 of 1993 may defend legal proceedings instituted against it and may institute legal proceedings connected with its functions, including, but not limited to, proceedings to prohibit the commission by any person of a particular kind of cruelty to animals. [559]

The name of a non-profit company, irrespective of its form or language, must end with the expression 'NPC'. [560]

Statutory bodies. There are many bodies which owe their existence to special Acts of Parliament, and in many cases these bodies are endowed by the legislature with corporate status so that they can sue and be sued in their own names. It is not possible to give an exhaustive list of all such bodies which are not mentioned under other headings. In the case of all these bodies the applicable Acts must be looked to in order to fix the status of the bodies.

Syndicates. See the notes s v 'Voluntary associations' below, and see the notes to rule 14 above.

Transnet SOC Limited and PRASA. The South African Transport Services Act 65 of 1981 repealed the Railways and Harbours Control and Management (Consolidation) Act 70 of 1957. In terms of the former Act, the South African Transport Services, a 'commercial enterprise of the State', succeeded the South African Railways and Harbours Administration. [561]

Notwithstanding that it was not a separate legal person, [562] all legal proceedings to which the South African Transport Services ('SATS') was a party had to be brought by or against it in the name 'South African Transport Services' [563] and it was empowered to sue or be sued in any legal proceedings of a civil nature. [564] In terms of s 64(3) of the South African Transport Services Act 65 of 1981 it was a prerequisite for the enforcement of any claim against SATS that it be lodged in writing with SATS within three months of the date upon which it became due.

By s 2 of the Legal Succession to the South African Transport Services Act 9 of 1989 a public company, Transnet Limited ('Transnet'), was created. [565] Transnet became the legal successor to SATS on 1 April 1990. [566]

Transnet is not an organ of state for purposes of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002. [567]

Any reference to SATS, its predecessors or the general manager thereof in any law, contract, a register or record created in terms of a statute or other document must be construed as a reference to Transnet or its managing director, respectively. [568]

In terms of s 22(1) of the Legal Succession to the South African Transport Services Act 9 of 1989, as amended by the Legal Succession to the South African Transport Services Amendment Act 38 of 2008, a juristic person, the Passenger Rail Agency of South Africa ('PRASA'), was established to provide rail commuter services within, to and from the Republic in the public interest. [569]

The Legal Succession to the South African Transport Services Act 9 of 1989 repealed s 64(3) of the South African Transport Services Act 65 of 1981 and did not replace this provision with any similar general time limit for the lodging of claims

against Transnet or PRASA. [570]

Trusts. A trust is not a legal *persona* but a legal institution, *sui generis*. [571] The trustee is the owner of the trust property for purposes of administration of the trust, but *qua* trustee he has

no beneficial interest therein. [572] The proper person to act in legal proceedings on behalf of a trust is the trustee and not a beneficiary of the trust. [573] In legal proceedings trustees must act *nomine officii* and cannot act in their private capacities. [574] Where a trustee, not authorized by the Master of the High Court to act as such in terms of s 6(1) of the Trust Property Control Act 57 of 1988 commences legal proceedings on behalf of the trust, those proceedings are a nullity. [575] If the trustees litigate in their representative capacity judgment cannot be given against them personally and neither does a judgment in their favour enure for their personal benefit, since it accrues to the fund of the trust. [576]

Trust beneficiaries are permitted to bring actions in their own right against the trustee for maladministration of the trust estate, or for failing to pay or transfer to beneficiaries what is due to them under the trust, or transferring to one beneficiary what is not due to him. [577] A trust beneficiary can apply for the removal of a trustee of a trust. [578]

Both at common law and under s 20(1) of the Trust Property Control Act 57 of 1988 the founder of a trust who is not a trustee or beneficiary, and who has not reserved the right to enforce, vary or revoke the terms of the trust, has no legal standing in relation to its affairs apart from a right to take steps to have the trust declared invalid. Having transferred the trust property to the trustees, he is *functus officio*, and has no further part to play. [579]

If a trust has more than one trustee, all the trustees must be joined in suing and all must be joined when action is instituted against a trust. [580]

It has been held that the provisions of the Collective Investment Schemes Act 45 of 2002, read together with the Deed prescribed by s 97 of that Act, did not deprive a trustee of its common-law *locus standi* to vindicate property held by it in the trust. [581]

Example: The plaintiffs are AB, CD and EF, major [582] male public accountants and auditors, duly registered in terms of the Auditing Profession Act 26 of 2005, carrying on business at 43 Stanza Bopape Street, Pretoria, herein acting in their capacity as the only trustees of the Moonlight Trust (registration no T38614/99). [583]

Unincorporated bodies. See the notes s v 'Voluntary associations' below, and see the that to rule 14 above.

Universities. See the notes s v 'Educational institutions' above.

***Universitas personarum*.** See the notes s v 'Voluntary associations' below, and see the notes to rule 14 above.

Voluntary associations. The common-law rule is that an association of natural persons which has not its own legal personality cannot, as a general rule, sue or be sued in its own name, either directly or indirectly through the members of the executive in their representative capacity. [584] A person wishing to sue such a body must either join all the individual members of the association [585] or must sue the actual persons who contracted or committed the delict in their personal capacities. [586]

The position is now governed by the provisions of rule 14, which enable associations to sue or be sued in their own names. See further the notes to rule 14 above.

There are certain exceptions to the normal common-law rule, in which cases reliance on rule 14 would be unnecessary. These are as follows:

(a) An association may sue or be sued in its own name if its constitution, regulations or by-laws provide that actions may be brought in the name of the association as such. Similarly, if it is provided that action may be brought in the name of specified office-bearers in their capacity as such, the association may sue or be sued through such representatives. [587] Where an association institutes motion proceedings, it must appear that the person who makes the application on behalf of that association is duly authorized by it to do so. [588]

(b) An association that, by its constitution, provides that it has the capacity to acquire rights and obligations in its own name, and that has perpetual succession, can acquire legal personality and become what is known as a *universitas personarum*. [589] The special sanction of the State is not always required before an association can become a universitas; whether an association has acquired legal personality depends upon its nature, its constitution, its objects and activities. [590] A society or body which has no constitution is not a universitas and cannot sue or be sued in its own name. [591] The right to hold property in its own name has been held to be one of the features of a universitas. [592]

A *universitas personarum* formed before 31 December 1939 may sue or be sued in its own name or, in a proper case, in the name of its executive. [593] But no association formed in the Republic after that date for the purpose of carrying on any business that has for its object the acquisition of gain by the association or the individual members thereof can be a company or other form of body corporate, unless it is registered as a company under the Companies Act 71 of 2008, or is formed in pursuance of some other law, or was, before 31 May 1962, formed in pursuance of Letters Patent or Royal Charter. [594]

The provincial 'branches' of a sect which is a *persona* in law are not themselves *personae*. [595]

If the committee of an unincorporated body is authorized to expel members or to elect them, an action by a member aggrieved by his expulsion or non-election must be brought against the committee, not against the general body of members nor against trustees authorized to bring or defend actions on behalf of the body. [596]

If the funds of a church are by constitution vested in the congregation, any member of the congregation may base an action against the *kerkraad* (the governing and administering body) upon an allegation that such funds are being diverted from their legitimate use. [597] The right of a person to an office to which he is elected is a personal right, and if his office is wrongfully usurped, and he is prevented from performing his functions, he must sue as an individual. [598]

Members of a political party (which is a voluntary association) do not normally enjoy any proprietary interests in the party. Consequently, if a member of a political party wants to prevent his expulsion from the party by means of injunction, such member must demonstrate that he stands to lose some proprietary interest if he is expelled from the party, absent which a court has no jurisdiction to interfere with the expulsion. [599]

(c) Associations may acquire legal personality under the provisions of either a general Act of Parliament, such as the Companies Act 71 of 2008, or a special Act, such as those which create the various universities in South Africa. [600] In all

such cases the incorporating statute must be looked at to ascertain the proper party to sue or be sued.

Examples:

(i) The plaintiff is the AB Football Club, an association with perpetual succession and authorized by its constitution to acquire, own and dispose of property apart from its members and to take or defend itself against legal action, with its main place of business situated at AB Football Club Stadium, 999 Athlone Street, Pretoria.

(ii) The defendant is AB Florist, a firm trading at 111 Flower Street, Pretoria. [601]

Wildlife Society. The Wildlife and Environment Society of South Africa, a non-profit company, [602] has been in existence since 1926 and works towards achieving the conservation of the Earth's limited resources through lobbying, environmental education, conservation campaigns and latterly, through litigation. [603] In *Wildlife Society of Southern Africa v Minister*

of Environmental Affairs and Tourism [604] the *locus standi in judicio* of the Society to apply for a *mandamus* compelling the State to comply with its obligations, imposed by statute, to protect the environment was challenged. By the time of the hearing of the application the respondents had conceded that the applicant had the necessary *locus standi*. Nevertheless, the court remarked, in an *obiter dictum*, that 'there is . . . much to be said for the view that, in circumstances where the *locus standi* afforded persons by s 7 of the Constitution [605] is not applicable and where a statute imposes an obligation upon the State to take certain measures in order to protect the environment in the interests of the public, then a body such as the first applicant, with its main object being to promote environmental conservation in South Africa, should have *locus standi* at common law to apply for an order compelling the State to comply with its obligations in terms of such statute'. [606]

Example: The plaintiff is the Wildlife and Environment Society of South Africa NPC, [607] a company not for gain, duly registered and incorporated in terms of the Statutes of the Republic of South Africa, with registered address and principal place of business at 1 Karkloof Road, Howick, KwaZulu-Natal.

1 *Van Heerden v Du Plessis* 1969 (3) SA 298 (O); *Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd intervening)* 1994 (2) SA 363 (C) at 369J–370A; *Friends of the Sick Association v Commercial Properties (Pty) Ltd* 1996 (4) SA 154 (D). See also Fareed Moosa 'Non-existent plaintiff: Dealing with misdescriptions in citations' 2013 (September) *De Rebus* 22. It is well established that a summons issued by a company after deregistration is a nullity (*Broughton v Manicaland Air Services (Pvt) Ltd* 1972 (4) SA 458 (R) at 459E; *Silver Sands Transport (Pty) Ltd v SA Linde (Pty) Ltd* 1973 (3) SA 548 (W) at 549C–E; *Pieterse v Kramer NO* 1977 (1) SA 589 (A) at 597H and 601H; *Village Freezer t/a Ashmel Spar v CA Focus CC* 2012 (6) SA 80 (ECG) at 87A).

2 As to which, see Volume 1 third edition, Part D.

3 For the citation of the relevant division of the High Court in the heading of a combined summons, see Directive 3/2004 issued by the Chief Justice under GN 148 of 28 February 2014 (*GG* 37390 of 28 February 2014), which is reproduced in Volume 3, Part E1.

4 See *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1991 (3) SA 787 (T) at 791F.

5 In *Alberts v Minister of Justice and Correctional Services* 2022 (6) SA 59 (SCA) the appeal arose from a combined summons sued out by 138 plaintiffs in the High Court under rule 17(2)*(a)* prior to its amendment with effect from 1 February 2022. Each of them claimed damages from the Minister of Justice and Correctional Services arising from an alleged assault on each particular plaintiff at St Albans Medium B Correctional Centre on 1 and 2 March 2014. The assaults were alleged to have been perpetrated by Correctional Services officials employed there by the Minister. They were alleged to have used batons, hands and feet to beat, slap and kick the plaintiffs. Different injuries and *sequelae* were pleaded for each plaintiff and each of them claimed R500 000 by way of general damages. The plaintiffs annexed 138 separate sets of particulars of claim to the combined summons. That prompted the Minister to enter a special plea which, *inter alia*, raised a defence that a combined summons was defined in rule 1 as a summons with a statement of claim annexed thereto. If one had regard to Form 10 of the First Schedule to the rules, a summons had to have annexed to it 'a set of Particulars of Claim'. Because 138 sets of particulars of claim were attached to the summons, the summons was irregular as not complying with Form 10. The High Court upheld the special plea and dismissed the claims. In upholding the plaintiffs' appeal against the order of the High Court, the Supreme Court of Appeal stated (*per* Gorven JA):
'[7] I see no reason why, when a number of documents containing the particulars in respect of each plaintiff's claim are annexed, this should result in the dismissal of all of the claims. After all, if a single, composite set of particulars had been annexed, the present action would simply include paragraphs describing each plaintiff in turn. The other 13 paragraphs which are . . . virtually identical, could then follow one after the other. It may be that the manner in which the particulars of claim have been annexed is unwieldy, but it is not irregular. Of course, this should not be understood as encouraging the practice. It must be said that, in argument before us, the Minister, while not abandoning this point, indicated that it was not being pressed. In my view this was prudent.
[8] In any event, an overly formal approach to pleadings has always been discouraged. It is generally only where there is prejudice to a litigant that a different approach is taken by our courts . . . No question of prejudice is raised in the present matter. If any irregularity arose, therefore, it is not a fatal one and could be condoned in the discretion of the court. It is certainly no basis for dismissing the claims as was done in the High Court.'

6 Rule 41A(2)*(a)*.

7 Rule 41A(2)*(c)*.

8 Rule 41A(2)*(d)*.

9 Rule 41A(4)*(c)*.

10 *Nasionale Aartappel Koöperasie Bpk v Price Waterhouse Coopers Ing* 2001 (2) SA 790 (T).

11 For the citation of the relevant division of the High Court in the heading of a simple summons, see Directive 3/2004 issued by the Chief Justice under GN 148 of 28 February 2014 (*GG* 37390 of 28 February 2014), which is reproduced in Volume 3, Part E1.

12 *Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd and Another (No 1)* 2010 (1) SA 627 (C) at 629F–H. In *Standard Bank of South Africa Ltd v Dawood* 2012 (6) SA 151 (WCC) the full court held (at 160A–B) that it was not impermissible or irregular to use a combined summons in matters of this kind. See also *Absa Bank Ltd v Janse van Rensburg* 2013 (5) SA 173 (WCC) at 177C–E.

13 *Volkskas Bank Ltd v Wilkinson* 1992 (2) SA 388 (C) at 395A; *ABSA Bank Ltd v Studdard* (unreported, GSJ case no 2011/24206 dated 13 March 2012) at paragraph 10.

14 *B W Kuttle & Association Inc v O'Connell Manthe & Partners Inc* 1984 (2) SA 665 (C) at 668C; *ABSA Bank Ltd v Studdard* (unreported, GSJ case no 2011/24206 dated 13 March 2012) at paragraph 10.

15 *B W Kuttle & Association Inc v O'Connell Manthe & Partners Inc* 1984 (2) SA 665 (C) at 668B–D; *ABSA Bank Ltd v Studdard* (unreported, GSJ case no 2011/24206 dated 13 March 2012) at paragraph 8; *Standard Bank of South Africa Ltd v Dawood* 2012 (6) SA 151 (WCC) at 156E–F. In the latter case it was remarked (at 157A) that:
'Nowadays . . . the simple summons can no longer be regarded as merely "a label to the claim", at least not in claims where the NCA is applicable. This is so . . . due to the "myriad allegations which a plaintiff is [now] required to make regarding NCA compliance where the statute is applicable and compliance with the constitutional imperatives prescribed by s 26(1) of the Constitution".'
See also *Absa Bank Ltd v Janse van Rensburg* 2013 (5) SA 173 (WCC) at 177A–C.

16 *B W Kuttle & Association Inc v O'Connell Manthe & Partners Inc* 1984 (2) SA 665 (C) at 668B–D; *ABSA Bank Ltd v Studdard* (unreported, GSJ case no 2011/24206 dated 13 March 2012) at paragraph 10.

17 *ABSA Bank Ltd v Studdard* (unreported, GSJ case no 2011/24206 dated 13 March 2012) at paragraphs 9–10.

18 *Volkskas Bank Ltd v Wilkinson* 1992 (2) SA 388 (C) at 398A; *ABSA Bank Ltd v Studdard* (unreported, GSJ case no 2011/24206 dated 13 March 2012) at paragraphs 6 and 10–14 and the authorities referred to therein; *Absa Bank Ltd v Janse van Rensburg* 2013 (5) SA 173 (WCC) at 176F–180E. In the latter case the full court stated the following (at 180H–181B):
'Apart from the authorities and precedents referred to above, there are important considerations of principle and policy supporting such an approach. In this regard it should be borne in mind that the purpose of a simple summons is not merely to inform the defendant of the nature of the claim being instituted by the plaintiff, but also — and perhaps more importantly — to enable the court "to decide whether

judgment should be granted". More recently, this latter requirement has assumed added importance in the light of the constitutional and statutory need for judicial oversight in matters involving the NCA, especially where the home of debtors are concerned. There is no doubt in my mind that this function can be more readily performed if copies of the relevant documents (including underlying agreements on which the claims are based) were to be attached to the simple summons.'

19 *ABSA Bank Ltd v Studdard* (unreported, GSJ case no 2011/24206 dated 13 March 2012) at paragraphs 15–27. In this case, which was an application for default judgment where the required documents were not attached to the simple summons, Wepener J postponed the application in order for the plaintiff to correct the defect. Costs incurred as a result of the defect were disallowed.

20 *Icebreakers No 83 (Pty) Ltd v Medicross Healthcare Group (Pty) Ltd* 2011 (5) SA 130 (KZD) at 131F–H and 134E–G; *Absa Bank Ltd v Janse van Rensburg* 2013 (5) SA 173 (WCC) at 175G–176F and 180D.

21 Rule 31(2)*(a)*; and see *Consolidated Fish Distributors (Pty) Ltd v Sargeant, Jones, Valentine & Co* 1966 (4) SA 427 (C) at 428G–H.

22 Rule 41A(2)*(a)*.

23 Rule 41A(2)*(c)*.

24 Rule 41A(2)*(d)*.

25 Rule 41A(4)*(c)*.

26 See for example *Pietpotgietersrust White Lime Co v Sand & Co* 1916 TPD 687; *B W Kuttle & Association Inc v O'Connell Manthe and Partners Inc* 1984 (2) SA 665 (C) at 668; *Stafford v Special Investigating Unit* 1999 (2) SA 130 (E) at 137H–J.

27 *Kikillus v Susan* 1955 (2) SA 137 (T); *Marais v Munro & Co Ltd* 1957 (4) SA 53 (E); *Rieckhoff v Jacobs* 1967 (1) SA 680 (W).

28 *SA Cooling Services (Pty) Ltd v Church Council of the Full Gospel Tabernacle* 1955 (3) SA 541 (N) at 543C.

29 GN R1272 of 17 November 2017 in *GG* 41257 of 17 November 2017.

30 2006 (2) SA 264 (SCA) at 277C–E.

31 2011 (4) SA 314 (GNP).

32 2012 (6) SA 166 (WCC).

33 At 169D–E.

34 2006 (2) SA 264 (SCA) at 277C–E.

35 At 169H.

36 2012 (6) SA 151 (WCC).

37 At 165B–F.

38 The notice approved and accepted by Madondo J in *FirstRand Bank Ltd v Soni* 2008 (4) SA 71 (N) at 78H is, in view of the wording rule 46(1)*(a)*(ii) and the present positive law, too limited.

39 2011 (6) SA 111 (WCC) at 127C–F.

40 2010 (6) SA 439 (SCA) at 455C–G. In *Sebola v Standard Bank of South Africa Ltd* 2012 (5) SA 142 (CC) at 159H–168F the Constitutional Court qualified the decision in the *Rossouw* case. See further the notes to rule 32 s v 'Summary judgment under the National Credit Act 34 of 2005 ("the NCA")' below.

41 See also *Standard Bank of South Africa Ltd v Bekker and Another and Four Similar Cases* 2011 (6) SA 111 (WCC) at 129F.

42 2019 (3) SA 341 (CC).

43 At 359C–360E (footnotes omitted).

44 *Author's note:* The Alienation of Land Act 68 of 1981.

45 *Author's note:* See s 3*(e)*(ii) of the NCA.

46 *Author's note: Nkata v FirstRand Bank Ltd* 2016 (4) SA 257 (CC).

47 *Burglar Proof Gate & Fence Co Ltd v Venite Construction (Pty) Ltd* 1977 (1) SA 708 (W); *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) at 692; and see *Wedge Steel (Pty) Ltd v Wepener* 1991 (3) SA 444 (W) at 446H.

48 See *C & T Products (Pty) Ltd v MH Goldschmidt (Pty) Ltd* 1981 (3) SA 619 (C). The Usury Act 73 of 1968 was repealed by s 172(4)*(a)* of the National Credit Act 34 of 2005 with effect from 1 June 2006. Item 5 of Schedule 3 of the National Credit Act provides that the maximum annual finance rate set in terms of the Usury Act and in effect immediately before the effective date (i e 1 June 2006) continues in force despite the repeal of the Usury Act until the Minister (i e the member of the Cabinet responsible for consumer credit matters) first prescribes a maximum rate of interest in terms of s 105. Section 105 came into operation on 1 June 2007 (*GG* 28824 of 11 May 2006).

49 *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC* 2011 (3) SA 511 (SCA) at 523I–526H.

50 Voet 22 1 10: *Balliol Investment Co (Pty) Ltd v Jacobs* 1946 TPD 269; *Standard Bank of South Africa Ltd v Lotze* 1950 (2) SA 698 (C); *Turner and Wright v Versatile Pump and Foundry Works* 1953 (3) SA 556 (T); *Trust Bank van Afrika Bpk v Van der Walt NO* 1972 (3) SA 166 (C) at 169G; *Bellairs v Hodnett* 1978 (1) SA 1109 (A) at 1145D–H; *Commissioner for Inland Revenue v First National Industrial Bank Ltd* 1990 (3) SA 641 (A) at 652 and 654; *Sasria Ltd (formerly South African Special Risks Insurance Association) v Certain Underwriters at Lloyds* 2002 (4) SA 474 (SCA) at 478B–C; *Scoin Trading (Pty) Ltd v Bernstein NO* 2011 (2) SA 118 (SCA) at 121C–G; *Mokala Beleggings v Minister of Rural Development and Land Reform* 2012 (4) SA 22 (SCA); *Crookes Brothers Ltd v Regional Land Claims Commission, Mpumalanga* 2013 (2) SA 259 (SCA) at 268A–B.

51 See, for example, rule 31(6) of the standard management rules contemplated in s 35(2) (now repealed) of the Sectional Titles Act 95 of 1986 which authorizes the trustees to charge interest on arrear amounts at such rate as they may from time to time determine. In *Mitchell v Beheerliggaam RNS Mansions* 2010 (5) SA 75 (GNP) it was held (at 78I–79F and 79H–I) that rule 31(6) authorized the charging of compound interest on unpaid levies and interest.

52 *Xoyeya v Watruss and Winter* 1923 EDL 310.

53 1988 (1) SA 290 (A) at 298G–I, overruling *Stroebel v Stroebel* 1973 (2) SA 137 (T). See also *Standard Bank of South frica Ltd v Oneanate Investments (Pty) Ltd (in liquidation)* 1998 (1) SA 811 (SCA) at 827G–H. In the latter case it was held (at 828I) that the practice of compounding interest does not result in the interest losing its character.

54 In *Structured Mezzanine Investments (Pty) Ltd v Davids* 2010 (6) SA 622 (WCC) at 629D–H it was held, *inter alia*, that:

(a) a court will not lightly interfere with an interest rate upon which the parties have agreed;

(b) although parties to a contract are at liberty to agree on a rate of interest peculiar to the risk involved and the peculiar circumstances of the parties, interest which is proved to be extortionate or usurious cannot be claimed by a creditor;

(c) the onus is on the debtor to prove that the particular interest rate is too high and should not be enforced by a court;

(d) in determining whether a rate of interest is usurious, and thus contrary to public policy, a court will take all relevant circumstances into consideration, such as the rate of interest which is applied in the economy at the time, the risk involved in the transaction, the period of the loan, the amount lent, the relevant positions of the parties and the circumstances existing at the time of the conclusion of the contract.

55 In order to become entitled to a rate of interest under this section it must be alleged, or at least appear by inference, that there was no governing rate of interest whether 'by any other law or a trade custom or in any other manner' (*UAL Leasing Corporation Ltd v Frew* 1977 (4) SA 249 (W) at 254C). See also *List v Jungers* 1979 (3) SA 106 (A) at 124D and *Basson v Hanna* 2017 (3) SA 22 (SCA) at 27E–F.

56 Section 1(3) of the Act defines *(a)* 'repurchase rate' as 'the rate at which banks borrow rands from the South African Reserve Bank', and *(b)* 'South African Reserve Bank' as 'the central bank of the Republic regulated in terms of the South African Reserve Bank Act, 1989 (Act 90 of 1989)'.

57 Accessible at https://www.werksmans.com/legal-updates-and-opinions/there-is-a-curious-lacuna-in-our-law-pertaining-to-prescribed-rates-of-interest/. See also Patrick Bracher 'Prescribed rate of interest is 11,75% from 1 July 2023' accessible at https://www.financialinstitutionslegalsnapshot.com/2023/06/prescribed-rate-of-interest-is-11-75-from-1-july-2023/.

58 Thus, for example, under GN 461 of 22 April 2016 (*GG* 39943 of 22 April 2016) the published rate of interest was 10,50%. Under GN 924 of 1 September 2017 (*GG* 41082 of 1 September 2017) it was 10,25%. Under GN 435 of 20 April 2018 (*GG* 41581 of 20 April 2018) it was 10%. Under GN R25 of 22 January 2019 (*GG* 42179 of 22 January 2019) it was 10,25%. Under GN R1212 of 20 September 2019 (*GG* 42713 of 20 September 2019) it was 10,00%. Under GN R397 of 27 March 2020 (*GG* 43146 of 27 March 2020) it was 9,75%. Under GN R713 of 26 June 2020 (*GG* 43475 of 26 June 2020) it was 8,75%. Under GN R987 of 11 September 2020 (*GG* 43703 of 11 September 2020) it was 7,75%. Under GN R1067 of 9 October 2020 (*GG* 43781 of 9 October 2020) it was 7,25%. Under GN 2345 of 5 August 2022 (*GG* 47197 of 5 August 2022) it was 7,75%. This picture is, however, incorrect and incomplete as pointed out by Jennifer Smit 'Article of interest — a curious lacuna in our law on prescribed rates of interest' dated 14 September 2022 accessible at https://www.werksmans.com/legal-updates-and-opinions/there-is-a-curious-lacuna-in-our-law-pertaining-to-prescribed-rates-of-interest/. See also Patrick Bracher 'Prescribed rate of interest is 11,75% from 1 July 2023' accessible at https://www.financialinstitutionslegalsnapshot.com/2023/06/prescribed-rate-of-interest-is-11-75-from-1-july-2023/. The interest rates published by the Cabinet member responsible for the administration of justice in the *Government Gazette* after GN 2345 of 5 August 2022 (*GG* 47197 of 5 August 2022) are not incorporated in this work.

59 Section 1(1) of the Prescribed Rate of Interest Act 55 of 1975. See also *Volkskas Beleggingskorporasie Bpk v Oranje Benefit Society* 1978 (1) SA 45 (A) at 60; *Davehill (Pty) Ltd v Community Development Board* 1988 (1) SA 290 (A) at 300H–301F; *Crookes Brothers Ltd v Regional Land Claims Commission, Mpumalanga* 2013 (2) SA 259 (SCA) at 270I–271E; *Watson v Renasa Insurance Co Ltd* 2019 (3) SA

593 (WCC) at 618G. This principle does not unconditionally apply to interest on unliquidated debts. See s 2A(5) of the Prescribed Rate of Interest Act 55 of 1975, as amended, and *Adel Builders (Pty) Ltd v Thompson* 1999 (1) SA 680 (SE), confirmed on appeal in 2000 (4) SA 1027 (SCA); *The MV Sea Joy, Owners of the Cargo Lately Laden on Board the MV Sea Joy v The MV Sea Joy* 1998 (1) SA 487 (C) at 508E–I.

60 Section 3(1) of the Prescribed Rate of Interest Act 55 of 1975. The rate of interest prescribed in the first ever notice was 11% (GN R1217 of 16 July 1976). The rate of interest prescribed in the first notice published under s 1 of the Act in its amended form (s 1 was substituted with effect from 8 January 2016 by s 3 of the Judicial Matters Amendment Act 24 of 2015), was 10,25% (GN 226 of 4 March 2016).

61 The term '*mora*' simply means delay or default (*Crookes Brothers Ltd v Regional Land Claims Commission, Mpumalanga* 2013 (2) SA 259 (SCA) at 269E–F).

62 *Linton v Corser* 1952 (3) SA 685 (A) at 695G–696A; *Davehill (Pty) Ltd v Community Development Board* 1988 (1) SA 290 (A) at 298G–I; *Crookes Brothers Ltd v Regional Land Claims Commission, Mpumalanga* 2013 (2) SA 259 (SCA) at 268A–269E; *Nedbank Ltd v Houtbosplaas (Pty) Ltd* 2022 (6) SA 140 (SCA) at paragraphs [50]–[57].

63 *Kessel v Davis* 1905 TS 731; *Becker v Stusser* 1910 CPD 289; *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 at 195–6; *Venter v Venter* 1949 (1) SA 768 (A) at 784; *Van der Merwe v Reynolds* 1972 (3) SA 740 (A) at 747A–D; *Mokala Beleggings v Minister of Rural Development and Land Reform* 2012 (4) SA 22 (SCA) at 25D–C; *Crookes Brothers Ltd v Regional Land Claims Commission, Mpumalanga* 2013 (2) SA 259 (SCA) at 269E–F. If a settlement agreement which is made an order of court defers payment of a debt to a future date, *mora* interest shall run from that date, and not from the date of judgment (*Dunn v Road Accident Fund* 2019 (1) SA 237 (KZD) at 242G–H, 243G–244G, 246A, 246C–E and 246F; and see *Motaung v Road Accident Fund and Two Related Matters* 2023 (4) 643 (GP)).

64 *Bellairs v Hodnett* 1978 (1) SA 1109 (A) at 1145D–G; *Scoin Trading (Pty) Ltd v Bernstein NO* 2011 (2) SA 118 (SCA) at 121C–G; *Mokala Beleggings v Minister of Rural Development and Land Reform* 2012 (4) SA 22 (SCA) at 25E; *Crookes Brothers Ltd v Regional Land Claims Commission, Mpumalanga* 2013 (2) SA 259 (SCA) at 269C–D; *Nedbank Ltd v Houtbosplaas (Pty) Ltd* 2022 (6) SA 140 (SCA) at paragraphs [50]–[57].

65 *Scoin Trading (Pty) Ltd v Bernstein NO* 2011 (2) SA 118 (SCA) at 121B–C.

66 *Scoin Trading (Pty) Ltd v Bernstein NO* 2011 (2) SA 118 (SCA) at 122H.

67 *Scoin Trading (Pty) Ltd v Bernstein NO* 2011 (2) SA 118 (SCA) at 122H–123A.

68 See *Crookes Brothers Ltd v Regional Land Claims Commission, Mpumalanga* 2013 (2) SA 259 (SCA) at 269F–G.

69 *Nel v Cloete* 1972 (2) SA 150 (A); *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1977 (4) SA 310 (T) at 343H–349B. Older decisions on *mora debitoris* should be read subject to the authoritative exposition in the judgment of Wessels JA in *Nel v Cloete* 1972 (2) SA 150 (A). The older cases are considered by De Vos (1970) 87 *SALJ* 304. The statement that *mora* interest starts to run 'from the date of receipt of the letter of demand' (*West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 at 183 and 197) is incorrect and decisions in which this view is propounded can no longer be accepted (such as, for example, *Ridley v Marais* 1939 AD 5; *Johnston v Harrison* 1946 NPD 239; *Pillay Bros (Pty) Ltd v FM Cash Store* 1976 (2) SA 660 (E)).

70 *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173; *Ridley v Marais* 1939 AD 5; *Blundell v McCawley* 1948 (4) SA 473 (W); *Kangisser v Rieton (Pty) Ltd* 1952 (4) SA 424 (T).

71 *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173; *Ridley v Marais* 1939 AD 5.

72 1972 (2) SA 150 (A) at 164–6.

73 See *Theron v Theron* 1973 (3) SA 667 (C) at 674A.

74 *Theron v Theron* 1973 (3) SA 667 (C) at 673B.

75 *Land and Agricultural Development Bank of SA v Ryton Estates (Pty) Ltd* 2013 (6) SA 319 (SCA) at 326C.

76 *Intramed (Pty) Ltd (In Liquidation) v Standard Bank of South Africa Ltd* 2008 (2) SA 466 (SCA) at 470A–H.

77 *Mokala Beleggings v Minister of Rural Development and Land Reform* 2012 (4) SA 22 (SCA). See also *Commissioner for Inland Revenue v First National Industrial Bank Ltd* 1990 (3) SA 641 (A) at 649; *Mbanga v MEC for Welfare, Eastern Cape* 2002 (1) SA 359 (SE) at 366A.

78 The Prescribed Rate of Interest Amendment Act 7 of 1997 was published in *GG* 17914 of 11 April 1997 and came into operation on that date. In *The MV Sea Joy, Owners of the Cargo Lately Laden on Board the MV Sea Joy v The MV Sea Joy* 1998 (1) SA 487 (C) at 506H and *Adel Builders (Pty) Ltd v Thompson* 1999 (1) SA 680 (SE) at 689G the date of coming into operation of that Act is wrongly referred to as 5 April 1997.

79 Cf *Kudu Granite Operation (Pty) Ltd v Caterna Ltd* 2003 (5) SA 193 (SCA) at 205D–E.

80 *Adel Builders (Pty) Ltd v Thompson* 1999 (1) SA 680 (SE) at 688G–692D, confirmed on appeal in 2000 (4) SA 1027 (SCA). See also *David Trust v Aegis Insurance Co Ltd* 2000 (3) SA 289 (SCA) and *The MV Sea Joy, Owners of the Cargo Lately Laden on Board the MV Sea Joy v The MV Sea Joy* 1998 (1) SA 487 (C) at 506G–508E.

81 In terms of s 2A(5) of the Prescribed Rate of Interest Act 55 of 1975: *Adel Builders (Pty) Ltd v Thompson* 2000 (4) SA 1027 (SCA) at 1032H–I; *Springgold Investments (Pty) Ltd v Guardian National Insurance Co Ltd* 2009 (3) SA 235 (D) at 244F–G; *Du Plooy v Venter Joubert Inc* 2013 (2) SA 522 (NCK) at 528H–529C, overruled on appeal in *Venter Joubert Inc v Du Plooy* 2017 (5) SA 439 (NCK) at 444E–G on the basis that the court *a quo* failed to judicially excercise its discretion under s 2A(5).

82 In *Davehill (Pty) Ltd v Community Development Board* 1988 (1) SA 290 (A) at 300H–301F.

83 This, it is submitted, is also the effect of s 1 of the Prescribed Rate of Interest Act 55 of 1975 in its amended form (s 1 was substituted with effect from 8 January 2016 by s 3 of the Judicial Matters Amendment Act 24 of 2015).

84 *Adel Builders (Pty) Ltd v Thompson* 1999 (1) SA 680 (SE) at 692G–H, confirmed on appeal in 2000 (4) SA 1027 (SCA). See also *The MV Sea Joy, Owners of the Cargo Lately Laden on Board the MV Sea Joy v The MV Sea Joy* 1998 (1) SA 487 (C) at 508E–I.

85 *Adel Builders (Pty) Ltd v Thompson* 2000 (4) SA 1027 (SCA) at 1032B–I; *MV Gladiator: Samsun Corporation t/a Samsun Line Corporation v Silver Cape Shipping Ltd, Malta* 2007 (2) SA 401 (D) at 412I; *Springgold Investments (Pty) Ltd v Guardian National Insurance Co Ltd* 2009 (3) SA 235 (D) at 244H–246B; *Du Plooy v Venter Joubert Inc* 2013 (2) SA 522 (NCK) at 528H–529C. In *Drake Flemmer & Orsmond Inc v Gajjar NO* 2018 (3) SA 353 (SCA) it was held (at 378B–D) that the court's discretion may be used to neutralize the effect of trial delay and inflation on the value of the claim. See also *Watson v Renasa Insurance Co Ltd* 2019 (3) SA 593 (WCC) at 617B–619A.

86 *Adel Builders (Pty) Ltd v Thompson* 2000 (4) SA 1027 (SCA) at 1032H–J; *Drake Flemmer & Orsmond Inc v Gajjar NO* 2018 (3) SA 353 (SCA) at paragraph [80].

87 Groenewegen *De Leg Abr* 4 32 27 1; Van Leeuwen *RHR* 4 7 5 and *Cens For* 1 4 4 45; Voet 22 1 19; *Van Niekerk v Van Niekerk* (1830) 1 Menz 454; *Union Government v Jordaan's Executor* 1916 TPD 411; *Solomon v Jeary* 1921 CPD 108; *Van Coppenhagen v Van Coppenhagen* 1947 (1) SA 576 (T) at 581–2; *Stroebel v Stroebel* 1973 (2) SA 137 (T) at 138C–D; *LTA Construction Bpk v Administrateur, Transvaal* 1992 (1) SA 473 (A) at 482B–D; *Commercial Bank of Zimbabwe Ltd v MM Builders & Suppliers (Pvt) Ltd* 1997 (2) SA 285 (ZH) at 303C–E; *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation)* 1998 (1) SA 811 (SCA) at 827H; *F&I Advisors (Edms) Bpk v Eerste Nasionale Bank van Suidelike Afrika Bpk* 1999 (1) SA 515 (SCA) at 522G and 525E; *Sanlam Life Insurance Ltd v South African Breweries Ltd* 2000 (2) SA 647 (W) at 650I–J, 652E–653A and 655C–E; *Verulam Medicentre (Pty) Ltd v Ethekweni Municipality* 2005 (2) SA 451 (D) at 454D–F; *City of Tshwane Metropolitan Municipality v Brooklyn Edge (Pty) Ltd* [2022] 2 All SA 334 (SCA) at paragraphs [31] and [32]. See also *Commissioner, South African Revenue Service v Woulidge* 2002 (1) SA 68 (SCA) at 75B–E; *Meyer v Catwalk Investments 354 (Pty) Ltd* 2004 (6) SA 107 (T) at 115H–118H; *Ethekwini Municipality v Verulam Medicentre (Pty) Ltd* [2006] 3 All SA 325 (SCA) at 328*a* and 328*c–e*; *Paulsen v Slip Knot Investments 777 (Pty) Ltd* 2014 (4) SA 253 (SCA) at 260F and 262A, overruled on appeal by the Constitutional Court in *Paulsen v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC), but not on this point. The existence of the *in duplum* rule is recognized by the Constitutional Court in the latter case (at 500B–C) and a brief outline of the history thereof is given (at 500A–B). In the *Ethekwini* case (*supra*) it is emphasized (at 330*d–e*) that the rule applies only to *arrear* interest; and see *Drake Flemmer & Orsmond Inc v Gajjar NO* 2018 (3) SA 353 (SCA) at 377B–F. For a discussion of the case law, see *Da Cruz v Bernardo* 2022 (2) SA 185 (GJ) at paragraphs [17]–[43]. See also Kelly-Louw (2006) 14 *JBL* 141; Kelly-Louw (2007) 19 *SA Merc LJ* 337; Tertius Maree '*In Duplum* rule: Another view of *Paulsen v Slip Knot*' 2017 (May) *De Rebus* 39–41. In *Drake Flemmer & Orsmond Inc v Gajjar NO* 2018 (3) SA 353 (SCA) the Supreme Court of Appeal raised, but did not decide, the question whether the *in duplum* rule applies to interest on contractual damages (at 376H–377B). The Supreme Court of Appeal held (at 377E–G) that a court could, if it was just, by way of s 2A(5) of the Prescribed Rate of Interest Act 55 of 1975 order interest to be paid which exceeded the amount of the unliquidated amount in question.

88 *Margo v Gardner; Gardner v Margo* 2010 (6) SA 385 (SCA) at 388G–H.

89 *Van Coppenhagen v Van Coppenhagen* 1947 (1) SA 576 (T) at 582; *Commercial Bank of Zimbabwe Ltd v MM Builders & Suppliers (Pvt) Ltd* 1997 (2) SA 285 (ZH) at 297F; *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation)* 1998 (1) SA 811 (SCA) at 827H, where it was held that 'when due to payment interest drops below the outstanding capital, interest begins to run until it once again equals that amount'. See also Kelly-Louw (2006) 14 *JBL* 141.

90 *LTA Construction Bpk v Administrateur, Transvaal* 1992 (1) SA 473 (A) at 482F; *Sanlam Life Insurance Ltd v South African Breweries Ltd* 2000 (2) SA 647 (W) at 655D; *Verulam Medicentre (Pty) Ltd v Ethekweni Municipality* 2005 (2) SA 451 (D) at 454F; *Ethekwini Municipality v Verulam Medicentre (Pty) Ltd* [2006] 3 SA 325 (SCA) at 328*a–b*; *Margo v Gardner; Gardner v Margo* 2010 (6) SA 385 (SCA) at 388E–F; *Paulsen v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) at 501A–C; *City of Tshwane Metropolitan Municipality v Brooklyn Edge*

(Pty) Ltd [2022] 2 All SA 334 (SCA) at paragraph [31]. See also Vessio (2006) 39 *De Jure* 25 at 26–7 and Kelly-Louw (2006) 14 *JBL* 141.

91 *Margo v Gardner; Gardner v Margo* 2010 (6) SA 385 (SCA) at 388I.

92 *LTA Construction Bpk v Administrateur, Transvaal* 1992 (1) SA 473 (A) at 482I–483A; *Ethekwini Municipality v Verulam Medicentre (Pty) Ltd* [2006] 3 All SA 325 (SCA) at 328*b–c*; *Margo v Gardner; Gardner v Margo* 2010 (6) SA 385 (SCA) at 388E–F. See also *Vessio* (2006) 39 *De Jure* 25 at 26–7.

93 *Sanlam Life Insurance Ltd v South African Breweries Ltd* 2000 (2) SA 647 (W) at 655B–E; *Verulam Medicentre (Pty) Ltd v Ethekweni Municipality* 2005 (2) SA 451 (D) at 454D–I. In the latter case it appeared to the court (at 454I–455B) that the test might simply be whether in a particular case public policy requires the debtor to be protected against exploitation by the creditor. In this regard the court referred to the judgment of Froneman AJA in *Commissioner, South African Revenue Service v Woulidge* 2002 (1) SA 68 (SCA) at 75B–C. In upholding the ultimate conclusion of the court, the Supreme Court of Appeal in *Ethekwini Municipality v Verulam Medicentre (Pty) Ltd* [2006] 3 All SA 325 (SCA), however, observed and said the following (at 331*b–h*):

'It must however be pointed our that his interpretation of the *Woulidge* case (*supra)* regarding the extent of the *in duplum* rule's application, appears to be based on an error. The judgment is reported both in the South African Law Reports (the version indicated in paragraph 19 above on which the court *a quo* relied) and the All South African Law Reports. The relevant portion is quoted as follows in the SALR at paragraph 12:

"It is clear that the *in duplum* rule can be applied in the real world of commerce and economic activity *only* where it serves considerations of public policy in the protection of borrowers against exploitation by lenders *(LTA Construction Bpk v Administrateur, Transvaal* 1992 (1) SA 473 (A) at 482F–G: *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in Liquidation)* 1998 (1) SA 811 (SCA) at 828D)." (My emphasis.)

[21] The correct quotation is, however, the one contained in the other report, [2002] 2 All SA 199 (SCA) *Commissioner, South African Revenue Service v Woulidge* and it reads as follows at paragraph 12:

"It is clear that the *in duplum* rule can *only* be applied in the real world of commerce and economic activity where it serves considerations of public policy in the protection of borrowers against exploitation by lenders . . ." (My emphasis.)

[22] It is readily apparent, on a comparison of the two quotations, that the word "only" is misplaced in the first version, thus giving the sentence a meaning that is completely different to what Froneman AJA obviously intended to convey, which also does not tally with the dicta expressed in the decided cases on which he relied in that regard. The court *a quo's* conclusion about the so-called "lenient" test namely, that the enquiry is merely ". . . whether in the particular case public policy requires the debtor to be protected against exploitation by the creditor", which invariably necessitates an enquiry into the identity of the debtor instead of the nature of the debt, is thus based on an incorrect premise.

[23] Furthermore, whilst it maybe so that the *in duplum* rule is founded on public policy considerations, it now forms part of positive law. Consequently, public policy is not the criterion in deciding whether or not the rule applies. As was correctly submitted on the appellant's behalf, the rule is not qualified so that it applies only where a debtor cannot cope with the burden of interest exceeding the capital sum. The *Woulidge* case *(supra)* should accordingly not be understood to mean that the identity of the debtor (i e whether the debtor requires protection from exploitation) determines whether or not the *in duplum* rule is to be applied.'

94 *F&I Advisors (Edms) Bpk v Eerste Nasionale Bank van Suidelike Afrika Bpk* 1999 (1) SA 515 (SCA) at 525E; and see *Commissioner for SA Revenue Service v Woulidge* 2000 (1) SA 600 (C) at 610G–612H, reversed partly on appeal, but not on this point, in *Commissioner, South African Revenue Service v Woulidge* 2002 (1) SA 68 (SCA).

95 *Da Cruz v Bernardo* 2022 (2) SA 185 (GJ) at paragraphs [45]–[62].

96 *F&I Advisors (Edms) Bpk v Eerste Nasionale Bank van Suidelike Afrika Bpk* 1999 (1) SA 515 (SCA) at 525E–526C; *Da Cruz v Bernardo* 2022 (2) SA 185 (GJ) at paragraph [68].

97 *Commercial Bank of Zimbabwe Ltd v MM Builders & Suppliers (Pvt) Ltd* 1997 (2) SA 285 (ZH) at 321F–G; *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation)* 1998 (1) SA 811 (SCA) at 828D; *F&I Advisors (Edms) Bpk v Eerste Nasionale Bank van Suidelike Afrika Bpk* 1999 (1) SA 515 (SCA) at 525F; *Georgias v Standard Chartered Finance Zimbabwe Ltd* 2000 (1) SA 126 (ZS); *Verulam Medicentre (Pty) Ltd v Ethekweni Municipality* 2005 (2) SA 451 (D) at 454E–F; *Ethekwini Municipality v Verulam Medicentre (Pty) Ltd* [2006] 3 All SA 325 (SCA) at 328*b*. In *F&I Advisors (Edms) Bpk (supra*) it was said (at 525I–J) that it might well, however, be possible for a debtor, when interest has accumulated, to agree with his creditor, for example to avoid litigation, that he will not rely on the *in duplum* rule.

98 *Georgias v Standard Chartered Finance Zimbabwe Ltd* 2000 (1) SA 126 (ZS) at 139F–141B; and see *F&I Advisors (Edms) Bpk v Eerste Nasionale Bank van Suidelike Afrika Bpk* 1999 (1) SA 515 (SCA) at 525I–J.

99 *Paulsen v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) at 501C–517G, overruling *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation)* 1998 (1) SA 811 (SCA) at 834H; *Paulsen v Slip Knot Investments 777 (Pty) Ltd* 2014 (4) SA 253 (SCA) at 261A–F; and also overruling *Absa Bank Ltd v Erasmus* 2007 (2) SA 545 (C) at 553G–554B; *Margo v Gardner; Gardner v Margo* 2010 (6) SA 385 (SCA) at 388B–D and 388I–J.

100 *Paulsen v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) at 517A and the authorities there referred to.

101 *Paulsen v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) at 517A–B and the authorities there referred to.

102 2015 (3) SA 479 (CC) at 517B–D.

103 Three further questions arose in the Constitutional Court:

(a) Does post-judgment interest run on the whole of the judgment debt or only on the original capital amount of the loan?

(b) Does the *in duplum* rule cap the running of such additional interest at double the sum of the whole of the judgment debt or double the sum of the original capital amount of the loan?

(c) Does this interest run at the contractual rate or at the statutorily prescribed rate of interest?

With regard to the first two questions, the Constitutional Court did not disturb the order of the Supreme Court of Appeal in *Paulsen v Slip Knot Investments 777 (Pty) Ltd* 2014 (4) SA 253 (SCA) that interest runs on the whole of the judgment debt, and is limited to an amount equal to the whole of the judgment debt, including the portion which consists of previously accrued interest. With regard to the third question, the Supreme Court of Appeal in *Paulsen v Slip Knot Investments 777 (Pty) Ltd* 2014 (4) SA 253 (SCA) held (at 264H–265A), and ordered (at 265E) that the post-judgment interest runs at the rate agreed upon by the parties contractually, i e 3% per month. The Constitutional Court (at 518B–C) found no reason to disturb this finding and order of the Supreme Court of Appeal.

104 Section 103(5) came into operation on 1 June 2007 (*GG* 28824 of 11 May 2006). It does not apply to pre-existing credit agreements as defined in Schedule 3 of the National Credit Act. In *The National Credit Regulator v Nedbank Ltd and Others* 2009 (6) SA 295 (GNP) (confirmed on appeal *sub nomine Nedbank Ltd and Others v National Credit Regulator and Another* 2011 (3) SA 581 (SCA)) at 321E–G Du Plessis J made the following declaratory order:

'11. On a proper interpretation of s 103(5) read with ss 101(1)*(b)–(g)* of the National Credit Act, 2005:

(a) the amounts contemplated in ss 101(1)*(b)–(g)* which accrue while the consumer is in default may not exceed, in aggregate, the unpaid balance of the principal debt when the default occurred;

(b) once the total charges referred to in ss 101(1)*(b)–(g)* equal the amount of the unpaid balance, no further charges may be levied;

(c) once the total charges referred to in ss 101(1)*(b)–(g)* equal the amount of the unpaid balance, payments made by a consumer thereafter during a period of default do not have the effect of permitting the credit provider to charge further interest while such default persists.'

See further Kelly-Louw (2006) 14 *JBL* 141 at 142–5; Kelly-Louw (2007) 19 *SA Merc LJ* at 337–45; Campbell (2010) 22 *SA Merc LJ* at 1–11; Otto (2012) 75 *THRHR* 127–39.

105 Interest is one such amount — see s 101(1)*(d)*.

106 *Bellairs v Hodnett* 1978 (1) SA 1109 (A).

107 *Northern Assurance Co Ltd v Somdaka* 1960 (1) SA 588 (A); *Wiehahn Konstruksie Toerustingmaatskappy (Edms) Bpk v Potgieter* 1974 (3) SA 191 (T) at 200A; *Minister of Prisons v Jongilanga* 1983 (3) SA 47 (E) at 53H; *Minister of Prisons v Jongilanga* 1985 (3) SA 117 (A) at 123I; *Small Business Development Corporation Ltd v Kubheka* 1990 (2) SA 851 (T) at 853J–854A.

108 *Minister van Wet en Orde v Molaolwa* 1986 (3) SA 900 (NC).

109 *Small Business Development Corporation Ltd v Kubheka* 1990 (2) SA 851 (T) at 852E. It was held in this case (at 853H) that the address of 'Document Exchange' (Docex) is not an attorney's address as envisaged by the rule.

110 Voet 22 1 10: *Balliol Investment Co (Pty) Ltd v Jacobs* 1946 TPD 269; *Standard Bank of South Africa Ltd v Lotze* 1950 (2) SA 698 (C); *Turner and Wright v Versatile Pump and Foundry Works* 1953 (3) SA 556 (T); *Trust Bank van Afrika Bpk v Van der Walt NO* 1972 (3) SA 166 (C) at 169G; *Bellairs v Hodnett* 1978 (1) SA 1109 (A) at 1145D–H; *Commissioner for Inland Revenue v First National Industrial Bank Ltd* 1990 (3) SA 641 (A) at 652 and 654; *Sasria Ltd (formerly South African Special Risks Insurance Association) v Certain Underwriters at Lloyds* 2002 (4) SA 474 (SCA) at 478B–C.

111 *Chasen v Ritter* 1992 (4) SA 323 (SE).

112 As was held in *Noord-Kaap Lewendehawe Koöp Bpk v Lombaard* 1988 (4) SA 810 (NC) at 816J–817A. See also *Motloung v Sheriff, Pretoria East* 2019 (3) SA 228 (GP) at 230C–232H.

113 *Chasen v Ritter* 1992 (4) SA 323 (SE) at 326H.

114 *Chasen v Ritter* 1992 (4) SA 323 (SE) at 326J–327A.

115 *Mynhardt v Mynhardt* 1986 (1) SA 456 (T) at 462G, cited with approval in *Chasen v Ritter* 1992 (4) SA 323 (SE) at 329D.

116 2020 (5) SA 123 (SCA).

117 At paragraph [29].

118 *Minister of Justice v Human* 1970 (2) SA 765 (E); *Protea Assurance Co Ltd v Vinger* 1970 (4) SA 663 (O); *Wiehahn Konstruksie Toerustingmaatskappy (Edms) Bpk v Potgieter* 1974 (3) SA 191 (T).

119 *Motloung v Sheriff, Pretoria East* 2020 (5) SA 123 (SCA) at paragraphs [16] and [17].

120 *Chasen v Ritter* 1992 (4) SA 323 (SE) at 327B.

121 By Burger J in *Chasen v Ritter* 1992 (4) SA 323 (SE) at 327C. In *Motloung v Sheriff, Pretoria East* 2020 (5) SA 123 (SCA) the Supreme Court of Appeal in an *obiter dictum* stated (at paragraph [18]):
'There was some debate in the papers and the heads of argument as to what actions constitute "issuing" a summons. The appellants submit that a summons which has taken a route through the office of the registrar has been issued. This may be somewhat too broad. It does, however, bear echoes of the dictum of Innes CJ concerning the meaning of "process of court" in *Dorfman v Deputy Sheriff for the Witwatersrand District* [1908 TS 701 at 703] where he held that:
"A process of the court must be something which proceeds from the court; some step in legal proceedings which can only be taken with the aid of the court or of one of its officers."
If the registrar has allocated a case number, that number and the requisite particulars have been entered into whatever records are used by the registrar to regulate the further administrative procedures relating to the action, and the registrar has dated and stamped the summons and then released it for service, this may amount to issuing a summons. It would certainly constitute a process of court as described by Innes CJ.'

122 1970 (4) SA 663 (O) at 665A.

123 *Chasen v Ritter* 1992 (4) SA 323 (SE) at 327G.

124 In *Chasen v Ritter* 1992 (4) SA 323 (SE) at 327G it is suggested that this is the sense in which the *obiter* remarks in *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 780G and *Minister of Prisons v Jongilanga* 1985 (3) SA 117 (A) at 123H regarding the nullity of a summons that had not been issued by the registrar, must be understood.

125 *Bassett v Platt* 1954 (1) SA 264 (N).

126 *Tilbrook v Higgins* 1932 WLD 147. If he is sued in a representative capacity, judgment should be given against him in his representative capacity (*Goldschmidt & Co v Wallis* (1884) 2 HCG 550) and a writ of execution issued against his personal capacity will be quashed (*Brink qq Breda v Voigt & Breda* (1832) 1 Menz 537).

127 *SA Cooling Services (Pty) Ltd v Church Council of the Full Gospel Tabernacle* 1955 (3) SA 541 (N) at 543C. See further the notes and examples in the *excursus* s v 'Parties' below.

128 *Spoornet v Watson* 1994 (1) SA 513 (W) at 514G.

129 *Van Heerden v Du Plessis* 1969 (3) SA 298 (O) at 304A; *Friends of the Sick Association v Commercial Properties (Pty) Ltd* 1996 (4) SA 154 (D) at 157H.

130 1998 (2) SA 105 (W) at 108G.

131 *Gross v Pentz* 1996 (4) SA 617 (A) at 632B–C; *Sandton Civic Precinct (Pty) Ltd v City of Johannesburg* 2009 (1) SA 317 (SCA) at 322F–G. See also, in general, *Amler's Precedents of Pleadings* 247–8.

132 *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* 2013 (3) BCLR 251 (CC) at paragraph [32], referring with approval to *Jacobs v Waks* 1992 (1) SA 521 (A) at 536A.

133 Unreported, NWM case no 596/20 dated 9 June 2023.

134 *Author's note:* Evidently this is meant to be a reference to *Kommissaris van Binnelandse Inkomste v Van der Heever* 1999 (3) SA 1051 (SCA).

135 *Author's note:* Evidently this is meant to be a reference to *Kommissaris van Binnelandse Inkomste v Van der Heever* 1999 (3) SA 1051 (SCA).

136 *Dalrymple v Colonial Treasurer* 1910 TPD 372 at 390; *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 (A) at 388A–H; *Jacobs v Waks* 1992 (1) SA 521 (A) at 533J–534A; *Bophuthatswana Transport Holdings (Edms) Bpk v Matthysen Busvervoer (Edms) Bpk* 1996 (2) SA 166 (A) at 173B–F; *Gross v Pentz* 1996 (4) SA 617 (A) at 632B–C; *Kolbatschenko v King NO* 2001 (4) SA 336 (C) at 346F–H; *Pick 'n Pay Stores Ltd v Teazers Comedy and Revue CC* [2002] 3 All SA 147 (W) at 160*b–f*; *Voget v Kleynhans* 2003 (2) SA 148 (C) at 151E; *Judin v Wedgwood* 2003 (5) SA 472 (W) at 475H–476A; *Sandton Civic Precinct (Pty) Ltd v City of Johannesburg* 2009 (1) SA 317 (SCA) at 322F–H; *Public Protector v Mail & Guardian Ltd* 2011 (4) SA 420 (SCA) at 427F–428A; *YB v SB* 2016 (1) SA 47 (WCC) at 52C–53A; *Four Wheel Drive Accessory Distributors CC v Rattan NO* 2019 (3) SA 451 (SCA) at 454G–H and 455A–B; *Trevo Capital Ltd v Steinhoff International Holdings (Pty) Ltd* 2021 (6) SA 260 (WCC) at paragraphs [39]–[40]; *Trustees for the Time Being of the Legacy Body Corporate v Bae Estates and Escapes (Pty) Ltd* 2022 (1) SA 424 (SCA) at paragraph [37]; *Lebashe Financial Services (Pty) Ltd v Prudential Authority* 2023 (2) SA 130 (SCA) at paragraph [24]. In the *Jacobs* case (*supra*) the court stated (at 534A–D) that *locus standi* was not ''n tegniese begrip met vas omlynde grense nie', and that the assessment of the sufficiency of a litigant's interest depended on the particular circumstances of the case. See also *Antares International Ltd v Louw Coetzee & Malan Inc* 2014 (1) SA 172 (WCC) at 186H–I; *Smyth v Investec Bank Ltd* 2018 (1) SA 494 (SCA) at 511G–I; *Durdoc Centre Body Corporate v Singh* 2019 (6) SA 45 (KZP) at 48H–49E; *Destinar Ltd v NTS Shipping Pte Ltd* (unreported, WCC case no AC07/2020 dated 28 April 2020) at paragraph [33]; *Oppressed A C S A Minority 1 (Pty) Ltd v Government of the Republic of South Africa* (unreported, SCA case no 898/2020 dated 11 April 2022) at paragraph [19]; *Walker v National Commissioner of The South African Police Services* (unreported, GP case no 38035/21 dated 5 December 2022) at paragraph [23]; *Firm-O-Seal CC v Prinsloo & Van Eeden Inc* (unreported, SCA case no 483/22 dated 27 June 2023) at paragraph [6]; *Chairperson of the Western Cape Gambling and Racing Board v Goldrush Group Management (Pty) Ltd* (unreported, SCA case no 660/2022 dated 10 November 2023) at paragraph [18].

137 *JDJ Properties CC v Umngeni Local Municipality* 2013 (2) SA 395 (SCA) at 407C; *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper* 2018 (4) SA 71 (SCA) at 79E–F; *Mogoje v Droogfontein Communal Property Association* (unreported, NCK case no 2635/2019 dated 1 October 2021) at paragraph [15]; *Walker v National Commissioner of The South African Police Services* (unreported, GP case no 38035/21 dated 5 December 2022) at paragraph [23]; *Firm-O-Seal CC v Prinsloo & Van Eeden Inc* (unreported, SCA case no 483/22 dated 27 June 2023) at paragraph [6].

138 *Mars Incorporated v Candy World (Pty) Ltd* 1991 (1) SA 567 (A) at 575H–I; *Trakman NO v Livshitz* 1995 (1) SA 282 (A) at 287B–F; *Kommissaris van Binnelandse Inkomste v Van der Heever* 1999 (3) SA 1051 (SCA) at 1057G–H; *Four Wheel Drive Accessory Distributors CC v Rattan NO* 2019 (3) SA 451 (SCA) at 454H; *Mogoje v Droogfontein Communal Property Association* (unreported, NCK case no 2635/2019 dated 1 October 2021) at paragraph [15]; *Walker v National Commissioner of The South African Police Services* (unreported, GP case no 38035/21 dated 5 December 2022) at paragraph [24]; *Bakgatla-Ba-Kgafela Property Association v Pilane* (unreported, NWM case no M450/2021 dated 25 May 2023) at paragraph [28]; *Mango Airlines SOC Limited v Minister of Public Enterprises* [2023] 4 All SA 475 (GP) at paragraph [47]. The question whether a party has *locus standi in judicio* may be dealt with on exception (*Ahmadiyya Anjuman Ishaati-Islam Lahore (South Africa) v Muslim Judicial Council (Cape)* 1983 (4) SA 855 (C); and see the cases referred to in this regard in the excursus to rule 22 s v 'Particular Defences' below). An objection taken *in limine* to the *locus standi* of a plaintiff or applicant, like an exception, must be dealt with on the assumption that all the allegations of fact relied upon by that party are true (*Kuter v South African Pharmacy Board* 1953 (2) SA 307 (T) at 313; *Letseng Diamonds Ltd v JCI Ltd; Trinity Asset Management (Pty) Ltd v Investec Bank Ltd* 2007 (5) SA 564 (W) at 571H).

139 *Van Staden NO v Pro-Wiz Group (Pty) Ltd* 2019 (4) SA 532 (SCA) at 538E–G.

140 *Van Staden NO v Pro-Wiz Group (Pty) Ltd* 2019 (4) SA 532 (SCA) at 538E–G.

141 *Van Staden NO v Pro-Wiz Group (Pty) Ltd* 2019 (4) SA 532 (SCA) at 538E–G.

142 *Logan v Read and Ash* (1892) 9 SC 514; *Fairbairn v Pepper* (1904) 21 SC 154; *Schmidt v Barnardo* (1906) 23 SC 447; *Blower v Van Noorden* 1909 TS 890 at 897–9; *Freemantle v McKenzie* 1915 CPD 568; *Commaille v Jamaloodien* 1917 CPD 656; *Howard's Debt Collecting Agency v Haarhoff* 1925 TPD 272; *SWA Amalgameerde Afslaers (Edms) Bpk v Louw* 1956 (1) SA 346 (A); *Ncqula v Muller's Book Shop* 1960 (4) SA 300 (E); *Marais v Perks* 1963 (4) SA 802 (E); *Nordis Construction Co (Pty) Ltd v Theron, Burke and Isaac* 1972 (2) SA 535 (D); *Sentrakoop Handelaars Bpk v Lourens* 1991 (3) SA 540 (W) at 544F–545G; *Standard General Insurance Co Ltd v Eli Lilly (SA) (Pty) Ltd (FBC Holdings (Pty) Ltd, Third Party)* 1996 (1) SA 382 (W) at 387C–D; *Gravett NO v Van der Merwe* 1996 (1) SA 531 (D) at 537G; *Auditor-General v MEC for Economic Opportunities, Western Cape* 2022 (5) SA 44 (SCA) at paragraph [12].

143 *Fulton & Co v Knox* 1917 WLD 48; *Ashley v SA Prudential Ltd* 1929 TPD 283; *Town Council of Brakpan v Cohen* 1938 WLD 146; *Belonje v African Electric Co (Pty) Ltd* 1949 (1) SA 592 (E) at 598; *Sentrakoop Handelaars Bpk v Lourens* 1991 (3) SA 540 (W) at 544F–545G.

144 See, for example, *Steenkamp v Webster* 1955 (1) SA 524 (A).

145 *Blower v Van Noorden* 1909 TS 890 at 897.

146 *Wood v Visser* 1929 CPD 55; and see *Edelson v Glenfields Estates (Pty) Ltd* 1955 (2) SA 527 (E).

147 *Langham Court (Pty) Ltd v Mavromaty* 1954 (3) SA 742 (T).

148 *Howard's Debt Collecting Agency v Haarhoff* 1925 TPD 272 at 277.

149 *Gadlela v Mountjoy* 1921 EDL 151.

150 *Allen v Du Preez* 1950 (1) SA 410 (W); *Edelson v Glenfields Estates (Pty) Ltd* 1955 (2) SA 527 (E) at 529.

151 1963 (4) SA 802 (E) at 807.

152 Kahn (1956) 73 *SALJ* 10; Hunt 1963 *Annual Survey* 171.

153 *Nordis Construction Co (Pty) Ltd v Theron, Burke and Isaac* 1972 (2) SA 535 (D); *Terblanche v Nothnagel* 1975 (4) SA 405 (C); *Indrieri v Du Preez* 1989 (2) SA 721 (C) at 727I–728D; the bald statement to the contrary in *Van Eeden v Sasol Pensioenfonds* 1975 (2) SA 167 (O) at 180H cannot be regarded as unqualified acceptance in our law of the rule in *Kelner v Baxter* (1867) LR 2 CP 174.

154 In *Cullinan v Noordkaaplandse Aartappelkernmoerkwekers Kööperasie Bpk* 1972 (1) SA 761 (A) the Appellate Division held that the doctrine of the undisclosed principal, even though its validity may be questionable, has been applied in our law for a long time and must now be regarded as accepted law. See, in general, Van der Horst *Die Leerstuk van die 'Undisclosed Principal'* (Annale, Universiteit van Stellenbosch, vol 33 Serie B no 2, 1971). The doctrine is, however, to be confined to one undisclosed principal only. See, further, *Karstein v Moribe* 1982 (2) SA 282 (T) at 299C–D.

155 *O'Leary v Harbord* (1888) 5 HCG 1; *Natal Trading and Milling Co Ltd v Inglis* 1925 TPD 724; *Katzeff v City Car Sales (Pty) Ltd* 1998 (2) SA 644 (C) at 647B–C; *Stafford t/a Natal Agricultural Co v Lions River Saw Mills (Pty) Ltd* 1999 (2) SA 1077 (N).

156 *Lazarus v Ndimangele* 1913 CPD 732; *Zieve v Verster & Co* 1918 CPD 296.

157 *Lambinion v Du Toit* 1952 (4) SA 431 (T); *Martian Entertainments (Pty) Ltd v Berger* 1949 (4) SA 583 (E). See, however, *Karstein v Moribe* 1982 (2) SA 282 (T) in which Ackermann J held (at 299E–300A) that the undisclosed principal's intervention may be excluded where it could result in prejudice to the third party unforeseen by him at the time of entering into the contract; this approach, it was held, and particularly the requirement of prejudice, might well exclude the third party's defence to the undisclosed principal's intervention where the third party's objection to the undisclosed principal is merely subjective, and unconnected with any actual or potential prejudice on his part.

158 *Natal Trading and Milling Co Ltd v Inglis* 1925 TPD 724 at 742; *Hirsch v Rosen* 1944 WLD 24; *Van Staden v Prinsloo* 1947 (4) SA 842 (T) at 847.

159 *Miller, Gibb & Co v Smith & Tyer Ltd* [1917] 2 KB 141; *Teheran-Europe Co Ltd v S T Belton (Tractors) Ltd* [1968] 2 QB 545 at 553E–F; 558D–G and 561G–562A; [1968] 2 All ER 886.

160 For example in *Bothomley v Siew & Co* (1902) 9 HCG 207; *Freemantle v McKenzie* 1915 CPD 568.

161 Wille & Millin *Mercantile Law of South Africa* 510–11; De Villiers & Macintosh *Law of Agency in South Africa* 485–6.

162 The description of a party as an adult ('volwassene'), by which a pleader intends establishing the *locus standi* of that party, is unacceptable and ought not to be used in pleadings and affidavits (*Stassen v Stassen* 1998 (2) SA 105 (W) at 108E–I).

163 *Ex parte Savage* 1914 CPD 827 at 830; *Sibisi v Hermansberg Mission Society* (1916) 37 NLR 409.

164 *Ex parte Savage* 1914 CPD 827 at 831; *Ex parte Naude* 1915 CPD 675; *Ex parte Lezard* 1917 CPD 453 at 456.

165 *Ex parte Skoda Works (SA) (Pty) Ltd* 1941 TPD 29.

166 *Porter v Freudenberg* [1915] 1 KB 875 (CA).

167 *Stern & Co v De Waal* 1915 TPD 60; *Hehde v Estate Blum* 1940 (2) PH M87 (SWA).

168 *Stern & Co v De Waal* 1915 TPD 60; *Adler v Salisbury City Council* 1947 (3) SA 220 (SR). Even an enemy subject interned in this country can sue (*Schaffenius v Goldberg* [1916] 1 KB 284; *Hoch v Scoble* 1916 TPD 642; *Wipperman v Wipperman* 1916 EDL 411; *Schultz v Schultz* 1917 CPD 459; *Mathiesen v Glas* 1940 TPD 147. The case of *Labuschagne v Maarburger* 1915 CPD 423 has been overruled).

169 *Sorfracht v Van Uden* [1943] 1 AC 203 (HL).

170 *Overseas Trust Corporation Ltd v Godfrey* 1940 CPD 177.

171 *Schering Ltd v Stockholms Bank* [1946] 1 All ER 36 (HL).

172 There is no requirement in the Architectural Profession's Act 44 of 2000 that a professional architect must have reached any particular age in order to be registered. It is submitted that it is not necessary to allege that an architect cited as such is a major. Pursuant to a reconsideration of the position, this view differs from the one expressed in previous revision services of this work.

173 A person may not practise as a professional architect unless he is registered with the South African Council for the Architectural Profession (see s 18 of the Architectural Profession's Act 44 of 2000).

174 Unless registration is alleged, the particulars of claim will not disclose a cause of action and be excipiable (*Meredith Woods Johnson & Associates Trust v Deep Blue See Properties (Pty) Ltd* (unreported, SECLD case no 744/2003 dated 17 December 2003); *Moditi Consultant Engineers (CC) v Tectura International (Pty) Ltd* (unreported, GP case no 21421/19 dated 10 January 2022).

175 For a case dealing with the nature and scope of an architect's obligations, see *Turn Around Investments 7 (Pty) Ltd v Marcus Smit Architects CC* 2023 (1) SA 300 (WCC) at paragraphs [47]–[55].

176 Majority is not a requirement for the admission and enrolment as an attorney under the Legal Practice Act 28 of 2018. It is submitted that it is not necessary to allege that an attorney cited as such is a major. Pursuant to a reconsideration of the position, this view differs from the one expressed in previous revision services of this work.

177 No person other than an attorney may hold himself out as an attorney or make any representation or use any type or description indicating or implying that he is an attorney (s 33(2) of the Legal Practice Act 28 of 2014).

178 Financial misconduct of one director invokes liability of all directors (*Limpopo Provincial Council of the South African Legal Practice Council v Chueu Incorporated Attorneys* (unreported, SCA case no 459/22 dated 26 July 2023). See also 'Liability of directors of an incorporated law practice' 2017 (July) *De Rebus* 18–9.

179 Section 3 of the Auditing Profession Act 26 of 2005.

180 Section 37(1) of Act 26 of 2005.

181 Section 41 of Act 26 of 2005.

182 There is no requirement in the Auditing Profession Act 26 of 2005 that an individual who applies to be registered as an auditor must have reached a particular age. It is submitted that it is not necessary to allege that an auditor cited as such is a major. Pursuant to a reconsideration of the position, this view differs from the one expressed in previous revision services of this work.

183 Where the principal is disclosed, then, in the absence of one of the factors mentioned above, the auctioneer cannot personally be a party to the action (*Hofmeyer & Son v Luyt* 1921 CPD 831; *SWA Amalgameerde Afslaers (Edms) Bpk v Louw* 1956 (1) SA 346 (A)).

184 Section 11(1) which, however, provides for an exception in the case of a foreign institution as contemplated in s 18A of the Act.

185 Section 3 of the Cape of Good Hope Society Act 33 of 1968.

186 Section 2 of the South African Reserve Bank Act 90 of 1989.

187 Section 2 of the Land and Agricultural Development Bank Act 15 of 2002. In *Holeni v Land and Agricultural Development Bank of South Africa* 2009 (4) SA 437 (SCA) it was held (at 446A) that Act 15 of 2002 made it clear that the bank was a separate juristic person acting in its own name and right, distinct from, although not entirely independent of, government. It was held (at 443B–446H) that, for purposes of s 11*(b)* of the Prescription Act 68 of 1969, 'the State' did not include the bank. See also *Thomas v Minister of Defence and Military Veterans* 2015 (1) SA 253 (SCA) at 257B–C.

188 Section 4 of the South African Postbank Limited Act 9 of 2010.

189 Van Leeuwen *Cens For* 1 4 34 3; Voet 18 4 15; Van der Keessel *Praelectiones* 3 14 12; *Van der Byl & Co v Findlay and Kihn* (1892) 9 SC 178; *Rothschild v Lowndes* 1908 TS 493; *Moola v Estate Moola* 1957 (2) SA 463 (N); *TA Engineering Co Ltd v Seacat Investments (Pty) Ltd* 1974 (1) SA 747 (A) at 763; *Thos Barlow & Sons (Natal) Ltd v Dorman Long Ltd* 1976 (3) SA 97 (D); *Pizani v First Consolidated Holdings (Pty) Ltd* 1979 (1) SA 69 (A) at 78C–F; *Purchase v De Huizemark Alberton (Pty) Ltd t/a Bob Percival Estates* 1994 (1) SA 281 (W) at 285B–E; *Standard General Insurance Co Ltd v Eli Lilly (SA) (Pty) Ltd (FBC Holdings (Pty) Ltd, Third Party)* 1996 (1) SA 382 (W) at 385F–H; *First National Bank of SA Ltd v Lynn NO* 1996 (2) SA 339 (A) at 345G–J; *Goodwin Stable Trust v Duohex (Pty) Ltd* 1999 (3) SA 353 (C) at 354H.

190 *Leyds NO v Noord-Westelike Koöperatiewe Landboumaatskappy Bpk* 1985 (2) SA 769 (A) at 780C–G; *Marais en Andere NNO v Ruskin NO* 1985 (4) SA 659 (A) at 669I–670A; *Bank of Lisbon and South Africa Ltd v The Master* 1987 (1) SA 276 (A) at 291H–294H; *Incledon (Welkom) (Pty) Ltd v Qwaqwa Development Corporation Ltd* 1990 (4) SA 798 (A) at 804H–I; *Land- en Landboubank van Suid-Afrika v Die Meester* 1991 (2) SA 761 (A) at 771D–G; *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 (1) SA 77 (A) at 87G–H; *Louw v WP Koöperatief Bpk* 1994 (3) SA 434 (A) at 443F; *Millman NO v Twiggs* 1995 (3) SA 674 (A) at 676H–I; *Standard General Insurance Co Ltd v SA Brake CC* 1995 (3) SA 806 (A) 815B; *Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd* 2009 (1) SA 493 (SCA) at 496C–D; *Grobler v Oosthuizen* 2009 (5) SA 500 (SCA) at paragraphs [15] and [17]; *Engen Petroleum Ltd v Flotank Transport (Pty) Ltd* (unreported, SCA case no 876/2020 dated 21 June 2022) at paragraphs [13]–[16]. See also *Van Zyl NO v Look Good Clothing CC* 1996 (3) SA 523 (SE) at 526C–528H; *Free State Consolidated Gold Mines (Operations) Bpk v Sam Flanges Mining Supplies BK* 1997 (4) SA 644 (O) at 654H–655B.

191 *Wetzler v The General Insurance Company* (1884) 3 SC 86; *National Bank of SA Ltd v Cohen's Trustee* 1911 AD 235 at 251; *Kimberley Motor Supplies Co Ltd v Union Trade Promotion Co* 1938 GWL 23 at 33; *Barclays Bank v Riverside Dried Fruit Co (Pty) Ltd* 1949 (1) SA 937

(C); *De Hart NO v Virginia Land and Estate Co Ltd* 1957 (4) SA 501 (O).

192 *National Bank of SA Ltd v Cohen's Trustee* 1911 AD 235 at 251; *Bank of Lisbon and South Africa Ltd v The Master* 1987 (1) SA 276 (A) at 294B–D; *Land- en Landboubank van Suid-Afrika v Die Meester* 1991 (2) SA 761 (A) at 771E–F.

193 *Estate Lutkins v White* (1905) 26 NLR 409. This follows logically from the fact that the cedent, as a result of the cession, is divested of all rights in the ceded right of action. It is presumably *aliter* if the contract so provides (*Kuranda v Boustred* 1933 WLD 49 at 52).

194 Van Leeuwen *Cens For* 1 4 34 3; Voet 18 4 15; Van der Keessel *Praelectiones* 3 14 12; *Van der Byl & Co v Findlay and Kihn* (1892) 9 SC 178; *Rothschild v Lowndes* 1908 TS 493; *Moola v Estate Moola* 1957 (2) SA 463 (N); *LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd* 1974 (1) SA 747 (A) at 763; *Thos Barlow & Sons (Natal) Ltd v Dorman Long Ltd* 1976 (3) SA 97 (D); *Thekweni Properties (Pty) Ltd v Picardi Hotels Ltd (and Others as Third Parties)* 2008 (2) SA 156 (D) at 160H–I, overruled on appeal but not on this point, in *Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd* 2009 (1) SA 493 (SCA). The older cases are listed in *Clark v Van Rensburg* 1964 (4) SA 153 (O) at 158. See also *Bank of Lisbon and South Africa Ltd v The Master* 1987 (1) SA 276 (A) at 294C–F; *African Consolidated Agencies (Pty) Ltd v Siemens Nixdorf Information Systems (Pty) Ltd* 1992 (2) SA 739 (C) at 743C–744A and the authorities there referred to; *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 (1) SA 77 (A) at 87G–I.

195 Voet 18 4 15; *Jacobson's Trustee v Standard Bank* (1899) 16 SC 201; *Misnum v New Rietfontein GM Co Ltd* 1912 TPD 702; *Graaff-Reinet Board of Executors Ltd v Estate Erlank* 1933 CPD 41; *Lovell v Paxinos and Plotkin: In re Union Shopfitters v Hansen* 1937 WLD 84; *Barclays Bank v Riverside Dried Fruit Co (Pty) Ltd* 1949 (1) SA 937 (C); *Trust Bank van Afrika Beperk v Oosthuizen* 1962 (2) SA 307 (T); *Agricultural and Industrial Mechanisation (Vereeniging) (Edms) Bpk v Lombard* 1974 (1) SA 485 (O).

196 *Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd* 2009 (1) SA 493 (SCA) at 496C–D.

197 *Estate Komen v Koning and Vos* (1915) 36 NLR 518; *Standard General Insurance Co Ltd v Eli Lilly (SA) (Pty) Ltd (FBC Holdings (Pty) Ltd, Third Party)* 1996 (1) SA 382 (W) at 385G–H and 387D; *Goodwin Stable Trust v Duohex (Pty) Ltd* 1999 (3) SA 353 (C) at 354H–I.

198 *George Loder & Co v Vosloo* 1939 OPD 151.

199 *National Bank of SA Ltd v Cohen's Trustee* 1911 AD 235 at 247; *Bank of Lisbon and South Africa Ltd v The Master* 1987 (1) SA 276 (A) at 294D–E; *Incledon (Welkom) (Pty) Ltd v Qwaqwa Development Corporation Ltd* 1990 (4) SA 798 (A) at 804I–805A; *African Consolidated Agencies (Pty) Ltd v Siemens Nixdorf Information Systems (Pty) Ltd* 1992 (2) SA 739 (C) at 742C–D.

200 *Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd* 2009 (1) SA 493 (SCA) at paragraph [14]; *Extra Dimensions 44 (Pty) Ltd v Devcor Investments (Pty) Ltd* (unreported, GJ case no 33476/2019 dated 14 December 2021) at paragraph [11].

201 In *Extra Dimensions 44 (Pty) Ltd v Devcor Investments (Pty) Ltd* (unreported, GJ case no 33476/2019 dated 14 December 2021) it was held (at paragraph [10]) that in circumstances where a cedent incorrectly instituted proceedings in its name, those proceedings would not necessarily be a nullity. The defect in procedure could be remedied by substituting the correct person as plaintiff or by the plaintiff taking re-cession of the claims in question from the cessionary (obviously before judgment and provided there is no material prejudice to the other parties).

202 *Clark v Van Rensburg* 1964 (4) SA 153 (O) at 158, followed in *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 473E–475B.

203 1978 (1) SA 671 (A) at 680F.

204 1991 (3) SA 540 (W) at 543E–545B. See also *Standard General Insurance Co Ltd v Eli Lilly (SA) (Pty) Ltd (FBC Holdings (Pty) Ltd, Third Party)* 1996 (1) SA 382 (W) at 385F–H and 386E–387F (in which the decision in *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) was overruled); *Grindrod (Pty) Ltd v Seaman* 1998 (2) SA 347 (C) at 354D–I; *Goodwin Stable Trust v Duohex (Pty) Ltd* 1998 (4) SA 606 (C) at 623A–624A; *Homes for SA (Pty) Ltd v Rand Building Contractors (Pty Ltd* 2004 (6) SA 373 (W) at 376F–G; *Smyth v Investec Bank Ltd* 2018 (1) SA 494 (SCA) at 503C–E.

205 *Waikiwi Shipping Co Ltd v Thomas Barlow and Sons (Natal) Ltd* 1978 (1) SA 671 (A) at 678G; *Brummer v Gorfil Brothers Investments (Pty) Ltd* 1999 (3) SA 389 (SCA) at 410F; *Fisher v Natal Rubber Compounders (Pty) Ltd* 2016 (5) SA 477 (SCA) at 481D–483D.

206 *Fisher v Natal Rubber Compounders (Pty) Ltd* 2016 (5) SA 477 (SCA) at 483C–D.

207 *Tecmed (Pty) Ltd v Nissho Iwai Corporation* 2011 (1) SA 35 (SCA) at paragraph [20]; *Jacobs v Garlicke and Bousfield Inc* (unreported, KZD case no 1340/2011 dated 13 September 2023) at paragraph [24].

208 *Moosa v Mahomed* 1938 TPD 473; *Botha v Champion* 1941 WLD 83.

209 *Coetzee v Eloff* 1923 EDL 113; *Botha v Carapax Shadeports (Pty) Ltd* 1992 (1) SA 202 (A) at 212G–214I; *Branco t/a Mr Cool v Gale* 1996 (1) SA 163 (E) at 168F–169A; *Homes for SA (Pty) Ltd v Rand Building Contractors (Pty) Ltd* 2004 (6) SA 373 (W) at 376D–E.

210 *Thos Barlow & Sons (Natal) Ltd v Dorman Long Ltd* 1976 (3) SA 97 (D) at 102 and 103, where Kriek J comments on a passage from the judgment of Holmes JA in *Government of the Republic of SA v Ngubane* 1972 (2) SA 601 (A) at 608. The different forms which the cession can take is apparent from a comparison of the cession in the *Thos Barlow* case with that in *Schreuder v Steenkamp* 1962 (4) SA 74 (O) at 75. See also *Erasmus v Michael James (Pty) Ltd (t/a The Michael James Organisation) (Standard Bank of SA Ltd Intervening); Sashwood (Pty) Ltd v The Fund Constituting the Proceeds of the First and Second Judicial Sales of the MV Nautilus (Erasmus, Nel and Standard Bank of SA Ltd Intervening)* 1994 (2) SA 528 (C) at 555E–557G.

211 *Waikiwi Shipping Co Ltd v Thomas Barlow and Sons (Natal) Ltd* 1978 (1) SA 671 (A), overruling *Thos Barlow & Sons (Natal) Ltd v Dorman Long Ltd* 1976 (3) SA 97 (D); *Brummer v Gorfil Brothers Investments (Pty) Ltd* 1999 (3) SA 389 (SCA) at 410E–H; *Van Rensburg v Condoprops 42 (Pty) Ltd* 2009 (6) SA 539 (E) at 544E, applied in *Antonie v Noble Land (Pty) Ltd* 2014 (5) SA 307 (GJ) at 309H–310C. See also *Van Heerden* (1995) 112 *SALJ* 379 at 385.

212 *Walker v Matterson* 1936 NPD 495; *Curtis-Setchell & McKie v Koeppen* 1948 (3) SA 1017 (W); *Friedman v Woolfson* 1970 (3) SA 521 (D); *Marigold Ice Cream Co (Pty) Ltd v National Co-operative Dairies Ltd* 1997 (2) SA 671 (W) at 678D–F; *Brummer v Gorfil Brothers Investments (Pty) Ltd* 1999 (3) SA 389 (SCA) at 410E–H; *Van Rensburg v Condoprops 42 (Pty) Ltd* 2009 (6) SA 539 (E) at 544F–545D.

213 *Erasmus v Michael James (Pty) Ltd (t/a The Michael James Organisation) (Standard Bank of SA Ltd Intervening); Sashwood (Pty) Ltd v The Fund Constituting the Proceeds of the First and Second Judicial Sales of the MV Nautilus (Erasmus, Nel and Standard Bank of SA Ltd Intervening)* 1994 (2) SA 528 (C) at 566A; *Van Rensburg v Condoprops 42 (Pty) Ltd* 2009 (6) SA 539 (E) at 544F.

214 In *Presiding Bishop, Methodist Church of Southern Africa v Mtongana* 2008 (6) SA 69 (TkHC) it was held (at 73I–74B) that the provisions of the Laws and Discipline of the Methodist Church of Southern Africa relating to the institution of legal proceedings by and against the church precluded the institution of such legal proceedings.

215 What is known as *a universitas personarum* (see, for example, *Fountain Impactors Church v Here is Life Ministries* (unreported, KZP case no 15/2021P dated 24 October 2022) at paragraphs [14]–[17] and the authorities there referred to; and see the notes s v 'Voluntary associations' below).

216 The Close Corporations Act 69 of 1984 has been extensively amended by the Companies Act 71 of 2008, which came into operation on 1 May 2011 (Proc R32 in *GG* 34239 of 26 April 2011).

217 Section 2(2) of the Close Corporations Act 69 of 1984.

218 Section 2(4) of the Close Corporations Act 69 of 1984. As a general rule a close corporation may only litigate and appear before a court through a representative who is duly qualified and admitted to practise as such, but a court has a discretion, in exceptional circumstances, to allow a sole member of a close corporation to represent it (*Navy Two CC v Industrial Zone Ltd* [2006] 3 All SA 263 (SCA); and see *Fluxmans Incorporated v Lithos Corporation of South Africa (Pty) Ltd and Another (No 1)* 2015 (2) SA 295 (GJ) at 320B–321G and the authorities there referred to).

219 Section 22(1) of the Close Corporations Act 69 of 1984.

220 See the notes to rule 17(1) s v 'Every person making a claim . . . may . . . sue out a summons' above. See also P Pama 'Debt collecting against a deregistered close corporation or company' 2013 (August) *De Rebus* 38.

221 Section 32(1)*(a)* of the Companies Act 71 of 2008.

222 Section 32(1)*(b)* of the Companies Act 71 of 2008.

223 Section 32(4) of the Companies Act 71 of 2008.

224 Schedule 2 of the Companies Act 71 of 2008.

225 See item 2(2) of Schedule 2 of the Companies Act 71 of 2008.

226 *Van Staden NO v Pro-Wiz Group (Pty) Ltd* 2019 (4) SA 532 (SCA) at 537H–538H.

227 *Naidoo v Dube Tradeport Corp* 2022 (3) SA 390 (SCA) at paragraphs [21]–[22]).

228 Section 19(1)*(a)* of the Companies Act 71 of 2008.

229 Section 19(1)*(b)* of the Companies Act 71 of 2008.

230 Section 19(7) of the Companies Act 71 of 2008.

231 As to which see, *inter alia*, *Mbethe v United Manganese of Kalahari* 2016 (5) SA 414 (GJ) and the authorities therein referred to, confirmed on appeal *sub nomine Mbethe v United Manganese of Kalahari (Pty) Ltd* 2017 (6) SA 409 (SCA); *Larrett v Coega Development Corporation (Pty) Ltd* 2019 (3) SA 510 (ECG).

232 2022 (2) SA 543 (WCC).

233 At paragraphs [22]–[23].
234 At paragraphs [28]–[30].
235 At paragraphs [31]–32].
236 2023 (6) SA 268 (GJ).
237 At paragraph [29].
238 At paragraph [30].
239 At paragraph [31].
240 At paragraph [32].
241 At paragraph [35].
242 At paragraph [37].
243 At paragraph [38].
244 At paragraph [37].
245 *Smyth v Investec Bank Ltd* 2018 (1) SA 494 (SCA) at 502B–E and 510B–512G.
246 It has been held that the application must be brought in the name of the creditor and not in the name of its agent (*Body Corporate, Harbour View Sectional Title Scheme v Webb* (unreported, WCC case no 10619/15 dated 17 December 2015), following *Corder v Hanekom* 1934 CPD 46. See also *Van den Heever NO v World Marine Energy (Pty) Ltd (In Liq and Another and a related matter* 2023 (4) SA 296 (WCC) at paragraph [33], where it was also held that the same must hold true in respect of any application which is brought by an agent of a creditor in respect of the setting aside of a winding-up or in opposition to an application for a winding-up, unless the agent is expressly authorized to act on behalf of the creditor.
247 *Minister of Environmental Affairs v Recycling and Economic Development Initiative of South Africa NPC* 2018 (3) SA 604 (WCC) at 645I–649E.
248 *Gainsford and Others NNO v Tanzer Transport (Pty) Ltd* 2014 (3) SA 468 (SCA) at 473C–D, 474B–F and 475C–E. See also s 386(4)*(a)* of the (now repealed) Companies Act 61 of 1973 read with item 9 of Schedule 5 of the Companies Act 71 of 2008; Smith (2006) 14 *JBL* 105. In *Barnard and Others NNO v Imperial Bank Ltd* 2012 (5) SA 542 (GSJ), upheld on appeal *sub nomine Imperial Bank Ltd v Barnard* 2013 (5) SA 612 (SCA), the plaintiffs were cited in the particulars of claim *nomine officio* in their capacities as joint liquidators of the close corporation (in liquidation). They then sought an amendment of their citation on the basis that it was not strictly in accordance with the provisions of s 386(4)*(a)* of the (now repealed) Companies Act 61 of 1973. After a careful analysis of the conflicting cases regarding the correct form of citation (i e in the name of the company or *nomine officio*), the amendment was granted.
249 *FirstRand Bank Ltd v Cowin NO* 2018 (3) SA 322 (GP) at 332A–334B.
250 *HR Computek (Pty) Ltd v DR WAA Gouws (Johannesburg) (Pty) Ltd* 2023 (6) SA 268 (GJ) at paragraphs [12], [17] and [21]–[25] (where the court doubted decisions suggesting that the company was precluded from doing so as either wrong or *obiter*).
251 *Miller v Nafcoc Investment Holding Company Ltd* 2010 (6) SA 390 (SCA) at 395C–D; *Palala Resources (Pty) Ltd v Minister of Mineral Resources and Energy* 2016 (6) SA 121 (SCA) at 124A.
252 See the notes to rule 17(1) s v 'Every person making a claim . . . may . . . sue out a . . . summons' above. See also P Pama 'Debt collecting against a deregistered close corporation or company' 2013 (August) *De Rebus* 38.
253 *Bowman NO v Sacks* 1986 (4) SA 549 (W) at 464B–G.
254 This includes an arbitration (*Chetty t/a Nationwide Electrical v Hart and Another NNO* 2015 (6) SA 424 (SCA) at 427I–428C, 428G–429C and 435C–E).
255 2015 (4) SA 485 (KZD).
256 At 488E–489B.
257 2013 (6) SA 471 (GNP) at 473J–474D.
258 2016 (3) SA 209 (GP).
259 At 215B–216B.
260 2017 (4) SA 51 (WCC).
261 At 70D–71H and 73E–74F.
262 2017 (4) SA 592 (GJ).
263 At 598I–599C.
264 *Arendse v Van der Merwe and Another NNO* 2016 (6) SA 490 (GJ) at 497F–498D.
265 See also *Just Agronomics Group (Pty) Ltd v Afropulse 466 (Pty) Ltd* (unreported, GJ case no 24535/2020 dated 8 January 2021) at paragraphs [14]–[15].
266 *Kythera Court v Le Rendez-Vous Cafe CC* 2016 (6) SA 63 (GJ) at 66E–H, 67F and 67I; *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd* 2016 (6) SA 501 (WCC) at 506C–508B.
267 *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd* 2016 (6) SA 448 (KZD) at 457F–464H.
268 *Griessel v Lizemore* 2016 (6) SA 236 (GJ) at 263B–F.
269 *Timasani (Pty) Ltd (in business rescue) v Afrimat Iron Ore (Pty) Ltd* [2021] 3 All SA 843 (SCA) at paragraphs [24]–[37].
270 *Nedbank v Bruyns* 2015 (2) SA 430 (WCC) at paragraph [17]; *Nedbank Ltd v Zevoli 208 (Pty) Ltd* 2017 (6) SA 318 (KZP) at 325G–326C.
271 *Ergomode (Pty) Ltd v Jordaan NO* (unreported, SCA case no 643/2022 dated 29 January 2024) at paragraph [34].
272 *Newton Global Trading (Pty) Ltd v Da Corte* (unreported, SCA case no 104/15 dated 2 December 2015) at paragraphs [7], [8] and [9]. In *Just Agronomics Group (Pty) Ltd v Afropulse 466 (Pty) Ltd* (unreported, GJ case no 24535/2020 dated 8 January 2021) it was held (at paragraph [19]) that where the business rescue practitioner had been cited in his representative capacity, the company was properly before the court.
273 *Firm-O-Seal CC v Wynand Prinsloo & Van Eeden Inc* 2022 (4) SA 205 (ML) at paragraphs [4]–[6] and [16].
274 *Islandsite Investments 180 (Pty) Ltd v National Director of Public Prosecutions* (unreported, SCA case no 894/2022 dated 1 December 2023).
275 *Tegeta Exploration and Resources (Pty) Ltd v National Director of Public Prosecutions* (unreported, GP case nos 62604/2021; 62601/2021 dated 11 December 2023).
276 The service and notification requirements set out in s 132(2) of the Companies Act 71 of 2008 are not merely procedural steps. They are substantive requirements, compliance with which is an integral part of making an application for an order for business rescue (*Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC* 2013 (6) SA 141 (KZP) at paragraphs [26]–[27]; *Lutchman NO v African Global Holdings* 2022 (4) SA 529 (SCA) at paragraph [39]). Strict compliance with those requirements are therefore required (*Lutchman NO v African Global Holdings* 2022 (4) SA 529 (SCA) at paragraph [39]). Because the application is a substantive Form 2*(a)* application, it must be served in the manner provided for in rule 4(1)*(a)* (*Lutchman NO v African Global Holdings* 2022 (4) SA 529 (SCA) at paragraph [40]).
277 *Lutchman NO v African Global Holdings* 2022 (4) SA 529 (SCA) at paragraph [40].
278 *Van Staden NO v Pro-Wiz Group (Pty) Ltd* 2019 (4) SA 532 (SCA) at 538E–G.
279 2019 (3) SA 510 (ECG).
280 At 520A–G.
281 Section 185(1) of the Companies Act 71 of 2008.
282 *Farmers' Co-operative Society v Berry* 1912 AD 343 at 350–1; *Westelike Provinsie Ko-operatiewe Tabakkwekers Maatskappy Bpk v Psaltis* 1938 CPD 165 at 165–6; *TWK Agriculture Ltd v NCT Forestry Co-operative Ltd* 2006 (6) SA 20 (N) at 29B–C.
283 The Act came into operation on 2 May 2007 (Proc R6 in *GG* 29830 of 30 April 2007) and repealed the Co-operatives Act 91 of 1981. The Co-operatives Act 14 of 2005 applies to co-operative banks unless the application of a provision thereof has specifically been excluded or amended by the Co-operative Banks Act 40 of 2007 (s 4(1) of Act 40 of 2007).
284 Section 4(2) of Act 14 of 2005, without limitation, provides for the following kinds of co-operative:
(a) housing co-operative;
(b) worker co-operative;
(c) social co-operative;
(d) agricultural co-operative;
(e) co-operative burial society;
(f) financial co-operative;
(g) consumer co-operative;
(h) marketing and supply co-operative; and

(i) service co-operative.
See also the definition of each of the above co-operatives in s 1 of Act 14 of 2005.

285 Section 4(1) of the Co-operatives Act 14 of 2005 provides for the registration of the following forms of co-operative:
(a) a primary co-operative;
(b) a secondary co-operative;
(c) a tertiary co-operative; and
(d) the national apex co-operative.
See also the definition of each of the above co-operatives in s 1 of Act 14 of 2005.

286 In terms of ss 6 and 7 of the Co-operatives Act 14 of 2005.

287 Section 8(1) of the Co-operatives Act 14 of 2005.

288 In terms of s 10 of Act 14 of 2005 a co-operative must have the word —
(a) 'co-operative' or 'co-op' as part of its name in the case of a co-operative registered before the commencement of the Co-operatives Amendment Act 6 of 2013;
(b) 'Limited' or the abbreviation 'Ltd' as the last word of its name, unless the constitution of a co-operative does not limit the liability of its members in respect of co-operatives registered before the commencement of the Co-operatives Amendment Act 6 of 2013; and
(c) 'co-op Limited' or 'co-op Ltd' as the last words of its name in the case of a co-operative registered after the commencement of the Co-operatives Amendment Act 6 of 2013.
The Co-operatives Amendment Act 6 of 2013 came into operation on 1 April 2019 (Proc 14 in *GG* 42320 of 19 March 2019).
In addition the kind of co-operative (e g agricultural) must be designated in the name (see the various Parts of Schedule 1 to the Co-operatives Act 14 of 2005).

289 Section 20(1) of the Co-operatives Act 14 of 2005.

290 Section 20(2) of the Co-operatives Act 14 of 2005.

291 Section 62 of the Co-operatives Act 14 of 2005.

292 Section 66 of the Co-operatives Act 14 of 2005.

293 Section 97(1) of the Co-operatives Act 14 of 2005.

294 Proclamation R6, 2007 in *GG* 29830 of 30 April 2007. The Co-operatives Amendment Act 6 of 2013 came into operation on 1 April 2019 (Proc 14 in *GG* 42320 of 19 March 2019).

295 Section 97(2) of the Co-operatives Act 14 of 2005.

296 In accordance with s 7 of the Co-operatives Act 14 of 2005.

297 Section 97(2) of Act 14 of 2005.

298 Section 23 of the Co-operatives Act 14 of 2005.

299 Section 9(1) of the Co-operatives Act 14 of 2005.

300 In accordance with s 7 of the Co-operatives Act 14 of 2005.

301 Section 9(2) of the Co-operatives Act 14 of 2005. The ratification must be by means of ordinary resolution taken at a general meeting (s 9(2) of Act 14 of 2005).

302 Section 9(3) of the Co-operatives Act 14 of 2005.

303 Section 9(4) of the Co-operatives Act 14 of 2005.

304 *Louw v WP Koöperasie Bpk* 1991 (3) SA 593 (A) at 601F–604I.

305 Section 96(1) of the Customs and Excise Act 91 of 1964.

306 Section 96(1) of the Customs and Excise Act 91 of 1964.

307 Section 96(2) of the Customs and Excise Act 91 of 1964.

308 Section 89(1) of the Customs and Excise Act 91 of 1964.

309 Section 89(3) of the Customs and Excise Act 91 of 1964.

310 Section 89(2) of the Customs and Excise Act 91 of 1964.

311 *Ohlsson's Cape Breweries v Hamburg* 1908 TS 134; *Fitzgerald v Green* 1910 EDL 299 at 306 and 308–9; *Yoonuce v Pillay NO* 1964 (2) SA 286 (D); *Anirudh v Samdei* 1975 (2) SA 706 (N); *Nyati v Minister of Bantu Administration* 1978 (3) SA 224 (E); *Asmal v Asmal* 1991 (4) SA 262 (N) at 265B–E; *Gross v Pentz* 1996 (4) SA 617 (A) at 625B. The court will not interfere with an executor's sole right to carry on an action to recover assets in an estate by granting an application by a residuary heir to be joined as a co-plaintiff, except in cases of misconduct, where justice may be thwarted or impeded by permitting him to carry it on alone, or on other good cause shown (*Clark v Barnacle NO* 1958 (3) SA 41 (SR)).

312 *Gartrell v Southern Life Association* 1909 TH 57; *Krige v Scoble* 1912 TPD 814; *Horwood v Horwood* 1936 (1) PH F74; and see the cases referred to in the preceding footnote.

313 *Estate Hughes v Fouche* 1930 TPD 41; *Yoonuce v Pillay NO* 1964 (2) SA 286 (D).

314 *Scheepers v Kerkraad of the DRC Alexandria* 1930 EDL 66.

315 *Marskill v Estate Hove & Hove* (1907) 28 NLR 607; *Erasmus v Muller* 1909 EDC 293.

316 *Van der Merwe v Heydenrych* (1909) 19 CTR 460; *McLeod's Executor v McLeod* 1913 WR 644; *Conradie v Smit* 1966 (3) SA 368 (A) at 374.

317 1968 (3) SA 386 (T).

318 *Young's Executor v Rand Townships Registrar* 1910 TPD 12; *Vermaak's Executrix v Birkenstock* (1916) 37 NLR 560; *Schwulst v Somdaga* 1927 EDL 229; *Hare v Estate Hare* 1961 (4) SA 42 (W).

319 *Standard Life Association v Wright* 1915 OPD 2.

320 *Estate Amod Jeewa v Kharwa* (1911) 32 NLR 371; *Joint Estate Potgieter v Intestate Estate Potgieter* (1915) 36 NLR 45.

321 *Muter and Stone v Spangenberg* (1834) 2 Menz 457; *Ex parte Jensen* 1902 TH 98; *Gartrell v Southern Life Association* 1909 TH 57; *Klempman NO v Law Union & Rock Insurance Co Ltd* 1957 (1) SA 506 (W).

322 *Chapman v Rock* 1915 EDL 33; *Cilliers NO v Ellis* (unreported, SCA case no 200/2016 dated 17 March 2017) at paragraph [40].

323 *Ex parte Schnehage* 1935 (1) PH G20; *Basson v Redelinghuys* 1945 CPD 194; *Ex parte Kahn* 1962 (4) SA 119 (D).

324 *MacNamee v Executors Estate MacNamee* (1913) 34 NLR 428; *Rampersadh v Pillay* 1963 (3) SA 320 (D).

325 Section 55(1) of the Administration of Estates Act 66 of 1965.

326 Section 55(2) of the Administration of Estates Act 66 of 1965.

327 This includes an action in a magistrate's court.

328 Sections 3 and 4 of the Diplomatic Immunities and Privileges Act 37 of 2001. See also, in general, Riaan de Jager 'Diplomatic Immunity: Its nature, effects and implications' 2018 (July) *De Rebus* 26 and 'Diplomatic Law: Legal proceedings against a foreign diplomat in a South African court' 2018 (August) *De Rebus* 20.

329 *Dickinson v Del Solar* [1930] 1 KB 376 at 380; *Empson v Smith* [1965] 2 All ER 881 at 886E. See also s 8 of the Diplomatic Immunities and Privileges Act 37 of 2001. In terms of s 8(3) any waiver shall be express and in writing.

330 Section 15 of the Diplomatic Immunities and Privileges Act 37 of 2001.

331 *S v Penrose* 1966 (1) SA 5 (N).

332 Section 20.

333 Section 20(4) of the Higher Education Act 101 of 1997.

334 Section 51(1)*(b)* of the Higher Education Act 101 of 1997.

335 See also *Fish Hoek Primary School v Welcome* 2009 (3) SA 36 (C) at 37H — I; *Hoërskool Ermelo v Head, Department of Education, Mpumalanga* 2009 (3) SA 422 (SCA) at 423D.

336 If a public school has taken out insurance and the school activity is an eventuality covered by the insurance policy, the liability of the State as provided for in s 60(1)*(a)* is limited to the extent that the damage or loss has not been compensated in terms of the policy (s 60(1)*(b)* of the South African Schools Act 84 of 1996).

337 Section 60(2) of the South African Schools Act 84 of 1996.

338 Section 60(3) of the South African Schools Act 84 of 1996.

339 Section 60(4) of the South African Schools Act 84 of 1996.

340 Section 60(5) of the South African Schools Act 84 of 1996.

341 The governing body of a public school is entitled to institute proceedings either in its own name or that of the school itself (*Despatch High School v Head, Department of Education, Eastern Cape and Others* 2003 (1) SA 246 (CkH)). See also *Grove Primary School v Minister of*

Education and Others 1997 (4) SA 982 (C); *Iqhayiya Technical College v MEC for Education, Eastern Cape Province* 1998 (4) SA 502 (CkH); *Bennie Groenewald Primêre Skool v Premier van die Noord-Kaap* [1998] 3 All SA 426 (NC); *Governing Body, Mikro Primary School v Minister of Education, Western Cape* 2005 (3) SA 504 (C); *Kimberley Girls' High School v Head, Department of Education, Northern Cape Province* 2005 (5) SA 251 (NC); *Hoërskool Ermelo v Head, Department of Education, Mpumalanga* 2009 (3) SA 422 (SCA) at 423D; *MEC for Education, Gauteng Province v Governing Body, Rivonia Primary School* 2013 (6) SA 582 (CC) at 585H–586A; *Head of Department, Department of Education, Free State Province v Welkom High School* 2014 (2) SA 228 (CC) at 234D–E.

342 See also *Fish Hoek Primary School v Welcome* 2009 (3) SA 36 (C) at 37H–I.

343 As to the meaning of 'foreign company' and 'external company', see s 1 of the Companies Act 71 of 2008.

344 Section 23(3)*(a)* of the Companies Act 71 of 2008.

345 Section 23(3)*(b)*.

346 On jurisdiction over foreign companies, see *Appleby (Pty) Ltd v Dundas Ltd* 1948 (2) SA 905 (E); *Dairy Board v John T Rennie & Co (Pty) Ltd* 1976 (3) SA 768 (W); *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A) at 496F–497D; *Siemens Ltd v Offshore Marine Engineering Ltd* 1993 (3) SA 913 (A).

347 As to the meaning of 'foreign company' and 'external company', see s 1 of the Companies Act 71 of 2008.

348 *CMC di Ravenna SC v Companies and Intellectual Property Commission* 2020 (2) SA 109 (GP) at paragraphs [23]–[39], confirmed on appeal by the Supreme Court of Appeal *sub nomine Cooperativa Muratori & Cementisti v Companies and Intellectual Property Commission* 2021 (3) SA 393 (SCA).

349 Section 2(1) of the Foreign States Immunities Act 87 of 1981; *Saharawi Arab Democratic Republic v Owners and Charterers of the Cherry Blossom* 2017 (5) SA 105 (ECP) at 121G–122C. 'Foreign state' is defined in s 1 as including the head of state of that foreign state, in his capacity as such head of state, the government of that foreign state, and any department of that government.

350 Section 2(2) of the Foreign States Immunities Act 87 of 1981; *Saharawi Arab Democratic Republic v Owners and Charterers of the Cherry Blossom* 2017 (5) SA 105 (ECP) at 122C–127I.

351 Section 3 of the Foreign States Immunities Act 87 of 1981.

352 'Commercial transaction' is defined in s 4(3) of the Foreign States Immunities Act 87 of 1981.

353 Section 4(1) of the Foreign States Immunities Act 87 of 1981.

354 Section 5(1) of the Foreign States Immunities Act 87 of 1981. See s 5(2) for exceptions to s 5(1).

355 Section 6 of the Foreign States Immunities Act 87 of 1981.

356 Section 7(1) of the Foreign States Immunities Act 87 of 1981.

357 Section 7(2) of the Foreign States Immunities Act 87 of 1981.

358 Section 14(1) and (2) of the Foreign States Immunities Act 87 of 1981.

359 Section 14(2) of the Foreign States Immunities Act 87 of 1981.

360 1925 WLD 164.

361 At 166–168.

362 *Escom v Rademeyer* 1985 (2) SA 654 (T) at 658H; *Botes v Goslin* 1987 (2) SA 716 (C) at 721A–C; *Courtney v Boshoff N.O.* [2023] 2 All SA 100 (GJ) at paragraph [28].

363 See also *Botes v Goslin* 1987 (2) SA 716 (C) at 721C–H; and see *Maluleke v Dupont NO* 1967 (1) SA 574 (RA) at 576D–H and 577B–578A; 1967 (4) SA 31 (RA). It has been held that a judgment creditor who is a fugitive from justice and who seeks enforcement of a judgment is not entitled to obtain a writ of execution on that judgment (*Botes v Goslin* 1987 (2) SA 716 (C) at 721D–722A). A person who has escaped from prison, where he was serving the sentence passed on him against which he wishes to appeal, has no *locus standi in judicio* to approach the court (*S v Nkosi* 1963 (4) SA 87 (T); *S v Kennedy* 1967 (1) SA 297 (C); *S v Isaacs* 1968 (2) SA 184 (A)).

364 2011 (2) SA 294 (GSJ).

365 At 300C–301F.

366 2017 (4) SA 80 (GP) at 89H–90F.

367 [2023] 2 All SA 100 (GJ) at paragraphs [22] and [47]–[48].

368 *Meyerson v Health Beverages (Pty) Ltd* 1989 (4) SA 667 (C) at 673G. See also *Escom v Rademeyer* 1985 (2) SA 654 (T); *Botes v Goslin* 1987 (2) SA 716 (C) at 721I; *Fraind v Nothmann* 1991 (3) SA 837 (W) at 841A–I. In *Escom v Rademeyer* 1985 (2) SA 654 (T) the court, however, in an *obiter dictum* stated that it may very well be that a fugitive who is a defendant does not enjoy the right ordinarily enjoyed by a defendant to institute a claim in reconvention (at 662D) or to apply for an extension of time to show cause why a rule *nisi* should not be confirmed (at 662A–F).

369 *Fraind v Nothmann* 1991 (3) SA 837 (W) at 841A–I. See, however, *Chetty v Law Society, Transvaal* 1983 (1) SA 777 (T).

370 *Courtney v Boshoff N.O.* [2023] 2 All SA 100 (GJ) at paragraph [31] (a case where it was found that the applicant was not a fugitive from justice).

371 Section 2(1) of the State Liability Act 20 of 1957, as amended by s 1 of the State Liability Amendment Act 14 of 2011 with effect from from 30 August 2011 (*GG* 34545 of 22 August 2011) and by s 3 of the Judicial Matters Amendment Act 8 of 2017 with effect from 2 August 2017 (*GG* 41018 of 2 August 2017). See also s 2(2) of the State Liability Act 20 of 1957, as amended, in Part D11 below.

372 Section 34 of the General Law Amendment Act 62 of 1955.

373 The text of the Act is reproduced in Part D11 below.

374 Section 1(1) of Act 40 of 2002.

375 Section 1(2) of Act 40 of 2002.

376 Section 1(3) of Act 40 of 2002.

377 Section 1(1) of Act 40 of 2002.

378 Section 1(1) of Act 40 of 2002.

379 Section 2(1) of Act 40 of 2002.

380 Section 3(1) of Act 40 of 2002.

381 Section 3(1)*(b)* of Act 40 of 2002.

382 The prescribed period must be calculated according to *computatio civilis,* i e by including the day on which the event occurred and excluding the last day of the period (*Die Minister van Polisie v De Beer* 1970 (2) SA 712 (T)).

383 Section 3(2)*(a)* of Act 40 of 2002.

384 Section 3(2)*(b)*(i) of Act 40 of 2002.

385 Section 3(2)*(b)*(ii) of Act 40 of 2002.

386 Section 3(3)*(a)* of Act 40 of 2002.

387 Section 3(4) of Act 40 of 2002. It is submitted that, by virtue of the wording of s 3(4), a court is precluded from raising the failure of a creditor to comply with s 3(2)*(a) mero motu*, and an application for condonation is necessary only if the organ of state relies on such failure. See further the notes to this subsection in Part D11 below.

388 Section 3(4)*(b)*(i) of Act 40 of 2002.

389 Section 3(4)*(b)*(ii) of Act 40 of 2002. See further the notes to this subsection in Part D11 below.

390 Section 3(4)*(b)*(iii) of Act 40 of 2002. See further the notes to this subsection in Part D11 below.

391 Section 3(4)*(c)* of Act 40 of 2002.

392 Section 4(1) of Act 40 of 2002.

393 Section 4(1)*(a)–(f)* of Act 40 of 2002 lists the various officers or persons to whom the notice must be delivered.

394 Section 4(2)*(a)* of Act 40 of 2002.

395 Section 4(2)*(b)* of Act 40 of 2002.

396 Section 4(2)*(b)*(iv) of Act 40 of 2002.

397 Section 5(2) of Act 40 of 2002.

398 Section 5(3) of Act 40 of 2002.

399 Section 5(1)*(b)*(ii)*(aa)* of Act 40 of 2002.

400 Section 5(1)*(b)*(ii)*(bb)* of Act 40 of 2002.

401 Section 5(1)*(b)*(iii) of Act 40 of 2002.

402 Section 5(1)*(b)*(i) of Act 40 of 2002.

403 *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) at 128E–F and 129H–130B; *HAL obo MML v MEC for Health, Free State* 2022 (3) SA 571 (SCA) at paragraph [183]). Once a decision has been made to contest the claim, the State Attorney must give effect to instructions to

that effect (*Minister of Police v Van der Watt* (unreported, SCA case no 1009/2021 dated 21 July 2022) at paragraphs [30]–[31]).

404 *Ahmed v City of Cape Town* 1936 CPD 54; *Osler v Johannesburg City Council* 1948 (1) SA 1027 (W); *Mphelo v Bruwer* 1951 (1) SA 433 (T); *Administrator Transvaal v Husband* 1959 (1) SA 392 (A); *Dease v Minister of Justice* 1962 (3) SA 215 (T) at 220; *Boshoff Munisipaliteit v Niemann* 1969 (1) SA 75 (O); and see *Minister of Defence v Carlson* 1971 (2) SA 231 (N); *Maponya v Minister of Police* 1983 (2) SA 616 (T) at 619G–620D; *Minister van Wet en Orde v Hendricks* 1987 (3) SA 657 (A) at 663B–664F; *Abrahamse v East London Municipality, East London Municipality v Abrahamse* 1997 (4) SA 613 (SCA) at 623E–624C.

405 *Pakco (Pty) Ltd v Verulam Town Board* 1962 (4) SA 632 (D), and see the decisions referred to in the preceding footnote.

406 *Mkhize v Swemmer* 1967 (1) SA 186 (D) at 194.

407 Section 5(4) of Act 40 of 2002.

408 *Minister of Police v Silvermoon Investments 145 CC* 2020 (6) SA 586 (KZD) at paragraphs [24], [35], [36], [44] and [48].

409 *Grevler v Landsdown* 1991 (3) SA 175 (T) at 177H; *Marais v Engler Earthworks (Pty) Ltd; Engler Earthworks (Pty) Ltd v Marais* 1998 (2) SA 450 (E) at 453C–I.

410 *Fourie v Magistrate of Harrismith* 1939 OPD 202 at 205.

411 'Personal injury' includes any form of *injuria (De Wet NO v Jurgens* 1970 (3) SA 38 (A). An insolvent who has suffered loss or damage as a result of personal injuries sustained by him may recover for his own benefit general damages (compensation for pain and suffering, loss of amenities and the like) and also special damages (e g medical and kindred expenses and loss of earnings) (*Santam Versekeringsmaatskappy Bpk v Kruger* 1978 (3) SA 656 (A)).

412 *Witz v Additional Magistrate and Witz's Trustee* 1931 WLD 180.

413 *Ecker v Dean* 1940 AD 206. See also *Ecker v Dean* 1937 AD 254 and 1938 AD 102, and *Dean v Estate Dean* 1938 AD 577.

414 *Mears v Rissik* 1905 TS 303. See also *Muller v De Wet NO* 1999 (2) SA 1024 (W) at 1027J–1030H, and the authorities there referred to.

415 *Kuper v Stern and Hewitt NO* 1941 WLD 1.

416 *Tucker v Joss* (1862) 1 Roscoe 42.

417 Section 20(1)*(b)* of the Insolvency Act 24 of 1936.

418 In terms of rule 15.

419 *Patel v Parouk's Trustee* 1944 AD 469.

420 Section 25 of the Insolvency Act 24 of 1936.

421 2008 (6) SA 511 (SCA) at 517C–521E.

422 *Rand Mutual Assurance Co Ltd v Road Accident Fund* 2008 (6) SA 511 (SCA) at 521E–H. See also *Smith v Banjo* 2011 (2) SA 518 (KZP) at 521D–522D and the cases there referred to; Alno Smit 'Does subrogation constitute a new cause of action to be pleaded?' 2021 (May) *De Rebus* 18.

423 Sections 79(1), 94(1) and 104 of the National Water Act 36 of 1998.

424 See *Soller v President of the Republic of South Africa* 2005 (3) SA 567 (T) at 569A and 575A, a case decided under s 25(1) of the now repealed Supreme Court Act 59 of 1959.

425 Cape Ordinance 20 of 1974 s 3; Natal Ord 25 of 1974 s 6; OFS Ord 8 of 1962 s 3(3); Transvaal Ord 17 of 1939 ss 6(1) and 9(1)*(b)*.

426 The text of the Act is reproduced in Part D11 below.

427 *GG* 24112 of 28 November 2002.

428 Section 1 of Act 94 of 1970.

429 Section 2 of Act 94 of 1970.

430 See the definition of 'organ of state' in s 1 of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002. The text of the Act is reproduced in Part D11 below.

431 *Bitou Municipality v Booysen* 2011 (5) SA 31 (WCC) at 34I, 36F and 36H–37F.

432 In terms of s 4(1)*(b)* of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002, a notice of intended legal proceedings contemplated in s 3 must be served on the municipal manager of the municipality concerned. In terms of s 115(3) of the Local Government: Municipal Systems Act 32 of 2000, any legal process is effectively and sufficiently served on a municipality when it is delivered to the municipal manager or a person in attendance at the municipal manager's office.

433 See the notes s v 'Judges' above.

434 Section 11 of the Matrimonial Property Act 88 of 1984.

435 Section 12 of the Matrimonial Property Act 88 of 1984.

436 Section 14 of the Matrimonial Property Act 88 of 1984.

437 As set out in s 15(2), (3) and (7) of Act 88 of the Matrimonial Property Act 1984.

438 Section 15(1) of the Matrimonial Property Act 88 of 1984.

439 The exceptions to the general rule are set out in s 17(1)*(a)–(c)* of the Matrimonial Property Act 88 of 1984. See also *Samsudin v Berrange NO* 2005 (3) SA 529 (N) at 533J–534A.

440 Section 17(1) of the Matrimonial Property Act 88 of 1984.

441 Section 17(2) of the Matrimonial Property Act 88 of 1984.

442 Section 17(5) of the Matrimonial Property Act 88 of 1984. See also *Zake v Nedcor Bank Ltd* 1999 (3) SA 767 (SE) at 770D–771B.

443 Sections 58(1) and 71(1) of the Constitution of the Republic of South Africa, 1996.

444 *GG* 26435 of 7 June 2004. The Act repeals the Powers and Privileges of Parliament Act 91 of 1963 (except ss 31 and 39). Section 9(1) of the Act provides that when a member (i e a member as defined in s 1 of the Act) is required to attend a court as a witness or as a defendant in any civil proceedings, or as a defendant in any civil proceedings, the Speaker or the Chairperson or a member designated by any one of them may issue a certificate stating that the member is required to attend to business in Parliament. In terms of s 9(2) of the Act such a certificate is sufficient proof that the member is in attendance on Parliament, and the member is, accordingly, absolved from attending the court pending completion of that business.

445 Section 117(1) of the Constitution of the Republic of South Africa, 1996. In terms of s 117(2) of the Constitution, other privileges and immunities of a provincial legislature and its members may be prescribed by national legislation. The Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 was enacted pursuant to s 117(2) of the Constitution.

446 A magistrate's court has no jurisdiction to make such a declaration, which affects the status of the *de cujus* (s 46(2)*(b)* Magistrates' Courts Act 32 of 1944).

447 *Mitchell v Mitchell* 1930 AD 217.

448 For a detailed discussion, see *Boberg's Law of Persons* 896 *et sqq*; Schäfer *Family Law Service* Division E.

449 The Act comes into operation incrementally. On 1 July 2007 the following provisions came into operation: ss 1–11, 13–21, 27, 30, 31, 35–40, 130–34, 305(1)*(b)*, 305(1)*(c)*, 305(3)–(7), 307–11, 313–15 and items 2, 3, 5, 7 and 9 of Schedule 4 (Proc 13, 2007 in *GG* 30030 of 29 June 2007). See, in general, 2007 (November) *De Rebus* 25.

450 Schedule 4 of the Children's Act 38 of 2005.

451 In s 1 of the Children's Act 38 of 2005 'child' is defined as 'a person under the age of 18 years'.

452 Section 17 of the Children's Act 38 of 2005.

453 *FB v MB* 2012 (2) SA 394 (GSJ) at 396E–G.

454 Whenever more than one person has guardianship of a child, each one of them is competent, subject to any other law or any order of a competent court to the contrary, to exercise independently and without the consent of the other any right or responsibility (including the right or responsibility to assist the child in legal matters) arising from such guardianship (s 18(4) of the Children's Act 38 of 2005).

455 *Ex parte Greeve* (1907) 24 SC 202; *Swart v Muller* (909) 19 CTR 475; *Yu Kwam v President Insurance Co Ltd* 1963 (1) SA 66 (T), confirmed 1963 (3) SA 766 (A) at 772; *Wolman v Wolman* 1963 (2) SA 452 (A); *Thole v Trans-Drakensberg Bank Ltd* 1967 (2) SA 214 (D); *Guardian National Insurance Co Ltd v Van Gool NO* 1992 (4) SA 61 (A) at 66F–H. Ordinarily, a court should appoint a *curator ad litem* where children's interests are at stake and a risk of an injustice being done to them might arise during the proceedings (*Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC) at 210G–212B; *S v Mokoena* 2008 (5) SA 578 (T) at 589C.

456 *Ex parte Dreyer* (1908) 18 CTR 205; *Ex parte Ellis* (1908) 17 CTR 229; *Mahomed Hassan v Minister of Justice* 1911 TPD 1163; *Ex parte Gerber* 1928 WLD 228; *Ex parte Hardenberg* 1946 (1) PH M10 (C); *Ex parte Goldman* 1960 (1) SA 89 (D).

457 Under the Constitution of the Republic of South Africa, 1996.

458 The court may grant appropriate relief, including a declaration of rights (s 15(1) of the Children's Act 38 of 2005).

459 It is submitted that s 15(2)*(a)* of the Children's Act 38 of 2005 does not alter the general principles relating to the assistance or representation of a child contemplated in that section as set out in the commentary above.

460 See, for example, *Dreyer v Sonop Bpk* 1951 (2) SA 392 (O).

461 Rule 17(4)*(b)*.

462 *Van der Walt v Hudson* (1886) 4 SC 327; *Pienaar v Godden* (1893) 10 SC 129; *Willmer v Rance* (1904) 21 SC 423; *Sharp v Dales* 1935 NPD 392; *Jacobs v Kegopotsimang* 1937 GWL 43.

463 *January v Kilpatrick* (1881) 2 EDC 18; *Van der Walt v Hudson* (1886) 4 SC 327; *Traub v Bloomberg* 1917 TPD 276; *Ex parte Donaldson* 1947 (3) SA 170 (T); *Wolman v Wolman* 1963 (2) SA 452 (A) at 459; *President Insurance Co Ltd v Yu Kwam* 1963 (3) SA 766 (A) at 772; *Nokoyo v AA Mutual Insurance Association Ltd* 1976 (2) SA 153 (E) at 155.

464 Rule 17(4)*(a)* and *(b)*; *January v Kilpatrick* (1881) 2 EDC 18.

465 'Die minderjarige in hierdie geval bly self die litigant ofskoon sy verskyningsbevoegdheid wat hy anders nie het nie, aangevul word met die nodige *auctoritas* en die vrug of verlies wat die saak mag afwerp wanneer hy so bygestaan word, val hom toe', *per* Erasmus J in *O'Linsky v Prinsloo* 1976 (4) SA 843 (O) at 847. See further *Willmer v Rance* (1904) 21 SC 423; *Potgieter v Kosana* 1913 EDL 458; *Mokhesi NO v Demas* 1951 (2) SA 502 (T); *Guardian National Insurance Co Ltd v Van Gool NO* 1992 (4) SA 61 (A) at 66H.

466 The modern position is stated as follows in *Grobler v Potgieter* 1954 (2) SA 188 (O) at 192A:
'. . . [I]n an action instituted by a father and natural guardian on behalf of his minor son, with or without the leave of the court, any order of costs — in the event of the action being lost — is never directed against the father in his personal capacity, except in those cases where the action was instituted frivolously or recklessly . . . Costs in such a case must be borne by the minor plaintiff.'
See also *Tshona v Principal, Victoria Girls High School* 2007 (5) SA 66 (E) at 82D–F. As is pointed out in *Boberg's Law of Persons* 683, it may not be worth suing an impecunious minor.

467 See *Boberg's Law of Persons* 911–15, where the older cases are considered.

468 *Per* Broome JP in *Ex parte Hodgert* 1955 (1) SA 371 (D) at 372. See also *Grobler v Potgieter* 1954 (2) SA 188 (O) at 192A:
'. . . [I]n an action instituted by a father and natural guardian on behalf of his minor son, with or without the leave of the court, any order of costs — in the event of the action being lost — is never directed against the father in his personal capacity, except in those cases where the action was instituted frivolously or recklessly . . . Costs in such a case must be borne by the minor plaintiff.'

469 See *Boberg's Law of Persons* 912–13.

470 *Re Estate Potgieter* 1908 TS 982 at 1000 and 1007.

471 See *Re Estate Potgieter* 1908 TS 982; *Bekker's Trustee v The Master* 1909 TS 646; *Claassens v Naude* 1911 CPD 725; *Nicholl NO v SAR & H* 1917 WLD 95; *Bayne NO v Kanthack* 1934 WLD 13; *Ex parte Bloemfontein Town Council* 1934 OPD 11; *Bellstedt v SAR & H* 1936 CPD 399; *Taylor NO v Lucas NO* 1937 TPD 405; *Jacobs v Kegopotsimang* 1937 GWL 43; *Grobler v Potgieter* 1954 (2) SA 188 (O) at 192; *Ex parte Bloy* 1984 (2) SA 410 (D) at 411H; *Tshona v Principal, Victoria Girls High School* 2007 (5) SA 66 (E) at 82D–F; *Boberg's Law of Persons* 914.

472 It is submitted that the word 'minor' in s 13(1)*(a)* of the Prescription Act 68 of 1969 should be interpreted as a reference to a 'child' as contemplated and defined in the Children's Act 38 of 2005, i e a person under the age of 18 years. In terms of s 17 of the Children's Act 38 of 2005 a child, whether male or female, becomes a major upon reaching the age of 18 years. See also *Santam Versekeringsmaatskappy Bpk v Roux* 1978 (2) SA 856 (A); Dicker 2008 (January/February) *De Rebus* 46; Van Graan 2008 (September) *De Rebus* 4–5, but see Klopper 2008 (May) *De Rebus* 5.

473 *Jonker v Rondalia Assurance Corporation of SA Ltd* 1976 (2) SA 334 (E) at 336; *Enslin v South African Eagle Insurance Co Ltd* 1981 (3) SA 71 (W) at 72C–H.

474 2012 (2) SA 519 (KZD). In *MEC for Education, KwaZulu-Natal v Shange* 2012 (5) SA 313 (SCA) the Supreme Court of Appeal, in dismissing an appeal against the decision of the court *a quo*, remarked (at 320D) that there was no need for the court *a quo* have entered into the involved investigation of the effect of s 17 of the Children's Act 38 of 2008 on the running of prescription in respect of the respondent's claim in that case.

475 At 527F–H.

476 2014 (3) SA 177 (SCA) at 187G–188C. See also K Haslam '18 the new 21 — the retrospective application of a statute' 2014 (July) *De Rebus* 30.

477 Section 1 read with s 19(1) of the Mutual Banks Act 124 of 1993. In terms of s 9(1) of the Act mutual banks are required to be registered as such. Contrary to the position pertaining to banks registered under the Banks Act 94 of 1990, mutual banks are not companies. In terms of s 19(2) of the Mutual Banks Act 124 of 1993 a juristic person registered as a company must be deregistered by the Companies and Intellectual Property Commission upon its receiving notice in writing from the Registrar of Banks that such juristic person has been registered as a mutual bank.

478 By the Banks Act 94 of 1990 and the Mutual Banks Act 124 of 1993, respectively.

479 Section 20(5) of the Mutual Banks Act 124 of 1993.

480 Section 20(7).

481 Section 18(2) of the National House of Traditional Leaders Act 22 of 2009.

482 Normally the plaintiff would sue as holder and, if so, he must allege that he is the holder (*Marcuson v Botha* 1913 TPD 650; cf *Van Heerden v De Beer* 1916 TPD 469; *Davis v Saxe* 1953 (3) SA 114 (C) at 117H–118B; *Trust Bank van Afrika Bpk v Bendor Properties Ltd* 1977 (2) SA 632 (T) at 635F–636A). But sometimes a person is entitled to sue even though not a holder. Thus, under s 57(2) of the Bills of Exchange Act 34 of 1964, a drawer who has been compelled to pay can sue the acceptor of a bill without, it is submitted, being a holder. In such case the plaintiff must, by appropriate averment in the summons, establish not that he is a holder, but the title in which he sues.

483 *African Credit & Investment Corporation v Knight* 1930 NPD 295; *Venter v Cassimjee* 1956 (2) SA 242 (N) at 245.

484 Section 46 of the Bills of Exchange Act 34 of 1964.

485 Section 48 of the Bills of Exchange Act 34 of 1964.

486 *Pine Designs (Pty) Ltd v Abt* 1976 (3) SA 795 (O) at 800C; *Alvern Cables (Pty) Ltd v Dynamis (Pty) Ltd* 1989 (3) SA 916 (C) at 920B–G.

487 *Alvern Cables (Pty) Ltd v Dynamis (Pty) Ltd* 1989 (3) SA 916 (C) at 920J–921A.

488 The Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004, s 23(1).

489 The Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004, s 23(2).

490 Section 5(1)*(a)*. See also *Chairman of the Board of the Sanlam Pensioenfonds (Kantoorpersoneel) v Registrar of Pension Funds* 2007 (3) SA 41 (T) at 44D–E and 45H–J.

491 2001 (4) SA 159 (SCA).

492 At 178B–179C.

493 *Chairman of the Board of the Sanlam Pensioenfonds (Kantoorpersoneel) v Registrar of Pension Funds* 2007 (3) SA 41 (T) at 45I–46A.

494 *Ramakatsa v Magashule* 2013 (2) BCLR 202 (CC) at paragraph [79]; *Magashule v Ramaphosa* [2021] 3 All SA 887 (GJ) at paragraph [3].

495 *Bio Energy Afrika Free State (Edms) Bpk v Freedom Front Plus* 2012 (2) SA 88 (FB) at 94F–G.

496 2012 (3) SA 486 (SCA).

497 At 504G.

498 *Democratic Alliance v Acting National Director of Public Prosecutions* 2012 (3) SA 486 (SCA) at 503F–504G.

499 *New Modderfontein GM Co v Transvaal Provincial Administration* 1919 AD 367; *Premier, Western Cape v President of the Republic of South Africa* 1999 (3) SA 657 (CC).

500 *De Waal NO v North Bay Canning Co Ltd* 1921 AD 521; *Administrateur, Transvaal v Carletonville Estates Ltd* 1959 (3) SA 150 (A); *Woods v Administrateur, Transvaal* 1960 (1) SA 311 (T); *Greyling v Administrator, Natal* 1966 (2) SA 684 (D); *Capital Construction Co (Pty) Ltd v Die Administrateur* 1969 (1) SA 99 (T); *The Administrator, Transvaal v Johannesburg City Council* 1971 (1) SA 56 (A); *Properties and Townships (SA) Ltd v The Administrator, Transvaal* 1977 (4) SA 454 (W); *Administrateur, Transvaal v Quid Pro Quo Eiendomsmaatskappy (Edms) Bpk* 1977 (4) SA 829 (A); *Truter v Die Administrateur, Kaapprovinsie* 1978 (3) SA 489 (C); *Munisipale Raad van Bainsvlei v Premier van die Oranje-Vrystaat* 1995 (1) SA 772 (O); *Cekeshe v Premier, Eastern Cape* 1998 (4) SA 935 (Tk); *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC).

501 *Cape Provincial Administration v Honiball* 1942 AD 1; *Transvaal Provincial Administration v Letanka* 1923 AD 102; *Johannesburg Consolidated Investment Co Ltd v Transvaal Provincial Administration* 1925 AD 477; *White v Natal Provincial Administration* 1955 (3) SA 82 (N); *Natal Provincial Administration v Buys* 1957 (4) SA 646 (A); *Natal Provincial Administration v Mahomed* 1971 (4) SA 74 (N); *Silver v Premier, Gauteng Provincial Government* 1998 (4) SA 569 (W); *Jacot-Guillarmod v Provincial Government, Gauteng* 1999 (3) SA 594 (T).

502 Section 2(1) of the State Liability Act 20 of 1957, as amended by s 1 of the State Liability Amendment Act 14 of 2011 with effect from 30 August 2011 (*GG* 34545 of 22 August 2011) and by s 3 of the Judicial Matters Amendment Act 8 of 2017 with effect from 2 August 2017 (*GG* 41018 of 2 August 2017). See also s 2(2) of the State Liability Act 20 of 1957, as amended, in Part D11 below.

503 2021 (1) SA 75 (SCA).

504 At paragraph [1] footnote 2.

505 Architectural Profession's Act 44 of 2000, s 2.
506 Quantity Surveying Profession Act 49 of 2000, s 2.
507 Nursing Act 33 of 2005, ss 2 and 5, read with Nursing Act 50 of 1978, s 2.
508 Pharmacy Act 53 of 1974, s 2.
509 Health Professions Act 56 of 1974, s 2.
510 Engineering Profession Act 46 of 2000, s 2.
511 Property Practitioners Act 22 of 2019, s 5(1).
512 Geomatics Profession Act 19 of 2013, s 3(1).
513 Planning Profession Act 36 of 2002, s 3.
514 Property Valuers Profession Act 47 of 2000, s 2.
515 Veterinary and Para-Veterinary Professions Act 19 of 1982, s 2.
516 Project and Construction Management Professions Act 48 of 2000, s 2.
517 Landscape Architectural Profession Act 45 of 2000, s 2.
518 Auditing Profession Act 26 of 2005, s 3(1)*(a)*.
519 Section 48.
520 Section 56.
521 Section 26 of the old Act.
522 Section 34A(1) of the old Act; *Brodsky Trading 224 CC v Cronimet Chrome Mining SA (Pty) Ltd* 2017 (4) SA 610 (SCA) at 617B–G. Section 34A(1) applied to any remuneration or other payment for acts performed by an estate agent pursuant to an agreement between estate agents *inter se* and not only to remuneration or other payment for acts performed in terms of an estate agent agreement with a prospective client (*Warren Jack Property Broker CC t/a Warren Jack Property Group v Venter* (unreported ECG case no CA 156/2011 dated 27 July 2012 — a decision of the full court)) at paragraphs [20]–[21]; *Bianca Properties (Pty) Ltd v Mogomana* (unreported, GP case no A113/2019 dated 17 September 2021 — a decision of the full court) at paragraphs [12]–[17] and [20]).
523 2020 (6) SA 397 (SCA).
524 2017 (4) SA 610 (SCA).
525 [2017] 1 All SA 146 (GJ).
526 At paragraph [14].
527 At paragraphs [23]–[26].
528 *Atlantic Beach Homeowners' Association NPC v Estate Agency Affairs Board* 2019 (6) SA 381 (SCA) at 385E–387B.
529 The Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004, s 29(1).
530 Act 4 of 2004, s 29(2).
531 A juristic person established in terms of the (now repealed) Multilateral Motor Vehicle Accidents Fund Act 93 of 1989.
532 *Road Accident Fund v Hansa* 2001 (4) SA 1204 (SCA) at 1205G–1206B; 1209I–1210C.
533 In *Road Accident Fund v Rampukar; Road Accident Fund v Gumede* 2008 (2) SA 534 (SCA) at 536B it was said that the Road Accident Fund has its principal place of business for purposes of s 19(1) of the Supreme Court Act 59 of 1959 within the area of jurisdiction of the Transvaal Provincial Division.
The following 'Practice Note', issued by the Chief Executive Officer of the Road Accident Fund, was published in 2008 (January/February) *De Rebus* 38:
'In the case of legal proceedings having to be commenced, it is the court (High Court or magistrate's court, depending on the amount claimed) within whose geographical area of jurisdiction the accident occurred that would have the requisite jurisdiction in a particular matter. Alternatively, the court (High Court or magistrate's court, again depending on the amount claimed) within whose geographical area of jurisdiction the Road Accident Fund (the Fund) has its principal place of business.
The Fund's head office and principal place of business, where its general administrative business is conducted, is currently situated at 38 Ida Street, Menlo Park, Pretoria, 0081.
Where legal proceedings have to be commenced in the High Court the Fund is not entitled to consent to jurisdiction in respect of a court that does not possess jurisdiction to entertain the action in accordance with the provisions of s 19 of the Supreme Court Act 59 of 1959, read with s 15(2) of the Road Accident Fund [*sic*].
However, the Fund may consent to a particular magistrate courts's [*sic*] jurisdiction in terms of s 45(1) of the Magistrates' Courts Act 32 of 1944 or alternatively, the Fund may elect not to object to the jurisdiction of a particular magistrate court [*sic*], in terms of s 28(1)*(f)* of the Magistrates' Courts Act.
This practice note withdraws and replaces the practice note published in 1997 (June) *DR* 383, as it relates to the jurisdiction and institution of legal proceedings.'
534 Section 2(1) of the Sectional Titles Schemes Management Act 8 of 2011.
535 *Body Corporate of Nautica v Mispha CC* [2022] 1 All SA 399 (WCC) at paragraph [75].
536 As from the date of the establishment of the body corporate, a sectional title scheme must be regulated and managed by means of rules (s 10(1) of the Sectional Titles Schemes Management Act 8 of 2011). The rules bind the body corporate and the owners of the sections and any person occupying a section (s 10(4) of the Sectional Titles Schemes Management Act 8 of 2011). In terms of s 4*(i)* of Act 8 of 2011 the body corporate may exercise the powers conferred upon it by or under that Act or the rules, and such powers include the power to do all things reasonably necessary for the enforcement of the rules and for the management and administration of the common property.
537 Section 2(5) of the Sectional Titles Schemes Management Act 8 of 2011. In terms of s 4*(i)* of Act 8 of 2011 the body corporate may exercise the powers conferred upon it by or under that Act or the rules, and such powers include the power to do all things reasonably necessary for the enforcement of the rules and for the management and administration of the common property.
538 Section 2(4) of the Sectional Titles Schemes Management Act 8 of 2011.
539 The corporate name of a body corporate is 'the Body Corporate of the . . . (name) . . . Scheme, No . . .'. The name and number to be inserted are the name given to the scheme in the draft sectional plan referred to in s 5(3)*(b)* and number allotted to the scheme in terms of s 12(1)*(a)* of the Sectional Titles Act 95 of 1986 by the Registrar of Deeds upon registration of the scheme (s 2(4) of the Sectional Titles Schemes Management Act 8 of 2011).
540 Section 2(7)*(a)* of the Sectional Titles Schemes Management Act 8 of 2011.
541 Section 2(7)*(b)* of the Sectional Titles Schemes Management Act 8 of 2011.
542 Section 2(7)*(c)* of the Sectional Titles Schemes Management Act 8 of 2011.
543 Section 2(7)*(d)* of the Sectional Titles Schemes Management Act 8 of 2011; and see *Body Corporate of Nautica v Mispha CC* [2022] 1 All SA 399 (WCC) at paragraphs [65]–[78].
544 Section 2(7)*(e)* of the Sectional Titles Schemes Management Act 8 of 2011.
545 *Stad Tshwane Metropolitaanse Munisipaliteit (voorheen bekend as Stadsraad van Pretoria) v Body Corporate Faeriedale* 2003 (6) SA 440 (SCA) at 446J–447B. It is submitted that the decision has not been affected by the Sectional Titles Schemes Management Act 8 of 2011.
546 'Court' means 'the High Court having jurisdiction' (s 1(1) of Act 8 of 2011).
547 Section 9(2)*(a)* of the Sectional Titles Schemes Management Act 8 of 2011. In *Cassim v Voyager Property Management* 2011 (6) SA 544 (SCA) the following was held in respect of s 41 (now repealed) of the Sectional Titles Act 95 of 1986 (at 551H–553F):
(a) s 41 was in accordance with the common-law principle that where a wrong is done to a juristic person, only that entity, and not its individual members, may take proceedings against the wrongdoers;
(b) the role of s 41 was to filter out unmeritorious claims by overzealous individuals while at the same time ensuring that owners with legitimate complaints had access to the information and funds at the disposal of the body corporate;
(c) s 41 was particularly applicable where there was disharmony in the body corporate;
(e) s 41 did not require an owner to cause the body corporate to act in a particular way if the latter was unwilling to do so: all that was envisaged was for the owner to effect service of a notice on the body corporate calling upon it within the stated period to institute the contemplated proceedings. Should the body corporate fail to do so, the owner's remedy was not to compel compliance with the notice, but rather to approach the court for the appointment of a *curator ad litem* for the purposes of instituting and conducting the proceedings on behalf of the body corporate;
(f) if it appeared that the body corporate was dysfunctional there would be no point in calling upon it to institute proceedings, and in such circumstances the court could authorize the owner to dispense with the notice requirement.
It is submitted that the position in respect of s 9 of the Sectional Titles Schemes Management Act 8 of 2011 is the same as the aforesaid. In *Henque 1838 CC v Maxprop Holdings (Pty) Ltd* (unreported, SCA case no 759/2022 dated 12 October 2023) it was held that a sectional title owner is enjoined to follow the steps prescribed by s 9 of the Sectional Titles Schemes Management Act 8 of 2011 if it wishes to assert a right and claim in terms of s 2(7) of that Act (at paragraph [20]). In *Spilhaus Property Holdings (Pty) Limited v Mobile Telephone Networks*

(Pty) Limited 2019 (4) SA 406 (CC) the central issue in an application for leave to appeal that had to be considered by the Constitutional Court was the question whether the Sectional Titles Act 95 of 1986 deprived individual owners in a sectional title scheme of legal standing to enforce a zoning scheme applicable to the area where the sectional titles scheme was located, where the breach of the zoning scheme regulation occurred on the common property. In other words, the singular issue that arose for determination was whether s 41 (now repealed) of the Act denied the owners standing to seek the mandatory interdict and restricted them to a claim for the appointment of a *curator ad litem*. The resolution of the issue depended on the wording of s 41 of the Act, read together with ss 36(6) and 37(1). The Supreme Court of Appeal (in *Mobile Telephone Networks (Pty) Ltd v Spilhaus Property Holdings (Pty) Ltd* 2018 (3) SA 396 (SCA)), in overruling the decision of the High Court, held that the individual owners had no standing. The Constitutional Court, in granting leave to appeal and deciding the appeal, overruled the decision of the Supreme Court of Appeal and held (at paragraphs [24]–[43]) that owners of units in a sectional title scheme to which the relevant zoning scheme applied, were entitled to institute proceedings to enforce the zoning scheme and that s 41 of the Act did not preclude them from doing so. Therefore, the Supreme Court of Appeal erred in construing s 41 and concluding that it deprived the owners of legal standing to institute the proceedings. The owners had standing (at paragraph [43]).

548 'Court' means 'the High Court having jurisdiction' (s 1(1) of Act 8 of 2011).

549 Section 15(1)*(a)* of the Sectional Titles Schemes Management Act 8 of 2011.

550 Section 15(1)*(b)* of the Sectional Titles Schemes Management Act 8 of 2011.

551 Section 15(1)*(c)* of the Sectional Titles Schemes Management Act 8 of 2011.

552 Section 15(2) of the Sectional Titles Schemes Management Act 8 of 2011.

553 Section 54 of the Sheriffs Act 90 of 1986.

554 Section 30(1) of the Sheriffs Act 90 of 1986.

555 Now a non-profit company under the Companies Act 71 of 2008.

556 Section 2(1) of the Societies for the Prevention of Cruelty to Animals Act 169 of 1993. See also *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA).

557 Section 3 of the Societies for the Prevention of Cruelty to Animals Act 169 of 1993. See also *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) at 342B–C.

558 Section 6(2)*(e)* of the Societies for the Prevention of Cruelty to Animals Act 169 of 1993.

559 Section 9(2)*(l)* of the Societies for the Prevention of Cruelty to Animals Act 169 of 1993.

560 Section 11(3)*(c)*(v) of the Companies Act 71 of 2008.

561 Section 3(1) of the South African Transport Services Act 65 of 1981.

562 Section 3(1) of the South African Transport Services Act 65 of 1981.

563 Section 3(2) of the South African Transport Services Act 65 of 1981.

564 Section 9(4) of the South African Transport Services Act 65 of 1981.

565 At present, in terms of s 2(4) of the Legal Succession to the South African Transport Services Act 9 of 1989, the State is the only member and shareholder of Transnet. See also *South African Association of Retired Persons v Transnet Ltd* [1999] 4 All SA 25 (W) at 52*a–d*.

566 Section 3(1) of the South African Transport Services Act 9 of 1989, read with GN 578 (in *GG* 12364) dated 23 March 1990.

567 *Haigh v Transnet Ltd* 2012 (1) SA 623 (NCK) at 636A–D.

568 Section 5(1) of the South African Transport Services Act 9 of 1989. In terms of s 5(3) the phrase, ' "any reference to the South African Transport Services, its predecessors" in s 5(1) shall be construed as including any reference to the State where the latter reference in context includes a reference to the South African Transport Services or its predecessors'.

569 Section 23(1) of the South African Transport Services Act 9 of 1989. PRASA is a wholly owned Government entity.

570 As to the effect of the repeal of s 64(3) on claims arising before the repeal of Act 65 of 1981, see *Transnet Ltd v Ngcezula* 1995 (3) SA 538 (A).

571 *Commissioner for Inland Revenue v MacNeillie's Estate* 1961 (1) SA 833 (A) at 840G–H; *Braun v Blann and Botha NNO* 1984 (2) SA 850 (A) at 859E; *Commissioner for Inland Revenue v Friedman NO* 1993 (1) SA 353 (A) at 370E–H; *Mariola v Kaye-Eddie NO* 1995 (2) SA 728 (W) at 731C; *Van der Westhuizen v Van Sandwyk* 1996 (2) SA 490 (W) at 495D; *Rosner v Lydia Swanepoel Trust* 1998 (2) SA 123 (W) at 126H–127B; *Cupido v Kings Lodge Hotel* 1999 (4) SA 257 (E) at 263F–G; *First National Bank of SA Ltd v Strachan Family Trust* [2000] 3 All SA 379 (T) at 383*g–i*; *Desai-Chilwan NO v Ross* 2003 (2) SA 644 (C) at 647D–E; *Lupacchini NO and Another v Minister of Safety and Security* 2010 (6) SA 457 (SCA) at 459A–B; *Bonugli v Standard Bank of South Africa Ltd* 2012 (5) SA 202 (SCA) at 207F; *Theron and Another NNO v Loubser NO* 2014 (3) SA 323 (SCA) at 327D–I; *WT v KT* 2015 (3) SA 574 (SCA) at 581F; *Standard Bank of South Africa Ltd v Swanepoel NO* 2015 (5) SA 77 (SCA) at 79I–J; *Gowar v Gowar* 2016 (5) SA 225 (SCA) at 231B–G; *Tshaka NO v Standard Bank of South Africa Ltd* (unreported, SCA case no 141/2019 dated 25 June 2020) at paragraph [19].

572 *Braun v Blann and Botha NNO* 1984 (2) SA 850 (A) at 859H; *Mariola v Kaye-Eddie NO* 1995 (2) SA 728 (W) at 731C; *Cupido v Kings Lodge Hotel* 1999 (4) SA 257 (E) at 263F–G; *Desai-Chilwan NO v Ross* 2003 (2) SA 644 (C) at 647D–E; *Lupacchini NO and Another v Minister of Safety and Security* 2010 (6) SA 457 (SCA) at 459A–B. As to the sanctity of preservation of trust property and the personal estate of a trustee, see *RP v DP* 2014 (6) SA 243 (ECP).

573 *Gross v Pentz* 1996 (4) SA 617 (A) at 625B–E.

574 *Mariola v Kaye-Eddie NO* 1995 (2) SA 728 (W) at 731F; *Rosner v Lydia Swanepoel Trust* 1998 (2) SA 123 (W) at 127C.

575 *Lupacchini NO and Another v Minister of Safety and Security* 2010 (6) SA 457 (SCA) at 459F–G, 459H–460B, 467H–468A and 468F–H. See also *Joubert v Joubert* 2019 (6) SA 51 (WCC) at 57C–E.

576 *Rosner v Lydia Swanepoel Trust* 1998 (2) SA 123 (W) at 127B.

577 *Gross v Pentz* 1996 (4) SA 617 (A) at 625F–G.

578 *Ras and Others NNO v Van der Meulen* 2011 (4) SA 17 (SCA) at 20C–D. See also *Gowar v Gowar* 2016 (5) SA 225 (SCA).

579 *Van der Walt v Van der Walt NO* (unreported, WCC case no 5525/2018 dated 20 October 2020) at paragraphs [27]–[34].

580 *Van der Westhuizen v Van Sandwyk* 1996 (2) SA 490 (W) at 494G–495D. In the *Van der Westhuizen* case Streicher J held (at 494J–495A) that the *obiter dictum* in *Mariola v Kaye-Eddie NO* 1995 (2) SA 728 (W) at 431E, that all trustees had to be joined unless one of the trustees was authorized by the remaining ones, was no authority for the contention that all the trustees did not have to be joined in order to enforce a right appertaining to the trust. In *Desai-Chilwan NO v Ross* 2003 (2) SA 644 (C) at 647F–652I the court differed from the judgment of Streicher J and held that all the trustees must be joined *unless one of the trustees is authorized by the remaining trustee or trustees*. The *obiter dictum* in *Mariola's* case has been followed, without reasoning, in *Deutschmann NO v Commissioner for the South African Revenue Service; Shelton v Commissioner for the South African Revenue Service* 2000 (2) SA 106 (E) at 119F–G. In *Cupido v Kings Lodge Hotel* 1999 (4) SA 257 (E) at 263F–G reliance was placed on *Goolam Ally Family Trust t/a Textile, Curtaining and Trimming v Textile, Curtaining and Trimming (Pty) Ltd* 1989 (4) SA 985 (C) at 988D–E for the proposition that all the trustees need not be joined if one of the trustees is authorized by the other or others. However, in *Van der Westhuizen v Van Sandwyk* 1996 (2) SA 490 (W) it was held (at 495A–C) that *Goolam's* case is not authority for the said proposition. In *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA) one of three trustees ceased to be a trustee yet continued to act as if he was a trustee and signed the trust's application (i e petition) for leave to appeal. The appeal was also instituted in the names of the three trustees after leave to appeal had been granted. It was held (at 92A) that the trust did not validly apply for leave to appeal nor was it at any stage properly before the full court in the appeal. The full court should have struck the appeal from the roll. In *Hyde Construction CC v Deuchar Family Trust* 2015 (5) SA 388 (WCC) it was held (at 396C–G) by the full court that the unauthorized institution of proceedings on behalf of a trust could be ratified by a later decision of all the trustees. See also *Lupacchini NO and Another v Minister of Safety and Security* 2010 (6) SA 457 (SCA) at 459D–E; *Steyn and Others NNO v Blockpave (Pty) Ltd* 2011 (3) SA 528 (FB) at 532D–537B; *O'Shea NO v Van Zyl and Others NNO* 2012 (1) SA 90 (SCA) at 97B–D; *Bonugli v Standard Bank of South Africa Ltd* 2012 (5) SA 202 (SCA) at 207F–208A; *Standard Bank of South Africa Ltd v Swanepoel NO* 2015 (5) SA 77 (SCA) at 81G–I; *Davids NO v Tai Ross Properties VDBP (Pty) Ltd* (unreported, GP case no 24523/2015 dated 2 March 2015) at paragraph [19]; *Tshaka NO v Standard Bank of South Africa Ltd* (unreported, SCA case no 141/2019 dated 25 June 2020) at paragraph [20].

581 *Yarram Trading CC t/a Tijuana Spur v Absa Bank Ltd* 2007 (2) SA 570 (SCA) at 575G–578D.

582 See the example s v 'Auditors' and the notes thereto above.

583 Note that in the heading of the summons and all other pleadings the plaintiff will be cited as 'AB N.O.'.

584 *Levin v Transvaal Miners' Association* 1912 WLD 144; *Ex-TRTC United Workers Front v Premier, Eastern Cape Province* 2010 (2) SA 114 (ECB) at 124E–125B and the authorities there referred to.

585 *Graham v Milnerton Turf Club* 1921 CPD 688; *Ex-TRTC United Workers Front v Premier, Eastern Cape Province* 2010 (2) SA 114 (ECB) at 124B. See also *Leschin v Kovno Sick Benefit and Benevolent Society* 1936 WLD 9.

586 *Ho Ling v Leung Quinn* 1909 TH 64; *Louvis v Oiconomos* 1917 TPD 465; *Cohen v Committee of Harrismith Hebrew Congregation* 1924 OPD 25; *Mtshali v Mtambo* 1962 (3) SA 469 (GW).

587 *In re Cape of Good Hope Building Society* (1898) 15 SC 323; *Malcomess v Kuhn* 1911 CPD 546; *Rainsford v Trustees of the Salisbury Club* 1914 AD 499; *De Waal v Van der Horst* 1918 TPD 277; *Pickard v Eastern Province Building Society* 1926 OPD 144; *United Apostolic Faith*

Church v Boksburg Christian Academy 2011 (6) SA 156 (GSJ) at 160I–161D.

588 *Yiba v African Gospel Church* 1999 (2) SA 949 (C) at 957H.

589 *The Committee of the Johannesburg Public Library v Spence* (1898) 5 Off Rep 84; *Cassere v United Party Club* 1930 WLD 39; *Tilbrook v Higgins* 1932 WLD 147 (the Salvation Army); *Silverman v Silver Slipper Club* 1932 TPD 355; *Van Rensburg v Afrikaanse Taal- en Kultuurvereniging (SAS & H)* 1941 CPD 179; *Stuart v Ismail* 1942 AD 327; *Ahmadiyya Anjuman Ishaati-Islam Lahore (South Africa) v Muslim Judicial Council (Cape)* 1983 (4) SA 855 (C) at 860H–863G; *Molotlegi v President of Bophuthatswana* 1989 (3) SA 119 (B) at 125G–I; *African National Congress v Lombo* 1997 (3) SA 187 (A) at 195I–196J; *Interim Ward S 19 Council v Premier, Western Cape Province* 1998 (3) SA 1056 (C) at 1060G–1061A; *Rail Commuter Action Group v Transnet Ltd t/a Metrorail (No 1)* 2003 (5) SA 518 (C) at 554C–557C. See also, in general, *Ex-TRTC United Workers Front v Premier, Eastern Cape Province* 2010 (2) SA 114 (ECB) at 126C–129B; *United Apostolic Faith Church v Boksburg Christian Academy* 2011 (6) SA 156 (GSJ) at 160I–161D. Where there is a dispute between two groups of such an association it is more appropriate, if not necessary, that the plaintiff members should join the other members individually as defendants (*Nortje v Fransman NO* 1975 (1) SA 532 (C)).
Where the members of an association, which had as one of its objects the preservation of the environment of a particular area, brought an application against the association for an order setting aside a contract for the alienation of property between the association and a third party on the ground that, *inter alia*, the alienation would lead to the very environmental degradation that the association was committed to preventing, it was held, with reference to s 38 of the Republic of South Africa Constitution, 1996, that the applicants had the necessary *locus standi in judicio* to bring the application (*McCarthy v Constantia Property Owners' Association* 1999 (4) SA 847 (C) at 853B–855E).

590 *Morrison v Standard Building Society* 1932 AD 229; *Leschin v Kovno Sick Benefit and Benevolent Society* 1936 WLD 9; *Moloi v St John Apostolic Faith Mission* 1954 (3) SA 940 (T); *Malebjoe v Bantu Methodist Church of SA* 1957 (4) SA 465 (W); *Ex parte Johannesburg Congregation of the Apostolic Church* 1968 (3) SA 377 (W); *Bohlokong Black Taxi Association v Interstate Bus Lines (Edms) Bpk* 1997 (4) SA 635 (O) at 643F–644A. See also *Evangelical Lutheran Church in Southern Africa (Western Diocese) v Sepeng* 1988 (3) SA 958 (B) at 968B–D, where it was held that a local congregation of a church whose constitution did not give a congregation the right to participate in decisions by the church, did not have *locus standi* to join in proceedings by the church for the ejectment of the congregation's pastor from the manse belonging to the church.

591 *Ex parte Doornfontein-Judith's Paarl Ratepayers' Association* 1947 (1) SA 476 (W).

592 *Webb and Co Ltd v Northern Rifles; Hobson & Sons v Northern Rifles* 1908 TS 462; *Cassim v Molife* 1908 TS 748; *Levin v Transvaal Miners' Association* 1912 WLD 144; *Louvis v Oiconomos* 1917 TPD 465; *Bantu Callies Football Club (Also Known As Pretoria Callies Football Club) v Motlhamme* 1978 (4) SA 486 (T) at 488G.

593 *Van Rensburg v Afrikaanse Taal- en Kultuurvereniging (SAS & H)* 1941 CPD 179; *Stuart v Ismail* 1942 AD 327; *Klerksdorp and District Muslim Merchants Association v Mahomed* 1948 (4) SA 731 (T).

594 Section 8(3) of the Companies Act 71 of 2008. In terms of s 30(1) of the Companies Act 61 of 1973 no association consisting of more than 20 persons shall be formed in the Republic for the purpose of carrying on any business that has for its object the acquisition of gain by the association or the individual members thereof, unless it is registered as a company under that Act or is formed in pursuance of some other law or was before 31 May 1962 formed in pursuance of Letters Patent or Royal Charter. The word 'its' in the expression 'that has for its object the acquisition of gain by the association' in s 8(3) of the Companies Act 71 of 2008 (and formerly in ss 30(1) and 31 of the Companies Act 61 of 1973) is not sufficiently weighty *(a)* to be indicative of a single dominant purpose with the implication that any other purpose is relegated to the status of a subordinate purpose which must then be discarded and *(b)* to exclude the feasibility of a duality or even a multiplicity of purposes, provided that they are congruent and not contradictory (*Mitchell's Plain Town Centre Merchants Association v McLeod* 1996 (4) SA 159 (A) at 168J–169B; *Huey Extreme Club v McDonald t/a Sport Helicopters* 2005 (1) SA 485 (C) at 492 A–D). The word 'gain' in that expression means a commercial or material benefit or advantage, not necessarily a pecuniary profit, in contradistinction to the kind of benefit or result which a charitable, benevolent, humanitarian, philanthropic, literary, scientific, political, cultural, religious, social, recreational or sporting organization, for instance, seeks to achieve. It is submitted that s 8(3) of the Companies Act 71 of 2008, like ss 30(1) and 31 of the Companies Act 61 of 1973 is concerned with commercial enterprises and 'gain' must be given a corresponding meaning (see *Mitchell's Plain Town Centre Merchants Association v McLeod* 1996 (4) SA 159 (A) at 169J–170C; and see *South African Flour Millers' Mutual Association v Rutowitz Flour Mills Ltd* 1938 CPD 199 at 202–3; *Huey Extreme Club v McDonald t/a Sport Helicopters* 2005 (1) SA 485 (C) at 492D–H).

595 *Congregation of Oblates of Mary Immaculate in the Transvaal v Moluele* 1949 (3) SA 885 (T).

596 *Rainsford v Trustees of the Salisbury Club* 1914 AD 499; *Chetty v Siva Subramanier Aulayam* 1930 EDL 347.

597 *De Waal v Van der Horst* 1918 TPD 277.

598 *Ntombela v Shibe* 1949 (3) SA 586 (N).

599 *Mcoyi v Inkatha Freedom Party; Magwaza-Msibi v Inkatha Freedom Party* 2011 (4) SA 298 (KZP) at 309D–J.

600 See the notes s v 'Universities' and 'Statutory bodies' above.

601 See the notes to rule 14 above.

602 In terms of the Companies Act 71 of 2008.

603 *Wildlife Society of Southern Africa v Minister of Environmental Affairs and Tourism of the Republic of South Africa* 1996 (3) SA 1095 (TkS) at 1098I–1099A; and see the Society's website at http://www.wessa.org.za.

604 1996 (3) SA 1095 (TkS).

605 The reference here is to s 7 of the Constitution of the Republic of South Africa Act 200 of 1993. See now s 38 of the Constitution of the Republic of South Africa, 1996.

606 *Wildlife Society of Southern Africa v Minister of Environmental Affairs and Tourism of the Republic of South Africa* 1996 (3) SA 1095 (TkS) at 1105A–B. See also *McCarthy v Constantia Property Owners' Association* 1999 (4) SA 847 (C) at 854E–855E.

607 The name of a non-profit company, irrespective of its form or language, must end with the expression 'NPC' (s 11(3)*(c)*(v) of the Companies Act 71 of 2008).