31 Judgment on confession and by default and rescission of judgments

(1)*(a)* Save in actions for relief in terms of the Divorce Act, 1979 (Act 70 of 1979), or nullity of marriage, a defendant may at any time confess in whole or in part the claim contained in the summons.

(b) The confession referred to in paragraph *(a)* shall be signed by the defendant personally and the defendant's signature shall either be witnessed by an attorney acting for the defendant, not being the attorney acting for the plaintiff, or shall be verified by affidavit.

(c) Such confession shall then be furnished to the plaintiff, whereupon the plaintiff may apply in writing through the registrar to a judge for judgment according to such confession.

(2)*(a)* Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as it deems fit.

(b) A defendant may within 20 days after acquiring knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as it deems fit.

(3) Where a plaintiff has been barred from delivering a declaration the defendant may set the action down as provided in subrule (4) and apply for absolution from the instance or, after adducing evidence, for judgment, and the court may make such order thereon as it deems fit.

(4) The proceedings referred to in subrules (2) and (3) shall be set down for hearing upon not less than five days' notice to the party in default: Provided that no notice of set down shall be given to any party in default of delivery of notice of intention to defend.

(5)*(a)* Whenever a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff, who wishes to obtain judgment by default, shall where each of the claims is for a debt or liquidated demand, file with the registrar a written application for judgment against such defendant: Provided that when a defendant is in default of delivery of a plea, the plaintiff shall give such defendant not less than five days' notice of the intention to apply for default judgment.

(b) The registrar may —

(i) grant judgment as requested;

(ii) grant judgment for part of the claim only or on amended terms;

(iii) refuse judgment wholly or in part;

(iv) postpone the application for judgment on such terms as may be considered just;

(v) request or receive oral or written submissions;

(vi) require that the matter be set down for hearing in open court.

Provided that if the application is for an order declaring residential property specially executable, the registrar must refer such application to the court.

(c) The registrar shall record any judgment granted or direction given.

(d) Any party dissatisfied with a judgment granted or direction given by the registrar may, within 20 days after such party has acquired knowledge of such judgment or direction, set the matter down for reconsideration by the court.

(e) The registrar shall grant judgment for costs:

(i) in accordance with Part II of Table A of Annexure 2 to the Rules for the Magistrates' Courts plus the sheriff's fees if the value of the claim as stated in the summons, apart from any consent to jurisdiction, is within the jurisdiction of the magistrate's court; and

(ii) in other cases, unless the application for default judgment requires costs to be taxed or the registrar requires a decision on costs from the Court, in accordance with items 1 and 2 of Section B of rule 70 plus the sheriff's fees.

(6)*(a)* Any person affected by a default judgment which has been granted, may, if the plaintiff has consented in writing to the judgment being rescinded, apply to court in accordance with Form 2B of the First Schedule to rescind the judgment, and the court may upon such application rescind the judgment.

(b) A judgment debtor against whom a default judgment has been granted, or any person affected by such judgment, may, if the judgment debt, the interest at the rate granted in the judgment and the costs have been paid, apply to court to rescind the judgment, and the court may on such application by the judgment debtor or other person affected by the judgment, rescind the judgment.

(c) An application in terms of paragraph *(b)* shall —

(i) be made on Form 2C of the First Schedule:

(ii) be accompanied by reasonable proof that the judgment debt, interest and costs, as referred to in paragraph *(b).* have been paid; and

(iii) be served on the judgment creditor not less than 10 days (which exclude a public holiday, Saturday or Sunday) before the hearing of the application and proof of such service shall accompany the application.

(d) The application referred to in paragraph *(c)* —

(i) may be set down for hearing not less than 10 days (which exclude a public holiday, Saturday or Sunday) after service of the application upon the judgment creditor; and

(ii) may be heard by a judge in chambers.

[Rule 31 substituted by GN R61 of 25 January 2019.]

Commentary

Forms. Application for rescission of judgment in terms of rule 31(6)*(a)*, 2B; Application for rescission of judgment in terms of rule 31(6)*(b)*, 2C.

General. Section 23 of the Superior Courts Act 10 of 2013 provides that a judgment by default may be granted and entered by the registrar of a division of the High Court in the manner and in the circumstances prescribed in the rules, and that a judgment so entered is deemed to be a judgment of a court of that division. Section 23 is the founding statutory provision for rule 31(5) in regard to the granting of default judgment by a registrar whenever a defendant is in default of delivery of a notice of intention to defend or of a plea and the plaintiff wishes to obtain judgment by default on a claim for a debt or a liquidated demand.

Section 23A of the Superior Courts Act 10 of 2013 provides for *(a)* the rescission of a default judgment with the written consent of a plaintiff; and *(b)* the rescission of a judgment where the judgment debt has been paid. In the latter regard the provisions of s 23A of the Act are not restricted to judgment debts arising from default judgments only. Section 23A is the founding statutory provision for rule 31(6) only in so far as rescission of default judgments with the written consent of a plaintiff or which have been paid are concerned. In other words, rule 31(6) cannot be applied where rescission of a judgment not being a default judgment in respect of which the judgment debt has been paid is sought. Judgments not being default judgments which have been paid can be set aside in terms of s 23A(2)*(a)* of the Act but not in terms of rule 31(6). It is submitted that s 23A and rule 31(6) apply to default judgments granted by a court as well as default judgments granted by a registrar in terms of rule 31.

Rule 31 makes provision for the following distinct procedures:

(a) confession of a claim contained in a summons and judgment according to such confession (subrule (1)*(a)–(c)*);

(b) default judgment by the court on a claim which is not for a debt or liquidated demand where the defendant is in default of delivery of a notice of intention to defend or a plea (subrules (2)*(a)* and (4));

(c) the setting aside, on application by a defendant, of a default judgment referred to in paragraph *(b)* above (subrule (2)*(b)*);

(d) absolution from the instance, or judgment, as the case may be, by the court where a plaintiff has been barred from delivering a declaration (subrules (3) and (4));

(e) default judgment, etc by the registrar on a claim which is for a debt or liquidated demand where the defendant is in default of delivery of a notice of intention to defend or a plea (subrule (5)*(a)*–*(c)*);

(f) default judgment by the court on a claim which is for a debt or liquidated demand where the defendant is in default of delivery of a notice of intention to defend or a plea, and where the registrar has required that the matter be set down for hearing in open court (subrule (5)*(b)*(vi));

(g) an order by the court declaring residential property specially executable where the claim is for a debt or liquidated demand and the defendant is in default of delivery of a notice of intention to defend or a plea, after the registrar has referred the application to the court (proviso to subrule (5)*(b)*); [1]

(h) the reconsideration by the court of a judgment granted or direction given by the registrar in terms of the rule at the instance of a party dissatisfied with such judgment or direction (subrule (5)*(d)*);

(i) judgment for costs by the registrar in the event of the registrar granting judgment as contemplated in paragraph *(e)* above (subrule (5)*(e)*);

(j) rescission of a default judgment, on application by a person affected by the judgment, where the plaintiff has consented in writing to such rescission (subrule (6)*(a)*);

(k) rescission of a default judgment, on application by the judgment debtor or a person affected by the judgment, where the judgment debt, the interest at the rate granted in the judgment and the costs have been paid (subrule (6)*(b)* and *(c)*).

Save for the instances provided for in subrules (2)*(b)* and (6), rule 31 does not provide for the setting aside of a default judgment granted by the court. In other words, rule 31 does not provide for the setting aside of:

(a) a default judgment granted by the court on a claim for a debt or a liquidated amount pursuant to the registrar having required that the matter be set down for hearing in open court in terms of subrule (5)*(b)*(vi);

(b) an order by the court declaring residential property specially executable where the claim is for a debt or liquidated demand, and the defendant is in default of delivery of a notice of intention to defend or a plea, pursuant to the registrar having referred the application for such an order to the court in terms of the proviso to subrule (5)*(b)*;

(c) absolution from the instance, or judgment, as the case may be, granted by the court in terms of subrule (3) where a plaintiff has been barred from delivering a declaration.

It is submitted that a judgment or order referred to in *(a)*–*(c)* above could be set aside by virtue of the High Court's common-law powers to set aside a default judgment, [2] or, if applicable, under rule 42, or in the exercise of its inherent jurisdiction by the High Court, as the case may be. [3] In *Ellis v Eden* [4] Rogers J expressed a different view:

> '[27] The learned authors of *Erasmus Superior Court Practice* submit that if a court, rather than the registrar, grants default judgment on a claim for a debt or liquidated demand, neither rule 31(2)*(b)* nor rule 31(5)*(d)* applies, and that a defendant must seek rescission in terms of the common law or rule 42(1). [5] In my opinion, however, there is no rational basis for excluding such a case from the scope of rule 31. The relevant parts of the rule were no doubt drafted on the assumption that, in the case of a debt or liquidated demand, the plaintiff would follow the less expensive procedure laid down in rule 31(5). But where, on such a claim, default judgment is instead granted by the court, there is no reason to deprive a defendant of the benefit of rule 31(2)*(b)* and, conversely, there is no reason why such a defendant should not be bound by the 20-day time limit specified in rules 31(2)*(b)*, as would have the been position in terms of 31(5)*(d)*, had the default judgment been granted by the registrar. Reading rule 31 purposively, I consider it to be necessarily implied that rule 31(2)*(b)* applies where, for any reason, the court rather than the registrar has granted default judgment on a claim for a debt or liquidated demand.'

The aforementioned judgment was given under the following relevant circumstances:

(a) the plaintiff instituted action against the defendant for, *inter alia*, an order dissolving the alleged partnership between them; [6]

(b) the defendant was in default of delivery of a notice of intention to defend and a plea; [7]

(c) an application for default judgment (i e for an order to dissolve the partnership) was brought, and granted by the court on the unopposed motion roll; [8]

(d) an application to rescind the default judgment was brought by the defendant in terms of rule 31(2)*(b)*, alternatively rule 42(1), further alternatively the common law; [9]

(e) Rogers J thought that the claim for dissolution of the partnership was one for a debt or liquidated demand and approached the rescission application on that basis for purposes of rule 31(2)*(b)*; [10]

(f) after concluding that rule 31(2)*(b)* was applicable on the basis of a purposive interpretation of rule 31, Rogers J found that the defendant had not discharged the double burden that rested upon him in respect of (i) good cause (including a bona fide defence); and (ii) condonation for his failure to comply with the 20-day time period, both as required by rule 31(2)*(b)*; [11]

(g) consequently the case for a rescission in terms of rule 31(2)*(b)* was rejected. [12]

Accepting for the moment that the default judgment was one for a debt or liquidated demand, it is submitted that rule 31(2)*(b)* was not applicable in the circumstances of the *Ellis* case, and that the judgment is incorrect for, *inter alia*, the following reasons:

(a) Until 1997 rule 31(2) provided that:

- Whenever a defendant was in default of delivery of a notice of intention to defend, or of a plea, the plaintiff could set the action down on the court roll and the court could, where the claim was for a debt or liquidated demand, without hearing evidence, and in the case of any other claim, after hearing evidence, grant judgment against the defendant or make such order as to it seemed meet. [13]
- A defendant could, within the time provided for in the subrule, apply to the court on notice to the plaintiff to set aside such default judgment upon good cause shown and upon the defendant furnishing the required security for payment of the costs of the default judgment and of the application to rescind it, and the court could thereupon set aside the judgment on such terms as to it seemed meet. [14]

(b) During 1997 rule 31(2) was substituted by the rule in it its current form, [15] the most notable changes being the deletion of claims for a debt or liquidated demand from both subrules *(a)* and *(b)*, and the deletion of the requirement in respect

of security from subrule *(b)*.

(c) During 1993 rule 35(5) was added. [16] The subrule was subsequently substituted during 1997 [17] and again during 1998. [18]

(d) It is well established that, in applying the purposive approach, care must be taken not to violate the lawgiver's language employed in the legislation. As Innes CJ put it in *Dadoo Ltd and v Krugersdorp Municipal Council*: [19]

> 'A Judge has authority to interpret, but not to legislate, and he cannot do violence to the language of the lawgiver by placing upon it a meaning of which it is not reasonably capable, in order to give effect to what he may think to be policy or object of the particular measure.'

(e) Pursuant to the amendments to the rule, and applying the well-established principles of interpretation, [20] it is clear from the language of the provisions of rule 31, and the scheme of the rule, that the granting and setting aside of default judgments are distinctly provided for as pointed out in the earlier notes above. As evidently intended by the Rules Board for Courts of Law in framing the rule in its current form, it does not provide for the setting aside of:

(i) a default judgment granted by the court on a claim for a debt or a liquidated amount pursuant to the registrar having required that the matter be set down for hearing in open court in terms of subrule (5)*(b)*(vi);

(ii) an order by the court declaring residential property specially executable where the claim is for a debt or liquidated demand, and the defendant is in default of delivery of a notice of intention to defend or a plea, pursuant to the registrar having referred the application for such an order to the court in terms of the proviso to subrule (5)*(b)*;

(iii) absolution from the instance, or judgment, as the case may be, granted by the court in terms of subrule (3) where a plaintiff has been barred from delivering a declaration.

(f) In the premises, and also having regard to the fact that the common law, rule 42 and the inherent jurisdiction of the High Court provide adequate remedies, as the case may be, the need for a purposive approach did not arise.

Although claims in convention and in reconvention are normally dealt with *pari passu*, the court has the inherent power to grant judgment by default on a claim in reconvention before the claim in convention is disposed of. [21]

If a provisional sentence judgment is given by default, it can be rescinded either in terms of rule 42(1) or under the common law, but not under rule 31(2)*(b)*. [22]

Subrule (1)*(a)*: 'A defendant may at any time confess . . . the claim contained in the summons.' This confession of claim is what is generally known as 'consent to judgment'.

In notice of motion proceedings [23] the confession must be to the claim in the notice of motion. [24]

If the claim to be confessed is founded not on the relief claimed in the summons or notice of motion but on a settlement agreement, rule 31(1) cannot be applied. [25]

It is submitted that the words 'at any time' seem to indicate that the confession may be made by the defendant at any time before judgment is granted by the court, for example, even after the close of pleadings or during the trial.

Subrule (1)*(b)*: 'The confession shall be signed . . . or be verified by affidavit.' A consent to judgment is a formal document [26] and the provisions of this subrule relating to its execution are peremptory and not merely directory. [27] Thus, the consent must be signed by the

defendant personally and his signature must either be witnessed by an attorney who is acting for him but who is not the attorney acting for the plaintiff or be verified by affidavit, the latter verification meaning that the defendant himself must verify his signature. [28]

If there is any irregularity in the consent it may be set aside, for example, where it is drawn up for the defendant by or in the offices of the plaintiff's attorney, unless verified by affidavit. [29] However, a consent to judgment duly executed cannot be arbitrarily revoked or withdrawn. [30]

In *Barbour v Herf* [31] a confession was made by the defendant which differed from the summons in that *(a)* the claim which the defendant confessed was different and *(b)* the summons claimed 'costs of suit' only whereas the confession added the qualifying costs of two expert witnesses. Furthermore the application for judgment was accompanied by a statement by the plaintiff's attorney. The full court held that the confession signed by the defendant was one which, despite the said addition, confessed the amount contained in the summons as the rule required, further that the expenses for the witnesses were part of the costs of suit and the confession did therefore not differ from what was claimed in the summons and, lastly, that while rule 31(1) did not in express terms provide for the practice of a statement or evidence by plaintiff's attorney, it did not follow that there was anything wrong with the practice or that it should be discontinued; in fact it is a salutary practice which promoted justice and fairness.

'An attorney acting for the defendant.' In rule 1 'attorney' is defined as 'a legal practitioner as defined, admitted and enrolled as such, under the Legal Practice Act, 2014 (Act 28 of 2014)'.

Subrule (1)*(c)*: 'The plaintiff may apply in writing . . . for judgment according to such confession.' The confession as envisaged by the rule must be furnished to the plaintiff in order to enable him to apply for judgment. The plaintiff may not add any further terms to the confession furnished to him. [32] The application for judgment may be made without any notice to the defendant. [33] An application under this subrule is akin to an *ex parte* application and full disclosure of the relevant facts is required, particularly as to the defendant's attitude. Failure to make full disclosure may result in the setting aside of the judgment. [34]

The defendant is not entitled to withdraw a confession made in terms of this subrule. [35]

An admission in a plea does not justify the grant of a judgment under this subrule as a plea which is not signed by the defendant personally is not a consent as envisaged by the subrule. [36] A deed of settlement of the plaintiff's claim to a servitude, the plaintiff's claim being withdrawn and the defendant undertaking in consideration of such withdrawal to transfer certain ground, is not a consent of claim within the ambit of this subrule and cannot be made an order of court under it. [37] Judgment may be granted in respect of one or more of the claims in a summons where there are multiple claims based on distinct causes of action. [38]

A plaintiff who takes judgment by consent for a portion of his claim is not entitled, without notice to the defendant, to apply for default judgment for the balance of his claim. [39] In *Changing Tides 17 (Pty) Ltd v Miekle* [40] the applicant, after service of a

summons in an action on a mortgage bond over a residential property, and having obtained a confession to judgment by the defendants in terms of rule 31(1), applied for judgment in terms of rule 31(1) together with an application to declare the immovable property executable in terms of rule 46A. It was held [41] that it is undesirable, impractical and contrary to the interests of justice to combine a judgment by confession with an application to declare an immovable residential property executable in compliance with the requirements of rule 46A. This is so because service of the application for judgment by confession would not inform the defendants, as lay persons, how they should go about placing before the judge in chambers any facts or representations regarding the fate of the residential property. In this instance the High Court proceeded to grant, in chambers, the money judgment by confession but postponed the declaration of the immovable property as executable *sine die* pending an application in open court in compliance with the legal requirements for such relief.

'Registrar.' This includes an assistant registrar. [42]

'Judge.' In terms of the definition of 'judge' in rule 1 this means a judge sitting otherwise than in open court, i e a judge in chambers.

'For judgment according to such confession.' Since there is in subrule (1) no provision similar to subrule (2)*(b)*, a defendant against whom a judgment has been granted in terms of this subrule is not entitled to apply for the rescission of such a judgment. [43] At common law a judgment can, however, be set aside on the following grounds: fraud, *justus error* (on rare occasions), in certain exceptional circumstances where new documents have been discovered, where judgment had been granted by default and, in the absence between the parties of a valid agreement to support the judgment, on the grounds of *justa causa*. [44] It may also be set aside under rule 42, if applicable. [45]

Subrule (2)*(a)*: 'Action.' In terms of rule 1 'action' means 'a proceeding commenced by summons'.

'Not for a debt or liquidated demand.' Where the claim is not for a debt or liquidated demand, the court may, after hearing evidence, grant default judgment. [46] As to what constitutes a debt or liquidated demand, see the notes to subrule (5)*(a)* s v 'Is for a debt or liquidated demand' below.

'Defendant is in default of delivery of notice of intention to defend.' Notwithstanding the period allowed for entry of appearance to defend, [47] the defendant may in terms of rule 19(5)

deliver a notice of intention to defend even after expiration of such period, provided default judgment has not yet been granted. The effect of rule 19(5) is that the late delivery of a notice of intention to defend does not entitle a plaintiff to apply for or proceed with an application for default judgment. [48] If the notice of intention to defend was delivered after the plaintiff had lodged the application for judgment by default, he shall be entitled to costs. [49]

If the defence is withdrawn subsequent to the delivery of a notice of intention to defend, default judgment may also be applied for. [50]

'Or of a plea.' A plea must be delivered within the period laid down in rule 22(1), or within the period stipulated in a notice of bar under rule 26, or, upon leave to defend having been granted in summary judgment proceedings, within the time stipulated by the court for delivery of pleadings, as the case may be.

If the defence is withdrawn subsequent to the delivery of a plea, default judgment may also be applied for. [51]

'The plaintiff may set the action down.' The application for default judgment must be set down for hearing upon not less than five court days notice to the party in default. [52] No such notice need be given to a party in default of delivery of notice of intention to defend. [53] See further the notes to subrules (4) and (5) below.

'The court may.' This subrule gives the court not only the discretion, after hearing evidence, to grant or refuse default judgment, but also to make such order as it deems fit, including such an order as to costs.

'After hearing evidence.' In, for example, an action for damages sustained in a motor car collision, the plaintiff must lead evidence. [54] Under certain circumstances evidence of damages may be given on affidavit, but proving damages by affidavit of a medical practitioner could be dangerous. [55]

'Grant judgment.' The court should hear an application for default judgment before it and within its jurisdiction: if a lower court also has jurisdiction in the matter and it could be dealt with in that court at less expense to the litigants, the court could discourage the approach to the High Court by an appropriate order as to costs. [56]

Subrule (2)*(b)*: 'A defendant may . . . apply to court . . . to set aside such judgment.' An application for rescission may be brought under this subrule where the defendant had been in default of delivery of a notice of intention to defend or a plea. [57] The subrule does not apply to judgments obtained on an unopposed basis in motion proceedings. [58] See also the notes to this subrule s v 'Set aside' below.

See further the notes to rule 31 s v 'General' above.

'Within 20 days after acquiring knowledge of such judgment.' Divergent opinions have been expressed on the effect of a statutory provision which provides that an application shall be made before a certain date. In *Theunissen v Payne* [59] it was held that the application must be set down for hearing before the prescribed date; it is not sufficient to file the application within that period. In *Du Plessis v Tager*, [60] which was concerned with the equivalent provision in the former magistrates' courts rules for the setting aside of a default judgment, [61] it was held that the rule does not require that the application must come before the court within the prescribed period, but merely that the notice of motion be served upon the respondent and filed with the clerk of the court and placed on the roll. [62] In *Government of the Islamic Republic of Iran v Berends* [63] it was held that the subrule requires no more than that the application be lodged with the registrar and served on the respondent within the prescribed period on the ground that *(a)* there is a preponderance of authority that expressions such as 'application shall be made' should be interpreted as meaning that the application must be filed with the registrar and served on the respondent within the prescribed period, [64] and *(b)* to hold otherwise would not only defeat the underlying purpose of the subrule, but would also be harsh, unjust, unreasonable and absurd. [65]

'Apply to court.' See the notes s v 'Upon notice to the plaintiff' below.

'Upon notice to the plaintiff.' The application is not on notice of motion, but merely on notice to the plaintiff. [66]

'The court may, upon good cause shown.' The court has a wide discretion in evaluating 'good cause' in order to ensure that justice is done. [67] For this reason the courts have refrained from attempting to frame an exhaustive definition of what would

constitute sufficient cause to justify the grant of an indulgence, for any attempt to do so would hamper the exercise of the discretion. [68]

The requirements for an application for rescission under this subrule have been stated to be as follows: [69]

> '(a) He (i e the applicant) must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the Court should not come to his assistance.
>
> (b) His application must be bona fide and not made with the intention of merely delaying plaintiff's claim.
>
> (c) He must show that he has a bona fide defence to plaintiff's claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour.'

Wilful default. This subrule does not require that the conduct of the applicant for rescission of a default judgment be not wilful, but it has been held that it is clearly an ingredient of the good cause to be shown that the element of wilfulness is absent. [70]

While wilful default on the part of the applicant is not a substantive or compulsory ground for refusal of an application for rescission, the reasons for the applicant's default remain an essential ingredient of the good cause to be shown. [71] The wilful or negligent nature of the

defendant's default is one of the considerations which the court takes into account in the exercise of its discretion to determine whether or not good cause is shown. [72] While the court may well decline to grant relief where the default has been wilful or due to gross negligence, the absence of gross negligence is not an absolute criterion, nor an absolute prerequisite, for the granting of relief — it is but a factor to be considered in the overall determination of whether or not good cause has been shown. [73]

The reasons for the applicant's absence or default must, therefore, be set out because it is relevant to the question whether or not his default was wilful. [74] In *Silber v Ozen Wholesalers (Pty) Ltd* [75] it has been held that the explanation for the default must be sufficiently full to enable the court to understand how it really came about, and to assess the applicant's conduct and motives. An application which fails to set out these reasons is not proper, [76] but where the reasons appear clearly, the fact that they are not set out in so many words will not disentitle the applicant to the relief sought. [77]

Before a person can be said to be in wilful default, the following elements must be shown: [78]

(a) knowledge that the action is being brought against him;

(b) a deliberate refraining from entering appearance, though free to do so; and

(c) a certain mental attitude towards the consequences of the default.

The courts have had some difficulty in defining the third requirement. At one stage it was held to be a *willingness that judgment should go against him, because of a knowledge or belief that he has no defence*. [79] In *Hainard v Estate Dewes* [80] the test of willingness was retained (although the court expressed the opinion [81] that *unconcern* or *insouciance* would be more appropriate terms), but without the qualification that the willingness must be because of a knowledge or belief that there was no defence. In *Chedburn v Barkett* [82] the court followed this suggestion, and the test adopted was whether the person alleged to be in wilful default, 'knows what he is doing, intends what he is doing, and is a free agent, and is *indifferent* as to what the consequences of his default may be'. [83] This latter test has been followed in a number of later cases [84] but it has been suggested that this test, too, is not conclusive and that the true test is whether the default is a deliberate one, i e when a defendant with full knowledge of the circumstances and of the risks attendant on his default freely takes a decision to refrain from

taking action. [85] All three elements must be established before the party can be said to have been in wilful default. The onus of proof rests ultimately on the respondent. [86] In some cases the respondent will be able to show these elements by direct evidence, but if he cannot do so, they can be shown by inference. [87]

An applicant will, therefore, be held *not* to be in wilful default if he acted on a bona fide but mistaken belief; [88] or where his default is due to a mistake, or non-compliance with the rules, on his own part; [89] or of his attorney; [90] or where the summons had not been properly served. [91]

If a party deliberately and with full knowledge of the legal consequences of the default fails to defend an action because he believes that no defence is called for, it cannot be 'wilful default'. [92]

The applicant was held to be in wilful default where he was unable to instruct an attorney because of lack of funds; [93] where he absented himself from the trial after he had been notified of the date of the trial; [94] where he had deliberately consented to an order being made against him in his absence; [95] where he had ignored the summons on him, despite advice to consult an attorney, as he was of the opinion that the court would not grant judgment against him without proof that the amount claimed was indeed owing by him; [96] where he failed to enter appearance to defend because he had no defence to the plaintiff's claim and acquiesced in the granting of judgment against him. [97]

An applicant who has been in wilful default cannot apply for a rescission of judgment if he becomes aware of a possible defence after judgment has been granted against him. [98]

Reasonable explanation. Where the applicant has provided a poor explanation for default, a good defence may compensate. [99] In circumstances where the strength of the defence on the

merits becomes crucial, the applicant must furnish sufficient information to satisfy the court that he has a good defence. [100]

Bona fide defence. In *Silber v Ozen Wholesalers (Pty) Ltd* [101] the Appellate Division held that 'good cause' includes, but is not limited to, the existence of a substantial defence. It has been held that the requirement of 'good cause' cannot be held to be satisfied unless there is evidence not only of the existence of a substantial defence but, in addition, of the bona fide presently held desire on the part of the applicant for relief actually to raise the defence concerned in the event of the judgment being rescinded. [102] It has always been the hallmark of a bona fide defence, which has to be established before rescission is granted, that the defendant honestly intends to place before a court a set of facts, which, if true, will constitute a defence. [103]

The subrule imposes on the applicant for rescission the burden of actually proving, as opposed to merely alleging, good cause for a rescission. [104] The requirement that the applicant for rescission must show the existence of a substantial defence

does, however, not mean that he must show a probability of success: it suffices if he shows a prima facie case, or the existence of an issue which is fit for trial. [105] The applicant need not deal fully with the merits of the

case, [106] but the grounds of defence must be set forth with sufficient detail to enable the court to conclude that there is a bona fide defence, and that the application is not made merely for the purpose of harassing the respondent. [107]

Although a judgment granted against a person may affect his creditworthiness, there is no reason for a court to participate in granting rescission to a party who does not wish to defend in respect of a claim which, because it was settled, the plaintiff has no intention to prosecute further. [108] Neither the fact that the existence of the default judgment makes it difficult for the defendant to obtain credit facilities from financial institutions nor the fact that the plaintiff has consented to rescission can make any difference: once it is known that the judgment was correctly granted, there is no reason to 'falsify the past' [109] to make life easier for the defendant. [110]

In *Juma v Mercedes Benz Financial Services South Africa (Pty) Ltd* [111] default judgment was given in favour of the respondent for confirmation of the termination of the credit agreement and the return of the vehicle concerned. The claim for damages was postponed *sine die* and the applicant was ordered to pay the costs on an attorney and client basis to be taxed. In rescinding the default judgment in terms of this subrule, the court held [112] that the time had arrived where credit providers who requested judgment by default also had to indicate what response, if any, the s 129 notice or the summons elicited, or what payments, if any, were made from the moment that the s 129 notice was issued to the date that default judgment was requested. In circumstances where the credit provider alleged that the agreement had been cancelled at the issue of the s 129 notice, but continued to receive payments, more was expected in the report to the court considering judgment by default. Where the consumer made payments, believing those were payments in fulfilment of the agreement, when the agreement had been cancelled and such cancellation was known only to the creditor, such receipt seemed to be a receipt under false pretences. Mitigation of damages and transparency, especially a frank and candid disclosure to a court called upon to determine the request for default judgment, were not mutually exclusive. Courts should ensure that the bad tendencies, practices and cultures in debt recovery, especially hasty and unnecessary dispossession of properties which were subject to credit agreements, did not remain a living, stubborn heritage in the history of consumer credit, when considering, especially, judgment by default. [113]

'Set aside.' The object of rescinding a judgment is 'to restore a chance to air a real dispute'. [114] See further the notes to this subrule s v 'Bona fide defence' above.

A rescinded default judgment is a nullity and neither advantage nor disadvantage can flow therefrom; the applicant is entitled to claim that the *status quo ante* the judgment be restored. [115] Once a judgment has been rescinded, the consequences thereof fall to be set aside. [116]

If a final judgment is set aside, the interruption of prescription under s 15(1) of the Prescription Act 68 of 1969 lapses, and the running of prescription is not deemed to have been interrupted. [117]

'The default judgment.' It is submitted that in appropriate circumstances, and on good cause shown, an order made under subrule (2)*(a)* in contradistinction to a default judgment, may also be set aside.

'On such terms as it deems fit.' If a defendant established a bona fide defence against a portion of a plaintiff's claim he is entitled to rescission of the whole judgment. Some courts have adopted the view that the subrule does not allow the setting aside of part of a default judgment. [118] In *Conekt Business Group (Pty) Ltd v Navigator Computer Consultants* [119] it was, however, held that a court acting under this subrule may rescind part of a default judgment provided that the judgment is divisible into discrete defensible and non-defensible parts. It has been held [120] that in a case where a defendant's defence had been struck out and default judgment subsequently granted to the plaintiff, the judgment could be rescinded to allow the defendant to challenge the plaintiff's evidence on the *quantum* of damages only or to present rebutting evidence thereon. [121]

An application for rescission of a default judgment is regarded as an indulgence and, as a general rule, the applicant would be ordered to pay the costs of such an application if the respondent's opposition thereto was reasonable. [122]

Subrule (3): 'Where a plaintiff has been barred from delivering a declaration.' Where a plaintiff has been barred from delivering a declaration [123] the defendant may set the action

down for hearing upon not less than five days' notice to the party in default [124] and apply for absolution from the instance. [125]

The defendant may also, after adducing evidence, [126] apply for judgment. The court, where the plaintiff is in default, should, however, only finally determine the action if very special circumstances exist. [127]

'The court may make such order thereon as it deems fit.' Under this subrule the court has a discretion to grant absolution from the instance or, if the plaintiff's case has been proved by means of evidence on a balance of probabilities, judgment. In addition, the court has a discretion to make any other order as it deems fit, including an order as to costs.

On the setting aside of an order made under this subrule, see the notes to rule 31 s v 'General' above.

Subrule (4): 'The proceedings . . . shall be set down for hearing.' An application for default judgment shall be set down for hearing upon not less than five days' notice to the party in default. In terms of the proviso to this subrule it is not necessary to give notice of the set-down to any party in default of delivery of a notice of intention to defend.

Some of the divisions of the High Court have their own requirements for the filing of a notice of set-down. Thus, for example, in the Western Cape Division of the High Court, Cape Town, a notice of set-down must be filed with the registrar by no later than noon on the day but one prior to the date of hearing. [128]

Subrule (5): General. Section 23 of the Superior Courts Act 10 of 2013 provides that a judgment by default may be granted and entered by the registrar of a division of the High Court in the manner and in the circumstances prescribed in the rules, and that a judgment so entered is deemed to be a judgment of a court of that division.

Under this subrule a plaintiff who wishes to obtain judgment by default in respect of a claim which is for a debt or a liquidated demand must file with the registrar a written application for judgment against the defendant. The purpose of the subrule is to relieve the burden on judges of the High Court. It empowers the registrar (and imposes on him the duty) to grant or refuse judgment in uncomplicated matters where he simply checks that all administrative and formal steps have been taken to justify a judgment, [129] and where no evidence is required to prove the amount of the claim or the cause of action. [130] The

cases are not harmonious as to whether the registrar is precluded by s 130(3) of the National Credit Act 34 of 2005 ('the NCA') from granting default judgment in terms of this subrule in respect of matters falling under the NCA. On the one hand, it has been held (by courts constituted before a single judge) that the registrar is not entitled to do so, [131] and if the registrar oversteps

his powers or if, contrary to a statutory provision, he arrogates to himself the power to grant a default judgment, such a default judgment is null and void. [132] On the other hand, it has been held (by a full court) [133] that the registrar can do so and is also competent to entertain claims under the NCA for cancellation of the credit agreement and return of the movable property concerned. [134]

Subrule (5)*(a)*: 'A defendant is in default of notice of intention to defend.' See the notes to subrule (2)*(a)* s v 'Defendant is in default of delivery of notice of intention to defend' above.

'Or a plea.' See the notes to subrule (2)*(a)* 'Or a plea' above.

'Each of the claims.' This means that where there are numerous claims, one or more of which is not for a debt or a liquidated amount, the matter should be enrolled in open court in accordance with subrule (4).

'Is for a debt or liquidated demand.' A 'liquidated demand' relating to default judgment covers much more than a 'liquidated amount in money' relating to summary judgment proceedings under rule 32. [135]

Under the old Transvaal Rule of Court 42 the words 'liquidated demand' were defined as follows:

> 'The words "liquidated demand" shall be here understood to mean a claim for a fixed definite thing, as, for instance, a claim for transfer or ejectment, for the delivery of goods, for rendering an account by a partner, for the cancellation of a contract, or the like.'

The present rules contain no such definition. The term 'debt or liquidated demand' can be equated with a claim for a fixed, certain or ascertained amount or thing, [136] and includes a liquidated claim as known at common law. [137] The undermentioned decisions illustrate how the courts have construed these words.

Accounts. It was held that while a claim for an account and debatement thereof can be a 'claim for a debt or liquidated demand', a claim for payment of the amount found to be due after debatement of the account is not a debt or liquidated demand. [138]

Audit fees. These were held not to be a debt or liquidated demand and, accordingly, a combined summons should have been issued. [139] Where the audit fee was, however, calculated in terms of s 23 of the of the Public Audit Act 25 of 2004, it was held to be a debt or liquidated demand. [140]

Cancellation of lease. Cancellation was granted in terms of a clause in a lease, giving right to cancel on breach of condition(s) of lease. [141]

Cancellation of sale and ejectment. Cancellation was granted in terms of conditions of sale and at the same time an order for ejectment was made. [142]

Cancellation of sale and forfeiture of instalments paid in terms of condition of sale. Cancellation and forfeiture was granted. [143]

Claim against deceased estate. In a matter where the plaintiff's claim against a deceased estate had been accepted by the executor, it was held that, when the executor had lodged an account which recorded an award to the plaintiff, there should at least have been an allegation in the plaintiff's summons that the estate account had lain for inspection and that there had been no objection thereto, or an objection had been withdrawn, or the account had been amended to meet the objection. In the absence of such allegations default judgment was refused. [144]

Collection costs. A mere undertaking to pay collection costs prima facie means that these are payable only in the event of the collection being successfully done; otherwise the undertaking is a penalty and subject to reduction in the event of the total being unreasonable. [145]

Company debts. A court cannot without hearing evidence make a finding under s 424(1) of the Companies Act 61 of 1973 that a director or officer is guilty of recklessness or intent to defraud, and hence liable for company debts. The grant by default of an order under s 424(1) without hearing evidence is erroneous within the meaning of rule 42(1)*(a)*, and liable to be set aside. [146]

Declaration of rights and perpetual interdict. These were held to be a liquidated demand within the meaning of former Transvaal rule 42. [147]

Declaring immovable property executable. A prayer for a declaration that immovable property be declared executable is a liquidated demand within the meaning of this subrule. [148]

Ejectment. An order for ejectment and for payment of arrear rent was granted where the defendant had refused to give up occupation, though he had received notice to do so. [149]

Income tax. Judgment was granted for an amount of tax assessed and due. [150]

Interdict. A claim *(a)* declaring a defendant as having no right to occupy a farm and *(b)* for a perpetual interdict restraining him from trespassing on the farm was granted. [151]

Maintenance. A claim for past maintenance of a child is a liquidated demand. [152]

Overdraft. An overdraft granted to a customer will clearly fall within the rule as being a debt. If a plaintiff sues for repayment of an overdraft (or a loan) all that a simple summons need contain is a statement setting out the relief claimed and the succinct outline of the cause of action, i e that an agreement of overdraft (or of loan) was concluded between the parties providing for interest on the balance outstanding from time to time at a specified (or ascertainable) rate and which overdraft (or loan) was repayable on demand (or on affixed or ascertainable date) and which, despite demand (or the arrival of that date), has not been repaid. [153] Thus, it has been held that a court is certainly not required to be astute in denying a plaintiff default judgment against his debtor, and a mere suspicion that the interest claimed in the summons exceeds that which is prescribed by the (now repealed) [154] Usury Act 73 of 1968, does not justify a court in refusing an application for default judgment or even in delaying the grant thereof. [155] Furthermore, it was held that in applications for default judgment for a

debt it cannot be assumed that where the defendant, duly served with the summons and — where the claim is based on or is supported by documentary evidence — also served with copies of such documents, does not choose to defend the action, it is a tacit acknowledgement that he does not contest the plaintiff claim(s) and has no defence(s) to advance; if the debtor should allege that he has been charged an excessive rate of interest and should then fail to avail himself of the opportunity accorded him in terms of s 11 of the Usury Act 73 of 1968, [156] to have an officer of the plaintiff bank examined on its claim, the debtor's failure would serve to reinforce the tacit acknowledgement that he had no defence to the claim; thus mere suspicion that one of the claims, i e that for interest, may be usurious, ought not, in the absence of anything more and without any protest in that regard from the defendant, to constitute an obstacle in the plaintiff's path to a judgment against a defendant. [157]

Penalty. A claim for a penalty which is not a genuine pre-estimate of the damage cannot, it would seem, be a liquidated demand in terms of the rule. [158]

Property. In a claim for delivery of property or alternatively payment of its value, the alternative claim is one for damages and evidence in regard to the value must be given. [159]

Rectification of deed of transfer. The rectification of a deed of transfer by substitution of a correct for an erroneous diagram and the amendment of the deed of transfer in conformity with the new diagram was granted. [160]

Stolen money and stolen goods. A claim for money alleged to have been stolen was refused in one division [161] and granted in others. [162] A claim for the value of goods stolen was refused. [163]

Work done and material supplied. A claim for the cost of work and labour done and material supplied is one for a debt or liquidated demand. [164]

The High Court has concurrent jurisdiction with the magistrates' courts in respect of actions instituted under the National Credit Act 34 of 2005. [165] Consequently, the registrar is entitled to deal with applications for default judgment falling under that Act. [166] It has been held by a full court of the Transvaal Provincial Division that a plaintiff ran a risk of only being allowed to recover costs on a magistrate's court scale if action under the National Credit Act 34 of 2005 was instituted in a High Court on a claim which fell within the jurisdiction of the magistrate's court. [167]

'Shall . . . file.' This subrule is phrased in peremptory language ('shall', 'moet') and it would appear that a plaintiff who wishes to obtain default judgment against a defendant in respect of a claim which is for a debt or liquidated demand is obliged to lodge a written application with the registrar. [168] In respect of costs, however, the registrar has limited powers under subrule (5)*(e)* and the question arises whether a plaintiff who seeks a judgment in respect of costs which exceeds the jurisdiction of the registrar is obliged to apply first to the registrar. [169] It is submitted that the subrule should be so construed as to entitle a plaintiff who wishes to obtain judgment in respect of a claim which is for a debt or liquidated amount, to set an

application for default judgment down as provided for in subrule (4) in the event of good cause existing on the papers. [170]

'Registrar.' In terms of rule 1 this includes an assistant registrar.

Subrule (5)*(b)*: Proviso: 'Provided that if the application is for an order declaring residential property specially executable.' As from 22 December 2017 rule 46A applies whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor, including such debtor's primary residence. In terms of rule 46A(2)*(c)* the registrar is prohibited from issuing a writ of execution against the residential immovable property of any judgment debtor unless a court has ordered execution against such property. The proviso has therefore been rendered obsolete by the provisions of rule 46A.

The question arises whether the registrar still has the power to declare immovable property of a judgment debtor other than such debtor's residential property or primary residence specially executable when granting default judgment in terms of subrule (5)*(b)*(i). It is submitted that the registrar has such power for the simple reason that in terms of rule 46(1)*(a)*(ii), which came into operation on 22 December 2017, [171] no writ of execution against the immovable property of any judgment debtor (i e immovable property other than the residential property or primary residence of a judgment debtor) shall be issued unless such property has been declared specially executable by the court *or where judgment is granted by the registrar under rule 31(5)*. See further the notes to rule 46(1)*(a)*(ii) s v 'Where judgment is granted by the registrar under rule 31(5)' below.

Subrule (5)*(d)*: 'Any party dissatisfied.' This includes the plaintiff and the defendant but not a non-litigant having an interest in the action. [172] It does not include a party who, although satisfied with the judgment granted by the registrar, seeks a court order confirming such judgment; no procedure exists by which a court could 'confirm' what amounted to its own orders. [173]

'Within 20 days.' Only court days falling within the definition of 'court day' in rule 1 are to be included in the computation of the period of 20 days.

'Has acquired knowledge.' As to what is meant by knowledge, see the notes to subrule (2)*(b)* s v 'Wilful default' above.

'Set the matter down.' This subrule does not contain any explicit directions as to the manner of set down. It is, however, clear that set down of a matter for reconsideration by the court will have to be on notice to the other parties to the action. It is, accordingly, submitted that such set down is, *mutatis mutandis*, to be in accordance with subrule (4), that is, upon not less than five days' notice to the other parties concerned.

'For reconsideration.' Subrule (5)*(d)* has elicited conflicting judgments. In *Bloemfontein Board Nominees Ltd v Benbrook* [174] it was held that the 'reconsideration' of a default judgment granted by the registrar in terms of this subrule did not mean that the court substituted its discretion for that of the registrar, but that the court would interfere with the judgment or direction given by the registrar only if it was of the opinion that the registrar had erred. [175] In *Pansolutions Holdings*

Ltd v P&G General Dealers & Repairers CC [176] it was held that the power accorded to the court under this subrule was that of substituting its discretion for that of the registrar. In addition, it was held [177] that the 'good cause' criteria applicable under rule 31(2)*(b)* were applicable when the court, in terms of this subrule, reconsidered a default judgment granted by the registrar. It is submitted that the latter view is to be preferred. See further the notes s v 'General' above.

'By the court.' As to the meaning of 'court', see the notes to rule 1 s v 'Court' above.

Subrule (5)*(e)*(i): 'The value of the claim . . . is within the jurisdiction of the magistrate's court.' In cases which fall

within the jurisdiction of the magistrate's court, the registrar is competent to grant judgment for costs in accordance with Part II of Table A of Annexure 2 to the rules for the magistrates' courts plus sheriff's fees. [178] The registrar does not have a discretion to grant attorney and client costs in a matter which falls within the jurisdiction of the magistrate's court. [179]

In *First National Bank Ltd t/a Wesbank v Prins and a Similar Case* [180] the registrar of the High Court, on interpreting the jurisdiction clauses in the underlying agreements as requiring that the claims be dealt with in the magistrate's court, declined to grant default judgment for the return of motor vehicles purchased in instalment sale agreements in terms of rule 31 of the Uniform Rules of Court and referred the cases to the High Court for adjudication. The court found [181] that the clauses did not operate to deprive the plaintiff of the right to institute proceedings in the High Court for a claim for relief arising out of cancelled instalment sale agreements even though the value of the contract might fall within the monetary jurisdiction of the magistrate's court and, accordingly, that the registrar erred in refusing, in terms of rule 31(5)*(b)*(iii) of the Uniform Rules of Court, to grant default judgment on the ground that the High Court lacked jurisdiction. After having considered the decisions in *Nedbank Ltd v Thobejane and Similar Matters,* [182] *Nedbank Ltd v Gqirana NO, and Similar Matters*, [183] *Carlyn Medical Extrusions (Pty) Ltd v Light-Be-Lighting (Pty) Ltd* [184] and paragraph E of the Practice Directive

issued by the Judge President of the Western Cape Division of the High Court on 1 February 2021 [185] the court came to the following conclusion: [186]

> '[11] For my part I favour the rationale in *Nedbank Ltd v Gqirana N.O.* and the prior judgment in *Carlyn Medical Extrusions (Pty) Ltd and Lighting (Pty) Ltd and others* [*Carlin Medical Extrusions (Pty) Ltd v Light-Be-Lighting (Pty) Ltd* (unreported, GJ case no 16312/2013 dated 2 December 2013)] where Van Oosten J held that, all things being equal, a party remains entitled to a free choice of a forum in which to bring proceedings on condition that such Court has the necessary jurisdiction and subject to the possibility of an order limiting or, if appropriate, disallowing costs. I associate myself fully with the reasoning of Van Oosten J in that matter and particularly with the quotation from *Standard Credit Corporation Ltd v Bester and Others* to the following effect:
>
> > "*. . . courts should be extremely wary of closing their doors to any litigant entitled to approach a particular court. The doors of court should at all times be open to litigants falling within their jurisdiction. If congested rolls tend to hamper the proper functioning of a court then a solution should be found elsewhere, but not by refusing to hear a litigant or to entertain proceedings in a matter within a court's jurisdiction and properly before the court.*"
>
> [12] I am also aware of a practice directive issued by the Judge President of this Division having effect from 1 February 2021, which directs that matters which fall within the jurisdiction of the Magistrates [*sic*] Court should be brought within those respective Magistrates [*sic*] Courts, arguably precluding litigants from bringing such proceedings in the High Court. That directive obviously does not apply to applications for default judgment brought before that date. Counsel acting for Firstrand Bank Ltd raised the question of the legality of such a practice directive contending that it may well be *ultra vires* inasmuch as it is at variance with the provisions of **sec 21** of the Superior Courts Act, 10 of 2013. **Section 21(1)** provides that Divisions of the High Court have jurisdiction "*over all persons residing or being in, and in relation to all causes arising in . . . within its area of jurisdiction*".
>
> [13] The issue of whether the relevant directive is *ultra vires* does not arise in the present matters however and therefore the question, if it requires determination, must wait for another day.
>
> [14] As far as applications for default judgments which are not hit by the provisions of this new practice directive, the Chief Registrar must ensure that her officials perform their duties in terms of **Rule 31(5)** rather than referring these applications for default judgment to open court on the basis *inter alia* of misconceived interpretations of the underlying jurisdiction clauses.'

Default judgment with costs on the magistrates' courts scale was consequently granted by the court. [187]

In the event that the registrar requires a matter to be set down in open court in terms of subrule (5)*(b)*(vi), the court, in considering all relevant factors when awarding costs, may

have regard to whether the litigation could have been conducted out of the magistrate's court. [188]

Subrule (5)*(e)*(ii): 'In other cases.' The 'other cases' are cases which do not fall within the jurisdiction of the magistrate's court. In such cases, the registrar is competent to grant judgment for costs in accordance with items 1 and 2 of Section B of rule 70 plus sheriff's fees unless:

(i) the application for default judgment requires costs to be taxed, or

(ii) the registrar requires a decision on costs from the court. [189]

Where taxation of costs is required in the application for default judgment, and if there is a prior agreement between the parties that attorney and client costs will be payable in the event of legal proceedings, the registrar is not only entitled but also obliged to award attorney and client costs. [190]

Subrule (6): General. The wording of this subrule echoes that of s 23A of the Superior Courts Act 10 of 2013 to a large extent and the reader is accordingly referred to the notes on s 23A in Volume 1 third edition, Part D. It would appear that the subrule is restricted to default judgments granted in terms of rule 31. In other words, the subrule appears to apply to default judgments granted in terms of rule 31(2)*(a)* and (5) only. See further the notes to rule 31 s v 'General' above and the notes to s 23A(1) of the Superior Courts Act 10 of 2013 s v 'Default judgment' in Volume 1 third edition, Part D.

1 It is submitted that the registrar could still grant an order declaring immovable property, excluding residential property or the primary home of a debtor, specially executable. See, in this regard, the notes to rule 31(5)*(b)* s v 'Proviso: "Provided that if the application is for an order declaring residential property specially executable"' below. In the event of the registrar granting such an order, it could be reconsidered, and set aside, by the court in terms of rule 31*(5)(d)*.

2 See *De Wet v Western Bank Ltd* 1979 (2) SA 103 (A) at 1042F–1043A; *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765B–C; *Nyingwa v Moolman NO* 1993 (2) SA 508 (Tk); *Harris v Absa Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T) at 528H–529A; *Naidoo v Matlala NO* 2012 (1) SA 143 (GNP) at 152H–153A.

3 See *Naidoo v Cavendish Transport Co (Pty) Ltd* 1956 (3) SA 244 (N) at 247F; *Sterkl v Kustner* 1959 (2) SA 495 (SWA) at 496E–F; *Msane v Bertie Williams (Pty) Ltd* 1962 (1) SA 910 (D) at 912D–F. In terms of s 173 of the Constitution of the Republic of South Africa, 1996, the High Court has the inherent power to protect and regulate its own process, taking into account the interests of justice.

4 2023 (1) SA 544 (WCC).

5 *Author's note:* This is a reference to Volume 2 second edition at D1–361 [Service 8, 2019].

6 At paragraph [5].

7 At paragraphs [7]–[8].

8 At paragraphs [9] and [16].

9 At paragraph [24].

10 At paragraph [26].

11 At paragraphs [26] and [31]–[52].

12 At paragraph [53].

13 Subrule (2)*(a)*.
14 Subrule (2)*(b)*.
15 By GN R417 of 14 March 1997.
16 By GN R2365 of 10 December 1993.
17 By GN R417 of 14 March 1997.
18 By GN R785 of 5 June 1998.
19 1920 AD 530 at 543, applied by the majority in *Phillips v SA Reserve Bank* 2013 (6) SA 450 (SCA) at paragraph [66]; and see *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at paragraph [18].
20 Laid down in, amongst others, *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at paragraphs [18] and [24]–[26].
21 *Matyeka v Kaaber* 1960 (4) SA 900 (T).
22 *Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd* 1977 (2) SA 576 (W); *Munshi v Naicker* 1978 (1) SA 1093 (D).
23 In terms of s 1 of the now repealed Supreme Court Act 59 of 1959 'civil summons' included, *inter alia*, a notice of motion and, accordingly, notice of motion proceedings fell within the ambit of rule 31(1) (*Citibank NA v Thandroyen Fruit Wholesalers CC* 2007 (6) SA 110 (SCA) at 113H). The Superior Courts Act 10 of 2013 does not contain a definition of 'civil summons'. It is submitted that despite the lack of a definition of 'civil summons' in the Superior Courts Act 10 of 2013 (or in these rules), rule 31(1) applies to notice of motion proceedings.
24 *Citibank NA v Thandroyen Fruit Wholesalers CC* 2007 (6) SA 110 (SCA) at 113H–I.
25 *Citibank NA v Thandroyen Fruit Wholesalers CC* 2007 (6) SA 110 (SCA) at 113J–114A.
26 *Estate Huisman v Visse* 1967 (1) SA 470 (T); *Moshal Gevisser (Trademarket) Ltd v Midlands Paraffin Co* 1977 (1) SA 64 (N).
27 *Sunset Investments (Pty) Ltd v Bramdaw* 1973 (2) SA 415 (D).
28 *Sunset Investments (Pty) Ltd v Bramdaw* 1973 (2) SA 415 (D).
29 *Mostert v South African Association* 1868 Buch 286.
30 *Moshal Gevisser (Trademarket) Ltd v Midlands Paraffin Co* 1977 (1) SA 64 (N).
31 1986 (2) SA 414 (N).
32 *Sunset Investments (Pty) Ltd v Bramdaw* 1973 (2) SA 415 (D).
33 *Sunset Investments (Pty) Ltd v Bramdaw* 1973 (2) SA 415 (D). If the judge who deals with the application for judgment is aware, from the terms of the confession, that it may not be utilized by the plaintiff for the purpose of obtaining judgment unless the defendant has failed to comply with such terms, he may require the plaintiff to satisfy him that the defendant has in fact failed to do so, and may require that notice be given to the defendant before judgment will be granted in terms of the confession (*Moshal Gevisser (Trademarket) Ltd v Midlands Paraffin Co* 1977 (1) SA 64 (N)).
34 *Bankorp Ltd v Ridl* 1993 (4) SA 276 (D) at 277B–D.
35 *Moshal Gevisser (Trademarket) Ltd v Midlands Paraffin Co* 1977 (1) SA 64 (N).
36 *Royce-Kincaid (Pty) Ltd v Wylfred Gardens (Pty) Ltd* 1974 (2) SA 554 (D).
37 *Eloff v Malan* 1928 TPD 393.
38 *Garaj v Singh* 1957 (4) SA 556 (D); *Royce-Kincaid (Pty) Ltd v Wylfred Gardens (Pty) Ltd* 1974 (2) SA 554 (D).
39 *Blaikie-Johnstone v P Hollingsworth (Pty) Ltd and Others* 1974 (3) SA 392 (D). It was suggested, and it is submitted correctly so, that *exceptio res iudicatae vel litis finitae* might lie (cf *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A)).
40 2020 (5) SA 146 (KZP).
41 At paragraphs [8]–[18].
42 See rule 1.
43 *Morkel v Absa Bank Bpk* 1996 (1) SA 899 (C) at 902F; and see *Standard Bank of SA Ltd v Essop* 1997 (4) SA 569 (D) at 576D.
44 *Le Sueur v Stainton* (unreported, KZP case no 2091/19P dated 28 July 2021) at paragraph [74]. See further the notes to rule 42(1) s v 'In addition to any other powers it may have' below.
45 *Le Sueur v Stainton* (unreported, KZP case no 2091/19P dated 28 July 2021) at paragraph [74].
46 Cf *Baliso v FirstRand Bank Ltd t/a Wesbank* 2017 (1) SA 292 (CC) at 297C.
47 See s 24 of the Superior Courts Act 10 of 2013 in Volume 1 third edition, Part D, and rule 19(1) and (2) above.
48 See *Washaya v Washaya* 1990 (4) SA 41 (ZH).
49 See rule 19(5).
50 *Matyeka v Kaaber* 1960 (4) SA 900 (T); but see *Mauritz Marais Bouers (Pty) Ltd v Carizette (Pty) Ltd* 1986 (4) SA 439 (O).
51 *Matyeka v Kaaber* 1960 (4) SA 900 (T); but see *Mauritz Marais Bouers (Pty) Ltd v Carizette (Pty) Ltd* 1986 (4) SA 439 (O).
52 Rule 31(4).
53 Rule 31(4).
54 Cf *Mashifane v Suliman* 1931 TPD 329; *Eloff v Sprinz's Executors* 1920 TPD 93; *Knight v Harris* 1962 (2) SA 317 (SR).
55 See *New Zealand Insurance Co Ltd v Du Toit* 1965 (4) SA 136 (T); *N C P Havenga v S M Parker* (unreported, TPD case dated 26 February 1993) (discussed in 1993 *De Rebus* 483); and *Marshall v Pillay* (unreported, WCC case no 3761/17 dated 28 April 2023) at paragraph [25]. It was held in *Dorfling v Coetzee* 1979 (2) SA 632 (NC) that in motor collision cases the evidence should not be confined to the *quantum* of damage suffered but should also establish the cause of action, whether there has been contributory negligence and whether there should be an apportionment. The practice in this respect is, however, not uniform. In *Venter v Nel* 1997 (4) SA 1014 (N) at 1016A it was, for example, pointed out that the practice in that division is to hear *some* evidence on claims for damages but that the inquiry is not as detailed or controversial as it would be were the matter defended.
56 *Standard Credit Corporation Ltd v Bester* 1987 (1) SA 812 (W), not approving *Standard Bank of South Africa v Shiba; Standard Bank of South Africa v Van den Berg* 1984 (1) SA 153 (W).
57 *Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd* 1977 (2) SA 576 (W) at 578B; *De Wet v Western Bank Ltd* 1977 (4) SA 770 (T) at 776E; *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1038A; *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A); *Topol v L S Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W) at 651B–C; *Athmaram v Singh* 1989 (3) SA 953 (D) at 954E; *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 468H; *Nyingwa v Moolman NO* 1993 (2) SA 508 (Tk) at 509I–510D; *Terrace Auto Services Centre (Pty) Ltd v First National Bank of South Africa Ltd* 1996 (3) SA 209 (W); *Swart v Absa Bank Ltd* 2009 (5) SA 219 (C).
58 *Eskom Holdings SOC Ltdv Akgwevhu Enterprise (Pty) Ltd* (unreported, GJ case no 4554921 dated 22 November 2022) at paragraphs [19]–[20]; and see *ADB Financial Services (Pty) Ltd v Mercantile Bank Limited* (unreported, GP case no 42352/2020 dated 8 February 2023) at paragraph [21].
59 1946 TPD 680 in which the court was concerned with s 7 of Ordinance 4 of 1927 (Transvaal).
60 1953 (2) SA 275 (O).
61 New magistrates' courts rules came into effect on 15 October 2010 (GN R740 in *GG* 33487 of 23 August 2010). Rule 49(1) now explicitly provides that the applicant must 'serve and file' his application within the prescribed period. It does not mean that the application must actually come before the magistrate's court during the period.
62 In *Du Plessis v Tager* 1953 (2) SA 275 (O) the period in question expired on 29 December, the notice of motion enrolling the application for 16 March the following year was served and filed on 11 December. This was held to comply with the rule as it then read. For the present position, see the preceding footnote.
63 1998 (4) SA 107 (NmH).
64 Reference is made (at 112H) to *Fisher v Commercial Union Assurance Co of SA Ltd* 1977 (2) SA 499 (C); *Peters v Union and National South British Insurance Co Ltd* 1978 (2) SA 58 (D); *Zungu v Kwa-Zulu Government* 1980 (1) SA 231 (D); *Tyhopho v Santam Insurance Co Ltd* 1984 (2) SA 73 (Tk); *Modise v Incorporated General Insurances Ltd* 1985 (4) SA 650 (B); *Pio v Smith* 1986 (3) SA 145 (ZH); *Tladi v Guardian National Insurance Co Ltd* 1992 (1) SA 76 (T); *Mobius Group (Pty) Ltd v Duff NO* 1992 (4) SA 752 (E).
65 At 120C–E.
66 *Miller v Paulsen* 1977 (3) SA 206 (E).
67 *Wahl v Prinswil Beleggings (Edms) Bpk* 1984 (1) SA 457 (T); *Hossein NO v Adinolfi* (unreported, GP case no A390/2019 dated 8 November 2022 — a decision of the full bench) at paragraph 19.
68 *Cairns' Executors v Gaarn* 1912 AD 181 at 186; *Abraham v City of Cape Town* 1995 (2) SA 319 (C) at 321I–J. See further the notes to rule 27(1) s v 'On good cause shown' above.
69 *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476–7, cited with approval in *HDS Construction (Pty) Ltd v Wait* 1979 (2) SA 298 (E) at 300F–301C; *Naidoo v Cavendish Transport Co Ltd* 1956 (3) SA 244 (D) at 247F; *Msane v Bertie Williams (Pty) Ltd* 1962 (1) SA 910 (N) at 912D–F; *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765B–D; *Federated Timbers Ltd v Bosman NO* 1990 (3) SA 149 (W) at

155G–H; *Kouligas & Spanoudis Properties (Pty) Ltd v Boland Bank Bpk* 1987 (2) SA 414 (O) at 417C–D; *Morkel v Absa Bank Bpk* 1996 (1) SA 899 (C) at 903D–E; *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd* 1994 (4) SA 705 (E) at 708H–709D; *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 9F; *Creative Car Sound v Automobile Radio Dealers Association 1989 (Pty) Ltd* 2007 (4) SA 546 (D) at 554F–555E; *Vosal Investments (Pty) Ltd v City of Johannesburg* 2010 (1) SA 595 (GSJ) at 599A–B; *Coetzee v Nedbank Ltd* 2011 (2) SA 372 (KZD) at 373G–I. See also *E H Hassim Hardware (Pty) Ltd v FAB Tanks CC* (unreported, SCA case no 1129/2016 dated 13 October 2017) at paragraphs [12] and [28]; *Leopard Line Haul (Pty) Ltd t/a Elite Line v New Clicks South Africa (Pty) Ltd; In re: New Clicks South Africa (Pty) Ltd v Leopard Line Haul (Pty) Ltd t/a Elite Line* (unreported, GJ case no 39276/2019 dated 16 July 2021) at paragraph [26]; *Nale Trading CC v Freyssinet Posten (Pty) Ltd In re: Freyssinet Posten (Pty) Ltd v Nale Trading (Pty) Ltd* (unreported, GJ case no 26992/2019 dated 22 September 2021) at paragraph [12]; *KT Aluminimum and Construction (Pty) Ltd v Molefe* (unreported, LP case no HCA06/2021 dated 23 February 2022) at paragraph [11]; *Thondlana v Absa Bank Limited* (unreported, GJ case no 29241/2017 dated 3 March 2022) at paragraph [26]; *Norman v Cashflow Capital (Pty) Ltd* (unreported, GP case no 19832/2020 dated 8 March 2022) at paragraph [2]; *Kgoste v 4 Seasons Logistics CC* (unreported, WCC case no 9657/2022 dated 9 November 2022) at paragraph [8]; *Hossein NO v Adinolfi* (unreported, GP case no A390/2019 dated 8 November 2022 — a decision of the full bench) at paragraph 19; *Steenkamp v Sasfin Bank Limited* (unreported, GP case no 15935/2021 dated 20 February 2023) at paragraph [11].

70 *Maujean t/a Audio Video Agencies v Standard Bank of SA Ltd* 1994 (3) SA 801 (C) at 803J; *Nale Trading CC v Freyssinet Posten (Pty) Ltd In re: Freyssinet Posten (Pty) Ltd v Nale Trading (Pty) Ltd* (unreported, GJ case no 26992/2019 dated 22 September 2021) at paragraph [13].

71 *Harris v Absa Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T) at 529E–F; *Nale Trading CC v Freyssinet Posten (Pty) Ltd In re: Freyssinet Posten (Pty) Ltd v Nale Trading (Pty) Ltd* (unreported, GJ case no 26992/2019 dated 22 September 2021) at paragraph [14]; *Thondlana v Absa Bank Limited* (unreported, GJ case no 29241/2017 dated 3 March 2022) at paragraph [26].

72 *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd* 1994 (4) SA 705 (E) at 708G; *Harris v Absa Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T) at 530B–531B; *Scholtz v Merryweather* 2014 (6) SA 90 (WCC) at 94F–96C; *Nale Trading CC v Freyssinet Posten (Pty) Ltd In re: Freyssinet Posten (Pty) Ltd v Nale Trading (Pty) Ltd* (unreported, GJ case no 26992/2019 dated 22 September 2021) at paragraph [13]; *Thondlana v Absa Bank Limited* (unreported, GJ case no 29241/2017 dated 3 March 2022) at paragraph [26].

73 *Vincolette v Calvert* 1974 (4) SA 275 (E) at 376H; *Saraiva Construction (Pty) Ltd v Zululand Electrical and Engineering Wholesalers (Pty) Ltd* 1975 (1) SA 612 (D) at 614C; *HDS Construction (Pty) Ltd v Wait* 1979 (2) SA 298 (E) at 301A–C; *Zealand v Milborough* 1991 (4) SA 836 (SE) at 838A–C; *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd* 1994 (4) SA 705 (E) at 709A–E.

74 *Brown v Chapman* 1928 TPD 320 at 328.

75 1954 (2) SA 345 (A) at 353A. See also *Mnandi Property Development CC v Beimore Development CC* 1999 (4) SA 462 (W) at 464G; *Jwacu v Jwacu* (unreported, ECM case no 3223/20 dated 1 February 2022) at paragraph [20].

76 *Marais v Mdowen* 1919 OPD 34.

77 Cf *Behncke v Winter* 1925 SWA 59.

78 This paragraph was cited with approval in *Nale Trading CC v Freyssinet Posten (Pty) Ltd In re: Freyssinet Posten (Pty) Ltd v Nale Trading (Pty) Ltd* (unreported, GJ case no 26992/2019 dated 22 September 2021) at paragraph [15].

79 *Hitchcock v Raaff* 1920 TPD 366.

80 1930 OPD 119.

81 At 124.

82 1931 CPD 423.

83 At 423 (emphasis added).

84 For example, in *Newman v Ayten* 1931 CPD 454; *Mangalelwe v Van Niekerk* 1941 EDL 229.

85 *Neuman (Pvt) Ltd v Marks* 1960 (2) SA 170 (SR) at 173A; *Maujean t/a Audio Video Agencies v Standard Bank of SA Ltd* 1994 (3) SA 801 (C) at 804C; *Harris v Absa Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T) at 529G–530B; and see *Hendricks v Allen* 1928 CPD 519; *Reddy v Chellan* (1928) 49 NLR 239; *De Beer v Dippenaar* 1922 OPD 196; *Kouligas & Spanoudis Properties (Pty) Ltd v Boland Bank Bpk* 1987 (2) SA 414 (O) at 417E–H; *Morkel v Absa Bank Bpk* 1996 (1) SA 899 (C) at 905C–D. In the latter case it was held that the rules do not make provision for a defendant to apply for a rescission of judgment if he becomes aware of a possible defence after judgment has been granted against him.

86 Whilst the respondent has to prove wilfulness of the default, the applicant bears the overall burden of proving good cause for the rescission of a default judgment (*Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352G–H; *Leopard Line Haul (Pty) Ltd t/a Elite Line v New Clicks South Africa (Pty) Ltd; In re: New Clicks South Africa (Pty) Ltd v Leopard Line Haul (Pty) Ltd t/a Elite Line* (unreported, GJ case no 39276/2019 dated 16 July 2021) at paragraph [26]).

87 *Mahomed Abdulha v Chochan* 1933 NPD 334.

88 As, for example, in *Koekemoer v Viljoen* 1921 TPD 129.

89 *O'Reilly v Montgomery* 1923 (2) PH L21 (CPD).

90 *Doyle v McDonnel* (1901) 11 CTR 310; *Jabavu & Co Ltd v Corfield* 1906 EDC 128; *Joosub v Natal Bank Ltd* 1908 TS 375; *Heinze v Van Aardt* 1920 SWA 61. The court is, however, entitled to refuse an application for rescission where the default is that of the applicant's attorney (*Du Plessis v Tager* 1953 (2) SA 275 (O) at 280; *Cavalinias v Claude Neon Lights Ltd* 1965 (2) SA 649 (T)).

91 *Peters and October v Isaacs* 1931 CPD 450. See also *Fraind v Nothmann* 1991 (3) SA 837 (W).

92 *V Saitis and Co (Pvt) Ltd v Fenlake (Pvt) Ltd* [2002] 4 All SA 50 (ZH) at 61*g*.

93 *Bowes v Pinnick* 1905 TS 156: he could have appeared personally or asked leave to defend *in forma pauperis*.

94 *Neuman (Pvt) Ltd v Marks* 1960 (2) SA 170 (SR).

95 *Naidoo v Narainsamy* 1956 (3) SA 223 (N).

96 *Vincolette v Calvert* 1974 (4) SA 275 (E).

97 *Maujean t/a Audio Video Agencies v Standard Bank of SA Ltd* 1994 (3) SA 801 (C). See also *Blue Crane Route Municipality v Municipal Workers Retirement Fund* (unreported, ECG case no 3016/2019 dated 8 October 2020) at paragraph [20].

98 *Morkel v Absa Bank Bpk* 1996 (1) SA 899 (C). See, however, *Kouligas & Spanoudis Properties (Pty) Ltd v Boland Bank Bpk* 1987 (2) SA 414 (O).

99 *Carolus v Saambou Bank Ltd; Smith v Saambou Bank Ltd* 2002 (6) SA 346 (SE) at 349B–C; *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at paragraph [12]; *Creative Car Sound v Automobile Radio Dealers Association 1989 (Pty) Ltd* 2007 (4) SA 546 (D) at 555C–D; *Gangat v Akoon* (unreported, GJ case nos A5044/2019; 3751/2007 dated 21 December 2021 — a decision of the full court) at paragraph [30]; *Thondlana v Absa Bank Limited* (unreported, GJ case no 29241/2017 dated 3 March 2022) at paragraph [28]; *Kgoste v 4 Seasons Logistics CC* (unreported, WCC case no 9657/2022 dated 9 November 2022) at paragraph [8]. In *Valor IT v Premier, North West Province* 2021 (1) SA 42 (SCA) at paragraph [38] Plasket JA, in a different context, said that 'very weak prospects of success may not offset a full, complete and satisfactory explanation for a delay; while strong merits of success may excuse an inadequate explanation for the delay'. This approach was adopted in rescission proceedings under this rule in *Leopard Line Haul (Pty) Ltd t/a Elite Line v New Clicks South Africa (Pty) Ltd; In re: New Clicks South Africa (Pty) Ltd v Leopard Line Haul (Pty) Ltd t/a Elite Line* (unreported, GJ case no 39276/2019 dated 16 July 2021) at paragraph [26].

100 *Carolus v Saambou Bank Ltd; Smith v Saambou Bank Ltd* 2002 (6) SA 346 (SE) at 349B–E.

101 1954 (2) SA 345 (A) at 352. See also *Wright v Westelike Provinsie Kelders Bpk* 2001 (4) SA 1165 (C) at 1180F–1181F; *Harris v ABSA Bank Ltd t/a Volkskas* [2002] 3 All SA 215 (T) at 217*f*–218*c*; *Gangat v Akoon* (unreported, GJ case nos A5044/2019; 3751/2007 dated 21 December 2021 — a decision of the full court) at paragraphs [27]–[34]. See, in general, *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) at 350D and *Scholtz v Merryweather* 2014 (6) SA 90 (WCC) at 93F–94E.

102 *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352G–H; *Galp v Tansley NO* 1966 (4) SA 555 (C) at 560; *Kritzinger v Northern Natal Implement Co (Pty) Ltd* 1973 (4) SA 542 (N) at 546; *Nale Trading CC v Freyssinet Posten (Pty) Ltd In re: Freyssinet Posten (Pty) Ltd v Nale Trading (Pty) Ltd* (unreported, GJ case no 26992/2019 dated 22 September 2021) at paragraph [24]; *Jwacu v Jwacu* (unreported, ECM case no 3223/20 dated 1 February 2022) at paragraphs [24]–[30]; *RGS Properties (Pty) Ltd v Ethekwini Municipality* 2010 (6) SA 572 (KZD) at 575D–G and the further authorities there referred to. In the latter case the court stated (at 575G–576C):
'I may add to this principle that judgment by default is inherently contrary to the provisions of s 34 of the Constitution. The section provides that everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or, where appropriate, another independent and impartial tribunal or forum. Therefore, in my view, in weighing up facts for decision, the court must on the one hand balance the need of an individual who is entitled to have access to court, and to have his or her dispute resolved in a fair public hearing, against those facts which led to the default judgment being granted in the first instance. In its deliberation the court will no doubt be mindful, especially when assessing the requirement of reasonable cause being shown, that while this requirement incorporates, among others, showing the existence of a bona fide defence, the court is not seized with the duty to evaluate the merits of such defence. The fact that the court may be in doubt about the prospects of the defence to be advanced, is not a good reason why the application should not be granted. That said however, the nature of the defence advanced must not be such that it prima facie amounts to nothing more

than a delaying tactic on the part of the applicant.'

103 *Saphula v Nedcor Bank Ltd* 1999 (2) SA 76 (W) at 79C–D; *ADB Financial Services (Pty) Ltd v Mercantile Bank Limited* (unreported, GP case no 42352/2020 dated 8 February 2023) at paragraph [23].

104 *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352G–H; *De Vos v Cooper & Ferreira* 1999 (4) SA 1290 (SCA) at 1304H; *Brangus Ranching (Pty) Ltd v Plaaskem (Pty) Ltd* 2011 (3) SA 477 (KZP) at 485A–C.

105 See, for example, *Brown v Chapman* 1928 TPD 320 at 328; *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476–7; *Kritzinger v Northern Natal Implement Co (Pty) Ltd* 1973 (4) SA 542 (N); *Greenberg v Meds Veterinary Laboratories (Pty) Ltd* 1977 (2) SA 277 (T) at 279; *Kavasis v South African Bank of Athens Ltd* 1980 (3) SA 394 (D) at 395; *Sanderson Technitool (Pty) Ltd v Intermenua (Pty) Ltd* 1980 (4) SA 573 (W) at 575; *Kouligas & Spanoudis Properties (Pty) Ltd v Boland Bank Bpk* 1987 (2) SA 414 (O) at 417C–D; *Federated Timbers Ltd v Bosman NO* 1990 (3) SA 149 (W) at 155G–I; *Morkel v Absa Bank Bpk* 1996 (1) SA 899 (C) at 903D–E; *Saphula v Nedcor Bank Ltd* 1999 (2) SA 76 (W) at 79C; *Santam Ltd v Bamber* [2006] 1 All SA 311 (W) at 315*b–c*; *Pienaar v Bean* (unreported, WCC case no A277/2019 dated 21 October 2020) at paragraphs [19] and [20]; *Gangat v Akoon* (unreported, GJ case nos A5044/2019; 3751/2007 dated 21 December 2021 — a decision of the full court) at paragraphs [27]–[35]; *Jwacu v Jwacu* (unreported, ECM case no 3223/20 dated 1 February 2022) at paragraph [31]–[36].

106 *Brown v Chapman* 1928 TPD 320; *Greenberg v Meds Veterinary Laboratories (Pty) Ltd* 1977 (2) SA 277 (T) at 279; *Kavasis v South African Bank of Athens Ltd* 1980 (3) SA 394 (D) at 395.

107 *Ngcezulla v Stead* 1912 EDL 110; *Scheider v Abel* 1916 CPD 346; *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476. In *Standard Bank of SA Ltd v El-Naddaf* 1999 (4) SA 779 (W) at 785I–786B Marais J declined to follow *Grant v Plumbers (supra)* in so far as that case may suggest that a mere bald averment 'which appears in all the circumstances to be needlessly bald, vague or sketchy' is sufficient to demonstrate bona fides. Marais J held (at 786B–D) that the degree of detail must depend on the circumstances. See also *Duma v Absa Bank Ltd* 2018 (4) SA 463 (GP) at paragraph [8].

108 *Saphula v Nedcor Bank Ltd* 1999 (2) SA 76 (W) at 79A–B; and see *Swart v Absa Bank Ltd* 2009 (5) SA 219 (C); *Nedbank Ltd v Soneman* 2013 (3) SA 526 (ECP) at 528E–530G and the authorities there referred to.

109 *Saphula v Nedcor Bank Ltd* 1999 (2) SA 76 (W) at 79C; and see *Swart v Absa Bank Ltd* 2009 (5) SA 219 (C).

110 *Lazarus v Nedcor Bank Ltd; Lazarus v Absa Bank* 1999 (2) SA 782 (W); and see *Weare v Absa Bank Ltd* 1997 (2) SA 212 (D) at 216E; *Swart v Absa Bank Ltd* 2009 (5) SA 219 (C).

111 2022 (3) SA 506 (WCC).

112 At paragraph [19].

113 At paragraph [20].

114 *Lazarus v Nedcor Bank Ltd; Lazarus v Absa Bank* 1999 (2) SA 782 (W).

115 *Jasmat v Bhana* 1951 (2) SA 496 (T) at 499D–500F. In the *Jasmat* case it was held (at 499D–500G) that an occupier who vacates after a writ is issued pursuant to a default judgment is entitled to repossession on rescission until such time as the occupier has established a right to occupy.

116 *Naidoo v Somai* 2011 (1) SA 219 (KZD) at 221G–H; *Securiforce CC v Ruiters* 2012 (4) SA 252 (NCK) at 261D–E.

117 Section 15(2) of the Prescription Act 68 of 1969.

118 *Kavasis v South African Bank of Athens Ltd* 1980 (3) SA 394 (D); *Gründer v Gründer* 1990 (4) SA 680 (C); *Zealand v Milborough* 1991 (4) SA 836 (SE); *Terrace Auto Services Centre (Pty) Ltd v First National Bank of South Africa Ltd* 1996 (3) SA 209 (W) at 213D–214G.

119 2015 (4) SA 103 (GJ) at 110F–G and 110H–111C. In *SOS Kinderdorf International v Effie Lentin Architects* 1993 (2) SA 481 (Nm), the view taken in *Maia v Total Namibia (Pty) Ltd* 1991 (2) SA 188 (Nm) was endorsed that the court is not in any way limited in setting aside a part of a default judgment. See also *Silky Touch International (Pty) Ltd v Small Business Development Corporation Ltd* [1997] 3 All SA 439 (W) and *Securiforce CC v Ruiters* 2012 (4) SA 252 (NCK), in both of which it has been held that under s 36 of the Magistrates' Courts Act 32 of 1944 and the magistrates' courts rules a partial rescission of a judgment is lawful.

120 *Revelas v Tobias* 1999 (2) SA 440 (W).

121 *Revelas v Tobias* 1999 (2) SA 440 (W) at 447A–E.

122 *Phillips t/a Southern Cross Optical v SA Vision Care (Pty) Ltd* 2000 (2) SA 1007 (C) at 1015G–H. See also *Greeff v FirstRand Bank Ltd* 2012 (3) SA 157 (NCK) at 166E. In the latter case it was held (at 166E–H) that, having regard to the relevant circumstances, each party had to pay its own costs.

123 As to bar, see rule 26 above.

124 In terms of the proviso to subrule (4) no notice of set down need be given to any party in default of delivery of a notice of intention to defend.

125 As to absolution from the instance, see the notes to rule 39 s v 'Apply for absolution from the instance' below.

126 The evidence may be presented *viva voce* or, with the leave of the court, by means of affidavit.

127 *Bosman v Du Toit's Executors* 1937 CPD 209; and see *Estate De Vries v Estate De Vries* 1943 CPD 502; *Eleftheriou v Universal Trading Co* 1946 TPD 173.

128 See paragraph 18 of the Consolidated Practice Notes of that division of the High Court in Volume 3, Part N1.

129 *Standard Bank of SA Ltd v Ngobeni* 1995 (3) SA 234 (V) at 235B–D.

130 *Erf 1382 Sunnyside (Edms) Bpk v Die Chipi BK* 1995 (3) SA 659 (T) at 661I–J.

131 *Theu v First Rand Auto Receivables (RF) Ltd* (unreported, GP case no 89371/19 dated 12 June 2020) at paragraphs [34]–[47]; *Seleka v Fast Issuer SPV (RF) Ltd* (unreported, GP case no 4660/20 dated 10 March 2021) at paragraph [15]; *Xulu v Standard Bank of South Africa Ltd* (unreported, KZP case nos 1570/21 and 2909/14 dated 23 August 2021) at paragraph [12]; *Gsasamba v Mercedes-Benz Financial Services SA (Pty) Ltd* 2023 (1) SA 141 (FB) at paragraphs [30]–[68].

132 *Seleka v Fast Issuer SPV (RF) Ltd* (unreported, GP case no 4660/20 dated 10 March 2021) at paragraph [15].

133 *Nedbank Ltd v Mollentze* 2022 (4) SA 597 (ML) at paragraphs [12]–[37]. The judgment of the full court in this case was criticized and not followed by Snellenburg AJ in *Gsasamba v Mercedes-Benz Financial Services SA (Pty) Ltd* 2023 (1) SA 141 (FB) at paragraphs [34]–[67].

134 *Nedbank Ltd v Mollentze* 2022 (4) SA 597 (ML) at paragraphs [38]–52].

135 See the notes to rule 32(1)*(b)* s v 'Liquidated amount in money' below.

136 See Harms *Main Binder* B–202 and, in general, *Allied Bakeries (Pvt) Ltd v Pitzar* 1962 (1) SA 339 (SR); *Windsor Diesels (Pvt) Ltd v Shangani Saw Mills (Pvt) Ltd* 1969 (3) SA 145 (R); *Morris v Stern* 1970 (1) SA 246 (R); *Brooks v Martin Bros Plumbing Co (Pvt) Ltd* 1974 (2) SA 39 (R); *Supreme Diamonds (Pty) Ltd v Du Bois; Regent Neckware Manufacturing Co (Pty) Ltd v Ehrke* 1979 (3) SA 444 (W); *Nedbank Ltd v Mollentze* 2022 (4) SA 597 (ML) at paragraphs [40]–[52]; *Auditor-General of South Africa v The Accounting Officer of Gateway Airports Authority (Ltd)* (unreported, LP case no 124/2022 dated 26 May 2022) at paragraph [4].

137 *Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd* 1962 (1) SA 736 (T); *International Harvester v Ferreira* 1975 (3) SA 831 (SE); and see *Quality Machine Builder v M I Thermocouples (Pty) Ltd* 1982 (4) SA 591 (W) and *Neves Builders & Decorators v De la Cour* 1985 (1) SA 540 (C).

138 *Allied Bakeries (Pvt) Ltd v Pitzar* 1962 (1) SA 339 (SR) and *Consolidated Fish Distributors (Pty) Ltd v Sargeant, Jones, Valentine & Co* 1966 (4) SA 427 (C), following *SA Fire and Accident Insurance Co Ltd v Hickman* 1955 (2) SA 131 (C). The *Allied Bakeries* case was approved in *Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd* 1962 (1) SA 736 (T). For a somewhat complicated order granted on a claim for a statement of account and debatement thereof, see *Hynes v Bailey* 1974 (2) SA 580 (D). Judgment was also granted on a summons claiming a specified amount 'being the fair, reasonable and equitable value of assets sold by a defendant who had received the proceeds thereof' (*Berringer v Berringer* 1953 (1) SA 38 (E)).

139 *Consolidated Fish Distributors (Pty) Ltd v Sargeant, Jones, Valentine & Co* 1966 (4) SA 427 (C).

140 *Auditor-General of South Africa v The Accounting Officer of Gateway Airports Authority (Ltd)* (unreported, LP case no 124/2022 dated 26 May 2022) at paragraphs [6]–[7] and [10].

141 *Marx v Pratt* 10 CTR 626. See also *Solomon v Van Zyl* 18 CTR 1093; *Du Plessis v Du Plessis* 1914 EDL 124.

142 *Welcome Estate Ltd v Muller* (1911) 28 *SALJ* 521. See also the notes s v 'Ejectment' below.

143 *Phillips Estate v Cornelissen* 1913 CPD 922. In *Sadien v Sulamania Islamic Free School* 1934 (1) PH F24 (CPD) an order for the refund of a purchase price was granted.

144 *McNicol v Delport NO* 1980 (4) SA 287 (W).

145 *Noord-Kaapse Lewendehawe Koöp v Broden* 1975 (4) SA 643 (NC). Refused in *Cape Eastern Meat Co-operative Co Ltd v Price* 1962 (1) SA 448 (E), unless the amount is set out in the summons. Granted in *Trinidad & General Asphalt Co v O'Connel* 1970 (2) SA 779 (NC). See further *SA Mutual Life Assurance Society Ltd v Uys* 1970 (4) SA 489 (O); *UDC Rhodesia Ltd v Usewokinze* 1972 (4) SA 446 (R); *Claude Neon Lights (SA) Ltd v Schlemmer* 1974 (1) SA 143 (N); *Van Houwelingen v Van Rensburg* 1974 (1) SA 159 (C); *Western Bank v Carmichael* 1974 (2) SA 232 (E); *Western Bank Ltd v Honeyville* 1974 (4) SA 148 (D). In regard to what constitutes collection costs, see *Sentraal Westelike Koöperatiewe Maatskappy Bpk v Smith* 1980 (2) SA 371 (O).

146 *Minnaar v Van Rooyen NO* 2016 (1) SA 117 (SCA) at 121C–D and 122B–D.

147 *Curlewis v Carlyle* 1908 TS 932.

148 See *Entabeni Hospital Ltd v Van der Linde* 1994 (2) SA 422 (N) at 424G–I; *Erf 1382 Sunnyside (Edms) Bpk v Die Chipi BK* 1995 (3) SA 659 (T) at 661H–I; *Nedbank Ltd v Mortinson* 2005 (6) SA 462 (W) at 469I–470A; *Standard Bank of South Africa Ltd v Saunderson* 2006 (2) SA 264 (SCA) at 276I–J; *Absa Bank Ltd v Ntsane* 2007 (3) SA 554 (T) at 557G–H. See further the notes to the proviso to subrule (5) s v 'Provided that if the application is for an order declaring residential property specially executable' below.

149 *Bell v Locke* 15 SC 199; *Grundlingh v Grundlingh* 3 SC 45; *Morris v Stern* 1970 (1) SA 246 (R); *Brooks v Martin Bros Plumbing Co (Pvt) Ltd* 1974 (2) SA 39 (R).

150 *Colonial Government v Rosenberg* 1906 (16) CTR 34.

151 *Rhodes Fruit Farms Limited v Williams* 1939 CPD 50.

152 *Martin v Le Vatte* 1914 CPD 212.

153 *Volkskas Bank Ltd v Wilkinson* 1992 (2) SA 388 (C).

154 The Usury Act 73 of 1968 was repealed by the National Credit Act 34 of 2005 with effect from 1 June 2006 (*GG* 28824 of 11 May 2006). See further the *excursus* to rule 17 s v 'Interest' above.

155 *Volkskas Bank Ltd v Wilkinson* 1992 (2) SA 388 (C).

156 Now s 169(1) of the National Credit Act 34 of 2005.

157 *Volkskas Bank Ltd v Wilkinson* 1992 (2) SA 388 (C).

158 *Pearl Assurance Co v Union Government* 1934 AD 560; but see the Conventional Penalties Act 15 of 1962 and *Western Bank Ltd v Meyer* 1973 (4) SA 697 (T), following *Maiden v David Jones (Pty) Ltd* 1969 (1) SA 59 (N). See also *Claude Neon Lights (SA) Ltd v Schlemmer* 1974 (1) SA 143 (N). Collection costs which prima facie amount to a penalty will not be granted (*Midde-Vrystaatse Suiwelkorporasie Bpk v Bondesio* 1971 (3) SA 110 (O)).

159 *Supreme Diamonds (Pty) Ltd v Du Bois; Regent Neckware Manufacturing Co (Pty) Ltd v Ehrke* 1979 (3) SA 444 (W).

160 *Colonial Government v Logan* 25 SC 924.

161 *Du Toit v Grobler* 1947 (3) SA 213 (SWA).

162 *Brown Bros & Taylor (Pty) Ltd v Smeed* 1957 (2) SA 498 (C); *Van der Westhuizen NO v Kleynhans* 1969 (3) SA 174 (O), and on appeal *sub nomine Kleynhans v Van der Westhuizen NO* 1970 (1) SA 565 (O). See also *Kolrod Motors (Pty) Ltd v Bhula* 1976 (3) SA 836 (W).

163 *Brown Bros & Taylor (Pty) Ltd v Smeed* 1957 (2) SA 498 (C).

164 *International Harvester v Ferreira* 1975 (3) SA 831 (SE).

165 *Nedbank Ltd v Mateman*; *Nedbank Ltd v Stringer* 2008 (4) SA 276 (T) at 280B and 284F–G. See also *Standard Bank of South Africa Ltd v Panayiotts* 2009 (3) SA 363 (W) at 368B–H; *FirstRand Bank Ltd v Maleke and Three Similar Cases* 2010 (1) SA 143 (GSJ) at 159A–D; *Standard Bank of SA Ltd v Kekana and Similar Cases* (unreported, WCC case no 19167/2019 dated 25 May 2020); Roestoff and Coetzee (2008) 71 *THRHR* 678; Van Heerden 2008 *TSAR* 840. In *Nedbank Ltd v Mashaba and Other Similar Matters* 2024 (3) SA 153 (GJ) Gilbert AJ, however, held that the magistrate's court has exclusive jurisdiction under s 127(8)*(a)* of the National Credit Act 34 of 2005 and that the judgment of the full court in *Mateman* was not binding upon the court. The applications for default judgment were therefore struck from the roll for lack of jurisdiction. Subsequently, leave to appeal to the Supreme Court of Appeal was granted (*Nedbank Limited v Abrahams* (unreported, GJ case no 2023-003529 dated 18 March 2024)).

166 *Nedbank Ltd v Mateman; Nedbank Ltd v Stringer* 2008 (4) SA 276 (T).

167 *Nedbank Ltd v Mateman*; *Nedbank Ltd v Stringer* 2008 (4) SA 276 (T). The *ratio* for this decision is difficult to understand. In respect of matters falling under the National Credit Act 34 of 2005, the magistrate's court has an unlimited jurisdiction by virtue of the provisions of s 172(2) of the National Credit Act and s 29(1)*(e)* of the Magistrates' Courts Act 32 of 1944. This was recognized by the full court (at 284A–B). There is, therefore, no monetary limit which could, as in the cases setting the general principle in respect of the risk of costs being granted only on a magistrate's court scale, activate that risk. Simply put, the general principle does not seem to apply in actions falling under the National Credit Act 34 of 2005.

168 *Entabeni Hospital Ltd v Van der Linde* 1994 (2) SA 422 (N); *Erf 1382 Sunnyside (Edms) Bpk v Die Chipi BK* 1995 (3) SA 659 (T); *Lindeijer and Another NNO v Butler* 2010 (3) SA 348 (ECP) at 350B–352C, not following *Standard Bank of SA Ltd v Snyders and Eight Similar Matters* 2005 (5) SA 610 (C) at 616A–E.

169 In terms of subrule (5)*(b)*(vi) the registrar may, after an application for judgment has been filed, require that the matter be set down for hearing in open court.

170 For example, the existence of an agreement providing for costs to be paid on the scale as between attorney and client. See, however, the remarks of Jones J in *Lindeijer and Another NNO v Butler* 2010 (3) SA 348 (ECP) at 351I–J.

171 Under GN R1272 of 17 November 2017 in *GG* 41257 of 17 November 2017.

172 See the definition of 'party' in rule 1 above.

173 *FirstRand Bank Ltd v Woods and Similar Cases* 2011 (5) SA 536 (ECP) at 540C–D, 540I–541C and 541H–542B.

174 1996 (1) SA 631 (O) at 633H.

175 *Bloemfontein Board Nominees Ltd v Benbrook* 1996 (1) SA 631 (O) at 633H.

176 2011 (5) SA 608 (KZD) at 610H–I. See also *Steenkamp v Sasfin Bank Limited* (unreported, GP case no 15935/2021 dated 20 February 2023) at paragraph [9].

177 *Pansolutions Holdings Ltd v P&G General Dealers & Repairers CC* 2011 (5) SA 608 (KZD) at 611F. See also *Steenkamp v Sasfin Bank Limited* (unreported, GP case no 15935/2021 dated 20 February 2023) at paragraph [9].

178 See also *FirstRand Bank Ltd v Maleke and Three Similar Cases* 2010 (1) SA 143 (GSJ) at 152F–G and 152I–J.

179 *Bloemfontein Board Nominees Ltd v Benbrook* 1996 (1) SA 631 (O) at 634B and 635F. If there is a prior agreement between the parties that attorney and client costs will be payable in the event of legal proceedings, a magistrate's court is competent to make such an award (see the notes to s 80(3) s v 'Under a special agreement' in Jones & Buckle *Civil Practice* vol I).

180 Unreported, WCC case no 4028/2020 dated 26 February 2021.

181 At paragraph [4].

182 2019 (1) SA 594 (GP), subsequently overruled on appeal in *Standard Bank of South Africa Ltd v Mpongo* 2021 (6) SA 403 (SCA) (dated 25 June 2021), in which the Supreme Court of Appeal held that a court was obliged by law to hear any matter that fell within its jurisdiction and had no power to exercise a discretion to decline to hear such a matter on the ground that another court (for example, a magistrate's court) had concurrent jurisdiction.

183 2019 (6) SA 139 (ECG), subsequently overruled on appeal in *Standard Bank of South Africa Ltd v Mpongo* 2021 (6) SA 403 (SCA) (dated 25 June 2021), in which the Supreme Court of Appeal held that a court was obliged by law to hear any matter that fell within its jurisdiction and had no power to exercise a discretion to decline to hear such a matter on the ground that another court (for example, a magistrate's court) had concurrent jurisdiction.

184 Unreported, GJ case no 16312/2013 dated 2 December 2013.

185 Paragraph E reads as follows:
'MATTERS FALLING WITHIN THE JURISDICTION OF THE MAGISTRATE'S COURT
All matters in respect of which the respective magistrates' courts have jurisdiction, shall be instituted in that court having jurisdiction in respect of the matter.'
In *Standard Bank of South Africa Ltd v Mpongo* 2021 (6) SA 403 (SCA) (dated 25 June 2021), the Supreme Court of Appeal held that a court was obliged by law to hear any matter that fell within its jurisdiction and had no power to exercise a discretion to decline to hear such a matter on the ground that another court (for example, a magistrate's court) had concurrent jurisdiction.

186 At paragraphs [11]–[14] (footnotes omitted).

187 At paragraph [15].

188 Rule 67A(2)*(f)*.

189 *Bloemfontein Board Nominees Ltd v Benbrook* 1996 (1) SA 631 (O) at 634B.

190 *Bloemfontein Board Nominees Ltd v Benbrook* 1996 (1) SA 631 (O) at 635D.