## 22 Plea



(1) Where a defendant has delivered notice of intention to defend, he shall within twenty days after the service upon him of a declaration or within twenty days after delivery of such notice in respect of a combined summons, deliver a plea with or without a claim in reconvention, or an exception with or without application to strike out.

[Subrule (1) substituted by GN R2021 of 5 November 1971, by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

(2) The defendant shall in his plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent, and shall clearly and concisely state all material facts upon which he relies.

(3) Every allegation of fact in the combined summons or declaration which is not stated in the plea to be denied or to be admitted, shall be deemed to be admitted. If any explanation or qualification of any denial is necessary, it shall be stated in the plea.

(4) If by reason of any claim in reconvention, the defendant claims that on the giving of judgment on such claim, the plaintiff's claim will be extinguished either in whole or in part, the defendant may in his plea refer to the fact of such claim in reconvention and request that judgment in respect of the claim or any portion thereof which would be extinguished by such claim in reconvention, be postponed until judgment on the claim in reconvention. Judgment on the claim shall, either in whole or in part, thereupon be so postponed unless the court, upon the application of any person interested, otherwise orders, but the court, if no other defence has been raised, may give judgment for such part of the claim as would not be extinguished, as if the defendant were in default of filing a plea in respect thereof, or may, on the application of either party, make such order as to it seems meet.

(5) If the defendant fails to comply with any of the provisions of subrules (2) and (3), such plea shall be deemed to be an irregular step and the other party shall be entitled to act in accordance with rule 30.

[Subrule (5) inserted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

### Commentary

**Form.** Notice of agreement or opposition to mediation, 27.

**General.** This rule allows a defendant to respond to a declaration or a combined summons, as the case may be, by means of a plea with or without a claim in reconvention, or an exception with or without an application to strike out. The rule sets out the requirements for a plea. Exceptions and applications to strike out are dealt with in rule 23. Claims in reconvention are dealt with in rule 24.

The plea is the defendant's answer to the claim contained in the plaintiff's declaration or particulars of claim annexed to a combined summons, as the case may be, and in it the defendant must set out whatever defence he relies upon. The purpose of pleading being to



clarify the issues between the parties, [1] the allegations in the plea must be of sufficient precision to enable the plaintiff to know what is the case he has to meet. [2] The defendant cannot, therefore, rely upon a defence which is not pleaded, or which he is not allowed to incorporate into the plea by an amendment. A pleader cannot be allowed to direct the attention of the other party to one issue and then, at the trial, attempt to canvass another. [3]

There are generally four ways in which a defendant can answer the plaintiff's allegations in his plea:

*(a)* He can deny the whole or an essential part of the allegations relied upon by the plaintiff. This is called *traversing* the plaintiff's allegations.

*(b)* He can *confess and avoid*, i e he can admit all or some of the allegations, but go on to set out other facts, omitted from the declaration or particulars of claim, which put a different complexion on the case, and destroy the effect of the admitted allegations.

*(c)* He can file a special plea, i e a *dilatory* or *declinatory plea* or a *plea in bar/plea in abatement* or a *peremtory plea*, which raises formal objections to the proceedings without presenting any substantial answer to the merits of the action, such as pleas to jurisdiction, lis pendens, want of compliance with a statutory notice, [4] etc.

*(d)* He can file a claim in reconvention under rule 24 together with his plea, and refer to such claim in reconvention in his plea.

The kind of plea referred to in paragraph *(c)* above is commonly known as a 'special plea'. A special plea raises a special defence apart from the merits which either destroys or postpones the operation of the plaintiff's cause of action. [5] A special plea that postpones a cause of action is a dilatory plea; a special plea that destroys a cause of action is called a plea in abatement or a plea in bar. It is not necessary to give a special plea a heading such as a plea in bar or a plea in abatement. [6]

The practice has not been uniform in regard to the necessity of pleading over on the merits when a special plea is delivered. In the Western Cape, especially where a plea such as want of jurisdiction, *lis pendens*, *res judicata* or arbitration as a condition precedent has been raised, pleading over on the merits was not insisted on. [7] It has, however, been held that this subrule contemplates the pleading of all defences at one and the same time; that is, every defence, including a defence raised by way of a 'special plea', must be raised as part of the plea required by the subrule. Except where a defendant is prepared to have his case stand or fall by the defence raised in his 'special plea', there is no action in which no plea over is necessary. [8]



Contradictory defences may be pleaded provided it is done in the alternative. [9]

The following defences have been held to be mutually contradictory, and can therefore be validly pleaded only if pleaded in the alternative:

*(a)* a denial of a purchase, coupled with a plea of payment; [10]

*(b)* a denial that a contract is in force, and a plea that the plaintiff had waived his rights thereunder; [11]

*(c)* a denial of liability, coupled with a tender that involves an admission of liability, but not a denial of liability coupled with an offer of compromise that does not admit any liability; [12]

*(d)* where the plaintiff alleged that the defendant had unlawfully entered his land, and the defendant denied all the allegations in the summons, and pleaded that any entry was by the leave of the plaintiff; [13]

*(e)* the defendant pleaded to a claim for the price of tiles sold and delivered (1) that the purchase was by sample and that the delivery did not conform to sample, and (2) that if the tiles were in accordance with sample, that they were negligently packed and broke in transit. An amendment to the effect that the sample was unfit for the use to which, to the plaintiff's knowledge, it was to be put and had a latent defect, was refused on the ground that it would put the plaintiff into the position of having to prove, in reply to plea (1), that the tiles conformed to sample and, in reply to the proposed amendment, that they did not so conform. [14]

The following defences have been held to be not mutually contradictory, and may thus be raised in the same plea, even if not

in the alternative:

*(a)* in a defamation action, a denial of the words alleged coupled with a plea of justification (for the words may be true and for the public benefit even though defendant never used them), [15] or a denial of the words alleged coupled with a plea of privilege (for the occasion may have been privileged even though the words were never said), [16] or a denial of the words alleged coupled with a defence of *rixa*, [17] or a defence of *rixa* as an alternative to a main defence of justification; [18]

*(b)* where the plaintiff, suing for goods sold and delivered, alleges that they were bought by an agent of the defendant who did not disclose the defendant as his principal, and that the plaintiff had in ignorance obtained judgment against the agent, the defendant may plead both *res judicata* and a denial of the agency. [19]



A defence which is inconsistent with a previous admission will also be struck out, not because it is one of two defences which are mutually contradictory, but because it is inconsistent with the earlier admission, and contradictory matter. Thus:

*(a)* if a plaintiff admits a contract containing a clause stating that it was entered into irrespective of any misrepresentations, he cannot plead misrepresentation; [20]

*(b)* a plaintiff cannot admit liability for part of the claim, and then ask for absolution from the instance; [21]

*(c)* where the defendant admitted the plaintiff's allegation that goods had been sold to L as her agent, and went on to plead that L had acted as agent for the estate of her late husband, this was held to be inconsistent and embarrassing. [22]

If a plea is ambiguous, so that it may or may not contradict another plea, it should not be struck out. [23]

Separate defences must be pleaded as separately and distinctly as separate causes of action. Although this is not expressly stated in the rules, a failure to separate will probably render the plea embarrassing, and liable to exception. [24] If it is not clear from the plea whether there are two defences or only one, the plea is embarrassing, even though there may be some good defence wrapped up therein. [25]

An alternative defence operates merely as a subsidiary support for a defendant's case. If the primary defence is established, it is unnecessary for the court to give any decision on the alternative. It is open to a litigant to say which he regards as his main claim, and if it is upheld, he is entitled to take the benefit of that finding, even if the court finds for him on the alternative plea. [26] Where there were two inconsistent defences, and both were upheld by a magistrate, the court of appeal stated:

> 'It is seldom that two inconsistent defences which have been legitimately pleaded are upheld. Where they are, as happened here, I think the second decision must be held to be conditional and of no effect until the finding on the first plea has been overruled. The second finding must be regarded as not having been made, because the decision of the claim has already been arrived at on the main issue.' [27]

A defence must be pleaded as well as proved, [28] for the court sits to try the issues raised by the pleadings. [29] A defendant who has missed his true defence, or who has learned of it only from facts which appeared during the trial, must therefore raise the defence formally and have it placed on record. [30] If no amendment is made to the pleadings, the defence will as a general



rule not be adjudicated upon. [31] The same applies where the defence arises out of facts which have occurred after *litis contestatio.* [32]

**Subrule (1): 'Delivered notice of intention to defend.'** See rule 19 and the notes thereto above.

**'Within twenty days after.'** The defendant must file his plea, in the case of a combined summons, within 20 days of the delivery of his notice of intention to defend and, in the case of a simple summons, within 20 days after the service upon him of the plaintiff's declaration. The court may, on good cause shown, extend the period for the delivery of the plea. [33] Failure to deliver a plea within the time stated does not entail an automatic bar; notice of bar must be given. [34]

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

**'A plea.'** See the notes s v 'General' above.

**'With or without a claim in reconvention.'** See rule 24 and the notes thereto below.

**'Or an exception with or without application to strike out.'** See rule 23 and the notes thereto below. An exception is a pleading and cannot be objected to as having been filed out of time unless notice of bar has been given. [35] See further, in this regard, the notes to rule 23(1) s v 'Within the period allowed for filing any subsequent pleading' below.

**Subrule (2): 'The defendant shall in his plea either.'** This subrule requires the defendant to give a fair and clear answer to every point of substance raised by the plaintiff in his declaration or particulars of claim, by frankly admitting or explicitly denying (or confessing and avoiding) every material matter alleged against him. [36]



'**Admit.'** The defendant is taken to have admitted not only the facts expressly admitted but also the necessary implications from, or inevitable consequences of, these facts, unless these are specially stated in the plea to be denied. [37] It is only necessary implications and consequences that are taken to be admitted. The court will probably not build upon an admission to make a finding which is in conflict with the other proven facts. [38]

A fact which is admitted is eliminated from the issues to be tried and the plaintiff is relieved of the duty of bringing evidence to establish it. [39] While the admission stands on the pleadings, the defendant is estopped for the purposes of that case from contending to the contrary of the facts which have been admitted. [40]

It follows that once an admission is made, if the defendant is allowed to withdraw it, this may prejudice the plaintiff in the conduct of his case. The defendant is consequently not permitted to withdraw an admission except by leave of the court. The court, before allowing him to withdraw, will require evidence of the circumstances under which the admission came to be made. In *Amod v SA Mutual Fire & General Insurance Co Ltd* [41] the position (after a review of earlier decisions) is stated as follows: [42]

> 'The court has a discretion but will require a reasonable explanation both of the circumstances under which the admission was made and the reasons why it is sought to withdraw it. In addition, the court must also consider the question of prejudice to the other party.'

As a general rule, the court will not give a finding of fact which is inconsistent with an admission, except perhaps where it is clear that what has been admitted is contrary to the facts that have been established, and that strict injustice would result if a finding were given in accordance with the admission. [43] In *Amod v SA Mutual Fire & General Insurance Co Ltd* [44] it is pointed out that the desire of a court to 'see what the real position is between the parties' cannot be achieved in every case. The

very fact that a court has the power to refuse to allow a litigant to withdraw an admission made in the pleadings implies that a court can, in certain circumstances, decide a case on facts which, although deemed to be true for the purposes of the case, are known not to be true in reality. [45] However, a court will not generally regard itself as being bound by a mistake of law on the part of a litigant. [46]

**'Or deny.'** A denial is the express contradiction of an allegation of fact in the opponent's pleading; it is generally a contradiction in the very terms of the allegation. It is, as a rule, framed in the negative, because the fact which is denied is, as a rule, alleged in the affirmative.



A denial must be clear, and not evasive. [47] The defendant must meet the substance of the allegation; [48] he must either admit it frankly or deny it boldly. Any half-admission or half-denial is evasive. [49] If the plea is not clear, the court may hold that certain facts were not put in issue. [50]

The defendant should not resort to a too literal traverse of the plaintiff's allegations, for by so doing he may fail to deal adequately with all the plaintiff's allegations. What is apparently one allegation may in reality amount to two or more, and in such cases, if the defendant merely repeats the plaintiff's allegation and prefixes it with either a negative or a denial, his traverse will be ambiguous, and will result in 'a negative pregnant' i e a denial cast in such a form as to imply an affirmative statement. [51] In order therefore that every allegation may be specifically denied care must be taken to analyse the plaintiff's allegations into its components. If it is clear from the rest of the plea that the allegations in the summons are being denied, a 'negative pregnant' will sometimes be allowed to stand. [52]

If the plaintiff's allegation is in the conjunctive, the defendant's denial should be in the disjunctive. In other words, if the plaintiff uses the word 'and', the defendant in his denial should use the word 'or'; if the plaintiff uses 'all', the defendant should use 'any'. [53] The addition of the words 'or at all' to a denial may also avoid the danger of a pregnant negative.

A practice which has been sanctioned, and which avoids the necessity for the pleader to copy out every allegation which he denies, is for the defendant to plead, for example, that 'each and every allegation in paragraph 2 is denied as specifically as if herein set out and denied'. While valid in some cases, this form of pleading cannot be resorted to in all. [54] It is bad in cases where it leads to ambiguity or where a denial calls for some positive averment to supplement it, and cannot stand alone. [55]

The effect of a denial is to put the fact denied in issue between the parties, and also all the necessary implications which flow from it, and to advise the plaintiff that he will be required to prove these at the trial. [56] It follows that a defendant who improperly denies a fact which he ought to have admitted lengthens the trial. He may because of this be mulcted in the costs he has unnecessarily caused. [57] If the denial is either frivolous or vexatious, the court may make a special award of costs against a defendant. [58]



While the defendant should therefore be careful not to deny a fact which should be admitted, there are two considerations operating in the other direction which should not be lost sight of. First, whatever is not denied and is not inconsistent with the plea is taken to be admitted, and while an admission stands on the pleadings the defendant cannot contend to the contrary. The defendant should therefore be careful to see that the paragraphs not denied are either indisputable or do not conflict with the plaintiff's case. It may be safer to deny too much than too little. Secondly, it is sometimes desirable as a matter of tactics to deny an allegation which is not in dispute in order to compel the plaintiff or some other witness whose cross-examination is likely to help the defendant's case, which is really in issue, to go into the witness-box. It should, however, be borne in mind that such tactical denials do not always endear themselves to the court, nor do they always achieve the desired result. [59]

If the defendant pleads that it 'does not admit any of the allegations contained in this paragraph', the plaintiff cannot know what the defendant's defence is. It is not regarded to be a denial. [60]

A defendant is often in the position where he has no knowledge of certain facts pleaded by the plaintiff and is unable either to admit them or deny them. Subrule (2) allows a defendant in his plea to state which of the material facts alleged in the summons are not admitted and to what extent. In practice the defendant is not required to state why, in such circumstances, he has no knowledge, but it has been held that the non-admission must be accompanied by an explanation, such as no - knowledge. [61] There is no difference in effect between denying and not admitting: the distinction is one of emphasis, a denial being more emphatic than a non-admission. [62]

Subrule (3) provides that if any explanation or qualification of any denial is necessary, it must be stated in the plea. See further the notes to subrule (3) below.

**'Or confess and avoid.'** The defendant can answer the plaintiff's claim by admitting all or any of the plaintiff's allegations, and then going on to set out new facts which he alleges put a different complexion on things, and destroy or avoid the legal effect of the allegations which he has confessed. [63]

All matter justifying or excusing the act complained of by the plaintiff must be specially and separately pleaded. [64] A denial cannot be made to do the work of a plea in confession and avoidance. The function of a denial is to contradict, not to excuse or justify; its object is to compel the plaintiff to prove the truth of the allegation traversed. As a general rule, the onus is on the plaintiff to prove those facts which have been denied, but on the defendant to prove facts which he has alleged by way of confession and avoidance. [65] A defendant will not be



allowed to shift the onus by denying when he should confess and avoid; on the other hand, he should not attract the possible incidence of an onus by confessing and avoiding when he can merely deny. [66]

The fact that an admission in a plea is coupled with an explanation does not necessarily amount to a confession and avoidance and does not in itself attract the burden of proof. [67]

**'All the material facts alleged in the combined summons or declaration.'** Only allegations of fact should be traversed; matters of law should not be dealt with. [68] Nor should a defendant traverse matters which the plaintiff might have, but has not, raised against him. [69] All that this subrule requires is that a defendant should deal with all the material facts alleged in the combined summons or declaration. It does not expressly require the defendant to deal with *each* allegation, seriatim, and either to admit it, deny it, or confess and avoid it. Consequently, if the defendant in traversing one allegation necessarily and unmistakably traverses another as well, so that the latter is denied by necessary implication, this is a sufficient compliance with the rule. [70]

The defendant need not in his plea deal with the plaintiff's allegations of fact in the precise order in which they are set out in the summons, provided the defence is set out with clearness and certainty. [71]

**'Or state which . . . facts are not admitted and to what extent.'** This subrule gives effect to earlier decisions of various provincial divisions, [72] and allows a defendant in his plea to state which of the material facts alleged in the summons are not admitted and to what extent. Though the rule does not require a defendant to give reasons for the non-admission, it has been held that the rule does not alter the common law or existing practice which allows a plea of non-admission only if it is clear from the plea that the defendant has good reason for not complying with the basic rule to admit, deny or confess and avoid.

One such reason is no knowledge. [73] There is no difference in effect between not admitting an allegation and denying it: the distinction is one of emphasis, a denial being more emphatic than a non-admission. [74]



**'Concisely state all material facts upon which he relies.'** In some cases, even if the defendant deals with all the allegations in the plaintiff's summons, his defence will not properly appear. The clearest example is where the defence is one of confession and avoidance. Having admitted all the plaintiff's allegations, the defendant must go further, and must state the material facts on which he relies to negate the effect of the admitted facts.

What appears to be only a denial may in reality be a defence of confession and avoidance, and in such cases the defendant cannot content himself with having dealt with all the plaintiff's allegations, but must go on to set out the material facts upon which his defence is based. Thus, where a summons alleges that an act was done wrongfully and unlawfully, it is not sufficient to deny that it was done wrongfully and unlawfully. [75] What the defendant is doing is to admit having done the act, and to seek to justify it. He must therefore set out the facts upon which he relies for justification.

Whenever a denial implies some positive allegation upon which the defence will rest, the defendant must go on to state the material facts relied upon. The rule applies in all cases where the defendant wishes to avoid the plaintiff's claim by the adduction of new facts. [76] This embraces not only the case where the defence is a confession and avoidance but also the case where the defence is a special one, which requires to be supported by facts. [77]

If, however, the plaintiff's allegation is a simple one, and the defence is merely a denial, there is no need for the defendant to go further and to state any facts: his defence is based on a traverse, or denial, and not on any facts. In fact, where the defence is based simply on a denial the introduction of any matter other than the denial into the plea is often embarrassing and irrelevant, and therefore objectionable. Thus, where the plaintiff alleges that the defendant uttered certain defamatory words to and concerning him, the defendant is not permitted, after denying that he used the words, to set out different words which he admits having used, and to allege that such words were true and published in the public interest. If he were permitted to do so, the plaintiff would be embarrassed, for the plea would raise issues entirely different from those contained in the summons. [78] This case may be contrasted with the case where the defendant admits the defamatory words, denies the innuendo pleaded by the plaintiff, and sets out a different innuendo. This is not improper pleading. [79]

What is required of the defendant is that he states the grounds of his defence with sufficient precision, and in sufficient detail, to enable the plaintiff to know what case he has to meet. [80] The plaintiff must be informed as to which facts exactly are being admitted, and which denied, and what will be asserted by the defendant to counter the admitted allegations, so that he knows what he has to establish and what he has to meet at the trial. [81] The



plea must be drawn in such a way that the plaintiff will not at the trial be taken by surprise by the defence raised. [82]

It is not enough for the plea to state the *nature* of the defence without setting out the material facts upon which it is based. [83] The defendant cannot make merely a general allegation that the contract sued upon was induced by fraud [84] or by mistake; [85] the particulars of the fraud or the nature of the mistake must be set out. If a defendant is held liable under a contract which he avers does not reflect the true intention of the parties, he should (i) allege in his plea that the contract does not reflect the true intention of the parties in that a common error had bona fide taken place; (ii) set out the true intention of the parties; (iii) claim rectification of the contract in terms of the true intention; (iv) allege that the contract so rectified confers no cause of action on the plaintiff. [86]

The subrule requires only that the material facts should be *concisely* stated. The pleader should not plead the evidence which he will adduce in support of his allegation, [87] nor should he plead irrelevant matter. [88]

Two disadvantages faced by a defendant when he goes on to plead his own story were pointed out by Odgers. [89] First, the defendant necessarily somewhat limits his case at the trial; secondly, although the onus of proof is not in fact shifted by such method of pleading, [90] the court may expect the defendant to prove an affirmative case, and is apt to find against him if he does not. The defendant will therefore be well advised not to add to his allegations unless this course is necessary.

In accordance with the aforegoing principles, the material facts upon which the following defences, [91] all of which go to the merits of the case, must in terms of the subrule be pleaded by the defendant:

- acquiescence; [92]



- agency; [93]
- benefits of suretyship; [94]
- breach of warranty; [95]
- compromise; [96]
- contributory negligence; [97]
- defences in defamation actions; [98]
- demand; [99]



- discharge; [100]
- estoppel; [101]
- fraud; [102]
- interruption of prescription; [103]
- lack of authority; [104]
- lien; [105]
- misrepresentation; [106]
- mistake; [107]

- novation; [108]
- payment; [109]
- prescription; [110]



- set-off; [111]
- undue influence; [112]
- waiver. [113]

Dilatory defences and pleas in bar, which raise formal objections to the proceedings without presenting any substantial answer to the merits of the action, must also be specially pleaded. These are considered in more detail in the notes s v 'Particular Defences' below.

An allegation of abuse of process is not lightly upheld, especially given the constitutionally protected right of access to courts in s 34 of the Constitution. [114] A party who relies on abuse of process must pertinently plead the abuse, substantiate it by facts and lay a foundation in fact, which could enable the opposing parties to deal with that reliance. [115]

The defence that a plaintiff is endeavouring to enforce an illegal contract merits special treatment. Not only may the defendant take the defence at any stage without pleading it, [116] but it is the duty of the court to take the point *mero motu* even if the defendant does not raise it. Two points should be noted, however. First, the court will *mero motu* decline to enforce the contract only if it is *ex facie* illegal, and not where the question of illegality depends upon the surrounding circumstances. [117] In the latter case, it must be pleaded. Secondly, if the court takes the point *mero motu*, and the defendant has deliberately not raised it himself, he may not get his costs. [118]



**Subrule (3): 'Shall be deemed to be admitted.'** This subrule makes it clear that *every* allegation of fact in the combined summons or declaration which is not denied or admitted in the plea, shall be deemed to be admitted. [119] All allegations of fact, whether material or otherwise, in the combined summons or declaration which are not denied in the defendant's plea or not stated to be not admitted, are therefore in terms of the subrule deemed to be admitted. It has, however, been held that the subrule cannot be applied piecemeal to a party's averments so as to deprive such a party of a defence which is plainly, though perhaps imprecisely, raised on the pleadings. [120] If a plaintiff is embarrassed by an apparent contradiction arising from the absence of a precisely targeted denial of a particular averment in the particulars of claim, the plaintiff's remedy lies in a notice to the defendant to cure a vague and embarrassing pleading in terms of rule 23(1). [121]

**'Any explanation or qualification of any denial.'** In some cases, even if the defendant deals with all the allegations in the plaintiff's combined summons or declaration, his defence will not properly appear. A bare denial of the plaintiff's allegations may in certain circumstances not fully convey to the plaintiff the nature of the case he has to meet. An explanation or a qualification of a denial will, for example, be necessary where the denial is partial or where it implies some positive allegation by way of explanation upon which the defence will rest. It is unacceptable for a party to plead a bare denial in the face of straightforward and undeniable allegations against such party. [122]

See further the notes to subrule (2) s v 'Concisely state all material facts upon which he relies' above.

**Subrule (4): 'If by reason of any claim in reconvention . . . the plaintiff's claim will be extinguished.'** A defendant who is in the position that he must admit the claim against him but who has an unliquidated counterclaim which is not capable of set-off, is faced with a dilemma. If he admits the claim against him, he cannot in his plea set off his claim against his admitted indebtedness until his claim is liquidated. In order to liquidate it, he must bring an action against the plaintiff. If the action is brought as a separate action, the plaintiff will be able to obtain a judgment against him on the admitted claim, which the defendant will have to satisfy even though ultimately he establishes that the plaintiff was at all times indebted to him on balance. In this way his credit may be seriously injured although in reality the plaintiff might owe him considerably more than he is ordered to pay to the plaintiff. Moreover, the plaintiff might be a man of straw and by the time the defendant obtains his judgment on the claim in reconvention, it might be impossible to recover anything and his judgment would be valueless. [123] One way of meeting this problem is for the court to permit the plaintiff to enter judgment against the defendant before adjudication on the defendant's claim, but to stay execution until the defendant's claim has been determined. A more common practice is that which has found recognition in this subrule. The subrule accords a defendant, who has filed a claim in reconvention ('counterclaim'), the right to request postponement of judgment on such part of the claim as admitted by him until the counterclaim



has been finally determined. In exercising this right the defendant must demonstrate that his counterclaim, if successful, will wholly or partially extinguish the plaintiff's claim. This means, in general that the claim and counterclaim must sound in money. [124] It is evident from the provisions of rule 22(4) that the *pari passu* determination of a claim in convention and a counterclaim cannot be claimed as of right. The court has a discretion whether or not to postpone the claim in convention so that both the claim and the counterclaim are heard simultaneously. [125]

**'The defendant may in his plea.'** This subrule sanctions the practice of allowing a defendant, who is faced with the dilemma set out in the notes under the preceding head, after admitting liability in his plea for the amount claimed by the plaintiff, to ask that entry of judgment against him be postponed until his unliquidated counterclaim has been adjudicated upon. [126] The purpose of the practice is to avoid a multiplicity of consecutive actions and cross-actions and of process in execution between the same parties and, where possible and just, to dispose of all issues, claims and counterclaims between the same litigants in one and the same trial in order that there should be an end to litigation. [127]

The procedural right thus granted to a defendant does not, however, enlarge his rights under common law so as to permit him to set off an unliquidated claim for damages against monthly instalments due by him pending the decision on the claim and counterclaim. [128]

The subrule is not intended to apply to a second defendant who relies not upon his own counterclaim but upon that of the first defendant. [129] It has, however, been held that a surety (and co-principal debtor) may invoke the subrule and avail himself of the defence that the debt of the principal debtor has been discharged by set-off against a debt due to the principal debtor by the creditor. [130]

The subrule contemplates that the claim and counterclaim will be heard in the same forum. [131] Where the counterclaim is subject to arbitration, the arbitration proceedings in respect of the counterclaim does not amount to proceedings truly separate in their forum. [132]

In *LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd* [133] the defendant was allowed to invoke a defence analogous to that under this subrule. The defendant averred that the plaintiff's claim was founded on a cession which was intentionally designed by the cessionary and the cedent to frustrate the defendant's rights arising from his counterclaim against the



cedent. The defendant pleaded that the plaintiff's (cessionary's) claim be postponed until final judgment was given in the defendant's action against the cedent. An exception to the plea was dismissed on appeal.

**'Judgment in respect of the claim or any portion thereof.'** The defendant is entitled to utilize the procedure under the subrule even if the amount of the counterclaim is less than the conventional claim. [134]

**'Judgment on the claim shall . . . be . . . postponed unless the court . . . otherwise orders.'** In terms of this subrule, judgment on the claim in convention shall either in whole or in part be postponed unless the court, upon the application of any person interested, [135] otherwise orders. The court thus has a discretion whether or not to postpone judgment on a claim pending the decision on a counterclaim, and in appropriate cases may refuse to do so. [136] This discretion must be judicially exercised in accordance with the tenets of justice, fairness and reasonableness, and with reference to all the relevant facts and circumstances. [137] It is not necessary for the court to consider the merits or demerits of the counterclaim in weighing up its decision. [138] Generally speaking, the court will lean in favour of granting a postponement, for it is desirable that, in the absence of cogent reason to the contrary, the process of the court should not issue until all claims and counterclaims between the parties, not being manifestly unsubstantial, have been determined. [139]

The claim in convention may be unrelated to the counterclaim and not capable of being extinguished, either in whole or in part, by any judgment which may be given on the counterclaim. In such a case the court will, in the exercise of its discretion, grant judgment on the claim in convention. Thus, it has been held that it would be inequitable that a plaintiff with a valid claim for immediate ejectment should have his rights frustrated by a counterclaim which has no bearing on his claim for ejectment. [140]

**'If no other defence has been raised.'** In this phrase the word 'defence' means a defence valid in law. [141]

**'May give judgment for such part of the claim as would not be extinguished.'** If it is obvious that the claim will not be wholly extinguished by the counterclaim, it would be prima facie unfair not to grant the plaintiff an immediate judgment for the amount of the difference between the claim and counterclaim; and the concluding portion of the subrule is intended to give effect to this consideration. [142]

**Subrule (5): 'Such plea shall be deemed to be an irregular step . . . in accordance with rule 30.'** See rule 30 and the notes thereto below.

**Prayer.** A plea must end with a prayer, either for judgment against the plaintiff or for the dismissal of the plaintiff's claim, [143] presumably with costs.



### Particular defences

The following defences are normally raised by way of 'special plea':

**(i) Arbitration.** Section 6(1) of the Arbitration Act 42 of 1965 [144] provides that if any party to an arbitration agreement [145] commences any legal proceedings in any court, including an inferior court, against any other party to the agreement in respect of a matter which it was agreed should be referred to arbitration, any party to such proceedings may at any time after entering appearance, but before delivering pleadings or taking other steps in the proceedings, apply to court for the stay of such proceedings. [146] If the court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement, the court may make an order staying the proceedings subject to such terms and conditions as it may consider just. [147] If there is a challenge to the arbitration agreement, so as to call into question the consent of the parties to have any dispute submitted to arbitration, the court will have to consider how best to deal with that challenge. The court may decide the challenge or decide that it would be preferable to decline to do so and, under the guidance of the principle of competence-competence, allow the arbitrator to first render an award on the question of his jurisdiction. [148]

The Act has not ousted the common law: it merely provides better and more efficient means of having disputes submitted to arbitration and the enforcement of the awards of the arbitrators. [149] In proceedings under the Act the arbitration agreement must be in writing, but under the common law there may be a parol submission to arbitration. [150] By Roman-Dutch law a defendant, when cited to appear before a public tribunal, was entitled to plead by way of an *exceptio* that the parties had themselves agreed upon a special tribunal to decide disputes between them. [151] Our law has recognized the principle of party autonomy in arbitration proceedings. [152] Our law has also recognized the rule that where a party has agreed to submit a dispute to arbitration, or where it is a term of a contract that any dispute arising out of it should be submitted to arbitration, the dispute may not be taken to court unless the matter



has first been submitted to arbitration in terms of the contract, [153] or unless the right to insist on arbitration has been waived. [154]



The court may still be called upon to enforce the award, [155] or in certain circumstances to set it aside, [156] but otherwise the right of recourse to the courts is postponed until effect has been given to the arbitration provision in the contract. [157] It follows that if the contract sued upon contains a term that disputes arising out of the contract should be decided by arbitration, then the party cited before the court can claim that the action be stayed, and that the matter be referred to arbitration.

The common-law defence is raised in our courts by way of special plea for a stay of the proceedings pending final determination of the dispute by arbitration, [158] whereas under the Act it is raised by application. [159] While the language used in s 6(1) of the Act is suggestive of a substantive application, the procedure provided in the Act is not obligatory but permissive, and does not derogate from the practice of pleading the submission clause either by way of preliminary special plea or by way of defence. [160] The application must be brought before the



delivery of any pleadings by the applicant (defendant) or the taking by him of any other step in the proceedings. [161] Only a

party to the arbitration agreement, and not a person who is a party to the litigation but not a party to the agreement, has power to bring the application. [162]

Before a stay will be granted and the matter be referred to arbitration, the following requirements must be fulfilled:

*(a)* It must be clear that the matter falls within the scope of the submission. [163]

*(b)* The legal validity or the existence of the contract must not be in issue or the subject of the dispute. [164]



The onus is on the party applying for a stay of proceedings to show (i) the existence of the arbitration agreement or clause; (ii) that there exists a dispute between the parties; [165] (iii) that the dispute between the parties is covered by the arbitration agreement or clause; [166] and (iv) that all the preconditions contained in the agreement for the arbitration have been complied with. [167]

The onus of satisfying the court that the matter should not be referred to arbitration is on the party who instituted the action in court. [168] In other words, the party resisting the stay of proceedings bears the onus to convince the court that, owing to exceptional circumstances, the stay should be refused. [169]

In an application for a stay made under the Act the applicant must further show that he is, and has at all material times been, willing and ready to go to arbitration. This is not a requirement at common law, however. [170] The fact that the agreement provides no tribunal for arbitration is also no bar to a stay: the provision for arbitration cannot be said to be inoperative until some effort has been made to make it operative, and has failed. [171]

Under the Act, even if the court is satisfied that the various requirements have been fulfilled, it retains a discretion to grant or refuse a stay; [172] if it is satisfied that there is sufficient reason why the matter should not be referred in accordance with the submission, it may



refuse the application for a stay. [173] However, the party seeking to be absolved from an agreement to have a dispute referred to arbitration will have to make out a very strong case.

The following circumstances which have been allowed to weigh with the courts in the exercise of their discretion in applications for a stay made in terms of the statutes are listed:

*(a)* that the arbitrator is not to be trusted to give a fair decision; [174]

*(b)* that allegations of fraud have been publicly made, and the person against whom the allegations have been made desires an opportunity of clearing his name in public; [175]

*(c)* that there are a number of claims, not all of them falling within the submission, and the balance of convenience favours their being determined together; [176]

*(d)* that the only point for decision is a point of law. The mere fact that there is a point of law involved will not be sufficient if there are other matters to be decided. [177] If the only point for determination is a point of law, and the matter proceeds to arbitration, the arbitrator can in any event, under the provisions of the Act, [178] be compelled to state a special case on that point for the opinion of the court, and, accordingly, if the matter is taken to court, the court will probably refuse a stay. [179]

*(e)* that the two arbitrators disagree, and the parties have not authorized them to appoint an umpire; [180]

*(f)* if the defendant admits the claim, he cannot demand arbitration; there is nothing to arbitrate about; [181]

*(g)* a real risk that the arbitrator will be unable to give an impartial decision; [182]

*(h)* that there might be a multiplicity of actions with resultant conflicting decisions. [183]

The courts have ordered a stay, and have referred the matter to arbitration, despite the fact —

*(a)* that there are special circumstances rendering it inconvenient for the parties to go to arbitration, at any rate, where the circumstances were known to the parties at the time when the agreement was made; [184]

*(b)* that the dispute is only as to part of a claim, the whole of which falls within the submission to arbitration; [185]



*(c)* that the construction of the contract is in dispute, [186] or that the defendant denies liability under the contract. [187]

In *Foize Africa (Pty) Ltd v Foize Beheer BV* [188] an *incola* company sought an interim interdict against certain foreigners and foreign companies. The respondents did not file any answering affidavits but, instead, when the application was set down in the court *a quo*, they sought to resist the application by raising an objection *in limine* based on an agreement between the parties which reads as follows:

> '10.1 This agreement shall, for all intents and purposes, be governed by and executed according to Dutch law.
>
> 10.2 The parties irrevocably consent to the jurisdiction of the courts of Holland for any matter arising out of or in connection with this agreement.
>
> 10.3 Should any dispute arise out of or in connection with this agreement, that dispute shall be referred to and finally decided by arbitration in accordance with the rules of the International Chamber of Commerce on arbitration with the seat of the arbitration being Amsterdam and the language of such arbitration shall be English.'

The Supreme Court of Appeal held [189] that the court *a quo* should have approached the objection *in limine* on the basis that it enjoyed a discretion whether or not to enforce the clause, taking into account all the relevant facts and circumstances. As far as factors relevant to the exercise of the court's discretion are concerned, the following was stated: [190]

> 'Of course the factors relevant to the discretion a court is called on to exercise are of importance. In the light of my view on the outcome of this appeal, it is unnecessary to deal in detail with what factors appear at this stage to be relevant. Indeed it would be premature and improper to do so without the parties having had the opportunity to properly canvass the facts. Nevertheless it is of assistance to consider in broad terms the factors which may be relevant. In *The Eleftheria* [1969] 2 All ER 641 (PDA) ([1969] 1 Lloyds Rep 237), when considering whether an action should be stayed by reason of a foreign jurisdiction clause, Brandon J stated:
>
> > "In particular . . . the following matters, where they arise, may properly be regarded: *(a)* In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the [local] and foreign courts; *(b)* Whether the law of the foreign court applies and, if so, whether it differs from [local] law in any material respects; *(c)* With what country either party is connected, and how closely; *(d)* Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages; *(e)* Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would — (i) be deprived of security for that claim, (ii) be unable to enforce any judgment obtained, (iii) be faced with a time-bar not applicable [locally], or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial."

These are not the only factors to which regard may be had. Others which may be relevant include the following:

*(a)* Flowing from the sanctity of contracts, it has often been said that a decision not to enforce either an arbitration or foreign jurisdiction clause should only be made where there is a very strong case made out for the parties not to be bound by their agreement.

*(b)* It is desirable if at all possible to avoid a multiplicity of actions in different courts with the associated potential complication of conflicting decisions. In the present case this may well be a weighty factor bearing in mind that there is no reason why the appellant's claims in respect of all but the first and third respondents cannot be determined in the high court and only those two respondents may seek to invoke clause 10 to have their dispute with the appellant determined elsewhere.

*(c)* Moreover, a single action has the undoubted advantage of saving time, expense and costs when compared to a multiplicity of actions.

This too may be a weighty factor as the appellant's claims that are capable of being determined in the high court against most of the respondents will involve the same factual matrix and the same witnesses as in the foreign proceedings against the first and third respondents.

*(d)* When considering the issue of costs, it should also be remembered, certainly if the cost of litigation in England is any barometer, that the cost of litigation in Europe may well be astronomical when compared to the cost of litigation in this country. Sight must also not be lost of the likely fees and charges of the arbitrators should an arbitration take place.

*(e)* If the dispute involves questions of law rather than of fact, arbitration may well prove to be both inconvenient and impractical. Consequently regard should be had to whether the dispute is readily capable of being dealt with by way of arbitration. If not, it would count heavily against the enforcement of an arbitration clause.

These are some of the relevant factors which spring readily to mind. The list is certainly not intended to be exhaustive. Of course the discretion to be exercised is fact-specific in the sense that each case must be considered in the light of its own discrete facts, with the various relevant factors being afforded whatever weight in the scales is appropriate in the circumstances. Certainly no hard-and-fast rules can be prescribed.'

It is submitted that the circumstances that have allowed to weigh with the courts in the exercise of their discretion in applications for a stay made in terms of statutory provisions referred to above could also serve as guidelines for a court in the exercise of its discretion in applying the common-law rule.

In *Crompton Street Motors CC t/a Wallers Garage Service Station v Bright Idea Projects 66 (Pty) Limited t/a All Fuels CC* [191] the Constitutional Court approved the High Court's consideration of factors that militated against a stay such as *(a)* the voluminous applications that were argued before it on the merits and the judicial resources that had been expended by the time the stay application, which was included in the answering affidavits, was made — cognizance had to be taken of the 'critical need for prudence and frugality in the deployment of court time and its other resources'; [192] and *(b)* the fact that the agreement in the matter had lapsed and the arbitrator would not have had the power to extend the lapsed agreement or force the parties to conclude a new agreement. [193]



If a stay is granted the only recourse that the claimant then has in order to pursue the claim is to proceed by way of arbitration. [194] The stay does not, however, afford the defendant an absolute defence to the claim. Its purpose is to have the claim determined by the forum to which the parties have agreed to submit themselves. [195] It does not matter how far the litigation has progressed: if the question of arbitration is raised by way of special plea, rather than under s 6(1) of the Act, the litigation will proceed on all issues until the stage when the special plea is determined as a separate issue under rule 33(4). If a stay is granted at that stage then the claimant is entitled to pursue its claim by way of arbitration. [196]

The High Court's jurisdiction is not ousted by an arbitration agreement if (*a*) the party wishing to rely on it is unable to show that the agreement is applicable to the dispute between the parties, or (*b*) the entity that is supposed to conduct the arbitration lacks power to grant the relief claimed. [197]

There is a distinction between arbitration and contractual adjudication. Courts are to respect and enforce an adjudicator's decision as binding, unless a clear case is made out that the adjudicator has exceeded his jurisdiction. [198]

**Jurisdiction.** The objection that the court has no jurisdiction is ordinarily raised by special plea, [199] i e a declinatory special plea, [200] but if the fact of lack of jurisdiction appears from the summons, the defendant is entitled to raise an exception to the summons on the ground that no cause of action is disclosed. [201] Non-jurisdiction is not to be presumed. [202] Any question of onus which arises in connection with any challenge of the court's jurisdiction must be determined on a consideration of the particular form in which the challenge is raised on the pleadings. [203] If the defendant raises the *exceptio fori declinatoria* as a substantive plea, the onus



rests on him of proving the facts upon which his plea to jurisdiction is based. [204] However, if the defendant merely denies the plaintiff's allegations of jurisdiction in the particulars of claim, the onus is on the plaintiff to prove such allegations and, consequently, that the court has jurisdiction. [205] If the plaintiff in his summons avers facts which, if proved, establish jurisdiction, the onus lies with the plaintiff to prove such facts. [206]

A foreign jurisdiction (or arbitration) clause does not exclude the High Court's jurisdiction. [207] Parties to a contract cannot exclude the jurisdiction of a court by their own agreement, and where a party wishes to invoke the protection of a foreign jurisdiction clause, it should do so by way of a special or dilatory plea seeking a stay of proceedings. [208] That having been done, the court will then be called on to exercise its discretion whether or not to enforce the clause in question, taking into account all the relevant facts and circumstances. [209] As to the factors relevant to the exercise of its discretion by a court, see the notes s v 'Arbitration' above.

**Limitation of actions.** The objection that an action has not been commenced within the time prescribed by some statute is raised by special plea. [210]

***Lis pendens*.** The plea that there is pending litigation between the same parties on the same cause of action may be raised by special plea, [211] i e a dilatory special plea, [212] but in appropriate circumstances also by way of application for a stay of the action. [213]

The court may stay an action on the ground that there is already an action pending between the same parties or their successors in title, based on the same cause of action, and in respect of the same subject matter. [214] The defendant is not entitled as of right to a stay



in such circumstances: the court has a discretion whether to order a stay or not, and may decide to allow the action to

proceed if it deems it just and equitable to do so, [215] or where the balance of convenience favours it. [216] As the later proceedings are presumed to be vexatious, the party who instituted those proceedings bears the onus of establishing that they are not, in fact, vexatious. This must be done by satisfying the court that despite all of the elements of *lis pendens* being present, justice and equity and the balance of convenience are in favour of those proceedings being dealt with. [217]

The effect of an order staying proceedings is to put an end to all the proceedings in the litigation; while the stay continues, no application of any sort can be made, not even for a change of venue. [218]

The requirement that the parties be the same does not entail that the same plaintiff should have sued the same defendant in both proceedings. The plaintiff in the first proceeding could, as a defendant in the second, raise the plea of *lis pendens*. [219]

The two actions need not be identical in form. The requirement of 'the same cause of action' is satisfied if the other case necessarily involves a determination of some point of law which will be *res judicata* in the action sought to be stayed. [220] This requirement could be relaxed if the circumstances justified doing so. It would be relaxed in such an instance

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to require that the central issue be the same in both proceedings. [221] In order to decide what matter is in issue the pleadings should be looked to, and not the evidence. [222]

The requirement that the subject matter be the same (i e that the relief claimed be the same) could be relaxed if the circumstances supported doing so. [223]

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The plea may be taken whether the two actions are pending in the same court, [224] or in different courts in the same country. [225] To bring two actions in two courts of the same country with regard to the same subject matter is prima facie vexatious, [226] and the court will generally put the plaintiff to his election as to which one he intends to continue. [227]

If one of the actions is in a foreign country, there is no presumption that the multiplicity of suits is vexatious, and a special case must be made out in order to secure a stay of one. [228] Prima facie, however, the fact that an action is pending in a foreign court affords good ground for the objection, in the absence of proof that justice would not be done without the double remedy. [229]

If the first action is allowed to lapse, e g through the non-appearance of the plaintiff, [230] or if it is withdrawn, [231] the plea of *lis pendens* to the second claim will not be upheld.

The plea need not be taken *in initio litis*, though if it is taken later than it could have been taken, the defendant may be mulcted in costs. [232] The plea may thus be taken even though the other action was not yet pending in another court when the proceedings sought to be stayed were commenced. The court in the exercise of its discretion, however, may well decide that the other action, having been commenced later, should be the one to be stayed. [233]

There is a difference between a defence of *lis pendens* and an application for the suspension of an action on the ground of non-payment of the costs of a previous action. A defence of *lis pendens* is dependent upon the existence of a pending, other action. Suspension for non-payment of costs suggests that the other action has been disposed of and that only the costs remain to be paid. [234]

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**Misjoinder and non-joinder.** The ordinary procedure by which to raise a question of joinder, whether it be misjoinder or non-joinder, is by way of special plea in abatement/dilatory special plea. [235] It would seem that if, as a consequence of an alleged non-joinder, the impugned pleading is vague and embarrasing or lacks averments which are necessary to sustain a cause of action, the exception procedure under rule 23 could be followed. Where the pleading concerned, however, discloses a cause of action but also suggests that the cause of action should not be heard until an absent party has been joined or indicated its willingness to be bound by the judgment in the cause, then the apparent non-joinder is not appropriately raised by exception. It is instead a point to be specially pleaded. [236]

It has been held that the plea of misjoinder (and *a fortiori* non-joinder) must be raised *in initio litis.* [237] A court, including a court of appeal, is, however, entitled *mero motu* to raise the question of non-joinder to safeguard the interests of third parties. [238]

**National Credit Act 34 of 2005.** In *Standard Bank of South Africa Ltd v Hales* [239] it was held that, if in legal proceedings on a loan agreement that is a credit agreement as defined in s 1 of the National Credit Act 34 of 2005, [240] a consumer seeks an order in terms of s 85*(a)* that the court refer the matter directly to a debt counsellor for evaluation and a recommendation in terms of s 86(7), the request of the consumer is, at most, a dilatory plea rather than one being in the nature of a confession and avoidance. Accordingly, it was held that no question of onus arises. [241] In the *Hales* case it was common cause that the consumer was over-indebted. In *Collett v FirstRand Bank Ltd* [242] the Supreme Court of Appeal held that over-indebtedness is not a defence on the merits in summary judgment proceedings.

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In terms of s 126B(1)*(b)* of the National Credit Act 34 of 2005 no person may continue the collection of, or re-activate a debt under a credit agreement to which the National Credit Act applies —

(i) which debt has been extinguished by prescription under the Prescription Act 68 of 1969; and

(ii) where the consumer raises the defence of prescription, or would reasonably have raised the defence of prescription had the consumer been aware of such a defence, in response to a demand, whether as part of legal proceedings or otherwise. In the event of the continuation of the collection of, or re-activation of a debt under a credit agreement as contemplated in s 126B(1)*(b)* of the National Credit Act 34 of 2005, the consumer is entitled, in defending the legal proceedings concerned, to raise the defence of prescription. This should be done in the manner set out in the notes s v 'Prescription' below. In the event of only a demand, and legal proceedings not having yet commenced, the consumer is entitled to raise the defence of prescription in any manner whatsoever. In such event the provisions of s 17(2) of the Prescription Act 68 of 1969 do not find application.

Section 126B(1)*(b)* of the National Credit Act 34 of 2005 has no retrospective operation. [243]

***Non locus standi in judicio*.** It is for the party instituting proceedings to allege and prove that he has *locus standi in judicio*. [244]

Lack of standing is ordinarily raised by special plea, i e a dilatory special plea. [245] If the fact of non *locus standi in judicio* appears from the summons, the defendant is entitled to take an exception under rule 23 that no cause of action is

disclosed. [246]

**Prescription.** The court cannot of its own motion take notice of prescription. [247] Section 17(2) of the Prescription Act 68 of 1969 provides that a party to litigation who invokes prescription 'shall do so in the relevant document filed of record in the proceedings'. [248] If prescription is raised in a plea it should be done by means of a special plea [249] (i e a peremptory special plea). [250]



In *Sanan v Eskom Holdings Ltd* [251] the court was confronted with an exception to particulars of claim to the effect that s 35 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 did not allow for such a claim to be brought in court. The particulars of claim placed the plaintiff foursquare within the ambit of the embargo. The plaintiff argued that a special plea ought to have been taken and that an exception was inappropriate. This contention was rejected and the exception was upheld. [252] The court, however, embarked on an unnecessary discussion whether, in principle, a special plea or an exception is the appropriate procedure to raise a defence, and came to the following conclusion in regard to the view that prescription should be raised by way of special plea and not by way of exception: [253]

> '[I]t it seems to me incongruous that a party is obliged to raise a defence in a particular way in order to accommodate or assist his opponent in raising a counter argument to such defence.'

In *Living Hands (Pty) Ltd v Ditz,* [254] not following the *Sanan* case, it was held that prescription may not be raised by way of an exception as opposed to a special plea. In *Habib v Ethekwini Municipality* [255] the plaintiff sought to set aside an exception that relied on prescription as an irregular step. It was held [256] that if prescription is raised by means of an exception, the exception does not constitute an irregular step. The approach the court should adopt, if presented with an exception raising prescription, is to examine whether the particulars of claim are indeed excipiable, in other words, whether they contain insufficient averments to sustain a cause of action. [257] In conclusion the court said: [258]

> 'I think the point is rather that an exception based on prescription will usually fail because the contention that the particulars of claim lack averments necessary to sustain an action is incorrect. This is because the plaintiff is not required to aver that his claim has not become prescribed.'

In *Jugwanth v Mobile Telephone Networks (Pty) Ltd* [259] the plaintiff, an attorney, sued the defendant in the High Court for payment of outstanding fees. The defendant successfully excepted to the plaintiff's particulars of claim on the basis that they did not disclose a cause of action because the debts on which the claim was based had prescribed. On appeal the Supreme Court of Appeal set aside the High Court's order and substituted it with an order dismissing the exception. In clarifying the position, the Supreme Court of Appeal, amongst other things, held that:

*(a)* prescription was fact driven; the fact that a debt appeared to have become due on a certain date was not the only relevant fact required to determine whether it had prescribed; particulars of claim did not necessarily show when the debt became due, whether the creditor was prevented from coming to know of the existence of the debt, when the creditor became aware of the identity of the debtor, whether the completion of prescription was delayed, whether the running of prescription was interrupted or whether there was an agreement not to invoke prescription; [260]



*(b)* the necessary corollary of the fact that s 17(1) of the Prescription Act 68 of 1969 precluded a court from raising prescription from its own accord, was that, if a defendant failed to enter an appearance to defend and a claim in which the particulars referred to in *(a)* above were not set out, came before a court for default judgment, the court could not refuse it on the basis that the debt had prescribed; [261]

*(c)* having regard to *(a)* and *(b)* above, it was not necessary for a plaintiff to anticipate the invocation of prescription and plead a basis on which the claim had not prescribed in its particulars of claim; [262]

*(d)* the defendant's reliance on the *Habib* case as justification for its exception was not supported by the conclusion in that case that 'the plaintiff is not required to aver that his claim has not become prescribed'; [263]

*(e)* the fact that delivering an exception might not be an irregular step did not make the exception good; the plaintiff could simply argue that the exception should not succeed in which instance the true test remained to determine whether the particulars of claim sustained a cause of action; in this regard it was important to bear in mind that rule 23(4) did not, in the ordinary course, envisage further pleading, including a replication, that could be a retort to a plea of prescription; [264]

*(f)* the exception in the *Sanan* case was, in the circumstances of that case, taken correctly, but the court, in embarking on the unnecessary discussion of whether a special plea or exception was the appropriate procedure to raise a defence, was incorrect to say that where prescription was concerned, raising 'a defence in a particular way' was done 'in order to accommodate or assist his opponent in raising a counter argument to such defence'; [265]

*(g)* the defendant's submission that the delivery of the exception brought about a situation where the plaintiff was required to amend the particulars to plead a basis on which the claim had not prescribed, had to be rejected; it simply could not be the case that an exception to otherwise sufficient particulars of claim required a plaintiff to amend on pain of the exception being upheld and the claim being dismissed; if a plaintiff need not have anticipated prescription being raised in order for the particulars of claim to disclose a cause of action, the delivery of an exception could not change the picture. [266]

The special plea can be raised at any stage in the proceedings and need not necessarily be taken before *litis contestatio*. [267]

See also the notes s v 'National Credit Act 34 of 2005' above.

See the notes to rule 28 s v 'Shall furnish particulars of the amendment' below as regards the introduction by way of an amendment of a claim which has become prescribed.

***Res judicata.*** It is a fundamental doctrine that there must be an end to litigation, [268] and from this flows the rule that legal proceedings can be stayed if it can be shown that the point at



issue has already been adjudicated upon between the parties. [269] The policy which underlies the principle of *res judicata* is that nobody should be permitted to harass another with second litigation on the same subject. Such litigation can be viewed as an abuse of process. [270] In *S v Molaudzi* [271] the Constitutional Court considered the doctrine of *res judicata* and concluded that the Court had the power to relax the doctrine in exceptional circumstances. [272] Exceptional circumstances should be linked to either the probability of grave individual injustice or a situation where, even if grave individual injustice might not follow, the administration of justice might be brought into disrepute if no reconsideration occurs. A high threshold is set by the words 'exceptional circumstances'. [273] In determining whether the point has already been decided between the parties, in a manner sufficient to justify a plea of *res judicata* (i e a peremptory special plea), [274] a distinction must at the outset be drawn between judgments *in rem* and judgments *in personam*. If the judgment which it is contended constitutes a bar to the second

action was a judgment *in rem* (i e affecting either the status of a person or his property), [275] and if it concerned persons domiciled or property situated within the jurisdiction of the court, it is conclusive against all the world in respect of what the judgment settles as to the status of such person or property, or as to the right or title to the latter, and as to whatever disposition it makes in regard to the disposition of the property. [276] Thus, a decree issued by a court of a person's domicile that he is presumed dead is binding against the world. [277] If the judgment was merely a judgment *in personam*, a plea of *res judicata* will be upheld only if



certain requirements, discussed below, are present. To determine whether a judgment was *in rem* or merely *in personam*, the issues raised in the pleadings must be looked at, and the judgment analysed to ascertain exactly what decision was given. [278]

The requirements for the defence of *res judicata* are that there must be:

*(a)* concluded litigation;

*(b)* between the same parties;

*(c)* in relation to the same thing; and

*(d)* based on the same cause of action. [279]

Each of the aforesaid requirements will be dealt with in turn.

***(a)* Concluded litigation.** There must have been prior litigation or legal proceedings [280] between the parties, culminating in a final judgment, or a decision which has a final effect between the parties, [281] based on the merits of the point in issue. [282] It is not a requirement that the matter shall have been adjudicated upon before a civil court. [283] It is enough if a judicial tribunal, i e 'a person or body of persons, exercising judicial functions by common law, statute, patent, charter, custom . . .' adjudicated upon the matter. [284] Thus, an administrative order is not a bar to subsequent proceedings. [285] If the point at issue is a factual one, a previous judgment operates as a bar only if evidence has been led in the case in which the judgment was delivered. [286] Apart from these considerations, it makes no difference if the action was defended or not. [287]



No question can arise whether the prior judgment was wrong or right. [288] Every judgment is presumed right, and can be challenged only on appeal. [289] If the judgment is clearly correct on the evidence, the loser's remedy is to bring an action for reopening. [290] It has been held that an abandonment of a judgment cannot trump the defence of *res judicata*. [291] In appropriate circumstances the *res judicata* doctrine may, however, be relaxed in order to prevent a denial of justice to the party who abandoned the judgment. The matter should be approached on a fact-specific basis. [292]

As a general rule a judgment of 'absolution from the instance' does not constitute a bar to a subsequent action. [293] If a court orders that the case is dismissed with costs, this is equivalent to an absolution judgment. [294] It is, however, possible that judgment of absolution does finally determine a question of fact, in which case it can be pleaded that the particular issue is *res judicata*. [295]

If the Master of the High Court confirms a contribution account, that has not the effect of a final and definitive sentence. [296]

The setting aside of a judicial management order is not in the nature of a final order in respect of which the *exceptio rei judicatae* can be raised. [297]

The judgment must emanate from a competent court. [298] If the court in which the prior judgment was given lacked jurisdiction, its judgment is no bar to a subsequent action. [299]



The judgment of a foreign court having jurisdiction can be pleaded as a bar to a subsequent action. [300] A defence that there has been a determination and award by arbitrators can be pleaded as *res judicata*. [301]



The confirmation of an executor's account in a deceased estate is not a bar to an action, concerning items which do not concern the estate, and are thus irrelevant to the account. [302]

***(b)* Between the same parties.** Unless the judgment is between the same parties, or is a judgment *in rem*, it is *res inter alios acta*, and cannot support a plea of *res judicata*. [303]

A judgment binds not only the parties themselves but also their privies, i e persons deriving their interest in title through or from the parties, for example a deceased and his heir, a principal and his agent, and a person under curatorship and his curator. [304]

The 'same parties' requirement is not met by the fact that an applicant was joined as a nominal respondent in previous proceedings with no relief being claimed against it. [305]

An executor is bound by a judgment to which the deceased was a party, and a judgment against a principal is binding on his sureties, but not to the extent of determining the amount of each surety's individual liability. [306]

The trustee of an insolvent estate is normally regarded as the privy of the insolvent, but there may be cases where a judgment against the insolvent may not be *res judicata* against his trustee. Where, if the judgment were allowed to stand, the judgment creditor would obtain an unfair advantage over the general body of creditors, the doctrine of *res judicata* has no application. [307] Similarly, where the trustee in the discharge of his statutory duties seeks, as the plaintiff in an action, to attack a defendant in order to secure some lawful advantage to the estate and to that end relies on a collusive dealing entered into between the defendant and the insolvent, the fact that such dealing has been the subject matter of a previous judgment in an action between the defendant and the insolvent in no way binds the trustee. [308] A judgment obtained against the trustee of an insolvent, in the insolvent's absence and without his consent, is not *res judicata* against the insolvent. [309]

An admission by the defendant, made in an earlier case between the plaintiff and a third party, does not debar the defendant from maintaining the contrary of his admission in a subsequent case between himself and the plaintiff. [310]

A judgment in a criminal case can never bar a subsequent civil case. [311] Nor can proof of a civil judgment for ejectment constitute evidence that the accused, in a criminal charge of



trespass, is a trespasser. [312]

It is an abuse of the process of the court, and vexatious, to try to obtain the retrial of an issue already decided by simulating a different cause of action by means of a difference of parties. [313]

If a third party intervenes in an action, he is as a general rule bound by the judgment given in the action. He is also bound by a judgment in an action in which he has the right to intervene, if he is given notice of the action, and that his title is being called into question, but he neglects to intervene. Thus, where A sold property to B, which was later claimed by C, who successfully brought an ejectment action against B, and A failed to intervene in the action even though B had given him notice thereof, it was held that A was debarred from thereafter bringing an action against C for trespass on the property, the questions of the parties' title being *res judicata* as between A and C. [314]

Certain limitations to this doctrine were stated by Fagan AJA in *Amalgamated Engineering Union v Minister of Labour*: [315]

> 'Mere non-intervention, or even an intimation of non-intervention, with nothing more to it, after receipt of a notice of legal proceedings short of citation, cannot therefore, to my mind, be treated as if it were a representation, express or tacit, that the party concerned will submit to, and be bound by, any judgment that may be given.'

There are cases where a third party may have sufficient interest in an action to entitle him to intervene, and the judgment may yet not bind him as *res judicata*. [316]

***(c)* In relation to the same thing/based on the same cause of action.** In essence this relates to the same point in issue although it has been differently stated in a number of the leading cases on the subject. Thus, it has been said that the same point must have been in issue [317] and that the same thing must have been demanded; [318] that the action must have been based on the same ground and with respect to the same subject matter; [319] that it must have concerned



the same subject matter and must have been founded on the same cause of complaint; [320] that the action must have been on the same cause for the same relief. [321] Again it has been said that where a court has come to a decision on the merits of a question in issue, that question, as a *causa petendi* of the same thing between the same parties, cannot be resuscitated in subsequent proceedings. [322]



The point need not have been expressly raised in the earlier matter, for even if it was decided only by implication, it bars a later attempt to have the same point determined again. If the earlier case

> 'necessarily involved a judicial determination of some question of law or some issue of fact, in the sense that the decision could not have been legitimately or rationally



> pronounced by the tribunal without at the same time, and in the same breath, so to speak, determining that question or issue in a particular way, such determination, though not declared on the recorded decision, is deemed to constitute an integral part of it as effectively as if it had been made so in express terms'. [323]

In order to determine whether the same point was in issue in the earlier case the pleadings and not the evidence in that case must be looked to. [324] Apart from the record in that case, no other evidence is admissible. [325]

If in the earlier case the plaintiff claimed and recovered less than the evidence showed he was entitled to, he is not debarred from instituting a second action for the balance, for an examination of the pleadings and the judgment in the earlier case will show that his right to recover the balance was not in issue. [326]

If judgment was given for the delivery of certain goods, or payment of their value, and the court estimated the value for the purposes of the alternative order, this estimate will not bind the court in a later case when it is called upon to decide whether the defendant has delivered all the goods he was ordered to deliver. [327]

**Illustrations**

A plea of *res judicata* was upheld in the following cases:

*(a)* Where a wife had obtained a decree of divorce against her husband, and in a later case he sought a declaration that the marriage was *ab initio* null and void, this issue having been raised in the divorce proceedings. [328]

*(b)* A sued B for ejectment, alleging that his lease had been cancelled. Appearance to defend was entered, but no plea was filed, and judgment was entered for A by default.

*(c)* Thereafter B claimed damages from A on the ground that it had unlawfully cancelled the lease. [329]

*(d)* When sued on a promissory note, the defendant pleaded that the note had been given in respect of the purchase price of a car lift and compressor, and that the plaintiff had failed to deliver the lift and compressor. Judgment was given for the plaintiff and the defendant paid the purchase price. In a subsequent action the defendant sued for recovery of the amount paid in pursuance of the judgment on the ground that the lift had not been delivered. [330]

*(e)* The court had rejected an application for an order declaring invalid an expropriation of property for a town-planning scheme. In a subsequent action it was endeavoured to obtain a reversal of this decision by advancing different reasons. [331]



If a plaintiff with a single cause of action takes a final judgment for part of the claim, he cannot thereafter proceed with the same action for a judgment in respect of the balance of the claim. [332]

An exception once repelled cannot subsequently be upheld, for the point is *res judicata* between the parties. [333]

A plea of *res judicata* was not upheld —

*(a)* where the first claim was for one month's rent, the second for a subsequent month's rent. It was held that, although the same point might be in issue, the same thing was not demanded in the two actions; [334]

*(b)* where the two claims were for interest in respect of different periods, [335] or for maintenance for a child in respect of different periods; [336]

*(c)* where the first claim was for the amount due under a building contract, and the second was for extras not provided for in the contract; [337]

*(d)* where, in an action for infringement of a trade mark, an English court had held that the plaintiff's name had by extensive use in England acquired a secondary meaning in England, and the issue before the Transvaal court in a subsequent action was whether the name had by extensive use in the Transvaal acquired a secondary meaning in the Transvaal; [338]

*(e)* where in the first action the summons was held to disclose no cause of action, and the second action was brought on a

fresh, redrafted summons which did disclose a cause of action. [339] The position would have been different had the second action been on the same summons as had been dismissed in the first action; [340]

*(f)* where the second action was on a promissory note given to satisfy the judgment in the first action; [341]

*(g)* where in the first action the defendant was ordered to erect a certain fence or to pay a certain amount as damages, and the second action was brought for damages after the defendant had elected to erect the fence, but had failed to finish it; [342]

*(h)* where there had been a change of circumstances warranting a new notice and a landlord commenced new proceedings for an order of ejectment based on a fresh notice to vacate and subsequent to a dismissal of other proceedings; [343]

*(i)* where a court had in a previous judgment expressed an *obiter* view on a certain matter; [344]

*(j)* where the first action was for arrear rental arising from an agreement of lease of movables and the second was for damages arising out of inadequate delivery of movables after termination of the lease. [345]



The defence of *res judicata* must be raised specifically by the defendant, for the prior judgment does not *ipso jure* deprive the plaintiff of his right of action. [346] The proper way to raise the defence of *res judicata* is by special plea and not by exception, since evidence must be led as to the previous action. [347] It can be raised *in initio litis*, [348] but if disallowed by the court, it can be raised again at any time before judgment. [349]

The onus is on the party raising the defence to prove it. [350] To determine whether a matter is *res judicata* the judgment, order and pleadings must be examined. [351] The record of the previous action should be produced, [352] or adequate reasons for the non-production should be given. It has been said that if there is any doubt as to any of the essentials required to be proved, the plea will fail. [353]

Not only a defendant but also a plaintiff can plead *res judicata*. Thus, no defence which is raised in the pleadings, and which is adjudicated upon between the parties by the decision in the case, can be raised as a defence in a subsequent action between the same parties. [354]

**Superannuation.** Superannuation is a remedy which developed under the common law and must be specially pleaded. An inexcusable delay which caused prejudice to the defendant is a prerequisite for the defence. [355]

1 See the notes to rule 18(4) s v 'Every pleading shall contain a clear and concise statement' above. See also, in general, *Amler's Precedents of Pleadings*; Vettori & De Beer 'The consequences of pleading a non-admission' (2013) 46(2) *De Jure* 612; Marius van Staden 'Notes on drafting a plea' (2024) April *De Rebus* 6.

2 *Neugebauer & Co Ltd v Bodiker & Co (SA) Ltd* 1925 AD 316 at 319; *General Commercial and Industrial Finance Corp Ltd v Pretoria Portland Cement Co Ltd* 1944 AD 444 at 453; *Connock's Motor Co Ltd v Sentraal Westelike Ko-op Mpy Bpk* 1964 (2) SA 47 (T) at 46; *Wilson v South African Railways and Harbours* 1981 (3) SA 1016 (C); *FPS Ltd v Trident Construction (Pty) Ltd* 1989 (3) SA 537 (A) at 541H–542D; *Makhwelo v Minister of Safety and Security* 2017 (1) SA 274 (GJ) at 276G–H.

3 *Nyandeni v Natal Motor Industries Ltd* 1974 (2) SA 274 (D) at 279; *Kali v Incorporated General Insurances Ltd* 1976 (2) SA 179 (D) at 182A; *Nieuwoudt v Joubert* 1988 (3) SA 84 (SE) at 90A.

4 *Makhwelo v Minister of Safety and Security* 2017 (1) SA 274 (GJ) at 278I–279A and the cases there referred to. For a brief exposition of the terminology, see *Titan Asset Management (Pty) Ltd v Lanzerac Estate Investments (Pty) Ltd* [2023] 3 All SA 589 (WCC) at paragraph [37].

5 *Brown v Vlok* 1925 AD 56.

6 *Van der Westhuizen v Smit NO* 1954 (3) SA 427 (SWA) at 430E.

7 *George v Lewe* 1935 CPD 402 at 405; *Schuddingh v Uitenhage Municipality* 1937 CPD 113 at 118; *Meyerson v Health Beverages (Pty) Ltd* 1989 (4) SA 667 (C) at 674A–B.

8 *David Beckett Construction (Pty) Ltd v Bristow* 1987 (3) SA 275 (W) at 279G–282B, not approving *Sibeko v Minister of Police* 1985 (1) SA 151 (W). See also *Thyssen v Cape St Francis Township (Pty) Ltd* 1966 (2) SA 115 (E) at 116H where it is stated that if rules 22 and 23 are read together 'one gains the impression that rule 22 envisages the pleading of all defences at one and the same time'.

9 *Glenn v Bickel* 1928 TPD 186; *SA Railways & Harbours v Lennon Ltd* 1945 AD 157 at 167.

10 *Vanger v Thomson and Meyer* 1915 CPD 752.

11 *E K Green & Co v Adkins* 1930 CPD 253.

12 *Van der Spuy v The Colonial Government* (1897) 14 SC 410; *Hurwitz v Rhodesia Railways Ltd* 1912 AD 8; *Kam NO v Udwin* 1939 WLD 339 at 350; *Trust Bank of Africa Ltd v Eksteen* 1968 (3) SA 529 (N) at 534.

13 *Careless v Stalbaum* 1925 (2) PH L16.

14 *C A MacDonald Ltd v Cornelius* (1921) 42 NLR 344.

15 *Botha v Brink* 1878 Buch 118; and see *Nepgen v Brown* 1918 EDL 169 (an assault case).

16 *Reynolds v Ainsley* 1904 TS 868; *O'Reilly v Goldstein* 1922 SWA 89.

17 *Wood NO v Branson* 1952 (3) SA 369 (T).

18 *Lichtenburg Garage (Pty) Ltd v Gerber* 1963 (4) SA 395 (T). However, a rolled-up plea is objectionable, i e a plea of a combination of both justification and fair comment in regard to the same allegations contained in the offending statement. The plaintiff is entitled to know which defence the defendant is setting up, i e whether he relies on justification or fair comment, or whether he puts forward alternative defences (*Davies v Lombard* 1966 (1) SA 585 (W)).

19 *O'Reilly v Collins* 1914 CPD 985.

20 *SA Alumenite Co v Wells* 1926 EDL 273; upheld on appeal in *Wells v SA Alumenite Co* 1927 AD 69.

21 *Murphy v Brimacombe* 1913 CPD 894; *Mogale v Engelbrecht* 1907 TS 836; *Harris v Miller* 1914 EDL 570; *East London Municipality v Minister of Railways* 1914 EDL 441.

22 *Westphal v Schlemmer* 1925 SWA 127.

23 *Heydenrych v Platt* 1925 SWA 42. In *Harding and Parker v John Pierce & Co* 1919 OPD 113 at 122 Ward J stated:
'When there is a doubt whether a paragraph should stand, or should be deleted, in my opinion the paragraph should be allowed to stand.'

24 *Steenkamp v Laurence* 1918 CPD 79; *Golding v Torch Printing and Publishing Co (Pty) Ltd* 1948 (3) SA 1067 (C) at 1090.; *Davies v Lombard* 1966 (1) SA 585 (W).

25 *E K Green & Co v Adkins* 1930 CPD 253; *Allers v Rautenbach* 1949 (4) SA 226 (O).

26 *Wannenburg v Vogel en Seuns* 1951 (2) SA 599 (T) at 603.

27 *Wannenburg v Vogel en Seuns* 1951 (2) SA 599 (T) at 603.

28 *Lombard Bank v Hammes, husband of Storm* (1832) 3 Menz 349; *Lubbe v Colonial Government* (1906) 2 Buch AC 269; *Doyle v Botha* (1909) 26 SC 245; *Naran v Rajoo* (1921) 42 NLR 39; *Circle Construction (Pty) Ltd v Smithfield Construction* 1982 (4) SA 726 (N) at 730.

29 See *Dinath v Breedt* 1966 (3) SA 712 (T) at 717; *Circle Construction (Pty) Ltd v Smithfield Construction* 1982 (4) SA 726 (N) at 730.

30 The original pleading must have been due to some error which ought to be allowed to be corrected (*Cornelius & Sons v McClaren* 1961 (2) SA 604 (E)). See also *Circle Construction (Pty) Ltd v Smithfield Construction* 1982 (4) SA 726 (N) at 730.

31 See *Circle Construction (Pty) Ltd v Smithfield Construction* 1982 (4) SA 726 (N) at 730. In *Dinath v Breedt* 1966 (3) SA 712 (T), an ejectment action, there was no denial of ownership in the plea and it was held that the action fell to be decided on the footing that the plaintiff was the owner of the property at the time of issue of the summons notwithstanding the fact that it was known to the court that the plaintiff was not the owner of the property. At 718 Colman J states:
'We have no discretion to disregard the admission of ownership in the pleadings before us.'

See, however, the remarks of Miller J in *South British Insurance Co Ltd v Glisson* 1963 (1) SA 289 (D) at 297. It is submitted that it is the duty of the court to determine what are the real issues between the parties and, provided no prejudice is caused to either party, to decide the case on these real issues. Thus, where an uneducated woman defended in person and did not plead any defence, but a defence appeared from her evidence, she was allowed the benefit of it (*Cohen v Coetzee* 1912 EDL 305). Where a defence (consent) had not been pleaded in the court of first instance, but the plaintiff had taken no objection to evidence of consent being heard and had dealt with it in cross-examination, a judgment based upon the fact that consent had been established was upheld on appeal (*Bredenkamp v Du Toit* 1924 GWL 15). In *Segal v Pein & Co* 1924 GWL 41, it was assumed 'for the sake of argument' that a point not pleaded and not dealt with in the lower court, because the facts came out only at the trial, could be used on appeal. No decision was given on the point, however.

32 See *Circle Construction (Pty) Ltd v Smithfield Construction* 1982 (4) SA 726 (N) at 730. A compromise after *litis contestatio* should be raised by way of amended plea, and not by way of a motion to stay proceedings (*Western Assurance Co v Caldwell's Trustee* 1918 AD 262; *Brachvogel v Boschrand Citrus Co Ltd* 1923 WLD 222).

33 *Feldman v Feldman* 1986 (1) SA 449 (T).

34 See rule 26 below.

35 *Tyulu v Southern Insurance Association Ltd* 1974 (3) SA 726 (E); *Felix v Nortier NO (2)* 1994 (4) SA 502 (SE) at 506E; *Landmark Mthatha (Pty) Ltd v King Sabata Dalindyebo Municipality: In re African Bulk Earthworks (Pty) Ltd v Landmark Mthatha (Pty) Ltd* 2010 (3) SA 81 (ECM) at 86G.

36 *FPS Ltd v Trident Construction (Pty) Ltd* 1989 (3) SA 537 (A) at 541B; *Makhwelo v Minister of Safety and Security* 2017 (1) SA 274 (GJ) at 276G–H.

37 *Griqualand West Diamond Mining Co Ltd v London and SA Exploration Co* (1883) 1 Buch AC 239.

38 *Rand Trading Co Ltd v Lewkewitsh* 1908 TS 108 at 112–13; *Rance v Union Mercantile Co Ltd* 1922 AD 312 at 315.

39 *Taylor v Budd* 1932 AD 326; *Gordon v Tarnow* 1947 (3) SA 525 (A); *Van Deventer v De Villiers* 1953 (4) SA 72 (C) at 75. See also s 15 of the Civil Proceedings Evidence Act 25 of 1965.

40 *Stephens v Liepner* 1939 WLD 26 at 29; *Whittal v Alexandria Municipality* 1966 (4) SA 297 (E).

41 1971 (2) SA 611 (N).

42 At 614–15. See also *Watersmeet (Pty) Ltd v De Kock* 1960 (4) SA 734 (E); *Kevin and Lasia Property Investment CC v Roos NO* 2004 (4) SA 103 (SCA) at 108B–C.

43 *Whitaker v Roos* 1911 TPD 1092 at 1102; *Rance v Union Mercantile Co Ltd* 1922 AD 312 at 315; *Canaric NO v Shevil's Garage* 1932 TPD 196; *Van Deventer v De Villiers* 1953 (4) SA 72 (C) at 75; *Jensen v Williams, Hunt & Clymer Ltd* 1959 (4) SA 583 (O) at 595E–H; *Frosso Shipping Corporation v Richmond Maritime Corporation* 1985 (2) SA 476 (C) at 485D; *Fourie v Sentrasure Bpk* 1997 (4) SA 950 (NC) at 970G and 973I–J.

44 1971 (2) SA 611 (N) at 615E.

45 *South British Insurance Co Ltd v Glisson* 1963 (1) SA 289 (D) at 297B–E; *Dinath v Breedt* 1966 (3) SA 712 (T) at 717; *Mthanti v Netherlands Insurance Co of SA Ltd* 1971 (2) SA 305 (N) at 310D–H.

46 *Van Rensburg v Van Rensburg* 1963 (1) SA 505 (A) at 510A; *Rosenbach & Co (Pty) Ltd v Dalmonte* 1964 (2) SA 195 (N) at 200H–210A; *Community Development Board v Revision Court for Durban Central* 1971 (1) SA 557 (N) at 564C; *Amod v SA Mutual Fire & General Insurance Co Ltd* 1971 (2) SA 611 (N) at 616A–D; *McDonald t/a Sport Helicopter v Huey Extreme Club* 2008 (4) SA 20 (C) at 25I–26A.

47 Rule 18(5).

48 Rule 18(5).

49 See, for example, *Brink v Cloete* 1869 Buch 215; *CSAR v Ward* 1907 TS 314; *SA Railways and Harbours v Landau & Co* 1917 TPD 485; *Dhlamini v Jooste* 1925 OPD 223 at 234; *Hillman Bros Ltd v Kelly and Hingle* 1926 WLD 153; *Mostert v Bleden* 1927 CPD 89; *Yallop v Wilkins* 1927 CPD 161 at 163; *Makgothi v Estate Makgothi* 1928 OPD 76; *Du Plessis v SA Railways and Harbours* 1930 TPD 50 at 67; *Hlongwane v Methodist Church of South Africa* 1933 WLD 165 at 169; *Stephens v Liepner* 1938 WLD 30.

50 *Taylor v Budd* 1932 AD 326; *Durbach v Fairway Hotel Ltd* 1949 (3) SA 1081 (SR); *Nyandeni v Natal Motor Industries Ltd* 1974 (2) SA 274 (D).

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

52 *Pretoria Town Council v Wolhuter* 1930 TPD 761.

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

54 *Dhlamini v Jooste* 1925 OPD 223; *Nyandeni v Natal Motor Industries Ltd* 1974 (2) SA 274 (D) at 278; and see *Jon Lancaster Radiators Ltd v General Motor Radiator Co Ltd* [1946] 2 All ER 685 (CA).

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

56 *Builders Ltd v Union Government (Minister of Finance)* 1928 AD 46 at 53; *Nyandeni v Natal Motor Industries Ltd* 1974 (2) SA 274 (D) at 278A–F.

57 *SA Railways and Harbours v Landau & Co* 1917 TPD 485 at 488.

58 *Ebrahim v Excelsior Shopfitters and Furnishers (Pty) Ltd (2)* 1946 TPD 226; *Bailen v Hamza* 1949 (1) SA 993 (C); *Suzman Ltd v Pather and Sons* 1957 (4) SA 690 (N).

59 See *Joseph v Bloch* 1930 WLD 327 at 338, upheld on appeal *sub nomine Bloch v Joseph* 1931 AD 132 at 138.

60 *Wilson v South African Railways and Harbours* 1981 (3) SA 1016 (C).

61 *Wilson v South African Railways and Harbours* 1981 (3) SA 1016 (C). In *Standard Bank Factors Ltd v Furncor Agencies (Pty) Ltd* 1985 (3) SA 410 (C) at 416H–417A the correctness of this view was queried but not decided. See further, in general, *N Goodwin Design (Pty) Ltd v Mosack* 1992 (1) SA 154 (C).

62 *N Goodwin Design (Pty) Ltd v Mosack* 1992 (1) SA 154 (C) at 163H, rejecting the view to the contrary in *Standard Bank Factors Ltd v Furncor Agencies (Pty) Ltd* 1985 (3) SA 410 (C). Jacob & Goldrein *Pleadings: Principles and Practice* 122, while they agree that sometimes the distinction is simply a matter of emphasis, say that the distinction usually observed is that a party denies any matter that, if it has occurred, would have been within his own knowledge, while he refuses to admit matters that are not within his own knowledge.

63 See Beck *Pleading* 75–8; Jacob & Goldrein *Pleadings: Principles and Practice* 133–4.

64 *Dreyer v Van Reenen* (1845) 3 Menz 375; *Peacock v Hodges* 1876 Buch 65; *Stadler v Hugo* 1876 Buch 6; *Naude v Bredenkamp* 1956 (2) SA 448 (O).

65 *Minister of Law and Order v Monti* 1995 (1) SA 35 (A) at 40C. Thus, in actions for damages in respect of a delict affecting a plaintiff's personality and bodily integrity, such as assault, the defendant ordinarily bears the onus of proving the excuse or justification which he raises: see, for example, *Mabaso v Felix* 1981 (3) SA 865 (A) at 874A–B; *Ramsay v Minister van Polisie* 1981 (4) SA 802 (A) at 807E–F; *Ferreira v Ntshingila* 1990 (4) SA 271 (A) at 273A–B.

66 See Beck *Pleading* 75–8; Jacob & Goldrein *Pleadings: Principles and Practice* 134; *Van Wyk v Boedel Louw* 1957 (3) SA 481 (C) at 482H–483C.

67 See *Seedat v Tucker's Shoe Co* 1952 (3) SA 513 (T) at 515–16; *Sager Motors (Pvt) Ltd v Patel* 1968 (4) SA 98 (RA) at 102F–103C. Thus, the fact that the defendant pleads a different version of a contract from that of the plaintiff does not cast any burden on the defendant to prove his version, for such a plea is not one of confession and avoidance.

68 If the defendant ignores a statement of law in the summons, he is not taken either to have admitted or denied it (*The Master v General Accident, Fire and Life Assurance Co* 1935 CPD 250; *Levine v Levine* 1939 CPD 97; *Edwards v African Guarantee and Indemnity Co Ltd* 1952 (4) SA 335 (O) at 340A).

69 *Mascrowitz v Olver* 1903 TH 322; *Heiberg v Palm* 1920 WLD 10; *Westphal v Schlemmer* 1925 SWA 127; *Botha v Brink* 1943 CPD 29; *Parowlands (Pty) Ltd v Schneider* 1952 (1) SA 150 (SWA) at 152; *Van Wyk v Boedel Louw* 1957 (3) SA 481 (C). The limits to this rule were stated in *Leslie v African Life Assurance Society Ltd* 1927 WLD 151; and see *Mordt NO v Union Government* 1938 TPD 589; *Golding v Torch Printing & Publishing Co (Pty) Ltd* 1948 (3) SA 1067 (C) at 1090.

70 *Britz v Weideman* 1946 OPD 144 at 151.

71 *Pilcher and Conways (Pty) Ltd v Van Heerden* 1963 (3) SA 205 (O) at 211; and see *Central SA Railways v Ward* 1907 TS 314.

72 See, for example, *Berkowitz's Trustee v Brewer and Segal* 1908 TS 1036 at 1042; *Cornforth & Co v Holding* (1914) 35 NLR 38; *Colonial Industries Ltd v Provincial Insurance Co Ltd* 1920 CPD 627 at 632.

73 *Wilson v South African Railways and Harbours* 1981 (3) SA 1016 (C) at 1018A–E.

74 *N Goodwin Design (Pty) Ltd v Mosack* 1992 (1) SA 154 (C) at 163H, rejecting the view to the contrary in *Standard Bank Factors Ltd v Furncor Agencies (Pty) Ltd* 1985 (3) SA 410 (C). Jacob & Goldrein *Pleadings: Principles and Practice* 122, while they agree that sometimes

the distinction is simply a matter of emphasis, say that the distinction usually observed is that a party denies any matter which, if it has occurred, would have been within his own knowledge, while he refuses to admit matters that are not within his own knowledge.

75 *Crosbie v Estate Halgryn* 1916 CPD 664; *Peninsula Cricket League v Hewson* 1922 CPD 165; *Dhlamini v Jooste* 1925 OPD 223 at 235; *Fourie v Fourie* 1928 CPD 90; *Els v Els* 1933 OPD 9.

76 *Dhlamini v Jooste* 1925 OPD 223 at 234; *Britz v Weideman* 1946 OPD 144 at 152.

77 *Lubbe v Bosman* 1948 (3) SA 909 (O).

78 *Heiberg v Palm* 1920 WLD 10.

79 *Leslie v African Life Assurance Society Ltd* 1927 WLD 151.

80 *Neugebauer & Co Ltd v Bodiker & Co (SA) Ltd* 1925 AD 316 at 319; *Bodiker & Co (SA) Ltd v Neugebauer & Co Ltd* 1926 AD 17 at 21; *FPS Ltd v Trident Construction (Pty) Ltd* 1989 (3) SA 537 (A) at 542; *Makhwelo v Minister of Safety and Security* 2017 (1) SA 274 (GJ) at 276G–H; *Bravospan 252 CC v Greater Tzaneen Municipality* (unreported, LP case no 393/2018 dated 2 February 2021) at paragraph [25], overruled on appeal, but not on this point, in *Greater Tzaneen Municipality v Bravospan 252 CC* (unreported, SCA case no 428/2021 dated 7 November 2022). In *Builders Ltd v Union Government (Minister of Finance)* 1928 AD 46 at 53 Curlewis JA stated:
'A plea should be clear and unequivocal, it should not leave one guessing as to what it means.'
For a model plea, see *Mabaso v Felix* 1981 (3) SA 865 (A) at 875 and, in general, *Amler's Precedents of Pleadings*.

81 *Thomas Ltd v May* 1952 (3) SA 750 (SR).

82 *FPS Ltd v Trident Construction (Pty) Ltd* 1989 (3) SA 537 (A) at 541H–542D; *Bravospan 252 CC v Greater Tzaneen Municipality* (unreported, LP case no 393/2018 dated 2 February 2021) at paragraph [25], overruled on appeal, but not on this point, in *Greater Tzaneen Municipality v Bravospan 252 CC* (unreported, SCA case no 428/2021 dated 7 November 2022).

83 For example, where a defendant complained that she had been underpaid by the plaintiff, but failed to set out the grounds upon which she relied in order to establish such underpayment, or the items in respect of which she had been underpaid, or the extent of the alleged underpayment, her plea was dismissed as not complying with the rule (*Segall & Co v Becker* 1927 EDL 113).

84 *Clulee v McArthur, Atkins & Co* (1907) 29 NLR 487; *Lazarus v Kemp* (1915) 36 NLR 504; *Kruger v Symington NO* 1958 (2) SA 128 (O).

85 *Bokaba v Makona* 1930 (2) PH F135 (T); *Von Ziegler v Superior Furniture Manufacturers (Pty) Ltd* 1962 (3) SA 399 (T) at 411.

86 *Strydom v Coach Motors (Edms) Bpk* 1975 (4) SA 838 (T); and see *Von Ziegler v Superior Furniture Manufacturers (Pty) Ltd* 1962 (3) SA 399 (T) at 410.

87 *Jones v Hamilton & Haw* (1886) 5 EDC 222. In *Van Biljoen v Botha* 1952 (3) SA 494 (O) it was said that, although ordinarily evidence should not be pleaded, this may be done where it is essential to inform the other party of the case he has to meet.

88 The pleading of irrelevant matter may make the plea vague and embarrassing, but where irrelevant matter is pleaded as history, this consequence does not follow (*Du Plessis v Van Zyl* 1931 CPD 439 at 442. See also *Du Toit v Du Toit* 1958 (2) SA 354 (D)).

89 *Pleading* 113.

90 *Kilgour v Alexander* (1860) 14 Moore 177.

91 This list does not purport to be exhaustive.

92 The plea should allege the particulars of the plaintiff's conduct from which acquiescence is to be inferred (*Van Biljon v Wilcocks NO* 1930 OPD 134). See also *Policansky Bros v Hermann & Canard* 1911 TPD 319 at 1278–9; *Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Green Point) (Pty) Ltd* 1974 (2) SA 125 (C) at 136H–137B; *Safari Surf Shop CC v Heavywater* [1996] 4 All SA 316 (D) at 323*i–j*; *Botha v White* 2004 (3) SA 184 (T) at 192D–193H. The doctrine of peremption (i e acquiescence) has been extended to applications for rescission of default judgment (*Hlatshwayo v Mare and Deas* 1912 AD 242; *Sparks v David Polliack & Co (Pty) Ltd* 1963 (2) SA 491 (T) at 496D–F); and see *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State* 2021 (11) BCLR 1263 (CC) at paragraph [101]. In *Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd* 2016 (1) SA 78 (GJ) it was held (at 92G–H) that there appears to be no reason, either in policy or in principle, not to apply the doctrine of peremption to the right to set aside an arbitration award. In other words, a party who has acquiesced in the award is taken to have perempted any right to set the award aside. In *New Media Publishing (Pty) Ltd v Eating Out Web Services CC* 2005 (5) SA 388 (C) doubt was expressed as to whether this defence is still part of our law.

93 *Fleming v Commins* (1904) 14 CTR 879.

94 A surety wishing to raise the benefits of excussion, division, or cession of actions must not only specifically plead them, but must also raise them in *initio litis (Rogerson NO v Meyer and Berning* (1837) 2 Menz 39 at 48; *Hurley v Marais* (1882) 2 SC 155 at 160; *Klopper v Van Straaten* (1894) 11 SC 94; *Ridley v Anderson* 1911 EDL 13; *Worthington v Wilson* 1918 TPD 104). If the defendant denies the suretyship, he should nevertheless raise *in initio litis* the plea of non-excussion (*Rogerson NO v Meyer and Berning* (1837) 2 Menz 39; *Mason & Co v Booth & Co* (1903) 20 SC 645; *Jeeva Mahomed v Mahomed Valli* 1922 TPD 124; *Moosa v Mahomed* 1939 TPD 271). If the plea of non-excussion succeeds, the court may not necessarily postpone the matter to enable the principal debtor to be excused: in a proper case absolution from the instance may be granted (*Oslo Land Co Ltd v Temple Nourse* 1930 TPD 735).

95 *Garde v Brink* 1907 EDC 50; *Doyle v Botha* (1909) 26 SC 245.

96 See *The Torch Moderne Binnehuis Vervaardiging Venn (Edms) Bpk v Husserl* 1946 CPD 548. The onus is on the party alleging that a compromise has been effected. Compromise being a form of novation involving the waiver of existing rights (or those claimed), it must be clearly and unambiguously proved (*Gridmark CC v Razia Trading CC* (unreported, SCA case no 349/18 dated 25 March 2019) at paragraph 13]). A *transactio* is an absolute defence to the matter compromised, having the effect of *res judicata*. The object of a compromise is to 'end, or to destroy, or to prevent a legal dispute' (*Standard Bank of South Africa Ltd v Swartz* (unreported, SCA case no 1175/2022 dated 22 March 2024) at paragraph [18], referring to *Western Assurance Co v Caldwell's Trustee* 1918 AD 262 at 270 and *Estate Erasmus v Church* 1927 TPD 20 at 26).

97 It is not necessary for a defendant to plead an apportionment of damages provided that the negligence of the plaintiff is put in issue (*AA Mutual Insurance Association Ltd v Nomeka* 1976 (3) SA 45 (A); *Ndaba v Purchase* 1991 (3) SA 640 (N)).

98 *SAUK v O'Malley* 1977 (3) SA 394 (A) at 403C; *Brett v Schultz* 1982 (3) SA 286 (SE) at 292D.

99 In cases where demand before summons is a condition precedent to the issue of summons, the plaintiff's failure to send a demand constitutes a defence and should be pleaded. Where demand is not a condition precedent, it does not afford a defence, but can at most affect the question of costs (*Booi v Blake* 1877 Buch 113; *Havenga v Lotter* 1912 TPD 395; *McMurtrie v Norton* 1922 EDL 140; *Reichman v Ysebrand & Co* 1930 OPD 148; *Hooper v De Villiers* 1934 TPD 200, *Feyt v Myers* 1919 CPD 122; *De Kock v Davidson* 1971 (1) SA 428 (T); *AMS Marketing Co (Pty) Ltd v Holzman* 1983 (3) SA 263 (W) at 270). There are, however, certain exceptional circumstances in which a party who has come to court for relief against another without prior demand on that person will not be deprived of his costs (*Tullis Laundry and Engineering Supplies (Pty) Ltd v Marcuson & Co (Pty) Ltd* 1960 (1) SA 105 (T)). In those cases where demand is not a condition precedent to the issue of summons, the defendant is justified in refusing to pay the costs of summons if he satisfies the claim within a reasonable time after service (*Havenga v Lotter* 1912 TPD 395; *McMurtrie v Norton* 1922 EDL 140). A verbal demand is effective to render the defendant liable for costs of summons (*Van der Berg v Tonder* (1899) 16 SC 509; *Livingstone v Cochrane* 1908 TS 89; *Geldenhuys v Visser* 1914 CPD 336).
The bare rendering of an account is not an adequate demand (*Dougan v Estment* 1910 TPD 998). It is not necessary, in order that the demand should be effective, that there be a threat of legal proceedings; all that the plaintiff need do is to notify the defendant that the debt is due, and that he requires payment (*Livingstone v Cochrane* 1908 TS 89; see also *Amalgamated Society of Woodworkers of SA v Die 1963 Ambagsaalvereniging* 1968 (1) SA 283 (T) at 287). Sufficient detail must be given to enable the debtor to know on what score the creditor claims the relief (*Matz v Meyerthal* 1920 TPD 338 at 341).
If *dies interpellat pro homine*, demand is not necessary (*Venter v Venter* 1949 (1) SA 768 (A)).
Demand may be made by post; but the letter must be prepaid and properly addressed (*Goustyn v Van Putten* (1898) 15 SC 34; *Mechau v Van Jaarsveld* (1847) 1 Menz 113). It is properly addressed if addressed as the defendant has directed; the fact that the address was wrongly given by defendant, whether wilfully (*Chittenden v Schoeman* 1905 TS 42) or negligently (*Dougan v Estment* 1910 TPD 998), does not vitiate the demand. It is not properly addressed if only the name of the farm, not that of the local post office, is given (*Goustyn v Van Putten* (1898) 15 SC 34). Nor if the address on the letter, though likely enough to find the defendant, is to the plaintiff's knowledge, not that where the defendant habitually gets his letters (*Agulhas v Dix & Hahn* 1905 TS 292). A letter properly addressed and posted is presumed to have been received, but there must be evidence that it was posted (*Smook v Dreyer* 1918 OPD 1). The presumption is rebuttable (*Essack v Smith* (1888) 2 SAR 243; *Van der Merwe v Colonial Government* (1904) 14 CTR 732; *Dougan v Estment* 1910 TPD 998). No presumption of delivery arises when the letter is handed to a messenger (not being a postman) (*Adams v Mowbray Municipal Council* (1906) 16 CTR 371), nor when it is sent to a place where there is no regular delivery (*Dyantyi v Warner* 1909 EDC 342). It has been held that the word 'presumption' in this context means no more than that the fact that a letter was posted is evidence from which the inference that it reached the addressee may be drawn. In this regard all the circumstances must be considered in order to decide whether on a balance of probabilities the inference ought to be drawn (*Goldfields Confectionery and Bakery (Pty) Ltd v Norman Adam (Pty) Ltd* 1950 (2) SA 763 (T) at 768). As to proof of the posting of letters, see Zeffertt *Evidence* 222; and see s 7 of the Interpretation Act 33 of 1957.
If such a letter was not in fact received, it does not constitute a good demand (*Van der Merwe v Colonial Government* (1904) 14 CTR 732, overruling *Jones v Cauvin & Co* (1891) 8 SC 217) unless the non-receipt was due to the defendant's deceit (*Chittenden v Schoeman* 1905 TS

42) or negligence (*Dougan v Estment* 1910 TPD 998).
Summons is itself a demand, and unless tender is made within a reasonable time after service, the defendant will be liable in costs (*William's Est v Gideon* (1900) 10 CTR 426; *Ridley v Marais* 1939 AD 5; and see *Blundell v McCawley* 1948 (4) SA 473 (W); *Joss v Barclays Western Bank Ltd* 1990 (1) SA 575 (T)).
In certain cases the legislature has provided that before an action is commenced notice of the intended action must be given within a certain time before summons is issued. Failure to make such a demand, or to give such notice, should be pleaded. See, in this regard, Part D11 below.

100 *Leben v Cohen* 1927 SWA 2.

101 *Lubbe v Colonial Government* (1906) 2 Buch AC 269; *Mha v Pinkerton* 1916 EDL 389; *The Riverside Estates Ltd v McDonald* 1934 SR 51; *Blackie Swart Argitekte v Van Heerden* 1986 (1) SA 249 (A) at 260I.

102 *Credit Corporation of SA Ltd v Du Preez* 1961 (4) SA 515 (T); and see *Schierhout v Union Government* 1927 AD 94 at 98; *Lazarus v Kemp* (1915) 36 NLR 504.

103 *Van Wyk v Boedel Louw* 1957 (3) SA 481 (C).

104 The lack of authority on behalf of an alleged agent must be specifically put in issue in the plea, otherwise the defendant will be precluded from canvassing the issue in evidence (*Durbach v Fairway Hotel Ltd* 1949 (3) SA 1081 (SR); *Nyandeni v Natal Motor Industries Ltd* 1974 (2) SA 274 (D); *Charugo Development Co (Pty) Ltd v Maree NO* 1973 (3) SA 759 (A) at 763F–764A; *Tuckers Land and Development Corporation (Pty) Ltd v Perpelliet* 1978 (2) SA 11 (T) at 16F–H; *Northview Shopping Centre (Pty) Ltd v Revelas Properties Johannesburg CC* 2010 (3) SA 630 (SCA) at 641A–B).

105 *Acton v Motau* 1909 TS 841 at 845.

106 *Hoffman v SA Conservatorium of Music* (1908) 25 SC 24. If the pleader wishes to plead fraud he must make the allegation that the person who made the representation was aware that the representation was false (*Breedt v Elsie Motors (Edms) Bpk* 1963 (3) SA 525 (A)).

107 The defendant should set out details as to the nature of the mistake (*Bokaba v Makona* 1930 (2) PH F135 (T)) and allege that the mistake was reasonable (*Paul Mole v De Charmoy* 1933 NPD 628).

108 *Stassen v Nel* 1912 CPD 284 at 290; and see *Van Coppenhagen v Van Coppenhagen* 1947 (1) SA 576 (T) at 579; *Tauber v Von Abo* 1984 (4) SA 482 (E); *Hochfeld Commodities (Pty) Ltd v Theron* 2000 (1) SA 551 (O) at 569F. See also *Rodel Financial Service (Pty) Ltd v Naidoo* 2013 (3) SA 151 (KZP) at 155G–156A; *National Health Laboratory Service v Lloyd-Jansen van Vuuren* 2015 (5) SA 426 (SCA) at 430H–431D and 432B–F.

109 The onus is on the party alleging payment to prove it (*Pillay v Krishna* 1946 AD 946; *Asmal v Stanger Motor Centre (Pty) Ltd* 1973 (3) SA 642 (D)).

110 See the notes s v 'Particular Defences' below.

111 *Great North Farms (Edms) Bpk v Ras* 1972 (4) SA 7 (T). As to set-off in general, see *Road Accident Fund v Myhill NO* 2013 (5) SA 426 (SCA) at 433G–434A and the authorities there referred to; *Standard Bank of South Africa Ltd v Renico Construction (Pty) Ltd* 2015 (2) SA 89 (GJ) at 91E–94B; *Bannister's Print (Pty) Ltd v D&A Calendars CC* 2018 (6) SA 77 (GJ). A credit provider's common-law right to set-off is not applicable in respect of credit agreements falling under the National Credit Act 34 of 2005 (*National Credit Regulator v Standard Bank of South Africa* Ltd 2019 (5) SA 512 (GJ)).

112 *Paul Mole v De Charmoy* 1933 NPD 628; *Patel v Grobbelaar* 1974 (1) SA 532 (A).

113 *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) at 436; *Montesse Township and Investment Corporation (Pty) Ltd v Gouws NO* 1965 (4) SA 373 (A) at 381C. The onus of proving waiver is strictly on the party alleging it (see, *inter alia*, *Laws v Rutherfurd* 1924 AD 261 at 263; *Borstlap v Spangenberg* 1974 (3) SA 695 (A) at 704; *Netlon Ltd v Pacnet (Pty) Ltd* 1977 (3) SA 840 (A) at 872; *Stocks & Stocks (Pty) Ltd v TJ Daly & Sons (Pty) Ltd* 1979 (3) SA 754 (A) at 763; *Feinstein v Niggli* 1981 (2) SA 684 (A) at 698; *Ficksburg Transport (Edms) Bpk v Rautenbach* 1988 (1) SA 318 (A) at 336; *Trust Bank van Afrika Bpk v President Versekeringsmaatskappy Bpk* 1988 (1) SA 546 (W) at 562; *Bayview (Pty) Ltd v Director of Valuations* 1989 (1) SA 999 (C) at 1003–4; *Hlaba v Director-General, Department of Education and Training* 1990 (1) SA 492 (C) at 499; *Hochfeld Commodities (Pty) Ltd v Theron* 2000 (1) SA 551 (O) at 564H–565B; *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) at 50F–G; *Meintjies NO v Coetzer* 2010 (5) SA 186 (SCA) at 191A–B; *Van Deventer v Ivory Sun Trading 77 (Pty) Ltd* 2015 (3) SA 532 (SCA) at 543B–D; *Hyde Construction CC v Deuchar Family Trust* 2015 (5) SA 388 (WCC) at 403H–I); *Nkata v FirstRand Bank Ltd* 2016 (4) SA 257 (CC) at 275H–J; *Coppermoon Trading 13 (Pty) Ltd v Government, Eastern Cape Province* 2020 (3) SA 391 (ECB) at paragraph [27]; *Robertson v Fourie* (unreported, NCK case no CA&R 8/2019 dated 26 March 2021) at paragraph 12; *McGrane v Cape Royale The Residence (Pty) Ltd* (unreported, SCA case no 831/2020 dated 6 October 2021) at paragraph [21].

114 *MT Pretty Scene: Galsworthy Ltd v Pretty Scene Shipping* SA 2021 (5) SA 134 (SCA) at paragraph [84]. See also *Ethekweni Municipality v Morar Incorporated* (unreported, KZP case no 8786/2021P dated 24 August 2021) at paragraphs [12]–[16] and the cases there referred to.

115 *Janse van Rensburg and Others NNO v Steenkamp; Janse van Rensburg and Others NNO v Myburgh* 2010 (1) SA 649 (SCA) at paragraph [30]; *Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation* 2020 (1) SA 327 (CC) at paragraph [41]. See also *Mineral Sands Resources (Pty) Ltd v Reddell and Two Related Cases* 2021 (4) SA 268 (WCC); *Ethekweni Municipality v Morar Incorporated* (unreported, KZP case no 8786/2021P dated 24 August 2021) at paragraphs [12]–[16] and the cases there referred to.

116 *Hutton v Steinweiss* 1904 TH 293, affirmed in 1905 TS 43; *Flanagan v Flanagan* (1914) 35 NLR 27; *Brandt v Bergstedt* 1917 CPD 344; *Stanford v City Bioscope* 1917 CPD 591; *Campbell v Welverdiend Diamonds Ltd* 1930 TPD 287. In *Lekeur v Santam Insurance Co Ltd* 1969 (3) SA 1 (C) the defendant was at the trial allowed an appropriate amendment of his plea (at 4).

117 *Hugo and Möller NO v The Transvaal Loan, Finance and Mortgage Co* (1894) 1 Off Rep 336; *Flanagan v Flanagan* (1914) 35 NLR 27 at 36; *Sidubulekana v Peverett* 1916 CPD 369; *Sim v Cape General Dairy and Livestock Auctioneers* 1923 TPD 340 (leave to appeal was refused: 1924 AD 167); *Dada & Sons v Makhetle* 1949 (2) SA 485 (T); *Yannakou v Apollo Club* 1974 (1) SA 614 (A) at 623.

118 *Estate Fuchs v D'Assonville* 1935 OPD 4; *Lubbe v Trollip* 1926 EDL 239.

119 For examples of cases in which material allegations were under this or similar rules taken to be admitted, see the notes to rule 17(3)*(a)* s v 'Shall be deemed to be admitted' in Jones & Buckle *Civil Practice* vol II.

120 *Absa Bank Ltd v Blumberg and Wilkinson* 1995 (4) SA 403 (W) at 4081; *Absa Bank Ltd v I W Blumberg and Wilkinson* 1997 (3) SA 669 (SCA) at 672I–674C.

121 *Absa Bank Ltd v Blumberg and Wilkinson* 1995 (4) SA 403 (W) at 409E–F.

122 *Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA) at paragraph [11]; *Biyela v Minister of Police* 2023 (1) SACR 235 (SCA) at paragraph [8].

123 See *Hesse and Ritter v Louw* 1930 SWA 92 at 95–6; *Parekh v Shah Jehan Cinemas (Pty) Ltd* 1980 (1) SA 301 (D) at 306H.

124 *Consol Ltd t/a Consol Glass v Twee Jongegezellen (Pty) Ltd* 2002 (2) SA 580 (C) at 584J to 585A–B.

125 *E H Hassim Hardware (Pty) Ltd v FAB Tanks CC* (unreported, SCA case no 1129/2016 dated 13 October 2017) at paragraph [23]. See also *Bonnievale Piggery (Pty) Ltd v Van der Merwe* (unreported, WCC case no A96/2019 dated 4 February 2020) at paragraphs [14]–[22].

126 *Vaughan & Co Ltd v Delagoa Bay Engineering Co Ltd* 1919 TPD 165; *Hesse and Ritter v Louw* 1930 SWA 92; *Fielding v Sociedade Industrial de Oleas Limitada* 1935 NPD 540 at 548; *Hipkin v Nigel Engineering Works (Pty) Ltd* 1941 TPD 155; *Abbott v Nolle* 1951 (2) SA 419 (C); *Weinkove v Botha* 1952 (3) SA 178 (C); *Du Toit v De Beer* 1955 (1) SA 469 (T), not following *Trotman v Edwick* 1950 (1) SA 376 (C). See also *Van den Bergh & Partners Ltd v Robinson* 1952 (3) SA 747 (SR); *Umtali Farmers' Co-op Ltd v Sunnyside Coffee Estates (Pvt) Ltd* 1972 (1) SA 449 (R); *Metje & Ziegler Ltd v Stauch, Vorster and Partners* 1972 (4) SA 679 (SWA) at 682; *Marshall Timbers Ltd v Hauser and Battaglia (Pty) Ltd* 1976 (3) SA 437 (D).

127 *Standard Bank of SA Ltd v SA Fire Equipment (Pty) Ltd* 1984 (2) SA 693 (C) at 699C.

128 *Sapro v Schlinkman* 1948 (2) SA 637 (A); *Arnold v Viljoen* 1954 (3) SA 322(C); *Rosettenville Motor Exchange v Grootenboer* 1956 (2) SA 624 (T); *Tooth v Maingard and Mayer (Pty) Ltd* 1960 (3) SA 127 (N); *Marcuse v Cash Wholesalers (Pvt) Ltd* 1962 (1) SA 705 (FC); *Basinghall Investments (Pty) Ltd v Figure Beauty Clinics (SA) (Pty) Ltd* 1976 (3) SA 112 (W); *Greenberg v Meds Veterinary Laboratories (Pty) Ltd* 1977 (2) SA 277 (T); *Parekh v Shah Jehan Cinemas (Pty) Ltd* 1980 (1) SA 301 (D) at 310D–312F.

129 *J R & M Moffett (Pty) Ltd v Kolbe Eiendoms Beleggings (Edms) Bpk* 1974 (2) SA 426 (O).

130 *Standard Bank of SA Ltd v SA Fire Equipment (Pty) Ltd* 1984 (2) SA 693 (C) at 700B–701B; *Inter Industria Bpk v Nedbank Bpk* 1989 (3) SA 33 (NC).

131 *S & R Valente (Pty) Ltd v Benoni Town Council* 1975 (4) SA 364 (W) at 366A; *Parekh v Shah Jehan Cinemas (Pty) Ltd* 1980 (1) SA 301 (D) at 307H–308E.

132 *Parekh v Shah Jehan Cinemas (Pty) Ltd* 1980 (1) SA 301 (D) at 308F–H.

133 1974 (1) SA 747 (A). See also *Frank v Premier Hangers CC* 2008 (3) SA 594 (C).

134 *Abbott v Nolte* 1951 (2) SA 419 (C) and *Du Toit v De Beer* 1955 (1) SA 469 (T), not approving the reasoning in *Trotman v Edwick* 1950 (1) SA 376 (C). See also *Wilson v Hoffman* 1974 (2) SA 44 (R); *H I Lockhat (Pty) Ltd v Domingo* 1979 (3) SA 696 (T); *Flugel v Swart* 1979 (4) SA 493 (E) at 500.

135 An application for summary judgment is not an application under this subrule (*Cape Town Transitional Metropolitan Substructure v Ilco Homes Ltd* 1996 (3) SA 492 (C) at 501B).

136 *ERE Foundry (Pty) Ltd v San Sales (Pty) Ltd* 1984 (1) SA 372 (D); *NTC Steel Services (Pty) Ltd v Jamor (Pty) Ltd (t/a Steel King)* 1984 (2) SA 629 (T); *Standard Bank of SA Ltd v SA Fire Equipment (Pty) Ltd* 1984 (2) SA 693 (C); *Truter v Degenaar* 1990 (1) SA 206 (T).

137 *Consol Ltd t/a Consol Glass v Twee Jongegezellen (Pty) Ltd* 2002 (2) SA 580 (C) at 585C–D.

138 *Consol Ltd t/a Consol Glass v Twee Jongegezellen (Pty) Ltd* 2002 (2) SA 580 (C) at 585H.

139 *Van den Bergh & Partners Ltd v Robinson* 1952 (3) SA 747 (SR) at 748H.

140 *Amavuba (Pty) Ltd v Pro Nobis Landgoed (Edms) Bpk* 1984 (3) SA 760 (N) at 766H.

141 *Baking Investments (Pty) Ltd v Britz* 1978 (3) SA 1067 (T) at 1071A.

142 See *Baking Investments (Pty) Ltd v Britz* 1978 (3) SA 1067 (T); *Flugel v Swart* 1979 (4) SA 493 (E) at 500E–G.

143 The lesser will not justify the greater (*Double v Delport* 1949 (2) SA 621 (N) at 626).

144 Section 42(1) of the Act repeals the previous arbitration Acts and Ordinances: Arbitrations Act 29 of 1898 (Cape); Arbitration Ordinance 24 of 1904 (Transvaal); Arbitration Act 24 of 1898 (Natal); Arbitration Proclamation 3 of 1926 (South West Africa).

145 In s 1 of the Act an 'arbitration agreement' is defined as 'a written agreement providing for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement, whether an arbitrator is named or designated therein or not'.

146 *Conress (Pty) Ltd v Gallic Construction (Pty) Ltd* 1981 (3) SA 73 (W) at 76A–B; *BDE Construction v Basfour 3581 (Pty) Ltd* 2013 (5) SA 160 (KZP) at 162G–I; *KZN Oils (Pty) Ltd v Nelta (Pty) Ltd t/a Keyway Motors* [2021] 2 All SA 478 (KZP) at paragraphs [41]–[47]; *Crompton Street Motors CC t/a Wallers Garage Service Station v Bright Idea Projects 66 (Pty) Limited t/a All Fuels CC* 2021 (11) BCLR 1203 (CC) at paragraph [32].

147 Section 6(2); *Wilson v Hammond and Brouwer* 1954 (2) SA 27 (N).

148 *Canton Trading 17 (Pty) Ltd t/a Cube Architects v Hattingh NO* 2022 (4) SA 420 (SCA) at paragraph [38].

149 *Nkuke v Kindi* 1912 CPD 529 at 531 and 532; *The Rhodesian Railways Ltd v MacKintosh* 1932 AD 359 at 370–71; *PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd* 2009 (4) SA 68 (SCA) at 72A–C; *V v V* (unreported, FB case no A58/2022 dated 17 November 2022 — a decision of the full bench) at paragraphs [23]–[27].

150 *Nkuke v Kindi* 1912 CPD 529.

151 Voet 4 8 21 (where it is stated that a plea of *lis pendens* can be supported by a submission to arbitration); Groenewegen *De Leg Abr* 4 8 30; Van der Linden *Jud Prac* 4 1 4.

152 *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) at 278J–279A; *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) at 592E–F; *Aveng (Africa) Ltd (formerly Grinaker-LTA Ltd) t/a Grinaker-LTA Building East v Midros Investments (Pty) Ltd* 2011 (3) SA 631 (KZD) at 636F–637B. It has, however, been held that our law does not permit parties by their agreement completely to oust the jurisdiction of the public courts (*Yenapergasam v Naidoo* 1959 (2) SA 478 (T)).

153 *The Rhodesian Railways Ltd v MacKintosh* 1932 AD 359 at 375; *Parekh v Shah Jehan Cinemas (Pty) Ltd* 1980 (1) SA 301 (D); *G K Breed (Bethlehem) (Edms) Bpk v Martin Harris & Seuns (OVS) (Edms) Bpk* 1984 (2) SA 66 (O).

154 *Daniel & Co v Siebert and Van Eeden* (1892) 9 SC 31 at 33. It has been held that if one party takes legal proceedings, he thereby waives his right to demand arbitration if the other party does the same (*Kantor Bros v The Transatlantic Fire Insurance Co* (1892) 4 SAR 185; *Riegler v African Lands & Hotel Co Ltd* (1907) 24 SC 393). It has also been held that, if the defendant fails to apply for a stay of proceedings, he thereby waives his right to go to arbitration (*Provincial Building Society of SA v P R Wade & Co (Pty) Ltd (in liquidation)* 1967 (1) SA 121 (N) at 129). A party to an arbitration agreement who commences litigation instead of proceeding to arbitration does not, merely as a result of adopting that course, abandon its right to have resort to arbitration under the agreement. That being so, it is not open to the other party to contend that it has 'accepted' the resort to litigation by not itself seeking a stay, and that this 'acceptance' debars subsequent resort to arbitration. While parties can by mutual agreement put an end to an arbitration agreement, that requires the elements of a contractual agreement to be present. The act of litigating instead of arbitrating is not an offer in the contractual sense available to be accepted. Nor is the act of the other party, in failing to raise arbitration as a dilatory plea, or by way of an application for a stay, a contractual acceptance. The commencement of litigation does not preclude the claimant from invoking the arbitration clause in the contract. The party who commenced with litigation is free to abandon the litigation and proceed to arbitration, but is not entitled to seek a stay of the litigation whilst it pursues its claim by way of arbitration. Such party cannot seek to enforce the arbitration agreement while in breach of that very agreement: the commencing of action being in breach of the agreement to arbitrate (*Aveng Africa Ltd (formerly Grinaker-LTA Ltd) t/a Grinaker-LTA Building East v Midros Investments (Pty) Ltd* 2011 (3) SA 631 (KZD) at 639H–641A). The decision in *Aveng Africa* was criticized and not followed in *BDE Construction v Basfour 3581 (Pty) Ltd* 2013 (5) SA 160 (KZP). The reasons stated by Swain J are, *inter alia*, the following (at 162G–164B):

'It is clear that where a party to an arbitration agreement institutes proceedings in breach of the arbitration agreement, the other party is faced with an election whether to enforce the arbitration agreement by seeking a stay of the proceedings, or not. If the innocent party elects to enforce the arbitration agreement, this must be done either:

[9.1] By applying for a stay of the proceedings in terms of s 6 of the Arbitration Act 42 of 1965 before the delivery of any pleadings or the taking of any further step in the proceedings. Should the innocent party take a further step in the proceedings without having applied for a stay, it thereby precludes itself from doing so. *Conress (Pty) Ltd and Another v Gallic Construction (Pty) Ltd* 1981 (3) SA 73 (W) at 76A–B.

[9.2] Alternatively, the innocent party may file a special plea in the nature of a dilatory plea, for the stay of the proceedings until the dispute has been determined by arbitration. *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd* 1977 (4) SA 682 (C) at 692H.

In the present case, as in *Aveng*, the respondent did not contest the entitlement of the applicant to institute these proceedings by seeking their stay. It is therefore clear that the respondent, when faced with what it contends was a breach of the arbitration agreement, elected not to seek its enforcement. It is trite that having made such an election, the respondent is bound by it and thereby waived any reliance upon, and thereby condoned, the applicant's alleged breach of the arbitration agreement . . .

I accordingly respectfully disagree with the conclusion of Wallis J that a breach of the arbitration agreement, caused by the failure of one party to refer a dispute to arbitration and institute legal proceedings does not cease to be such where the other party elects not to rely upon the breach and stay the proceedings. The consequence of having made an election not to rely upon the breach is to waive reliance upon it and thereby condone it. That the arbitration agreement imposes reciprocal obligations upon the parties, such that performance by the one party is conditional upon performance by the other, and that the applicant may have ignored its contractual obligations under the arbitration agreement and proceeded with the present application, which the respondent has not challenged, does not alter the fact that the respondent in electing not to challenge the present proceedings, made an election not to enforce the arbitration agreement by which it is bound, which has as a consequence condonation of the applicant's breach of the arbitration agreement.

I accordingly respectfully disagree with and conclude that Wallis J was wrong in concluding that where a party to an arbitration agreement commences litigation in breach of the arbitration agreement, to which the other party to the arbitration agreement elects not to seek a stay of such proceedings, the party instituting such proceedings is precluded from seeking a stay of those proceedings and must abandon them, before being able to refer the dispute to arbitration, in terms of the arbitration agreement.

The applicant is accordingly entitled to seek a stay of the present proceedings and is not obliged to withdraw them, before referring the parties' dispute to arbitration.'

The mere fact that a defendant has not claimed arbitration before the plaintiff brought his action is not a waiver (*Nash v Muirhead* (1908) 18 CTR 444), nor is the fact that the defendant, an insurance company, has elected to exercise the option under the policy of reinstating rather than paying (*Jordaan v Scottish Assurance Corporation* 1922 OPD 129); nor is an offer to go to court instead of to arbitration which is not accepted by the other side, or which is only partially accepted by the other side (*East Rand Proprietary Mines Ltd v Cinderella Consolidated Gold Mining Co Ltd* 1922 WLD 122). Conversely, where a party has successfully raised a plea that the matter has to go to arbitration, he cannot thereafter allege that the arbitration clause is no longer binding upon him (*Botha v Reitz Ko-operatiewe Landbouw Vereeniging* 1924 AD 391).

155 Section 31 of the Arbitration Act 42 of 1965; *Davies v The South British Insurance Co (1885)* 3 SC 416 at 421. A claim that an arbitration award be made an order of court is not a debt in terms of the Prescription Act 68 of 1969 (*Brompton Court Body Corporate SS119/2006 v Khumalo* 2018 (3) SA 347 (SCA) at 351B–E and the cases there referred to).

156 *Dickenson and Brown v Fischer's Executors* 1915 AD 166; *Evangelization and Missionary Trust v Gumbi* 1975 (3) SA 636 (D).

157 *Davies v The South British Insurance Co* (1885) 3 SC 416; *The Rhodesian Railways Ltd v MacKintosh* 1932 AD 359.

158 *Davies v The South British Insurance Co* (1885) 3 SC 416; *King v Harris* 1909 TS 292; *Anglish & Co v Palatine Insurance Co Ltd* (1911) 32 NLR 293; *Glanfield v Asp Development Syndicate* 1911 AD 347; *Collins v Levy* 1917 CPD 49; *Stanhope v Combined Holdings and Industries Ltd* 1950 (3) SA 52 (E) at 57; *Street v Dublin* 1961 (2) SA 4 (W) at 11; *Stocks Construction (OFS) (Pty) Ltd v Metter-Pingon (Pty) Ltd* 1978 (4) SA 35 (T) at 39; *G K Breed (Bethlehem) (Edms) Bpk v Martin Harris & Seuns (OVS) (Edms) Bpk* 1984 (2) SA 66 (O) at 71–2; *PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd* 2009 (4) SA 68 (SCA) at 72A; *Aveng (Africa) Ltd (formerly Grinaker-LTA Ltd) t/a Grinaker-LTA Building East v Midros Investments (Pty) Ltd* 2011 (3) SA 631 (KZD) at 639B; *BDE Construction v Basfour 3581 (Pty) Ltd* 2013 (5) SA 160 (KZP) at 162I–J; *Crompton Street Motors CC t/a Wallers Garage Service Station v Bright Idea Projects 66 (Pty) Limited t/a All Fuels CC* 2021 (11) BCLR 1203 (CC) at paragraphs [32]–[33]; *Foize Africa (Pty) Ltd v Foize Beheer BV* 2013 (3) SA 91 (SCA) at 99F–H and the authorities there referred to, and at 102G–H. In the latter case it was held (at 100G–H) that no hard-and-fast rule can be laid down as to the stage at which a court should exercise its discretion to enforce an arbitration clause. In each given case much will depend upon the particular facts and circumstances of the case as well as the stage at which and the manner in which the issue of

enforcement of the clause in question is raised. The mere fact that a respondent raises the issue when an applicant seeks interim relief as a precursor to trial proceedings does not, in itself, preclude a court from exercising its discretion to enforce the arbitration clause at that stage. This special plea is in the nature of a dilatory plea and the question cannot be raised by way of an exception even if it should appear from the plaintiff's particulars of claim that there is in fact an arbitration clause (*Parekh v Shah Jehan Cinemas (Pty) Ltd* 1980 (1) SA 301 (D)).

159 Section 6(1) of Act 42 of 1965; *Conress (Pty) Ltd v Gallic Construction (Pty) Ltd* 1981 (3) SA 73 (W); *PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd* 2009 (4) SA 68 (SCA) at 71H–J; *Aveng (Africa) Ltd (formerly Grinaker-LTA Ltd) t/a Grinaker-LTA Building East v Midros Investments (Pty) Ltd* 2011 (3) SA 631 (KZD) at 639A–B; *BDE Construction v Basfour 3581 (Pty) Ltd* 2013 (5) SA 160 (KZP) at 162G–J.

160 *The Rhodesian Railways Ltd v MacKintosh* 1932 AD 359 at 370–71; *PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd* 2009 (4) SA 68 (SCA) at 72A–C. See also *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd* 1977 (4) SA 682 (C) at 692H; *Stocks Construction (OFS) (Pty) Ltd v Metter-Pingon (Pty) Ltd* 1978 (4) SA 35 (T); *Delfante v Delta Electrical Industries Ltd* 1992 (2) SA 221 (C) at 226F–H.

161 *Conress (Pty) Ltd v Gallic Construction (Pty) Ltd* 1981 (3) SA 73 (W) at 76A–B; *BDE Construction v Basfour 3581 (Pty) Ltd* 2013 (5) SA 160 (KZP) at 162G–I; *Crompton Street Motors CC t/a Wallers Garage Service Station v Bright Idea Projects 66 (Pty) Limited t/a All Fuels CC* 2021 (11) BCLR 1203 (CC) at paragraph [32]. See also *Killarney of Durban (Pty) Ltd v Lomax* 1961 (4) SA 93 (D) at 96.

162 *Freightmarine Shipping Ltd v S Wainstein & Co (Pty) Ltd* 1984 (2) SA 425 (D).

163 This is so at common law as well as under the Act (*Kantor Bros v The Transatlantic Fire Insurance Co* (1892) 4 SAR 185; *Davies v The South British Insurance Co* (1885) 3 SC 416). Whether the matter falls within the scope of the deed of submission depends on the terms of the deed, which is conclusive (*Rogers v Matthews* 1926 TPD 21; *Silpert v Seymour* 1932 TPD 329), or upon the arbitration clause in the contract (*Tyler v Phillips* 1933 CPD 611; *Meny-Gibert v Crawley* 1938 CPD 491; *Sell & Co v Pretoria Townships Ltd* 1911 TPD 390). Thus, if the arbitration clause applies only to the assessment of the amount of damage, and the insurer totally denies all liability, the issue does not fall within the submission (*Hurwitz' Trustee v Magdeburg Fire Insurance Co* 1917 TPD 443). See also *Paley v Michaelian* 1929 CPD 309 at 315–16; *Scriven Bros v Rhodesian Hides & Produce Co Ltd* 1943 AD 393 at 401; *Enterprise Wholesalers (Pty) Ltd v Ebrahim* 1954 (2) SA 262 (N); *Turkstra v Massyn* 1958 (1) SA 623 (T); *Street v Dublin* 1961 (2) SA 4 (W); *Kathmer Investments (Pty) Ltd v Woolworths (Pty) Ltd* 1970 (2) SA 498 (A); *Van Heerden v Sentrale Kunsmis Korporasie (Edms) Bpk* 1973 (1) SA 17 (A) at 27 and 30; *Sera v De Wet* 1974 (2) SA 645 (T); *J C Dunbar & Sons (Pty) Ltd v Ellgood Properties (Pty) Ltd* 1975 (4) SA 455 (W).

164 See the *dictum* of Viscount Simon LC in *Heyman v Darwins Ltd* [1942] 1 All ER 337 (HL) at 343, which was quoted with approval in *Scriven Bros v Rhodesian Hides & Produce Co Ltd* 1943 AD 393 at 400–1. Section 3(1) of the Act provides that an arbitration agreement can be terminated only by consent of all the parties unless the arbitration agreement itself provides otherwise. The cancellation of the contract pursuant to a breach thereof therefore does not terminate the arbitration clause (*Garden Hotel (Pty) Ltd v Somadel Investments (Pty) Ltd* 1981 (3) SA 911 (W)). If the arbitration agreement itself is alleged to be void and the arbitrator's alleged jurisdiction is based solely upon that agreement, he will not have jurisdiction to consider that issue (*Van Heerden v Sentrale Kunsmis Korporasie (Edms) Bpk* 1973 (1) SA 17 (A)). In *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) SA 1 (SCA) the parties had entered into a settlement agreement containing an arbitration clause, and the issue for determination on appeal was whether the arbitration clause would compel the parties to submit to arbitration in the face of allegations that the settlement had been induced by the appellant's fraud, i e whether an arbitration clause could survive the demise of the contract in which it was concluded. The arbitration clause provided specifically that 'any dispute . . . including any question as to the enforceability of this contract' would be referred to arbitration. The Supreme Court of Appeal held that it was in principle possible for the parties to agree that the question of the validity of the agreement would be determined by arbitration even though the reference to arbitration was part of the agreement being questioned — provided that they foresaw the possibility of such a dispute arising. Whether this was so would depend on a purposive construction of the arbitration clause itself and the agreement generally, having regard to the context of the agreement and what the parties probably intended (at 5F–6D, 7C–8A and 8E–9D). It was held, further, that the purpose of the settlement agreement had been to resolve certain accounting issues, and that the evidence was that the respondent had at the time of its conclusion not foreseen that there might have been fraudulent conduct by the appellant. There was thus no intention that the arbitrator would have to resolve issues relating to fraud, it having been envisaged that the arbitrator's role would be to determine disputes in respect of accounting issues (at 9H–10G). Having regard to the purpose of the settlement agreement and to what the parties envisaged at its conclusion, it was therefore not intended that the validity or enforceability of the agreement, induced as it was by fraudulent misrepresentations and non-disclosures, would be arbitrable (at 10I–11A). The bank could not be compelled to refer to arbitration the questions of fraud and the bank's right to resile from the agreement (at 11I). See also *Allied Mineral Development Corporation (Pty) Ltd v Gemsbok Vlei Kwartsiet (Edms) Bpk* 1968 (1) SA 7 (C) and the authorities referred to therein at 12–13. See further *Collins v Levy* 1917 CPD 490 at 492; *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) at 389–90.

165 The dispute must be demarcated in the special plea (*Parekh v Shah Jehan Cinemas (Pty) Ltd* 1980 (1) SA 301 (D)).

166 *Tvl Mines Labour Co Ltd v Robinson Group of Mines* 1911 WLD 191 at 194; *Emdon v Margau* 1926 WLD 159 at 162; *Stanhope v Combined Holdings and Industries Ltd* 1950 (3) SA 52 (E) at 56; *Enterprise Wholesalers (Pty) Ltd v Ebrahim* 1954 (2) SA 262 (N) at 266; *Kathmer Investments (Pty) Ltd v Woolworths (Pty) Ltd* 1970 (2) SA 498 (A); *Universiteit van Stellenbosch v J A Louw (Edms) Bpk* 1983 (4) SA 321 (A); *G K Breed (Bethlehem) (Edms) Bpk v Martin Harris & Seuns (OVS) (Edms) Bpk* 1984 (2) SA 66 (O) at 69; *Omar v Inhouse Venue Technical Management (Pty) Ltd* 2015 (3) SA 146 (WCC) at 163C–D.

167 *Richtown Construction Co (Pty) Ltd v Witbank Town Council* 1983 (2) SA 409 (T). See also *Omar v Inhouse Venue Technical Management (Pty) Ltd* 2015 (3) SA 146 (WCC) at 163C–D.

168 *Kathmer Investments (Pty) Ltd v Woolworths (Pty) Ltd* 1970 (2) SA 498 (A) at 504; *Lancaster v Wallace NO* 1975 (1) SA 844 (W); *Universiteit van Stellenbosch v J A Louw (Edms) Bpk* 1983 (4) SA 321 (A) at 333H; *Grobbelaar v De Villiers NO* 1984 (2) SA 649 (C) at 658; *Aveng (Africa) Ltd (formerly Grinaker-LTA Ltd) t/a Grinaker-LTA Building East v Midros Investments (Pty) Ltd* 2011 (3) SA 631 (KZD) at 639B.

169 *Polysius (Pty) Ltd v Transvaal Alloys (Pty) Ltd* 1983 (2) SA 630 (W); *Transvaal Alloys (Pty) Ltd v Polysius (Pty) Ltd* 1983 (2) SA 630 (T). The courts consistently require a very strong case to be made out by a party seeking to be absolved from an agreement to have a dispute referred to arbitration (*Glanfield v Asp Development Syndicate* 1911 AD 374 at 380; *The Rhodesian Railways Ltd v MacKintosh* 1932 AD 359 at 375; *Metallurgical Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) at 391; *Sera v De Wet* 1974 (2) SA 645 (T) at 649–50; *Polysius (Pty) Ltd v Transvaal Alloys (Pty) Ltd* 1983 (2) SA 630 (W) at 639–40; *Transvaal Alloys (Pty) Ltd v Polysius (Pty) Ltd* 1983 (2) SA 630 (T) at 656; *Universiteit van Stellenbosch v J A Louw (Edms) Bpk* 1983 (4) SA 321 (A) at 333–4; *G K Breed (Bethlehem) (Edms) Bpk v Martin Harris & Seuns (OVS) (Edms) Bpk* 1984 (2) SA 66 (O) at 70; *MV Iran Dastghayb Islamic Republic of Iran Shipping Lines v Terra-Marine SA* 2010 (6) SA 493 (SCA) at 502E–G; *Aveng (Africa) Ltd (formerly Grinaker-LTA Ltd) t/a Grinaker-LTA Building East v Midros Investments (Pty) Ltd* 2011 (3) SA 631 (KZD) at 639B); *Development Bank of Southern Africa Ltd v Proline Trading 60 (Pty) Ltd* (unreported, GJ case no 30282/2020 dated 5 September 2022) at paragraphs [31]–[32].

170 *Stanhope v Combined Holdings and Industries Ltd* 1950 (3) SA 52 (E). See also *Daniel & Co v Siebert and Van Eeden* (1892) 9 SC 31 at 33 and *Glanfield v Asp Development Syndicate* 1911 AD 374.

171 *Daniel & Co v Siebert and Van Eeden* (1892) 9 SC 31 at 33. In *Sera v De Wet* 1974 (2) SA 645 (T) it was held that the fact that the space for the name of the arbitrator had not been filled in the arbitration clause did not render it inoperative, because alternative provision had been made in the clause for the election of an arbitrator.

172 *Schietekat v Naumov* 1936 (1) PH A26 (C); *The Rhodesian Railways Ltd v MacKintosh* 1932 AD 359 at 375; *Universiteit van Stellenbosch v J A Louw (Edms) Bpk* 1983 (4) SA 321 (A) at 333; *G K Breed (Bethlehem) (Edms) Bpk v Martin Harris & Seuns (OVS) (Edms) Bpk* 1984 (2) SA 66 (O) at 70; *Grobbelaar v De Villiers NO* 1984 (2) SA 649 (C) at 658. See also *Body Corporate Pinewood Park v Dellis (Pty) Ltd* 2013 (1) SA 296 (SCA) at 306A–B.

173 Section 6(2) of Act 42 of 1965; *Parekh v Shah Jehan Cinemas (Pty) Ltd* 1980 (1) SA 301 (D) at 305; *Intercontinental Export Co (Pty) Ltd v MV 'Dien Danielsen'* 1982 (3) SA 534 (N) at 539–40; *G K Breed (Bethlehem) (Edms) Bpk v Martin Harris & Seuns (OVS) (Edms) Bpk* 1984 (2) SA 66 (O) at 70.

174 *Verhagen v Abramowitz* 1960 (4) SA 947 (C) at 952; *Sera v De Wet* 1974 (2) SA 645 (T).

175 A distinction must be drawn between the case where it is the person charged with fraud who seeks a hearing in open court, rather than in the arbitration for which he has contracted, and the case where it is the person charging fraud who claims that relief. In the former case a claim for a hearing in court will ordinarily be acceded to (*Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) at 393 and the authorities there referred to; *Sera v De Wet* 1974 (2) SA 645 (T) at 655; *Scriven Bros v Rhodesian Hides & Produce Co Ltd* 1943 AD 393 at 402).

176 *Emdon v Margau* 1926 WLD 159 at 165; *Meny-Gibert v Crawley* 1938 CPD 491; *Sera v De Wet* 1974 (2) SA 645 (T).

177 *Baragwanath v Olifants Asbestos Co (Pty) Ltd* 1951 (3) SA 222 (T) at 230; *Elebelle (Pty) Ltd v Szynkarski* 1966 (1) SA 592 (W). There is nothing which precludes parties from submitting a dispute involving a matter of law or a matter of mixed law and fact to arbitration (*Allied Mineral Development Corporation (Pty) Ltd v Gemsbok Vlei Kwartsiet (Edms) Bpk* 1968 (1) SA 7 (C); *Government of the Republic of South Africa v Midkon (Pty) Ltd* 1984 (3) SA 552 (T) at 559).

178 Section 20 of Act 42 of 1965.

179 *Lancaster v Wallace NO* 1975 (1) SA 844 (W) at 847. This is apparently the rule at common law also: see *Van der Spuy v Directors of*

*Paarl Bank* (1890) 7 SC 245.

180 *Haffajee v Gordon & Sons* 1928 (2) PH A31 (GW).

181 *Close Settlement Corporation v Olds* 1917 TPD 636.

182 *Universiteit van Stellenbosch v J A Louw (Edms) Bpk* 1983 (4) SA 321 (A) at 342.

183 *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd* 1977 (4) SA 682 (C) at 693–4.

184 *Glanfield v Asp Development Syndicate* 1911 AD 374.

185 *King v Harris* 1909 TS 292.

186 *Mossop v Frater* 1917 CPD 403. The fact that only the construction of the agreement is in dispute may induce the court to exercise its discretion to refuse arbitration (*East Rand Proprietary Mines Ltd v Cinderella Consolidated Gold Mining Co Ltd* 1922 WLD 122). In *Elebelle (Pty) Ltd v Szynkarski* 1966 (1) SA 592 (W) it was held (at 593F–H) that neither the fact that the arbitrator would be required to decide a question of law nor the fact that he would have no authority to grant an interdict afforded any good ground for refusing to refer the matter to arbitration.

187 *Metelerkamp v Railway Passengers Assurance Co* 1924 CPD 302.

188 2013 (3) SA 91 (SCA).

189 At 99H–I.

190 At 101A–102E (footnotes omitted).

191 2021 (11) BCLR 1203 (CC).

192 At paragraphs [49]–[40].

193 At paragraph [51].

194 *Aveng (Africa) Ltd (formerly Grinaker-LTA Ltd) t/a Grinaker-LTA Building East v Midros Investments (Pty) Ltd* 2011 (3) SA 631 (KZD) at 639B–C.

195 *Aveng (Africa) Ltd (formerly Grinaker-LTA Ltd) t/a Grinaker-LTA Building East v Midros Investments (Pty) Ltd* 2011 (3) SA 631 (KZD) at 639C–D.

196 Cf *Aveng (Africa) Ltd (formerly Grinaker-LTA Ltd) t/a Grinaker-LTA Building East v Midros Investments (Pty) Ltd* 2011 (3) SA 631 (KZD) at 639D–E. As pointed out in the *Aveng* case (at 639I–J), issues of prescription might then arise.

197 *Peel v Hamon J&C Engineering (Pty) Ltd* 2013 (2) SA 331 (GSJ) at 359B–G.

198 *Framatome v Eskom Holdings SOC Ltd* 2021 (2) SA 494 (GJ) at paragraph [45].

199 *King's Transport v Viljoen* 1954 (1) SA 133 (C); *Dusheiko v Milburn* 1964 (4) SA 648 (A) at 655A–B; *Spie Batignolles Société Anonyme v Van Niekerk: In re Van Niekerk v SA Yster en Staal Industriële Korporasie Bpk* 1980 (2) SA 441 (NC) at 448A; *Communication Workers Union v Telkom SA Ltd* 1999 (2) SA 586 (T) at 594B–C; *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) at 71G–I; *Tshepe v Rustia Feed (Pty) Ltd* (unreported, SCA case no 90/2020 dated 23 July 2021) at paragraph [15]; *Nohaji v MEC for Transport, Eastern Cape* (unreported, ECB case no 385/2020 dated 17 September 2021) at paragraph [6].

200 *Titan Asset Management (Pty) Ltd v Lanzerac Estate Investments (Pty) Ltd* [2023] 3 All SA 589 (WCC) at paragraph [37].

201 *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O) at 759H–760E; *Communication Workers Union v Telkom SA Ltd* 1999 (2) SA 586 (T) at 594B–C; *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) at 71G–I; *Tshepe v Rustia Feed (Pty) Ltd* (unreported, SCA case no 90/2020 dated 23 July 2021) at paragraph [15]; *Nohaji v MEC for Transport, Eastern Cape* (unreported, ECB case no 385/2020 dated 17 September 2021) at paragraph [6]; *Pena v University of Fort Hare* (unreported, EL case no 240/2021 dated 3 February 2022) at paragraph [15]; *Titan Asset Management (Pty) Ltd v Lanzerac Estate Investments (Pty) Ltd* [2023] 3 All SA 589 (WCC) at paragraph [58]. See also *Malone v Government of the United Kingdom of Great Britain and Northern Ireland* (unreported, KZD case no D5778/2020 dated 26 January 2024).

202 *Haisman v Maasch* 1879 Buch 119.

203 *Union Market Agency Ltd v T Glick & Co* 1927 OPD 285 (but see the comments thereon in *Licences and General Insurance Co v Bassano* 1936 CPD 179); *Lubbe v Bosman* 1948 (3) SA 909 (O) at 914–15; *Kaplan v Laughton* 1949 (2) SA 840 (O) at 842; *Malherbe v Britstown Municipality* 1949 (1) SA 281 (C) at 287; *Lieberman v Van der Stel Furniture Manufacturers (Pty) Ltd* 1963 (1) SA 769 (T) at 771G–772D; *Lategan v Risk* 1967 (1) SA 217 (O) at 220A–E; *Sefuthi v Minister van Justisie* 1967 (1) SA 300 (O) at 307D–G; *Buys v Roodt (nou Otto)* 2000 (1) SA 535 (O) at 539E–G; *Suid-Westelike Transvaalse Landbou Koöperasie v Kotze* [2000] 1 All SA 170 (NC) at 174*d-f*.

204 See, for example, *Lubbe v Bosman* 1948 (3) SA 909 (O) at 914–15; *Malherbe v Britstown Municipality* 1949 (1) SA 281 (C) at 287; *Munsamy v Govender* 1950 (2) SA 622 (N) at 624; *Durban City Council v Kadir* 1971 (1) SA 364 (N) at 371C–G; *Botha v Andrade* 2009 (1) SA 259 (SCA) at 264I–265A.

205 *Lubbe v Bosman* 1948 (3) SA 909 (O) at 915; *Malherbe v Britstown Municipality* 1949 (1) SA 281 (C) at 287–8; *Lieberman v Van der Stel Furniture Manufacturers (Pty) Ltd* 1963 (1) SA 769 (T) at 771H–772D; *Sefuthi v Minister van Justisie* 1967 (1) SA 300 (O) at 307.

206 *Union Market Agency Ltd v T Glick and Co* 1922 OPD 285 (but see the comment in *Licences and General Insurance Co v Bassano* 1936 CPD 179); *Lubbe v Bosman* 1948 (3) SA 909 (O) at 914–15; *Malherbe v Britstown Municipality* 1949 (1) SA 281 (C); *Kaplan v Laughton* 1949 (2) SA 840 (O) at 842; *Lieberman v Van der Stel Furniture Manufacturers (Pty) Ltd* 1963 (1) SA 769 (T) at 771–2; *Lategan v Risk* 1967 (1) SA 217 (O) at 220; *Sefuthi v Minister van Justisie* 1967 (1) SA 300 (O) at 307; *Durban City Council v Kadir* 1971 (1) SA 364 (N) at 366; *Buys v Roodt (nou Otto)* 2000 (1) SA 535 (O) at 539E–G; *Suid-Westelike Transvaalse Landbou Koöperasie v Kotze* [2000] 1 All SA 170 (NC) at 174*d–f*; *Botha v Andrade* 2009 (1) SA 259 (SCA) at 264I–265A; *Keyter NO v Van der Meulen and Another NNO* 2014 (5) SA 215 (ECG) at 217E–F. In *Le Roux v Le Roux* 1980 (2) SA 632 (C) the question upon whom the onus rests to prove jurisdiction in an application for spoliation was raised but not decided.

207 *Foize Africa (Pty) Ltd v Foize Beheer BV* 2013 (3) SA 91 (SCA) at 99E–F.

208 *Foize Africa (Pty) Ltd v Foize Beheer BV* 2013 (3) SA 91 (SCA) at 99F–G.

209 *Foize Africa (Pty) Ltd v Foize Beheer BV* 2013 (3) SA 91 (SCA) at 99F–I and the authorities there referred to.

210 See, for example, *Russel v Cape Town Municipality* 1926 CPD 93; *Dease v Minister of Justice* 1962 (3) SA 215 (T).

211 See, for example, *Marks and Kantor v Van Diggelen* 1935 TPD 29.

212 *Titan Asset Management (Pty) Ltd v Lanzerac Estate Investments (Pty) Ltd* [2023] 3 All SA 589 (WCC) at paragraph [37].

213 See, for example, *Kerbel v Kerbel* 1987 (1) SA 562 (W). In *Clipsal Australia (Pty) Ltd v GAP Distributors* 2010 (2) SA 289 (SCA) at 297C it was held that a court has the power to stay civil proceedings in certain circumstances, e g to prevent an abuse of the process of the court (see also *Corderoy v Union Government (Minister of Finance)* 1918 AD 512 at 517) and if an action is already pending between the same parties on the same cause of action. A court will not, in the absence of a viable defence of *lis alibi pendens*, on equitable grounds suspend an eviction order pending the finalization of related matters (*Belmont House (Pty) Ltd v Gore and Another NNO* 2011 (6) SA 173 (WCC) at 177F–178I).

214 Voet 44 2 7; Van Leeuwen *RLD* 5 17 6; *Wolff NO v Solomon* (1898) 15 SC 297 at 306; *Westphal v Schlemmer* 1925 SWA 127; *Marks and Kantor v Van Diggelen* 1935 TPD 29 at 37; *Mtshali v Mtambo* 1962 (3) SA 469 (GW); *Williams v Shub* 1976 (4) SA 567 (C) at 570C; *George v Minister of Environmental Affairs and Tourism* 2005 (6) SA 297 (EqC) at 310D–E; and see *Metequity Ltd NO v Heel* 1997 (3) SA 432 (W) at 438F–G; *Bafokeng Tribe v Impala Platinum Ltd* 1999 (3) SA 517 (BH) at 552B–C; *Shapiro v South African Recording Rights Association Ltd (Galeta Intervening)* 2008 (4) SA 145 (W) at 148H–149A; *Berrange NO v Hassan* 2009 (2) SA 339 (N) at 357C–357I (incorrectly referring to Voet 45 2 7 instead of Voet 44 2 7); *Association of Mineworkers and Construction Union v Ngululu Bulk Carriers (Pty) Ltd (In Liquidation)* 2020 (7) BCLR 779 (CC) at paragraph [26]. See also *Nestlé (South Africa) (Pty) Ltd v Mars Inc* 2001 (4) SA 542 (SCA) at 549B–D. In *Socratous v Grindstone Investments* 2011 (6) SA 325 (SCA) the Supreme Court of Appeal stated (at 330G–H):
'Courts are public institutions under severe pressure. The last thing that already congested court rolls require is further congestion by an unwarranted proliferation of litigation. The court below erred in not holding that against Grindstone when it dismissed the defence of lis pendens without due regard to the facts and on wrong principle. The court below ought not to have proceeded to consider the merits.'

215 *Buchbinder v Wolff* (1901) 18 SC 93; *Michaelson v Lowenstein* 1905 TS 328; *Westphal v Schlemmer* 1925 SWA 127; *Osman v Hector* 1933 CPD 503; *Loader v Dursot Bros (Pty) Ltd* 1948 (3) SA 136 (T) at 138; *Kempster Sedgewick (Pty) Ltd v Rajah* 1959 (1) SA 314 (N) at 317; *Hubert v Hubert* 1960 (3) SA 181 (W) at 185; *Geldenhuys v Kotzé* 1964 (2) SA 167 (O) at 172; *Rauties Transport (Edms) Bpk v Voorsitter, Plaaslike Padvervoerraad, Johannesburg* 1983 (4) SA 146 (W) at 157; *Kerbel v Kerbel* 1987 (1) SA 562 (W) at 565D; *Van As v Appollus* 1993 (1) SA 606 (C) at 610D–F; *Ntshiqa v Andreas Supermarket (Pty) Ltd* 1997 (1) SA 184 (Tk) at 192A–C; *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC* 2013 (6) SA 499 (SCA) at 513F–G; *Keyter NO v Van der Meulen and Another NNO* 2014 (5) SA 215 (ECG) at 218A–B.

216 *Geldenhuys v Kotzé* 1964 (2) SA 167 (O) and the authorities cited therein at 168; *H R Holfeld (Africa) Ltd v Karl Walter & Co GmbH (1)* 1987 (4) SA 850 (W) at 858C–H; *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC* 2013 (6) SA 499 (SCA) at 513F–G; *Keyter NO v Van der Meulen and Another NNO* 2014 (5) SA 215 (ECG) at 218C.

217 *Keyter NO v Van der Meulen and Another NNO* 2014 (5) SA 215 (ECG) at 218C–D.

218 *Ex parte Cooper* 1907 TH 6 at 7. See also *Nestlé (South Africa) (Pty) Ltd v Mars Inc* 2001 (4) SA 542 (SCA) at 548I–549A.

219 *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC* 2013 (6) SA 499 (SCA) at 505E–G, 506B–C and 509D–F.

220 *Marks and Kantor v Van Diggelen* 1935 TPD 29 at 37. In *Electrolux South Africa (Pty) Ltd v Rentek Consulting (Pty) Ltd* 2023 (6) SA 452 (WCC) the applicant brought an application for the final liquidation of the respondent in the Western Cape Division of the High Court, Cape Town. For that purpose it relied upon a letter of demand for payment in terms of s 345(1)*(a)*(i) of the Companies Act 61 of 1973 under circumstances where the respondent failed to respond to the demand for payment made in the letter, and was therefore deemed to be commercially insolvent. Prior to the bringing of the application the applicant has, however, instituted action against the respondent in the same court for payment of the same debt. The respondent's defence of *lis pendens* in the application was dismissed on the basis that the cause of action in the action proceedings and the liquidation application were different (at paragraphs [9]–[15]).

221 *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC* 2013 (6) SA 499 (SCA) at 508A–509C and 509G–510B.

222 *Marks and Kantor v Van Diggelen* 1935 TPD 29 at 33; *Wolfaardt v Colonial Government* (1899) 16 SC 250; *MacCullum v Lubbe* 1908 EDC 58.

223 *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC* 2013 (6) SA 499 (SCA) at 508B–509C.

224 *Marks and Kantor v Van Diggelen* 1935 TPD 29 at 38; *Nestlé (South Africa) (Pty) Ltd v Mars Inc* 2001 (4) SA 542 (SCA) at 549B–C; *Shapiro v South African Recording Rights Association Ltd (Galeta Intervening)* 2008 (4) SA 145 (W) at 149A.
In *Eksteen v Road Accident Fund* [2021] 3 All SA 46 (SCA) the appellant instituted an action against the respondent in the Bloemfontein magistrate's court on 17 January 2008. Without withdrawing that action, and on 19 October 2016, the appellant instituted another action against the respondent in the Free State Division of the High Court for damages he suffered as a result of a motor vehicle collision, which occurred on 18 June 2003. The respondent raised, amongst others, a special plea of *lis pendens*. One of the questions that had to be answered on appeal was whether, in terms of the provisions of s 2(1)*(e)*(ii) of the Road Accident Fund(Transitional Provisions) Act 15 of 2012, a claimant was required to withdraw his claim in the magistrate's court prior to instituting an action in the High Court in the light of conflicting judgments in the various divisions of the High Court on the issue. The Supreme Court of Appeal was unanimous in answering the question in the affirmative and in upholding the special plea of *lis pendens*.

225 *Osman v Hector* 1933 CPD 503; *Painter v Strauss* 1951 (3) SA 307 (O) at 312. In *Nestlé (South Africa) (Pty) Ltd v Mars Inc* 2001 (4) SA 542 (SCA) at 549B–C it was said that *lis pendens* could also be applied 'where the same dispute, between the same parties, is sought to be placed before the same tribunal (or two tribunals with equal competence to end the dispute authoritatively)'. See also *Shapiro v South African Recording Rights Association Ltd (Galeta Intervening)* 2008 (4) SA 145 (W) at 149A.

226 *Berrange NO v Hassan* 2009 (2) SA 339 (N) at 357A–B.

227 *Osman v Hector* 1933 CPD 503.

228 See *Ionian Bank Ltd v Couvreur* [1969] 2 All ER 651 (CA).

229 *Wolff NO v Solomon* (1898) 15 SC 297 at 306; *Kerbel v Kerbel* 1987 (1) SA 562 (W); *H R Holfeld (Africa) Ltd v Karl Walter & Co GmbH (1)* 1987 (4) SA 850 (W) at 858; *Van As v Appollus* 1993 (1) SA 606 (C) at 611C–F; *Berrange NO v Hassan* 2009 (2) SA 339 (N) at 357E–H; *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC* 2013 (6) SA 499 (SCA) at 513F–514A.

230 *Cole v Magaqa* 1912 EDL 187.

231 *Partridge v Blake* (1894) 4 CTR 280.

232 *Barsdorf & Co v Lace Diamond Co Ltd* 1903 TH 317.

233 This is not an immutable rule, however, and considerations of convenience and fairness are decisive in determining this question (*Van As v Appollus* 1993 (1) SA 606 (C) at 610D–G; *Janse van Rensburg and Others NNO v Steenkamp; Janse van Rensburg and Others NNO v Myburgh* 2010 (1) SA 649 (SCA) at 663D–E).

234 *RSA Faktors Bpk v Bloemfontein Township Developers (Edms) Bpk* 1981 (2) SA 141 (O) at 145A.

235 *Anderson v Gordik Organisation* 1960 (4) SA 244 (N) at 247D; *Titan Asset Management (Pty) Ltd v Lanzerac Estate Investments (Pty) Ltd* [2023] 3 All SA 589 (WCC) at paragraph [36]. The test for a plea of non-joinder or misjoinder is whether or not a party has a 'direct and substantial interest' in the subject matter of the action, that is, a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court. The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The rule is that any person is a necessary party and should be joined if such person has a direct and substantial interest in any order the court might make, or if such an order cannot be sustained or carried into effect without prejudicing that party (*Multisure Corporation (Pty) Ltd v KGA Life Ltd* (unreported, ECGq case no 2780/2021 dated 30 August 2022) at paragraph [32] and the authorities there referred to).

236 *Titan Asset Management (Pty) Ltd v Lanzerac Estate Investments (Pty) Ltd* [2023] 3 All SA 589 (WCC) at paragraphs [39] and [59].

237 *Broadway Pen Corporation v Wechsler & Co (Pty) Ltd* 1963 (4) SA 434 (T) at 450A; *D H Meskin Construction Co (Pty) Ltd v Magliano* 1979 (3) SA 1303 (T) at 1306H–1307A. See also *Bekker v Meyring, Bekker's Executor* (1844) 2 Menz 436; *Knysna Wharf Co v Holbery* (1881) 1 SC 311 and *Gibson v Sanders* 1915 EDL 174.

238 *Blake v Commissioner of Mines* 1903 TS 784; *Aaron v Johannesburg Municipality* 1904 TS 696 at 701; *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 649 and 653; *Roberts Construction Co Ltd v Verhoef* 1952 (2) SA 300 (W) at 308; *Selborne Furniture Store (Pty) Ltd v Steyn NO* 1970 (3) SA 774 (A); *Koen v Goosen* 1971 (3) SA 501 (C) at 509G; *Toekies Butchery (Edms) Bpk v Stassen* 1974 (4) SA 771 (T) at 774G–H; *Ngcawashe v Terblanche* 1977 (3) SA 796 (A) at 806H; *Aramugam v Johannesburg City Council* 1979 (1) SA 972 (W) at 974D; *Esquire Electronics Ltd v Executive Video* 1986 (2) SA 576 (A) at 590J–591C; *Acar v Pierce and Other Like Applications* 1986 (2) SA 827 (W) at 831H; *Klep Valves (Pty) Ltd v Saunders Valve Co Ltd* 1987 (2) SA 1 (A) at 39I–40B; *Harding v Basson* 1995 (4) SA 499 (C) at 501C–I; *Rosebank Mall (Pty) Ltd v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (W) at 366B–D; *Clientele Life Assurance Company Ltd v Payment Association of South Africa* (unreported, GJ case no 2021/42435 dated 4 September 2023) at paragraphs 16–21 and the order made by the court. See also the judgment of the Court of Appeal of Lesotho in *Phakisi v Tlapana* (unreported, Court of Appeal for Lesotho case no C of A (Civ)/50/2014 dated 21 April 2016) at paragraph [2] (*per* Farlam AP).

239 2009 (3) SA 315 (D).

240 In s 1 of the National Credit Act 34 of 2005 a credit agreement is defined as 'an agreement that meets all the criteria set out in section 8'.

241 *Standard Bank of South Africa Ltd v Hales* 2009 (3) SA 315 (D) at 320C–G.

242 2011 (4) SA 508 (SCA) at 518G–519A.

243 *Kaknis v Absa Bank Ltd* 2017 (4) SA 17 (SCA) at 32A.

244 *Hoole v Singel* (1905) 10 HCG 38; *Mars Incorporated v Candy World (Pty) Ltd* 1991 (1) SA 567 (A) at 575H–J; *Kommissaris van Binnelandse Inkomste v Van der Heever* 1999 (3) SA 1051 (SCA) at 1057G–H.

245 *Titan Asset Management (Pty) Ltd v Lanzerac Estate Investments (Pty) Ltd* [2023] 3 All SA 589 (WCC) at paragraph [37].

246 *Anirudh v Samdel* 1975 (2) SA 706 (N); *Ahmadiyya Anjuman Ishaati-Islam Lahore (South Africa) v Muslim Judicial Council (Cape)* 1983 (4) SA 855 (C) at 860B–H; *Van Zyl NO v Bolton* 1994 (4) SA 648 (C) at 651D–E; *Voget v Kleynhans* 2003 (2) SA 148 (C) at 151F; and see *Malan v Van Rooyen* 1929 OPD 25; *Edwards v Woodnutt NO* 1968 (4) SA 184 (R) at 186; *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O) at 759–60; *Titan Asset Management (Pty) Ltd v Lanzerac Estate Investments (Pty) Ltd* [2023] 3 All SA 589 (WCC) at paragraphs [50]–[58].

247 Section 17(1) of the Prescription Act 68 of 1969.

248 Extinctive prescription as intended in the Prescription Act 68 of 1969 can be raised in interlocutory proceedings, either if it were common cause or in situations where a claim or the right to claim were 'known to have prescribed' (*Union Finance Holdings (Pty) Ltd v Bonugli and Another NNO* 2013 (2) SA 449 (GSJ) at 452B–C).

249 See, *inter alia*, *Holmes v Schoch* 1910 TPD 700 at 703 and 705; *Reuben v Myers* 1957 (4) SA 57 (SR) at 58C–F; *Walsh NO v Scholtz* 1968 (2) SA 223 (GW) at 224E–F; *Union & SWA Insurance Co Ltd v Hoosein* 1982 (2) SA 141 (W) at 482G; *Ntame v MEC for Social Development, Eastern Cape, and Two Similar Cases* 2005 (6) SA 248 (E) at 256A–B; *Living Hands (Pty) Ltd v Ditz* 2013 (2) SA 368 (GSJ) at 392A–B. See also *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A) at 525A; *Drennan Maud & Partners v Pennington Town Board* 1998 (3) SA 200 (SCA) at 204A–B; *Liberty Group Ltd v Illman* 2020 (5) SA 397 (SCA) at paragraph [8] (in this case it was held that the service of a summons on a surety and co-principal debtor does not interrupt the running of prescription in favour of the other sureties and co-principal debtors).

250 *Titan Asset Management (Pty) Ltd v Lanzerac Estate Investments (Pty) Ltd* [2023] 3 All SA 589 (WCC) at paragraph [37].

251 2010 (6) SA 638 (GSJ).

252 At paragraphs [14], [15] and [21].

253 At paragraph [20].

254 2013 (2) SA 368 (GSJ) at 391C–393E.

255 2020 (1) SA 280 (KZD).

256 At paragraphs [6] and [16].

257 At paragraphs [16] and [19].

258 At paragraph [16].
259 [2021] 4 All SA 346 (SCA).
260 At paragraph [8].
261 At paragraph [9].
262 At paragraph [10].
263 At paragraphs [11]–[12].
264 At paragraph [12].
265 At paragraphs [14]–[16].
266 At paragraph [17].
267 See s 17(2) of the Prescription Act 68 of 1969 and *Stolz v Pretoria North Town Council* 1953 (3) SA 884 (T).
268 Voet 44 2 1, where it is said that the exception of *res judicata* 'was mainly brought in to prevent inextricable difficulties arising from discordant or perhaps mutually contradictory decisions due to the same suit being aired more than once in different judicial proceedings' (Gane's translation). See also *Boshoff v Union Government* 1932 TPD 345 at 350; *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 472B; *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 835F–H; *Bafokeng Tribe v Impala Platinum Ltd* 1999 (3) SA 517 (BH) at 551B; *Ascendis Animal Health (Pty) Ltd v Merck Sharpe Dohme Corporation* 2020 (1) SA 327 (CC) at paragraphs [69] and [70]; *South African Municipal Workers Union National Provident Fund v Dihlabeng Local Municipality* 44 *ILJ* 1479 (SCA) at paragraph [12].
269 Generally on this topic, see Voet 44 2 3; *LAWSA* IX paragraphs 338–66; Hoffmann & Zeffertt *Evidence* 335 et sqq; *Hiddingh v Denyssen* (1885) 3 SC 424 at 450; *Bertram v Wood* (1893) 10 SC 177; *Warner v Wright* 1908 EDC 14; *Pretorius v Barkly East Divisional Council* 1914 AD 407; *Mitford's Executor v Ebden's Executors* 1917 AD 682; *R v Manasewitz* 1933 AD 165; *Boshoff v Union Government* 1932 TPD 345; *Marks and Kantor v Van Diggelen* 1935 TPD 29; *Veley v Vinjevold* 1935 NPD 578; *Sundays River Irrigation Board v Parkes Bros* 1938 AD 493; *Roopnarain v R* 1938 NPD 106; *R v De Beer* 1944 NPD 334; *Loesch v Crowther (2)* 1947 (3) SA 251 (O); *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 564C–E; *S v Ndou* 1971 (1) SA 668 (A) at 675; *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 472A–B; *Minister of Justice v Bagattini* 1975 (4) SA 252 (T) at 259; *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 (3) SA 509 (D) at 521G–J; *Bafokeng Tribe v Impala Platinum Ltd* 1999 (3) SA 517 (BH) at 551B–567B; *Hochfeld Commodities (Pty) Ltd v Theron* 2000 (1) SA 551 (O) at 566F–H; *Dancarl Diamonds (Pty) Ltd v Wilmans NO (Vize toetredend)* 2001 (4) SA 1123 (NC) at 1128B–1129B; *Wright v Westelike Provinsie Kelders Bpk* 2001 (4) SA 1165 (C) at 1175C–1176C; *Holtzhausen v Gore NO* 2002 (2) SA 141 (C) at 148D–150F; *Man Truck & Bus (SA) (Pty) Ltd v Dusbus Leasing* CC 2004 (1) SA 454 (W) at 466D–467H; *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd (2)* 2005 (6) SA 23 (C) at 45D–48I; *Al-Kharafi & Sons v Pema and Others NNO* 2010 (2) SA 360 (W) at 389E–390G; *Prinsloo NO v Goldex 15 (Pty) Ltd* 2014 (5) SA 297 (SCA) at 301A–C; *Royal Sechaba Holdings (Pty) Ltd v Coote* 2014 (5) SA 562 (SCA) at 566F–G.
270 *Janse van Rensburg and Others NNO v Steenkamp; Janse van Rensburg and Others NNO v Myburgh* 2010 (1) SA 649 (SCA) at 660H–661D; *Basson NO v Orcrest Properties (Pty) Ltd and two related matters* [2016] 4 All SA 368 (WCC) at paragraph [50]; *Jiyana v Absa Bank* (unreported, WCC case no 15952/2016 dated 29 June 2017) at paragraph [31].
271 2015 (2) SACR 341 (CC).
272 See also *Jiyana v Absa Bank* (unreported, WCC case no 15952/2016 dated 29 June 2017) at paragraph [32]; *Ascendis Animal Health (Pty) Ltd v Merck Sharpe Dohme Corporation* 2020 (1) SA 327 (CC) at paragraph [72]; *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State* 2021 (11) BCLR 1263 (CC) at paragraphs [88]–[90].
273 *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State* 2021 (11) BCLR 1263 (CC) at paragraphs [91]–[92].
274 *Titan Asset Management (Pty) Ltd v Lanzerac Estate Investments (Pty) Ltd* [2023] 3 All SA 589 (WCC) at paragraph [37].
275 See, for example, *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 651; *Tshabalala v Johannesburg City Council* 1962 (4) SA 367 (T) at 368–9.
276 *Koster Ko-operatiewe Landbou Mpy Bpk v Wadee* 1960 (3) SA 197 (T) at 199, and see *Ex parte Welsh: In re Estate Keegan* 1943 WLD 147 at 149; *Tshabalala v Johannesburg City Council* 1962 (4) SA 367 (T) at 368–70.
277 *Ex parte Welsh: In re Estate Keegan* 1943 WLD 147.
278 *Pretorius v Barkly East Divisional Council* 1914 AD 407 at 409.
279 *Bafokeng Tribe v Impala Platinum Ltd* 1999 (3) SA 517 (BH) at 566B–E; *Mulaudzi v Old Mutual Life Assurance Co (South Africa) Ltd* 2017 (6) SA 90 (SCA) at 107E–F; *Ascendis Animal Health (Pty) Ltd v Merck Sharpe Dohme Corporation* 2020 (1) SA 327 (CC) at paragraph [71]; and see *Douglasdale Dairy (Pty) Ltd v Bragge* 2018 (4) SA 425 (SCA) at 431G–H; *R v R* 2023 (9) BCLR 1126 (CC) at paragraph [67]; *South African Municipal Workers Union National Provident Fund v Dihlabeng Local Municipality* 44 *ILJ* 1479 (SCA) at paragraph [12]. In *Jacobson v Havinga t/a Havingas* 2001 (2) SA 177 (T) it was held (at 179E–F) that a party must show —
*(a)* that there has already been a prior judgment;
*(b)* in which the parties were the same; and
*(c)* the same point was in issue.
280 *Umhlebi v Estate of Umhlebi* (1905) 19 EDC 237.
281 Voet 44 2 3, where it is said that there 'is no room for this exception unless a suit which had been brought to an end (*lis terminata*) is set in motion afresh' (Gane's translation). See also *Hilton v Hamilton* (1906) 16 CTR 531; *R v Kerr* (1908) 25 SC 91 at 96; *Walker v Arnot NO* (1893) Hertzog 167; *Bell v Bell's Trustee* 1909 TS 51; *Verhagen v Abramowitz* 1960 (4) SA 947 (C) at 951; *Van der Linde v Van Straaten* 1976 (1) SA 369 (O) at 372; *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A) at 45–7; *Johannesburg City Council v Elesander Investments (Pty) Ltd* 1979 (3) SA 1273 (T) at 1282; *Tradax Ocean Transportation SA v MV Silvergate Properly Described as MV Astyanax: MV Silvergate* 1999 (4) SA 405 (SCA) at 417C–F; *Mogalakwena Municipality v Provincial Executive, Limpopo* 2016 (4) SA 99 (GP) at 118E–F. An *obiter dictum* concerning a particular point does not have the effect of a final judgment on that point (*Coetzee v Stellenbosch Universiteit* 1959 (4) SA 705 (C)).
282 *S v Moodie* 1962 (1) SA 587 (A) at 596; *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 562; *Hochfeld Commodities (Pty) Ltd v Theron* 2000 (1) SA 551 (O) at 567A–D; *Rail Commuters' Action Group v Transnet Ltd* 2006 (6) SA 68 (C) at 74F–H. See also *Jacobson v Havinga t/a Havingas* 2001 (2) SA 177 (T) at 181E–182B.
283 *Horowitz v Brock* 1988 (2) SA 160 (A) at 178H; *Sparks v Sparks* 1998 (4) SA 714 (W) at 723H–724G.
284 *Sparks v Sparks* 1998 (4) SA 714 (W) at 723I–724A.
285 *Mostert v South African Association* 1868 Buch 286; *In re Boesen v Astrup's Insolvent Estate* (1885) 6 NLR 203; *Steyn's Trustee v Gous* (1894) 11 SC 34; *Bell v Bell's Trustee* 1909 TS 51 at 55; and see *Minister of Justice v Bagattini* 1975 (4) SA 252 (T) at 259. See also *S v Delport alias Boucher* 1984 (1) SA 511 (O) at 515H–516C.
286 *Thwaites v Van der Westhuizen* (1888) 6 SC 259.
287 *Paarl Pretoria Gold Mining Co v Donovan and Wolff NO* (1889) 3 SAR 56 at 93; *Town Council of Cape Town v The SA Missionary Society* (1901) 18 SC 216; *Boshoff v Union Government* 1932 TPD 345 at 351; *Jacobson v Havinga t/a Havingas* 2001 (2) SA 177 (T) at 179H–180B.
288 *Bertram v Wood* (1893) 10 SC 177 at 180; *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 564; *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 (3) SA 509 (D) at 521.
289 Voet 44 2 1; *Bertram v Wood* (1893) 10 SC 177 at 180; *Makings v Makings* 1958 (1) SA 338 (A) at 349; *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 564; *Le Roux v Le Roux* 1967 (1) SA 446 (A) at 462–3; *S v Ndou* 1971 (1) SA 668 (A) at 676; *Minister of Justice v Bagattini* 1975 (4) SA 252 (T) at 264; *Liley v Johannesburg Turf Club* 1983 (4) SA 548 (W) at 550H.
290 *Vermaak v Vermaak* 1948 (4) SA 90 (C) at 92.
291 *Wesbank, A Division of Firstrand Bank Limited v Investment Auto Group (Pty) Ltd* (unreported, GJ case no 2020/7439 dated 24 September 2021) at paragraphs [24]–[29].
292 *FirstRand Bank Ltd t/a First National Bank v Fondse* (unreported, GJ case no A5027/2016 dated 23 June 2017 — a decision of the full court) at paragraphs [48]–[49]; *Absa Bank Ltd v Prinsloo Familie Trust* 2024 (3) SA 80 (GJ) at paragraphs [39]–[49].
293 *Grimwood v Balls* (1835) 3 Menz 448; *Thwaites v Van der Westhuizen* (1888) 6 SC 259; *Rail Commuters' Action Group v Transnet Ltd* 2006 (6) SA 68 (C) at 74H.
294 *Thwaites v Van der Westhuizen* (1888) 6 SC 259; *De Jager v Vorster* (1900) 10 CTR 239; *Cloete v Greyling* (1907) 24 SC 57; *Municipality of Christiana v Victor* 1908 TS 1117; *Sebastian v Brummer* 1928 TPD 679; *Miller v Larter* 1941 EDL 98; *Becker v Wertheim, Becker & Leveson* 1943 (1) PH F34 (A); *Afrikaanse Handelaars (Edms) Bpk v Van Niekerk* 1944 (1) PH F25; *Van Rensburg v Coetzee* 1977 (3) SA 130 (T) at 136B; *De Wet v Western Bank Ltd* 1977 (2) SA 1033 (W) at 1035F–G; *Regering van die Republiek van Suid-Afrika v South African Eagle Versekeringsmaatskappy Bpk* 1985 (2) SA 42 (O) at 56–7; *Twins Products (Pty) Ltd v Hollywood Curl (Pty) Ltd* 1986 (4) SA 392 (T) at 394D. In *Purchase v Purchase* 1960 (3) SA 383 (N) at 385A, *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 563D–H and *Sparks v Sparks* 1998 (4) SA 714 (W) at 721F it was held that in motion proceedings the dismissal or refusal of an application amounts to a decision in favour of the respondent; but see *Vena v Vena* 2010 (2) SA 248 (ECP) at 253A–I where it was held that

the dismissal of an application amounts to absolution from the instance. The decision in *Schutze v Rocher* (1896) 3 Off Rep 126 is not authority to the contrary: 'dismissal of the claim' is an incorrect translation of the Dutch order 'ontzegging van den eisch' — the case was not dismissed but the claim refused.

295 *De Wet v Paynter* 1921 CPD 576; *Cohn v Rand Rietfontein Estates Ltd* 1939 TPD 319.

296 *Bell v Bell's Trustee* 1909 TS 51; s 112 of the Insolvency Act 24 of 1936.

297 *Noordkaap Lewendehawe Ko-op Bpk v Schreuder* 1974 (3) SA 102 (A).

298 *Tradax Ocean Transportation SA v MV Silvergate Properly Described as MV Astyanax: MV Silvergate* 1999 (4) SA 405 (SCA) at 417C–F.

299 *Suid-Afrikaanse Sentrale Ko-Operatiewe Graanmaatskappy Bpk v Shifren and Others and The Taxing Master* 1964 (1) SA 162 (O) at 164D–H; *Trade Fairs and Promotions (Pty) Ltd v Thomson* 1984 (4) SA 177 (W) at 186B–G; *S v Absalom* 1989 (3) SA 154 (A) at 164E–G; and see *G W Willis v Letitia B Cauvin* (1883) 4 NLR 97 at 98; *R v Ntoyaba* (1886) 4 SC 249 at 252; *Moresby-White v Moresby-White* 1972 (3) SA 222 (RA).

300 *Wolff NO v Solomon* (1898) 15 SC 297 at 306; *Joffe v Salmon* 1904 TS 317 at 319; *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd (2)* [1966] 2 All ER 536 (HL) at 554; *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 (3) SA 509 (D) at 521; and see *Tradax Ocean Transportation SA v MV Silvergate Properly Described as MV Astyanax: MV Silvergate* 1999 (4) SA 405 (SCA) at 417C–F.

301 *Schoeman v Van Rensburg* 1942 TPD 175; *Verhagen v Abramowitz* 1960 (4) SA 947 (C) at 950; *Zygos Corporation v Salen Rederierna AB* 1984 (4) SA 444 (C) at 456A.

302 *Knox v Winship* (1929) 50 NLR 150.

303 Grotius 3 49; Voet 42 1 29; 44 2 3; *Pretorius v Barkly East Divisional Council* 1914 AD 407 at 409; *Mitford's Executor v Ebden's Executors* 1917 AD 682; *Boshoff v Union Government* 1932 TPD 345 at 349; *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 472; *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 (3) SA 509 (D) at 521; *Tradax Ocean Transportation SA v MV Silvergate Properly Described as MV Astyanax: MV Silvergate* 1999 (4) SA 405 (SCA).

304 Voet 44 2 1; 44 2 5; *Cassim v The Master* 1960 (2) SA 347 (N) at 355, approved in *Shokkos v Lampert NO* 1963 (3) SA 421 (W) at 425; *Swadiff (Pty) Ltd v Dyke NO* 1978 (1) SA 928 (A) at 945B; *Rail Commuters' Action Group v Transnet Ltd* 2006 (6) SA 68 (C) at 82H–I.

305 *Mogalakwena Municipality v Provincial Executive, Limpopo* 2016 (4) SA 99 (GP) at 118E–F.

306 *Church Wardens of Uitenhage v Meyer and Barnard* (1835) 2 Menz 21 at 25.

307 *Scharf NO v Dempers & Co* 1955 (3) SA 316 (SWA).

308 *Shokkos v Lampert NO* 1963 (3) SA 421 (W) at 425.

309 *Cassim v The Master* 1960 (2) SA 347 (N).

310 *London & SA Exploration Co v Murphy* (1887) 4 HCG 322.

311 *Hare v Kotze* (1840) 3 Menz 472; *Mostert v Fuller* 1875 Buch 23; *Fischer v Genricks* (1885) 4 SC 31; *Du Toit v Grobler* 1947 (3) SA 213 (SWA). This is so even where the prosecution was a private one (*Eaton v Moller* 2 Roscoe 85), and even though the plaintiff in the civil case received the fine imposed in the prior criminal case (*Gagela v Ganca* (1907) 17 CTR 359; *Ganca v Gagela* 24 *SALJ* 41; (1907) 3 Buch AC 102; *Hornby v Municipal Council of Roodepoort-Maraisburg* 1917 WLD 54; *Van der Westhuizen v Raubenheimer* 1875 Buch 37). The latter fact may be taken into account in assessing damages in the civil case. The record of a criminal conviction of a sexual offence has sometimes been held to constitute prima facie evidence of the defendant's adultery in a subsequent divorce case (*Christie v Christie* 1922 WLD 109; *Kleynhans v Kleynhans* 1933 OPD 110; *Dickason v Dickason* 1934 NPD 97). The conviction of a person on a charge of theft is not, however, prima facie evidence against the same person who is sued for payment of the money alleged to have been stolen (*Du Toit v Grobler* 1947 (3) SA 213 (SWA)).

312 *R v Lechudi* 1945 AD 796.

313 *Burnham v Fakheer* 1938 NPD 63 at 67; and see *Thorsen v Coopsamy* 1936 NPD 636 at 641.

314 *Paarl Pretoria Gold Mining Co v Donovan and Wolff NO* (1889) 3 SAR 56. It is for this reason, *inter alia*, that the court will insist on the joinder of a party who has a direct interest in the litigation (*Brink NO v Gain NO* 1958 (3) SA 503 (C) at 506E). In *Bester NO v Pieters* 2023 (1) SA 398 (WCC) it was held (at paragraph [31]) that a party who intervenes as an 'intervening party' to existing proceedings and causes those proceedings to be postponed or stymied in order for such party to participate, cannot at a later stage claim to have not been a party to the proceedings merely because it chose not to file any papers. Such a party cannot approbate and reprobate.

315 1949 (3) SA 637 (A) at 662–3. This was reaffirmed in *Kethel v Kethel's Estate* 1949 (3) SA 598 (A) at 609.

316 *Kethel v Kethel's Estate* 1949 (3) SA 598 (A) at 603.

317 'An issue, broadly speaking, is a matter of fact or a question of law in dispute between two or more parties which a court is called upon by the parties to determine and pronounce upon in its judgment, and is relevant to the relief sought' (*Horowitz v Brock* 1988 (2) SA 160 (A) at 179G–H.) An issue can be said to have been finally and definitively determined when it has been fully canvassed by both parties in the expectation of the court pronouncing upon it (*Horowitz v Brock* 1988 (2) SA 160 (A) at 180J–181A; *Al-Kharafi & Sons v Pema and Others NNO* 2010 (2) SA 360 (W) at 390F).

318 *Bertram v Wood* (1893) 10 SC 177; *Hornby v Municipal Council of Roodepoort-Maraisburg* 1917 WLD 54 at 56; *Kethel v Kethel's Estate* 1949 (3) SA 598 (A) at 605; *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 562A; *Hochfeld Commodities (Pty) Ltd v Theron* 2000 (1) SA 551 (O) at 567G–568A; *Holtzhausen v Gore NO* 2002 (2) SA 141 (C) at 148E–F; *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd (2)* 2005 (6) SA 23 (C) at 45F–46A; and see *Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk* 1995 (1) SA 653 (A) at 664D; *Al-Kharafi & Sons v Pema and Others NNO* 2010 (2) SA 360 (W) at 390F. If the cause of action is a continuing one, a judgment to satisfy the obligation up to a certain point is not *res judicata* in respect of the obligation thereafter. Thus, a judgment for one month's rent is no bar to judgment for the rent of the subsequent month (*De Wet v Jooste* (1892) 9 SC 239; *Maister and Shagan v Bernstein* 1915 CPD 373).

319 *Mitford's Executor v Ebden's Executors* 1917 AD 682 at 686; *Boshoff v Union Government* 1932 TPD 345; *Green v Coetzer* 1958 (2) SA 697 (W); *Bafokeng Tribe v Impala Platinum Ltd* 1999 (3) SA 517 (BH) at 553C–E; *Tradax Ocean Transportation SA v MV Silvergate Properly Described as MV Astyanax: MV Silvergate* 1999 (4) SA 405 (SCA) at 417E–F.

320 *Hiddingh v Denyssen* (1885) 3 SC 424 at 450, adopted by Searle J in the court *a quo* in *Pretorius v Barkly East Divisional Council* 1914 AD 407 at 409.

321 *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 472A–B; *National Sorghum Breweries (Pty) Ltd (t/a Vivo Africa Breweries) v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA) at 235I and 239F–H; *SANDU v Minister of Defence* [2003] 3 All SA 436 (T) at 444*d–f*; *Molefe v Regent Insurance Company (Pty) Ltd* [2008] 1 All SA 158 (W) at 159*i*–160e; *Yellow Star Properties 1020 (Pty) Ltd v MEC, Department of Development Planning and Local Government, Gauteng* 2009 (3) SA 577 (SCA) at 586E–H; and see *Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk* 1995 (1) SA 653 (A) at 664D.

322 *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 562A; *Bafokeng Tribe v Impala Platinum Ltd* 1999 (3) SA 517 (BH) at 559A; *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd (2)* 2005 (6) SA 23 (C) at 45F–46A; *Rail Commuters' Action Group v Transnet Ltd* 2006 (6) SA 68 (C) at 74E–F; and see *S v Ndou* 1971 (1) SA 668 (A) at 672; *Minister of Justice v Bagattini* 1975 (4) SA 252 (T) at 263–4. In the latter case it is pointed out that a judgment on *all* the merits is not required: a decision on one issue often renders it unnecessary to consider the other issues in a case, but the decision on the one issue is nevertheless a judgment 'on the merits'. In *Horowitz v Brock* 1988 (2) SA 160 (A) at 179A Smalberger JA explained the difference between *res judicata* and 'issue estoppel' by saying that '[t]he doctrine of issue estoppel does not require for its application that the same thing must have been demanded, and it is the lack of this element which distinguishes it from *res judicata*'. In *Smith v Porritt* 2008 (6) SA 303 (SCA) at 307I–308E Scott JA explained the position as follows:

'Following the decision in *Boshoff v Union Government* 1932 TPD 345 the ambit of the *exceptio rei judicata* has over the years been extended by the relaxation in appropriate cases of the common-law requirements that the relief claimed and the cause of action be the same (*eadem res* and *eadem petendi causa*) in both the case in question and the earlier judgment. Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same (*idem actor*) and that the same issue (*eadem quaestio*) must arise. Broadly stated, the latter involves an inquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed. Where the plea of *res judicata* is raised in the absence of a commonality of cause of action and relief claimed it has become commonplace to adopt the terminology of English law and to speak of issue estoppel. But, as was stressed by Botha JA in *Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk* 1995 (1) SA 653 (A) at 669D, 670J–671B, this is not to be construed as implying an abandonment of the principles of the common law in favour of those of English law; the defence remains one of *res judicata.* The recognition of the defence in such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case-by-case basis. (*Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk (supra*) at 670E–F.) Relevant considerations will include questions of equity and fairness not only to the parties themselves but also to others. As pointed out by De Villiers CJ as long ago as 1893 in *Bertram v Wood* (1893) 10 SC 177 at 180, "unless carefully circumscribed, [the defence of *res judicata*] is capable of producing great hardship and even positive injustice to individuals".'

The aforesaid explanation was reaffirmed in *Democratic Alliance v Brummer* (unreported, SCA case no 793/2021 dated 3 November 2022) at paragraph [12].

In *Prinsloo NO v Goldex 15 (Pty) Ltd* 2014 (5) SA 297 (SCA) it was held (at 305A–C and 305H–306A) that the requirements of same cause

and same relief which form part of the requirements of *res judicata* could be dispensed with where the same issue had been finally decided in the previous proceeding, viz the form of *res judicata* known as issue estoppel. A plea of issue estoppel could only, it was held, be permitted though, if it would not cause unfairness in the latter proceeding. In *Douglasdale Dairy (Pty) Ltd v Bragge* 2018 (4) SA 425 (SCA) it was held (at 432B–C) that it is impossible to provide a clear test as to what would give rise to unfairness. In that case the problem which presented itself was that the findings of the court *a quo* were not subjected to the rigours of an appeal (at 431I). The Supreme Court of Appeal, with reference to the *Prinsloo* case (*supra*), concluded that fairness demanded that issue estoppel should not be allowed to operate in any pending litigation because there had been no need to canvass the merits of the appeal as a result of a legally relevant new fact (i e the death of the first respondent after judgment in the court *a quo* had been delivered) and the changed legal position that followed (at 432B–D and 432G). See also *Hyprop Investments Ltd v NSC Carriers and Forwarding CC* 2014 (5) SA 406 (SCA) at 410B–H; *Royal Sechaba Holdings (Pty) Ltd v Coote* 2014 (5) SA 562 (SCA) at 566H–568A; *De Freitas v Jonopro (Pty) Ltd* 2017 (2) SA 450 (GJ) at 458G–J; *Transalloys (Pty) Ltd v Mineral-Loy (Pty) Ltd* (unreported, SCA case no 781/2016 dated 15 June 2017) at paragraph [22]; *Wilke NO v Griekwaland Wes Korporatief Ltd* (unreported, SCA case no 1327/2019 dated 23 December 2020) at paragraphs [16]–[20]. In the minority judgment of Wille J in *Democratic Alliance v Brummer* 2021 (6) SA 144 (WCC) it was held (at paragraph [28]) that a court's authority not to apply issue estoppel for reasons of justice and equity (i e unfairness) must be assessed in the light of the principle that parties to litigation were required to bring forward their whole case and should not be allowed to relitigate the same issue by dressing it in different causes of action, i e the so-called *Henderson* principle (laid down in *Henderson v Henderson* (1843) 3 Hare 100 ([1843–1860] All ER Rep 378) at 114–115 (Hare)), which entails that —

'. . . when a given matter becomes a subject of litigation —

the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case'. According to Wille J (at paragraph [29]), the *Henderson* principle has been 'fully assimilated into our law' and 'applies equally to pure claims of *res judicata* and to claims based on issue estoppel'.

In *Petersen v Gqosha* (unreported, ELEL case no 1574/2022 dated 25 April 2023) Laing J observed:

'[38] The *Henderson* principle must not be confused with issue estoppel. Whereas Wille J's point was that the former must inform the application of the latter, the concepts are distinguishable. As this court understands it, the *Henderson* principle requires a party to present his or her case in its entirety, rather than subsequently attempt to litigate aspects of it that were previously omitted. In contrast, issue estoppel is a defence (derived from the principle of *res iudicata*) that can be raised when the same issue has already been adjudicated to finality between the same parties.'

If the relaxation of the three requirements of *res judicata* would lead to inequity, issue estoppel should not preclude a later claim that arises from the same issues (*Prinsloo NO v Goldex 15 (Pty) Ltd* 2014 (5) SA 297 (SCA) at 304D–306A; *Hyprop Investments Ltd v NSC Carriers and Forwarding CC* 2014 (5) SA 406 (SCA) at 412H–413C; *Bravospan 252 CC v Greater Tzaneen Municipality* (unreported, LP case no 393/2018 dated 2 February 2021) at paragraph [31], overruled on appeal, but not on this point, in *Greater Tzaneen Municipality v Bravospan 252 CC* (unreported, SCA case no 428/2021 dated 7 November 2022); *Trustees, Burmilla Trust v President of the Republic of South Africa* 2022 (5) SA 78 (SCA) at paragraph [43]).

In *Royal Sechaba Holdings (Pty) Ltd v Coote* 2014 (5) SA 562 (SCA) at 566H–568A, 570D–G and 571B–E the Supreme Court of Appeal reaffirmed the requirements of a successful plea of *res judicata* and added that in appropriate circumstances the requirement that the parties had to be the same could also be dispensed with.

An identity of interest between plaintiffs in two different actions is sufficient to satisfy the same-party requirement of issue estoppel (*Aon South Africa (Pty) Ltd v Van den Heever NO* 2018 (6) SA 38 (SCA) at 48C–49G; and see *Bester NO v Pieters* 2023 (1) SA 398 (WCC) at paragraph [31]).

As to 'issue estoppel' see also *Goldfields Laboratories (Pty) Ltd v Pomate Engineering (Pty) Ltd* 1983 (3) SA 197 (W); *Liley v Johannesburg Turf Club* 1983 (4) SA 548 (W) at 551; *Marievale Consolidated Mines Ltd v National Union of Mineworkers* 1986 (2) SA 472 (W) at 496; *Boland Bank Bpk v Steele* 1994 (1) SA 259 (T) at 268–70; *Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk* 1995 (1) SA 653 (A) at 667J–670B and 670I–671C; *Bafokeng Tribe v Impala Platinum Ltd* 1999 (3) SA 517 (BH) at 566F–567B; *Man Truck & Bus (SA) (Pty) Ltd v Dusbus Leasing* CC 2004 (1) SA 454 (W) at 462E–468E; *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd (2)* 2005 (6) SA 23 (C) at 47C–D; *Yellow Star Properties 1020 (Pty) Ltd v MEC, Department of Development Planning and Local Government, Gauteng* 2009 (3) SA 577 (SCA) at 586D–587A; *Janse van Rensburg and Others NNO v Steenkamp; Janse van Rensburg and Others NNO v Myburgh* 2010 (1) SA 649 (SCA) at 657E–660A; *Al-Kharafi & Sons v Pema and Others NNO* 2010 (2) SA 360 (W) at 390B–C; *NSC Carriers & Forwarding CC v Hyprop Investments Ltd* 2013 (1) SA 340 (GSJ) at 349I–350F; *De Freitas v Jonopro (Pty) Ltd* 2017 (2) SA 450 (GJ) at 457H–458J; *Department of Transport v Tasima (Pty) Ltd; Tasima (Pty) Ltd v Road Traffic Management Corporation* 2018 (9) BCLR 1067 (CC) at paragraphs [82]–[85]; the majority decision in *Democratic Alliance v Brummer* 2021 (6) SA 144 (WCC) at paragraphs [72]–[80]; *Bester NO v Pieters* 2023 (1) SA 398 (WCC) at paragraph [30]; *Skog NO v Agullus* 2024 (1) SA 72 (SCA) at paragraph [65]; *South African Municipal Workers Union National Provident Fund v Dihlabeng Local Municipality* 44 *ILJ* 1479 (SCA) at paragraphs [13]–[14]; Hoffmann & Zeffertt *Evidence* 346–50; 2004 (September) *De Rebus* 47–8.

323 Spencer-Bower *Res Judicata* sec 162, quoted with approval in *Boshoff v Union Government* 1932 TPD 345 at 350 and *Liley v Johannesburg Turf Club* 1983 (4) SA 548 (W) at 551–2.

324 *Wolfaardt v Colonial Government* (1899) 16 SC 250; *McCallum v Lubbe* 1908 EDC 58 at 61; *Pretorius v Barkly East Divisional Council* 1914 AD 407 at 409; *Commissioner of Customs v Airton Timber Co Ltd* 1926 CPD 359; *Boshoff v Union Government* 1932 TPD 345; *Veley v Vinjevold* 1935 NPD 578; *Marks and Kantor v Van Diggelen* 1935 TPD 29 at 33; *Van Niewenhuizen v Richards* 1959 (2) SA 686 (T) at 687; *Van Zyl v Niemann* 1964 (4) SA 661 (A) at 669; *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 472; *Maritime Laconian Enterprises Ltd v Agromar Lineas Ltd* 1986 (3) SA 509 (D) at 521; *Horowitz v Brock* 1988 (2) SA 160 (A) at 179–82; *Hochfeld Commodities (Pty) Ltd v Theron* 2000 (1) SA 551 (O) at 568A–D.

325 *Pretorius v Barkly East Divisional Council* 1914 AD 407.

326 *Lawton v Rens* (1842) 3 Menz 483.

327 *Stanton v Westaway* (1893) 8 EDC 1; *Goldstuck v Mappin & Webb Ltd* 1927 TPD 723.

328 *Turk v Turk* 1954 (3) SA 971 (W).

329 *Boshoff v Union Government* 1932 TPD 345.

330 *Van Niewenhuizen v Richards* 1959 (2) SA 686 (T).

331 *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A), in which it is pointed out (at 563) that 'different reasons leading to a different conclusion cannot affect the identity of the question to be decided'.

332 *Blaikie-Johnstone v P Hollingsworth (Pty) Ltd and Others* 1974 (3) SA 392 (D).

333 *Quin v Oelofse* 1926 TPD 336 at 340.

334 *De Wet v Jooste* (1892) 9 SC 239; *Bertram v Wood* (1893) 10 SC 177; *Maister and Shagan v Bernstein* 1915 CPD 373.

335 *Bertram v Wood* (1893) 10 SC 177.

336 *Fredericks v Jaffar* (1895) 12 SC 381.

337 *Warner v Wright* 1908 EDC 14.

338 *J Goddard & Sons v R S Goddard & J Mentz & Co* 1924 TPD 290.

339 *De Vos v Munnik and Visser* 1944 CPD 30.

340 *Kruger v Schoombie* 1916 EDL 279.

341 *Kilfoil v Macomo* 1911 CPD 83.

342 *Matthews v Trow* 1913 EDL 368, following *Meyer v Carlisle, Campbell* (1832) 1 Menz 540. See also Voet 44 2 1. If the defendant had elected to pay the damages, and had paid a portion thereof, the plaintiff's remedy would have been to execute upon the first judgment.

343 *Essack v Essay* 1955 (2) SA 407 (D).

344 *Coetzee v Stellenbosch Universiteit* 1959 (4) SA 705 (C).

345 *Goldfields Laboratories (Pty) Ltd v Pomate Engineering (Pty) Ltd* 1983 (3) SA 197 (W).

346 Voet 42 1 47; 44 2 2; *Mann v Sydney Hunt Motors (Pty) Ltd* 1958 (2) SA 102 (GW); *Blaikie-Johnstone v P Hollingsworth (Pty) Ltd and Others* 1974 (3) SA 392 (D).

347 *Fell v Goodwill* (1884) 5 NLR 265; *Lamb v The Colonial Secretary and the Rand Mining Estates Ltd* 1902 TS 319; *Lowrey v Steedman* 1914 AD 532 at 539; *Blaikie-Johnstone v P Hollingsworth (Pty) Ltd and Others* 1974 (3) SA 392 (D) at 395D; *Hochfeld Commodities (Pty) Ltd v Theron* 2000 (1) SA 551 (O) at 566J–567A; *Technical Systems (Pty) Ltd v RTS Industries* (unreported, WCC case no 5288/2020 dated 1 March 2021) at paragraphs [6]–[11] and [23].

348 Voet 44 2 1.

349 Voet 44 2 6.

350 *Hoatson v Paton* (1907) 28 NLR 12; *Lowrey v Steedman* 1914 AD 532.

351 *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A) at 46A–47H; *Horowitz v Brock* 1988 (2) SA 160

(A) at 180J–181A; *Rail Commuters' Action Group v Transnet Ltd* 2006 (6) SA 68 (C) at 74H*ff*; *Al-Kharafi & Sons v Pema and Others NNO* 2010 (2) SA 360 (W) at 390F.

352 *Lamb v The Colonial Secretary and the Rand Mining Estates Ltd* 1902 TS 319; *Lowrey v Steedman* 1914 AD 532.

353 *Boshoff Municipality v Boshoff Kerkraad* (1893) 10 *CLJ* 252.

354 *Humphries v Humphries* [1910] 2 KB 531; *Cooke v Rickman* [1911] 2 KB 1125.

355 See, *inter alia*, *Cassimjee v Minister of Finance* 2014 (3) SA 198 (SCA); *Refitlhile Taxi Association v Vaalharts Taxi Association* (unreported, NCK case no 2227/2014 dated 14 December 2021); *Coetzee v T Voetpad CC* (unreported, WCC case no 521/2012 dated 27 May 2022) at paragraph [11]; *Naude v Breda NO* (unreported, GP case no 46807/11 dated 7 November 2022) at paragraphs [16]–[17] and [29]; *Lesela v Terblanche* (unreported, FB case no 3394/2022 dated 10 February 2023); and see Marius van Staden and Stephen Leinberger 'Superannuation — a common law remedy' 2019 (December) *De Rebus* 20.