22 Plea

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

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

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

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

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

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

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

Commentary

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

The plea is the defendant's answer to the claim contained in the plaintiff's declaration or particulars of claim annexed to a combined summons, as the case may be, and in it the defendant must set out whatever defence he relies upon. The purpose of pleading being to clarify the issues between the parties, [1] the allegations in the plea must be of sufficient precision to enable the plaintiff to know what is the case he has to meet. [2] The defendant cannot,

therefore, rely upon a defence which is not pleaded, or which he is not allowed to incorporate into the plea by an amendment. A pleader cannot be allowed to direct the attention of the other party to one issue and then, at the trial, attempt to canvass another. [3]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) if a plaintiff admits a contract containing a clause stating that it was entered into irrespective of any misrepresentations, he cannot plead

misrepresentation; [20]

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

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

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

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

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

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

A defence must be pleaded as well as proved, [28] for the court sits to try the issues raised by the pleadings. [29] A defendant who has missed his true defence, or who has learned of it only from facts which appeared during the trial, must therefore raise the defence formally and have it placed on record. [30] If no amendment is made to the pleadings, the defence will as a general rule not be adjudicated upon. [31] The same applies where the defence arises out of facts which

have occurred after *litis contestatio.* [32]

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

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

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

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

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

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

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

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

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

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

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

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

the case, are known not to be true in reality. [45] However, a court will not generally regard itself as being bound by a mistake of law on the part of a litigant. [46]

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

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

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

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

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

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

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

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

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

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

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

All matter justifying or excusing the act complained of by the plaintiff must be specially and separately pleaded. [64] A denial cannot be made to do the work of a plea in confession and avoidance. The function of a denial is to contradict, not to excuse or justify; its object is to compel the plaintiff to prove the truth of the allegation traversed. As a general rule, the onus is on the plaintiff to prove those facts which have been denied, but on the defendant to prove facts which he has alleged by way of confession and avoidance. [65] A defendant will not be allowed to shift the onus by denying when he should confess and avoid; on the other hand, he should not attract the possible incidence of an onus by confessing and avoiding when he can merely deny. [66]

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

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

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

'Or state which … facts are not admitted and to what extent.' This subrule gives effect to earlier decisions of various provincial divisions, [72] and allows a defendant in his plea to state which of the material facts alleged in the summons are not admitted and to what extent. Though the rule does not require a defendant to give reasons for the non-admission, it has

been held that the rule does not alter the common law or existing practice which allows a plea of non-admission only if it is clear from the plea that the defendant has good reason for not complying with the basic rule to admit, deny or confess and avoid.

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

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

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

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

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

What is required of the defendant is that he states the grounds of his defence with sufficient precision, and in sufficient detail, to enable the plaintiff to know what case he has to meet. [80]

It is not enough for the plea to state the *nature* of the defence without setting out the material facts upon which it is based. [81] The defendant cannot make merely a general allegation that the contract sued upon was induced by fraud [82] or by mistake; [83] the particulars of the fraud or the nature of the mistake must be set out. If a defendant is held liable under a contract which he avers does not reflect the true intention of the parties, he should (i) allege in his plea that the contract does not reflect the true intention of the parties in that a common error had bona fide taken place; (ii) set out the true intention of the parties; (iii) claim rectification of the contract in terms of the true intention; (iv) allege that the contract so rectified confers no cause of action on the plaintiff. [84]

The subrule requires only that the material facts should be *concisely* stated. The pleader should not plead the evidence which he will adduce in support of his allegation, [85] nor should he plead irrelevant matter. [86]

Two disadvantages faced by a defendant when he goes on to plead his own story were pointed out by Odgers. [87] First, the defendant necessarily somewhat limits his case at the trial; secondly, although the onus of proof is not in fact shifted by such method of pleading, [88] the court may expect the defendant to prove an affirmative case, and is apt to find against him if he does not. The defendant will therefore be well advised not to add to his allegations unless this course is necessary.

In accordance with the aforegoing principles, the material facts upon which the follow-ing defences, [89] all of which go to the merits of the case, must in terms of the subrule be pleaded by the defendant:

- acquiescence; [90]
- agency; [91]

- benefits of suretyship; [92]
- breach of war-ranty; [93]
- compromise; [94]
- contributory negligence; [95]
- defences in defamation actions; [96]
- demand; [97]

- discharge; [98]
- estoppel; [99]
- fraud; [100]
- interruption of prescription; [101]
- lack of authority; [102]
- lien; [103]
- misrepresentation; [104]
- mistake; [105]
- novation; [106]
- payment; [107]
- prescription; [108]
- set-off; [109]

- undue influence; [110]
- waiver. [111]

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

The defence that a plaintiff is endeavouring to enforce an illegal contract merits special treatment. Not only may the defendant take the defence at any stage without pleading it, [112] but it is the duty of the court to take the point *mero motu* even if the defendant does not raise it. Two points should be noted, however. First, the court will *mero motu* decline to enforce the contract only if it is *ex facie* illegal, and not where the question of illegality depends upon the surrounding circumstances. [113] In the latter case, it must be pleaded. Secondly, if the court takes the point *mero motu*, and the defendant has deliberately not raised it himself, he may not get his costs. [114]

Subrule (3): 'Shall be deemed to be admitted.' This subrule makes it clear that *every* allegation of fact in the combined summons or declaration which is not denied or admitted in the plea, shall be deemed to be admitted. [115] All allegations of fact, whether material or otherwise, in the combined summons or declaration which are not denied in the defendant's plea or not stated to be not admitted, are therefore in terms of the subrule deemed to be admitted. It has, however, been held that the subrule cannot be applied piecemeal to a party's averments so as to deprive such a party of a defence which is plainly, though perhaps imprecisely, raised on the pleadings. [116] If a plaintiff is embarrassed by an apparent contradiction arising from the absence of a precisely targeted denial of a particular averment in the particulars of claim, the plaintiff's remedy lies in a notice to the defendant to cure a vague and embarrassing pleading in terms of rule 23(1). [117]

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

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

Subrule (4): 'If by reason of any claim in reconvention ... the plaintiff's claim will be extinguished.' A defendant who is in the position that he must admit the claim against him but who has an unliquidated counterclaim which is not capable of set-off, is faced with a dilemma. If he admits the claim against him, he cannot in his plea set off his claim against his admitted indebtedness until his claim is liquidated. In order to liquidate it, he must bring an action against the plaintiff. If the action is brought as a separate action, the plaintiff will be able to obtain a judgment against him on the admitted claim, which the defendant will have to satisfy even though ultimately he establishes that the plaintiff was at all times indebted to him on balance. In this way his credit may be seriously injured although in reality the plaintiff might owe him considerably more than he is ordered to pay to the plaintiff. Moreover, the plaintiff might be a man of straw and by the time the defendant obtains his judgment on the claim in reconvention, it might be impossible to recover anything and his judgment would be valueless. [118] One way of meeting this problem is for the court to permit the plaintiff to enter judgment against the defendant before adjudication on the defendant's claim, but to stay execution until the defendant's claim has been determined. A more common practice is that which has found recognition in this subrule. The subrule accords a defendant, who has filed a claim in reconvention ('counterclaim'), the right to request postponement of

judgment on such part of the claim as admitted by him until the counterclaim

has been finally determined. In exercising this right the defendant must demonstrate that his counterclaim, if successful, will wholly or partially extinguish the plaintiff's claim. This means, in general that the claim and counterclaim must sound in money. [119] It is evident from the provisions of rule 22(4) that the *pari passu* determination of a claim in convention and a counterclaim cannot be claimed as of right. The court has a discretion whether or not to postpone the claim in convention so that both the claim and the counterclaim are heard simultaneously. [120]

'The defendant may in his plea.' This subrule sanctions the practice of allowing a defendant, who is faced with the dilemma set out in the notes under the preceding head, after admitting liability in his plea for the amount claimed by the plaintiff, to ask that entry of judgment against him be postponed until his unliquidated counterclaim has been adjudicated upon. [121] The purpose of the practice is to avoid a multiplicity of consecutive actions and cross-actions and of process in execution between the same parties and, where possible and just, to dispose of all issues, claims and counterclaims between the same litigants in one and the same trial in order that there should be an end to litigation. [122]

The procedural right thus granted to a defendant does not, however, enlarge his rights under common law so as to permit him to set off an unliquidated claim for damages against monthly instalments due by him pending the decision on the claim and counterclaim. [123]

The subrule is not intended to apply to a second defendant who relies not upon his own counterclaim but upon that of the first defendant. [124] It has, however, been held that a surety (and co-principal debtor) may invoke the subrule and avail himself of the defence that the debt of the principal debtor has been discharged by set-off against a debt due to the principal debtor by the creditor. [125]

The subrule contemplates that the claim and counterclaim will be heard in the same forum. [126] Where the counterclaim is subject to arbitration, the arbitration proceedings in respect of the counterclaim does not amount to proceedings truly separate in their forum. [127]

In *LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd* [128] the defendant was allowed to invoke a defence analogous to that under this subrule. The defendant averred that the plaintiff's claim was founded on a cession which was intentionally designed by the cessionary and the cedent to frustrate the defendant's rights arising from his counterclaim against the

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

'Judgment in respect of the claim or any portion thereof.' The defendant is entitled to utilize the procedure under the subrule even if the amount of the counterclaim is less than the conventional claim. [129]

'Judgment on the claim shall ... be ... postponed unless the court ... otherwise orders.' In terms of this subrule, judgment on the claim in convention shall either in whole or in part be postponed unless the court, upon the application of any person interested, [130] otherwise orders. The court thus has a discretion whether or not to postpone judgment on a claim pending the decision on a counterclaim, and in appropriate cases may refuse to do so. [131] This discretion must be judicially exercised in accordance with the tenets of justice, fairness and reasonableness, and with reference to ail the relevant facts and circumstances. [132] It is not -necessary for the court to consider the merits or demerits of the counterclaim in weighing up its decision. [133] Generally speaking, the court will lean in favour of granting a postponement, for it is desirable that, in the absence of cogent reason to the contrary, the process of the court should not issue until all claims and counterclaims between the parties, not being manifestly unsubstantial, have been determined. [134]

The claim in convention may be unrelated to the counterclaim and not capable of being extinguished, either in whole or in part, by any judgment which may be given on the counterclaim. In such a case the court will, in the exercise of its discretion, grant judgment on the claim in convention. Thus, it has been held that it would be inequitable that a plaintiff with a valid claim for immediate ejectment should have his rights frustrated by a counterclaim which has no bearing on his claim for ejectment. [135]

'If no other defence has been raised.' In this phrase the word 'defence' means a defence valid in law. [136]

'May give judgment for such part of the claim as would not be extinguished.' If it is obvious that the claim will not be wholly extinguished by the counterclaim, it would be prima facie unfair not to grant the plaintiff an immediate judgment for the amount of the difference between the claim and counterclaim; and the concluding portion of the subrule is intended to give effect to this consideration. [137]

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

Prayer. A plea must end with a prayer, either for judgment against the plaintiff or for the dismissal of the plaintiff's claim, [138] presumably with costs.

Particular defences

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

(i) Arbitration. Section 6(1) of the Arbitration Act 42 of 1965 [139] provides that if any party to an arbitration agreement [140] commences any legal proceedings in any court, including an inferior court, against any other party to the agreement in respect of a matter which it was agreed should be referred to arbitration, any party to such proceedings may at any time after entering appearance, but before delivering pleadings or taking other steps in the proceedings, apply to court for the stay of such proceedings. [141] If the court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement, the court may make an order staying the proceedings subject to such terms and conditions as it may consider just. [142]

The Act has not ousted the common law: it merely provides better and more efficient means of having disputes submitted to arbitration and the enforcement of the awards of the arbi-trators. [143] In proceedings under the Act the arbitration agreement must be in writing, but under the common law there may be a parol submission to arbitration. [144] By Roman-Dutch law a defendant, when cited to appear before a public tribunal, was entitled to plead by way of an *exceptio* that the parties had themselves agreed upon a special tribunal to decide disputes between them. [145] Our law has recognized the principle of party autonomy in arbitration proceedings. [146] Our law has also recognized the rule that where a party has agreed to submit a dispute to arbitration, or where it is a term of a contract that any dispute arising out of it should be submitted to arbitration, the dispute may not be taken to court unless the matter has first been submitted to arbitration in terms of the contract, [147] or unless the right to insist on arbitration has been waived. [148]

The court may still be called upon to enforce the award, [149] or in certain circumstances to set

it aside, [150] but otherwise the right of recourse to the courts is postponed until effect has been given to the arbitration provision in the contract. [151] It follows that if the contract sued upon contains a term that disputes arising out of the contract should be decided by arbitration, then the party cited before the court can claim that the action be stayed, and that the matter be referred to arbitration.

The common-law defence is raised in our courts by way of special plea for a stay of the proceedings pending final determination of the dispute by arbitration, [152] whereas under the Act it is raised by application. [153] While the language used in s 6(1) of the Act is suggestive of a substantive application, the procedure provided in the Act is not obligatory but permissive, and does not derogate from the practice of pleading the submission clause either by way of preliminary special plea or by way of defence. [154] The application must be brought before the delivery of

any pleadings by the applicant (defendant) or the taking by him of any other step in the proceedings. [155] Only a party to the arbitration agreement, and not a person who is a party to the litigation but not a party to the agreement, has power to bring the application. [156]

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

(a) It must be clear that the matter falls within the scope of the submission. [157]

(b) The legal validity or the existence of the contract must not be in issue or the subject of the dispute. [158]

The onus is on the party applying for a stay of proceedings to show (i) the existence of the arbitration agreement or clause; (ii) that there exists a dispute between the parties; [159] (iii) that the dispute between the parties is covered by the arbitration agreement or clause; [160] and

(iv) that all the preconditions contained in the agreement for the arbitration have been complied with. [161]

The onus of satisfying the court that the matter should not be referred to arbitration is on the party who instituted the action in court. [162] In other words, the party resisting the stay of proceedings bears the onus to convince the court that, owing to exceptional circumstances, the stay should be refused. [163]

In an application for a stay made under the Act the applicant must further show that he is, and has at all material times been, willing and ready to go to arbitration. This is not a requirement at common law, however. [164] The fact that the agreement provides no tribunal for arbitration is also no bar to a stay: the provision for arbitration cannot be said to be inoperative until some effort has been made to make it operative, and has failed. [165]

Under the Act, even if the court is satisfied that the various requirements have been fulfilled, it retains a discretion to grant or refuse a stay; [166] if it is satisfied that there is sufficient reason why the matter should not be referred in accordance with the submission, it may refuse the application for a stay. [167] However, the party seeking to be absolved from an agreement to have a dispute referred to arbitration will have to make out a very strong case.

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

(a) that the arbitrator is not to be trusted to give a fair decision; [168]

(b) that allegations of fraud have been publicly made, and the person against whom the allegations have been made desires an opportunity of clearing his name in public; [169]

(c) that there are a number of claims, not all of them falling within the submission, and the balance of convenience favours their being determined together; [170]

(d) that the only point for decision is a point of law. The mere fact that there is a point of law involved will not be sufficient if there are other matters to be decided. [171] If the only point for determination is a point of law, and the matter proceeds to arbitration, the arbitrator can in any event, under the provisions of the Act, [172] be compelled to state a special case on that point for the opinion of the court, and, accordingly, if the matter is taken to court, the court will probably refuse a stay. [173]

(e) that the two arbitrators disagree, and the parties have not authorized them to appoint an umpire; [174]

(f) if the defendant admits the claim, he cannot demand arbitration; there is nothing to arbitrate about; [175]

(g) a real risk that the arbitrator will be unable to give an impartial decision; [176]

(h) that there might be a multiplicity of actions with resultant conflicting decisions. [177]

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

(a) that there are special circumstances rendering it inconvenient for the parties to go to arbitration, at any rate, where the circumstances were known to the parties at the time when the agreement was made; [178]

(b) that the dispute is only as to part of a claim, the whole of which falls within the submission to arbitration; [179]

(c) that the construction of the contract is in dispute, [180] or that the defendant denies liability under the contract. [181]

In *Foize Africa (Pty) Ltd v Foize Beheer BV* [182] an *incola* company sought an interim interdict against certain foreigners and foreign companies. The respondents did not file any answering affidavits but, instead, when the application was set down in the court *a quo*, they sought to resist the application by raising an objection *in limine* based on an agreement between the parties which reads as follows:

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

The Supreme Court of Appeal held [183] that the court *a quo* should have approached the objection *in limine* on the basis that it enjoyed a discretion whether or not to enforce the clause, taking into account all the relevant facts and circumstances. As far as factors relevant to the exercise of the court's discretion are concerned, the following was stated: [184]

> 'Of course the factors relevant to the discretion a court is called on to exercise are of importance. In the light of my view on the outcome of this appeal, it is unnecessary to deal in detail with what factors appear at this stage to be relevant. Indeed it would be premature and improper to do so without the parties having had the opportunity to properly canvass the facts. Nevertheless it is of assistance to consider in broad terms the factors which may be relevant. In *The Eleftheria* [1969] 2 All ER 641 (PDA) ([1969] 1 Lloyds Rep 237), when considering whether an action should be stayed by reason of a foreign jurisdiction clause, Brandon J stated:
>
> > "In particular … the following matters, where they arise, may properly be regarded: *(a)* In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the [local] and foreign courts; *(b)* Whether the law of the foreign court applies and, if so, whether it differs from [local] law in any material respects; *(c)* With what country either party is connected, and how closely; *(d)* Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages; *(e)* Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would — (i) be deprived of security for that claim, (ii) be unable to enforce any judgment obtained, (iii) be faced with a time-bar not applicable [locally], or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial."
>
> These are not the only factors to which regard may be had. Others which may be relevant include the following:
>
> *(a)* Flowing from the sanctity of contracts, it has often been said that a decision not to enforce either an arbitration or foreign jurisdiction clause should only be made where there is a very strong case made out for the parties not to be bound by their agreement.
>
> *(b)* It is desirable if at all possible to avoid a multiplicity of actions in different courts with the associated potential complication of conflicting decisions. In the present case this may well be a weighty factor bearing in mind that there is no reason why the appellant's claims in respect of all but the first and third respondents cannot be determined in the high court and only those two respondents may seek to invoke clause 10 to have their dispute with the appellant determined elsewhere.
>
> *(c)* Moreover, a single action has the undoubted advantage of saving time, expense and costs when compared to a multiplicity of actions.
>
> This too may be a weighty factor as the appellant's claims that are capable of being determined in the high court against most of the respondents will involve the

same factual matrix and the same witnesses as in the foreign proceedings against the first and third respondents.

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

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

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

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

If a stay is granted the only recourse that the claimant then has in order to pursue the claim is to proceed by way of arbitration. [185] The stay does not, however, afford the defendant an absolute defence to the claim. Its purpose is to have the claim determined by the forum to which the parties have agreed to submit themselves. [186] It does not matter how far the litigation has progressed: if the question of arbitration is raised by way of special plea, rather than under s 6(1) of the Act, the litigation will proceed on all issues until the stage when the special plea is determined as a separate issue under rule 33(4). If a stay is granted at that stage then the claimant is entitled to pursue its claim by way of arbitration. [187]

The High Court's jurisdiction is not ousted by an arbitration agreement if (*a*) the party wishing to rely on it is unable to show that the agreement is applicable to the dispute between the parties, or (*b*) the entity that is supposed to conduct the arbitration lacks power to grant the relief claimed. [188]

Jurisdiction. The objection that the court has no jurisdiction is ordinarily raised by special plea, [189] but if the fact of lack of jurisdiction appears from the summons, the defendant is entitled to raise an exception to the summons on the ground that no cause of action is disclosed. [190] Non-jurisdiction is not to be presumed. [191] Any question of onus which arises in connection with any challenge of the court's jurisdiction must be determined on a consideration of the

particular form in which the challenge is raised on the pleadings. [192] If the defendant raises the *exceptio fori declinatoria* as a substantive plea, the onus rests on him of proving the facts upon which his plea to jurisdiction is based. [193] However, if the defendant merely denies the plaintiff's allegations of jurisdiction in the particulars of claim, the onus is on the plaintiff to prove such allegations and, consequently, that the court has jurisdiction. [194] If the plaintiff in his summons avers facts which, if proved, establish jurisdiction, the onus lies with the plaintiff to prove such facts. [195]

A foreign jurisdiction (or arbitration) clause does not exclude the High Court's jurisdiction. [196] Parties to a contract cannot exclude the jurisdiction of a court by their own agreement, and where a party wishes to invoke the protection of a foreign jurisdiction clause, it should do so by way of a special or dilatory plea seeking a stay of proceedings. [197] That having been done, the court will then be called on to exercise its discretion whether or not to enforce the clause in question, taking into account all the relevant facts and circumstances. [198] As to the factors relevant to the exercise of its discretion by a court, see the notes sv 'Arbitration' above.

Limitation of actions. The objection that an action has not been commenced within the time prescribed by some statute is raised by special plea. [199]

***Lis pendens*.** The plea that there is pending litigation between the same parties on the same cause of action may be raised by special plea, [200] but in appropriate circumstances also by way of application for a stay of the action. [201]

The court may stay an action on the ground that there is already an action pending between the same parties or their successors in title, based on the same cause of action, and in respect of the same subject matter. [202] The defendant is not entitled as of right to a stay in such circumstances: the court has a discretion whether to order a stay or not, and may decide to allow the action to proceed if it deems it just and equitable to do so, [203] or where the balance of convenience favours it. [204] As the later proceedings are presumed to be vexatious, the party who instituted those proceedings bears the onus of establishing that they are not, in fact, vexatious. This must be done by satisfying the court that despite all of the elements of *lis pendens* being present, justice and equity and the balance of convenience are in favour of those proceedings being dealt with. [205]

The effect of an order staying proceedings is to put an end to all the proceedings in the litigation; while the stay continues, no application of any sort can be made, not even for a change of venue. [206]

The requirement that the parties be the same does not entail that the same plaintiff should have sued the same defendant in both proceedings. The plaintiff in the first proceeding could, as a defendant in the second, raise the plea of *lis pendens*. [207]

The two actions need not be identical in form. The requirement of 'the same cause of action' is satisfied if the other case necessarily involves a determination of some point of law which will be *res judicata* in the action sought to be stayed. [208] This requirement could be relaxed if the circumstances justified doing so. It would be relaxed in such an instance to require that the central issue be the same in both proceedings. [209] In order to decide what matter is in issue the pleadings should be looked to, and not the evidence. [210]

The requirement that the subject matter be the same (i e that the relief claimed be the same) could be relaxed if the circumstances supported doing so. [211]

The plea may be taken whether the two actions are pending in the same court, [212] or in different courts in the same country. [213] To bring two actions in two courts of the same country with regard to the same subject matter is prima facie vexatious, [214] and the court will generally put the plaintiff to his election as to which one he intends to continue. [215]

If one of the actions is in a foreign country, there is no presumption that the multiplicity of suits is vexatious, and a special case must be made out in order to secure a stay of one. [216] Prima facie, however, the fact that an action is pending in a foreign court affords good ground for the objection, in the absence of proof that justice would not be done without the double remedy. [217]

If the first action is allowed to lapse, e g through the non-appearance of the plaintiff, [218] or if it is withdrawn, [219] the plea of *lis pendens* to the second claim will not be upheld.

The plea need not be taken *in initio litis*, though if it is taken later than it could have been taken, the defendant may be mulcted in costs. [220] The plea may thus be taken even though the other action was not yet pending in another court when the proceedings sought to be stayed were commenced. The court in the exercise of its discretion, however, may well decide that the other action, having been commenced later, should be the one to be stayed. [221]

There is a difference between a defence of *lis pendens* and an application for the suspension of an action on the ground of non-payment of the costs of a previous action. A defence of *lis pendens* is dependent upon the existence of a pending, other action. Suspension for non-payment of costs suggests that the other action has been disposed of and that only the costs remain to be paid. [222]

Misjoinder and non-joinder. The usual procedure by which to raise a question of joinder, whether it be misjoinder or non-joinder, is by way of special plea in abatement. [223] If the fact of misjoinder or non-joinder is apparent on the face of the pleadings, the objection may be raised by exception. [224]

It has been held that the plea of misjoinder (and *a fortiori* non-joinder) must be raised *in initio litis.* [225] A court, including a court of appeal, is, however, entitled *mero motu* to raise the question of non-joinder to safeguard the interests of third parties. [226]

National Credit Act 34 of 2005. In *Standard Bank of South Africa Ltd v Hales* [227] it was held that, if in legal proceedings on a loan agreement that is a credit agreement as defined in s 1 of the National Credit Act 34 of 2005, [228] a consumer seeks an order in terms of s 85*(a)* that the court refer the matter directly to a debt counsellor for evaluation and a recommendation in terms of s 86(7), the request of the consumer is, at most, a dilatory plea rather than one being in the nature of a confession and avoidance. Accordingly, it was held that no question of onus arises. [229] In the *Hales* case it was common cause that the consumer was over-indebted. In *Collett v FirstRand Bank Ltd* [230] the Supreme Court of Appeal held that over-indebtedness is not a defence on the merits in summary judgment proceedings.

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

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

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

Section 126B(1)*(b)* of the National Credit Act 34 of 2005 has no retrospective operation. [231]

Non locus standi in judicio. It is for the party instituting proceedings to allege and prove that he has *locus standi in judicio*. [232]

If the fact of non *locus standi in judicio* appears from the summons, the defendant is entitled to take an exception under rule 23 that no cause of action is disclosed. [233]

Prescription. Section 17(2) of the Prescription Act 68 of 1969 provides that a party to litigation who invokes prescription 'shall do so in the relevant document filed of record in the proceedings.' [234] If prescription is raised in a plea it should be done by means of a special plea. [235] In *Living Hands (Pty) Ltd v Ditz* [236] it was held that prescription may not be raised by way of an exception as opposed to a special plea. The special plea can be raised at any stage in the proceedings and need not necessarily be taken before *litis contestatio*. [237] The court cannot of its own motion take notice of prescription. [238] See also the notes s v 'National Credit Act 34 of 2005' above. See the notes to rule 28 s v 'Shall furnish particulars of the amendment' below as regards the introduction by way of an amendment of a claim which has become prescribed.

Res judicata. It is a fundamental doctrine that there must be an end to litigation, [239] and from this flows the rule that legal proceedings can be stayed if it can be shown that the point at issue has already been adjudicated upon between the parties. [240] The policy which underlies the principle of *res judicata* is that nobody should be permitted to harass another with second litigation on the same subject. Such litigation can be viewed as an abuse of

process. [241] In *S v Molaudzi* [242] the Constitutional Court considered the doctrine of *res judicata* and concluded that the Court had the power to relax the doctrine in exceptional circumstances. [243]

In determining whether the point has already been decided between the parties, in a manner sufficient to justify a plea of *res judicata*, a distinction must at the outset be drawn between judgments *in rem* and judgments *in personam*. If the judgment which it is contended constitutes a bar to the second action was a judgment *in rem* (i e affecting either the status of a person or his property), [244] and if it concerned persons domiciled or property situated within the jurisdiction of the court, it is conclusive against all the world in respect of what the judgment settles as to the status of such person or property, or as to the right or title to the latter, and as to whatever disposition it makes in regard to the disposition of the property. [245] Thus, a decree issued by a court of a person's domicile that he is presumed dead is binding against the world. [246] If the judgment was merely a judgment *in personam*, a plea of *res judicata* will be upheld only if certain requirements, discussed below, are present. To determine whether a judgment was *in rem* or merely *in personam*, the issues raised in the pleadings must be looked at, and the judgment analysed to ascertain exactly what decision was given. [247]

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

(a) concluded litigation;

(b) between the same parties;

(c) in relation to the same thing; and

(d) based on the same cause of action. [248]

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

***(a)* Concluded litigation.** There must have been prior litigation or legal proceedings [249] between the parties, culminating in a final judgment, or a decision which has a final effect between the parties, [250] based on the merits of the point in issue. [251] It is not a requirement that the matter shall have been adjudicated upon before a civil court. [252] It is enough if a judicial tribunal, i e 'a person or body of persons, exercising judicial functions by common law, statute, patent, charter, custom …' adjudicated upon the matter. [253] Thus, an administrative order is not a bar to subsequent proceedings. [254] If the point at issue is a factual one, a previous judgment operates as a bar only if evidence has been led in the case in which the judgment was delivered. [255] Apart from these considerations, it makes no difference if the action was defended or not. [256]

No question can arise whether the prior judgment was wrong or right. [257] Every judgment is presumed right, and can be challenged only on appeal. [258] If the judgment is clearly correct on the evidence, the loser's remedy is to bring an action for reopening. [259]

As a general rule a judgment of 'absolution from the instance' does not constitute a bar to a subsequent action. [260] If a court orders that the case is dismissed with costs, this is equivalent to an absolution judgment. [261] It is, however, possible that judgment of absolution does finally determine a question of fact, in which case it can be pleaded that the particular issue is *res judicata*. [262]

If the Master of the High Court confirms a contribution account, that has not the effect of a final and definitive sentence. [263]

The setting aside of a judicial management order is not in the nature of a final order in respect of which the *exceptio rei judicatae* can be raised. [264]

The judgment must emanate from a competent court. [265] If the court in which the prior judgment was given lacked jurisdiction, its judgment is no bar to a subsequent action. [266]

The judgment of a foreign court having jurisdiction can be pleaded as a bar to a subsequent action. [267] A defence that there has been a determination and award by arbitrators can be pleaded as *res judicata*. [268]

The confirmation of an executor's account in a deceased estate is not a bar to an action, concerning items which do not concern the estate, and are thus irrelevant to the account. [269]

(b) **Between the same parties.** Unless the judgment is between the same parties, or is a judgment *in rem*, it is *res inter alios acta*, and cannot support a plea of *res judicata*. [270]

A judgment binds not only the parties themselves but also their privies, i e persons deriving their interest in title through or from the parties, for example a deceased and his heir, a principal and his agent, and a person under curatorship and his curator. [271]

The 'same parties' requirement is not met by the fact that an applicant was joined as a nominal respondent in previous proceedings with no relief being claimed against it. [272]

An executor is bound by a judgment to which the deceased was a party, and a judgment against a principal is binding on his sureties, but not to the extent of determining the amount of each surety's individual liability. [273]

The trustee of an insolvent estate is normally regarded as the privy of the insolvent, but there may be cases where a judgment against the insolvent may not be *res judicata* against his trustee. Where, if the judgment were allowed to stand, the judgment creditor would obtain an unfair advantage over the general body of creditors, the doctrine of *res judicata* has no application. [274] Similarly, where the trustee in the discharge of his statutory duties seeks, as the plaintiff in an action, to attack a defendant in order to secure some lawful advantage to the estate and to that end relies on a collusive dealing entered into between the defendant and the insolvent, the fact that such dealing has been the subject matter of a previous judgment in an action between the defendant and the insolvent in no way binds the trustee. [275] A judgment obtained against the trustee of an insolvent, in the insolvent's absence and without his consent, is not *res judicata* against the insolvent. [276]

An admission by the defendant, made in an earlier case between the plaintiff and a third party, does not debar the defendant from maintaining the contrary of his admission in a subsequent case between himself and the plaintiff. [277]

A judgment in a criminal case can never bar a subsequent civil case. [278] Nor can proof of a civil judgment for ejectment constitute evidence that the accused, in a criminal charge of trespass, is a trespasser. [279]

It is an abuse of the process of the court, and vexatious, to try to obtain the retrial of an issue already decided by simulating a different cause of action by means of a difference of parties. [280]

If a third party intervenes in an action, he is as a general rule bound by the judgment given in the action. He is also bound by a judgment in an action in which he has the right to intervene, if he is given notice of the action, and that his title is being called into question, but he neglects to intervene. Thus, where A sold property to B, which was later claimed by C,

who successfully brought an ejectment action against B, and A failed to intervene in the action even though B had given him notice thereof, it was held that A was debarred from thereafter bringing an action against C for trespass on the property, the questions of the parties' title being *res judicata* as between A and C. [281]

Certain limitations to this doctrine were stated by Fagan AJA in *Amalgamated Engineering Union v Minister of Labour*: [282]

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

There are cases where a third party may have sufficient interest in an action to entitle him to intervene, and the judgment may yet not bind him as *res judicata*. [283]

(c) **In relation to the same thing/based on the same cause of action.** In essence this relates to the same point in issue although it has been differently stated in a number of the leading cases on the subject. Thus, it has been said that the same point must have been in issue [284] and that the same thing must have been demanded; [285] that the action must have been based on the same ground and with respect to the same subject matter; [286] that it must have concerned the same subject matter and must have been founded on the same cause of complaint; [287] that the action must have been on the same cause for the same relief. [288] Again it has been said that where a court has come to a decision on the merits of a question in issue, that question, as a

causa petendi of the same thing between the same parties, cannot be resuscitated in subsequent proceedings. [289]

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

> 'necessarily involved a judicial determination of some question of law or some issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without at the same time, and in the same breath, so to speak, determining that question or issue in a particular way, such determination, though not declared on the recorded decision, is deemed to constitute an integral part of it as effectively as if it had been made so in express terms'. [290]

In order to determine whether the same point was in issue in the earlier case the pleadings and not the evidence in that case must be looked to. [291] Apart from the record in that case, no other evidence is admissible. [292]

If in the earlier case the plaintiff claimed and recovered less than the evidence showed he was entitled to, he is not debarred from instituting a second action for the balance, for an examination of the pleadings and the judgment in the earlier case will show that his right to recover the balance was not in issue. [293]

If judgment was given for the delivery of certain goods, or payment of their value, and the court estimated the value for the purposes of the alternative order, this estimate will not bind the court in a later case when it is called upon to decide whether the defendant has delivered all the goods he was ordered to deliver. [294]

Illustrations

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

(a) Where a wife had obtained a decree of divorce against her husband, and in a later case he sought a declaration that the marriage was *ab initio* null and void, this issue having been raised in the divorce proceedings. [295]

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

(c) Thereafter B claimed damages from A on the ground that it had unlawfully cancelled the lease. [296]

(d) When sued on a promissory note, the defendant pleaded that the note had been given in respect of the purchase price of a car lift and compressor, and that the plaintiff had failed to deliver the lift and compressor. Judgment was given for the plaintiff and the defendant paid the purchase price. In a subsequent action the defendant sued for recovery of the amount paid in pursuance of the judgment on the ground that the lift had not been delivered. [297]

(e) The court had rejected an application for an order declaring invalid an expropriation of property for a town-planning scheme. In a subsequent action it was endeavoured to obtain a reversal of this decision by advancing different reasons. [298]

If a plaintiff with a single cause of action takes a final judgment for part of the claim, he cannot thereafter proceed with the same action for a judgment in respect of the balance of the claim. [299]

An exception once repelled cannot subsequently be upheld, for the point is *res judicata* between the parties. [300]

A plea of *res judicata* was not upheld —

(a) where the first claim was for one month's rent, the second for a subsequent month's rent. It was held that, although the same point might be in issue, the same thing was not demanded in the two actions; [301]

(b) where the two claims were for interest in respect of different periods, [302] or for maintenance for a child in respect of different periods; [303]

(c) where the first claim was for the amount due under a building contract, and the second was for extras not provided for in the contract; [304]

(d) where, in an action for infringement of a trade mark, an English court had held that the plaintiff's name had by extensive use in England acquired a secondary meaning in England, and the issue before the Transvaal court in a subsequent action was whether the name had by extensive use in the Transvaal acquired a secondary meaning in the Transvaal; [305]

(e) where in the first action the summons was held to disclose no cause of action, and the second action was brought on a fresh, redrafted summons which did disclose a cause of action. [306] The position would have been different had the second action been on the same summons as had been dismissed in the first action; [307]

(f) where the second action was on a promissory note given to satisfy the judgment in the first action; [308]

(g) where in the first action the defendant was ordered to erect a certain fence or to pay a certain amount as damages, and the second action was brought for damages after the defendant had elected to erect the fence, but had failed to finish it; [309]

(h) where there had been a change of circumstances warranting a new notice and a landlord commenced new proceedings for an order of ejectment based on a fresh notice to vacate and subsequent to a dismissal of other proceedings; [310]

(i) where a court had in a previous judgment expressed an *obiter* view on a certain matter; [311]

(j) where the first action was for arrear rental arising from an agreement of lease of movables and the second was for damages arising out of inadequate delivery of movables after termination of the lease. [312]

The defence of *res judicata* must be raised specifically by the defendant, for the prior judgment does not *ipso jure* deprive the plaintiff of his right of action. [313] The proper way to raise the defence of *res judicata* is by special plea and not by exception, since evidence must be led as to the previous action. [314] It can be raised *in initio litis*, [315] but if disallowed by the court, it can be raised again at any time before judgment. [316]

The onus is on the party raising the defence to prove it. [317] To determine whether a matter is *res judicata* the judgment, order and pleadings must be examined. [318] The record of the previous action should be produced, [319] or adequate reasons for the non-production should be given. It has been said that if there is any doubt as to any of the essentials required to be proved, the plea will fail. [320]

Not only a defendant but also a plaintiff can plead *res judicata*. Thus, no defence which is raised in the pleadings, and which is adjudicated upon between the parties by the decision in the case, can be raised as a defence in a subsequent action between the same parties. [321]

1 See the notes to rule 18(4) s v 'Every pleading shall contain a clear and concise statement' above. See also, in general, Vettori & De Beer 'The consequences of pleading a non-admission' (2013) 46(2) *De Jure* 612.

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

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

4 *Makhwelo v Minister of Safety and Security* 2017 (1) SA 274 (GJ) at 278I–279A and the cases there referred to.

5 *Brown v Vlok* 1925 AD 56.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 *Westphal v Schlemmer* 1925 SWA 127.

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

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

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

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

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

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

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

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

31 See *Circle Construction (Pty) Ltd v Smithfield Construction* 1982 (4) SA 726 (N) at 730. In *Dinath v Breedt* 1966 (3) SA 712 (T), an ejectment action, there was no denial of ownership in the plea and it was held that the action fell to be decided on the footing that the plaintiff was the owner of the property at the time of issue of the summons notwithstanding the fact that it was known to the court that the plaintiff was not the owner of the property. At 718 Colman J states: 'We have no discretion to disregard the admission of ownership in the pleadings before us.'
See, however, the remarks of Miller J in *South British Insurance Co Ltd v Glisson* 1963 (1) SA 289 (D) at 297. It is submitted that it is the duty of the court to determine what are the real issues between the parties and, provided no prejudice is caused to either party, to decide the case on these real issues. Thus where an uneducated woman defended in person and did not plead any defence, but a defence appeared from her evidence, she was allowed the benefit of it (*Cohen v Coetzee* 1912 EDL 305). Where a defence (consent) had not been pleaded in the court of first instance, but the plaintiff had taken no objection to evidence of consent being heard and had dealt with it in cross-examination, a judgment based upon the fact that consent had been established was upheld on appeal (*Bredenkamp v Du Toit* 1924 GWL 15). In *Segal v Pein & Co* 1924 GWL 41, it was assumed 'for the sake of argument' that a point not pleaded and not dealt with in the lower court, because the facts came out only at the trial, could be used on appeal. No decision was given on the point, however.

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

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

34 See rule 26 below.

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

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

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

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

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

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

41 1971 (2) SA 611 (N).

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

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

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

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

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

47 Rule 18(5).

48 Rule 18(5).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

78 *Heiberg v Palm* 1920 WLD 10.

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

80 *Neugebauer & Co Ltd v Bodiker & Co (SA) Ltd* 1925 AD 316 at 319; *FPS Ltd v Trident Construction (Pty) Ltd* 1989 (3) SA 537 (A) at 542; *Makhwelo v Minister of Safety and Security* 2017 (1) SA 274 (GJ) at 276G–H.

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

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

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

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

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

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

87 *Pleading* 113.

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

89 This list does not purport to be exhaustive.

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

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

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

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

94 See *The Torch Moderne Binnehuis Vervaardiging Venn (Edms) Bpk v Husserl* 1946 CPD 548. The onus is on the party alleging that a compromise has been effected. Compromise being a form of novation involving the waiver of existing rights (or those claimed), it must be clearly and unambiguously proved (*Gridmark CC v Razia Trading CC* (unreported, SCA case no 349/18 dated 25 March 2019) at paragraph 13]).

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

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

97 In cases where demand before summons is a condition precedent to the issue of summons, the plaintiff's failure to send a demand constitutes a defence and should be pleaded. Where demand is not a condition precedent, it does not afford a defence, but can at most affect the question of costs (*Booi v Blake* 1877 Buch 113; *Havenga v Lotter* 1912 TPD 395; *McMurtrie v Norton* 1922 EDL 140; *Reichman v Ysebrand & Co* 1930 OPD 148; *Hooper v De Villiers* 1934 TPD 200, *Feyt v Myers* 1919 CPD 122; *De Kock v Davidson* 1971 (1) SA 428 (T); *AMS Marketing Co (Pty) Ltd v Holzman* 1983 (3) SA 263 (W) at 270). There are, however, certain exceptional circumstances in which a party who has come to court for relief against another without prior demand on that person will not be deprived of his costs (*Tullis Laundry and Engineering Supplies (Pty) Ltd v Marcuson & Co (Pty) Ltd* 1960 (1) SA 105 (T)). In those cases where demand is not a condition precedent to the issue of summons, the defendant is justified in refusing to pay the costs of summons if he satisfies the claim within a reasonable time after service (*Havenga v Lotter* 1912 TPD 395; *McMurtrie v Norton* 1922 EDL 140). A verbal demand is effective to render the defendant liable for costs of summons (*Van der Berg v Tonder* (1899) 16 SC 509; *Livingstone v Cochrane* 1908 TS 89; *Geldenhuys v Visser* 1914 CPD 336).
The bare rendering of an account is not an adequate demand (*Dougan v Estment* 1910 TPD 998). It is not necessary, in order that the demand should be effective, that there be a threat of legal proceedings; all that the plaintiff need do is to notify the defendant that the debt is due, and that he requires payment (*Livingstone v Cochrane* 1908 TS 89; see also *Amalgamated Society of Woodworkers of SA v Die 1963 Ambagsaalvereniging* 1968 (1) SA 283 (T) at 287).
Sufficient detail must be given to enable the debtor to know on what score the creditor claims the relief (*Matz v Meyerthal* 1920 TPD 338 at 341).
If *dies interpellat pro homine*, demand is not necessary (*Venter v Venter* 1949 (1) SA 768 (A)).
Demand may be made by post; but the letter must be prepaid and properly addressed (*Goustyn v Van Putten* (1898) 15 SC 34; *Mechau v Van Jaarsveld* (1847) 1 Menz 113). It is properly addressed if addressed as the defendant has directed; the fact that the address was wrongly given by defendant, whether wilfully (*Chittenden v Schoeman* 1905 TS 42) or negligently (*Dougan v Estment* 1910 TPD 998), does not vitiate the demand. It is not properly addressed if only the name of the farm, not that of the local post office, is given (*Goustyn v Van Putten* (1898) 15 SC 34). Nor if the address on the letter, though likely enough to find the defendant, is to the plaintiff's knowledge, not that where the defendant habitually gets his letters (*Agulhas v Dix & Hahn* 1905 TS 292). A letter properly addressed and posted is presumed to have been received, but there must be evidence that it was posted (*Smook v Dreyer* 1918 OPD 1). The presumption is rebuttable (*Essack v Smith* (1888) 2 SAR 243; *Van der Merwe v Colonial Government* (1904) 14 CTR 732; *Dougan v Estment* 1910 TPD 998). No presumption of delivery arises when the letter is handed to a messenger (not being a postman) (*Adams v Mowbray Municipal Council* (1906) 16 CTR 371), nor when it is sent to a place where there is no regular delivery (*Dyantyi v Warner* 1909 EDC 342). It has been held that the word 'presumption' in this context means no more than that the fact that a letter was posted is evidence from which the inference that it reached the addressee may be drawn. In this regard all the circumstances must be considered in order to decide whether on a balance of probabilities the inference ought to be drawn (*Goldfields Confectionery and Bakery (Pty) Ltd v Norman Adam (Pty) Ltd* 1950 (2) SA 763 (T) at 768). As to proof of the posting of letters, see Zeffertt *Evidence* 222; and see s 7 of the Interpretation Act 33 of 1957.
If such a letter was not in fact received, it does not constitute a good demand (*Van der Merwe v Colonial Government* (1904) 14 CTR 732, overruling *Jones v Cauvin & Co* (1891) 8 SC 217) unless the non-receipt was due to the defendant's deceit (*Chittenden v Schoeman* 1905 TS 42) or negligence (*Dougan v Estment* 1910 TPD 998).
Summons is itself a demand, and unless tender is made within a reasonable time after service, the defendant will be liable in costs (*William's Est v Gideon* (1900) 10 CTR 426; *Ridley v Marais* 1939 AD 5; and see *Blundell v McCawley* 1948 (4) SA 473 (W); *Joss v Barclays Western Bank Ltd* 1990 (1) SA 575 (T)).
In certain cases the legislature has provided that before an action is commenced notice of the intended action must be given within a certain time before summons is issued. Failure to make such a demand, or to give such notice, should be pleaded. See, in this regard, Volume 1, Part A4.

98 *Leben v Cohen* 1927 SWA 2.

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

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

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

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

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

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

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

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

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

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

109 *Great North Farms (Edms) Bpk v Ras* 1972 (4) SA 7 (T). As to set-off in general, see *Road Accident Fund v Myhill NO* 2013 (5) SA 426 (SCA) at 433G–434A and the authorities there referred to; *Standard Bank of South Africa Ltd v Renico Construction (Pty) Ltd* 2015 (2) SA 89 (GJ) at 91E–94B; *Bannister's Print (Pty) Ltd v D&A Calendars CC* 2018 (6) SA 77 (GJ).

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

111 *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) at 436; *Montesse Township and Investment Corporation (Pty) Ltd v Gouws NO* 1965 (4) SA 373 (A) at 381C. The onus of proving waiver is strictly on the party alleging it (see, *inter alia*, *Laws v Rutherfurd* 1924 AD 261 at 263; *Borstlap v Spangenberg* 1974 (3) SA 695 (A) at 704; *Netlon Ltd v Pacnet (Pty) Ltd* 1977 (3) SA 840 (A) at 872; *Stocks & Stocks (Pty) Ltd v TJ Daly & Sons (Pty) Ltd* 1979 (3) SA 754 (A) at

763; *Feinstein v Niggli* 1981 (2) SA 684 (A) at 698; *Ficksburg Transport (Edms) Bpk v Rautenbach* 1988 (1) SA 318 (A) at 336; *Trust Bank van Afrika Bpk v President Versekeringsmaatskappy Bpk* 1988 (1) SA 546 (W) at 562; *Bayview (Pty) Ltd v Director of Valuations* 1989 (1) SA 999 (C) at 1003–4; *Hlaba v Director-General, Department of Education and Training* 1990 (1) SA 492 (C) at 499; *Hochfeld Commodities (Pty) Ltd v Theron* 2000 (1) SA 551 (O) at 564H–565B; *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) at 50F–G; *Meintjies NO v Coetzer* 2010 (5) SA 186 (SCA) at 191A–B; *Van Deventer v Ivory Sun Trading 77 (Pty) Ltd* 2015 (3) SA 532 (SCA) at 543B–D; *Hyde Construction CC v Deuchar Family Trust* 2015 (5) SA 388 (WCC) at 403H–I); *Nkata v FirstRand Bank Ltd* 2016 (4) SA 257 (CC) at 275H–J.

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

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

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

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

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

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

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

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

120 *E H Hassim Hardware (Pty) Ltd v FAB Tanks CC* (unreported, SCA case no 1129/2016 dated 13 October 2017) at paragraph [23].

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

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

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

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

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

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

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

128 1974 (1) SA 747 (A). See also *Frank v Premier Hangers CC* 2008 (3) SA 594 (C).

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

130 An application for summary judgment is not an application under this subrule (*Cape Town Transitional Metropolitan Substructure v Ilco Homes Ltd* 1996 (3) SA 492 (C) at 50IB).

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

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

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

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

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

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

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

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

139 Section 42(1) of the Act repeals the previous arbitration Acts and Ordinances: Cape Act 29 of 1898; Transvaal Ord 24 of 1904; Natal Act 24 of 1898; South West African Proc 3 of 1926.

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

141 *Conress (Pty) Ltd v Gallic Construction (Pty) Ltd* 1981 (3) SA 73 (W) at 76A–B; *BDE Construction v Basfour 3581 (Pty) Ltd* 2013 (5) SA 160 (KZP) at 162G–I.

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

143 *Nkuke v Kindi* 1912 CPD 529 at 531 and 532; *The Rhodesian Railways Ltd v MacKintosh* 1932 AD 359 at 370–71; *PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd* 2009 (4) SA 68 (SCA) at 72A–C.

144 *Nkuke v Kindi* 1912 CPD 529.

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

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

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

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

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

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

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

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

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

not alter the fact that the respondent in electing not to challenge the present proceedings, made an election not to enforce the arbitration agreement by which it is bound, which has as a consequence condonation of the applicant's breach of the arbitration agreement.
I accordingly respectfully disagree with and conclude that Wallis J was wrong in concluding that where a party to an arbitration agreement commences litigation in breach of the arbitration agreement, to which the other party to the arbitration agreement elects not to seek a stay of such proceedings, the party instituting such proceedings is precluded from seeking a stay of those proceedings and must abandon them, before being able to refer the dispute to arbitration, in terms of the arbitration agreement.
The applicant is accordingly entitled to seek a stay of the present proceedings and is not obliged to withdraw them, before referring the parties' dispute to arbitration.'
The mere fact that a defendant has not claimed arbitration before the plaintiff brought his action is not a waiver (*Nash v Muirhead* (1908) 18 CTR 444), nor is the fact that the defendant, an insurance company, has elected to exercise the option under the policy of reinstating rather than paying (*Jordaan v Scottish Assurance Corporation* 1922 OPD 129); nor is an offer to go to court instead of to arbitration which is not accepted by the other side, or which is only partially accepted by the other side (*East Rand Proprietary Mines Ltd v Cinderella Consolidated Gold Mining Co Ltd* 1922 WLD 122). Conversely, where a party has successfully raised a plea that the matter has to go to arbitration, he cannot thereafter allege that the arbitration clause is no longer binding upon him (*Botha v Reits Ko-op Landbou Vereeniging* 1924 AD 391).

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

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

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

152 *Davies v The South British Insurance Co* (1885) 3 SC 416; *King v Harris* 1909 TS 292; *Anglish & Co v Palatine Insurance Co Ltd* (1911) 32 NLR 293; *Glanfield v Asp Development Syndicate* 1911 AD 347; *Collins v Levy* 1917 CPD 49; *Stanhope v Combined Holdings and Industries Ltd* 1950 (3) SA 52 (E) at 57; *Street v Dublin* 1961 (2) SA 4 (W) at 11; *Stocks Construction (OFS) (Pty) Ltd v Metter-Pingon (Pty) Ltd* 1978 (4) SA 35 (T) at 39; *G K Breed (Bethlehem) (Edms) Bpk v Martin Harris & Seuns (OVS) (Edms) Bpk* 1984 (2) SA 66 (O) at 71–2; *PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd* 2009 (4) SA 68 (SCA) at 72A; *Aveng (Africa) Ltd (formerly Grinaker-LTA Ltd) t/a Grinaker-LTA Building East v Midros Investments (Pty) Ltd* 2011 (3) SA 631 (KZD) at 639B; *BDE Construction v Basfour 3581 (Pty) Ltd* 2013 (5) SA 160 (KZP) at 162I–J; *Foize Africa (Pty) Ltd v Foize Beheer BV* 2013 (3) SA 91 (SCA) at 99F–H and the authorities there referred to, and at 102G–H. In the latter case it was held (at 100G–H) that no hard-and-fast rule can be laid down as to the stage at which a court should exercise its discretion to enforce an arbitration clause. In each given case much will depend upon the particular facts and circumstances of the case as well as the stage at which and the manner in which the issue of enforcement of the clause in question is raised. The mere fact that a respondent raises the issue when an applicant seeks interim relief as a precursor to trial proceedings does not, in itself, preclude a court from exercising its discretion to enforce the arbitration clause at that stage. This special plea is in the nature of a dilatory plea and the question cannot be raised by way of an exception even if it should appear from the plaintiff's particulars of claim that there is in fact an arbitration clause (*Parekh v Shah Jehan Cinemas (Pty) Ltd* 1980 (1) SA 301 (D)).

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

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

155 *Conress (Pty) Ltd v Gallic Construction (Pty) Ltd* 1981 (3) SA 73 (W) at 76A–B; *BDE Construction v Basfour 3581 (Pty) Ltd* 2013 (5) SA 160 (KZP) at 162G–I. See also *Killarney of Durban (Pty) Ltd v Lomax* 1961 (4) SA 93 (D) at 96.

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

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

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

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

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

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

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

163 *Polysius (Pty) Ltd v Transvaal Alloys (Pty) Ltd* 1983 (2) SA 630 (W); *Transvaal Alloys (Pty) Ltd v Polysius (Pty) Ltd* 1983 (2) SA 630 (T). The courts consistently require a very strong case to be made out by a party seeking to be absolved from an agreement to have a dispute referred to arbitration (*Glanfield v Asp Development Syndicate* 1911 AD 374 at 380; *The Rhodesian Railways Ltd v MacKintosh* 1932 AD 359 at 375; *Metallurgical Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) at 391; *Sera v De Wet* 1974 (2) SA 645 (T) at 649–50; *Polysius (Pty) Ltd v Transvaal Alloys (Pty) Ltd* 1983 (2) SA 630 (W) at 639–40; *Transvaal Alloys (Pty) Ltd v Polysius (Pty) Ltd* 1983 (2) SA 630 (T) at 656; *Universiteit van Stellenbosch v J A Louw (Edms) Bpk* 1983 (4) SA 321 (A) at 333–4; *G K Breed (Bethlehem) (Edms) Bpk v Martin Harris & Seuns (OVS) (Edms) Bpk* 1984 (2) SA 66 (O) at 70; *MV Iran Dastghayb Islamic Republic of Iran Shipping Lines v Terra-Marine SA* 2010 (6) SA 493 (SCA) at 502E–G; *Aveng (Africa) Ltd (formerly Grinaker-LTA Ltd) t/a Grinaker-LTA Building East v Midros Investments (Pty) Ltd* 2011 (3) SA 631 (KZD) at 639B).

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

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

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

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

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

169 A distinction must be drawn between the case where it is the person charged with fraud who seeks a hearing in open court, rather than in the arbitration for which he has contracted, and the case where it is the person charging fraud who claims that relief. In the former case a claim for a hearing in court will ordinarily be acceded to (*Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) at 393 and the authorities there

referred to; *Sera v De Wet* 1974 (2) SA 645 (T) at 655; *Scriven Bros v Rhodesian Hides & Produce Co Ltd* 1943 AD 393 at 402).

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

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

172 Section 20 of Act 42 of 1965.

173 *Lancaster v Wallace NO* 1975 (1) SA 844 (W) at 847. This is apparently the rule at common law also: see *Van der Spuy v Directors of Paarl Bank* (1890) 7 SC 245.

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

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

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

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

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

179 *King v Harris* 1909 TS 292.

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

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

182 2013 (3) SA 91 (SCA).

183 At 99H–I.

184 At 101A–102E (footnotes omitted).

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

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

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

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

189 *King's Transport v Viljoen* 1954 (1) SA 133 (C); *Dusheiko v Milburn* 1964 (4) SA 648 (A) at 655A–B; *Spie Batignolles Société Anonyme v Van Niekerk: In re Van Niekerk v SA Yster en Staal Industriële Korporasie Bpk* 1980 (2) SA 441 (NC) at 448A; *Communication Workers Union v Telkom SA Ltd* 1999 (2) SA 586 (T) at 594B–C; *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) at 71G–I.

190 *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O) at 759H–760E; *Communication Workers Union v Telkom SA Ltd* 1999 (2) SA 586 (T) at 594B–C; and see *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) at 71G–I.

191 *Haisman v Maasch* 1879 Buch 119.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

208 *Marks and Kantor v Van Diggelen* 1935 TPD 29 at 37.

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

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

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

212 *Marks and Kantor v Van Diggelen* 1935 TPD 29 at 38; *Nestlé (South Africa) (Pty) Ltd v Mars Inc* 2001 (4) SA 542 (SCA) at 549B–C; *Shapiro v South African Recording Rights Association Ltd (Galeta Intervening)* 2008 (4) SA 145 (W) at 149A.

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

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

215 *Osman v Hector* 1933 CPD 503.

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

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

218 *Cole v Magaqa* 1912 EDL 187.

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

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

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

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

223 *Anderson v Gordik Organisation* 1960 (4) SA 244 (N) at 247D.

224 *Collin v Toffie* 1944 AD 456 at 466; *Anderson v Gordik Organisation* 1960 (4) SA 244 (N) at 247D; *Anirudh v Samdei* 1975 (2) SA 706 (N) at 708E; *Smith v Conelect* 1987 (3) SA 689 (W) at 692D–693F; *Royce Shoes (Pty) Ltd v McIndoe and Others NNO* 2000 (2) SA 514 (W) at 516D–G.

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

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

227 2009 (3) SA 315 (D).

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

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

230 2011 (4) SA 508 (SCA) at 518G–519A.

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

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

233 *Anirudh v Samdel* 1975 (2) SA 706 (N); *Van Zyl NO v Bolton* 1994 (4) SA 648 (C) at 651D–E; *Voget v Kleynhans* 2003 (2) SA 148 (C) at 151F; and see *Malan v Van Rooyen* 1929 OPD 25; *Edwards v Woodnutt NO* 1968 (4) SA 184 (R) at 186; *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O) at 759–60.

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

235 See, *inter alia*, *Holmes v Schoch* 1910 TPD 700 at 703 and 705; *Reuben v Myers* 1957 (4) SA 57 (SR) at 58C–F; *Walsh NO v Scholtz* 1968 (2) SA 223 (GW) at 224E–F; *Union & SWA Insurance Co Ltd v Hoosein* 1982 (2) SA 141 (W) at 482G; *Living Hands (Pty) Ltd v Ditz* 2013 (2) SA 368 (GSJ) at 392A–B; *Ntame v MEC for Social Development, Eastern Cape, and Two Similar Cases* 2005 (6) SA 248 (E) at 256A–B. See also *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A) at 525A; *Drennan Maud & Partners v Pennington Town Board* 1998 (3) SA 200 (SCA) at 204A–B.

236 2013 (2) SA 368 (GSJ) at 391C–393E, not following *Sanan v Eskom Holdings Ltd* 2010 (6) SA 638 (GSJ).

237 See s 17(2) of the Prescription Act 68 of 1969 and *Stolz v Pretoria North Town Council* 1953 (3) SA 884 (T).

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

239 Voet 44 2 1, where it is said that the exception of *res judicata* 'was mainly brought in to prevent inextricable difficulties arising from discordant or perhaps mutually contradictory decisions due to the same suit being aired more than once in different judicial proceedings' (Gane's translation). See also *Boshoff v Union Government* 1932 TPD 345 at 350; *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 472B; *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 835F–H; *Bafokeng Tribe v Impala Platinum Ltd and Others* 1999 (3) SA 517 (BH) at 551B.

240 Generally on this topic, see Voet 44 2 3; *LAWSA* IX paragraphs 338–66; Hoffmann & Zefferttt *Evidence* 335 et sqq; *Hiddingh v Denyssen* (1885) 3 SC 424 at 450; *Bertram v Wood* (1893) 10 SC 177; *Warner v Wright* 1908 EDC 14; *Pretorius v Barkly East Divisional Council* 1914 AD 407; *Mitford's Executor v Ebden's Executors* 1917 AD 682; *R v Manasewitz* 1933 AD 165; *Boshoff v Union Government* 1932 TPD 345; *Marks and Kantor v Van Diggelen* 1935 TPD 29; *Veley v Vinjevold* 1935 NPD 578; *Sundays River Irrigation Board v Parkes Bros* 1938 AD 493; *Roopnarain v R* 1938 NPD 106; *R v De Beer* 1944 NPD 334; *Loesch v Crowther (2)* 1947 (3) SA 251 (O); *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 564C–E; *S v Ndou* 1971 (1) SA 668 (A) at 675; *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 472A–B; *Minister of Justice v Bagattini* 1975 (4) SA 252 (T) at 259; *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 (3) SA 509 (D) at 521G–J; *Bafokeng Tribe v Impala Platinum Ltd and Others* 1999 (3) SA 517 (BH) at 551B–567B; *Hochfeld Commodities (Pty) Ltd v Theron* 2000 (1) SA 551 (O) at 566F–H; *Dancarl Diamonds (Pty) Ltd v Wilmans NO (Vize toetredend)* 2001 (4) SA 1123 (NC) at 1128B–1129B; *Wright v Westelike Provinsie Kelders Bpk* 2001 (4) SA 1165 (C) at 1175C–1176C; *Holtzhausen v Gore NO* 2002 (2) SA 141 (C) at 148D–150F; *Man Truck & Bus (SA) (Pty) Ltd v Dusbus Leasing* CC 2004 (1) SA 454 (W) at 466D–467H; *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd (2)* 2005 (6) SA 23 (C) at 45D–48I; *Al-Kharafi & Sons v Pema and Others NNO* 2010 (2) SA 360 (W) at 389E–390G; *Prinsloo NO v Goldex 15 (Pty) Ltd* 2014 (5) SA 297 (SCA) at 301A–C; *Royal Sechaba Holdings (Pty) Ltd v Coote* 2014 (5) SA 562 (SCA) at 566F–G.

241 *Janse van Rensburg and Others NNO v Steenkamp; Janse van Rensburg and Others NNO v Myburgh* 2010 (1) SA 649 (SCA) at 660H–661D; *Basson and Others NNO v Orcrest Properties (Pty) Ltd* [2016] 4 All SA 368 (WCC) at paragraph [50]; *Jiyana v Absa Bank* (unreported, WCC case no 15952/2016 dated 29 June 2017) at paragraph [31].

242 2015 (2) SACR 341 (CC).

243 See also *Jiyana v Absa Bank* (unreported, WCC case no 15952/2016 dated 29 June 2017) at paragraph [32].

244 See, for example, *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 651; *Tshabalala v Johannesburg City Council* 1962 (4) SA 367 (T) at 368–9.

245 *Koster Ko-operatiewe Landbou Mpy Bpk v Wadee* 1960 (3) SA 197 (T) at 199, and see *Ex parte Welsh: In re Estate Keegan* 1943 WLD 147 at 149; *Tshabalala v Johannesburg City Council* 1962 (4) SA 367 (T) at 368–70.

246 *Ex parte Welsh: In re Estate Keegan* 1943 WLD 147.

247 *Pretorius v Barkly East Divisional Council* 1914 AD 407 at 409.

248 *Mulaudzi v Old Mutual Life Assurance Co (South Africa) Ltd* 2017 (6) SA 90 (SCA) at 107E–F; and see *Douglasdale Dairy (Pty) Ltd v Bragge* 2018 (4) SA 425 (SCA) at 431G–H. In *Jacobson v Havinga t/a Havingas* 2001 (2) SA 177 (T) it was held (at 179E–F) that a party must show —

(a) that there has already been a prior judgment;
(b) in which the parties were the same; and
(c) the same point was in issue.

249 *Umhlebi v Estate of Umhlebi* (1905) 19 EDC 237.

250 Voet 44 2 3, where it is said that there 'is no room for this exception unless a suit which had been brought to an end (*lis terminata*) is set in motion afresh' (Gane's translation). See also *Hilton v Hamilton* (1906) 16 CTR 531; *R v Kerr* (1908) 25 SC 91 at 96; *Walker v Arnot NO* (1893) Hertzog 167; *Bell v Bell's Trustee* 1909 TS 51; *Verhagen v Abramowitz* 1960 (4) SA 947 (C) at 951; *Van der Linde v Van Straaten* 1976 (1) SA 369 (O) at 372; *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A) at 45–7; *Johannesburg City Council v Elesander Investments (Pty) Ltd* 1979 (3) SA 1273 (T) at 1282; *Tradax Ocean Transportation SA v MV Silvergate Properly Described as MV Astyanax: MV Silvergate* 1999 (4) SA 405 (SCA) at 417C–F; *Mogalakwena Municipality v Provincial Executive, Limpopo* 2016 (4) SA 99 (GP) at 118E–F. An *obiter dictum* concerning a particular point does not have the effect of a final judgment on that point (*Coetzee v Stellenbosch Universiteit* 1959 (4) SA 705 (C)).

251 *S v Moodie* 1962 (1) SA 587 (A) at 596; *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 562; *Hochfeld Commodities (Pty) Ltd v Theron* 2000 (1) SA 551 (O) at 567A–D; *Rail Commuters' Action Group v Transnet Ltd* 2006 (6) SA 68 (C) at 74F–H. See also *Jacobson v Havinga t/a Havingas* 2001 (2) SA 177 (T) at 181E–182B.

252 *Horowitz v Brock* 1988 (2) SA 160 (A) at 178H; *Sparks v Sparks* 1998 (4) SA 714 (W) at 723H–724G.

253 *Sparks v Sparks* 1998 (4) SA 714 (W) at 723I–724A.

254 *Mostert v South African Association* 1868 Buch 286; *In re Boesen v Astrup's Insolvent Estate* (1885) 6 NLR 203; *Steyn's Trustee v Gous* (1894) 11 SC 34; *Bell v Bell's Trustee* 1909 TS 51 at 55; and see *Minister of Justice v Bagattini* 1975 (4) SA 252 (T) at 259. See also *S v Delport alias Boucher* 1984 (1) SA 511 (O) at 515H–516C.

255 *Thwaites v Van der Westhuizen* (1888) 6 SC 259.

256 *Paarl Pretoria Gold Mining Co v Donovan and Wolff NO* (1889) 3 SAR 56 at 93; *Town Council of Cape Town v The SA Missionary Society* (1901) 18 SC 216; *Boshoff v Union Government* 1932 TPD 345 at 351; *Jacobson v Havinga t/a Havingas* 2001 (2) SA 177 (T) at 179H–180B.

257 *Bertram v Wood* (1893) 10 SC 177 at 180; *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 564; *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 (3) SA 509 (D) at 521.

258 Voet 44 2 1; *Bertram v Wood* (1893) 10 SC 177 at 180; *Makings v Makings* 1958 (1) SA 338 (A) at 349; *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 564; *Le Roux v Le Roux* 1967 (1) SA 446 (A) at 462–3; *S v Ndou* 1971 (1) SA 668 (A) at 676; *Minister of Justice v Bagattini* 1975 (4) SA 252 (T) at 264; *Liley v Johannesburg Turf Club* 1983 (4) SA 548 (W) at 550H.

259 *Vermaak v Vermaak* 1948 (4) SA 90 (C) at 92.

260 *Grimwood v Balls* (1835) 3 Menz 448; *Thwaites v Van der Westhuizen* (1888) 6 SC 259; *Rail Commuters' Action Group v Transnet Ltd* 2006 (6) SA 68 (C) at 74H.

261 *Thwaites v Van der Westhuizen* (1888) 6 SC 259; *De Jager v Vorster* (1900) 10 CTR 239; *Cloete v Greyling* (1907) 24 SC 57; *Municipality of Christiana v Victor* 1908 TS 1117; *Sebastian v Brummer* 1928 TPD 679; *Miller v Larter* 1941 EDL 98; *Becker v Wertheim, Becker & Leveson* 1943 (1) PH F34 (A); *Afrikaanse Handelaars (Edms) Bpk v Van Niekerk* 1944 (1) PH F25; *Van Rensburg v Coetzee* 1977 (3) SA 130 (T) at 136B; *De Wet v Western Bank Ltd* 1977 (2) SA 1033 (W) at 1035F–G; *Regering van die Republiek van Suid-Afrika v South African Eagle Versekeringsmaatskappy Bpk* 1985 (2) SA 42 (O) at 56–7; *Twins Products (Pty) Ltd v Hollywood Curl (Pty) Ltd* 1986 (4) SA 392 (T) at 394D. In *Purchase v Purchase* 1960 (3) SA 383 (N) at 385A, *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 563D–H and *Sparks v Sparks* 1998 (4) SA 714 (W) at 721F it was held that in motion proceedings the dismissal or refusal of an application amounts to a decision in favour of the respondent; but see *Vena v Vena* 2010 (2) SA 248 (ECP) at 253A–I where it was held that the dismissal of an application amounts to absolution from the instance. The decision in *Schutze v Rocher* (1896) 3 Off Rep 126 is not authority to the contrary: 'dismissal of the claim' is an incorrect translation of the Dutch order 'ontzegging van den eisch' — the case was not dismissed but the claim refused.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

279 *R v Lechudi* 1945 AD 796.

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

281 *Paarl Pretoria Gold Mining Co v Donovan and Wolff NO* (1889) 3 SAR 56. It is for this reason, *inter alia*, that the court will insist on the joinder of a party who has a direct interest in the litigation (*Brink NO v Gain NO* 1958 (3) SA 503 (C) at 506E).

282 1949 (3) SA 637 (A) at 662–3. This was reaffirmed in *Kethel v Kethel's Estate* 1949 (3) SA 598 (A) at 609.

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

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

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

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

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

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

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

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

In *Prinsloo NO v Goldex 15 (Pty) Ltd* 2014 (5) SA 297 (SCA) it was held (at 305A–C and 305H–306A) that the requirements of same cause and same relief which form part of the requirements of *res judicata* could be dispensed with where the same issue had been finally decided in the previous proceeding, viz the form of *res judicata* known as issue estoppel. A plea of issue estoppel could only, it was held, be permitted though, if it would not cause unfairness in the latter proceeding. In *Douglasdale Dairy (Pty) Ltd v Bragge* 2018 (4) SA 425 (SCA) it was held (at 432B–C) that it is impossible to provide a clear test as to what would give rise to unfairness. In that case the problem which presented itself was that the findings of the court *a quo* were not subjected to the rigours of an appeal (at 431I). The Supreme Court of Appeal, with reference to the *Prinsloo* case (*supra*), concluded that fairness demanded that issue estoppel should not be allowed to operate in any pending litigation because there had been no need to canvass the merits of the appeal as a result of a legally relevant new fact (i e the death of the first respondent after judgment in the court *a quo* had been delivered) and the changed legal position that followed (at 432B–D and 432G). See also *Hyprop Investments Ltd v NSC Carriers and Forwarding CC* 2014 (5) SA 406 (SCA) at 410B–H; *Royal Sechaba Holdings (Pty) Ltd v Coote* 2014 (5) SA 562 (SCA) at 566H–568A; *De Freitas v Jonopro (Pty) Ltd* 2017 (2) SA 450 (GJ) at 458G–J; *Transalloys (Pty) Ltd v Mineral-Loy (Pty) Ltd* (unreported, SCA case no 781/2016 dated 15 June 2017) at paragraph [22].

If the relaxation of the three requirements of *res judicata* would lead to inequity, issue estoppel should not preclude a later claim that arises from the same issues (*Prinsloo NO v Goldex 15 (Pty) Ltd* 2014 (5) SA 297 (SCA) at 304D–306A; *Hyprop Investments Ltd v NSC Carriers and Forwarding CC* 2014 (5) SA 406

(SCA) at 412H–413C).
In *Royal Sechaba Holdings (Pty) Ltd v Coote* 2014 (5) SA 562 (SCA) at 566H–568A, 570D–G and 571B–E the Supreme Court of Appeal reiterated the requirements of a successful plea of *res judicata* and added that in appropriate circumstances the requirement that the parties had to be the same could also be dispensed with.
An identity of interest between plaintiffs in two different actions is sufficient to satisfy the same-party requirement of issue estoppel (*Aon South Africa (Pty) Ltd v Van den Heever NO* 2018 (6) SA 38 (SCA) at 48C–49G).
As to 'issue estoppel' see also *Goldfields Laboratories (Pty) Ltd v Pomate Engineering (Pty) Ltd* 1983 (3) SA 197 (W); *Liley v Johannesburg Turf Club* 1983 (4) SA 548 (W) at 551; *Marievale Consolidated Mines Ltd v National Union of Mineworkers* 1986 (2) SA 472 (W) at 496; *Boland Bank Bpk v Steele* 1994 (1) SA 259 (T) at 268–70; *Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk* 1995 (1) SA 653 (A) at 667J–670B and 670I–671C; *Bafokeng Tribe v Impala Platinum Ltd and Others* 1999 (3) SA 517 (BH) at 566F–567B; *Man Truck & Bus (SA) (Pty) Ltd v Dusbus Leasing* CC 2004 (1) SA 454 (W) at 462E–468E; *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd (2)* 2005 (6) SA 23 (C) at 47C–D; *Yellow Star Properties 1020 (Pty) Ltd v MEC, Department of Development Planning and Local Government, Gauteng* 2009 (3) SA 577 (SCA) at 586D–587A; *Janse van Rensburg and Others NNO v Steenkamp; Janse van Rensburg and Others NNO v Myburgh* 2010 (1) SA 649 (SCA) at 657E–660A; *Al-Kharafi & Sons v Pema and Others NNO* 2010 (2) SA 360 (W) at 390B–C; *NSC Carriers & Forwarding CC v Hyprop Investments Ltd* 2013 (1) SA 340 (GSJ) at 349I–350F; *De Freitas v Jonopro (Pty) Ltd* 2017 (2) SA 450 (GJ) at 457H–458J; *Department of Transport v Tasima (Pty) Ltd; Tasima (Pty) Ltd v Road Traffic Management Corporation* 2018 (9) BCLR 1067 (CC) at paragraphs [82]–[85]; Hoffmann & Zeffertt *Evidence* 346–50; 2004 (September) *De Rebus* 47–8.

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

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

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

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

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

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

296 *Boshoff v Union Government* 1932 TPD 345.

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

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

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

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

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

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

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

304 *Warner v Wright* 1908 EDC 14.

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

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

307 *Kruger v Schoombie* 1916 EDL 279.

308 *Kilfoil v Macomo* 1911 CPD 83.

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

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

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

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

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

314 *Fell v Goodwill* (1884) 5 NLR 265; *Lamb v The Colonial Secretary and the Rand Mining Estates Ltd* 1902 TS 319; *Lowrey v Steedman* 1914 AD 532 at 539; *Blaikie-Johnstone v P Hollingsworth (Pty) Ltd and Others* 1974 (3) SA 392 (D) at 395D; *Hochfeld Commodities (Pty) Ltd v Theron* 2000 (1) SA 551 (O) at 566J–567A.

315 Voet 44 2 1.

316 Voet 44 2 6.

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

318 *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A) at 46A–47H; *Horowitz v Brock* 1988 (2) SA 160 (A) at 180J–181A; *Rail Commuters' Action Group v Transnet Ltd* 2006 (6) SA 68 (C) at 74H*ff*; *Al-Kharafi & Sons v Pema and Others NNO* 2010 (2) SA 360 (W) at 390F.

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

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

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

23 Exceptions and applications to strike out

(1) Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of paragraph *(f)* of subrule (5) of rule (6): Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days: Provided further that the party excepting shall within ten days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his exception.

[Subrule (1) amended by GN R2164 of 1987, by GN R2642 of 1987 and by GN R1262 of 1991.]

(2) Where any pleading contains averments which are scandalous, vexatious, or irrelevant, the opposite party may, within the period allowed for filing any subsequent pleading, apply for the striking out of the matter aforesaid, and may set such application down for hearing in terms of paragraph *(f)* of subrule (5) of rule 6, but the court shall not grant the same unless it is satisfied that the applicant will be prejudiced in the conduct of his claim or defence if it be not granted.

(3) Wherever an exception is taken to any pleading, the grounds upon which the exception is founded shall be clearly and concisely stated.

(4) Wherever any exception is taken to any pleading or an application to strike out is made, no plea, replication or other pleading over shall be necessary.

Commentary

General. An exception is a legal objection to the opponent's pleading. It complains of a defect inherent in the pleading: admitting for the moment that all the allegations in a summons or plea are true, it asserts that even with such admission the pleading does not disclose either a cause of action or a defence, as the case may be. [1] It follows that where an exception is taken, the court must look at the pleading excepted to as it stands: [2] no facts outside those stated in

the pleading can be brought into issue — except in the case of inconsistency [3] — and no reference may be made to any other document. [4] This is precisely the difference between exceptions on the one hand, and pleas in bar, dilatory pleas and pleas in abatement, on the other: the latter usually introduce fresh matter which requires to be proved by evidence. [5] In order to succeed an excipient has the duty to persuade the court that upon every interpretation which the pleading in question, and in particular the document on which it is based, can reasonably bear, no cause of action or defence is disclosed; failing this, the exception ought not to be upheld. [6]

The object of an exception is to dispose of the case or a portion thereof in an expeditious manner, or to protect a party against an embarrassment which is so serious as to merit the costs even of an exception. [7] An exception provides a useful mechanism for weeding out cases without legal merit. [8] Thus, an exception founded upon the contention that a summons discloses no cause of action, or that a plea lacks averments necessary to sustain a defence, is designed to obtain a decision on a point of law which will dispose of the case in whole or in part, and avoid the leading of unnecessary evidence at the trial. [9] If it does not have that effect the exception should not be entertained. [10] A dismissal of an exception, however, save an exception to the jurisdiction of the court, presented and argued as nothing other than an exception, does not finally dispose of the issue raised by the exception and is not appealable. [11]

The point could be re-argued at the trial in the event of the exception being dismissed. [12] The position would have been different if the court had at the request of parties or of its own accord, made an order in terms of rule 33(4) of the rules directing that the issue raised by the exception be finally disposed of. [13]

An exception can be taken to particular sections of a pleading provided that they are self-contained and amount in themselves to a separate claim or a separate defence, as the case may be. [14]

An exception cannot be taken to a declaration or particulars of claim on the ground that it does not support one of several claims arising out of one cause of action. [15] The unjustifiable claim is a *plus petitio* and its deletion will not result in the pleading not disclosing a cause of action. [16]

If the same claim is based on alternative causes of action, an exception can be taken against one or more of the alternatives. [17]

An excipient is obliged to confine his complaint to the stated grounds of his exception. [18]

In so far as there can be an onus on either party on a pure question of law it rests upon the excipient who alleges that a summons discloses no cause of action or that a plea discloses no defence; the excipient has the duty to persuade the court that the pleading is excipiable on every interpretation that can reasonably be attached to it. [19] The pleading must be looked at as a whole. [20] If there is uncertainty in regard to a pleader's intention, an excipient cannot

avail himself thereof unless he shows that upon any construction of the pleadings the claim is excipiable. [21]

Save in the instance where an exception is taken for the purpose of raising a substantive question of law which may have the effect of settling the dispute between the parties, an excipient should make out a very clear, strong case before he should be allowed to succeed. [22] An excipient has the duty to persuade the court that upon every interpretation which the particulars of claim could reasonably bear, no cause of action was disclosed. [23] Furthermore, a commercial document executed by the parties with the clear intention that it should have commercial operation would not lightly be held to be ineffective. A similar approach would be adopted to oral commercial agreements.

By way of example, it has been held [24] that the court is reluctant to decide the relaxation of the *par delictum* rule on public policy grounds on exception, since the issue is invariably fact-bound. Courts have not adopted an overly technical approach to pleadings. In general, where public policy considerations do not favour either party, the *par delictum* rule will operate against the plaintiff. At exception stage, however, the *par delictum* rule will generally defeat a plaintiff's claim only in the clearest of cases.

An exception should be dealt with sensibly and not in an over-technical manner. [25]

The aforegoing considerations do not, however, apply to an exception that a pleading is vague and embarrassing — an exception may be taken to protect oneself against embarrassment. [26]

If the exception is successful, the proper course for the court is to uphold it. When an exception is upheld, it is the pleading to which exception is taken which is destroyed. The remainder of the edifice does not crumble. [27] The upholding of an exception to a declaration or a combined summons does not, therefore, carry with it the dismissal of the summons or of the action. [28] The unsuccessful party may then apply for leave to amend his pleading. [29]

It is, in fact, the invariable practice of the courts, in cases where an exception has successfully been taken to an initial pleading that it discloses no cause of action, to order that the pleading be set aside and that the plaintiff be given leave, if so advised, to file an amended pleading within a certain period of time. [30] It has been held that it is doubtful whether this practice brooks of any departure; in the rare case in which a departure may be permissible, the court should give reasons for the departure. [31] This practice *a fortiori* also applies where an exception is granted on the ground that a pleading is vague and embarrassing, a ground which strikes at the formulation of the cause of action and not its legal validity. [32]

Leave to amend is often granted irrespective of whether or not at the hearing of the argument on exception the plaintiff applied for such leave. If the court does not grant leave to amend when making an order setting aside the pleading, the plaintiff is entitled to make application for such leave once judgment setting aside the pleading has been delivered. [33] If the unsuccessful party does not take any timeous steps, the excipient may take steps to bar him and apply to the court for absolution from the instance. [34]

Where an exception is taken to particulars of claim in which two forms of relief are sought and where such particulars reveal a cause of action for one of the forms of relief but not for the other, the court may uphold the exception *pro tanto*. [35]

Fundamentally defective pleadings of a plaintiff and defendant should be treated on an equal footing. [36] The rules in relation to the defective pleading of claims therefore apply *mutatis mutandis* to the flawed pleading of defences. [37] Consequently, if a defendant's plea is struck down in its entirety on exception, the defendant should be given an opportunity to amend the plea. [38]

A court has the power to defer consideration of an exception to the trial, [39] and will do so where the question raised by the exception seems to be interwoven with the evidence which will be led at the trial. [40] Thus, for example, where the whole of a contract is not before the court, it will not assign a meaning to particular words or clauses thereof at the exception stage if there is room for a contention, *ex facie* the pleadings, that the omitted terms, whether considered with or without additional evidence of surrounding circumstances, might have a significant bearing on the issue before the court. [41]

If a pleading is bad in law, the answer is to except; if it is vague and embarrassing, notice to cure may be given or further particulars (for purposes of trial) may be requested; and if the legal representative for a party has been genuinely taken by surprise by his opponent's reference to the cause of action in the opening address, he should take the opportunity to say so at the outset and object to the evidence if it does not accord with the pleadings. What a party cannot do, is to sit back, say nothing and then complain that the pleading is defective and that he was taken by surprise. [42]

Appeal. See s 16 of the Superior Courts Act 10 of 2013 and the notes thereto in Volume 1, Part A2.

Subrule (1): 'Where any pleading.' An exception may be raised against any pleading, including a replication or any subsequent pleading. In *Faischt v Colonial Government* [43] and in *De Beer v Minister of Posts and Telegraphs* [44] an exception was raised to a replication. See further the notes to rule 25 below.

A simple summons is not a pleading and accordingly cannot be attacked by way of an exception. [45]

'Is vague and embarrassing.' An exception that a pleading is vague and embarrassing is not directed at a particular paragraph within a cause of action: it goes to the whole cause of action, which must be demonstrated to be vague and embarrassing. [46] The exception is intended to cover the case where, although a cause of action appears in the summons there is some defect or incompleteness in the manner in which it is set out, which results in embarrassment to the defendant. [47] An exception that a pleading is vague and embarrassing strikes

at the formulation of the cause of action and not its legal validity. [48]

If a pleading both fails to comply with the provisions of rule 18 and is vague and embarrassing, the defendant has a choice of remedies: he may either bring an application in terms of rule 30 to have the pleading set aside as an irregular step, [49] or raise an exception in terms of rule 23(1). [50] The remedies, however, are based on separate and distinct complaints requiring different adjudication. [51] The crucial distinction between this rule and rule 30 are: *(a)* an exception that a pleading is vague and embarrassing can only be taken when the vagueness and embarrassment strikes at the root of the cause of action as pleaded; whereas *(b)* rule 30 may be invoked to strike out the claim pleaded when individual averments do not contain sufficient particularity; it is not necessary that the failure to plead material facts goes to the root of the cause of action. [52]

An exception that a pleading is vague or embarrassing will not be allowed unless the excipient will be seriously prejudiced if the offending allegations were not expunged. [53] The effect of this is that the exception can be taken only if the vagueness relates to the cause of action. [54] Such embarrassment may occur where the admission of one of two sets of contradictory allegations in the plaintiff's particulars of claim or declaration, destroys the plaintiff's cause of action. [55] In other words, averments in a pleading which are contradictory and which are not pleaded in the alternative are patently vague and embarrassing. [56]

The test applicable in deciding exceptions based on vagueness and embarrassment arising out of lack of particularity can be summed up as follows: [57]

(a) In each case the court is obliged first of all to consider whether the pleading does lack particularity to an extent amounting to vagueness. If a statement is vague it is either meaningless or capable of more than one meaning. [58] To put it at its simplest: the reader must be unable to distill from the statement a clear, single meaning. [59]

(b) If there is vagueness in this sense the court is then obliged to undertake a quantitative analysis of such embarrassment as the excipient can show is caused to him by the vagueness complained of. [60]

(c) In each case an ad hoc ruling must be made as to whether the embarrassment is so serious as to cause prejudice to the excipient if he is compelled to plead to the pleading in the form to which he objects. [61] A point may be of the utmost importance in one case, and the omission thereof may give rise to vagueness and embarrassment, but the same point may in another case be only a minor detail. [62]

(d) The ultimate test as to whether or not the exception should be upheld is whether the excipient is prejudiced. [63]

(e) The onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice. [64]

(f) The excipient must make out his case for embarrassment by reference to the pleadings alone. [65]

(g) The court would not decide by way of exception the validity of an agreement relied upon or whether a purported contract may be void for vagueness. [66]

The plaintiff cannot, in answering to the exception, rely on the fact that, apart from the allegations in the summons, the defendant of his own knowledge knows what case he is required to meet. In the majority of cases the defendant does know, yet this does not disentitle him to except successfully where the plaintiff's case is not conveyed to him by the summons with reasonable distinctness. [67] It must be borne in mind that the summons is for the information of the court as well as of the plaintiff. [68]

A summons will be vague and embarrassing where it is not clear whether the plaintiff sues in contract or in delict, [69] or upon which of two possible delictual bases he sues, [70] or what the contract is on which he relies, [71] or whether he sues on a written contract or a subsequent oral contract, [72] or if it can be read in any one of a number of different ways, [73] or if there is more than one claim and the relief claimed in respect of each is not separately set out. [74] Although the introduction of irrelevant matter into a summons may make it vague and embarrassing, the pleading of irrelevant matter as history does not. [75] The summons is also vague and embarrassing if there is inconsistency amounting to contradiction between the allegations in a claim in reconvention and the plea in convention, [76] or between the summons and the documents relied upon as the basis of the claim; [77] or where the admission of one of two sets of contradictory allegations in the plaintiff's particulars of claim or declaration would destroy the plaintiff's cause of action; [78] or where a pleading contains averments which are contradictory and which are not pleaded in the alternative. [79] Omission of the date on which a contract of sale was concluded may render a summons excipiable as being vague and embarrassing. [80] If a plaintiff claims in the particulars of claim global sums for general damages and sundry expenses without indicating which portion of the sums relates to which defendant, where more than one defendant is being sued, a

particular defendant is not able to assess what is being claimed against him in each case, and to that extent the pleading is vague and embarrassing. [81] Pleadings have been held to be vague and embarrasing where the plaintiff failed to plead that it was relying on a statutory provision which was tacitly implied. [82]

For purposes of deciding an exception contractual capacity is assumed. [83]

'Or lacks averments which are necessary to sustain an action.' While rule 18(4) requires every pleading to contain 'a clear and concise statement of the material facts upon which the pleader relies for his claim', rule 20(2) requires a declaration to 'set forth the nature of the claim' and 'the conclusions of law which the plaintiff shall be entitled to deduce from the facts stated therein', and this subrule warrants an exception if a pleading 'lacks averments which are necessary to sustain an action'.

Although these rules do not explicitly require the plaintiff's particulars of claim or declaration to disclose a cause of action, it is generally accepted that this is in fact what they require. [84]

In *McKenzie v Farmers' Co-operative Meat Industries Ltd* [85] the following definition of 'cause of action' was adopted by the Appellate Division:

> '… every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.'

It is important to bear in mind that the definition relates only to 'material facts', and at the same time to have due regard to the distinction between the *facta probanda* and the *facta probantia*. Care must be taken in any given case to distinguish the facts which must be proved in order to disclose a cause of action (the *facta probanda*) from the facts which prove them (the *facta probantia*). [86] It follows, therefore, that in order to ensure that his summons is not excipiable on the ground that it does not disclose a cause of action, the plaintiff

> 'moet toesien dat die wesenlike feite (dit wil sê die *facta probanda* en nie die *facta probantia* of getuienis ter bewys van die *facta probanda* nie) van sy eis met voldoende duidelikheid en volledigheid uiteengesit word dat, indien die bestaan van sodanige feite aanvaar word, dit sy regskonklusie staaf en hom in regte sou moet laat slaag t a v die regshulp of uitspraak wat hy aanvra'. [87]

What the *facta probanda* are in each particular case, is essentially a matter of substantive law, and not of procedure. [88]

In general the cause of action relied upon by a plaintiff must have subsisted when the summons was issued. [89] In the absence of special circumstances, a plaintiff will not be permitted to establish a cause of action, an essential element of which came into being only after the issue of summons. [90]

In suitable cases legitimate inferences can be drawn as to the meaning of the particulars and by implication the necessary averments can be supplied. [91] However, while the court should endeavour to look benevolently instead of over-critically at a pleading, [92] it should not push that benevolence to the length of upholding a declaration or particulars of claim which as it stands discloses no cause of action, by altering its language, by reading into it what is not there, and ignoring what is, and by thus making for the plaintiff a cause of action he has not himself put up. [93]

The particulars of claim or declaration may, in some cases, disclose a cause of action even where a necessary allegation which is omitted cannot be implied. Where, because a necessary averment is omitted, it may be read in two or more possible ways, and one of these possible readings discloses a cause of action, then the particulars of claim or declaration cannot be excepted to as disclosing no cause of action. [94] It may, however, be vague and embarrassing.

It is not only a declaration or particulars of claim which omits an essential allegation that cannot be implied that discloses no cause of action. One which shows a complete defence also discloses no cause of action and may be excepted to. [95] A defendant may, for example, except if *ex facie* the declaration or particulars of claim it appears that there has been a compromise, and there are no allegations sufficient for setting aside the compromise, [96] or if it appears *ex facie* the declaration or particulars of claim that the court has no jurisdiction. [97]

A declaration or particulars of claim (or a plea) which relies upon an allegation that cannot be proved by admissible evidence discloses no cause of action (or defence). [98] A declaration or particulars of claim which relies upon a prior verbal agreement which is inconsistent with a subsequent written agreement discloses no cause of action. [99] If a written agreement contains a clause in terms whereof the agreement can be varied only in writing, evidence of an oral agreement varying the written agreement is inadmissible and a pleading relying upon such oral agreement is excipiable. [100] It has been held that courts are reluctant to decide upon exception questions concerning the interpretation of a contract, [101] especially where its meaning is uncertain, where the whole contract is not before the court, [102] or where it appears from the contract itself or from the pleadings that there may be admissible evidence which, if placed before the court, could influence the court's decision as to the meaning of the contract. [103] It has also been held that the validity of a contract and the question whether a purported contract may be void for vagueness do not readily fall to be decided by way of an exception. [104]

If a cause of action is based on a written agreement to erect a dwelling house, the builder who institutes the action must allege that he is a registered home builder in terms of s 10(1) of the Housing Consumers Protection Measures Act 95 of 1998. [105]

In a claim for wages or remuneration, if it is to be set out with logical completeness, there should be an allegation that the services were rendered pursuant to a contract. A declaration or particulars of claim which claims a sum of money in respect of services rendered, but which omits the allegation that the services were rendered pursuant to a contract, discloses no cause of action. The allegation that the services were rendered at the defendant's request is not necessarily implied from the allegations that services were rendered by the plaintiff to the defendant.

If the allegations made in the particulars of claim do not entitle the plaintiff to claim the damages asked for, the particulars of claim discloses no cause of action and may be excepted to. [106] In an action based on negligence an allegation of negligence is a necessary allegation; failure to allege negligence renders the particulars of claim bad as disclosing no cause of action. [107] If breach of a specific duty is relied upon, the facts from which such duty arises must be stated, e g the negligent breach of a statutory duty. [108] In some cases, however, it has been held that an allegation of negligence could be implied from the other allegations in the particulars of claim, e g where the particulars of claim alleged that the defendant had lit a veld fire and 'allowed' it to spread over the plaintiff's boundary. [109] If, in an action for damages based on delictual liability, wrongfulness is challenged by way of an exception, the court assumes that the other elements of the cause of action will be capable of proof at trial so as to test the element of liability that is the subject of the challenge. [110]

Prior to the commencement of the Constitution of the Republic of South Africa Act 200 of 1993 the validity of statutes could not ordinarily be challenged. A defendant could not, therefore, rely on the invalidity of a statute as a defence. It is submitted that a defendant is now entitled to raise by way of plea (or special plea) the invalidity of a statute as a defence and pray that the issue be dealt with in accordance with the applicable provisions of the Constitution of the Republic of South Africa, 1996.

If a claim depends upon a statutory regulation which has to be proved in evidence and may itself not be valid, a claim which may possibly not be enforceable by reason of the provisions of such a regulation cannot be excepted to as disclosing no cause of action. [111]

The Appellate Division has laid down that 'as a matter of pleading, even if a pleader relies on a particular section of a statute, it is not necessary for him to state the number of the section, provided he formulates his claim clearly'. [112] It is, however, necessary for the plaintiff to allege all the facts necessary to bring his claim within the statute, [113] otherwise, if these cannot be implied, the summons discloses no cause of

action. If the relevant statute contains an express prohibition, the plaintiff must plead the required facts, failing which his particulars of claim would fail to disclose a cause of action. [114] A pleader relying on an implied statutory provision must plead it clearly, i e that he is relying on an implied provision, and what the content of the provision is. [115]

An objection of non-joinder, of *non locus standi in judicio* or lack of jurisdiction is usually taken by way of special plea, but if the fact of non-joinder or of *non locus standi in judicio* or of lack of jurisdiction appears from the summons, the defendant is entitled to except to the summons on the ground that no cause of action is disclosed. [116] For one of the averments necessary to sustain an action in a particular court is that such a court has jurisdiction to entertain the action; if the court has no jurisdiction in the matter the action cannot be sustained in that court. [117] See further the *excursus* to rule 22 s v 'Particular Defences' above.

'... or defence.' A pleading lacks averments which are necessary to sustain a defence (i) where the pleading does not justify the conclusions drawn therein; [118] or (ii) where the defence raised, though adequately pleaded, does not in law constitute a defence to the claim. [119]

'Within the period allowed for filing any subsequent pleading.' An exception is a pleading and, in the case of an exception to a declaration or combined summons, a notice of bar in terms of rule 26 is required before the plaintiff can object to the exception on the ground that it was delivered out of time. [120] A plaintiff can accordingly not object to the exception on the ground that it was delivered outside the prescribed period allowed for the delivery of a plea but before the expiration of the period provided in the notice of bar. This does not apply where an exception is taken to a plea; in such instance rule 26 provides for an automatic bar on failure to deliver a replication or subsequent pleading within the time allowed. [121] Upon dismissal of an exception against a declaration or combined summons it is not necessary for a defendant to seek an order granting leave to deliver a plea. In the event of the plaintiff wanting to seek default judgment under such circumstances, the plaintiff will have to deliver a further notice of bar on the defendant, requiring the latter to plead. [122]

'Deliver an exception.' If an exception will have the effect of putting an end to the action it is a party's duty to except, and not wait until the trial before raising the point in issue. If he fails to do so he may only be awarded costs as if he had taken exception [123] or even be ordered to pay the wasted costs occasioned by the hearing of evidence. [124] This rule is not inflexible [125] and it will not be applied if, for example, an amendment to the pleadings would have been granted had an exception been taken. [126]

An exception is a pleading and should be signed by both an advocate and an attorney, or by the excipient himself if he is appearing in person. [127]

'Set it down for hearing in terms of paragraph *(f)* of subrule (5) of rule 6.' The reference to rule 6(5)*(f)* means that the excipient is entitled within five days after delivering an exception to apply to the registrar for a date for the hearing thereof as contemplated in rule 6(5)*(f)*(i). If he does not do so the respondent is entitled to do so. [128]

'Provided that.' The proviso to the subrule is peremptory and a condition precedent to the taking of an exception that a pleading is vague and embarrassing. [129]

'Within the period allowed as aforesaid.' See the notes to this subrule s v 'Within the period allowed for filing any subsequent pleading' above. [130]

'By notice.' The notice calling upon the other party to remove the cause of complaint must give a proper indication of the matter complained of; it would be insufficient merely to state that the pleading is vague and embarrassing. [131]

'Afford his opponent an opportunity of removing the cause of complaint.' This subrule is designed to discourage exceptions where the cause of embarrassment can be removed by the furnishing of particulars, an amendment of pleadings or any other action which removes the cause of complaint. [132] Even voluntary particulars which have not been requested may in the court's discretion be allowed to stand if they are a method of removing a cause of complaint as envisaged by the subrule. [133]

If an attempt is made to remove the cause of complaint by amending the pleading in question, a party is entitled, if not satisfied that the cause of complaint has in fact been removed, to give his opponent notice once again that he intends taking an exception that the pleading in its amended form is vague and embarrassing. [134]

If a party is of the opinion that his opponent has failed to remove the cause of complaint, he is entitled within ten days after receipt of his opponent's reply to his notice to deliver his exception. He is not entitled to except and at the same time to apply in terms of rule 30(1) for his opponent's reply to his notice to be struck out. [135]

Subrule (2): General. The distinction between an application to strike out matter contained in a pleading and an exception was made clear in *Salzmann v Holmes*: [136]

> 'An exception goes to the root of the entire claim or defence as the case may be. The excipient alleges that the pleading objected to, taken as it stands, is legally invalid for its purpose. Whereas individual sections, which do not comprise the entire claim or defence, but are only portion of one, must if objected to, be attacked by a motion to expunge.' [137]

An application to strike out, though directed at individual paragraphs, may involve the destruction of the whole pleading. [138]

It will probably be found that in many cases the introduction of any scandalous, vexatious or irrelevant matter will render the pleading concerned vague and embarrassing, and so justify an exception. There will, however, be cases in which the introduction of such matter, while not rendering the pleading vague and embarrassing, will cause prejudice. It is in these cases that the provisions of this subrule will be found useful. The purpose of an application to strike out is to reduce the issues that will have to be canvassed in the pleadings and, more particularly, at the trial. The defendant may find himself embarrassed or prejudiced in some way if the pleading is allowed to stand, and he is thus afforded a means of asking that the position be remedied.

A decision whether or not to strike out is discretionary in nature. [139]

'Averments which are scandalous, vexatious, or irrelevant.' The meaning of these terms has been stated as follows: [140]

(a) Scandalous matter — allegations that may or may not be relevant but which are so worded as to be abusive or defamatory.

(b) Vexatious matter — allegations that may or may not be relevant but are so worded as to convey an intention to harass or annoy.

(c) Irrelevant matter — allegations that do not apply to the matter in hand and do not contribute in one way or the other to a decision of such matter.

'Irrelevant' in this context means irrelevant to the issue. [141] The rule is one of pleading and it is not intended that on an application to strike out the court should determine preliminary points of law. [142] Thus, matter will not be struck out as irrelevant merely because it raises a point on the pleadings which is bad in law. [143] The court is not concerned with the validity of the claim, or whether it raises a cause of action: that may be matter for exception. All that concerns the court is whether the passage sought to be struck out is relevant in order to raise an issue on the pleadings. [144] Another test which may be applied, is whether or not evidence would be admissible at the trial to prove certain facts: if evidence would be admissible, those facts cannot be regarded as irrelevant when pleaded. [145]

What is relevant to raise an issue on the pleadings is not always the same as what is relevant to those issues. For example, although evidence which is pleaded is relevant to the trial generally, and to the proof of the issues raised by the pleadings, the evidence is not relevant to raising the issues on the pleadings, and is thus irrelevant to the pleadings. [146]

In order to determine whether or not matter in a pleading is irrelevant the pleading must be considered as a whole. [147]

Any fact which may prove relevant on the question of costs should not be struck out. [148]

Irrelevant matter pleaded as history will not be struck out. [149] On the other hand, facts stated not for the purpose of supporting any claim for relief, but in anticipation of a possible defence, will be struck out. [150] So will a prayer unsubstantiated by any facts in the particulars of claim. [151]

'Apply for the striking out of the matter.' Although there is a difference in principle between an exception and an application to strike out, [152] both forms of relief can be applied for simultaneously, either together or in the alternative. The distinction in principle should, however,

be borne in mind and in an appropriate case the objector may be mulcted in the costs of an unjustified exception or application to strike out, as the case may be.

A decision whether to strike out or not is discretionary in nature. [153]

'Unless it is satisfied that the applicant will be prejudiced.' The key consideration is that of prejudice. [154] If the court is in doubt as to the relevancy of any matter, such matter will not be struck out. [155] In *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* [156] the court refused to strike out an alternative prayer on the ground that the applicant would suffer no prejudice by a refusal of the application to strike out since it was always open to it to argue that no order should be granted in terms of the alternative prayer.

Subrule (3): 'The grounds upon which the exception is founded.' This subrule obliges the excipient to state in clear and concise terms the particulars upon which his exception is based, and it is not sufficient merely to state that the summons discloses no cause of action or is vague and embarrassing. [157]

An excipient is bound to the grounds of exception set out in his notice of exception, and will not be permitted at the hearing of the exception to rely on different grounds or to raise a different exception. [158]

An exception which lacks a prayer is bad, but the court has the power to order an amendment to make good the defect, provided no prejudice or injustice is thereby caused to the respondent. [159] A prayer at the end of an exception normally reads as follows:

> 'Wherefore it is prayed that the exception be upheld with costs and that the [state party and pleading] be set aside.'

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

Subrule (4): 'No ... pleading over shall be necessary.' This subrule puts an end to the controversy that has long raged in regard to the circumstances in which it is necessary to plead over when an exception is taken or application to strike out is made. It is no longer necessary to plead over.

1 *Champion v J D Celliers & Co Ltd* 1904 TS 788 at 790–1; *Estate Edwards v Sinclair* 1918 EDL 12 at 19; *Amalgamated Footwear & Leather Industries v Jordan & Co Ltd* 1948 (2) SA 891 (C); *Marney v Watson* 1978 (4) SA 140 (C) at 144F–G; *Makgae v Sentraboer (Koöperatief) Bpk* 1981 (4) SA 239 (T) at 244H–245A, where Ackermann J points out that, where an exception is raised against a summons, '[word] die korrektheid van die feite in die besonderhede van vordering ... aanvaar maar die regskonklusie word betwis'. See also *Michael v Caroline's Frozen Yoghurt Parlour (Pty) Ltd* 1999 (1) SA 624 (W) at 632C–D; *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) 138 (SCA) at 143I–J; *Brooks v Minister of Safety and Security* 2008 (2) SA 397 (C) at 402F–G; *Stewart v Botha* 2008 (6) SA 310 (SCA) at 313F; *YB v SB* 2016 (1) SA 47 (WCC) at 51H–I. In *Natal Fresh Produce Growers' Association v Agroserve (Pty) Ltd* 1990 (4) SA 749 (N) it was held (at 755A) that this principle is limited in its operation to allegations of fact and that it does not extend to inferences and conclusions not warranted by the allegations of fact. It was further held (at 755B) that the principle does not oblige the court to stultify itself by accepting allegations of 'fact' that are manifestly false, allegations that are so divorced from reality that they cannot possibly be proved. See also *Van Zyl NO v Bolton* 1994 (4) SA 648 (C) at 651E–F; *Voget v Kleynhans* 2003 (2) SA 148 (C) at 151G–H; *TWK Agriculture Ltd v NCT Forestry Co-operative Ltd* 2006 (6) SA 20 (N) at 23B–C; *Brooks v Minister of Safety and Security* 2008 (2) SA 397 (C) at 402I.

2 *Salzmann v Holmes* 1914 AD 152 at 156; *Minister of Safety and Security v Hamilton* 2001 (3) SA 50 (SCA) at 52G–H; *Burger v Rand Water Board* 2007 (1) SA 30 (SCA) at 32D–E; *Gallagher Group Ltd v IO Tech Manufacturing (Pty) Ltd* 2014 (2) SA 157 (GNP) at 161D–E; *YB v SB* 2016 (1) SA 47 (WCC) at 51I–J; but see *Sanan v Eskom Holdings Ltd* 2010 (6) SA 638 (GSJ) at 644D–645G; *Baliso v FirstRand Bank Ltd t/a Wesbank* 2017 (1) SA 292 (CC) at 303D–E. The approach to exceptions that the claim that the impugned pleading does not sustain a cause of action is well established. The court is to take as true the allegations pleaded by the plaintiff and to assess whether they disclose a cause of action (*Oceana Consolidated Co Ltd v The Government* 1907 TS 786 at 788; *Stols v Garlicke & Bousfield Inc* 2012 (4) SA 415 (KZP) at 421H).

3 *Cassim's Estate v Bayat and Jadwat* 1930 (2) PH F81 (N); *Soma v Marulane NO* 1975 (3) SA 53 (T).

4 *SA Railways and Harbours v Pepeta* 1926 CPD 45; *Umpelea v Witbooi NO* 1926 OPD 251; *Amalgamated Footwear & Leather Industries v Jordan & Co Ltd* 1948 (2) SA 891 (C) at 893; *Serobe v Koppies Bantu Community School Board* 1958 (2) SA 265 (O) at 269A; *Johnston v Leal* 1980 (3) SA 927 (A) at 947H; *Wellington Court Shareblock v Johannesburg City Council* 1995 (3) SA 827 (A) at 833F and 834D; *Dilworth v Reichard* [2002] 4 All SA 677 (W) at 681*j*–682*a*; *Baliso v FirstRand Bank Ltd t/a Wesbank* 2017 (1) SA 292 (CC) at 303D–E; *Pretorius v Transport Pension Fund* 2019 (2) SA 37 (CC) at 44F–G.

5 *Brown v Vlok* 1925 AD 56 at 58; *Edwards v Woodnutt NO* 1968 (4) SA 184 (R) at 186E; *Muller v Cook* 1973 (2) SA 247 (N); but see *Sanan v Eskom Holdings Ltd* 2010 (6) SA 638 (GSJ) at 644D–645G.

6 *Theunissen v Transvaalse Lewendehawe Koöp Bpk* 1988 (2) SA 493 (A) at 500E–F; *Lewis v Oneanate (Pty) Ltd* 1992 (4) SA 811 (A) at 817F; *Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A) at 183E; *Pete's Warehousing and Sales CC v Bowsink Investments CC* 2000 (3) SA 833 (E) at 839G–H; *First National Bank of Southern Africa Ltd v Perry NO* 2001 (3) SA 960 (SCA) at 965C–D; *Vermeulen v Goose Valley Investments (Pty) Ltd* [2001] 3 All SA 350 (A); *Sanan v Eskom Holdings Ltd* 2010 (6) SA 638 (GSJ) at 645D.

7 *Colonial Industries Ltd v Provincial Insurance Co Ltd* 1920 CPD 627 at 630; *Kahn v Stuart* 1942 CPD 386 at 391; *Lobo Properties (Pty) Ltd v Express Lift Co (SA) (Pty) Ltd* 1961 (1) SA 704 (C) at 711G; *Miller v Muller* 1965 (4) SA 458 (C) at 468; *Central Merchant Bank Ltd v Oranje Benefit Society* 1975 (4) SA 588 (C) at 592A–B; *Lampert-Zakiewicz v Marine & Trade Insurance Co Ltd* 1975 (4) SA 597 (C) at 599G; *Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd (2)* 1976 (1) SA 100 (W) at 107D; *Du Preez v Boetsap Stores (Pty) Ltd* 1978 (2) SA 177 (NC) at 181G; *Diergaardt v Africa* 1979 (2) SA 584 (SWA) at 586E; *International Combustion Africa Ltd v Billy's Transport* 1981 (1) SA 599 (W) at 601A; *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A) at 553F–I; *Metwa v Minister of Health* 1989 (3) SA 600 (D) at 604B–C; *Francis v Sharp* 2004 (3) SA 230 (C) at 237C–F; *Gallagher Group Ltd v IO Tech Manufacturing (Pty) Ltd* 2014 (2) SA 157 (GNP) at 161C–D.

8 *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) at 465H; *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) at 199B. See also *Jake Trading CC v Rambore (Pty) Ltd t/a Rambore Specialist Contractors* (unreported, WCC case no 11909/2017 dated 13 March 2019) at paragraph [32].

9 *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A) at 706E; *Santos v Standard General Insurance Co Ltd* 1971 (3) SA 434 (O) at 437B; *Versluis v Greenblatt* 1973 (2) SA 271 (NC) at 274A–H; *Marais v Steyn* 1975 (3) SA 479 (T) at 486H–487G; *Van Lochen v Associated Office Contracts (Pty) Ltd* 2004 (3) SA 247 (W) at 252F–G; *Alphina Investments Ltd v Blacher* 2008 (5) SA 479 (C) at 483B; *Inzalo Communications & Event Management (Pty) Ltd v Economic Value Accelerators (Pty) Ltd* 2008 (6) SA 87 (W) at 101C–D; and see the authorities referred to in the preceding two footnotes.

10 In addition to the authorities referred to in the preceding three footnotes, see also *Miller v Bellville Municipality* 1971 (4) SA 544 (C) at 546D; *Rumanal (Pty) Ltd v Hubner* 1976 (1) SA 643 (E) at 646C; *Diergaardt v Africa* 1979 (2) SA 584 (SWA) at 588H.

11 *Maize Board v Tiger Oats Ltd* 2002 (5) SA 365 (SCA) at 373B–D. In *Pretorius v Transport Pension Fund* 2019 (2) SA 37 (CC) the Constitutional Court at 44E stated (*per* Froneman J):
'The dismissal of an exception is not usually finally dispositive of the legal issue at stake, unlike the upholding of an exception on the basis that the claim is bad in law.'

12 *Maize Board v Tiger Oats Ltd* 2002 (5) SA 365 (SCA) at 373B–D.

13 *Maize Board v Tiger Oats Ltd* 2002 (5) SA 365 (SCA) at 373B–D.

14 *Barrett v Rewi Bulawayo Development Syndicate* 1922 AD 457 at 459; *Lampert-Zakiewicz v Marine & Trade Insurance Co Ltd* 1975 (4) SA 597 (C) at 599E–600B; *Central Merchant Bank Ltd v Oranje Benefit Society* 1975 (4) SA 588 (C) at 592C; *Oranje Benefit Society v Central Merchant Bank Ltd* 1976 (4) SA 659 (A) at 676B; *International Combustion Africa Ltd v Billy's Transport* 1981 (1) SA 599 (W) at 601A; *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A) at 553F; *Tobacco Exporters & Manufacturers Ltd v Bradbury Road Properties (Pty) Ltd* 1990 (2) SA 420 (C) at 424E.

15 *Stein v Giese* 1939 CPD 336; *Du Plessis v Nel* 1952 (1) SA 513 (A) at 531H–532A; *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A) at 706E; *Versluis v Greenblatt* 1973 (2) SA 271 (NC) at 274A–H; *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1984 (1) SA 443 (W) at 456C.

16 *Thornton v Royal Insurance Co Ltd* 1958 (4) SA 171 (C) at 174G; *Santos v Standard General Insurance Co Ltd* 1971 (3) SA 434 (O) at 437E; *Marais v Steyn* 1975 (3) SA 479 (T) at 487C; *David Beckett Construction (Pty) Ltd v Bristow* 1987 (3) SA 275 (W) at 276D.

17 *Du Preez v Boetsap Stores (Pty) Ltd* 1978 (2) SA 177 (NC) at 181F.

18 *Scheepers v Krog* 1925 CPD 9; *Jack Smith v Joe's (Pty) Ltd* 1929 TPD 323; *Britz v Weideman* 1946 OPD 144 at 150; *Ritchie Motors v Moolman* 1956 (4) SA 337 (T); *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) at 899A; *Alphina Investments Ltd v Blacher* 2008 (5) SA 479 (C) at 483D and 488G–I; *Feldman NO v EMI*

Music SA (Pty) Ltd; Feldman NO v EMI Music Publishing SA (Pty) Ltd 2010 (1) SA 1 (SCA) at 5A; and see *Cotas v Williams* 1947 (2) SA 1154 (T) and *Wicksteed v George* 1961 (1) SA 651 (FC), both cases in which an appellant was not allowed to rely on a ground of exception not raised in the court below.

19 *Amalgamated Footwear & Leather Industries v Jordan & Co Ltd* 1948 (2) SA 891 (C) at 893; *Geldenhuys v Maree* 1962 (2) SA 511 (O) at 514C; *Kotsopoulos v Bilardi* 1970 (2) SA 391 (C) at 395D–E; *Callender-Easby v Grahamstown Municipality* 1981 (2) SA 810 (E) at 812H–813A; *Theunissen v Transvaalse Lewendehawe Koöp Bpk* 1988 (2) SA 493 (A) at 500E–F; *Klerck NO v Van Zyl and Maritz NNO* 1989 (4) SA 263 (SE) at 288E; *Lewis v Oneanate (Pty) Ltd* 1992 (4) SA 811 (A) at 817F; *Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A) at 183E; *First National Bank of Southern Africa Ltd v Perry NO* 2001 (3) SA 960 (SCA) at 965C–D; *Shell Auto Care (Pty) Ltd v Laggar* 2005 (1) SA 162 (D) at 170D–E; *Thekweni Properties (Pty) Ltd v Picardi Hotels Ltd (and Others as Third Parties)* 2008 (2) SA 156 (D) at 158H, overruled on appeal, but not on this point, in *Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd* 2009 (1) SA 493 (SCA); *Frank v Premier Hangers CC* 2008 (3) SA 594 (C) at 600F–G; *Stewart v Botha* 2008 (6) SA 310 (SCA) at 313E–F; *Picbel Groep Voorsorgfonds (in Liquidation) v Somerville, and Related Matters* 2013 (5) SA 496 (SCA) at 501A–B; *Gallagher Group Ltd v IO Tech Manufacturing (Pty) Ltd* 2014 (2) SA 157 (GNP) at 161E–F; *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) at 199B; *YB v SB* 2016 (1) SA 47 (WCC) at 52A.

20 *Nel and Others NNO v McArthur* 2003 (4) SA 142 (T) at 149F.

21 *Amalgamated Footwear & Leather Industries v Jordan & Co Ltd* 1948 (2) SA 891 (C) at 893; *Kotsopoulos v Bilardi* 1970 (2) SA 391 (C) at 395D–E; *Callender-Easby v Grahamstown Municipality* 1981 (2) SA 810 (E) at 812H–813A; *Klerck NO v Van Zyl and Maritz NNO* 1989 (4) SA 263 (SE) at 288E.

22 *Colonial Industries Ltd v Provincial Insurance Co Ltd* 1920 CPD 627 at 630; *Kahn v Stuart* 1942 CPD 386 at 391; *Van der Westhuizen v Le Roux and Le Roux* 1947 (3) SA 385 (C) at 390; *Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C) at 298A; *Francis v Sharp* 2004 (3) SA 230 (C) at 237D–I.

23 *Francis v Sharp* 2004 (3) SA 230 (C) at 237D–I.

24 *Klokow v Sullivan* 2006 (1) SA 259 (SCA).

25 *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) at 465H. See also *Jake Trading CC v Rambore (Pty) Ltd t/a Rambore Specialist Contractors* (unreported, WCC case no 11909/2017 dated 13 March 2019) at paragraph [32].

26 *General Commercial and Industrial Finance Corporation Ltd v Pretoria Portland Cement Co Ltd* 1944 AD 444 at 454–5; *Wilson v South African Railways and Harbours* 1981 (3) SA 1016 (C) at 1019C.

27 *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1991 (3) SA 787 (T) at 791H; *Princeps (Edms) Bpk v Van Heerden NO* 1991 (3) SA 842 (T) at 845A–F. The contrary view taken in *Natal Fresh Produce Growers' Association v Agroserve (Pty) Ltd* 1991 (3) SA 795 (N) at 800F–801C was expressly rejected by the Appellate Division in *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1993 (2) SA 593 (A) at 603C–D; *Constantaras v BCE Foodservice Equipment (Pty) Ltd* 2007 (6) SA 338 (SCA) at 348H–349A; *Ocean Echo Properties 327 CC v Old Mutual Life Assurance Co (South Africa) Ltd* 2018 (3) SA 405 (SCA) at 409C.

28 *Johannesburg Municipality v Kerr* 1915 WLD 35 at 37; *Berrange v Samuels II* 1938 WLD 189 at 190; *Santam Insurance Co Ltd v Manqele* 1975 (1) SA 607 (D) at 610C; *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1991 (3) SA 787 (T) at 791H–I; *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1993 (2) SA 593 (A) at 603C–H; *Constantaras v BCE Foodservice Equipment (Pty) Ltd* 2007 (6) SA 338 (SCA) at 348C–E; *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) at 219A–B.

29 *Santam Insurance Co Ltd v Manqele* 1975 (1) SA 607 (D) at 610C; *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1993 (2) SA 593 (A) at 602D–H; *Constantaras v BCE Foodservice Equipment (Pty) Ltd* 2007 (6) SA 338 (SCA) at 348C–E.

30 *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1993 (2) SA 593 (A) at 602D; *Trope v South African Reserve Bank* 1993 (3) SA 264 (A) at 269H; *Rowe v Rowe* 1997 (4) SA 160 (SCA) at 167G–I; *Constantaras v BCE Foodservice Equipment (Pty) Ltd* 2007 (6) SA 338 (SCA) at 348C–F; *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) at 219A–B; *Baliso v FirstRand Bank Ltd t/a Wesbank* 2017 (1) SA 292 (CC) at 302G; *Ocean Echo Properties 327 CC v Old Mutual Life Assurance Co (South Africa) Ltd* 2018 (3) SA 405 (SCA) at 409C–E.

31 *Rowe v Rowe* 1997 (4) SA 160 (SCA) at 167H.

32 *Trope v South African Reserve Bank* 1993 (3) SA 264 (A) at 269H–I.

33 *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1993 (2) SA 593 (A) at 602E–H.

34 *Santam Insurance Co Ltd v Manqele* 1975 (1) SA 607 (D) at 610E; *Princeps (Edms) Bpk v Van Heerden NO* 1991 (3) SA 842 (T) at 845D–F. A contrary view was taken in *Natal Fresh Produce Growers' Association v Agroserve (Pty) Ltd* 1991 (3) SA 795 (N).

35 *Swadif (Pty) Ltd v Dyke NO* 1978 (1) SA 928 (A) at 945H.

36 *Constantaras v BCE Foodservice Equipment (Pty) Ltd* 2007 (6) SA 338 (SCA) at 349A–B.

37 *Constantaras v BCE Foodservice Equipment (Pty) Ltd* 2007 (6) SA 338 (SCA) at 349B.

38 *Constantaras v BCE Foodservice Equipment (Pty) Ltd* 2007 (6) SA 338 (SCA) at 348H–349B.

39 *Hudson v Hudson* 1927 AD 259 at 269; *Minerals and Quarries (Pty) Ltd v Henckert* 1967 (4) SA 77 (SWA) at 84B; *Du Preez v Boetsap Stores (Pty) Ltd* 1978 (2) SA 177 (NC).

40 *Minerals and Quarries (Pty) Ltd v Henckert* 1967 (4) SA 77 (SWA) at 84A; *Versluis v Greenblatt* 1973 (2) SA 271 (NC) at 278A–C.

41 *Baragwanath v Olifants Asbestos (Pty) Ltd* 1951 (3) SA 222 (T) at 230D; *Sacks v Venter* 1954 (2) SA 427 (W) at 431B; *Reed v Warren* 1955 (2) SA 370 (N) at 374C; *Davenport Corner Tea Room (Pty) Ltd v Joubert* 1962 (2) SA 709 (N) at 715G.

42 *MN v AJ* 2013 (3) SA 26 (WCC) at 33H and 35G–I.

43 (1903) 20 SC 211.

44 1923 AD 653.

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

46 *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) at 899G; *Venter and Others NNO v Barritt; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd* 2008 (4) SA 639 (C) at 644A.

47 *Liquidators Wapejo Shipping Co Ltd v Lurie Bros* 1924 AD 69 at 74; *Scheepers v Krog* 1925 CPD 9 at 11; *Cilliers v Van Biljon* 1925 OPD 4; *Lockhat v Minister of the Interior* 1960 (3) SA 765 (D) at 777E; *Trope v South African Reserve Bank* 1993 (3) SA 264 (A) at 268F.

48 *Trope v South African Reserve Bank* 1993 (3) SA 264 (A) at 269I; *Venter and Others NNO v Barritt; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd* 2008 (4) SA 639 (C) at 643I–644A.

49 In terms of rule 18(12) failure to comply with the provisions of rule 18 is deemed to be an irregular step and the opposite party is entitled to act in accordance with rule 30.

50 *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a L H Marthinusen* 1992 (4) SA 466 (W) at 469F–J.

51 *ABSA Bank Ltd v Boksburg Transitional Local Council* 1997 (2) SA 415 (W) at 418E–H.

52 *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) at 902F–G; *Nasionale Aartappel Koöperasie Bpk v Price Waterhouse Coopers Ing* 2001 (2) SA 790 (T); *Venter and Others NNO v Barritt; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd* 2008 (4) SA 639 (C) a 645B–C.

53 *Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C) at 298A; *Gallagher Group Ltd v IO Tech Manufacturing (Pty) Ltd* 2014 (2) SA 157 (GNP) at 166G–H; *Eskom Holdings v Lesole Agencies CC* (unreported, FB case no 2555/2016 dated 28 September 2017) at paragraph [7].

54 *Carelsen v Fairbridge, Arderne & Lawton* 1918 TPD 306 at 309, approved in *Liquidators Wapejo Shipping Co Ltd v Lurie Bros* 1924 AD 69 at 74; *Horwitz v Hendricks* 1928 AD 391 at 393; *Factory Investments Ltd v Record Industries Ltd* 1957 (2) SA 306 (T) at 310B. See also *Lockhat v Minister of the Interior* 1960 (3) SA 765 (D) at 777E; *Brits v Coetzee* 1967 (3) SA 570 (T) at 572A. In *Keely v Heller* 1904 TS 101 at 103 Innes CJ stated that a defendant is entitled to except to a summons which discloses no 'intelligible ground of action', and in *Getz v Pahlavi* 1943 WLD 142 at 145 Schreiner J said: 'A man who has not an explicable cause of action is in the same position as one who has no cause of action at all.'

55 *Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C) at 298J–299C and 300G.

56 *Trope v South African Reserve Bank* 1992 (3) SA 208 (T) at 211E.

57 See *Lockhat v Minister of the Interior* 1960 (3) SA 765 (D) at 777A–E; *Quinlan v MacGregor* 1960 (4) SA 383 (D) at 393F–H; *Trope v South African Reserve Bank* 1992 (3) SA 208 (T) at 211B; *Gallagher Group Ltd v IO Tech Manufacturing (Pty) Ltd* 2014 (2) SA 157 (GNP) at 166H–J.

58 *Leathern v Tredoux* (1911) 32 NLR 346 at 348; *Callender-Easby v Grahamstown Municipality* 1981 (2) SA 810 (E) at 812H; *Wilson v South African Railways and Harbours* 1981 (3) SA 1016 (C) at 1018H; *Venter and Others NNO v Barritt; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd* 2008 (4) SA 639 (C) at 644A–B.

59 *Venter and Others NNO v Barritt; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd* 2008 (4) SA 639 (C) at 644B.

60 *Quinlan v MacGregor* 1960 (4) SA 383 (D) at 393E–H; *Trope v South African Reserve Bank* 1992 (3) SA 208 (T) at 211B; *ABSA Bank Ltd v Boksburg Transitional Local Council* 1997 (2) SA 415 (W) at 421I–422A. In *International Tobacco Co of SA Ltd v Wollheim* 1953 (2) SA 603 (A) at 613B and *Lockhat v Minister of the Interior* 1960 (3) SA 765 (D) at 777B it is said that it must be shown that the excipient will be 'substantially embarrassed' by the vagueness or lack of particularity.

61 *ABSA Bank Ltd v Boksburg Transitional Local Council* 1997 (2) SA 415 (W) at 421J–422A; *Venter and Others NNO v Barritt; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd* 2008 (4) SA 639 (C) at 645C–D; *Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd and Another (No 1)* 2010 (1) SA 627 (C) at 630B.

62 Thus, for example, the date of the transaction which forms the basis of the claim may be important in one case, but only a minor detail in another. If the claim is for damages arising from a collision between cars driven by the plaintiff and the defendant, and the date thereof is not pleaded, the defendant is unlikely to be left in doubt as to which collision is being referred to. In a summons for rent due to the plaintiff, the defendant may be embarrassed if he is not informed in respect of which month rent is being claimed.

63 *Quinlan v MacGregor* 1960 (4) SA 383 (D) at 393G; *Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C) at 298A; *Trope v South African Reserve Bank* 1992 (3) SA 208 (T) at 211B; *Francis v Sharp* 2004 (3) SA 230 (C) at 240E–F; *Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd and Another (No 1)* 2010 (1) SA 627 (C) at 630B.

64 The onus is always on the excipient to show that the pleading in question is excipiable (*Kennedy v Steenkamp* 1936 CPD 113 at 115; *City of Cape Town v National Meat Supplies Ltd* 1938 CPD 59 at 63; *Amalgamated Footwear & Leather Industries v Jordan & Co Ltd* 1948 (2) SA 891 (C) at 893; *Lockhat v Minister of the Interior* 1960 (3) SA 765 (D) at 777A; *Kotsopoulos v Bilardi* 1970 (2) SA 391 (C) at 395D–E; *Callender-Easby v Grahamstown Municipality* 1981 (2) SA 810 (E) at 813A; *Venter and Others NNO v Barritt; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd* 2008 (4) SA 639 (C) at 645C–D; *Eskom Holdings v Lesole Agencies CC* (unreported, FB case no 2555/2016 dated 28 September 2017) at paragraph [7]). See further the notes sv 'General' above.

65 *Deane v Deane* 1955 (3) SA 86 (N) at 87F; *Lockhat v Minister of the Interior* 1960 (3) SA 765 (D) at 777B.

66 *Francis v Sharp* 2004 (3) SA 230 (C) at 240F–G; *Eskom Holdings v Lesole Agencies CC* (unreported, FB case no 2555/2016 dated 28 September 2017) at paragraph [7].

67 *Cilliers v Van Biljon* 1925 OPD 4 at 9; *Boys v Piderit* 1925 EDL 23 at 24.

68 *Boys v Piderit* 1925 EDL 23 at 25.

69 *Brodovsky v Ackerman* 1913 CPD 996; *Wellworths Bazaars Ltd v Chandlers Ltd* 1948 (3) SA 348 (W); *Dunn and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 (1) SA 209 (C); *Gerber v Naude* 1971 (3) SA 55 (T); *Pocket Holdings (Pvt) Ltd v Lobel's Holdings (Pvt) Ltd* 1966 (4) SA 238 (R).

70 *Kock v Zeeman* 1943 OPD 135.

71 *Luttig v Jacobs* 1951 (4) SA 563 (O).

72 *Herbst v Smit* 1929 TPD 306.

73 *General Commercial and Industrial Finance Corporation Ltd v Pretoria Portland Cement Co Ltd* 1944 AD 444 at 454; *Callender-Easby v Grahamstown Municipality* 1981 (2) SA 810 (E) at 812H; *Wilson v South African Railways and Harbours* 1981 (3) SA 1016 (C) at 1018A.

74 *Kock v Zeeman* 1943 OPD 135 at 139; *Greyvenstein v Hattingh* 1925 EDL 308.

75 *Du Plessis v Van Zyl* 1931 CPD 439 at 442.

76 *Florence v Criticos* 1954 (3) SA 392 (N).

77 *Keely v Heller* 1904 TS 101; *Naidu v Naidoo* 1967 (2) SA 223 (N) at 226; in *Small v Herbert* 1914 CPD 273 the document relied upon was 'absolutely meaningless' and an exception taken to the summons as vague and embarrassing was upheld. If the document is ambiguous, and capable of more than one interpretation, and if on one of these interpretations the defendant may be liable on the basis alleged in the summons, the summons is not excipiable; the meaning of the document itself may be put in issue on the pleadings for decision at the trial (*Cairns (Pty) Ltd v Playdon & Co Ltd* 1948 (3) SA 99 (A) at 106; *Sacks v Venter* 1954 (2) SA 427 (W) at 431; *Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A)).

78 *Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C) at 298J and 300G.

79 *Trope v South African Reserve Bank* 1992 (3) SA 208 (T) at 211E.

80 *Horwitz v Hendricks* 1928 AD 391.

81 *Stafford v Special Investigating Unit* 1999 (2) SA 130 (E) at 137G–138C.

82 *Arun Property Development (Edms) Bpk v Stad Kaapstad* 2003 (6) SA 82 (C) at 92D–E and 93I.

83 *Pretorius v Transport Pension Fund* 2019 (2) SA 37 (CC) at 44F–G). In this case the defendants (i e the respondents in the appeal), in various exceptions to the particulars of claim, in essence contended that their predecessors either did not have the capacity to enter into the contract pleaded in the particulars of claim or were lawfully precluded from doing so. In reversing the upholding of the exceptions by the High Court, the Constitutional Court held (at 44G–45A and 50A–C) that the dismissal of the exceptions did not deprive the respondents of the opportunity to raise them as substantive defences in their plea and for the merits to be determined after the leading if evidence at the trial. According to the Constitutional Court it would be better to have the possible unconscionableness of state conduct thrashed out at the trial.

84 *Makgae v Sentraboer (Koöperatief) Bpk* 1981 (4) SA 239 (T) at 244C.

85 1922 AD 16 at 23, quoted in, *inter alia*, *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838E–F; *Minister of Law and Order v Thusi* 1994 (2) SA 224 (N) at 226H–I; *Buys v Roodt (nou Otto)* 2000 (1) SA 535 (O) at 539G–H; *Gardener's Grapevine CC t/a Grapevine v Flowcrete Precast CC* 2009 (1) SA 324 (N) at 326F–G. This definition is derived from that given in *Cooke v Gill* LR & CP 107 and *Read v Brown* [1888] 22 QB 128 at 131. In *Dusheiko v Milburn* 1964 (4) SA 648 (A) at 656–7 Ogilvie-Thompson JA, in delivering the judgment of the majority, stated that this definition has, in both the superior and the inferior courts, been applied on innumerable occasions, and no sufficient grounds exist for it to be reconsidered. In a dissenting judgment Rumpff JA said (at 659–60) that he could not subscribe to a so-called definition which had, years ago, been taken over from an English decision. See also *Lyon v SA Railways and Harbours* 1930 CPD 276 at 284; *Abrahamse & Sons v SA Railways and Harbours* 1933 CPD 626 at 637; *Coetzee v SA Railways and Harbours* 1933 CPD 565 at 570–1; *Malherbe v Britstown Municipality* 1949 (1) SA 281 (C) at 285; *Erasmus v Unieversekerings-Adviseurs (Edms) Bpk* 1962 (4) SA 646 (T) at 648H–649A; *Slomowitz v Vereeniging Town Council* 1966 (3) SA 317 (A) at 330B; *Marais v Du Preez* 1966 (4) SA 456 (E) at 458A; *Myerson v Hack* 1969 (4) SA 521 (SWA) at 522D; *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906 (N) at 909E–H; *Makgae v Sentraboer (Koöperatief) Bpk* 1981 (4) SA 239 (T) at 244E; *The Master v I L Back & Co Ltd* 1981 (4) SA 763 (C) at 778A–B; *Syfin Holdings Ltd v Pickering* 1982 (2) SA 225 (Z) at 232A–D; *Stols v Garlicke & Bousfield Inc* 2012 (4) SA 415 (KZP) at 421H–422A.

86 See *King's Transport v Viljoen* 1954 (1) SA 133 (C) at 138–9; *Erasmus v Unieversekerings-Adviseurs (Edms) Bpk* 1962 (4) SA 646 (T) at 649A; *Dusheiko v Milburn* 1964 (4) SA 648 (A) at 658A; *Myerson v Hack* 1969 (4) SA 521 (SWA) at 523C; *Patterton v Minister van Bantoeadministrasie en Ontwikkeling* 1974 (3) SA 684 (C) at 686H–687F; *Makgae v Sentraboer (Koöperatief) Bpk* 1981 (4) SA 239 (T) at 244F–G; *Minister of Law and Order v Thusi* 1994 (2) SA 224 (N) at 226; *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) at 903A–B; *Koth Property Consultants CC v Lepelle-Nkumpi Local Municipality* 2006 (2) SA 25 (T) at 30F–G.

87 *Makgae v Sentraboer (Koöperatief) Bpk* 1981 (4) SA 239 (T) at 245D.

88 *Alphedie Investments (Pty) Ltd v Greentops (Pty) Ltd* 1975 (1) SA 161 (T) at 161H.

89 *Rich v Bhyat* 1913 TPD 582 at 592; *Lebedina v Schechter and Haskell* 1931 WLD 247 at 255; *Dinath v Breedt* 1966 (3) SA 712 (T) at 715F–G; *De Bruyn v Centenary Finance Co (Pty) Ltd* 1977 (3) SA 37 (T) at 42A–E; *Ngani v Mbanje* 1988 (2) SA 649 (Z) at 651H–652B.

90 *Lebedina v Schechter and Haskell* 1931 WLD 247 at 255; *Mahomed v Nagdee* 1952 (1) SA 410 (A) at 418; *Western Bank Ltd v Wood* 1969 (4) SA 131 (D) at 136F–G; *Du Toit v Vermeulen* 1972 (3) SA 848 (A) at 856H–857A; *Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd (1)* 1976 (1) SA 93 (W) at 96G–97H; *Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd (2)* 1976 (1) SA 100 (W) at 103G–105D; *Philotex (Pty) Ltd v Snyman* 1994 (2) SA 710 (T) at 715F–716E.

91 *Van Zyl v Crause* 1945 OPD 168 at 170; *Goosen v Reed* 1955 (2) SA 478 (T) at 481; *Maree v Diedericks* 1962 (1) SA 231 (T) at 233; *Brits v Coetzee* 1967 (3) SA 570 (T) at 571; *Odendaal v Van Oudtshoorn* 1968 (3) SA 433 (T) at 436; *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O) at 757; *Tuckers Land and Development Corporation (Pty) Ltd v Loots* 1981 (4) SA 260 (T) at 263.

92 *First National Bank of Southern Africa Ltd v Perry NO* 2001 (3) SA 960 (SCA) at 972I; *Nel and Others NNO v McArthur* 2003 (4) SA 142 (T) at 149F. The test is less charitable where vagueness and embarrassment are the basis of an exception (*First National Bank of Southern Africa Ltd v Perry NO* 2001 (3) SA 960 (SCA) at 972I–J).

93 *General Commercial and Industrial Finance Corporation Ltd v Pretoria Portland Cement Co Ltd* 1944 AD 444 at 453; *Brits v Coetzee* 1967 (3) SA 570 (T) at 571; *Joubert v Impala Platinum (Pty) Ltd* 1998 (1) SA 463 (B) at 471H–I.

94 *Kennedy v Steenkamp* 1936 CPD 113 at 115; *Amalgamated Footwear & Leather Industries v Jordan & Co Ltd* 1948 (2) SA 891 (C); *Kitching v London Assurance Co* 1959 (3) SA 247 (C); *Fairlands (Pty) Ltd v Inter-Continental Motors (Pty) Ltd* 1972 (2) SA 270 (A).

95 *Union and National and General Assurance Co of SA Ltd v Forward Fashions Co* 1929 CPD 528.

96 *Wessels v Badenhorst* 1939 TPD 465; *Mothle v Mathole* 1951 (1) SA 785 (T) at 790; *Van Zyl v Niemann* 1964 (4) SA 661 (A) at 669–70; *Antonie v Koekoe* 1966 (2) SA 610 (O); *Solson's Properties (Pty) Ltd v Baksh* 1970 (1) SA 49 (N).

97 See the notes s v 'General' above.

98 *Joubert v Steenkamp* 1909 TS 169 at 171; *F J Hawkes & Co Ltd v Nagel* 1957 (3) SA 126 (W) at 130; *SA Defence and Aid Fund v Minister of Justice* 1967 (1) SA 31 (C) at 37. The converse proposition was stated in *McKelvey v Cowan NO* 1980 (4) SA 525 (Z) at 526:
'It is a first principle in dealing with matters of exception that, if evidence can be led which can disclose a cause of action alleged in the pleading, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleadings can disclose a cause of action.'

99 *General Commercial and Industrial Finance Corporation Ltd v Pretoria Portland Cement Co Ltd* 1944 AD 444 at 452; *Du Plessis v Nel* 1952 (1) SA 513 (A); *Gerber v Naude* 1971 (3) SA 55 (T) at 59.

100 *Shifren v SA Sentrale Ko-op Graanmaatskappy Bpk* 1964 (2) SA 343 (O); *Suid-Afrikaanse Sentrale Ko-Op Graanmaatskappy Bpk v Shifren* 1964 (4) SA 760 (A). See also *Impala Distributors v Taunus Chemical Manufacturing Co (Pty) Ltd* 1975 (3) SA 273 (T); *Plascon-Evans Paints (Transvaal) Ltd v Virginia Glass Works (Pty) Ltd* 1983 (1) SA 465 (O).

101 *Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A) at 186J; *Francis v Sharp* 2004 (3) SA 230 (C) at 237F–G.

102 *Dettmann v Goldfain* 1975 (3) SA 385 (A) at 400A.

103 *Dettmann v Goldfain* 1975 (3) SA 385 (A) at 400A–B and the cases there referred to.

104 *Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) at 455G; *Burroughs Machines Ltd v Chenille Corp of SA (Pty) Ltd* 1964 (1) SA 669 (W) at 676F–H; *Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd* 1991 (1) SA 508 (A) at 514E–F; *Francis v Sharp* 2004 (3) SA 230 (C) at 240F–G.

105 *IS & GM Construction CC v Tunmer* 2003 (5) SA 218 (W). In terms of s 10(1) of the Housing Consumers Protection Measures Act 95 of 1998 no person is entitled to carry on the business of a home builder or to receive any consideration in terms of any agreement with a housing consumer i r o the construction of a home unless such person is a registered home builder. The prohibition does not affect the validity of particular home-building agreements, but disentitles unregistered builders from receiving or claiming consideration under them. An intervening arbitration award in its favour would not aid the unregistered builder, for the court would be precluded from enforcing it. Given the clear wording of the prohibition and the illegality it contemplates, equity would not enter into the matter (*Hubbard v Cool Ideas 1186 CC* 2013 (5) SA 112 (SCA) at 118H–J and 119G–J, confirmed on appeal *sub nomine Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC)).

106 *Stephens v Liepner* 1938 WLD 30; *Graham v McGee* 1949 (4) SA 770 (D); *Palmer v President Insurance Co Ltd* 1967 (1) SA 673 (O) at 679.

107 *Varty v Nixen and Unali* (1892) 13 NLR 73; *Arnagiri v Moliffe* (1908) 29 NLR 80.

108 *Fleming v Rietfontein Deep Gold Mining Co Ltd* 1905 TS 111.

109 *Walbrugh v Newmark* 1912 CPD 725; and see *Varty v Nixen and Unali* (1892) 13 NLR 73.

110 *Van der Bijl v Featherbrooke Estate Homeowners' Association (NPC)* 2019 (1) SA 642 (GJ) at 546A–F.

111 *Durr v SA Railways and Harbours* 1917 CPD 284; *Raad vir Kuratore vir Warmbad Plase v Bester* 1954 (3) SA 71 (T); *Brandfort Munisipaliteit v Esterhuizen* 1957 (1) SA 229 (O); *Serobe v Koppies Bantu Community School Board* 1958 (2) SA 265 (O).

112 *Ketteringham v City of Cape Town* 1934 AD 80 at 90, upholding the view taken in *Van Buuren v Gien* 1913 TPD 346 at 351; *Yannakou v Apollo Club* 1974 (1) SA 614 (A) at 623G–H; *Fundtrust (Pty) Ltd (in Liquidation) v Van Deventer* 1997 (1) SA 710 (A) at 725H–I; *Swart v Heine* (unreported, SCA case no 192/2015 dated 14 March 2016) at paragraph [7]. See also *Arun Property Development (Edms) Bpk v Stad Kaapstad* 2003 (6) SA 82 (C) at 91B–D; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at 507C–D; *Nedbank Ltd v Mortinson* 2005 (6) SA 462 (W) at 473A–B; *Ehrlich v Minister of Correctional Services* 2009 (2) SA 373 (E) at 383F; *Vosal Investments (Pty) Ltd v City of Johannesburg* 2010 (1) SA 595 (GSJ) at 603C–604A.

113 *Grey v Stip* 1916 TPD 171; *Price v Price* 1946 CPD 59; *Van der Merwe v Santam* 1947 (2) SA 440 (C); *Botha v Guardian Assurance Co Ltd* 1949 (2) SA 223 (GW); *McKay v Stein* 1950 (4) SA 692 (W); *Wasmuth v Jacobs* 1987 (3) SA 629 (SWA) at 634I; *Fundtrust (Pty) Ltd (in Liquidation) v Van Deventer* 1997 (1) SA 710 (A) at 725H–I; *Arun Property Development (Edms) Bpk v Stad Kaapstad* 2003 (6) SA 82 (C) at 91E–92D; *Swart v Heine* (unreported, SCA case no 192/2015 dated 14 March 2016) at paragraph [7]; *Scheffer Supplier CC v Alorin International (Pty) Ltd* (unreported, GP case no 71836/2016 dated 3 August 2018) at paragraphs [10]–[13].

114 If a cause of action is, for example, based on a written agreement to erect a dwelling house, the builder who institutes the action must allege that he is a registered home builder in terms of s 10(1) of the Housing Consumers Protection Measures Act 95 of 1998 (*IS & GM Construction CC v Tunmer* 2003 (5) SA 218 (W) at 220G–I). In terms of s 10(1) of Act 95 of 1998 no person is entitled to carry on the business of a home builder or to receive any consideration in terms of any agreement with a housing consumer in respect of the construction of a home unless such a person is a registered home builder. The prohibition does not affect the validity of particular home-building agreements, but disentitles unregistered builders from receiving or claiming consideration under them. An intervening arbitration award in its favour would not aid the unregistered builder, for the court would be precluded from enforcing it. Given the clear wording of the prohibition and the illegality it contemplates, equity would not enter into the matter (*Hubbard v Cool Ideas 1186 CC* 2013 (5) SA 112 (SCA) at 118H–J and 119G–J, confirmed on appeal *sub nomine Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC)).

115 *Arun Property Development (Edms) Bpk v Stad Kaapstad* 2003 (6) SA 82 (C) at 91B–D.

116 *Collin v Toffie* 1944 AD 456 at 466; *Anderson v Gordik Organisation* 1960 (4) SA 244 (N) at 247D; *Edwards v Woodnutt NO* 1968 (4) SA 184 (R) at 186D–F; *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O) at 759H–760E; *Anirudh v Samdei* 1975 (2) SA 706 (N) at 708E; *Ahmadiyya Anjuman Ishaati-Islam Lahore (South Africa) v Muslim Judicial Council (Cape)* 1983 (4) SA 855 (C) at 860F; *Smith v Conelect* 1987 (3) SA 689 (W) at 692D–693F; *Van Zyl NO v Bolton* 1994 (4) SA 648 (C) at 651D; *Gallo Africa Ltd v Sting Music (Pty) Ltd* 2010 (6) SA 329 (SCA) at 331I–332B.

117 See *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O) at 759H.

118 See, for example, *Miller v Muller* 1965 (4) SA 458 (C) at 467A.

119 See, for example, *Lampert-Zakiewicz v Marine & Trade Insurance Co Ltd* 1975 (4) SA 597 (C) and *Voltex (Pty) Ltd v Chenleza CC* 2010 (5) SA 267 (KZP).

120 *Tyulu v Southern Insurance Association Ltd* 1974 (3) SA 726 (E) at 729C–E; *Felix v Nortier NO (2)* 1994 (4) SA 502 (SE) at 506E; *Landmark Mthatha (Pty) Ltd v King Sabata Dalindyebo Municipality: In re African Bulk Earthworks (Pty) Ltd v Landmark Mthatha (Pty) Ltd* 2010 (3) SA 81 (ECM) at 85H–86G.

121 *Stockdale Motors Ltd v Mostert* 1958 (1) SA 270 (O); *Tyulu v Southern Insurance Association Ltd* 1974 (3) SA 726 (E) at 729C–E; *Landmark Mthatha (Pty) Ltd v King Sabata Dalindyebo Municipality: In re African Bulk Earthworks (Pty) Ltd v Landmark Mthatha (Pty) Ltd* 2010 (3) SA 81 (ECM) at 86A–B.

122 *Landmark Mthatha (Pty) Ltd v King Sabata Dalindyebo Municipality: In re African Bulk Earthworks (Pty) Ltd v Landmark Mthatha (Pty) Ltd* 2010 (3) SA 81 (ECM) at 88H–I.

123 *Algoa Milling Co v Arkell & Douglas* 1918 AD 145; *Myers v Shraga* 1947 (2) SA 258 (T); *Allen and Others NNO v Gibbs* 1977 (3) SA 212 (SE).

124 *Ngwenya v Hindley* 1950 (1) SA 839 (C).

125 *Cohen v Haywood* 1948 (3) SA 365 (A).

126 *Berezniak v Van Nieuwenhuizen* 1948 (1) SA 1057 (T).

127 *Haarhoff v Wakefield* 1955 (2) SA 425 (E); and see rule 18(1) above.

128 See *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O) at 754H–755A.

129 *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O) at 753F; *NKP Kunsmisverspreiders (Edms) Bpk v Sentrale Kunsmis Korporasie (Edms) Bpk* 1973 (2) SA 680 (T) at 688D.

130 See also *Landmark Mthatha (Pty) Ltd v King Sabata Dalindyebo Municipality: In re African Bulk Earthworks (Pty) Ltd v Landmark Mthatha (Pty) Ltd* 2010 (3) SA 81 (ECM) at 85B.

131 See *National Union of South African Students v Meyer; Curtis v Meyer* 1973 (1) SA 363 (T) at 365D. It is, however, not necessary in the notice specially to draw attention to the time allowed by the rule for the removal of the cause of complaint (*Chapman v Proclad (Pty) Ltd* 1978 (2) SA 336 (NC) at 339F). In this case (see at 338C) the defendant was told in very precise terms in what respects its plea required amplification.

132 *Operative Furnishing Co (Pty) Ltd v Dragon Gas Services (Pty) Ltd* 1965 (4) SA 5 (E) at 10C; *National Union of South African Students v Meyer; Curtis v Meyer* 1973 (1) SA 363 (T) at 367B; *Trope v South African Reserve Bank* 1993 (3) SA 264 (A) at 268A–C.

133 *National Union of South African Students v Meyer; Curtis v Meyer* 1973 (1) SA 363 (T) at 366A–367A.

134 See *Trope v South African Reserve Bank* 1993 (3) SA 264 (A) at 268D.

135 *National Union of South African Students v Meyer; Curtis v Meyer* 1973 (1) SA 363 (T) at 368A–B.

136 1914 AD 152 at 156.

137 See also *Barendse v Rattray* 1917 TPD 622 at 623–4; *Commissioner of Customs v Airton Timber Co Ltd* 1926 AD 1 at 4; *Leslie v African Life Assurance Society Ltd* 1927 WLD 151 at 155–6.

138 *Champion v J D Celliers & Co Ltd* 1904 TS 788 at 790.

139 *Stephens v De Wet* 1920 AD 279 at 282; *Rail Commuters' Action Group v Transnet Ltd* 2006 (6) SA 68 (C) at 83E; *Living Hands (Pty) Ltd v Ditz* 2013 (2) SA 368 (GSJ) at 394D–E.

140 *Vaatz v Law Society of Namibia* 1991 (3) SA 563 (Nm) at 566C–E; *Tshabalala-Msimang v Makhanya* [2008] 1 All SA 509 (W) at 516*e-f*; *Breedenkamp v Standard Bank of South Africa Ltd* 2009 (5) SA 304 (GSJ) at 321C–E.

141 *Meintjes v Wallachs Ltd* 1913 TPD 278 at 285.

142 *Bosman v Van Vuuren* 1911 TPD 825 at 831–2; *Stephens v De Wet* 1920 AD 279 at 282; *Deeley-Barnard v Thambi* 1992 (4) SA 404 (D).

143 See *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1984 (1) SA 443 (W) at 456A–E.

144 *Bosman v Van Vuuren* 1911 TPD 825 at 832; *Stephens v De Wet* 1920 AD 279 at 282; *Brown v Bloemfontein Municipality* 1924 OPD 226 at 229; *Geyser v Geyser* 1926 TPD 590 at 593–5; *Katz v Saffer and Saffer* 1944 WLD 124 at 133; *Rail Commuters' Action Group v Transnet Ltd* 2006 (6) SA 68 (C) at 83G–H.

145 *Habib v Patel* 1917 TPD 230 at 232; *Geyser v Geyser* 1926 TPD 590 at 594; *Weichardt v Argus Printing & Publishing Co Ltd* 1941 CPD 133 at 145; *Golding v Torch Printing and Publishing Co (Pty) Ltd* 1948 (3) SA 1067 (C) at 1090. at 1090; *Rail Commuters' Action Group v Transnet Ltd* 2006 (6) SA 68 (C) at 83H.

146 *Ahlers NO v Snoeck* 1946 TPD 590 at 594; *Du Toit v Du Toit* 1958 (2) SA 354 (D) at 356C–F.

147 *Meintjies v Wallachs Ltd* 1913 TPD 278 at 285.

148 *Levinsohn v Ferreira* 1948 (4) SA 299 (T) at 301; *Foord v Lake and Others NNO* 1968 (4) SA 395 (W) at 398G.

149 *Richter v Town Council of Bloemfontein* 1920 OPD 172 at 174; *Ahlers NO v Snoeck* 1946 TPD 590 at 594; *Rail Commuters' Action Group v Transnet Ltd* 2006 (6) SA 68 (C) at 83I–84B.

150 *African Realty Trust v Roper* 1921 TPD 372 at 374–5; *Willemse's Curators v Leliveld* 1931 OPD 129 at 131.

151 *Taylor-Coryell Madagascar Syndicate Ltd v Madagascar Oil Development Co Ltd* 1910 WLD 265; but see *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1984 (1) SA 443 (W) at 456D.

152 See the notes to this subrule s v 'General' above.

153 *Stephens v De Wet* 1920 AD 279 at 282; *Rail Commuters' Action Group v Transnet Ltd* 2006 (6) SA 68 (C) at 83E.

154 *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 337C and the cases there referred to; *Living Hands (Pty) Ltd v Ditz* 2013 (2) SA 368 (GSJ) at 394D–E; *University of the Free State v Afriforum* 2017 (4) SA 283 (SCA) at 296E–F.

155 *Harding and Parker v John Pierce & Co* 1919 OPD 113 at 122; *Richter v Town Council of Bloemfontein* 1920 OPD 172 at 174; *Golding v Torch Printing and Publishing Co (Pty) Ltd* 1948 (3) SA 1067 (C) at 1090.

156 1984 (1) SA 443 (W) at 456E.

157 See *Molteno Bros v SA Railways* 1936 AD 408 at 417; *Sydney Clow & Co Ltd v Munnik* 1965 (1) SA 626 (A) at 6343G; *National Union of South African Students v Meyer; Curtis v Meyer* 1973 (1) SA 363 (T) at 368D–E; *Cook v Muller* 1973 (2) SA 240 (N) at 244A–C; *Bothma v Laubscher* 1973 (3) SA 590 (O) at 592B.

158 *Grimbeek v Leonard* 1932 CPD 62 at 63; *Britz v Weideman* 1946 OPD 144 at 150; *Inkin v Borehole Drillers* 1949 (2) SA 366 (A) at 373; *Ritchie Motors v Moolman* 1956 (4) SA 337 (T) at 340A–C; and see *Jack Smith v Joe's (Pty) Ltd* 1929 TPD 323; *Cotas v Williams* 1947 (2) SA 1154 (T); *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) at 899 (A); *Alphina Investments Ltd v Blacher* 2008 (5) SA 479 (C) at 483D, 488G–I. In *Wicksteed v George* 1961 (1) SA 651 (FC) an appellant was not allowed to rely on a ground of exception not raised in the court below.

159 *Jewish Colonial Trust Ltd v Estate Nathan* 1940 AD 163 at 174–5; *Singleton v Shevel* 1957 (1) SA 65 (O) at 68B; *Pietermaritzburg City Council v Local Road Transportation Board, Pietermaritzburg* 1960 (1) SA 254 (N) at 256E–F; *Kistensamy v Bramdaw* 1962 (3) SA 797 (D); *Soma v Marulane NO* 1975 (3) SA 53 (T) at 55B; *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A) at 552H. In *Marais v Steyn* 1975 (3) SA 479 (T) at 483A the absence of a prayer in an

exception was called 'die toppunt van die slordigheid wat die eiser se pleitstukke kenmerk'.

24 Claim in reconvention

(1) A defendant who counterclaims shall, together with his plea, deliver a claim in reconvention setting out the material facts thereof in accordance with rules 18 and 20 unless the plaintiff agrees, or if he refuses, the court allows it to be delivered at a later stage. The claim in reconvention shall be set out either in a separate document or in a portion of the document containing the plea, but headed 'Claim in Reconvention'. It shall be unnecessary to repeat therein the names or descriptions of the parties to the proceedings in convention.

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

(2) If the defendant is entitled to take action against any other person and the plaintiff, whether jointly, jointly and severally, separately or in the alternative, he may with the leave of the court proceed in such action by way of a claim in reconvention against the plaintiff and such other persons, in such manner and on such terms as the court may direct.

(3) A defendant who has been given leave to counterclaim as aforesaid, shall add to the title of his plea a further title corresponding with what would be the title of any action instituted against the parties against whom he makes claim in reconvention, and all further pleadings in the action shall bear such title, subject to the proviso to subrule (2) of rule 18.

(4) A defendant may counterclaim conditionally upon the claim or defence in convention failing.

(5) If the defendant fails to comply with any of the provisions of this rule, the claim in reconvention shall be deemed to be an irregular step and the other party shall be entitled to act in accordance with rule 30.

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

Commentary

General. It not infrequently happens that a defendant not only defends the action brought against him by the plaintiff but also has an action of his own to bring against the plaintiff. This cross-action may arise out of the same transaction that gave rise to the plaintiff's claim or may be quite separate and distinct from it. In both cases it is desirable that the defendant, instead of being required to institute a separate cross-action with his own summons, and which proceeds eventually to a separate trial and judgment, should be allowed to link his action with the plaintiff's so that in a proper case the two actions may be heard together, and so that judgment in the two may be pronounced at the same time. This prevents one party from getting a judgment against the other where the other has a claim which, when adjudicated upon in its turn, may compensate and wipe out the first claim. [1] The Roman-Dutch writers were emphatic that any right of action might be brought by way of claim in reconvention. [2] A claim in reconvention is, therefore, a convenient surrogate for an independent action. If a separate action were instituted by a defendant against the plaintiff, the actions could be consolidated, so that the situation would be no different from that which arises where there is a claim and counterclaim. The essence of the defence is that the two claims may be adjudicated upon simultaneously and judgment thereupon entered according to the balance which might result from such adjudication. [3]

Although the claims in convention and reconvention are normally dealt with *pari passu* and judgment on both is delivered simultaneously, the court has inherent power, in a proper case, to grant judgment by default on a claim in reconvention before the claim in convention is disposed of. [4] It has, however, been held that this power ought not be exercised where the claims are so closely interconnected that if they were heard together one could not be granted without the rejection of the other. [5]

The wording of rule 32 would appear clearly to limit the right to apply for summary judgment to a plaintiff in convention. It is furthermore submitted that to allow a plaintiff in reconvention to claim summary judgment against the defendant in reconvention might well result in frustration of the principle that the parties' claims should be set off, one against the other. See further, in this regard, the notes to rule 32(1) s v 'The plaintiff' below.

Section 8 of the Close Corporations Act 69 of 1984 makes provision for security for costs to be given by a plaintiff in reconvention. See further the notes to rule 47 s v 'General' below.

Subrule (1): 'A defendant who counterclaims.' The rules do not make provision for a counterclaim to a claim in reconvention, but such a procedure may be countenanced where the plaintiff's claim is withdrawn in its entirety. The defendant's claim in reconvention would in such a case become in reality the main claim and a counterclaim by the plaintiff a permissible response. [6]

It is not competent for one defendant to join a co-defendant as a defendant in a claim in reconvention except with the leave of the court in terms of subrule (2). [7] See further the notes to subrule (2) below.

'Shall, together with his plea, deliver a claim in reconvention.' Although as a general rule the claim in reconvention must be delivered with the plea, this subrule makes delivery possible at a later stage with the consent of the plaintiff or the leave of the court. [8] A notice of intention to amend a plea so as to introduce a claim in reconvention without the procedure in this subrule having been followed is an irregular step. [9]

'Setting out the material facts . . . in accordance with rules 18 and 20.' Although the two claims may proceed to trial simultaneously, they remain two separate actions [10] with two

wholly distinct sets of pleadings. [11] Thus, the defendant should make the allegations necessary for his defence in his plea, and must make the allegations necessary to support his counterclaim in his claim in reconvention. [12]

'The court allows it.' The introduction of a claim in reconvention subsequent to the delivery of a plea requires the leave of the court if the plaintiff refuses to consent thereto. The criteria in an application for such leave are, first, that there must be a reasonable and acceptable explanation for the lateness and, secondly, that the defendant must show an entitlement to institute the claim in reconvention (i e the proposed claim in reconvention must comply with the provisions of rules 18 and 24). [13] The court, however, retains a discretion whether or not to allow the introduction of the proposed claim in reconvention. [14]

'Either in a separate document or in a portion of the document containing the plea.' In terms of this subrule the claim in reconvention can be set out either in a separate document or in a portion of the document containing the plea. In the latter case it must be clearly headed 'Claim in Reconvention'. Since the claim and claim in reconvention are two separate and distinct actions, each with its separate set of pleadings, it is preferable that the claim in reconvention be set out in a separate document. [15]

'It shall be unnecessary to repeat therein.' It is customary to state in the claim in reconvention that the plaintiff in reconvention is the defendant in convention and that the defendant in reconvention is the plaintiff in convention and that the parties are referred to as before. [16] It is usual to incorporate by way of reference allegations contained in the plaintiff's pleadings in convention as well as allegations made in the plea. [17]

Subrule (2): 'If the defendant is entitled to take action against.' The defendant would be entitled to take action against ('geregtig om aksie in te stel teen') those mentioned in the rule if:

(a) he is eligible in law to institute action against the persons contemplated in the rule; and

(b) they are eligible in law to be sued.

The defendant would be eligible in law to institute action against the persons contemplated in the rule (and they would be eligible in law to be sued):

(i) under the common law, on grounds of convenience, equity, the saving of costs and the avoidance of multiplicity of actions; or

(ii) if the action fits into the mould of rule 10(3).

Entitlement to take action is not the equivalent of a prima facie case of potential success in an action against the persons concerned. [18]

'Against any other person and the plaintiff.' This subrule is limited to a claim in reconvention against the plaintiff and the other person and cannot be invoked where there is not a claim in reconvention against the plaintiff. The only way in which a defendant can bring a claim against a co-defendant in the absence of a claim in reconvention against the plaintiff would be by virtue of the provisions of rule 13. [19]

'May with the leave of the court proceed in such action.' An applicant who applies for leave in terms of this subrule to institute a claim in reconvention against the plaintiff and other persons need not in his application make out a prima facie case for the relief claimed in the claim in reconvention. The applicant is required to show that he is 'entitled to take action' against the persons concerned, to disclose his *locus standi* and that of the persons against whom he proposes to institute the claim in reconvention, and to disclose in terms of rule 10(3) the cause or causes of action upon which the action against them would be based. These facts together with such further facts as may possibly be material in a particular case, such as overriding considerations of justice, equity or convenience, form the subject matter for the exercise of the court's discretion under the subrule. [20]

Subrule (4): 'A defendant may counterclaim conditionally.' This subrule renders inapplicable decisions such as *Munro v Tayfield* [21] and (on this point) *Pilcher and Conways (Pty) Ltd v Van Heerden*. [22]

Subrule (5): 'The claim in reconvention shall be deemed to be an irregular step.' See rule 30 and the notes thereto below.

1 See *Du Toit v De Beer* 1955 (1) SA 469 (T); *J R & M Moffett (Pty) Ltd v Kolbe Eiendoms Beleggings (Edms) Bpk* 1974 (2) SA 426 (O); *Marshall Timbers Ltd v Hauser and Battaglia (Pty) Ltd* 1976 (3) SA 437 (D) at 439C–F.

2 Voet 5 1 78–80; and see *Brunett v Stanford* (1859) 3 Searle 221 at 225. At common law, however, there can be no counterclaim at all in cases of spoliation and of penal interdict (Van der Linden *Jud Prac* 2 4 13).

3 *Marshall Timbers Ltd v Hauser and Battaglia (Pty) Ltd* 1976 (3) SA 437 (D) at 439C–F.

4 *SA Fisheries and Cold Storage v Yankelowitz* (1906) 23 SC 667; *Smith NO v Brummer NO* 1954 (3) SA 352 (O) at 362F; *Matyeka v Kaaber* 1960 (4) SA 900 (T) at 904C; *Botes v Botes* 1966 (4) SA 295 (T) at 296B; *ACS v ACS* 1981 (2) SA 795 (W) at 796H–797C; *Mauritz Marais Bouers (Pty) Ltd v Carizette (Pty) Ltd* 1986 (4) SA 439 (O).

5 *Botes v Botes* 1966 (4) SA 295 (T) at 296B–H; *Smith NO v Brummer NO* 1954 (3) SA 352 (O) at 362A–E; *Mauritz Marais Bouers (Pty) Ltd v Carizette (Pty) Ltd* 1986 (4) SA 439 (O).

6 *Levy v Levy* 1991 (3) SA 614 (A) at 619E.

7 *Soundprops 1160 CC v Karlshavn Farm Partnership* 1996 (3) SA 1026 (N) at 1031B–D.

8 The amendment of the subrule in 1987 resolved the difference of opinion in this regard which manifested itself in, on the one hand, *Searle v Searle* 1967 (2) SA 19 (O) and, on the other, *Van Jaarsveld v Nel* 1974 (1) SA 103 (T).

9 *Shell SA Marketing (Pty) Ltd v Wasserman t/a Wasserman Transport* 2009 (5) SA 212 (O) at 217I–J.

10 See, for example, *Brunette v Stanford* (1859) 3 Searle 221 at 225–6; *Fripp v Gibbon & Co* 1913 AD 354 at 360; *Fielding v Sociedade Industrial de Oleas Limitada* 1935 NPD 540 at 547–8; *Du Toit v De Beer* 1955 (1) SA 469 (T) at 472 and 473, and the other authorities referred to therein; *Matyeka v Kaaber* 1960 (4) SA 900 (T); *Fisheries Development Corporation of SA Ltd v Jorgenson* 1979 (3) SA 1331 (W) at 1337D–F; *Kritzinger v Kritzinger* 1989 (1) SA 67 (C) at 78J–79A. There should be a judgment on each claim and, if possible, each should carry its own costs (*Rodel Bros v Thole* (1905) 26 NLR 702 at 706; *Simpson v Sharp* 1948 (4) SA 73 (N); *Trade Traffic (Pty) Ltd v Cook* 1979 (2) SA 1070 (C) at 1071H–1072A; *ACS v ACS* 1981 (2) SA 795 (W) at 797A–H; *MB Service Station v Sell-Mar Installations (Pty) Ltd* 1983 (2) SA 516 (T) at 518E).

11 *Cauvin v Landsberg* (1851) 1 Searle 86 at 92; *Sammel v Clerk of Magistrate's Court, Cape* 1918 CPD 529 at 532; *Fielding v Sociedade Industrial de Oleas Limitada* 1935 NPD 540 at 548.

12 In *Hill v Lewis and Marks* (1908) 10 HCG 156 it was held that a deficiency in the counterclaim cannot be cured by a reference to the plea. Nor can a vague and embarrassing plea be sought to be excused because the matter in doubt is more clearly set out in the claim in reconvention (*Park v Bank of Africa* (1883) 2 HCG 66 at 74; *Mullins v Mond* 1921 SR 62).

13 *Lethimvula Healthcare (Pty) Ltd v Private Label Promotion (Pty) Ltd* 2012 (3) SA 143 (GSJ) at 146G–148H.

14 *Lethimvula Healthcare (Pty) Ltd v Private Label Promotion (Pty) Ltd* 2012 (3) SA 143 (GSJ) at 148H–I.

15 See the remarks of Lansdown J in *Fielding v Sociedade Industrial de Oleas Limitada* 1935 NPD 540 at 548, cited with approval in *Pilcher and Conways (Pty) Ltd v Van Heerden* 1963 (3) SA 205 (O) at 209B.

16 *Amler's Precedents of Pleadings* 8; Beck *Pleading* 294.

17 *Amler's Precedents of Pleadings* 8; *London & SA Exploration Co v Noonan* (1887) 4 HCG 357 at 359.

18 *Hosch-Fömrdertechnik SA (Pty) Ltd v Brelko CC* 1990 (1) SA 393 (W) at 395B–H.

19 *Soundprops 1160 CC v Karlshavn Farm Partnership* 1996 (3) SA 1026 (N) at 1031C–E.

20 *Hosch-Fömrdertechnik SA (Pty) Ltd v Brelko CC* 1990 (1) SA 393 (W) at 395B–H.

21 (1928) 49 NLR 41.

22 1963 (3) SA 205 (O).

25 Replication and plea in reconvention

(1) Within fifteen days after the service upon him of a plea and subject to subrule (2) hereof, the plaintiff shall where necessary deliver a replication to the plea and a plea to any claim in reconvention, which plea shall comply with rule 22.

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

(2) No replication or subsequent pleading which would be a mere joinder of issue or bare denial of allegations in the previous pleading shall be necessary, and issue shall be deemed to be joined and pleadings closed in terms of paragraph *(b)* of rule 29.

(3) Where a replication or subsequent pleading is necessary, a party may therein join issue on the allegations in the previous pleading. To such extent as he has not dealt specifically with the allegations in the plea or such other pleading, such joinder of issue shall operate as a denial of every material allegation of fact in the pleading upon which issue is joined.

(4) A plaintiff in reconvention may, subject to the provisions mutatis mutandis of subrule (2) hereof, within ten days after the delivery of the plea in reconvention deliver a replication in reconvention.

[Subrule (4) substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

(5) Further pleadings may, subject to the provisions mutatis mutandis of subrule (2), be delivered by the respective parties within ten days after the previous pleading delivered by the opposite party. Such pleadings shall be designated by the names by which they are customarily known.

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

Commentary

General. The replication is the plaintiff's answer to the defendant's plea. It is unnecessary to deliver a replication if the plaintiff wishes only to deny the allegations contained in the plea; by virtue of the provisions of subrule (2), the plaintiff is deemed to have denied all the allegations in the plea. It follows that a replication need be delivered only if the plaintiff wishes to plead fresh facts in answer to the defendant's plea. If the plea is a bare denial of the allegations made in the declaration or particulars of claim, a replication is unnecessary, and the rules do not provide for one in such a case; the pleadings are closed as soon as the plea is delivered. [1] It is submitted that if an unnecessary replication is delivered, costs thereof should not be allowed to the plaintiff if he is successful. [2]

The plaintiff is restricted to answering the allegations made by the defendant in his plea and may not in his replication introduce a fresh claim or a fresh cause of action. A replication which does introduce a fresh cause of action is known as a 'departure', and is bad. [3] If he does so the defendant may apply to have the replication struck out as an irregular step [4] or may except [5] to the replication. To replicate that an alleged compromise was induced by

fraud, [6] or that an alleged prescription has been interrupted, [7] does not amount to raising new matter or involve any 'departure' from the declaration or particulars of claim. Repetitions are not 'new allegations'. [8] If the plaintiff wishes to introduce a new cause of action after the defendant has delivered his plea, his correct course is to apply for an amendment of his summons. [9] It follows that new allegations may be made in reply only when they are called for by the plea.

If the plea is a confession and avoidance of the facts pleaded in the declaration or particulars of claim, the plaintiff may answer the avoiding allegations by pleading new facts. The test is whether in so doing he is relying upon the same cause of action as set out in the summons, and merely answering the defendant's avoidance, or whether he is introducing a new basis for his claim. If, for example, the declaration or particulars of claim alleges a breach of contract, and this is sufficiently answered in the plea, the plaintiff cannot in his replication alter the basis of his claim to fraud. [10]

An illustration of the contrary proposition is furnished by *Graham v Ridley*. [11] The plaintiff claimed an ejectment order against the defendant, and alleged merely that he was the owner of the premises, and that the defendant was in wrongful and unlawful occupation thereof. The defendant admitted that he was in possession of the property, but pleaded that this was under and by virtue of a lease granted to him by the plaintiff. To this the plaintiff replied that the lease had been cancelled on the ground of a breach by the defendant. It was held that the reply was not a departure, as it did not introduce a new cause of action. The history of the matter appeared different after the reply was filed, but the cause of action remained the same. The plaintiff was the owner, and was therefore entitled to possession, whether or not there happened to have been a lease which had been terminated or cancelled.

In the original service of this work it was stated that estoppel could be raised by a plaintiff only in his replication. [12] In *Makate v Vodacom Ltd* [13] the Constitutional Court, in its main

judgment, was at pains to distinguish between estoppel and ostensible authority, [14] and held that ostensible authority could be pleaded by a plaintiff in his particulars of claim. [15] In the minority judgment it was pointed out [16] that, depending on the circumstances of the case, estoppel and ostensible authority could be pleaded in particulars of claim or by way of replication.

Subrule (1): 'Where necessary.' See the notes s v 'General' above.

Subrule (2): 'A mere joinder of issue or bare denial of allegations.' In view of the provisions of this subrule, a formal replication which merely denies the allegations in the plea and joins issue is no longer necessary, and the costs thereof may be disallowed on taxation. [17]

'Issue shall be deemed to be joined and pleadings closed.' The fact that a plaintiff is barred from replicating does not debar him from proceeding with the action; the pleadings are merely deemed to be closed and the action may be set down for trial. [18]

This subrule makes it clear that failure to deliver a replication or subsequent pleading, does not amount to an admission of the allegations in the plea or other previous pleading. [19]

Subrule (3): 'Shall operate as a denial of every material allegation of fact.' If a replication or subsequent pleading is delivered, failure to deal specifically with allegations in the previous pleading does not amount to an admission of the allegations in the plea or other previous pleading.

Subrule (5): 'Designated by the names by which they are customarily known.' The 'further pleadings' to which reference is made in this subrule are seldom required in practice. The full set of pleadings which can be exchanged between parties is as follows:

PLAINTIFF	**DEFENDANT**
• Declaration (Deklarasie)	
• Particulars of claim (Besonderhede van vordering)	• Plea (Pleit)
• Replication (Replikasie)	• Rejoinder (Dupliek)

• Surrejoinder (Tripliek)	• Rebutter (Tweede dupliek)
• Surrebutter (Tweede tripliek)	

1 See rule 29(1)*(a)*; *Uranowsky v Herzberg Mullne Automatic Products Ltd* 1933 CPD 423; and see *Moghambaram v Travagaimmal* 1963 (3) SA 61 (D); *Milne NO v Shield Insurance Co Ltd* 1969 (3) SA 352 (A).

2 See *Phiroz v Weinberg Bros* 1918 CPD 414; *Black v Hajie* 1919 CPD 83.

3 *Joerning v The Paarl Ophir Gold Mining and Milling Co Ltd* (1898) 5 Off Rep 9; *Broad v Bloom* 1903 TH 427.

4 In terms of rule 30.

5 In terms of rule 23. See also *Joerning v The Paarl Ophir Gold Mining and Milling Co Ltd* (1898) 5 Off Rep 9; *Broad v Bloom* 1903 TH 427; *Faischt v Colonial Government* (1903) 20 SC 210; *Farrar v Geldenhuis GM Co* 1908 TH 16; *Fourie NO v Oberholzer* 1914 TPD 227; *De Beer v Minister of Posts and Telegraphs* 1923 AD 653 at 657; *Seventh Day Adventists v Carey* 1930 CPD 243; *Butler v Swain* 1960 (1) SA 527 (N).

6 *Schultze & Co v Rosen Bros & Co* 1904 TH 153.

7 *Butler v Swain* 1960 (1) SA 527 (N).

8 *Butler v Swain* 1960 (1) SA 527 (N) at 529B–D.

9 *Faischt v Colonial Government* (1903) 20 SC 210; *De Beer v Minister of Posts and Telegraphs* 1923 AD 653 at 657; *United Dominions Corporation (Rhodesia) Ltd v Van Eyssen* 1961 (1) SA 53 (SR) at 58C; *Knightsbridge Investments (Pvt) Ltd v Gurland* 1964 (4) SA 273 (SR) at 279C.

10 See *United Dominions Corporation (Rhodesia) Ltd v Van Eyssen* 1961 (1) SA 53 (SR).

11 1931 TPD 476. The same point arose in *Loesch v Crowther (2)* 1947 (3) SA 251 (O). Further illustrations of replies which have been upheld as valid, and as not introducing fresh causes of action, are to be found in *Schultze & Co v Rosen Bros & Co* 1904 TH 153; *Reid & Co v Logan* (1906) 23 SC 731; *British SA Co Ltd v NZ Insurance Co Ltd* 1913 SR 138; *Heywood v Theron* 1930 NPD 144; *Van der Berg v Scholtz* 1938 TPD 129. In the following cases the reply was held to be bad as constituting a departure:

(a) the summons alleged a contract consisting of a written offer and a verbal acceptance; the reply alleged a written acceptance (*Titshall v Cole* (1913) 34 NLR 161);

(b) the summons claimed damages for breach of contract; the reply alleged that there was an express warranty which had been breached (*De Beer v Minister of Posts and Telegraphs* 1923 AD 653);

(c) the summons claimed on a written contract; in the reply reliance was put on a subsequent variation and addition thereto (*Maisel v Anglo African Furnishing Co* 1931 CPD 223);

(d) the claim was for damages for the non-delivery of certain luggage at Johannesburg; the plea alleged that the luggage had by plaintiff's direction been returned to Cape Town; the plaintiff replied that the defendants had contracted to deliver the luggage at Cape Town (*Faischt v Colonial Government* (1903) 20 SC 210). See also *Seventh Day Adventists v Carey* 1930 CPD 243; *Broad v Bloom* 1903 TH 427; *Fourie NO v Oberholzer* 1914 TPD 227; *The Guardian Insurance Co Ltd v Passaportis* 1915 SR 140; *Cycle Trade Supply Co v Elliot* 1915 JDR 195; *Oblowitz v Norwich Union Insurance Co* 1922 JDR 79; *De Villiers NO v Pretsch* 1932 SWA 5.

12 The cases relied upon for the statement were *Mann v Sydney Hunt Motors (Pty) Ltd* 1958 (2) SA 102 (GW) at 107D and *Rosen v Barclays National Bank Ltd* 1984 (3) SA 974 (W) at 983I.

13 2016 (4) SA 121 (CC).

14 At 137D–142B.

15 At 143C–D.

16 At 160B–162D.

17 *Matiwane v Minister of Police* 1979 (3) SA 312 (E); *Van Tonder v Minister van Landbou* 1982 (2) SA 594 (O).

18 See *Moghambaram v Travagaimmal* 1963 (3) SA 61 (D).

19 The subrule gives effect to the decision in *Breyten Collieries Ltd v Dennill* 1912 TPD 875.

26 Failure to deliver pleadings—barring

Any party who fails to deliver a replication or subsequent pleading within the time stated in rule 25 shall be *ipso facto* barred. If any party fails to deliver any other pleading within the time laid down in these rules or within any extended time allowed in terms thereof, any other party may by notice served upon him require him to deliver such pleading within five days after the day upon which the notice is delivered. Any party failing to deliver the pleading referred to in the notice within the time therein required or within such further period as may be agreed between the parties, shall be in default of filing such pleading, and *ipso facto* barred: Provided that for the purposes of this rule the days between 16 December and 15 January, both inclusive shall not be counted in the time allowed for the delivery of any pleading.

[Rule 26 substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

Commentary

'Fails to deliver a replication … fails to deliver any other pleading.' The effect of this rule is as follows:

(a) Failure to deliver a declaration or plea within the time stated does not entail an automatic bar; notice of bar must be given. [1]

(b) Failure to deliver a replication or subsequent pleading within the time stated entails an automatic bar, and no notice of bar is necessary. [2]

The rule does not deal explicitly with the case where a plaintiff is in default of delivering a declaration. It is submitted that the rule applies in such a case and that the plaintiff will be barred only if the defendant serves a notice requiring delivery of the declaration within the time prescribed and the plaintiff fails to comply with the notice. The court may, in appropriate circumstances, grant an extension of time for the delivery of a declaration. [3]

The delivery by a defendant of a notice in terms of rule 35(12) and (14) within the period of bar afforded to the defendant in a notice of bar does not suspend the operation of the notice of bar. On receipt of a notice of bar a defendant is put to an election of either delivering a pleading or applying for an extension of time within which to compel delivery of documents sought in terms of rule 35(12) and (14) and to deliver the intended pleading. The defendant's failure to do either will result in the defendant being *ipso facto* barred on completion of the period of bar. [4]

An exception is a pleading and cannot be objected to as having been filed out of time unless notice of bar has been given. [5] See further, in this regard, the notes to rule 23(1) s v 'Within the period allowed for filing any subsequent pleading' above.

'Shall be *ipso facto* barred.' The fact that a plaintiff is barred from replicating or from delivering a subsequent pleading does not debar him from proceeding with the action: the pleadings are merely deemed to be closed and the action may be set down for trial. [6] See rule 25(2) above.

If a plaintiff has been given leave to file amended particulars of claim within a certain time and fails to do so, notice of bar must be given before the defendant is entitled to apply for dismissal of the action. [7] An application for the dismissal of the plaintiff's action based on such failure without first having served a notice of bar in terms of rule 26 is premature and constitutes an irregular step under rule 30. [8] See further the notes to rule 23(1) s v 'Set it down for hearing in terms of paragraph *(f)* of subrule (5) of rule 6' above.

If a plaintiff does not effect an unopposed amendment, a defendant who wishes to resort to a notice in terms of rule 23(1) in respect of the plaintiff's unamended particulars of claim should first demand delivery of the amended pages of the particulars of claim in terms of rule 26 before resorting to rule 23(1). [9]

With regard to removal of bar, see rule 27 below.

1 *Landmark Mthatha (Pty) Ltd v King Sabata Dalindyebo Municipality: In re African Bulk Earthworks (Pty) Ltd v Landmark Mthatha (Pty) Ltd* 2010 (3) SA 81 (ECM) at 86B–C.

2 *Landmark Mthatha (Pty) Ltd v King Sabata Dalindyebo Municipality: In re African Bulk Earthworks (Pty) Ltd v Landmark Mthatha (Pty) Ltd* 2010 (3) SA 81 (ECM) at 86A–B.

3 See *Ford v South African Mine Workers' Union* 1925 TPD 405; *Irvin v Nefdt* 1950 (1) SA 431 (T).

4 *Potpale Investments (Pty) Ltd v Mkize* 2016 (5) SA 96 (KZP) at 100I and 105E–G.

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

6 See *Moghambaram v Travagaimmal* 1963 (3) SA 61 (D).

7 *Santam Insurance Co Ltd v Manqele* 1975 (1) SA 607 (D) at 610E; *Princeps (Edms) Bpk v Van Heerden NO* 1991 (3) SA 842 (T) at 845D–F; *Standard Bank of SA Ltd v Van Dyk* 2016 (5) SA 510 (GP) at 511F–513B. A contrary view was taken in *Natal Fresh Produce Growers' Association v Agroserve (Pty) Ltd* 1991 (3) SA 795 (N). In *Woolf v Zenex Oil (Pty) Ltd* 1999 (1) SA 652 (W) at 654G–I the court considered these conflicting judgments but distinguished the *Natal Fresh Produce* case on the facts and held that as the declaration was to be filed within the time period laid down in rule 6(5) or an extended period in terms of rule 27, a notice of bar had to be served requiring the party in default of delivering a declaration to do so within five days after the date upon which the notice of bar was delivered. In the event of continued inaction, the notice of bar could be followed by an application for absolution.

8 *Standard Bank of SA Ltd v Van Dyk* 2016 (5) SA 510 (GP) at 513B.

9 *Beukes v MEC, Agriculture and Environmental Affairs, Eastern Cape* 1999 (4) SA 772 (TkD) at 778I.

27 Extension of time and removal of bar and condonation

OS, 2015, D1-321

(1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.

(2) Any such extension may be ordered although the application therefor is not made until after expiry of the time prescribed or fixed, and the court ordering any such extension may make such order as to it seems meet as to the recalling, varying or cancelling of the results of the expiry of any time so prescribed or fixed, whether such results flow from the terms of any order or from these rules.

(3) The court may, on good cause shown, condone any non-compliance with these rules.

[Subrule (3) substituted by GN R235 of 18 February 1966.]

(4) After a rule *nisi* has been discharged by default of appearance by the applicant, the court or a judge may revive the rule and direct that the rule so revived need not be served again.

[Subrule (4) inserted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

Commentary

General. It is submitted that this rule does not affect the inherent power of the High Court to protect and regulate its own process. [1] Rule 27 provides for the following distinct situations:

(a) in the absence of agreement between the parties, the extension or abridging of any time—
  (i) prescribed by the rules;
  (ii) prescribed by an order of court;
  (iii) fixed by an order of court extending or abridging any time (subrule (1));

(b) the extension or abridging of any time referred to in paragraph *(a)* above before or after the time prescribed or fixed (subrule (2));

(c) the recalling, varying or cancelling of the results of the expiry of any time prescribed or fixed, whether such results flow from the terms of any court order or from the rules (subrule (2));

(d) condonation of any non-compliance with the rules (subrule (3));

(e) the revival of a rule *nisi* which has been discharged by default of appearance by the applicant (subrule (4)).

Good cause is a requirement for any extension or abridging of time and for the condonation of non-compliance with the rules. See further the notes to subrule (1) s v 'On good cause shown' below.

Subrule (1): 'In the absence of agreement between the parties.' This subrule clearly envisages that an application for the removal of bar is necessary only in the absence of agreement between the parties. [2]

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'The court.' In terms of rule 1 'court' means a court constituted in terms of s 13 of the (now repealed) Supreme Court Act 59 of 1959. That section dealt with the constitution of High Courts. Section 14 of the Superior Courts Act 10 of 2013 is the equivalent of the repealed section. [3] A 'court' is to be distinguished from a 'judge', which is defined in rule 1 as 'a judge sitting otherwise than in open court'. Consequently, a judge in chambers or sitting otherwise than in open court is not the court contemplated in this subrule. [4]

'May upon application.' An application founded on this subrule falls within the capability of the court to control and regulate its own proceedings. [5] There is no need to distinguish between an application before *litis contestatio* and one that is brought thereafter. [6] Although a bar may be removed by consent of the parties, there is no obligation on the party who has barred to consent to the removal merely upon tender of wasted costs. [7] If there has been a lengthy delay he is entitled to take up the attitude that the party in default should be required to satisfy the court that relief should be granted. [8] If he opposes the application for relief he may be ordered to pay his own costs or the costs caused by his opposition unless he has placed facts before the court which could reasonably be expected to affect the court's discretion with regard to the granting of such relief. [9]

'On good cause shown.' The requisites for the grant of an extension of time or removal of bar have through the years been expressed in different ways and cases decided under former rules should be used with some caution. [10] Rules in force prior to 1965 required an 'affidavit of merits' and other sufficient grounds for the grant of the application. [11] The requirements under the present subrule have been formulated in different and sometimes contradictory ways. [12] The correct view, it is submitted, is that expressed in *Du Plooy v Anwes Motors (Edms) Bpk,* [13] namely that the subrule requires 'good cause' to be shown. This gives the court a wide discretion [14] which must, in principle, be exercised with regard also to the merits of the matter seen as a whole. [15] This approach applies to all applications which may be brought under the subrule. What does differ is the *quantum* of the assurance required to the effect that there is indeed a defence, which may vary from case to case. [16] The graver the consequences which have already resulted from the omission, the more difficult it will be to obtain the indulgence. [17] There may also be an interdependence of, on the one hand, the reasons for and the extent of the omission and, on the other hand, the 'merits' of the case. [18]

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The courts have consistently refrained from attempting to formulate an exhaustive definition of what constitutes 'good cause', because to do so would hamper unnecessarily the exercise of the discretion. [19] Two principal requirements for the favourable exercise of the court's discretion have crystallized out. [20] The first is that the applicant should file an affidavit satisfactorily explaining the delay. In this regard it has been held that the defendant must at least furnish an explanation of his default sufficiently full to enable the court to understand how it really came about, and to assess his conduct and motives. [21] A full and reasonable explanation, which covers the entire period of delay, must be given. [22] If there has been a long delay, the court should require the party in default to satisfy the court that the relief sought should be granted, especially in a case where the applicant is the *dominus litis*. [23] It is not sufficient for the applicant to show that condonation will not result in prejudice to the other party. An applicant for relief under this rule must show good cause; the question of prejudice does not arise if it is unable to do so. [24] The court will refuse to grant the application where there has been a reckless or intentional disregard of the rules of court, or the court is convinced that the applicant does not seriously intend to proceed. [25] The application must be bona fide and not made with the intention of delaying the opposite party's claim. [26] The second requirement is that the applicant should satisfy the court on oath that he has a bona fide defence [27] or that his action is clearly not ill-founded, as the case may be. Regarding this requirement it has been held that the minimum that the applicant must show is that his defence is not patently

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unfounded and that it is based upon facts (which must be set out in outline) which, if proved, would constitute a defence. [28]

In most of the authorities a third requirement is also laid down, namely, that the grant of the indulgence sought must not prejudice the plaintiff (or defendant) in any way that cannot be compensated for by a suitable order as to postponement and costs. [29]

In *Smith NO v Brummer NO* [30] it was stated that the tendency of the court is to grant a removal of bar where:

(a) the applicant has given a reasonable explanation for his delay;

(b) the application is bona fide and not made with the object of delaying the opposite party's claim;

(c) there has not been a reckless or intentional disregard of the rules of court;

(d) the applicant's action is clearly not ill-founded, and

(e) any prejudice caused to the opposite party could be compensated for by an appropriate order as to costs.

In *Ferris v FirstRand Bank Ltd* [31] the Constitutional Court held that lateness is not the only consideration in determining whether an application for condonation may be granted. It held that the test for condonation is whether it is in the interests of justice to grant it and, in this regard, that an applicant's prospects of success and the importance of the issue to be determined are relevant factors.

'Make an order extending or abridging any time.' The powers of the court under this subrule, and rule 6(12), to abridge the times prescribed by the rules and to accelerate the hearing of matters should be exercised with judicial discretion and upon sufficient and satisfactory grounds being shown by the applicant. [32] The applicant will have to show good cause why the time should be abridged and why he could not be afforded substantial redress at a hearing in due course. [33] The three major considerations which the court would normally consider sufficient and satisfactory are *(a)* the prejudice that the applicant might suffer by having to wait for a hearing in ordinary course; *(b)* the prejudice that other litigants might suffer if the applicants were given preference; and *(c)* the prejudice that the respondents might suffer by the abridgement of the prescribed times and the early hearing. [34] The fact that a litigant with a claim sounding in money may suffer serious financial consequences by having to wait his turn for the hearing of his claim does not entitle him to preferential treatment. [35]

See further the notes to rule 6(12) s v 'Urgent applications' and 'Must set forth explicitly the circumstances … which render the matter urgent' above.

'Any time prescribed by these rules.' The default of a defendant in an action for provisional sentence in delivering a notice of intention to enter into the principal case or in delivering a plea within the period specified in rule 8(11) may be condoned under this subrule. [36]

'By an order of court.' In terms of the definition of 'court day' in rule 1 only court days are to be included in the computation of any time expressed in days fixed by an order of court. Non-court days, in terms of the definition, are Saturdays, Sundays and Public Holidays.

'Upon such terms as to it seems meet.' The order which the court makes must be designed to eliminate any prejudice to any party so as to ensure a fair trial. [37]

If the court removes the bar which has been placed upon the applicant and extends the time for filing a pleading, the applicant can do whatever he would have been entitled to do in terms of the rules. [38]

The court can make such an order as to costs upon an application under the subrule as to it seems meet. An application under the subrule is an application for the grant of an indulgence. [39] The general rule in such cases is that 'the applicant for the indulgence should pay all such costs as can reasonably be said to be wasted because of the application, such costs to include the costs of such opposition as is in the circumstances reasonable, and not vexatious or frivolous'. [40] If an application for relief under the subrule is opposed the respondent may be ordered to pay his own costs or the costs caused by his opposition unless he has placed facts before the court which could reasonably be expected to affect the court's discretion in regard to the granting of such relief. [41] Thus, in *Nathan (Pty) Ltd v All Metals (Pty) Ltd* [42] the successful applicant was ordered to pay the wasted costs as though the application were an unopposed application for the removal of bar.

Subrule (2): 'Of the results of the expiry of any time so prescribed or fixed.' In *Himelsein v Super Rich CC* [43] the court granted an order attaching certain assets in order to confirm jurisdiction in an action to be instituted. The order provided for the lapse of the attachment in the action was not instituted within 30 days. It was held [44] that the court was entitled to grant, under subrule (1), a retrospective extension of the period of 30 days for the institution of the action, and under this subrule a concomitant order that the lapse of the attachment be cancelled. The subrule also applies whether the results of the expiry of any time prescribed or fixed flow from the terms of any order or from the rules. The conversion of provisional sentence into a final judgment under rule 8(11) is one of such 'results' which may be 'recalled' or 'cancelled'. [45] The subrule therefore caters, as a matter of law, for a default in compliance with rule 8(11). [46]

Subrule (3): 'The court.' See the notes to subrule (1) s v 'The court' above.

'May.' This subrule gives the court a wide discretion. [47]

A taxing master has no power to condone the late filing of a notice of review (or cross-review) of taxation. This is the function of the reviewing judge acting in terms of this subrule. [48]

'On good cause shown.' In order not to hamper or abridge the exercise of this discretion, the courts have consistently refrained from attempting an exhaustive definition of what constitutes good or sufficient cause for the exercise of the discretion. [49] See further the notes to subrule (1) s v 'On good cause shown' above.

'Condone any non-compliance with these rules.' This subrule empowers the court to condone any non-compliance with the rules and is not confined to non-compliance with rules other than those laying down time-limits. [50]

It was held in *Brumloop v Brumloop (2)* [51] that inasmuch as the court is given a discretion to condone any non-compliance with the rules, so also it has a discretion to waive a requirement thereof.

The wide powers of the court to condone non-compliance with its own rules is subject to the requirement, and safeguard, that good cause must be shown. [52]

It has been held [53] that where what has been done amounts to a nullity it cannot be condoned in terms of the subrule but where there is a proceeding or step, albeit an irregular or improper one, it is capable of being condoned regardless of whether the rule which has not been complied with is directory or mandatory and whether there has been substantial compliance or not. The validity of this distinction between an irregular proceeding (which can be condoned) and one that is a nullity or void (which cannot be condoned) has been doubted: it is artificial and in conflict with the wide discretion afforded by the subrule to condone non-compliance with the rules. [54] The subrule empowers the court to condone 'any non-compliance' with the rules, and the use of the word 'any' emphasizes the absence of any restriction on the powers of the court to do so. [55] There must, obviously, be something to be condoned, an objective manifestation of an intention on the part of a litigant to cause a summons to be issued or to file a pleading or to take some other step in terms of the rules. [56]

Once there is such an act or objective manifestation of an intention, any non-compliance with the rules, however serious, can be condoned under the subrule. [57] In other words, by virtue of this subrule none of the provisions of the rules is peremptory. [58]

Non-compliance with the rules was condoned in the following cases;

1. the absence of the registrar's signature on a summons; [59]
2. the use of the wrong form (Form 2 instead of Form 2*(a)*) in notice of motion proceedings; [60]
3. the use of the wrong form (Form 9 instead of Form 10) in an action for damages; [61]
4. a defective power of attorney; [62]
5. failure to set out in a summons the full name and occupation of the plaintiff; [63]
6. failure to set out in a summons an address for service of documents; [64]
7. failure to give notice of attachment in terms of rule 45(8)*(c)*; [65]

8. an incorrect reference to the rules in a summons; [66]
9. acceptance of a document executed outside the Republic for use in the Republic as duly authenticated; [67] and
10. bringing review proceedings by way of combined summons instead of notice of motion. [68]

For the grant of condonation and extension of time in appeals see rule 49(6)*(b)* and the notes thereto below.

Subrule (4): 'The court or a judge.' See the notes to subrule (1) s v 'The court' above as to the distinction between 'court' and 'judge'. This subrule differs from subrules (1), (2) and (3) in that either a court or a judge may revive the rule *nisi* concerned.

'A rule *nisi* has been discharged by default of appearance.' It was held in *Fisher v Fisher* [69] that rule 27(2) does not empower the court to revive a rule *nisi* which has been discharged or which has lapsed. This subrule, which was inserted in 1987, now gives the court the power to revive such a rule which has been discharged by default of appearance by the applicant. The subrule does not, however, empower the court to revive a rule *nisi* which had lapsed because of the fulfilment of a resolutive condition such as, for example, the failure to have taken a prescribed step timeously. [70] The subrule does not purport to eliminate the lodging of a formal application for a 'revival' nor does it change the powers of the court to rescind a judgment. [71]

The subrule does not override or detract from the rights of the opposing party in the litigation or of third parties, nor does it diminish the need to care for such interests. The subrule must therefore be applied with due regard to the circumstances of each case and in particular to the effect which the revival of the rule *nisi* will have. [72]

1 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. See, in this regard, Volume 1, Part A1.

2 *Gool v Policansky* 1939 CPD 386 at 390.

3 See Volume 1, Part A2.

4 *Mahomed v Mahomed* 1999 (1) SA 1150 (E) at 1152A–C.

5 See the notes to rule 27 s v 'General' above.

6 *Standard General Insurance Co Ltd v Eversafe (Pty) Ltd* 2000 (3) SA 87 (W).

7 *Gool v Policansky* 1939 CPD 386 at 390.

8 *Gool v Policansky* 1939 CPD 386 at 390.

9 *Gool v Policansky* 1939 CPD 386 at 391.

10 *Du Plooy v Anwes Motors (Edms) Bpk* 1983 (4) SA 212 (O) at 215C.

11 See *Dalhouzie v Bruwer* 1970 (4) SA 566 (C) at 572C–574G.

12 Most of the cases are considered in *Du Plooy v Anwes Motors (Edms) Bpk* 1983 (4) SA 212 (O) at 215C–217C. In *P L J van Rensburg en Vennote v Den Dulk* 1971 (1) SA 112 (W) Hiemstra J rejected the view expressed in *Nathan (Pty) Ltd v All Metals (Pty) Ltd* 1961 (1) SA 297 (D) that all that the court requires is to be satisfied that the defendant bona fide believes that he has a good defence to the action.

13 1983 (4) SA 212 (O) at 216H–217D.

14 *Smith NO v Brummer NO* 1954 (3) SA 352 (O) at 358A; *Du Plooy v Anwes Motors (Edms) Bpk* 1983 (4) SA 212 (O) at 216H–217A.

15 See *Gumede v Road Accident Fund* 2007 (6) SA 304 (C) at 307C–308A.

16 *Du Plooy v Anwes Motors (Edms) Bpk* 1983 (4) SA 212 (O) at 217B.

17 See *Silverthorne v Simon* 1907 TS 123 at 126–7; *Dalhouzie v Bruwer* 1970 (4) SA 566 (C) at 573D–F; *Du Plooy v Anwes Motors (Edms) Bpk* 1983 (4) SA 212 (O) at 217C.

18 *Du Plooy v Anwes Motors (Edms) Bpk* 1983 (4) SA 212 (O) at 217D.

19 *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353A; *Smith NO v Brummer NO* 1954 (3) SA 352 (O) at 357C; *Saraiva Construction (Pty) Ltd v Zululand Electrical and Engineering Wholesalers (Pty) Ltd* 1975 (1) SA 612 (D) at 614E–H; *Van Aswegen v Kruger* 1974 (3) SA 204 (O) at 205C; *Ford v Groenewald* 1977 (4) SA 224 (T) at 225E–G.

20 *Dalhouzie v Bruwer* 1970 (4) SA 566 (C) at 571F and 572C; *Van Aswegen v Kruger* 1974 (3) SA 204 (O) at 205C; *Ford v Groenewald* 1977 (4) SA 224 (T) at 225G; *Flugel v Swart* 1979 (4) SA 493 (E) at 497G. See also *Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd* 2016 (1) SA 78 (GJ) at 91F–G and the authorities there referred to.

21 *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353A; *Ford v Groenewald* 1977 (4) SA 224 (T) at 225H. See also *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) at 477E–G; *Geldenhuys v National Director of Public Prosecutions* 2009 (2) SA 310 (CC) at 316B–317C; *Laerskool Generaal Hendrik Schoeman v Bastian Financial Services (Pty) Ltd* 2012 (2) SA 637 (CC) at 640H–I. The older cases are referred to in *Dalhouzie v Bruwer* 1970 (4) SA 566 (C) at 571F–H.

22 *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) at 477E–G; *Santa Fe Sectional Title Scheme No 61/1994 Body Corporate v Bassonia Four Zero Seven CC* 2018 (3) SA 451 (GJ) at 454G–H.

23 *Standard General Insurance Co Ltd v Eversafe (Pty) Ltd* 2000 (3) SA 87 (W) at 93G.

24 *Standard General Insurance Co Ltd v Eversafe (Pty) Ltd* 2000 (3) SA 87 (W) at 95E–F.

25 *Silverthorne v Simon* 1907 TS 123 at 124; *Ford v South African Mine Workers' Union* 1925 TPD 405 at 406; *Smith NO v Brummer NO* 1954 (3) SA 352 (O) at 358A; *Textile House (Pty) Ltd v Silvestri* 1960 (4) SA 800 (W); *Vincolette v Calvert* 1974 (4) SA 275 (E) at 277A–B; *Saraiva Construction (Pty) Ltd v Zululand Electrical and Engineering Wholesalers (Pty) Ltd* 1975 (1) SA 612 (D) at 615A–B; *Burton v Barlow Rand Ltd* 1978 (4) SA 794 (T) at 797D. In *Feldman v Feldman* 1986 (1) SA 449 (T) it was held (at 454I–455C) that the deliberate decision by the applicant to postpone pleading and filing a counterclaim in anticipation of the coming into operation of amendments to an Act which would confer certain advantages on him, could not be construed as either negligence or wilful default.

26 *Silverthorne v Simon* 1907 TS 123 at 124; *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476; *Smith NO v Brummer NO* 1954 (3) SA 352 (O) at 358A.

27 *Dalhouzie v Bruwer* 1970 (4) SA 566 (C) at 571F, 572C; *Van Aswegen v Kruger* 1974 (3) SA 204 (O) at 205C; *Ford v Groenewald* 1977 (4) SA 224 (T) at 225G; *Flugel v Swart* 1979 (4) SA 493 (E) at 497G; *Santa Fe Sectional Title Scheme No 61/1994 Body Corporate v Bassonia Four Zero Seven CC* 2018 (3) SA 451 (GJ) at 454F–G.

28 *Du Plooy v Anwes Motors (Edms) Bpk* 1983 (4) SA 212 (O) at 217H. See also *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476–7; *Smith NO v Brummer NO* 1954 (3) SA 352 (O) at 358A; *Van Aswegen v Kruger* 1974 (3) SA 204 (O) at 206E; *Dalhouzie v Bruwer* 1970 (4) SA 566 (C) at 574H–575A; *Broadly NO v Stevenson* 1973 (1) SA 585 (R) at 588A; *Motaung v Mukubela and Another NNO* 1975 (1) SA 618 (O) at 624E–G; *Ford v Groenewald* 1977 (4) SA 224 (T) at 226A–C; *Oostelike Transvaalse Koöperasie Bpk v Aurora Boerdery* 1979 (1) SA 521 (T) at 523D–H; *Flugel v Swart* 1979 (4) SA 493 (E) at 497H.

29 *Foster v Carlis and Houthakker* 1924 TPD 247 at 252; *Gool v Policansky* 1939 CPD 386; *Smith NO v Brummer NO* 1954 (3) SA 352 (O) at 358A; *The Master v Zick* 1958 (2) SA 539 (T) at 543A; *Dalhouzie v Bruwer* 1970 (4) SA 566 (C) at 572D; *Marais v Aldridge* 1976 (1) SA 746 (T) at 752C; *Chasen v Ritter* 1992 (4) SA 323 (SE) at 329I; *Santa Fe Sectional Title Scheme No 61/1994 Body Corporate v Bassonia Four Zero Seven CC* 2018 (3) SA 451 (GJ) at 454F–G.

30 1954 (3) SA 352 (O) at 358A.

31 2014 (3) SA 39 (CC) at 43G–44A and the cases there referred to.

32 *I L & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd* 1981 (4) SA 108 (C) at 112H.

33 *I L & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd* 1981 (4) SA 108 (C) at 110H–111A.

34 *I L & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd* 1981 (4) SA 108 (C) at 112H–113A.

35 *I L & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd* 1981 (4) SA 108 (C) at 113G; *Trustees BKA Besigheidstrust v Enco Produkte en Dienste* 1990 (2) SA 102 (T) at 108D–E.

36 *F O Kollberg (Pty) Ltd v Atkinsons's Motors Ltd* 1970 (1) SA 660 (C); *Kemp v Booysen* 1979 (4) SA 34 (T), overruling *Antares (Pty) Ltd v Chenille Corporation of SA (Pty) Ltd* 1976 (4) SA 140 (W); *Light Wall Erection (Pty) Ltd v De Tweedespruit Farm (Pty) Ltd* 1976 (1) SA 944 (W) at 948H; *Mahabro Investments (Pty) Ltd v Kara* 1980 (2) SA 772 (D).

37 See *Chasen v Ritter* 1992 (4) SA 323 (SE) at 329C.

38 See *Niesewand v Eastern Transvaal Townships Corporation (Pty) Ltd* 1959 (4) SA 750 (T).

39 See *Metje & Ziegler Ltd v Stauch, Vorster and Partners* 1972 (4) SA 679 (SWA) at 683A.

40 *Myers v Abramson* 1951 (3) SA 438 (C) at 455G; see further Cilliers *Costs* paragraph 2.34.

41 *Gool v Policansky* 1939 CPD 386 at 391. See also *Metje & Ziegler Ltd v Stauch, Vorster and Partners* 1972 (4) SA 679 (SWA) at 683A.

42 1961 (1) SA 297 (D) at 301B–302A.

43 1998 (1) SA 929 (W).

44 At 932E–933D.

45 *Mahabro Investments (Pty) Ltd v Kara* 1980 (2) SA 772 (D) at 775A.

46 *Mahabro Investments (Pty) Ltd v Kara* 1980 (2) SA 772 (D) at 775. See also *F O Kollberg (Pty) Ltd v Atkinson's Motors Ltd* 1970 (1) SA 660 (C) and *Kemp v Booysen* 1979 (4) SA 34 (T), not following *Antares (Pty) Ltd v Chenille Corporation of SA (Pty) Ltd* 1976 (4) SA 140 (W).

47 *Smith NO v Brummer NO* 1954 (3) SA 352 (O) at 358A; *Barclays Nasionale Bank Bpk v Badenhorst* 1973 (1) SA 333 (N) at 341E–F; *Chopra v Sparks Cinemas (Pty) Ltd* 1973 (2) SA 352 (D) at 357A; *Marais v Aldridge* 1976 (1) SA 746 (T) at 752C; *Mynhardt v Mynhardt* 1986 (1) SA 456 (T) at 461I–J.

48 *Brivik Bros (Pty) Ltd v Balmoral Sales Corporation (Pty) Ltd* 1978 (4) SA 716 (W) at 718C.

49 *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353A; *Smith NO v Brummer NO* 1954 (3) SA 352 (O) at 357C; *Van Aswegen v Kruger* 1974 (3) SA 204 (O) at 205C; *Saraiva Construction (Pty) Ltd v Zululand Electrical and Engineering Wholesalers (Pty) Ltd* 1975 (1) SA 612 (D) at 614E–H; *Ford v Groenewald* 1977 (4) SA 224 (T) at 225E–G; *Mynhardt v Mynhardt* 1986 (1) SA 456 (T) at 463E–F.

50 *Dalhouzie v Bruwer* 1970 (4) SA 566 (C) at 571E.

51 1972 (1) SA 503 (O) at 504F.

52 *Mynhardt v Mynhardt* 1986 (1) SA 456 (T) at 463H; *Chasen v Ritter* 1992 (4) SA 323 (SE) at 329C.

53 *Simross Vintners (Pty) Ltd v Vermeulen* 1978 (1) SA 779 (T) at 783H; *Krugel v Minister of Police* 1981 (1) SA 765 (T) at 768C; *Nampak Products Ltd t/a Nampak Flexible Packaging v Sweetcor (Pty) Ltd* 1981 (4) SA 919 (T) at 922C; *Minister of Prisons v Jongilanga* 1983 (3) SA 47 (E) at 54A; and see *Minister of Prisons v Jongilanga* 1985 (3) SA 117 (A) at 123G–H.

54 *Mynhardt v Mynhardt* 1986 (1) SA 456 (T) at 462G, 463E–F; *Gouws v Scholtz* 1989 (4) SA 315 (NC) at 320I; *Chasen v Ritter* 1992 (4) SA 323 (SE) at 329D–F.

55 *Mynhardt v Mynhardt* 1986 (1) SA 456 (T) at 463G; *Chasen v Ritter* 1992 (4) SA 323 (SE) at 328H. See also *General Accident Insurance Co South Africa Ltd v Zampelli* 1988 (4) SA 407 (C) at 410B.

56 *Chasen v Ritter* 1992 (4) SA 323 (SE) at 329F–I.

57 *Mynhardt v Mynhardt* 1986 (1) SA 456 (T) at 463G.

58 *Chopra v Sparks Cinemas (Pty) Ltd* 1973 (2) SA 352 (D) at 357B.

59 *Chasen v Ritter* 1992 (4) SA 323 (SE), not following *Noord-Kaap Lewendehawe Koöp Bpk v Lombaard* 1988 (4) SA 810 (NC).

60 *Barclays Nasionale Bank Bpk v Badenhorst* 1973 (1) SA 333 (N); *Mynhardt v Mynhardt* 1986 (1) SA 456 (T); *Gouws v Scholtz* 1989 (4) SA 315 (NC) at 320I; a contrary view was taken in *Simross Vintners (Pty) Ltd v Vermeulen* 1978 (1) SA 779 (T).

61 *Krugel v Minister of Police* 1981 (1) SA 765 (T).

62 *Nampak Products Ltd t/a Nampak Flexible Packaging v Sweetcor (Pty) Ltd* 1981 (4) SA 919 (T). This case was decided before the amendment of rule 7 in 1987.

63 *McGill v Vlakplaats Brickworks (Pty) Ltd* 1981 (1) SA 637 (W).

64 *Minister of Prisons v Jongilanga* 1983 (3) SA 47 (E) and 1985 (3) SA 117 (A).

65 *Marais v Aldridge* 1976 (1) SA 746 (T).

66 *Canale v Canale* 1995 (4) SA 426 (E).

67 *Chopra v Sparks Cinemas (Pty) Ltd* 1973 (2) SA 352 (D) in which it was held (at 357A) that rule 63(4) and this subrule stand side by side and that the one does not exclude the other.

68 *Adfin (Pty) Ltd v Durable Engineering Works (Pty) Ltd* 1991 (2) SA 366 (C).

69 1965 (4) SA 644 (W).

70 *Williams v Landmark Properties SA* 1998 (2) SA 582 (W). If a rule *nisi* operating as an interim interdict is discharged on the return day, the interim relief comes to an end and the interim interdict is not revived or perpetuated by the noting of an appeal (*SAB Lines (Pty) Ltd v Cape Tex Engineering Works (Pty) Ltd* 1968 (2) SA 535 (C); and see *Ismail v Keshavjee* 1957 (1) SA 684 (T)). Once a rule *nisi* is contested, the applicant is in no better position in other respects than he was when the order was first sought (*Banco de Mocambique v Inter-Science Research and Development Services (Pty) Ltd* 1982 (3) SA 330 (T) at 332B–D; *Ghomesi-Bozorg v Yousefi* 1998 (1) SA 692 (W) at 696C–D)).

71 *Manton v Croucamp NO* 2001 (4) SA 374 (W) at 381C–E.

72 *Ex parte S & U TV Services (Pty) Ltd: In re S & U TV Services (Pty) Ltd (in provisional liquidation)* 1990 (4) SA 88 (W) at 90H–J.

28 Amendments to pleadings and documents

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

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

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

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

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

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

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

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

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

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

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

Commentary

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

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

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

In *De Kock v Middelhoven* [1] the plaintiff served a notice to amend on the defendant. The latter, in response, served a notice of objection. Without responding to the objections, and without lodging an application for leave to amend in terms of rule 28(4), the plaintiff set down the intended amendment for hearing. The issue was as follows: Rule 28(4) provided that if an objection to a notice of amendment was timeously served, the party wishing to amend 'may', within 10 days, lodge an application for leave to amend. Did this mean that, as the defendant insisted, an amendment-seeking party served with an objection, who wished to proceed with

such amendment, was obliged to formally lodge a substantive application for leave to amend? Or was it sufficient for it, as occurred here, to simply apply orally for leave from the court to amend on the day of hearing? The court held [2] that rule 24(8) postulated two procedures by which a party seeking an amendment may approach a court for leave to amend. One was oral: by this method, all that the applicant had to do after receiving the notice of objection was to set such a matter down for hearing and on the date of hearing simply walk into court and orally apply for leave to amend. The other was to lodge a formal application for leave to amend as enjoined by the provisions of rule 28(4). It was left entirely to the discretion of the applicant to decide with which course to proceed. Accordingly, the matter was properly before the court.

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

A court of appeal will in exceptional circumstances allow the amendment of pleadings on appeal. See further, in this regard, the notes to s 19*(d)* of the Superior Courts Act 10 of 2013 s v 'Power to amend pleadings on appeal' in Volume 1, Part A2.

The general approach to an amendment of a notice of motion is the same as to a summons or pleading in an action. [3]

An affidavit or sworn statement is a document by means of which sworn evidence is put before a court in written form. [4] An amendment of an affidavit would amount to a change of evidence which had been given on oath and amendment thereof cannot be allowed by way of mere notice under the subrule: a party who wishes to change his evidence given on oath must do so on oath, if necessary by way of a further affidavit. [5] A respondent should not be ambushed by an applicant. An intended amendment of its case by an applicant which is not borne out by the facts in the papers amounts to an abuse of process which should not be tolerated. The prejudice to a respondent in such a case, should the amendment be granted, could not be cleared by an appropriate costs order. [6]

Subrule (1): 'Any party desiring to amend.' It is for the party desiring an amendment to ask for it, not for the court to make it without being asked or *mero motu* to direct a party to amend. [7]

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

If the Road Accident Fund had, in an agreement concluded between it and the plaintiff before the issue of summons, accepted liability for all the damages suffered by the plaintiff in consequence of injuries the plaintiff sustained in a motor vehicle accident, the Road Accident Fund's unqualified concession of liability rendered it both impermissible and opportunistic

for it to attempt to introduce the plaintiff's alleged contributory negligence by means of an amendment to its plea in an action instituted subsequent to the agreement. [8]

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

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

If a new cause of action is introduced by amendment, prescription is interrupted by, and on the date of delivery of, the notice of intention to amend under this subrule. [9]

'Shall furnish particulars of the amendment.' This subrule makes it clear that the party desiring to amend must set out in his notice particulars of the proposed amendment. Unless particulars of the proposed amendment are so set out the party receiving the notice would not be able to object to the amendment under subrules (2) and (3): the latter subrule requires the grounds of objection to be clearly and concisely stated. This is in accordance with the general rule that a court will not grant leave to amend until the amendment is formulated; courts are averse to the procedure of granting leave to amend within the limits laid down by

an order, for the amendment when it is ultimately formulated may be found to be excipiable or may unduly restrict the applicant, or confer upon his amended pleading an immunity from exception that might work an injustice to the respondent. [10] If the particulars are not set out in the notice, a party receiving the notice may invoke the provisions of rule 30.

If the substitution of a plaintiff is intended, the notice of intention to amend must make it clear that such a substitution is intended. [11]

Subrule (2): 'Unless written objection to the proposed amendment is delivered.' A party may object to a proposed amendment on any of the grounds on which the court would refuse an amendment to a pleading. See further the notes to subrule (4) s v 'Lodge an application for leave to amend' below.

The fact that a party gives notice of his intention to apply for an amendment on the date of trial does not prevent his opponent from objecting thereto under this subrule within ten days of delivery of the notice, and the party seeking the amendment will thereupon have to make a substantive application under subrule (4). [12]

'Within 10 days.' During this period there is nothing the party who gave notice of his intention to amend a pleading or document can do regarding the amendment or the protection of his rights with regard thereto. [13]

Subrule (3): 'Shall clearly and concisely state the grounds.' This subrule enables a party who wishes to amend a pleading to know the basis upon which objection to such a proposed amendment is made and to avoid a situation where such party has to endeavour to deal with every conceivable complaint when applying for an amendment. [14] In terms of subrule (2) any objection to a proposed amendment must be in writing, and in terms of this subrule such objection must state clearly and concisely the grounds upon which it is founded. [15]

Subrule (4): 'Lodge an application for leave to amend.' An application under this subrule is an interlocutory application as contemplated in rule 6(11) and need not be brought on notice of motion supported by affidavit. [16] However, it is trite law that an application for an amendment seeking to withdraw an admission must be supported by affidavit. [17]

A court hearing an application for an amendment has a discretion whether or not to grant it, a discretion which must be exercised judicially. [18]

The primary object of allowing an amendment is 'to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done'. [19]

The general approach to be adopted in applications for amendment has been set out in numerous cases. [20] The vital consideration is that an amendment will not be allowed in circumstances which will cause the other party such prejudice as cannot be cured by an order for costs and, where appropriate, a postponement. [21] The following statement by Watermeyer J in *Moolman v Estate Moolman* [22] has frequently been relied upon: [23]

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

The power of the court to allow material amendments is, accordingly, limited only by considerations of prejudice or injustice to the opponent. [24]

In *Moolman v Estate Moolman* [25] it was stated that an amendment would cause an injustice to the other side which could not be compensated by costs if—

> 'the parties cannot be put back for the purpose of justice in the same position as they were when the pleading it is sought to amend was filed'. [26]

Prejudice 'embraces prejudice to the rights of a party in regard to the subject matter of the litigation, provided there is a causal connection which is not too remote between the amendment of the pleading and the prejudice to the other party's rights'. [27]

Prejudice in this context has been interpreted as follows:

(i) Where a party would be no worse off if the amendment were granted with a suitable order as to costs than if his adversary's application or summons were dismissed unamended and proceedings were commenced afresh, there is no prejudice in granting the amendment: the mere loss of the opportunity of gaining time is not in law prejudice or injustice. [28]

(ii) The fact that the granting of the amendment would necessitate the reopening of the case for further evidence to be led is no ground for refusing the amendment where the reason for the failure to lead that evidence was the state of the pleadings, and not a deliberate failure on the part of the applicant. [29]

(iii) If a party makes a mistake in his pleadings by, for example, demanding too little when more is owing, or by admitting that the defendant has paid portion when in fact he has not, he gives his opponent an advantage which justice and fair dealing could not commend. If the opponent is then deprived of this unjust advantage by an amendment, the parties are put back for the purposes of justice in the same position as they were when the pleading it is sought to amend was filed. The opposing party suffers no injustice and is not prejudiced, for he is in no worse position than he would have been if the pleading in its amended form had been filed in the first instance. [30]

(iv) If a party makes a tactical blunder by, for example, admitting an allegation which can only be proved by a particular witness, who is then released by his opponent and leaves the country, his opponent may be prejudiced by an amendment withdrawing the admission. If the witness were not capable of recall or evidence could not be obtained from him on commission, then even though the admission might have been made bona fide, withdrawal of the admission would probably not be allowed. [31]

(v) If, as a result of an admission in a plea, a party had not used rights that he had at the time when the pleadings were originally filed and these rights had in the meantime lapsed, an amendment withdrawing the admission will not be allowed. [32]

(vi) The fact that an amendment may cause the other party to lose his case against the party seeking the amendment is not of itself 'prejudice' of the sort which will dissuade the court from granting it. [33] Thus, the fact that the effect of allowing of an amendment to a plea might be to defeat the plaintiff's claim is not what is meant by 'prejudice' which cannot be remedied by an appropriate order as to costs. [34] There may, however, be cases where no terms would overcome the prejudice which the amendment would cause to the other party. [35] For example, an amendment will not be allowed where it is applied for at such a late stage in the proceedings and not timeously raised to enable proper investigation and response thereto. [36]

The onus is on the party seeking the amendment to establish that the other party will not be prejudiced by it. [37]

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

***(a)* Formal amendments.** Formal amendments are usually allowed unless precluded by some rule of court. Thus arithmetical and clerical errors have been corrected [38] and misdescription of parties rectified. [39]

***(b)* Issues obscured by pleadings.** If the real issue in a case is imperfectly or ambiguously expressed in the pleadings, an amendment designed to place on record the true issue will be allowed. [40]

***(c)* Amendment of prayers.** The court will allow the amendment of a prayer if the main issue between the parties remains the same, [41] but will not readily do so if the addition of a prayer also entails the introduction of a new cause of action. [42] The court may grant leave to amend

a summons by the insertion of a prayer for costs [43] or interest. [44]

***(d)* Adding a new cause of action.** The courts have recognized that in many cases it may be convenient to incorporate fresh causes of action in original proceedings. [45] An amendment which introduces a new cause of action will only be allowed if no prejudice is occasioned thereby. [46] There is no objection in principle to a new cause of action or defence being added by way of amendment, even though it has the effect of changing the character of the action and necessitating the reopening of the case for fresh evidence to be led, if that is necessary to determine the real issue between the parties. [47] The amendment must be bona fide [48] and if it is, it will be granted, especially where the effect of refusing it would again bring the same parties before the same court on the same issue. [49]

If there is a valid cause of action upon the summons the court may allow the plaintiff to add a new cause of action which has accrued or been perfected since the issue of the summons. [50] Except in special or exceptional circumstances a summons may not be amended so as to include a cause of action not existing at the time of its issue. [51] It has further been held [52] that in terms of its inherent powers the court may grant an amendment of a fatally defective summons so as to cure the defect where such amendment will occasion no prejudice and will prevent waste of costs. [53]

It is important to distinguish between an amendment introducing a new cause of action (i e right of action) [54] and one which merely introduces fresh and alternative facts supporting the original right of action as set out in the cause of action. [55] An amendment which introduces a new claim will not be allowed if it would resuscitate a prescribed claim or defeat a statutory limitation as to time. [56]

In *Sentrachem Ltd v Prinsloo* [57] the Appellate Division laid down the test as follows: [58]

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

Where a plaintiff seeks by way of amendment to augment his claim for damages, he will be precluded from doing so by prescription if the new claim is based upon a new right of action and the relevant prescriptive period has run, but not if it was part and parcel of the original right of action and merely represents a fresh quantification of the original claim, or the addition of a further item of damages. [59]

***(e)* New facts discovered.** If a new ground for defence comes to a defendant's knowledge for the first time after he has filed his plea, he will be allowed to amend his plea, and provided the application be bona fide and not prejudicial to the opponent such amendment will be allowed. [60]

***(f)* Withdrawal of admissions.** An admission is an unequivocal agreement by one party with a statement of fact by the other. [61] The effect of an admission is to render it unnecessary for the plaintiff to prove the admitted fact. [62] In the exercise of its discretion the court may grant an amendment involving the withdrawal of an admission in a pleading. The court's discretion is not fettered by the necessity to find that there has been an error before it can allow such an amendment. [63] It has been stressed [64] that an amendment involving a withdrawal of an admission is not put on a basis different from any other amendment:

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

The court will, therefore, in the exercise of its discretion, require an explanation of the circumstances under which the admission was made and the reasons for now seeking to withdraw it. [65]

An allegation of fact in a pleading is not an admission of that fact and can be readily withdrawn. [66] Withdrawal of an admission of a fact which is common cause will not be permitted. [67]

A court is not obliged to consider prejudice to the other side where an amendment to a pleading retracting an incorrectly admitted legal consequence is being sought, for only the law would be prejudiced if cases were to be decided on what parties might in ignorance have agreed the law to be. [68]

The discretion of the court to relieve a party from the consequences of an admission made in error in a pleading should not be exercised in any other way than by granting an amendment of that pleading. [69]

***(g)* Tardiness.** Delay in bringing forward an amendment is in itself, in the absence of prejudice, no ground for refusing an amendment. [70] In the absence of prejudice to the other party, leave to amend may be granted 'at any stage, however careless the mistake or omission may have been, and however late may be the application for amendment'. [71]

The Appellate Division has stressed that a litigant who seeks to add new grounds of relief at the eleventh hour does not claim such an amendment as a matter of right but rather seeks an indulgence. [72] The applicant has to prove that he did not delay the application after he became aware of the material upon which he proposes to rely. He must explain the reason for the amendment and show prima facie that he has something deserving of consideration: a triable issue. A triable issue is *(a)* a dispute, which, if it is proved on the basis of the evidence foreshadowed by the applicant in his application, will be viable or relevant; or *(b)* a dispute, which will probably be established by the evidence thus foreshadowed. [73] The greater the disruption caused by the amendment, the greater the indulgence sought and the burden upon the applicant to convince the court to accommodate him. [74]

***(h)* Where excipiability would result.** Save in exceptional cases, where the balance of convenience or some such reason might render another course desirable, an amendment ought not be allowed where its introduction into the pleading would render such pleading excipiable. [75]

In other words, the issue proposed to be introduced by the amendment must be a triable issue. [76] A triable issue is one *(a)* which, if it can be proved by the evidence foreshadowed in the application for the amendment, will be viable or relevant; or *(b)* which, as a matter of probability, will be proved by the evidence so foreshadowed. [77] If the plaintiff's particulars of claim do not disclose a cause of action, an amendment of the defendant's plea thereto would be an exercise in futility. [78] If the proposed amendment raised a point of law which would dispose of the case in whole or in part, the court should determine that point of law. [79] If a plaintiff seeks to amend its particulars of claim to the effect that it is the 'successor in title to' a creditor to whom the defendant has bound itself as surety and co-principal debtor, it must state the basis on which it became the successor in title to the creditor. Failure to do so would render the particulars excipiable and the amendment sought would be disallowed. [80]

***(i)* Where the debt on which the claim is based, is prescribed.** An amendment seeking to introduce a claim in respect of which the underlying debt has clearly become prescribed or is known to have become prescribed, and which is objected to on that basis in terms of rule 28(3), [81] will not be allowed. [82] An amendment will be granted if it appears to the court that it is only possible and not definite that prescription is the full answer to the plaintiff's case. [83]

Where a new cause of action is introduced by amendment, prescription is interrupted by, and on the date of delivery of, the notice of intention to amend under rule 28(1). [84]

The service of a notice of application for the joinder of a third party as a co-defendant in an action in terms of rule 10(3) does not interrupt the running of prescription. [85]

***(j)* Where the court will have no jurisdiction.** Where it is proposed to introduce by way of amendment a cause of action in respect of which the court will not have jurisdiction, the amendment will be refused. [86] If, however, the question of jurisdiction is doubtful or arguable, it is submitted that the amendment should be allowed and that it should be left to the defendant to raise the issue of jurisdiction by way of special plea. [87]

***(k)* Payment into court not bar to amendment.** An unconditional payment into court by the defendant under rule 34 does not deprive the plaintiff of the opportunity to amend his particulars of claim. [88]

***(l)* Where an appeal is pending.** The court will not grant an amendment if an appeal is pending, the decision in which may render the amendment unnecessary. [89]

***(m)* On appeal.** The court will not allow an amendment on appeal if it is a new point raised for the first time on appeal, unless it was covered by the pleadings. [90] A party will not be permitted to introduce such amendment if it would be unfair and prejudicial to his opponent, which could be the case if the issue sought to be introduced, was not fully canvassed or investigated at the trial. [91] See also the notes to s 19*(d)* of the Superior Courts Act 10 of 2013 s v 'Power to amend pleadings on appeal' in Volume 1, Part A2.

***(n)* Substitution of parties.** The courts have by way of amendment under this subrule allowed the substitution of one entity as plaintiff by another entity in order to ensure that the true plaintiff is before the court. [92] Such substitution by way of amendment was, however, refused where the initial plaintiff was not a legal *persona*. [93] The test to be applied in each instance is

whether the application is bona fide and whether any prejudice may be occasioned to the defendant as a result thereof. [94] In such instance the notice of amendment must make it clear that a substitution was intended. This is not meaningfully conveyed through the phrases 'deletion of the words' and 'replacement of the words' which may be understood by the defendant to indicate that it was simply a misnomer that was being corrected. [95]

Where it is sought to introduce a new party to cure a nullity, [96] the *nunc pro tunc* rule probably applies, i e the new party takes the place of the former party for all purposes *nunc pro tunc*.

If the result is that a defendant is denied its right to raise the defence of prescription, a new plaintiff having stepped into the shoes of the old, the substitution will not be allowed. [97] The real question in such a case is whether the plaintiff's claim against the defendant has in fact already prescribed, or whether the running of prescription has been interrupted in terms of s 15(1) of the Prescription Act 68 of 1969. [98] If an amendment is sought to change the name of a plaintiff, then prescription will have been interrupted only if the facts show that it is by or on behalf of the creditor concerned, the one whose correct description is sought to be introduced by way of the amendment, that the process had been served on the defendant (as required by s 15(1) of the Prescription Act 68 of 1969). [99] If the wrong name had simply been a misdescription of the correct creditor it should not stand in the way of an amendment. [100] If, however, it is a case of having to replace the wrong party that had sued with the correct creditor after the expiry of the prescription period, then prescription will not have been interrupted. [101] Service of the original process in such a case cannot interrupt prescription. [102]

If an application to substitute a plaintiff is not a bona fide attempt at placing the true case before the court, but simply a device to circumvent a statutory provision (e g the provisions of the Prescription Act 68 of 1969), the application will not be granted. [103]

An amendment substituting the trustees of a trust in their capacities as such for the trust as plaintiff is permissible unless the application is *male fide* or would cause injustice or prejudice to the other party which could not be compensated for by an order for costs. [104]

If a plaintiff seeks to amend its particulars of claim to the effect that it is the 'successor-in-title to' a creditor to whom the defendant had bound himself as surety and co-principal debtor, it must state the basis on which it became the successor-in-title to the creditor. Failing that, the amended particulars of claim would be excipiable on the ground that there would be lacking therefrom averments necessary to constitute a valid cause of action. Under such circumstances the amendment will not be granted. [105]

If an amendment is sought to change the name of a defendant, prescription will have been interrupted [106] only if the facts show that the summons had been served on the party whose name is sought to be introduced in place of the existing name of the defendant. [107] In such an event the wrong description of the defendant would be nothing but a mere misdescription of the correct debtor and the amendment would serve no more than to correct a misdescription of the already existing defendant. [108] If, however, it is a case of having to replace the wrong party that had been sued with the correct debtor, then prescription will not have been interrupted. [109]

A summons which names no defendant is an invalid document and cannot be amended by inserting the defendant's name. [110]

It has been held that when substitution of a defendant is sought to be effected by amendment of the particulars of claim in terms of this subrule, such substitution is effective against the entity sought to be substituted only if the latter received notice of the intended amendment. [111] Thus, the notice required to be given in terms of rule 28(1) to the 'parties' is required also to be given to the entity sought to be substituted. [112]

The cases are not harmonious as to whether a court has the power to replace by way of an amendment to a summons a defendant by a person who is not a party to the dispute without the latter's consent. [113]

***(o)* Where merits conceded.** A court will not allow an amendment introducing a new defence on the merits where the parties have agreed that the merits and the *quantum* are to be separately determined and the defendant afterwards concedes the merits which concession is accepted by the plaintiff. By compromising the merits the defendant precludes himself from being able to revisit the merits as surely as if a judgment had been given thereon. [114]

***(p)* Grounds for refusal of amendment.** The essential ground for the refusal of an amendment is prejudice to the other party. An amendment should not be refused merely in order to punish the applicant for some mistake or neglect on his part; his punishment is in his being mulcted in the wasted costs. [115]

The court has on various occasions refused to allow an amendment where, even if it were allowed, the amending party would still have no prospect of success on the amended pleading. An amendment was refused where the new ground of action sought to be imported could be proved only by evidence which would have been inadmissible. [116] Nor will the court allow an amendment to a plea which has the effect of raising a defence of set-off where the plaintiff's claim is not liquidated; there can be no plea of set-off to an unliquidated claim, and an amendment which effects such an incompetent plea can be of no use to a defendant. [117]

Subrule (5): 'Shall be deemed to have consented to the amendment.' If a party does not object to a proposed amendment of which he has been given notice in terms of subrules (1) and (2), he is deemed in terms of this subrule to have consented to the amendment. The party seeking the amendment thereby acquires the right to amend but the actual amendment of the pleading takes place only when the amendment is effected within the stipulated time in accordance with subrule (7). [118]

A party who had consented to an amendment and allowed it to be incorporated into the pleadings is not entitled thereafter to argue that the court should disregard it. [119]

'Within 10 days of the expiration of the period mentioned in subrule (2).' A party who has been given notice by another party of the

latter's intention to amend is under subrule (2) entitled to object to the proposed amendment within ten days of delivery of the notice of intention to amend. If no objection is raised, the party wishing to amend may effect his amendment in accordance with subrule (7) within ten days after the expiration of this initial period of ten days.

Subrule (6): 'An amendment authorized by an order of the court'. The present wording of this subrule supersedes the finding in *Fiat SA (Pty) Ltd v Bill Troskie Motors* [120] that an amendment ordered by the court has immediate effect. The subrule makes it clear that the court merely authorizes an amendment, and the amendment only takes effect when the steps prescribed in subrule (7) have been taken within the applicable time limit. The court may, however, under its powers in terms of this subrule, order an amendment which takes immediate effect, or allow a period of more than ten days within which the amendment is to be effected in accordance with subrule (7).

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

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

A pleading into which words have been incorporated by amendment must, as a matter of interpretation, be regarded as if the incorporated words had been in it when it was originally filed. [121] The granting of an amendment does not, however, have retrospective effect in the proper sense, and prescription is not interrupted, in respect of a cause of action *introduced* by an amendment, from the date when the summons was originally served. [122] In other words, if the right which is sought to be enforced and the relief claimed in the amendment is different from the right sought to be enforced and the relief claimed in the original claim, the service of the summons does not interrupt prescription in respect of the claim introduced by the amendment. [123] If the right that is sought to be enforced and the relief claimed in the amended claim is the same or substantially the same as the right of action and the relief in the original claim, prescription is interrupted by the service of the summons. [124]

Where a new cause of action is introduced by amendment, prescription is interrupted by, and on the date of delivery of, the notice of intention to amend under subrule (1) of this rule. [125]

Subrule (8): 'Any party affected by an amendment.' It is submitted that a party 'affected by an amendment' denotes a party to whom each relevant page in its amended form is delivered as contemplated in subrule (7); it does not include the party who effects the amendment as contemplated in that subrule. Despite its amendment in 1994, this subrule therefore still does not meet the objections raised by Coetzee J in *Van Heerden v Van Heerden*. [126] See further the notes s v 'May also take the steps contemplated in rules 23 and 30' below.

'May within 15 days.' In *Nqabeni Attorneys Incorporated v God Never Fails Revival Church* [127] it was held that: [128]

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

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

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

'May also take the steps contemplated in rules 23 and 30.' Rule 23 deals with exceptions and applications to strike out; rule 30 provides for steps which may be taken in the case of irregular proceedings. Only the party to whom each relevant page in its amended form is delivered is entitled to take these steps. [129] Where a defendant failed to respond to the amendments effected by the plaintiff, it was held [130] that, in terms of the provisions of rule 22(3), '[e]very allegation of fact … which is not stated in the plea to be denied or to be admitted, shall be deemed to be admitted'. It is submitted that where a pleading is excipiable as a result of a failure to make consequential adjustments to such pleading as contemplated in this subrule, the party who has effected the amendment should, under an extension of time in terms of rule 27, deliver an exception thereto. [131]

Subrule (9): 'Unless the court otherwise directs, be liable for the costs thereby occasioned.' It is clear that the court, in accordance with the basic rule governing awards of costs, has a discretion.

The grant of an amendment is an indulgence to the party requiring it, which entails that such a party is generally liable for all the costs occasioned by or wasted as a result of the amendment. [132] Costs caused by an amendment are either additional costs resulting from a postponement caused by an amendment, if these costs would otherwise not have been incurred, or costs previously incurred which have become useless by reason of the amendment. [133]

Costs occasioned by an amendment have often been held to include the costs of such opposition as is in the circumstances reasonable and not vexatious or frivolous. [134] In other cases the costs of unsuccessful opposition were not so included and the unsuccessful objector was ordered to pay the costs of his opposition even though it was not considered unreasonable or vexatious or frivolous. [135]

It has, however, been stressed that in deciding whether the party to whom an indulgence is granted is to pay the costs of opposition, the recognition of a single criterion for liability (such as the reasonableness of the opposition) tends to hamper the exercise of the unfettered discretion which the court has in its awards of costs, the exercise of that discretion being essentially a matter of fairness to both sides. [136] Though reasonableness of the opposition is an important criterion in cases where an indulgence is sought, it need not necessarily be the only criterion. [137] A criterion which may be useful in one case may in other cases not have the desired fair effect. [138] Each case must, therefore, depend upon its own facts. [139]

It has been held that the test in regard to the awarding of costs of unsuccessful opposition has not been altered by the introduction of this rule in 1965. [140] The procedure introduced by the rule does, however, make a difference in one respect. The rule was clearly designed to obviate the necessity of applying to court whenever an amendment of a pleading is sought: an amendment can now be obtained without incurring the costs of an application, an application being necessary only in the event of the other side objecting. It seems to be implicit in the procedure under the rule that any objection to a notice of intention to amend must be reasonably and responsibly taken. [141]

Costs on amendment are, as with all costs, within the discretion of the court and a court of appeal is loath to interfere in a matter of this nature unless some wrong principle has been applied. [142]

Subrule (10): 'The court.' In terms of rule 1 this means a court constituted in terms of s 14 of the Superior Courts Act 10 of 2013. See, in this regard, the notes to rule 1 s v 'Court' above.

'At any stage before judgment.' This subrule is in the widest possible terms and does not envisage any period before judgment during which the possibility of making an application for an amendment is precluded. [143] Once a court has pronounced a final judgment or order, it is *functus officio* and has itself no authority thereafter to grant any amendment of the pleadings. [144] Applications for amendments have been entertained

and allowed after both sides have closed their cases, during the hearing of an application for absolution and in certain cases even after the conclusion of argument. [145] However, in *Kali v Incorporated General Insurances Ltd* [146] an amendment at the trial raising an entirely new issue after both parties had closed their case was not allowed.

If the issue of liability had been determined by judgment at an earlier hearing, the court, while dealing with the question of the *quantum* of damages, will not grant an amendment of a plea which would bring about a reopening of the issues which had been finalized at the earlier hearing. [147]

1 2018 (3) SA 180 (GP).

2 At 189C–192G.

3 *Devonia Shipping Ltd v MV* Luis *(Yeoman Shipping Co Ltd Intervening)* 1994 (2) SA 363 (C) at 369F–I; *Sebenza Forwarding & Shipping Consultancy (Pty) Ltd v Petroleum Oil and Gas Corporation of SA (Pty) Ltd t/a Petro SA* 2006 (2) SA 52 (C) at 57H–I; *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at 261C–D. As to the general approach, see the notes to subrule (4) s v 'Lodge an application for leave to amend' below.

4 *S v Opperman* 1969 (3) SA 181 (T) at 184F.

5 See *Brummund v Brummund's Estate* 1993 (2) SA 494 (NmHC) at 498E.

6 *Proxi Smart Services (Pty) Ltd v Law Society of South Africa* 2018 (5) SA 644 (GP) at 657B–F.

7 *Bam's Executors v Haupt* (1891) 8 SC 253; *The Master v Deedat* 2000 (3) SA 1076 (N) at 1090D–E. In *Keely v Heller* 1904 TS 101 at 103 Innes CJ stated that if a party 'does not … choose to apply for leave to amend, and goes on, he does so at his own risk'.

8 *Gusha v Road Accident Fund* 2012 (2) SA 371 (SCA) at 376H–377A and 377C–E.

9 *Mias de Klerk Boerdery (Edms) Bpk v Cole* 1986 (2) SA 284 (N) in which the decision in *Miller v H L Shippel & Co (Pty) Ltd* 1969 (3) SA 447 (T) was distinguished on the basis that it was decided under the provisions of s 6(1)*(b)* of the 'old' Prescription Act 18 of 1943, the wording of which differs materially from that of s 15(1) of the Prescription Act 68 of 1969. See further the notes to subrule (7) s v 'Shall effect the amendment by delivering' below.

10 *Cross v Ferreira* 1950 (3) SA 443 (C) at 452.

11 *Luxavia (Pty) Ltd v Gray Security Services (Pty) Ltd* 2001 (4) SA 211 (W) at 216F–G. See further the notes to subrule (4) s v 'Lodge an application for leave to amend' below.

12 *Nel v Mathews* 1973 (1) SA 184 (T) at 185D–E.

13 *Hart v Nelson* 2000 (4) SA 368 (E) at 372J–373A.

14 *Squid Packers (Pty) Ltd v Robberg Trawlers (Pty) Ltd* 1999 (1) SA 1153 (SE) at 1157E–G.

15 The requirement that the grounds of objection must be stated was introduced by the amendment of the subrule in 1987, probably as a result of the remarks in *Jacobsz v Fall* 1981 (4) SA 871 (C) at 872G. See also *Squid Packers (Pty) Ltd v Robberg Trawlers (Pty) Ltd* 1999 (1) SA 1153 (SE).

16 *Swartz v Van der Walt t/a Sentraten* 1998 (1) SA 53 (W) at 56I–J and 57G–J.

17 *Swartz v Van der Walt t/a Sentraten* 1998 (1) SA 53 (W) at 57C.

18 *Robinson v Randfontein Estates Gold Mining Company Ltd* 1921 AD 168 at 243; *Viljoen v Baijnath* 1974 (2) SA 52 (N) at 53H; *Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd (1)* 1976 (1) SA 93 (W) at 96D; *Hwedhanga v Cabinet for the Territory of South West Africa* 1988 (2) SA 746 (SWA) at 749G; *Caxton Ltd v Reeva Forman (Pty) Ltd* 1990 (3) SA 547 (A) at 565G; *YB v SB* 2016 (1) SA 47 (WCC) at 50H–J and the authorities there referred to.

19 *Cross v Ferreira* 1950 (3) SA 443 (C) at 447; *Trans-Drakensberg Bank Ltd v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D) at 638A; *Viljoen v Baijnath* 1974 (2) SA 52 (N) at 53H; *Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd (1)* 1976 (1) SA 93 (W) at 96A–C; *Kirsh Industries Ltd v Vosloo and Lindeque* 1982 (3) SA 479 (W) at 484G; *Hwedhanga v Cabinet for the Territory of South West Africa* 1988 (2) SA 746 (SWA) at 749H; *Matloga v Minister of Law and Order* 1989 (3) SA 440 (B) at 443D; *Benjamin v Sobac South African Building and Construction (Pty) Ltd* 1989 (4) SA 940 (C) at 957H–958C; *J R Janisch (Pty) Ltd v W M Spilhaus & Co (WP) (Pty) Ltd* 1992 (1) SA 167 (C) at 169I–170B; *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd* [2004] 1 All SA 129 (SCA) at 133 *h-i*; *Four Tower Investments (Pty) Ltd v André's Motors* 2005 (3) SA 39 (N) at 43G–H; *Thekweni Properties (Pty) Ltd v Picardi Hotels Ltd (and Others as Third Parties)* 2008 (2) SA 156 (D) at 158D, overruled on appeal, but not on this point, in *Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd* 2009 (1) SA 493 (SCA); *YB v SB* 2016 (1) SA 47 (WCC) at 51C–D; *RGT Smart Operations (Pty) Ltd v Verlag Automobil Wirtschaft (Pty) Ltd* (unreported, ECP case no 2446/2013 dated 5 August 2016) at paragraph [11].

20 Comprehensive reference to the earlier cases is made by Caney J in *Trans-Drakensberg Bank Ltd v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D). The applicable principles are summarized in *Commercial Union Assurance Co Ltd v Waymark NO* 1995 (2) SA 73 (Tk) at 77F–I, cited with approval in *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at 261C. See also *Kasper v Andrè Kemp Boerdery CC* 2012 (3) SA 20 (WCC) at 34C–G.

21 See the remarks of Schreiner J in *Union Bank of South Africa Ltd v Woolf* 1939 WLD 222 at 225, cited with approval in *Myers v Abramson* 1951 (3) SA 438 (C) at 451B–D; *Trans-Drakensberg Bank Ltd v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D) at 638H–639C; *Amod v SA Mutual Fire & General Insurance Co Ltd* 1971 (2) SA 611 (N) at 618A; *Euroshipping Corporation of Monrovia v Minister of Agriculture* 1979 (2) SA 1072 (C) at 1087C. See also *Absa Bank Ltd v Public Protector and Several Other Matters* [2018] 2 All SA 1 (GP) at paragraph [119].

22 1927 CPD 27 at 29.

23 See, for example, *Fish Hoek Village Management Board v Romain* 1932 CPD 304 at 307; *Frenkel, Wise & Co Ltd v Cuthbert* 1947 (4) SA 715 (C) at 718; *Cross v Ferreira* 1950 (3) SA 443 (C) at 447E–F; *Greyling v Nieuwoudt* 1951 (1) SA 88 (O) at 91H–92A; *Cornelius & Sons v McCLaren* 1961 (2) SA 604 (E); *Zarug v Parvathie NO* 1962 (3) SA 872 (D) at 880H; *Trans-Drakensberg Bank Ltd v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D) at 639D; *Crawford-Brunt v Kavnat* 1967 (4) SA 308 (C) at 311A; *Amod v SA Mutual Fire & General Insurance Co Ltd* 1971 (2) SA 611 (N) at 614A; *Euroshipping Corporation of Monrovia v Minister of Agriculture* 1979 (2) SA 1072 (C) at 1085H–1086A; *Hwedhanga v Cabinet for the Territory of South West Africa* 1988 (2) SA 746 (SWA) at 749J–750A; *Meyerson v Health Beverages (Pty) Ltd* 1989 (4) SA 667 (C) at 675C; *Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd intervening)* 1994 (2) SA 363 (C) at 369G; *Commercial Union Assurance Co Ltd v Waymark NO* 1995 (2) SA 73 (Tk) at 76E–F; *Rosner v Lydia Swanepoel Trust* 1998 (2) SA 123 (W) at 127D–G; *Four Tower Investments (Pty) Ltd v André's Motors* 2005 (3) SA 39 (N) at 43G–H; *Airconditioning Design & Development (Pty) Ltd v Minister of Public Works, Gauteng* 2005 (4) SA 103 (T) at 107H–I; *Thekweni Properties (Pty) Ltd v Picardi Hotels Ltd (and Others as Third Parties)* 2008 (2) SA 156 (D) at 158E, overruled on appeal, but not on this point, in *Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd* 2009 (1) SA 493 (SCA); *Holdenstedt Farming v Cederberg Organic Buchu Growers (Pty) Ltd* 2008 (2) SA 177 (C) at 183C–D; *YB v SB* 2016 (1) SA 47 (WCC) at 51A–D.

24 This is stressed in, for example, *Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd intervening)* 1994 (2) SA 363 (C) at 369G, cited with approval in *Rosner v Lydia Swanepoel Trust* 1998 (2) SA 123 (W) at 127D–G. This common-law rule has in magistrates' courts practice been given statutory effect in the proviso to s 111(1) of the Magistrates' Courts Act 32 of 1944.

25 1927 CPD 27 at 29.

26 Cited with approval in *South British Insurance Co Ltd v Glisson* 1963 (1) SA 289 (D) at 295H. See also *Randa v Radopile Projects CC* 2012 (6) SA 128 (GSJ) and T Bekker 'The late amendment of pleadings— ?time for a new approach? *Randa v Radopile Projects CC* 2012 (6) SA 128 (GSJ)' (2017) 38.1 *Obiter* 181.

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

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

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

30 See *Moolman v Estate Moolman* 1927 CPD 27 at 29.

31 In *Clarapede & Co v Commercial Union Association* (1883) 32 WR 262 at 263 Bowen LJ stated:
'Sometimes to correct the error will lead to injustice which cannot be cured, as when a witness who could give evidence cannot be got at, or the solvency of one party is doubtful.'

32 See, for example, *South British Insurance Co Ltd v Glisson* 1963 (1) SA 289 (D); *GMF Kontrakteurs (Edms) Bpk v Pretoria City Council* 1978 (2) SA 219 (T).

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

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

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

36 *Tengwa v Metrorail* 2002 (1) SA 739 (C).

37 *Union Bank of South Africa Ltd v Woolf* 1939 WLD 222 at 225; *Trans-Drakensberg Bank Ltd v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D) at 640H; *Euroshipping Corporation of Monrovia v Minister of Agriculture* 1979 (2) SA 1072 (C) at 1090B; *Thekweni Properties (Pty) Ltd v Picardi Hotels Ltd (and Others as Third Parties)* 2008 (2) SA 156 (D) at 158E–F, overruled on appeal, but not on this point, in *Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd* 2009 (1) SA 493 (SCA).

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

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

40 *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 279C; *Slomowitz v Vereeniging Town Council* 1966 (3) SA 317 (A) at 329E–F; *Western Bank Ltd v Wood* 1969 (4) SA 131 (D) at 135H; *Matloga v Minister of Law and Order* 1989 (3) SA 440 (B) at 443D.

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

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

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

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

45 *OK Motors v Van Niekerk* 1961 (3) SA 149 (T) at 152C; *MacDonald, Forman & Co v Van Aswegen* 1963 (2) SA 150 (O) at 153H–154A; *Fiat SA (Pty) Ltd v Bill Troskie Motors* 1985 (1) SA 355 (O) at 357G–H; *Tengwa v Metrorail* 2002 (1) SA 739 (C) at 745H.

46 *MacDonald, Forman & Co v Van Aswegen* 1963 (2) SA 150 (O) at 153D.

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

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

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

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

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

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

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

54 In *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at 15B–E it was pointed out that it is preferable in the context of prescription to speak of 'a right of action' instead of a 'cause of action'.

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

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

57 1997 (2) SA 1 (A). See also *Mazibuko v Singer* 1979 (3) SA 258 (W) at 265D–266C; *Associated Paint & Chemical Industries (Pty) Ltd t/a Albestra Paint and Lacquers v Smit* 2000 (2) SA 789 (SCA) at 794C–G; *Embling v Two Oceans Aquarium CC* 2000 (3) SA 691 (C) at 697F–698A; *Tengwa v Metrorail* 2002 (1) SA 739 (C) at 744I–745B; *CGU Insurance Ltd v Rumdel Construction (Pty) Ltd* 2004 (2) SA 622 (SCA) at 626H–I; *FirstRand Bank Ltd v Nedbank (Swaziland) Ltd* 2004 (6) SA 317 (SCA) at 321A–C; *Four Tower Investments (Pty) Ltd v André's Motors* 2005 (3) SA 39 (N) at 42H–47I; *Mntambo v Road Accident Fund* 2008 (1) SA 313 (W) at 318B–C.

58 At 15H–16C.

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

60 *Flemmer v Ainsworth* 1910 TPD 81; *Combrinck v Strasburger* 1914 CPD 314; *Estate Wolpert v Hewett* 1925 (2) PH F74 (D); *Frenkel, Wise & Co Ltd v Cuthbert* 1947 (4) SA 715 (C).

61 See, for example, *Botha v Van Niekerk* 1947 (1) SA 699 (T) at 703; *Geyser v Geyser* 1947 (4) SA 1 (T) at 4. The rules regarding withdrawals of admissions refer to admissions on the pleadings and not admissions *dehors* the pleadings (*Wild Sea Construction (Pty) Ltd v Van Vuuren* 1983 (2) SA 450 (C) at 452F).

62 *Gordon v Tarnow* 1947 (3) SA 525 (A) at 531; *AA Mutual Insurance Association Ltd v Biddulph* 1976 (1) SA 725 (A) at 735; *Bellairs v Hodnett* 1978 (1) SA 1109 (A) at 1150D; and see s 15 of the Civil Proceedings Evidence Act 25 of 1965.

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

64 In *President Versekeringsmaatskappy Bpk v Moodley* 1964 (4) SA 109 (T) at 110H–111A; *J R Janisch (Pty) Ltd v W M Spilhaus & Co (WP) (Pty) Ltd* 1992 (1) SA 167 (C) at 170C–G. See also Fareed Moosa 'Withdrawal of an admission in a plea' 2017 (July) *De Rebus* 24.

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

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

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

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

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

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

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

72 *Minister van die SA Polisie v Kraatz* 1973 (3) SA 490 (A) at 512E–H; *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd* 1978 (1) SA 914 (A) at 928D. In both these cases the remarks of Van den Heever J in *Van Aswegen v Fechter* 1939 OPD 78 at 88 are cited with approval.

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

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

75 *Heydenrych v Colonial Mutual Life Assurance Society Ltd* 1920 CPD 67; *Stuttaford & Co Ltd v Scher* 1931 CPD 341; *Beeton v Peninsula Transport Co (Pty) Ltd* 1934 CPD 53; *Edwards v African Guarantee and Indemnity Co Ltd* 1952 (4) SA 335 (O); *Cross v Ferreira* 1950 (3) SA 443 (C), upheld on appeal to the full court in *Cross v Ferreira* 1951 (2) SA 435 (C); *Myers v Abramson* 1951 (3) SA 438 (C); *Edwards v African Guarantee and Indemnity Co Ltd* 1952 (4) SA 335 (O) at 339; *Hochfeld (Pty) Ltd v Carmeldine Investments (Pty) Ltd* 1955 (4) SA 296 (W) at 298A; *Barkhuizen NO v Jackson* 1957 (3) SA 57 (T) at 58F; *Pieters v Pitchers* 1959 (3) SA 834 (T); *Lloyds & Co (South Africa) Ltd v Aucamp* 1961 (3) SA 879 (O); *Harnaker v Minister of the Interior* 1963 (4) SA 559 (C) at 563F; *Furstenberg v Smit* 1964 (3) SA 810 (O) at 815B; *Crawford-Brunt v Kavnat* 1967 (4) SA 308 (C) at 310G–311A; *Bedford v Uys* 1971 (1) SA 549 (C); *OK Bazaars*

(1929) Ltd v Universal Stores Ltd 1972 (3) SA 175 (C) at 177H; *Van Jaarsveld v Nel* 1974 (1) SA 103 (T); *Millman NO v Goosen* 1975 (3) SA 141 (O); *Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd* (2) 1976 (1) SA 100 (W); *R M van de Ghinste & Co (Pty) Ltd v Van de Ghinste* 1980 (1) SA 250 (C) at 256H–257D; *Hwedhanga v Cabinet for the Territory of South West Africa* 1988 (2) SA 746 (SWA) at 750D; *Bowring Barclays & Genote (Edms) Bpk v De Kock* 1991 (1) SA 145 (SWA); *De Klerk v Du Plessis* 1995 (2) SA 40 (T) at 43I; *Bafokeng Tribe v Impala Platinum Ltd and Others* 1999 (3) SA 517 (BH) at 539H–J; *Barnard v Barnard* 2000 (3) SA 741 (C) at 754F; *Nxumalo v First Link Insurance Brokers (Pty) Ltd* 2003 (2) SA 620 (T); *Alpha (Pty) Ltd v Carltonville Ready Mix Concrete CC* 2003 (6) SA 289 (W) at 293I–J; *Krischke v Road Accident Fund* 2004 (4) SA 358 (W) at 363B; *YB v SB* 2016 (1) SA 47 (WCC) at 51E–F.

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

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

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

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

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

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

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

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

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

85 *Peter Taylor & Associates v Bell Estates (Pty) Ltd* 2014 (2) SA 312 (SCA) at 319B–D; distinguished in *Huyser v Quicksure (Pty) Ltd* 2017 (4) SA 546 (GP).

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

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

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

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

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

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

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

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

94 *Airconditioning Design & Development (Pty) Ltd v Minister of Public Works, Gauteng* 2005 (4) SA 103 (T); *Tecmed (Pty) Ltd v Nissho Iwai Corporation* 2011 (1) SA 35 (SCA) at 41D–F. See also, in general, Moosa 'Non-existent plaintiff: Dealing with misdescriptions in citations' 2013 (September) *De Rebus* 22–4. See further the notes to rule 15 s v 'General' above.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

111 *Holdenstedt Farming v Cederberg Organic Buchu Growers (Pty) Ltd* 2008 (2) SA 177 (C) at 181B–D.

112 *Holdenstedt Farming v Cederberg Organic Buchu Growers (Pty) Ltd* 2008 (2) SA 177 (C) at 181B–D.

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

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

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

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

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

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

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

120 1985 (1) SA 355 (O) at 358C.

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

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

123 *Park Finance Corporation (Pty) Ltd v Van Niekerk* 1956 (1) SA 669 (T) at 674D; *Thompson & Stapelberg (Pty) Ltd v President Staal Korporasie (Edms)*

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

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

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

126 1977 (3) SA 455 (W) at 458C–D.

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

128 At paragraph [11].

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

144 *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) at 306F–G; *Govender v Hassim* 1994 (1) SA 304 (D) at 305G–H, the latter case not approving of the decision in *Dawson and Fraser (Pty) Ltd v Havenga Construction (Pty) Ltd* 1993 (3) SA 397 (BGD) in which a summons was amended after judgment under rule 42.

145 *Levy v Rose* (1903) 20 SC 189; *Clayton v Feitelberg* 1903 TH 99; *Vorster v Van der Walt* 1914 EDL 303; *Myers v Abramson* 1951 (3) SA 438 (C) at 445G–H. See also *Kasper v Andrè Kemp Boerdery CC* 2012 (3) SA 20 (WCC) at 34C–G.

146 1976 (2) SA 179 (D).

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

29 Close of pleadings and Notice of Set Down of trials

Pleadings are considered closed if —

(1) *(a)* either party has joined issue without alleging any new matter, and without adding any further pleading;

(b) the last day allowed for filing a replication or subsequent pleading has elapsed and it has not been filed;

(c) the parties agree in writing that the pleadings are closed and such agreement is filed with the registrar; or

(d) the parties are unable to agree as to the close of pleadings, and the court upon the application of a party declares them closed.

(2) *(a)* Upon allocation of a date or dates for trial, the registrar must inform all parties of the allocated dates.

(b) The party which applied for the trial date must, within 10 days of notification from the registrar, deliver a notice informing all other parties of the date or dates on which the matter is set down for trial.

[Rule 29 substituted by GN R678 of 3 June 2016.]

Commentary

Subrule (1): 'Pleadings are considered closed.' In modern practice *litis contestatio* is taken as being synonymous with close of pleadings, when the issue is crystallized and joined. [1] The effect of *litis contestatio* is to 'freeze the plaintiff's rights as at that moment'. [2]

In *Potgieter v Sustein (Edms) Bpk* [3] it was held that the provisions of this rule did not merely create a rebuttable presumption that the pleadings were closed but in fact constituted a substantive rule of adjective law, with the result that when a pleading was filed or amended after the close of pleadings in terms of the rule, such filing or amendment operated with retrospective effect and did not alter the fact that the pleadings were closed. In *Natal Joint Municipal Pension Fund v Endumeni Municipality* [4] the Supreme Court of Appeal pointed out [5] that there was no problem with the formulation that the effect of *litis contestatio* is to 'freeze the plaintiff's rights as at that moment' when parties abided by their pleadings and conducted the trial accordingly. Frequently, however, parties did not do so because other issues arose that they wished to canvass, and, either formally, by way of an amendment to pleadings, or informally, they altered the scope of the litigation. [6] The effect of this was stated by the Supreme Court of Appeal [7] to be the following (*per* Wallis JA):

> 'The answer is that when pleadings are reopened by amendment or the issues between the parties altered informally, the initial situation of litis contestatio falls away and is only restored once the issues have once more been defined in the pleadings or in some other less formal manner. That is consistent with the circumstances in which the notion of litis contestatio was conceived. In Roman law, once this stage of proceedings was reached, a new obligation came into existence between the parties, to abide the result

> of the adjudication of their case. Melius de Villiers *The Roman and Roman-Dutch Law of Injuries* explains the situation as follows:
>
> > "Through litis contestatio an action acquired somewhat of the nature of a contract; a relation was created resembling an agreement between the parties to submit their differences to judicial investigation. . . ."
>
> When the parties decide to add to or alter the issues they are submitting to adjudication, then the "agreement" in regard to those issues is altered and the consequences of their prior arrangement are altered accordingly. Accordingly, when in this case they chose to reformulate the issues at the commencement of the trial, a fresh situation of litis contestatio arose and the rights of the Fund as plaintiff were fixed afresh on the basis of the facts prevailing at that stage.'

In *KS v MS* [8] Kruger J, in regard to the aforesaid judgment of Wallis JA, stated: [9]

> 'Nor do I understand the judgment of Wallis JA to mean that any amendment, however immaterial or minor it may be, would result in fresh litis contestatio. It is when the parties "add to or alter the issues they are submitting to adjudication", by amendment or agreement, that "a new obligation" comes into existence and a fresh situation of litis contestatio arises.'

Claims under the *actio iniuriarum* and claims for damages for personal injury, in which are included the non-pecuniary heads of damage of pain and suffering, loss of amenities of life and disfigurement, [10] are transmissible on the death of the injured person after *litis contestatio*. [11] Such claims are not transmissible on the death of the injured person before *litis contestatio* nor capable of cession before the stage of *litis contestatio* has been reached. [12]

When an out-and-out cession of the claim of a party is affected after *litis contestatio* but prior to judgment, such party does not lose its *locus standi* and may thereafter proceed with the action in its name. [13] The cessionary of a claim that is the subject matter of a pending action is entitled to have itself substituted by the court [14] for the cedent in the action if there is no prejudice to the other party to the litigation. [15] The legal effect of a cession after *litis contestatio* is that it terminates the proceedings instituted by the cedent, with the corollary that the substitution of the cessionary, as a new plaintiff or applicant, must be regarded as the

institution of new proceedings. [16] If the cessionary is unsuccessful in the legal proceedings, the cessionary will be liable for costs as from date of substitution. In such an event the cedent will be liable for costs incurred prior to the substitution. [17]

Paragraph *(a)*: 'Has joined issue.' In terms of rule 25(2) it is unnecessary to file a replication or subsequent pleading which would be a mere joinder of issue. If it is filed the costs thereof might well be irrecoverable. [18] Where the filing of a replication (or further pleading) is not necessary, the plaintiff need not wait until the time for filing a notional replication has elapsed. [19] He can forthwith take the next procedural step, that of setting the matter down, and *litis contestatio* will take place when the notice of set-down is delivered. [20]

Joinder of issue operates merely as a denial of facts and not as a denial or admission of statements of law. If a paragraph of a plea is a statement of law and not of fact, such a paragraph may be ignored by the plaintiff in view of the fact that the pleading of a statement of law is bad pleading. [21]

'Without alleging any new matter.' The words 'new matter' refer to new matter which it is permissible to raise in a replication. An example occurs where the plaintiff in his replication pleads that the defendant is estopped from raising some defence set out in the plea. [22]

'Without adding any further pleading.' The phrase 'without adding any further pleading thereto' in former Natal rule 57*(b)* was held to mean 'without adding any further averment or allegation in the pleading in which the party has joined issue'. [23] The omission of the word 'thereto' in the present rule and the Afrikaans version of the phrase 'without adding any further pleading' ('sonder om 'n verdere pleitstuk by te voeg') suggest that the intended reference is to further pleadings such as a replication or a rejoinder and not to the contents of any such pleading.

Subrule (2): Most of the divisions of the High Court have their own local rules of practice relating to the allocation of trial dates and set down. [24]

1 *Milne NO v Shield Insurance Co Ltd* 1969 (3) SA 352 (A) at 358C; *Government of the Republic of SA v Ngubane* 1972 (2) SA 601 (A) at 608D; *Potgieter v Sustein (Edms) Bpk* 1990 (2) SA 15 (T) at 19B–H; *Van Rensburg v Condoprops 42 (Pty) Ltd* 2009 (6) SA 539 (E) at 542A; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at 601E–F; *Naidoo NO v Minister of Safety and Security* (unreported, ECP case no 1421/2011 dated 12 March 2019) at paragraph [5].

2 *Potgieter v Rondalia Assurance Corporation of SA Ltd* 1970 (1) SA 705 (N) at 710A; *Government of the Republic of SA v Ngubane* 1972 (2) SA 601 (A) at 608D–E.

3 1990 (2) SA 15 (T) at 20C.

4 2012 (4) SA 593 (SCA).

5 At 601D–F.

6 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at 601F–G.

7 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at 602A–D.

8 2016 (1) SA 64 (KZD).

9 At 69C–D.

10 As to the nature of such claims, see *Hoffa NO v SA Mutual Fire & General Insurance Co Ltd* 1965 (2) SA 944 (C); *Government of the Republic of SA v Ngubane* 1972 (2) SA 601 (A) at 606A–H.

11 *Jankowiak v Parity Insurance Co Ltd* 1963 (2) SA 286 (W); *Potgieter v Rondalia Assurance Corporation of SA Ltd* 1970 (1) SA 705 (N) at 710A–D; *Milne NO v Shield Insurance Co Ltd* 1969 (3) SA 352 (A) at 358C; *Government of the Republic of SA v Ngubane* 1972 (2) SA 601 (A) at 608D; *Potgieter v Sustein (Edms) Bpk* 1990 (2) SA 15 (T) at 21J–22D.

12 See the preceding footnote.

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

14 *Brummer v Gorfil Brothers Investments (Pty) Ltd* 1999 (3) SA 389 (SCA) at 410E–H; *Van Rensburg v Condo-props 42 (Pty) Ltd* 2009 (6) SA 539 (E) at 544F–545A; *Antonie v Noble Land (Pty) Ltd* 2014 (5) SA 307 (GJ) at 309H–310C.

15 *Erasmus v Michael James (Pty) Ltd (t/a The Michael James Organisation) (Standard Bank of SA Ltd Intervening); Sashwood (Pty) Ltd v The Fund Constituting the Proceeds of the First and Second Sales of the MV Nautilus (Erasmus, Nel and Standard Bank of SA Ltd Intervening)* 1994 (2) SA 528 (C) at 566A; *Van Rensburg v Condoprops 42 (Pty) Ltd* 2009 (6) SA 539 (E) at 544F; *Antonie v Noble Land (Pty) Ltd* 2014 (5) SA 307 (GJ) at 309H–310C.

16 *Silhouette Investments Ltd v Virgin Hotels Group Ltd* 2009 (4) SA 617 (SCA), applied in *Tecmed (Pty) Ltd v Nissho Iwai Corporation* 2011 (1) SA 35 (SCA) at 43B–D; *Antonie v Noble Land (Pty) Ltd* 2014 (5) SA 307 (GJ) at 310H–I. The substitution of a party after *litis contestatio* as a result of a cession of the debt does not give rise to a valid plea of prescription (*Sentrachem Ltd v Terreblanche*, unreported, SCA case no 237/2016 dated 22 March 2017).

17 *Antonie v Noble Land (Pty) Ltd* 2014 (5) SA 307 (GJ) at 310D–311B.

18 See *Milne NO v Shield Insurance Co Ltd* 1969 (3) SA 352 (A) at 358G.

19 *Milne NO v Shield Insurance Co Ltd* 1969 (3) SA 352 (A) at 358H.

20 *Milne NO v Shield Insurance Co Ltd* 1969 (3) SA 352 (A) at 359G.

21 See *The Master v General Accident, Fire and Life Assurance Co* 1935 CPD 250 at 254.

22 *Butler v Swain* 1960 (1) SA 527 (N) at 528F.

23 *Hanson, Tomkin & Finkelstein v DBN Investments (Pty) Ltd* 1951 (3) SA 769 (N); *Butler v Swain* 1960 (1) SA 527 (N) at 528A–D.

24 See, in general, Volume 3, Parts F–N.

30 Irregular proceedings

(1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.

[Subrule (1) substituted by GN R2164 of 2 October 1987, by GN R2642 of 27 November 1987 and by GN R1883 of 3 July 1992.]

(2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if —

(a) the applicant has not himself taken a further step in the cause with knowledge of the irregularity;

(b) the applicant has, within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days;

(c) the application is delivered within fifteen days after the expiry of the second period mentioned in paragraph *(b)* of subrule (2).

[Subrule (2) substituted by GN R1883 of 3 July 1992 and amended by GN R2047 of 13 December 1996.]

(3) If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet.

(4) Until a party has complied with any order of court made against him in terms of this rule, he shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order.

[Subrule (4) substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

(5) ...

[Subrule (5) deleted by GN R2047 of 13 December 1996.]

Commentary

General. In *SA Metropolitan Lewensversekeringsmaatskappy Bpk v Louw NO* [1] Flemming J stated the object of rule 30(1) as follows:

> 'I have no doubt that Rule 30(1) was intended as a procedure whereby a hindrance to the future conducting of the litigation, whether it is created by a non-observance of what the Rules of Court intended or otherwise, is removed.'

Rule 30 applies only to irregularities of form and not to matters of substance. [2] Specific defences such as lack of *locus standi* and prescription are raised by special plea and not by way of application under the rule. [3]

In terms of rules 18(12), 22(5) and 24(5) the pleadings referred to in these subrules are, on non-compliance with the provisions of the rule concerned, deemed to be an irregular step and the opposite party 'shall be entitled to act in accordance with rule 30'. In terms of rule 28(8) any party affected by an amendment may, within the time stipulated in the subrule, *inter alia*, take the steps contemplated in rule 30.

A party is not obliged to invoke the rule in order to have proceedings set aside on the ground of irregularity, but may avail himself of any other remedy available to him under the rules. [4] Thus, it has been held that an objection *in limine* that a notice of the hearing of an application for summary judgment did not comply with rule 32(2) need not be raised by way of formal application under rule 30(1); [5] a plaintiff may in terms of rule 31(2)*(a?)* apply for judgment by default without first making application to have an irregular notice of intention to defend set aside; [6] an objection of non-joinder or misjoinder may be raised under this rule but the more usual practice is to raise it by way of special plea. [7] If a pleading both fails to comply with rule 18 and is vague and embarrassing, the defendant has a choice of remedies: he may either bring an application in terms of rule 30 or raise an exception in terms of rule 23(1). [8]

Subrule (1): 'A party to a cause.' Prior to the amendment of the subrule in 1987 the phrase 'any cause' was used and it was held that the words were used in the widest possible sense and referred to any judicial proceeding of whatsoever nature. [9] It is submitted that the phrase 'a cause' in the present subrule has a similar wide meaning.

'An irregular step has been taken.' The irregular step contemplated by this subrule must be a step which advances the proceedings one stage nearer completion. [10] The subrule does not apply to omissions, but to positive steps or proceedings. [11] The annexure of an unsworn

statement to an affidavit is not an irregular proceeding under the subrule, [12] nor is a notice in respect of furnishing security. [13] Rule 30 has found application where, for example—

(a) a proper power of attorney had not been filed; [14]

(b) proper service of a summons had not been effected; [15]

(c) an address for service of documents was not set out in a summons; [16]

(d) pleadings were not signed in accordance with the rules or did not comply with the rules as to form; [17]

(e) particulars of claim in an action for damages failed to comply with the provisions of rule 18(10); [18]

(f) an application was brought on the grounds of urgency but no reasons of urgency were set out in the supporting affidavits; [19]

(g) there had been premature set-down; [20]

(h) review proceedings were brought by way of action and not in terms of rule 53; [21]

(i) an irregular notice of bar had been served in provisional sentence proceedings; [22]

(j) an irregular notice of bar had been served in summary judgment proceedings; [23]

(k) lengthy affidavits were filed in proceedings under rule 43; [24]

(l) proper notice of taxation had not been given; [25]

(m) a notice of appeal was defective; [26]

(n) a notice of intention to amend a plea so as to introduce a claim in reconvention was delivered without the procedure in rule 24(1) having been followed; [27]

(o) a notice of objection to the taxation of a bill of costs which is filed out of time. [28]

'May apply to court to set it aside.' A party's proper course where any proceeding in a cause is irregular is not to proceed as if there had been no such proceeding at all but to apply to court under this subrule for an order setting it aside. [29]

Proof of prejudice is a prerequisite to success in an application in terms of rule 30(1). [30] To this extent an application under the subrule need be supported by an affidavit. [31]

Subrule (2): 'Specifying particulars of the irregularity or impropriety alleged.' See the notes to subrule (1) s v 'May apply to court to set it aside' above.

Paragraph *(a)*: 'Taken a further step in the cause.' This paragraph is intended to deal with the situation where a party has taken a further step in the cause and thereafter seeks to make application to set aside an irregular or improper step. [32] A further step in the cause is some act which advances the proceedings one stage nearer completion. [33] Notice of intention to defend is not a further step in that sense but is merely an act done with the object of qualifying the defendant to put forward his defence. [34] A party takes a further step in the cause by the filing of a declaration, [35] a notice of bar, [36] a plea in response to an irregular notice of bar, [37] a replication, [38] or an answering affidavit, [39] but not by

filing a notice in respect of furnishing security. [40] Steps taken in preparation of trial, such as requesting particulars for trial, serving a notice to produce, and convening and attending a pre-trial conference, are further steps in the cause. [41]

It has previously been held that a notice of exception amounts to a further step as contemplated in this rule. [42] This approach has been rejected and it has been held [43] that an excipient

is concerned merely to make full use of the remedies that the rules provide, for an attack on a defective pleading. Where the grounds for the exception and the rule 30 application were the same, it was held [44] that it could not be said that the filing of the exception either *(a)* advanced the proceedings one step nearer completion or *(b)* manifested an intention to pursue the cause despite the irregularity. The fact that the exception and the rule 30 notice were contained on two different documents and that relief was not claimed in the alternative was irrelevant. [45]

In *Monumental Art Co v Kenston Pharmacy (Pty) Ltd* [46] it was said that subrule (2) does not apply when the irregular step complained of in the proceedings amounts to a nullity or the defect is such that the opposing party cannot cure the defect even though he were to waive his right to object thereto by taking a further step in the cause. The validity of any distinction between an irregular proceeding (which can be condoned) and one that is a nullity or void (which cannot be condoned) has, however, been doubted: see the notes to subrule (3) below and to rule 27(3) sv 'Condone any non-compliance with these rules' above.

'With knowledge of the irregularity.' It is submitted that knowledge of the irregularity means knowledge of the fact which constitutes the irregularity and not consciousness that the fact constitutes an irregularity. [47] See the notes to paragraph *(b)* sv 'Within ten days of becoming aware of the step' below.

Paragraph *(b)*: 'Within ten days of becoming aware of the step.' This paragraph in its amended form now makes it clear that a party must give notice to his opponent to remove the cause of complaint within ten days of becoming aware of the fact that the step concerned had been taken, and not within ten days of becoming aware of the irregularity of the step. [48]

'Of removing the cause of complaint.' This is an innovation introduced by the amendment of the subrule in 1992; previously a party was entitled to bring an application under the subrule without affording his opponent an opportunity of removing the cause of complaint. It is submitted that the purpose of the subrule is to prevent unnecessary applications being brought and to put a defaulting party on notice as to the consequences of his default. [49] In an appropriate case the court can condone non-compliance with this requirement. [50]

Paragraph *(c)*: 'The application is delivered within fifteen days.' The period may be extended by the court under the provisions of rule 27(1). [51] In such a case it would be appropriate if the application for the extension of time and the application for relief under this subrule were brought on the same papers at the same time. [52]

Subrule (3): 'May set it aside . . . or make any such order as to it seems meet.' This subrule gives a court very wide powers, powers which might enable a court to grant a plaintiff the

opportunity to amend a summons which is so defective as to constitute a nullity. [53] In terms of the subrule the court may, *inter alia*, make any order as it deems fit. [54]

The court has a discretion and it is not intended that an irregular step should necessarily be set aside. [55] The discretion must be exercised judicially on a consideration of the circumstances and what is fair to both sides. [56] The court is entitled to overlook in proper cases any irregularity which does not work any substantial prejudice to the other party. [57]

The court may refuse the costs of a technical application to set aside an irregular proceeding which could not be expected to yield any real advantage to the applicant. [58]

The court may dismiss an application which in fact is little but a stratagem to get the main matter postponed at the other party's costs. In such an event the applicant will be ordered to pay the costs of the application. [59]

See further the notes to rule 27(3) above.

Subrule (4): 'Apply for an extension of time.' See rule 27(1) and (2), and the notes thereto, above.

1 1981 (4) SA 329 (O) at 333G–H.

2 *Singh v Vorkel* 1947 (3) SA 400 (C) at 406; *Odendaal v De Jager* 1961 (4) SA 307 (O) at 310F–G; *Nyaniso v Head of the Department of Sports, Recreation, Arts and Culture, Eastern Cape Province* (unreported, ECB case no 643/2014 dated 27 September 2016) at paragraph [11]. In *Deputy Minister of Tribal Authorities v Kekana* 1983 (3) SA 492 (B) it was held *obiter* (at 495H–496B) that a defect going to the root of a claim may be attacked under the rule. In view of the provisions of rule 18(12), which were inserted on 27 November 1987, it is doubtful whether the *obiter* judgment is still applicable.

3 *De Polo v Dreyer* 1989 (4) SA 1059 (W) at 1061E.

4 *Stockdale Motors Ltd v Mostert* 1958 (1) SA 270 (O); *Burger v De Vos* 1967 (3) SA 63 (O); *Papenfus v Nichas & Son (Pty) Ltd* 1969 (4) SA 234 (O) at 237A; *KDL Motorcycles (Pty) Ltd v Pretorius Motors* 1972 (1) SA 505 (O) at 508G.

5 *Papenfus v Nichas & Son (Pty) Ltd* 1969 (4) SA 234 (O).

6 *KDL Motorcycles (Pty) Ltd v Pretorius Motors* 1972 (1) SA 505 (O); *Ladybrand Koöperatiewe Landboumaatskappy Bpk v Finlay* 1975 (1) SA 784 (O); *Swart v Flugel* 1978 (3) SA 265 (E).

7 *Skyline Hotel v Nickloes* 1973 (4) SA 170 (W).

8 *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a L H Marthinusen* 1992 (4) SA 466 (W) at 469F–J.

9 *Participation Bond Nominees (Pty) Ltd v Mouton (3)* 1978 (4) SA 508 (W) at 515D.

10 *Cyril Smiedt (Pty) Ltd v Lourens* 1966 (1) SA 150 (O) at 152E; *Market Dynamics (Pty) Ltd t/a Brian Ferris v Grögor* 1984 (1) SA 152 (W) at 153C.

11 *Jyoti Structures Africa (Pty) Ltd v KRB Electrical Engineers; Masana Mavuthani Electrical & Plumbing Services (Pty) Ltd t/a KRB Masana* 2011 (3) SA 231 (GSJ) at 235A–B; *Nyaniso v Head of the Department of Sports, Recreation, Arts and Culture, Eastern Cape Province* (unreported, ECB case no 643/2014 dated 27 September 2016) at paragraph [11]. In the *Masana* case (*supra*) the appellant had filed copies of the record on appeal, but without providing security. The respondent notified the appellant that its proceedings were irregular steps as intended in rule 30 because the record of appeal had been lodged without entering good and sufficient security for the respondent's costs, as required by rule 49(13). The respondent's notice invited the appellant to remove the cause of the complaint within ten days, in terms of rule 30(2)*(b)*. The appellant thereupon paid an amount of R1,000.00 as security. The respondent, contending that the amount was insufficient security, proceeded to apply under rule 30(1) to have the appellant's filing of the record and application for appeal set aside, and for an order declaring that the appeal had lapsed. It was held (at 234C and 234H) that the respondent's notice contained an invitation to cure the cause of the complaint. If security were thereafter furnished, the amount could be disputed, and rule 49(13)*(b)* provided the remedy, which was that the registrar had to be approached. If the appellant did not approach the registrar, it at best amounted to an omission and not a 'step' or 'proceeding'. The respondent could therefore not use rule 30 for purposes of complaining about the appellant's failure to approach the registrar, nor could it rely on the original rule 30 notice, because the cause of complaint stated therein had been removed. The respondent's remedy concerning the inadequacy of the amount was therefore to approach the registrar itself (the obvious route), or possibly to proceed in terms of rule 30A (non-compliance with the rules), or to seek a mandamus to direct the appellant to approach the registrar. Its remedy did not lie in proceeding with a rule 30 application (at 234I–235B).

12 *Cyril Smiedt (Pty) Ltd v Lourens* 1966 (1) SA 150 (O) at 152E.

13 *Market Dynamics (Pty) Ltd t/a Brian Ferris v Grögor* 1984 (1) SA 152 (W).

14 *Distins Seed Cleaning and Packing Co (Pty) Ltd v Stuart Wholesalers* 1954 (1) SA 283 (N); *Employers' Liability Assurance Corporation Ltd v Potgieter* 1959 (1) SA 850 (W); *Oos-Randse Bantoesake Administrasieraad v Santam Versekeringsmaatskappy Bpk (1)* 1978 (1) SA 160 (W); *Carlkim (Pty) Ltd v Shaffer* 1986 (3) SA 619 (N).

15 *SA Instrumentation (Pty) Ltd v Smithchem (Pty) Ltd* 1977 (3) SA 703 (D). See also *Van Loggerenberg v Lydenburg Municipal Council* 1939 TPD 180; *O'Donoghue v Human* 1969 (4) SA 35 (E); *Protea Assurance Co Ltd v Vinger* 1970 (4) SA 663 (O); *Wiehahn Konstruksie Toerustingmaatskappy (Edms) Bpk v Potgieter* 1974 (3) SA 191 (T). If proper service had not been effected, the court, in the exercise of its discretion, could treat the service as good service (*SA Instrumentation (Pty) Ltd v Smithchem (Pty) Ltd* 1977 (3) SA 703 (D) at 705H–706F and the cases there referred to; *Prism Payment Technologies (Pty) Ltd v Altech Information Technologies (Pty) Ltd (t/a Altech Card Solutions)* 2012 (5) SA 267 (GSJ) at 270I–271C and 272H–273A). In such instance rule 30 is not the proper procedure to follow (*Prism Payment Technologies (Pty) Ltd v Altech Information Technologies (Pty) Ltd (t/a Altech Card Solutions)* 2012 (5) SA 267

(GSJ) at 272H–273A). See also *Investec Property Fund Limited v Viker X (Pty) Limited* (unreported, GJ case no 2016/07492 dated 10 May 2016) at paragraphs [7]–[19].

16 *Minister of Prisons v Jongilanga* 1983 (3) SA 47 (E) and 1985 (3) SA 117 (A).

17 *Suliman v Karodia* 1926 WLD 102; *Union & SWA Salt Snoek Corporation (Pty) Ltd v Lancashire Agencies* 1959 (2) SA 52 (N); *Bredenkamp v Dart* 1960 (3) SA 106 (O).

18 *Minister of Law and Order v Taylor NO* 1990 (1) SA 165 (E); *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a L H Marthinusen* 1992 (4) SA 466 (W) at 471F–472C.

19 *Eniram (Pty) Ltd v New Woodholme Hotel (Pty) Ltd* 1967 (2) SA 491 (E).

20 *Santam Versekeringsmaatskappy Bpk v Leibrandt* 1969 (1) SA 604 (C).

21 *Secretary for the Interior v Scholtz* 1971 (1) SA 633 (C); *Deputy Minister of Tribal Authorities v Kekana* 1983 (3) SA 492 (B). See also *Adfin (Pty) Ltd v Durable Engineering Works (Pty) Ltd* 1991 (2) SA 366 (C).

22 *Participation Bond Nominees (Pty) Ltd v Mouton* (3) 1978 (4) SA 508 (W).

23 *Dass and Others NNO v Lowewest Trading (Pty) Ltd* 2011 (1) SA 48 (KZD) at 52I–J.

24 *Zoutendijk v Zoutendijk* 1975 (3) SA 490 (T).

25 *Brenner's Service Station and Garage (Pty) Ltd v Milne* 1983 (4) SA 233 (W).

26 *D & H (Pty) Ltd v Sinclaire* 1971 (2) SA 157 (W); *South African Druggists Ltd v Beecham Group plc* 1987 (4) SA 876 (T).

27 *Shell SA Marketing (Pty) Ltd v Wasserman t/a Wasserman Transport* 2009 (5) SA 212 (O).

28 *Olgar v Minister of Safety and Security* 2012 (4) SA 127 (ECG) at 134B–C and 135A–B.

29 *Schewe v Schewe* 1909 TH 149; *Gibson & Jones (Pty) Ltd v Smith* 1952 (4) SA 87 (T); *Creux & Sons (Pty) Ltd v Groenewald* 1953 (3) SA 726 (T); *Stoermer v Stoermer* 1959 (3) SA 922 (SWA); *Brümmer v Brümmer* 1962 (3) SA 101 (O); *Theron v Coetzee* 1970 (4) SA 37 (T).

30 *SA Metropolitan Lewensversekeringsmaatskappy Bpk v Louw NO* 1981 (4) SA 329 (O) at 333G–334G; *De Klerk v De Klerk* 1986 (4) SA 424 (W) at 426I; *Consani Engineering (Pty) Ltd v Anton Steinecker Maschinenfabrik GmbH* 1991 (1) SA 823 (T) at 824G–H; *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a L H Marthinusen* 1992 (4) SA 466 (W) at 469G; *Gardiner v Survey Engineering (Pty) Ltd* 1993 (3) SA 549 (SE) at 551C.

31 In *Chelsea Estates & Contractors CC v Speed-O-Rama* 1993 (1) SA 198 (E) at 202E–F and *Scott v Ninza* 1999 (4) SA 820 (E) at 823A–C it was held that an application under subrule (2) need not be supported by an affidavit and that all that the subrule requires is that the notice must specify the particulars of the irregularity or impropriety complained of, although, in the latter case, the court took note of the facts mentioned in the affidavits in support of and opposing the application. These decisions, obviously, lost sight of the fact that proof of prejudice is required in the affidavit in support of the application and can be rebutted by evidence in the affidavit opposing the application.

32 *Zoutendijk v Zoutendijk* 1975 (3) SA 490 (T).

33 *Pettersen v Burnside* 1940 NPD 403 at 406; *Market Dynamics (Pty) Ltd t/a Brian Ferris v Grögor* 1984 (1) SA 152 (W) at 153C; and see *Cyril Smiedt (Pty) Ltd v Lourens* 1966 (1) SA 150 (O) at 152E; *Kopari v Moeti* 1993 (4) SA 184 (BGD) at 188H.

34 *Winship NO v Jonsson's Executors* (1926) 47 NPD 43; *Oosterlak v Union Art Co (Pty) Ltd* 1931 WLD 101; *Pettersen v Burnside* 1940 NPD 403 at 406; *African Guarantee & Indemnity Co Ltd v Mills NO* 1955 (2) SA 522 (T); *Singh v Vorkel* 1947 (3) SA 400 (C) at 407; *Killarney of Durban (Pty) Ltd v Lomax* 1961 (4) SA 93 (D); *Western Bank Bpk v De Beer* 1975 (3) SA 772 (T) at 775A; and see rule 19(4) above.

35 *Chase & Sons (Pty) Ltd v Tecklenburg* 1957 (3) SA 51 (T) at 55A.

36 *Chase & Sons (Pty) Ltd v Tecklenburg* 1957 (3) SA 51 (T) at 55A.

37 *Dass and Others NNO v Lowewest Trading (Pty) Ltd* 2011 (1) SA 48 (KZD) at 53A.

38 *Odendaal v De Jager* 1961 (4) SA 307 (O) at 310D.

39 Cf *Graham v Law Society, Northern Provinces* 2016 (1) SA 279 (GP) at 287E–F.

40 *Market Dynamics (Pty) Ltd t/a Brian Ferris v Grögor* 1984 (1) SA 152 (W).

41 *Klein v Klein* 1993 (2) SA 648 (BG).

42 *Pounasamy v Moonsamy* 1934 NPD 180 at 182; *Killarney of Durban (Pty) Ltd v Lomax* 1961 (4) SA 93 (D) at 96A–F.

43 *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) at 904F–H.

44 *Nasionale Aartappel Koöperasie Bpk v Price Waterhouse Coopers Ing* 2001 (2) SA 790 (T) at 796F–797B.

45 *Gunston v Gunston* 1976 (3) SA 179 (W); Hahlo *Husband and Wife* 237.

46 1974 (2) SA 376 (C) at 379F.

47 The point was left open in *Wiehahn Konstruksie Toerustingmaatskappy (Edms) Bpk v Potgieter* 1974 (3) SA 191 (T) at 203E–G.

48 See *Minister of Law and Order v Taylor NO* 1990 (1) SA 165 (E) which was decided before the 1992 amendment of the rule. See also *Klein v Klein* 1993 (2) SA 648 (BG) at 651F.

49 See *Khunou v M Fihrer & Son (Pty) Ltd* 1982 (3) SA 353 (W) at 361A with reference to the similar provision in subrule (5) of this rule.

50 See *Khunou v M Fihrer & Son (Pty) Ltd* 1982 (3) SA 353 (W) at 360H with reference to the similar provision in subrule (5) of this rule.

51 See *Santam Versekeringsmaatskappy Bpk v Leibrandt* 1969 (1) SA 604 (C) at 608H–609A.

52 *Brenner's Service Station and Garage (Pty) Ltd v Milne* 1983 (4) SA 233 (W) at 238A.

53 See the *obiter* remarks of Cloete J in *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a L H Marthinusen* 1992 (4) SA 466 (W) at 473B–D.

54 Cf also *Rabie v De Wit* 2013 (5) SA 219 (WCC) at 233H–I.

55 *Northern Assurance Co Ltd v Somdaka* 1960 (1) SA 588 (A) at 595. See also *Singh v Vorkel* 1947 (3) SA 400 (C) at 406; *Distins Seed Cleaning and Packing Co (Pty) Ltd v Stuart Wholesalers* 1954 (1) SA 283 (N); *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A); *Feit v Bienz* 1962 (4) SA 377 (T); *Louwrens v Amery* 1965 (1) SA 477 (W) at 481B; *O'Donoghue v Human* 1969 (4) SA 35 (E) at 39H; *Protea Assurance Co Ltd v Vinger* 1970 (4) SA 663 (O); *National Union of South African Students v Meyer; Curtis v Meyer* 1973 (1) SA 363 (T) at 367F; *Wiehahn Konstruksie Toerustingmaatskappy (Edms) Bpk v Potgieter* 1974 (3) SA 191 (T) at 200D; *Uitenhage Municipality v Uys* 1974 (3) SA 800 (E) at 805E; *Minister of Prisons v Jongilanga* 1985 (3) SA 117 (A) at 123; *Carlkim (Pty) Ltd v Shaffer* 1986 (3) SA 619 (N) at 620C; *Minister van Wet en Orde v Jacobs* 1999 (1) SA 944 (O) at 958F–I.

56 *Northern Assurance Co Ltd v Somdaka* 1960 (1) SA 588 (A) at 596A; *Dreyer v Naidoo* 1958 (2) SA 628 (N) at 629F; *SA Instrumentation (Pty) Ltd v Smithchem (Pty) Ltd* 1977 (3) SA 703 (D) at 705H–706A, and see the authorities referred to in the preceding footnote.

57 *Foster v Carlis and Houthakker* 1924 TPD 247 at 251–2; *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 276F–H; *Uitenhage Municipality v Uys* 1974 (3) SA 800 (E) at 803B, 805E; *Brenner's Service Station and Garage (Pty) Ltd v Milne* 1983 (4) SA 233 (W) at 237G; *Carlkim (Pty) Ltd v Shaffer* 1986 (3) SA 619 (N) at 621H; *Soundprops 1160 CC v Karlshavn Farm Partnership* 1996 (3) SA 1026 (N) at 1034A–D.

58 *Oos-Randse Bantoesake Administrasieraad v Santam Versekeringsmaatskappy Bpk (1)* 1978 (1) SA 160 (W) at 164D; *Gardiner v Survey Engineering (Pty) Ltd* 1993 (3) SA 549 (SE) at 552C.

59 *Kmatt Properties (Pty) Ltd v Sandton Square Portion 8 (Pty) Ltd* 2007 (5) SA 475 (W) at 490B–E.

30A Non-compliance with rules

RS 10, 2019, D1-357

(1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, or with an order or direction made in a judicial case management process referred to in rule 37A, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days from the date of delivery of such notification, to apply for an order—

(a) that such rule, notice, request, order or direction be complied with; or

(b) that the claim or defence be struck out.

(2) Where a party fails to comply within the period of 10 days contemplated in subrule (1), application may on notice be made to the court and the court may make such order thereon as it deems fit.

[Rule 30A inserted by GN R881 of 26 June 1998 and substituted by GN R842 of 31 May 2019.]

Commentary

General. Rule 30(5) used to provide a remedy where a party failed to comply timeously with a request made or notice given pursuant to the rules. The subrule was deleted by GN R2407 of 13 December 1996. The reason for the deletion was probably because the rest of rule 30 deals with the situation where an *irregular step* has been taken by a party to proceedings. Prior to its repeal, the subrule was the source of some controversy. There was difference of opinion as to whether it was intended to apply in all cases where a particular rule did not itself provide for a special sanction for non-compliance with a notice or request, as for example in rules 14(5), 14(9), 36(2) and 37(1), but not in cases where such a special sanction was provided for, as for example in rules 21(6) (prior to the substitution of rule 21 in 1987) and 35(7). [1] This rule now provides a general remedy for non-compliance with the rules. It follows the wording of the repealed subrule (5) of rule 30, except that it is applicable to any failure to comply with these rules, or with a request made or notice given pursuant to the rules, or with an order or direction made in a judicial case management process referred to in rule 37A.

To the extent that the provisions of this rule may be in conflict with a provision in another rule which provides a specific remedy for non-compliance with that rule, a party need only follow the provisions of the other rule, without first having to give notice in terms of this rule or follow the provisions of this rule. [2]

The court has an inherent power to dismiss an action on account of a delay in its prosecution by the plaintiff. The circumstances under which the court may do so will depend on the period of the delay, the reasons therefor and the prejudice suffered by the other party. [3]

For the proper approach to an application under rule 30A to compel the production of documents under rule 35(12), see the notes to that rule s v 'Any party failing to comply with such notice' below.

Subrule (1): 'An order or direction made in a judicial case management process referred to in rule 37A.' The subrule applies only to orders and directions made under rule 37A. It does not apply to directions made by a judge in terms of rule 37(8)*(c)* at or after a pre-trial conference before a judge in chambers under rule 37. It therefore, for example, does not apply to a direction in terms of rule 37(8) as contemplated in rule 36(8). This seems to be a *lacuna* in the subrule.

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'After the lapse of 10 days.' The period of ten days affords the defaulting party an opportunity to comply with the rule, request, notice, order or direction concerned.

'To apply.' In view of subrule (2), this means an application on notice. See further the notes to subrule (2) s v 'The court may make such order thereon as it deems fit' below.

Subrule (1)*(b)*: 'The claim or defence be struck out.' This includes, it is submitted, a claim and defence in reconvention and a third party notice under rule 13 and a defence thereto.

Subrule (2): 'Fails to comply within the period of ten days.' The question whether there has been compliance as contemplated in rule 30A(1) does not give rise to the exercise of a discretion by the court hearing the application. The court must determine, as an objective question of law or fact, whether there has been non-compliance. [4] On that question, a court of appeal therefore makes the simple determination whether the lower court was right or wrong in its finding on compliance; the discretion of the lower court under rule 30A(2) does not feature at all. [5] See further the notes to rule 30A(2) s v 'The court may make such order thereon as it deems fit' below.

'The court.' This means a 'court' as defined in rule 1 and does not include a 'judge', i e a judge in chambers. See the definitions of 'court' and 'judge' in rule 1 and the notes thereto above.

'The court may make such order thereon as it deems fit.' This subrule confers a discretion on the court [6] which, it is submitted, must be exercised judicially on a proper consideration of all the relevant circumstances. Striking out a claim or defence is a drastic remedy and, accordingly, the court must be appraised of sufficient facts on the basis of which it could exercise its discretion in favour of such an order. Consequently, the necessary affidavits in support of and opposing such relief should be delivered. Relevant factors will include *(a)* the reasons for non-compliance with the rules, request, notice, order or direction concerned and, in this regard, whether the defaulting party has recklessly disregarded his obligations; *(b)* whether the defaulting party's case appears to be hopeless; and *(c)* whether the defaulting party does not seriously intend to proceed. [7] In addition, prejudice to either party is a relevant factor.

1 See *Norman & Co (Pty) Ltd v Hansella Construction Co (Pty) Ltd* 1968 (1) SA 503 (T) at 504E; *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis* 1979 (2) SA 457 (W) at 459–60; *Khunou v M Fihrer & Son (Pty) Ltd* 1982 (3) SA 353 (W) at 360H–361A; *Universal City Studios v Movie Time* 1983 (4) SA 736 (D) at 746A and 748A–D; *Gehle v McLoughlin* 1986 (4) SA 543 (W).

2 *ABSA Bank Ltd v The Farm Klippan 490 CC* 2000 (2) SA 211 (W) at 215A–B.

3 *Molala v Minister of Law and Order* 1993 (1) SA 673 (W); *Gopaul v Subbamah* 2002 (6) SA 551 (D) at 558A–B.

4 *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) at 31F–G.

5 *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) at 31G–H.

6 *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) at 31F.

7 See *Ford v South African Mine Workers' Union* 1925 TPD 405 at 406; *Harrison v Harrison* 1942 WLD 16; *Smith NO v Brummer NO* 1954 (3) SA 352 (O) at 357; *Van Aswegen v McDonald Forman & Co Ltd* 1963 (3) SA 197 (O) at 201; *SA Scottish Finance Corporation Ltd v Smit* 1966 (3) SA 629 (T) at 634; *Evander Caterers (Pty) Ltd v Potgieter* 1970 (3) SA 312 (T) at 317; *Thornhill v Gerhardt* 1979 (2) SA 1092 (T) at 1096–7.

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) judgment by default 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)* (subrule (2)*(b)*);

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

(e) judgment by default 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) an order 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 (proviso to subrule (5)*(a)*);

(g) 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)*);

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

(i) 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)*);

(j) 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)*).

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. [1]

Save for the instances provided for in rule 31(6), rule 31 does not make provision for an application by a defendant to set aside a judgment granted by a court on a claim for a debt or liquidated demand where the defendant was in default of delivery of a notice of intention to defend or a plea. Save for rule 31(6) the rule also does not make provision for a defendant in default to apply for the setting aside of an order declaring residential property specially executable by a court. It is submitted that such a default judgment or order 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. [3]

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)*. [4]

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 [5] the confession must be to the claim in the notice of motion. [6]

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. [7]

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 [8] and the provisions of this subrule relating to its execution are peremptory and not merely directory. [9] 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. [10]

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. [11] However, a consent to judgment duly executed cannot be arbitrarily revoked or withdrawn. [12]

In *Barbour v Herf* [13] 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 'an attorney admitted, enrolled and entitled to practise as such in the division concerned'.

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. [14] The application for judgment may be made without any notice to

the defendant. [15] 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. [16]

The defendant is not entitled to withdraw a confession made in terms of this subrule. [17]

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. [18] 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. [19] 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. [20] 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. [21]

'Registrar.' This includes an assistant registrar. [22]

'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. [23] 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*. [24] It may also be set aside under rule 42, if applicable.

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. [25] 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, [26] 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. [27] 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. [28]

If the defence is withdrawn subsequent to the delivery of a notice of intention to defend, default judgment may also be applied for. [29]

'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. [30]

'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. [31] No such notice need be given to a party in default of delivery of notice of intention to defend. [32] 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. [33] Under certain circumstances evidence of damages may be given on affidavit. [34]

'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. [35]

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. [36] 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* [37] 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*, [38] which was concerned with the equivalent provision in the former magistrates' courts rules for the setting aside of a default judgment, [39] 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. [40] In *Government of the Islamic Republic of Iran v Berends* [41] 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, [42] and *(b)* to hold otherwise would not only defeat the underlying purpose of the subrule, but would also be harsh, unjust, unreasonable and absurd. [43]

'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. [44]

'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. [45] 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. [46]

The requirements for an application for rescission under this subrule have been stated to be as follows: [47]

> *'(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. [48]

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. [49] 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. [50] 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. [51]

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. [52] In *Silber v Ozen Wholesalers (Pty) Ltd* [53] 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, [54] 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. [55]

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

(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*. [56] In *Hainard v Estate Dewes* [57] the test of willingness was retained (although the court expressed the opinion [58] 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 *Checkburn v Barkett* [59] 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'. [60] This latter test has been followed in a number of later cases [61] 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. [62]

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. 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. [63]

An applicant will, therefore, be held *not* to be in wilful default if he acted on a bona fide but mistaken belief; [64] or where his default is due to a mistake, or non-compliance with the rules, on his own part; [65] or of his attorney; [66] or where the summons had not been properly served. [67]

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'. [68]

The applicant was held to be in wilful default where he was unable to instruct an attorney because of lack of funds; [69] where he absented himself from the trial after he had been notified of the date of the trial; [70] where he had deliberately consented to an order being made against him in his absence; [71] 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; [72] 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. [73]

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. [74]

Reasonable explanation. Where the applicant has provided a poor explanation for default, a good defence may compensate. [75] 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. [76]

Bona fide defence. In *Silber v Ozen Wholesalers (Pty) Ltd* [77] 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. [78] 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. [79]

The subrule imposes on the applicant for rescission the burden of actually proving, as opposed to merely alleging, good cause for a rescission. [80] 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. [81] The applicant need not deal fully with the merits of the case, [82] 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. [83]

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. [84] 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' [85] to make life easier for the defendant. [86]

'Set aside.' The object of rescinding a judgment is 'to restore a chance to air a real dispute'. [87] 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. [88] Once a judgment has been rescinded, the consequences thereof fall to be set aside. [89]

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. [90]

'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. [91] In *Conekt Business Group (Pty) Ltd v Navigator Computer Consultants* [92] 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 [93] 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. [94]

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. [95]

Subrule (3): 'Where a plaintiff has been barred from delivering a declaration.' Where a plaintiff has been barred from delivering a declaration [96] the defendant may set the action down for hearing upon not less than five days' notice to the party in default [97] and apply for absolution from the instance. [98]

The defendant may also, after adducing evidence, [99] apply for judgment. The court, where the plaintiff is in default, should, however, only finally determine the action if very special circumstances exist. [100]

'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. [101]

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, [102] and where no evidence is required to prove the amount of the claim or the cause of action. [103]

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. [104]

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, [105] and includes a liquidated claim as known at common law. [106] 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. [107]

Audit fees. These were held not to be a debt or liquidated demand and, accordingly, a combined summons should have been issued. [108]

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. [109]

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. [110]

Cancellation of sale and forfeiture of instalments paid in terms of condition of sale. Cancellation and forfeiture was granted. [111]

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. [112]

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. [113]

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. [114]

Declaration of rights and perpetual interdict. These were held to be a liquidated demand within the meaning of former Transvaal rule 42. [115]

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. [116]

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. [117]

Income tax. Judgment was granted for an amount of tax assessed and due. [118]

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. [119]

Maintenance. A claim for past maintenance of a child is a liquidated demand. [120]

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. [121] 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) [122] Usury Act 73 of 1968, does not justify a court in refusing an application for default judgment or even in delaying the grant thereof. [123] 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, [124] 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. [125]

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. [126]

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. [127]

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. [128]

Stolen money and stolen goods. A claim for money alleged to have been stolen was refused in one division [129] and granted in others. [130] A claim for the value of goods stolen was refused. [131]

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. [132]

The High Court has concurrent jurisdiction with the magistrates' courts in respect of actions instituted under the National Credit Act 34 of 2005. [133] Consequently, the registrar is entitled to deal with applications for default judgment falling under that Act. [134] 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. [135]

'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. [136] 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. [137] 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. [138]

'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, [139] 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. [140] 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. [141]

'Within 20 days.' Only court days as defined 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* [142] 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. [143] In *Pansolutions Holdings Ltd v P&G General Dealers & Repairers CC* [144] 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 [145] 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)*: '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. [146] 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. [147]

'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. [148]

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. [149]

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, Part A2. 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, Part A2.

1 *Matyeka v Kaaber* 1960 (4) SA 900 (T).

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 *Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd* 1977 (2) SA 576 (W); *Munshi v Naicker* 1978 (1) SA 1093 (D).

5 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'. See, in this regard, the notes to rule 1 s v 'civil summons' above. It is submitted that despite the lack of a definition of a civil summons in the Superior Courts Act 10 of 2013, rule 31(1) applies to notice of motion proceedings.

6 *Citibank NA v Thandroyen Fruit Wholesalers CC* 2007 (6) SA 110 (SCA) at 113H–I.

7 *Citibank NA v Thandroyen Fruit Wholesalers CC* 2007 (6) SA 110 (SCA) at 113J–114A.

8 *Estate Huisman v Visse* 1967 (1) SA 470 (T); *Moshal Gevisser (Trademarket) Ltd v Midlands Paraffin Co* 1977 (1) SA 64 (N).

9 *Sunset Investments (Pty) Ltd v Bramdaw* 1973 (2) SA 415 (D).

10 *Sunset Investments (Pty) Ltd v Bramdaw* 1973 (2) SA 415 (D).

11 *Mostert v South African Association* 1868 Buch 286.

12 *Moshal Gevisser (Trademarket) Ltd v Midlands Paraffin Co* 1977 (1) SA 64 (N).

13 1986 (2) SA 414 (N).

14 *Sunset Investments (Pty) Ltd v Bramdaw* 1973 (2) SA 415 (D).

15 *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)).

16 *Bankorp Ltd v Ridl* 1993 (4) SA 276 (D) at 277B–D.

17 *Moshal Gevisser (Trademarket) Ltd v Midlands Paraffin Co* 1977 (1) SA 64 (N).

18 *Royce-Kincaid (Pty) Ltd v Wylfred Gardens (Pty) Ltd* 1974 (2) SA 554 (D).

19 *Eloff v Malan* 1928 TPD 393.

20 *Garaj v Singh* 1957 (4) SA 556 (D); *Royce-Kincaid (Pty) Ltd v Wylfred Gardens (Pty) Ltd* 1974 (2) SA 554 (D).

21 *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)).

22 See rule 1.

23 *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.

24 See the notes to rule 42(1) s v 'In addition to any other powers it may have' below.

25 Cf *Baliso v FirstRand Bank Ltd t/a Wesbank* 2017 (1) SA 292 (CC) at 297C.

26 See s 24 of the Superior Courts Act 10 of 2013 in Volume 1, Part A2, and rule 19(1) and (2) above.

27 See *Washaya v Washaya* 1990 (4) SA 41 (ZH).

28 See rule 19(5).

29 *Matyeka v Kaaber* 1960 (4) SA 900 (T); but see *Mauritz Marais Bouers (Pty) Ltd v Carizette (Pty) Ltd* 1986 (4) SA 439 (O).

30 *Matyeka v Kaaber* 1960 (4) SA 900 (T); but see *Mauritz Marais Bouers (Pty) Ltd v Carizette (Pty) Ltd* 1986 (4) SA 439 (O).

31 Rule 31(4).

32 Rule 31(4).

33 Cf *Mashifane v Suliman* 1931 TPD 329; *Eloff v Sprinz's Executors* 1920 TPD 93; *Knight v Harris* 1962 (2) SA 317 (SR).

34 See *New Zealand Insurance Co Ltd v Du Toit* 1965 (4) SA 136 (T) and *N C P Havenga v S M Parker* (TPD 26 February 1993, unreported) (discussed in 1993 *De Rebus* 483). 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.

35 *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).

36 *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).

37 1946 TPD 680 in which the court was concerned with s 7 of Ordinance 4 of 1927 (Transvaal).

38 1953 (2) SA 275 (O).

39 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.

40 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.

41 1998 (4) SA 107 (NmH).

42 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).

43 At 120C–E.

44 *Miller v Paulsen* 1977 (3) SA 206 (E).

45 *Wahl v Prinswil Beleggings (Edms) Bpk* 1984 (1) SA 457 (T).

46 *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.

47 *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].

48 *Maujean t/a Audio Video Agencies v Standard Bank of SA Ltd* 1994 (3) SA 801 (C) at 803J.

49 *Harris v Absa Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T) at 529E–F.

50 *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.

51 *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.

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

53 1954 (2) SA 345 (A) at 353A.

54 *Marais v Mdowen* 1919 OPD 34.

55 Cf *Behncke v Winter* 1925 SWA 59.

56 *Hitchcock v Raaff* 1920 TPD 366.

57 1930 OPD 119.

58 At 124.

59 1931 CPD 423.

60 At 423 (emphasis added).

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

62 *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.

63 *Mahomed Abdulha v Chochan* 1933 NPD 334.

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

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

66 *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)).

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

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

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

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

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

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

73 *Maujean t/a Audio Video Agencies v Standard Bank of SA Ltd* 1994 (3) SA 801 (C).

74 *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).

75 *Carolus v Saambou Bank Ltd; Smith v Saambou Bank Ltd* 2002 (6) SA 346 (SE) at 349B–C; *Creative Car Sound v Automobile Radio Dealers Association 1989 (Pty) Ltd* 2007 (4) SA 546 (D) at 555C–D.

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

77 1954 (2) SA 345 (A) at 352.

78 *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; *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 among others this requirement incorporates 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.'

79 *Saphula v Nedcor Bank Ltd* 1999 (2) SA 76 (W) at 79C–D.

80 *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.

81 *P L J van Rensburg en Vennote v Den Dulk* 1971 (1) SA 112 (W); *Sanderson Technitool (Pty) Ltd v Intermenua (Pty) Ltd* 1980 (4) SA 573 (W).

82 *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.

83 *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].

84 *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.

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

86 *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).

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

88 *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.

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

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

91 *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.

92 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.

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

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

95 *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.

96 As to bar, see rule 26 above.

97 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.

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

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

100 *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.

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

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

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

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

105 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).

106 *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).

107 *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)).

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

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

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

111 *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.

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

113 *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).

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

115 *Curlewis v Carlyle* 1908 TS 932.

116 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.

117 *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).

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

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

120 *Martin v Le Vatte* 1914 CPD 212.

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

122 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.

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

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

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

126 *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)).

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

128 *Colonial Government v Logan* 25 SC 924.

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

130 *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).

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

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

133 *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.

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

135 *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.

136 *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.

137 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.

138 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.

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

140 See the definition of 'party' in rule 1.

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

142 1996 (1) SA 631 (O) at 633H.

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

144 2011 (5) SA 608 (KZD) at 610H–I.

145 *Pansolutions Holdings Ltd v P&G General Dealers & Repairers CC* 2011 (5) SA 608 (KZD) at 611F.

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

147 *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).

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

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

32 Summary judgment

(1) The plaintiff may, after the defendant has delivered a plea, apply to court for summary judgment on each of such claims in the summons as is only—

(a) on a liquid document;

(b) for a liquidated amount in money;

(c) for delivery of specified movable property; or

(d) for ejectment;

together with any claim for interest and costs.

[Subrule (1) substituted by GN R842 of 31 May 2019.]

(2) *(a)* Within 15 days after the date of delivery of the plea, the plaintiff shall deliver a notice of application for summary judgment, together with an affidavit made by the plaintiff or by any other person who can swear positively to the facts.

(b) The plaintiff shall, in the affidavit referred to in subrule (2)*(a)*, verify the cause of action and the amount, if any, claimed, and identify any point of law relied upon and the facts upon which the plaintiff's claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial.

(c) If the claim is founded on a liquid document a copy of the document shall be annexed to such affidavit and the notice of application for summary judgment shall state that the application will be set down for hearing on a stated day not being less than 15 days from the date of the delivery thereof.

[Subrule (2) substituted by GN R1262 of 30 May 1991 and by GN R842 of 31 May 2019.]

(3) The defendant may—

(a) give security to the plaintiff to the satisfaction of the court for any judgment including costs which may be given; or

(b) satisfy the court by affidavit (which shall be delivered five days before the day on which the application is to be heard), or with the leave of the court by oral evidence of such defendant or of any other person who can swear positively to the fact that the defendant has a *bona fide* defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor.

[Subrule (3) substituted by GN R842 of 31 May 2019.]

(4) No evidence may be adduced by the plaintiff otherwise than by the affidavit referred to in subrule (2), nor may either party cross-examine any person who gives evidence orally or on affidavit: Provided that the court may put to any person who gives oral evidence such questions as it considers may elucidate the matter.

[Subrule (4) substituted by GN R842 of 31 May 2019.]

(5) If the defendant does not find security or satisfy the court as provided in paragraph *(b)* of subrule (3), the court may enter summary judgment for the plaintiff.

(6) If on the hearing of an application made under this rule it appears—

(a) that any defendant is entitled to defend and any other defendant is not so entitled; or

(b) that the defendant is entitled to defend as to part of the claim,

the court shall—

(i) give leave to defend to a defendant so entitled thereto and give judgment against the defendant not so entitled; or

(ii) give leave to defend to the defendant as to part of the claim and enter judgment against such defendant as to the balance of the claim, unless such balance has been paid to the plaintiff; or

[Subparagraph (ii) substituted by GN R1883 of 3 July 1992 and by GN R842 of 31 May 2019.]

(iii) make both orders mentioned in sub-paragraphs (i) and (ii).

(7) If the defendant finds security or satisfies the court as provided in subrule (3), the court shall give leave to defend, and the action shall proceed as if no application for summary judgment had been made.

(8) Leave to defend may be given unconditionally or subject to such terms as to security, time for delivery of pleadings, or otherwise, as the court deems fit.

(8A) ...

[Subrule 8A, previously subrule (8)*bis*, inserted by GN R2004 of 1967, amended by GN R1262 of 1991, renumbered by GN R2410 of 30 September 1991 and deleted by GN R842 of 31 May 2019.]

(9) The court may at the hearing of such application make such order as to costs as to it may seem just: Provided that if—

(a) the plaintiff makes an application under this rule, where the case is not within the terms of subrule (1) or where the plaintiff, in the opinion of the court, knew that the defendant relied on a contention which would entitle such defendant to leave to defend, the court may order that the action be stayed until the plaintiff has paid the defendant's costs; and may further order that such costs be taxed as between attorney and client; and

[Paragraph *(a)* substituted by GN R842 of 31 May 2019.]

(b) in any case in which summary judgment was refused and in which the court after trial gives judgment for the plaintiff substantially as prayed, and the court finds that summary judgment should have been granted had the defendant not raised a defence which in its opinion was unreasonable, the court may order the plaintiff's costs of the action to be taxed as between attorney and client.

Commentary

General. Summary judgment was a procedure introduced in England, in the second half of the last century, [1] to assist a plaintiff in a case where a defendant, who cannot set up a bona fide defence or raise against the plaintiff's case an issue which ought to be tried, [2] enters appearance merely in order to delay the granting of the plaintiff's rights. [3] In *Meek v Kruger* [4] Boshoff J observed that the summary judgment procedure: [5]

> '[W]as not intended to "shut (a defendant) out from defending" unless it was very clear indeed that he had no case in the action; *Sheppards v Wilkinson*, 6 T.L.R. 13. It was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights; *Jacobs v Booth's Distillery Company*, 85 L.T.R. 263 (H.L.).'

The object of rule 32 is very much the same: the rule was designed to prevent a plaintiff's claim, based upon certain causes of action, from being delayed by what amounts to an abuse of the process of the court. [6] In certain circumstances, therefore, the law allows the plaintiff to apply to court for judgment to be entered summarily against the defendant, thus disposing of the matter without putting the plaintiff to the expense of a trial. The procedure is not intended to shut out a defendant who can show that there is a triable issue applicable to the claim as a whole from laying his defence before the court. [7]

The remedy provided by the rule has for many years been regarded as an extraordinary and a very stringent one in that it closes the doors of the court to the defendant and permits a judgment to be given without a trial. [8] In *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* [9] the Supreme Court of Appeal, in holding that the time has perhaps come to discard labels such as 'extraordinary' and 'drastic', stated:

> 'The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the *Maharaj* case at 425G–426E, Corbett JA was keen to ensure, first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. A court which is satisfied that this threshold has

> been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of a defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor.
>
> Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are "drastic" for a defendant

who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the *Maharaj* case at 425G–426E.' [10]

The remedy should be resorted to and accorded only where the plaintiff can establish his claim clearly and the defendant fails to set up a bona fide defence. [11] A court must be careful

to guard against injustice to the defendant who is called upon at short notice and without the benefit of further particulars, discovery or cross-examination to satisfy it that he has a bona fide defence. [12] While on the one hand the court wishes to assist a plaintiff whose right to relief is being balked by the delaying tactics of a defendant who has no defence, on the other hand it is reluctant to deprive the defendant of his normal right to defend, except in a clear case. [13] This is why the courts have often emphasized the need for strict compliance with the rule, [14] but this does not mean that technical defects in procedure will not be condoned. [15]

It has been pointed out by Van den Heever J in *Edwards v Menezes* [16] that the courts have approached rule 32 from diametrically opposite points of view. On the one hand it has been stressed that the defendant must show, not that he is bona fide, but that he has a good defence: that the defendant must show a defence which, assuming the alleged facts to be true, is good in law; thus the defendant's duty under rule 32(3)*(b)* has been emphasized. On the other hand it has been stressed that it is only where the court has no reasonable doubt that the plaintiff is entitled to judgment as prayed, that the plaintiff has an unanswerable case, that summary judgment will be granted. Van den Heever J has expressed, with good reasons therefor, a preference for the latter approach. [17] The author is in respectful agreement with this view.

Although the remedy is regarded as stringent or extraordinary in that it effectively closes the door of the court on the defendant without affording an opportunity to ventilate the case by way of trial, [18] the situation is different in circumstances where the defence raised by the defendant is in the nature of a counterclaim instead of a plea. In that case, even where summary judgment has been granted for that part of the claim that would be extinguished by the counterclaim, the defendant can still pursue the counterclaim by issuing summons in a separate action. [19]

On 1 July 2019 material amendments to rule 32 came into operation. [20] In terms of the rule in its amended form:

(a) the plaintiff may only apply for summary judgment after the defendant has delivered a plea (subrule (1));

(b) the plaintiff must, in the affidavit in support of the application for summary judgment, verify the cause of action and the amount, if any, claimed, and identify any point of law relied upon and the facts upon which the plaintiff's claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial (subrule (2)*(b)*);

(c) the defendant may, in order to avoid summary judgment, give security to the satisfaction of the court, and no longer to the satisfaction of the registrar, for any judgment including costs which may be given (subrule (3)*(a)*).

The amendments to rule 32 were preceded by an investigation by the Superior Courts Task Team of the Rules Board for Courts of Law.

The Task Team concluded that the summary judgment procedure was unsatisfactory for a number of reasons and, in particular, the following: [21]

3.1 deserving plaintiffs were frequently unable to obtain expeditious relief because of an inability to expose bogus defences (either in their founding affidavit or in any further affidavit — further affidavits not being permitted);

3.2 opportunistic plaintiffs were able to use the procedure to get the defendant to commit to a version on oath and thus obtain a tactical advantage for a trial in due course; and

3.3 a burden of proof was arguably shifted to the defendant which was not only unfair but led to the kinds of constitutional challenges which have emanated in the High Court. [22]

The Task Team accordingly recommended amendments to rule 32 on the following basis: [23]

`8. By way of a brief overview of the Task Team's reasoning:

8.1 A plaintiff at present does not have to indicate what exactly its cause of action is, or what facts it relies on, or why a defendant does not have a defence. Instead, the plaintiff is merely required (and permitted) to file a brief affidavit, taken from a template, "verifying the cause of action" in the vaguest possible way, opining that the defendant has no bona fide defence, and stating that "a notice of intention to defend has been delivered solely for the purpose of delay" (rule 32(2). This formulaic affidavit is unsatisfactory in many respects.

8.1.1 The plaintiff, when deposing to its affidavit under the current rule, may well not be aware what defence the defendant is intending to advance.

8.1.2 The deponent of the affidavit (who could, for example, be an accounts manager in a bank) is also likely to have little idea as to why exactly the defendant is opposing: the defendant could for example believe (wrongly) that it has a viable defence, or that there is some impediment to the plaintiff succeeding irrespective of the merits (e.g. prescription, jurisdiction or lack of standing), or that the equities are such that a court could well be minded not to grant judgment for the plaintiff.

8.1.3 The current founding affidavit in summary judgment proceedings therefore invariably involves speculation on the part of the plaintiff's deponent. The lack of specificity as to the plaintiff's claim, and the complete lack of detail as to why the defendant's envisaged defence is bogus, coupled with the absence of any replying affidavit, also means that the plaintiff can easily be frustrated by a defendant who is prepared to construct or contrive a defence, or rely on technical points.

8.2 The best way of addressing these shortcomings would seem to be to require the founding affidavit in support of summary judgment to be filed at a time when the defendant's defence to the action is apparent, by virtue of having been set out in a plea. This course is better than allowing a replying affidavit to be filed (as was suggested by a report prepared a few decades ago by the Galgut Commission). Merely including provision for a replying affidavit would not address the problems with the formulaic nature of the founding affidavit, and the speculation inevitably contained therein.

8.3 In the event of a plaintiff applying for summary judgment after the delivery of a defendant's plea, the plaintiff would be able to explain briefly in its founding affidavit why the defences proffered by the defendant do not raise a triable issue; and should indeed be required to do so in order that the question of whether there is a bona fide defence which is capable of being sustained could be considered by the Court in a meaningful way. Requiring the plaintiff to set out why, in its view, it has a valid claim and why the defendant's defence is unsustainable, would also remove the criticism that the defendant is being required to commit itself to a version when the plaintiff is not similarly burdened. Obliging the plaintiff to engage meaningfully with the case in its founding affidavit would moreover have the added benefit of reducing the temptation for a plaintiff to seek summary judgment as a tactical move (and as a way of forcing the defendant to commit to a version on oath, which can be subsequently used in cross- examination to discredit a witness of the defendant).

8.4 A stipulation that a plaintiff can only apply for summary judgment after delivery of a plea (rather than a notice of intention to defend) would also mean that the summary judgment application would be adjudicated on the basis of the defendant's pleaded defence and thus hopefully avoid a situation (such as not infrequently occurs under the current rule) where a defendant's version in its opposing summary judgment application diverges materially from its subsequently-delivered plea. The summary judgment debate will thus hopefully be a more informed, and less, artificial, one, and engage with the real issues in the matter.

8.5 Although foreign practice must be viewed with caution given the differences between countries and their procedural systems, it is notable, too, that the other jurisdictions considered by the Task Team — the United Kingdom, Canada, Australia and the U.S.A. — all permit summary judgment only after a plea has been filed (and indeed after pleadings have closed). The summary judgment procedure was seemingly introduced in South Africa on the basis of its use in England and Scotland. The fact that summary judgment is only competent in those jurisdictions after at least a plea has been filed (and would thus be premature after merely a notice of intention to defend has been delivered) is thus reassuring, and indicative of the merits of the proposed change.

8.6 If the summary judgment procedure is changed as proposed, the Task Team does not believe that a replying affidavit would either be necessary or appropriate. A plaintiff would have had a chance to address the averments in the defendant's plea in its founding affidavit in support of summary judgment. If the defendant has a further rebuttal in its answering affidavit, then, if that is credible, the summary judgment application would be defeated; but that is not necessarily inappropriate as the matter would then presumably have complexities which render it ill-suited to the summary judgment remedy. For a similar reason, a referral to oral evidence (also mooted in the Galgut Commission report) seems inadvisable.

8.7 The Task Team debated whether, as in the comparative jurisdictions consulted, summary judgment should potentially be available for any kind of claim (including illiquid claims for damages). It was concluded that this would not be appropriate, and that summary judgment could justifiably be confined to the kinds of matters referred to in section 32(1).

8.8 The Task Team also debated whether, if summary judgment should no longer be brought after delivery of a notice of intention to amend, it should be allowed only after close of pleadings. It was however decided against requiring a plaintiff to wait until after any replication, rejoinder or rebuttal had been filed. While such a rule would ensure that the debate was fully informed, and based on all pleaded defences and ripostes, it was thought that the speediness of the remedy could be compromised, and also that, as the objective behind summary judgment was to allow judgment to be obtained expeditiously in clearly deserving cases, a matter in which there were replications, rebuttals and the like was probably one ill-suited to summary judgment.

9. An issue floated, but not finally decided, at the meeting of the Task Team was whether there should be a limit on the length of a founding affidavit in a summary judgment application brought under the proposed amended rule. (There could be no limit on a defendant's answering affidavit, as the defendant is, after all, facing final judgment. By contrast, the plaintiff would, if unsuccessful, merely be required to proceed with its action in the normal course.) The Task Team's chair was of the view that there is something to be said for a page limit (of, say, ten or fifteen pages) in a summary judgment founding affidavit; for otherwise there is a danger that an action could involve a lengthy application in which the plaintiff seeks immediate (or summary) relief, followed, if that is unsuccessful, by a trial; and that could impose an intolerable burden on the administration of justice, and also drive up costs for the parties. However, other Task Team members were not convinced that such a restriction should be imposed.'

Rule 32 in its amended form will probably increase the workload of judges as well as the costs for parties. This is unsatisfactory. Furthermore, the fact that under the new procedure the merits of a defendant's pleaded defence in an action would be subjected to judicial scrutiny, in what in effect is an opposed motion and not in the normal course of a trial, raises the issue of constitutionality of the procedure. Only time will tell whether the amended rule is constitutional and does in fact promote access to justice.

As pointed out above, the application for summary judgment is supported by an affidavit which must comply with rule 32(2)*(b)*. The plaintiff must confine himself to what the rule allows; [24] nor may he file replying affidavits [25] or cross-examine the defendant or any other person who gives evidence. [26] These restrictions upon the plaintiff make it clear that an application for summary judgment is in no sense a preliminary trial of the issues involved. The procedure is intended neither to give the plaintiff a tactical advantage in the trial [27] nor to provide a preview of the defendant's evidence or to limit the defences to those raised by the defendant. [28] Furthermore, the rule is not intended to replace the exception as a test of one or the other party's legal contentions or in effect to shift the onus (on claims based on an open account). [29]

An application for summary judgment cannot be deferred by delivery of a notice in terms of rule 35(12) and/or (14). [30]

Subrule (1): 'The defendant.' If the identity of the defendant is uncertain, for example, where there is more than one defendant and the plaintiff does not know which one concluded a certain contract with him, that uncertainty would operate to defeat the plaintiff's right to sue any particular one of them for summary judgment. [31]

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

'A plea.' Prior to the amendment of rule 32 with effect from 1 July 2019 [32] the delivery of a notice of intention to defend was a prerequisite to an application for summary judgment under rule 32(1). It has been held that once appearance to defend had been entered (i e a notice of intention to defend had been delivered) and the plaintiff thereafter filed a declaration or took a further procedural step, he thereby waived his right to apply for summary judgment, but not in a case where the declaration was attached to the summons for the sake of convenience only and before appearance to defend was entered. [33] The delivery of a plea is now a prerequisite to an application for summary judgment under rule 32(1) in its amended form. It is submitted that if the plaintiff takes a further procedural step after the delivery of

the plea, i e an exception or a replication to the plea, he thereby waives his right to apply for summary judgment. [34]

'The plaintiff.' The wording of the rule would appear clearly to limit the right to apply for summary judgment to a plaintiff in convention. It is furthermore submitted that to allow a plaintiff in reconvention to claim summary judgment against the defendant in reconvention might well result in frustration of the principle that the parties' claims should be set off, one against the other. The same reasoning leads to the conclusion that a plaintiff in convention cannot claim summary judgment against a defendant who has no defence to his claim, but only a claim in reconvention. [35]

'Apply.' This means apply on motion. [36]

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

By permitting a co-trustee to depose to an affidavit opposing summary judgment in which the court's jurisdiction is not challenged, the other co-trustee representing the trust is regarded to have submitted to the jurisdiction of the court in whose area of jurisdiction the latter trustee is not resident. [37]

'Each of such claims in the summons as is only.' It is a condition precedent to an application for summary judgment that the claim(s) upon which the application is based shall be one or more of those listed in subrule (1). If the claim is not one listed, the procedure of rule 32 does not apply. [38] If the summons contains several claims, some of which are not within the terms of rule 32(1), summary judgment can be applied for in respect of those claims which are of the nature specified in the rule. [39] The remainder of the claims will proceed to trial in the

ordinary manner. In *Malcomess Scania (Pty) Ltd v Vermaak*, [40] Coetzee J held that a claim for rectification of an acknowledgement of debt (and for payment in terms of the acknowledgement of debt as rectified) is not susceptible to summary judgment. In *PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd* [41] the Supreme Court of Appeal disagreed with that judgment 'to the extent that it suggests that summary judgment is incompetent, even where both parties are *ad idem* as to the respects in which their written contract does not correctly reflect the agreement between them'.

Subrule (1)*(a)*: 'Liquid document.' The action underlying summary judgment proceedings under this subrule is based, not on a liquid claim, but on a liquid document. The term 'liquid document' in this subrule has the same meaning as in provisional sentence proceedings. See further the notes to rule 8 s v 'Where by law any person may be summoned to answer a claim made for provisional sentence' above for instances of liquid documents.

It is submitted that whether or not a document is properly describable as a liquid document is not always of great importance for an application under rule 32, for if the document is not liquid it will in any event more often than not support a claim for summary judgment under subrule (1)*(b)*. [42]

It has been held that the attachment of a liquid document is required only when the plaintiff's claim is based on it. [43] See further the notes to rule 32(2)*(c)* s v 'If the claim is founded on a liquid document a copy ... shall be annexed' below.

Certificate of indebtedness. A provision in a deed of suretyship that 'the indebtedness of the said debtor ... shall at any time be determined and proved by a written certificate ... and such certificate shall be binding upon me and be conclusive proof of the amount of my indebtedness'

does not ouster the court's jurisdiction under the deed of suretyship. If such a certificate is filed by the plaintiff in a summary judgment application, judgment can be granted. [44] The Supreme Court of Appeal has, in regard to High Court practice under rule 32(4), held that certificates of balance 'handed in' at the hearing perform a useful function and are not hit by the provisions of that subrule. [45]

Subrule (1)*(b)*: 'Liquidated amount in money.' Under rule 31(2)*(a)* default judgment may be granted upon claims for a 'debt or liquidated demand' in the event of the defendant failing to deliver a notice of intention to defend. Care must be taken in applying decisions upon such applications to applications for summary judgment, for a 'liquidated demand' relating to default judgment covers much more than the words 'liquidated amount in money' in this subrule.

A liquidated amount in money is an amount which is either agreed upon or which is capable of speedy and prompt ascertainment. [46] Implied terms in a contract of sale that a reasonable price (i e a price ordinarily charged by persons who deal in articles such as the one sold at the time and place of sale) is intended to be paid, normally do not present difficulties of proof and the *quantum* can usually be ascertained speedily and promptly. [47]

There has been conflict of opinion on the question whether a claim founded on a *quantum meruit* should be treated as a liquidated amount of money. In the Transvaal Provincial Division a claim for a specific sum of money 'in respect of work done and material supplied ...' was held to be a debt or liquidated demand within the meaning of the then Transvaal rule 42 [48] (now rule 31). The decision of the court rested on the view that the factors necessary for the ascertainment of the sum due were actually in existence: the current reasonable remuneration for the work done and the current market price for the materials supplied were known and from this information the sum due could be readily ascertained; [49] and the decision as to whether the amount of a debt is capable of speedy and prompt ascertainment is a matter left to the discretion of the court in each particular case. [50] The approach of the Transvaal Provincial Division has been followed by the courts of several other divisions, [51] but in certain Cape decisions and in Natal a narrower test has been adopted, viz that a claim for a 'liquidated amount in money' is a claim based on an obligation to pay an agreed sum of money or is so expressed that the ascertainment of the amount is a mere matter of calculation. [52] However, it has now

been stated by Diemont J [53] that he 'can find no fault with the conclusions' reached in *Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd* [54] and he held that a claim for an amount for work and labour done and materials supplied should be treated as a liquidated amount of money. [55] In the exercise of its discretion under the wider test, the court must not look only at the summons in order to decide whether a claim is for a liquidated amount of money; the defence as disclosed in the defendant's opposing affidavit must also be taken into account. [56]

The following have been held to be liquidated amounts in money: an ordinary shop account; [57] the purchase price of goods sold, though not delivered, provided the plaintiff tenders delivery; [58] rent at definite sums per week; [59] board and lodging; and definite sums expended for clothes and medicine; [60] an amount shown on a balance sheet agreed to by the defendant; [61] an amount shown on a promissory note which the defendant has agreed to pay, even though, since defendant is not a party to the note, it is not a liquid document against him; [62] the purchase price and cost of erection of a fence which should have been erected by the defendant but which was erected by the plaintiff on the defendant's failure to erect it; [63] a claim for a specific balance overpaid in connection with payment of the full amount agreed to for delivery of a specific number of articles, where a number short of the stipulated quantity has been delivered but the whole agreed number has been paid for; [64] the price paid for a house from which the plaintiff was evicted by action, and the cost of defending the action at the defendant's request; [65] a claim upon a bill of exchange against a defendant who had taken over the liabilities of a firm on whose behalf acceptance had been made; [66] a claim under s 81(1) of the Bills of Exchange Act 34 of 1964 by the true owners of a stolen cheque for the amount of the cheque; [67] a claim by the government for income tax assessed and due; [68] insurance premiums; [69] interest; [70]

arrear maintenance for a child; [71] a claim for the forfeiture of executors' fees; [72] a claim for the value of property misappropriated, lost or mislaid by the defendant; [73] a taxed bill of costs; [74] a specific, known sum of money alleged to have been stolen; [75] a foreign judgment for money, if final and not superannuated; [76] a claim for the amount of a stolen cheque, the amount of the loss being the face value of the cheque. [77]

The following have been held not to be liquidated amounts in money: an account containing some items which the defendant contends to be overcharged for, and other items for goods sold which he contends were not of the quality guaranteed; [78] a disputed partnership account extending over two years, the determination whereof required evidence to be taken on commission in a foreign country; [79] an account guaranteed by the defendant, where the defendant's liability depended upon the contingency of the principal's failing to pay; [80] a claim for interest against the defendant, where the defendant had never agreed to pay any interest; [81] an untaxed bill of costs; [82] the costs of transfer of a property, where transfer had not yet been passed; [83] an uncertain claim for money alleged to have been stolen. [84] It has been said that by common consent a claim for damages constituted an unliquidated claim. [85] As a

general rule this is undoubtedly correct, but it is clear that where the amount claimed has been ascertained, by agreement [86] or by other means, [87] the claim is a liquidated one.

Subrule (1)*(c)*: 'Delivery of specified movable property.' The summons must specify the movable property with sufficient particularity to enable it to be identified from the description given in the summons. [88] If there is an alternative claim for the value of the property, or for damages in lieu of the return of the property, then, since both these alternatives are unliquidated claims, [89] the court may grant the prayer for delivery of the property but will refuse to grant the alternative(s). [90]

It has been held [91] that a claim for the statement of account could not be considered as a claim for a liquidated amount of money and that such claim is not susceptible to summary judgment. Cases [92] in which an order for the delivery of a statement of account was granted on default judgment are not applicable as the relief sought had been found to be a liquidated demand which is a concept different from a liquidated amount of money.

Subrule (1)*(d)*: 'Ejectment.' An owner is in law entitled to possession of his property and to an ejectment order against a person who unlawfully occupies the property [93] except if that right is limited by the Constitution of the Republic of South Africa, 1996, another statute, a contract, or on some or other legal basis. [94]

The High Court has no equitable jurisdiction to refuse or stay an order for ejectment. [95] It has, however, been held that the High Court retained a residual common-law power to stay or suspend an eviction order. [96] A stay of proceedings for ejectment can be granted if the proceedings are vexatious or an abuse of the process of court but not merely to avoid injustice or inequity. [97]

In *Ndlovu v Ngcobo; Bekker and Bosch v Jika* [98] the Supreme Court of Appeal, in a majority judgment, held that the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 ('PIE') disposed of certain common-law rights relating to eviction. The rights disposed of do not include a landlord's common-law rights in respect of buildings or

structures that do not perform the function of a form of dwelling or shelter for humans (e g commercial property) or occupied by juristic persons. In other words, such buildings and structures are not protected by PIE. See further Part D9 below.

'Together with ... interest and costs.' It has been held [99] (albeit in provisional sentence proceedings) that interest is a legal corollary to the principal indebtedness forming a separate and distinct indebtedness of its own. [100] In terms of subrule (1) the court is empowered to grant any claim for interest and the ancillary claim of costs. [101]

Subrule (2)*(a)*: 'Within 15 days after the date of delivery of the plea.' This means court days. It is submitted that if the plaintiff takes a further procedural step after the delivery of the plea, i e an exception or a replication to the plea, he thereby waives his right to apply for summary judgment. [102]

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

'Notice of application.' This means the short form of notice. The notice must state that the application will be set down for hearing on a stated day not being less than 15 days from the date of delivery of the application. [103]

'Together with an affidavit.' The notice of application for summary judgment must be accompanied by an affidavit which meets the requirements of the subrule [104] and which complies with the requirements for the making of an affidavit set out in regulation 3(1) of the Regulations Governing the Administering of an Oath or Affirmation. [105] The Regulations are reproduced in Part D3 below.

The burden of proof to show that the document is in fact an affidavit lies on the applicant who seeks summary judgment. [106]

The subrule makes provision for the filing of 'an' affidavit, which seems to indicate that only one is allowed. There is, however, nothing wrong in a plaintiff filing two (or more) affidavits when one person cannot swear positively to the facts. [107]

If the claim is founded on a liquid document, a copy of the document must be annexed to the affidavit. [108]

'By the plaintiff or by any other person.' Any person who can swear positively to the facts may make an affidavit in support of the application; the subrule does not require that the supporting affidavit be made by the plaintiff himself. It has been held that no special authority by the plaintiff is required for the validity or effectiveness of the affidavit made by another person. [109] The essential requirement is that such other person should state, at least, that the facts are within his personal knowledge. [110] If the plaintiff's authority were required, such authority might, in the absence of an express allegation that the deponent was duly authorized, be properly inferred from the affidavit and other documents properly before the court, [111] the principle being that, in deciding whether or not to grant summary judgment, the court should look at the matter on all the documents which are properly before it. [112]

Just as the deponent to an affidavit in motion proceedings need not be authorized by the party concerned to depose to the affidavit, so it is that the deponent to the verifying affidavit filed in terms of this subrule need not be authorized by the plaintiff to depose to the affidavit. [113]

'Who can swear positively.' Subrule (2)*(a)* contemplates the affidavit being made by the plaintiff himself or by some other person 'who can swear positively to the facts'. [114] In the latter event,

such person's ability to swear positively to the facts is essential to the effectiveness of the affidavit as a basis for summary judgment; and the court entertaining the application therefore must be satisfied, prima facie, that the deponent is such a person. Generally speaking, before a person can swear positively to facts in legal proceedings, they must be within his personal knowledge. [115] For this reason the practice has been adopted, both in regard to rule 32 and some of its provincial predecessors, of requiring that a deponent to an affidavit in support of summary judgment, other than the plaintiff himself (who is not required to do more than assert that he can positively swear to the facts), [116] should state, at least, that the facts are within his personal knowledge (or make some averment to that effect), unless such knowledge appears from other facts stated. [117] The mere assertion by a deponent that he 'can swear positively to the facts' (an assertion which merely reproduces the wording of the subrule) is not sufficient, unless there are good grounds for believing that the deponent fully appreciated the meaning of these words. [118] 'Information and belief' on the part of a deponent is insufficient to ground an order for summary judgment. [119]

It has been held that although a court has the power to condone mere technical non-compliance with the provisions of rule 32(2), it cannot condone non-compliance with the safeguards built into that subrule for the benefit of defendants, for instance regarding hearsay evidence and the doing away with or the relaxation of the test to be applied by every court considering an application for summary judgment to be able, on the evidence adduced in the affidavit supporting such application, to make a factual finding that the deponent was a qualified deponent. [120]

If the plaintiff is a company and the deponent is authorized by the company to swear the affidavit, and the deponent does not state in his affidavit the grounds, indicating only that

the facts deposed to by him are within his personal knowledge, the court will none the less not hold the affidavit to be defective for that reason, as long as the deponent is someone who would ordinarily be presumed to have personal knowledge of the matter. Thus, it has been held that the managing director of a company is presumed to be familiar with the facts in an affidavit deposed to by him and dealing with the affairs of the company; [121] but where the facts deposed to by a managing director cast doubt on the question as to whether he has in fact the requisite personal knowledge, summary judgment will be refused. [122] An affidavit by a director of a company is not sufficient, for it does not follow that a director knows anything about the dealings of the company of which he is a director, [123] unless it appears from the affidavit as a whole or from all the other documents relating to the proceedings, that he 'can swear positively to the facts'. [124] Affidavits by the following persons have been held to be sufficient: *(a)* the manager of a branch of a plaintiff bank, [125] *(b)* the branch manager's assistant, [126] *(c)* the manager of the regional credit department of the plaintiff's bank, [127] and *(d)* a provisional liquidator. [128] It has been held that the affidavit by a legal adviser of a plaintiff bank, in which it is stated that the facts deposed to fall within the knowledge of the deponent and that the deponent can swear positively to these facts and confirms them, is sufficient. [129] On the other hand, it has been held that a deponent who made the following allegations falls squarely into the category of persons of which it cannot be merely assumed that they have personal knowledge of the facts in question and, accordingly, that the affidavit is not sufficient:

'1. I am an adult female, Legal Advisor, employed by Old Mutual Property (Pty) Ltd, being the duly authorised managing agents of the Plaintiff.

2. I am duly authorised to depose to this affidavit for and on behalf of the Plaintiff.
3. The facts herein deposed to are both true and correct and fall within my personal knowledge, as my position [*sic*] as Legal Advisor I am tasked to have personal knowledge and interaction with matters of this kind (being matters where tenants default with their lease obligation) and to which this specific matter relates [*sic*].
4. I have all the relevant documentation in my possession. I have perused same and I have satisfied myself that it [*sic*] is true and correct.
5. I have full personal knowledge of the facts as set out in the Plaintiffs' Particulars of Claim.
6. I can and do swear positively to the facts contained in this affidavit. I hereby verify the cause of action and the amount claimed in the Summons.' [130]

In *Absa Bank Ltd v Le Roux* [131] the plaintiff instituted action against the defendants on the basis of their suretyships. The deponent to the affidavit in support of summary judgment, *inter alia*, stated:

'1. I am a manager of the plaintiff, employed at Wholesale Credit Restructuring and Advisory Group.
2. All the data and records relating to this action are under my control and I have acquainted myself therewith. The facts contained herein are within my personal knowledge and are both true and correct and I am duly authorised to make this affidavit.
3. I have read the summons and verify the cause of action and the indebtedness to the plaintiff in the amounts and on the grounds stated in the summons.'

In dismissing the application for summary judgment, Binns-Ward J, *inter alia*, stated: [132]

'[9] The supporting affidavit falls materially short of what the subrule requires. The defendants did not bind themselves as sureties and co-principal debtors in the stipulated amounts as the affidavit read with the summons suggests. In the case of the first and third defendants they bound themselves subject to a limitation that "the amount that the Bank shall be entitled to recover from me/us under this suretyship shall be limited to the maximum of R7 500 000 together with such further amounts in respect of interest and costs as have already accrued or which will accrue until the date of payment of the amount". In the case of the second defendant liability in terms of the annexed deed of suretyship was unlimited. The deponent carelessly purported to confirm the inaccurate content of a carelessly drafted summons. Moreover, the supporting affidavit was deposed to in Johannesburg, which is the seat of the plaintiff's registered office, and the place, one may assume, in the absence of any indication to the contrary, where the deponent is based. Two of the suretyships were executed in Hermanus, in July 2005 and August 2007, respectively, and the other in Bruma in August 2007. It is not evident from any of the content of the affidavit on what basis the deponent would have had personal knowledge of the execution of these deeds of suretyship in disparate places and different times, or of the principal debt to which the defendants' alleged liability is accessory. It appears from the "Certificate of Balance" annexed to the summons, which was signed by the same person who deposed to the supporting affidavit in the summary judgment application, that the principal debt relates to the debit balance of a specified account in the bank's books in the name of the principal debtor. It does not appear at which branch of the

plaintiff bank the account is operated, or on what basis the deponent made the certification. It is inherently improbable on the information before the court that the deponent has direct knowledge of most of the salient facts. Indeed, all that he expressly professes personal knowledge of is "the facts contained herein", i e the facts described in the supporting affidavit. The only facts set out in the affidavit are the deponent's position in the plaintiff's employ and his control of and reference to the data and records relating to the action. By itself that is not good enough.'

An affidavit by an employee of a commercial bank describing the deponent as 'Manager Arrears — Legal' and in which it is stated, *inter alia*, that 'I have personal knowledge of the facts and records relating to this matter, the cause of action as well as the amount owing by the respondent to the applicant' is also not sufficient. [133]

In *FirstRand Bank Ltd v Huganel Trust* [134] the bank official who deposed to the affidavit in support of the application for summary judgment on behalf of the plaintiff was employed by the plaintiff as a litigation administrator. In his affidavit he not only stated that he had knowledge of the facts set out in the summons and in the particulars of claim, but also stated:

'3.1 All the records, documentation and files are under my control.

3.2 I have studied and examined all the aforesaid documentation and have personal knowledge of the contents thereof.

3.3 The aforesaid matters were allocated to me by the applicant/plaintiff by virtue that I am personally in control thereof.'

Davis J, after a careful analysis of the relevant cases, [135] found that the bank official's averment of sufficient knowledge fell short of the requirements of subrule (2), and, *inter alia*, stated: [136]

'What is one to make of these conflicting judgments which all followed from that of *Maharaj*? It appears to me that there are at least three important points that should be emphasised.

1. While summary judgment is an order which will prevent a defendant from having his day in court, there are many cases where the plaintiff is entitled to relief on the basis that, *ex facie* the papers which have been filed, there is no justification for concluding that opposition can be regarded as anything other than a delaying tactic.

2. As Corbett JA emphasised in *Maharaj*, excessive formalism should be eschewed. Hence the substance of the dispute, together with the purpose of summary judgment, needs to be taken into account during the evaluation of the papers which have been placed before court in order to determine whether the summary form of relief should be justified.

3. While a measure of commercial pragmatism needs to be taken into account, in that many of these summary judgment applications are brought by large corporations and, accordingly, it may well be that first-hand knowledge of every fact cannot and should not be required, each case must be assessed on the facts which were placed before the court. It follows therefore that the nature of the defence becomes the starting point. For example, in *Maharaj*'s case Corbett JA found that it was a borderline case but one which fell on the right side of the border insofar as the plaintiff/applicant was concerned. On an evaluation of both the claim and the defence, it

could be concluded with justification that the deponent had sufficient knowledge to depose to the affidavit, which formed the basis of the factual matrix to sustain an application for summary judgment.

By contrast, there will be cases where, given the defence raised, some further knowledge is required beyond an examination of the documentation. In other words, knowledge of a personal nature may be required if it is relevant to the contractual relationship as alleged by the defendant and, if the defendant's version is proved, could constitute an adequate defence to the claim.'

In *Absa Bank Ltd v Le Roux* [137] Binns-Ward J doubted the correctness of the approach followed by Davis J in *FirstRand Bank Ltd v Huganel Trust* [138] referred to above. He, *inter alia*, stated: [139]

'[13] It seems to me, with respect, that, although there might be something to be said from a pragmatic perspective of the approach commended in *Huganel Trust* (and it is the words in the last part of the quoted passage that are of particular interest), it is nevertheless not one that accords either with the wording of the subrule or the approach to the application of the subrule explained in *Maharaj*. The judgment in *Maharaj* held that the court could obtain assurance that the deponent to the supporting affidavit had the requisite direct knowledge of the facts from the content of the papers as a whole, and not just from the content of the affidavit read on its own. That is evident from the following dictum at 423 in fine of the judgment: "Where the affidavit fails to measure up to these requirements [i e where it fails to comply strictly with the requirements of the subrule], the defect may, nevertheless, be cured by reference to other documents relating to the proceedings which are properly before the Court (see *Sand and Co Ltd v Kollias*, supra at p 165). The principle is that, in deciding whether or not to grant summary judgment, the Court looks at the matter at the end of the day on all the documents that are properly before it (ibid at p 165)." The judgment did not hold, however, that direct knowledge by the deponent to the supporting affidavit was not necessary, or might be overlooked, unless the defendant's answering affidavit raised an issue that made his apparent lack of direct knowledge relevant. It is not the allegations which the defendant puts in issue that determine the extent of the knowledge that the deponent to the supporting affidavit must have. The deponent must have direct knowledge of most, if not all, of the facts that the plaintiff will have to prove to establish its claim in the action.

[14] In noting the policy of the courts to eschew undue formalism, Corbett JA did not intend to suggest that substantive non-compliance with the requirements of the subrule could be overlooked; on the contrary, the learned judge of appeal emphasised that "in substance, the plaintiff should do what is required of him by the Rule". As apparent from the passage from the judgment quoted in para [5], above, he went on to state, "The grant of the remedy is based upon the supposition that the plaintiff's claim is unimpeachable and that the defendant's defence is bogus or bad in law. One of the aids to ensuring that this is the position is the affidavit filed in support of the application; and to achieve this end it is important that the affidavit should be deposed to either by the plaintiff himself or by someone who has personal knowledge of the facts." (The learned judge of appeal had no cause to consider whether reliance by a deponent on admissible hearsay evidence might in certain circumstances qualify the deponent to swear "positively" to the facts evinced by such evidence, something about which I shall say more later.)

[15] In the result it follows on the construction of the subrule given in *Maharaj* that, unless it appears from a consideration of the papers as a whole that the deponent to the supporting affidavit probably did have sufficient direct knowledge of the salient facts to be able to swear positively to them and verify the cause of action, the application for summary judgment is fatally defective and the court will not even reach the question whether the defendant has made out a bona fide defence. That is why a contention by a defendant that the supporting affidavit in a summary judgment application is non-compliant with the requirements of subrule 32(2) is properly characterised and dealt with as a point in limine in such applications.'

In *Rees v Investec Bank Ltd* [140] the combined summons issued by Investec Bank Ltd against the sureties (described by the court *a quo* as a 'work of epic proportions'), [141] ran to some 250 pages, consisting of 14 claims supported by annexures (running to some 770 pages), consisting of loan agreements, mortgage bonds, deeds of suretyship, certificates of balance, etc. The deponent to the affidavit in support of summary judgment stated: [142]

'1. I am an adult female Recoveries Officer employed as such by the applicant at 100 Grayston Drive, Sandton.

2. I am duly authorised to bring this application and depose to this affidavit on behalf of the applicant. I refer in this regard to the resolution of the applicant annexed hereto marked A.

3. In my capacity as Recoveries Officer, I have in my possession and under my control all of the applicant's records, accounts and other documents relevant to the claims forming the subject matter of the action instituted against the respondents under the above case number

(the action).

4. In the ordinary course of my duties as Recoveries Officer and having regard to the applicant's records, accounts and other relevant documents in my possession and under my control, I have acquired personal knowledge of the respondents' financial standing with the applicant and I can swear positively to the facts alleged and the amounts claimed in the applicant's particulars of claim.

5. I hereby verify—

5.1 the causes of action set out in the applicant's particulars of claim;

5.2 that, on the grounds set out therein, the respondents are indebted to the applicant in the amounts claimed by it.

6. In my opinion, the respondents—

6.1 do not have a bona fide defence to the action; and

6.2 they have delivered a notice of intention to defend the action solely for purpose of delay.'

In response the sureties filed an affidavit resisting summary judgment. In the affidavit the deponent, *inter alia*, stated: [143]

'8. It is clear from the affidavit in support of summary judgment that Ms Ackermann derives her knowledge of the case solely from files, books of account and other documents in her possession.

9. I am advised and accept the advice that it has been held that where a deponent acquires her knowledge solely from documents to which she had access, she cannot swear positively to the facts.

10. I deny that Ms Ackermann has personal knowledge of the financial standing of the Respondents with the Applicant.

11. I submit further that Ms Ackermann did not, during any of the times when the various suretyships in this matter were concluded, have any dealings with the Respondents.

12. Ms Ackermann also did not sign any of the certificates of indebtedness upon which the Applicant bases its claims.

13. Having regard to the case law on this issue, I am advised and submit that the Applicant has failed to comply with the requirements of Rule 32(2) of the Uniform Rules of Court as the deponent to the affidavit in support of the application for summary judgment does not have personal knowledge of the facts of the matter and cannot verify the causes of action and the amounts claimed.

14. Importantly, Ms Ackermann is also unable to affirm that the Respondents have no bona fide defence to the action.

15. For these reasons alone I submit that the application for summary judgment ought to be dismissed with costs and the Respondents granted leave to enter into the merits of the action.'

The court *a quo* granted summary judgment in favour of Investec Bank Ltd in respect of 13 of the 14 claims. [144]

On appeal, the primary contention advanced on behalf of the sureties was that Ms Ackermann was not a person who could 'swear positively to the facts' as envisaged in rule 32(2). [145]

In dismissing the appeal, the Supreme Court of Appeal stated: [146]

'[10] In *Maharaj* Corbett JA, in considering the requirement that the affidavit should be made by the plaintiff himself "or by any other person who can swear positively to the facts", stated:

"Concentrating more particularly on requirement *(a)* above, I would point out that it contemplates the affidavit being made by the plaintiff himself or some other person who can swear positively to the facts. In the latter event, such other person's ability to swear positively to the facts is essential to the effectiveness of the affidavit as a basis for summary judgment; and the Court entertaining the application therefor must be satisfied, prima facie, that the deponent is such a person. Generally speaking, before a person can swear positively to facts in legal proceedings they must be within his personal knowledge. For this reason the practice has been adopted, both in regard to the present Rule 32 and in regard to some of its provincial predecessors (and the similar rule in the magistrates' courts), of requiring that a deponent to an affidavit in support of summary judgment, other than the plaintiff himself, should state, at least, that the facts are within his personal knowledge (or make some averment to that effect), unless such direct knowledge appears from other facts stated. . . . The mere assertion by a deponent that he can swear positively to the facts (an assertion

which merely reproduces the wording of the Rule) is not regarded as being sufficient,unless there are good grounds for believing that the deponent fully appreciated the meaning of these words. … In my view, this is a salutary practice. While undue formalism in procedural matters is always to be eschewed, it is important in summary judgment applications under Rule 32 that, in substance, the plaintiff should do what is required of him by the Rule. The extraordinary and drastic nature of the remedy of summary judgment in its present form has often been judicially emphasised. … The grant of the remedy is based upon the supposition that the plaintiff's claim is unimpeachable and that the defendant's defence is bogus or bad in law. One of the aids to ensuring that this is the position is the affidavit filed in support of the application; and to achieve this end it is important that the affidavit should be deposed to either by the plaintiff himself or by someone who has personal knowledge of the facts.

Where the affidavit fails to measure up to these requirements, the defect may, nevertheless, be cured by reference to other documents relating to the proceedings which are properly before the Court. … The principle is that, in deciding whether or not to grant summary judgment, the Court looks at the matter at the end of the day on all the documents that are properly before it. …"

[11] In *Barclays National Bank Ltd v Love* (quoted with approval in *Maharaj* at 424B–D) the following is said:

"We are concerned here with an affidavit made by the manager of the very branch of the bank at which overdraft facilities were enjoyed by the defendant. The nature of the deponent's office in itself suggests very strongly that he would in the ordinary course of his duties acquire personal knowledge of the defendant's financial standing with the bank. This is not to suggest that he would have personal knowledge of every withdrawal of money made by the defendant or that he personally would have made every entry in the bank's ledgers or statements of account; indeed, if that were the degree of personal knowledge required it is difficult to conceive of circumstances in which a bank could ever obtain summary judgment."

[12] Since *Maharaj* the requirements of rule 32(2) have from time to time occupied the attention of our courts. In *Shackleton Credit Management v Microzone Trading* it was held in para 13 that:

"(F)irst-hand knowledge of every fact which goes to make up the applicant's cause of action is not required, and … where the applicant is a corporate entity, the deponent may well legitimately rely on records in the company's possession for their personal knowledge of at least certain of the relevant facts and the ability to swear positively to such facts."

Did the Ackermann affidavit meet the requirements of rule 32?

[13] Here Investec had issued a combined summons annexed to which were comprehensive particulars of claim setting out the cause of action against the appellants, supported by written agreements concluded with the principal debtors in each instance and suretyship agreements concluded with sureties on the terms set out in the agreements. Investec thus had either obtained judgment against the principal debtor or the principal debtor had been wound up at the instance of Mr Rees. Those occurrences operated as the trigger for Investec to proceed on the suretyship agreements against the appellants. Moreover, the suretyships provided for a certificate of balance to be issued by the relevant bank manager of Investec, which would either serve as a liquid document or constitute prima facie proof of the sureties' indebtedness. It is against that backdrop that Ms Ackermann's affidavit must be viewed.

[14] Ms Ackermann relied on the information at her disposal which she obtained in the course of her duties as the bank's recoveries officer, to swear positively to the contents of her affidavit. It is not in dispute that in the discharge of her duties as such she would have had access to the documents in question and upon a perusal of those documents she would acquire the necessary knowledge of the facts to which she deposed in her affidavit on behalf of Investec. Prior to the institution of the action Ms Ackermann had been corresponding with the appellants' attorney in regard to the principal debtors' delinquent accounts and had also addressed letters of demand to them, receiving letters in response which canvassed the appellants' defences. She could thus "swear positively to the facts", "verify the cause of action and the amount claimed" and assert that in her opinion the appellants did "not have a *bona fide* defence to the action" and had entered an appearance to defend "solely for the purpose of delay". These factors show that the requirements set out in *Maharaj* are met.

[15] The fact that Ms Ackermann did not sign the certificates of indebtedness nor was present when the suretyship agreements were concluded is of no moment. Nor should these be elevated to essential requirements, the absence of which is fatal to the respondent's case. As stated in *Maharaj*, "undue formalism in procedural matters is always to be eschewed" and must give way to commercial pragmatism. At the end of the day,

whether or not to grant summary judgment is a fact-based enquiry. Many summary judgment applications are brought by financial institutions and large corporations. First-hand knowledge of every fact cannot and should not be required of the official who deposes to the affidavit on behalf of such financial institution or large corporation. To insist on first-hand knowledge is not consistent with the principles espoused in *Maharaj*.

[16] The fact that leave to defend was granted in respect of claim does not mean as was suggested in argument that Ms Ackermann was untruthful and that her affidavit must be rejected in its entirety. It is clear that Ms Ackermann acquired her knowledge from documents under her control. She thus had the requisite knowledge as required by rule 32(2). In making such a finding Hutton AJ did not err.

…

[24] Looking at the matter at the "end of the day on all the documents that [were] properly before it", it cannot be said that the high court erred in granting summary judgment against the appellants.'

In *Absa Bank Ltd v Future Indefinite Investments 201 (Pty) Ltd* [147] the plaintiff's claim was founded on the first defendant's outstanding obligations in terms of a loan agreement concluded on 7 November 2008. A copy of the agreement was annexed to the combined summons. The deponent to the affidavit in support of summary judgment stated, *inter alia*:

'1 I am a Manager in the Absa Corporate and Business Bank, Support and Recovery Department of the abovenamed Applicant. In my aforesaid capacity I am duly authorised to depose to this affidavit on behalf of Applicant.

2. Unless the contrary is clearly indicated, I have knowledge of the facts hereinafter stated as a result of my access to and regard of [*sic*] all the relevant documents and data which the Applicant has electronically captured and stored which pertain to the cause of action against the Respondents.

3. In the light of the aforesaid, I can and do hereby swear positively to the facts verifying the cause of action and the amount as claimed in the summons and confirm that the Respondents are indebted to the Applicant in the amount of R617 597,47 plus interest thereon as set out in the Applicant's Particulars of Claim.'

In refusing the application for summary judgment, Binns-Ward J held: [148]

'[5] … It will be noted that the qualification at the beginning of paragraph 2 is purposeless, as there is nothing to the contrary indicated anywhere in the affidavit, whether "clearly", or at all. Moreover, there are no "facts hereinafter stated" and there is nothing to indicate definitively which documents and data the deponent considered to be relevant. She does not say positively that she has read the summons.

[6] The sloppy drafting of affidavits made in support of applications for summary judgment is to be deprecated. If a deponent has shown herself to be willing to sign a deposition that is so vacuous in obvious respects, how seriously is the court meant to take her word? Why should the court not be concerned that she has been just as careless in her consideration of "all the relevant documents and data" and the summons referred to in her averments? Slapdash supporting affidavits in summary judgment applications give cause for concern about their bona fides, and parties, such as the plaintiff in this case, who rely on them should not be surprised if their applications are refused in the exercise of the judge's discretion on this basis alone. Improper attention to the drafting of supporting affidavits in these cases can not only stultify the procedure to the detriment of the plaintiffs, but can also be prejudicial to the efficient disposal of cases in the court system.

[7] Corbett JA made it clear 40 years ago in *Maharaj v Barclays National Bank Limited* 1976 (1) SA 418 (A) at 423D–E, that "[t]he mere assertion by a deponent that he 'can swear positively to the facts' (an assertion that merely reproduces the wording of the Rule) is not regarded as being sufficient, unless there are *good grounds* for believing that the deponent *fully appreciated* the meaning of these words" (my emphasis). As mentioned, in the current case, the affidavit gives no indication of what the deponent considered to be "all the relevant documents and data" and the court thus has no basis to qualitatively assess the cogency of the averment. The averments amount to "mere assertion".

[8] However, as the judgment in *Maharaj* also indicated (at p. 423H), "Where the affidavit fails to measure up to [the] requirements [of rule 32(2)], the defect may, nevertheless, be cured by reference to other documents relating to the proceedings which are properly before the Court (see *Sand and Co. Ltd. v Kollias* [1962 (2) SA 162 (W)] … at p.165). The principle is that, in deciding whether or not to grant summary judgment, the Court looks at the matter 'at the end of the day' on all the documents before it".

[9] The affidavit was deposed to in Johannesburg and it may be inferred that the deponent employee is based there. The relevant transactions took place in the Western Cape. It may therefore also be inferred, as indeed indicated in the affidavit, that the deponent's knowledge of the facts germane to the cause of action, such as it was, was derived entirely from her consideration of "all of the relevant documents and data" that the plaintiff has electronically captured. It is now established that that is, in principle, unexceptionable in a case like this; see *Trustees for the time Being of the Delsheray Trust and Others v ABSA Bank Limited* [2014] 4 All SA 748 (WCC) and also the provisions of s 15 of the Electronic Communications and Transactions Act 25 of 2002 (to which, curiously in the circumstances, no reference was made in the Full Court's judgment).

[10] *Delsheray* does not, however, stand as authority that bald averments of the nature made in this case are sufficient to satisfy the requirements of rule 32(2). The founding affidavit in *Delsheray* read as follows:

"1) I am a Specialist employed at the Retail Bank Collection Division of the Plaintiff / Applicant. I am duly authorised to depose of this Affidavit. All the data and records, relating to the Applicant's/Plaintiff's action against the Defendant are under my control and I deal with this account on a day to day basis. The facts contained herein are within my personal knowledge and are both true and correct.

2) Unless the contrary appears, I have knowledge of the facts hereinafter stated, either personally or as a result of my access to all relevant computer data and documents pertaining to the Trust's mortgage loans, account number 4056939083.

3) I hereby verify the facts and cause of action stated in the Summons and the Particulars of Claim to the Summons as true and correct and verify in particular, that the Respondents/Defendants jointly and severally the one to pay the other to be absolved are indebted to the Plaintiff in the sum of R1 588 208,61 on the grounds stated in the Summons.

4) In my opinion the Respondents/Defendants, jointly and severally, the one paying the other to be absolved, do not have a *bona fide* defence to the Applicant's/Plaintiff's claim and their appearance to defend has been entered solely for purpose of delay." (Underlining supplied.)

The affidavit was not a model of draftmanship and quite thin on substance, but the deponent in that matter did make it clear that he dealt with the account in question on a day to day basis and thereby gave the court reason to believe that he had read the summons and particulars of claim on an informed basis. The distinguishing features of the supporting affidavit in *Delsheray* show that the submission by the plaintiff's counsel that I was bound by the principle of *stare decisis* to accept the supporting affidavit in the current case as sufficiently compliant with the requirements of rule 32(2) was misconceived. The *ratio decidendi* of *Delsheray* concerned the admissibility of evidence adduced on the basis of a deponent's reference to computerised records, as distinct from his first-hand knowledge of the underlying facts. Whether what the deponent states on the basis of such records is adequate for the purposes of rule 32(2) will depend on the content of the affidavit. Each case will have to be individually assessed.

[11] The judgments of the appeal court in *Rees and Another v Investec Bank Ltd* 2014 (4) SA 220 (SCA) and *Stamford Sales & Distribution (Pty) Limited v Metraclark (Pty) Limited* [2014] ZASCA 79 (29 May 2014), which the plaintiff's counsel invoked to support his attempt to defend the adequacy of the supporting affidavit in this case, in point of fact both serve to demonstrate that more was required.

[12] It is evident upon a proper reading of the judgment in *Rees* that the appeal court was persuaded to accept the supporting affidavit in that particular case as sufficient on the basis of the cumulative effect of a number of considerations. The affidavit in that matter went as follows:

"1. I am an adult female *Recoveries Officer* employed as such by the applicant at 100 Grayston Drive, Sandton.

2. I am duly authorised to bring this application and depose to this affidavit on behalf of the applicant. I refer in this regard to the resolution of the applicant annexed hereto marked A.

3. *In my capacity as Recoveries Officer*, I have in my possession and under my control all of the applicant's records, accounts and other documents relevant to the claims forming the subject matter of the action instituted against the respondents under the above case number (the action).

4. *In the ordinary course of my duties as Recoveries Officer and having regard to the applicant's records, accounts and other relevant documents* in my possession and under my control, I have acquired personal knowledge of the respondents' financial standing with the applicant and I can swear positively to the facts alleged and the amounts claimed in the applicant's particulars of claim.

5. I hereby verify—

5.1 the causes of action set out in the applicant's particulars of claim;

5.2 that, on the grounds set out therein, the respondents are indebted to the applicant in the amounts claimed by it.

6. In my opinion, the respondents—f

6.1 do not have a bona fide defence to the action; and

6.2 they have delivered a notice of intention to defend the action solely for purpose of delay."

[Emphasis with italicisation provided in the appeal court's judgment.]

The supporting affidavit in *Rees* was fuller in material respects than the affidavit in the current case. The appeal court also regarded it as material that the contract documents on which the claim was based had been annexed to the summons and that the deponent appeared to have had access to the other relevant documentation in *the ordinary course of her duties* (rather like the bank manager in *Maharaj*).

[13] It was also apparent on the papers before the court in *Rees* that the deponent to the supporting affidavit "had been corresponding with the appellants' attorney in regard to the principal debtors' delinquent accounts and had also addressed letters of demand to them, receiving letters in response which canvassed the appellants' defences". It is particularly the latter consideration that seems to have satisfied the appeal court that the deponent had been in a position sufficiently to swear positively to the facts verifying the cause of action. The approach of the appeal court in *Rees* was thus in all respects reconcilable with that adopted by the court in *Maharaj* (at pp. 422–424) in dealing with the point raised *in limine* in that case concerning non-compliance by the plaintiff with rule 32(2). It was also in line with the approach of Miller J in *Barclays Bank Ltd v Love* 1975 (2) SA 514 (D) at 516–7, referred to with approval in *Maharaj* at 424A–D.

[14] There was plainly material of substance before the court in *Rees* to satisfy it that the deponent to the supporting affidavit had sufficient knowledge of the facts. In the current matter the court is required to assume that by the "relevant documents" the deponent meant the documents attached in copied form to the summons. The affidavit does not expressly state as much. The court is also not informed what the deponent considered to be the relevant electronic data. One might assume that the captured data concerns the transactional history of the loan account, but the opacity of the entirely generic references by the deponent to the material that she had regard to means that making that assumption requires educated guesswork rather than reliance on evidence adduced. That is unsatisfactory.

[15] In *Stamford Sales & Distribution (Pty) Limited v Metraclark (Pty) Limited* [2014] ZASCA 79 (29 May 2014), it was pointed out that where the supporting affidavit is deficient by reason of a failure to comply punctiliously with the letter of rule 32, the deficiency might

be cured by a consideration of the contents of the verifying affidavit together with the other documents properly before the court "at the end of the day". As apparent from what has been said earlier in this judgment, that echoed what had been said in *Maharaj*. As Swain AJA explained "The object is to decide whether the positive affirmation of the facts forming the basis for the cause of action, by the deponent to the verifying affidavit, is *sufficiently reliable* to justify the grant of summary judgment." (Emphasis supplied.) The learned judge did not purport to depart from the judgment of Corbett JA in *Maharaj*, in which, approving the statement of the requirements of rule 32(2) by Theron J in this court in *Fischereigesellschaft F. Busse & Co. Kommanditgesellschaft v. African Frozen Products (Pty.) Ltd*., 1967 (4) SA 105 (C) at p. 108, it was emphasised that "[w]hile undue formalism in procedural matters is always to eschewed, *it is important in summary judgment applications under Rule 32 that, in substance, the plaintiff should do what is required of him by the Rule*". Corbett JA went on to state "The grant of the remedy is based upon the supposition that the plaintiff's claim is unimpeachable and that the defendant's defence is bogus or bad in law. One of the aids to ensuring that this is the position is the affidavit filed in support of the application; and *to achieve this end it is important that the affidavit should be deposed to either by the plaintiff himself or by someone who has personal knowledge of the facts*" (emphasis supplied).

[16] The reiterated use by Corbett JA of the word "important" in this passage (at p.423B–H) also illustrates that plaintiffs such as banks that are not in a position to support their applications for summary judgment with affidavits by any one person who has direct personal knowledge of all the material facts, but which do have comprehensive electronic records of all the pertinent documents and transactional evidence, would be well advised to avail of the Electronic Communications and Transactions Act in the manner advised in *Absa Bank Ltd v Le Roux* 2014 (1) SA 475 (WCC), rather than hoping, that in an opposed application like the current matter where the defendants take the point of non-compliance with rule 32, a judge might be persuaded, on a conspectus of all the papers after the opposing affidavit has been delivered, that there is enough to go on. Use of the relevant provisions of the Act would entail the deponent identifying the "data messages" (i.e. electronic records) to which reference is made with specificity.

[17] The supporting affidavit in *Stamford Sales* was quoted at para 8 of the appeal court's judgment. It went as follows:

"I, the undersigned

JANE WILLIS-SCHOEMAN

do hereby make oath and state:

1 I am the National Credit Manager of the Applicant herein and I am duly authorised to depose to this affidavit on behalf of the Applicant.

2. The facts contained herein are both true and correct and are within my personal knowledge and belief.

3. The Applicant's file pertaining to the above-captioned matter which contains, *inter alia,* a cession of book debts in favour of the Applicant, proof of the Applicant's claim against Quali Cool CC and all correspondence entered into by the Applicant and/or its attorney with the Respondent, is currently in my possession and under my control and I am fully conversant with the content thereof.

4. I have read the Combined Summons in this action and can and hereby do swear positively to the facts and verify all the causes of action and the total amount claimed by the Applicant therein.

5. I verily believe that the Respondent does not have a *bona fide* defence/defences to any of the Applicant's causes of action, and that Notice of Intention to Defend has been entered solely for the purposes of delay.

WHEREFORE I pray that the Court will grant Summary Judgment against the Respondent in favour of the Applicant in terms of the Notice to which this Affidavit is annexed."

It is evident that it contained a more detailed account and, thereby, provided a much firmer basis for the court to have inferred sufficient knowledge by the deponent of the facts of the case than does the supporting affidavit in the current matter. He stated that he had the plaintiff's file pertaining to the matter in his possession and under his control. His averments conveyed enough to confirm that he had indeed read and was *au fait* with its contents. They did this by making express reference to certain of the contents of the file that were germane to the claim. He also expressly stated that he had read the summons.

[18] The affidavit in the current matter, by contrast, is more closely comparable to that which I found to be inadequate in *Le Roux* supra. It does not escape notice that the plaintiff in the current matter was also the plaintiff in that matter, which suggests that little notice appears to have been taken of what was said there.

[19] I think it bears emphasis that the judgment in *Stamford Sales* should not be misread as having suggested that it is no longer "important", as Corbett JA put it, for an applicant for summary judgment to comply with rule 32(2). What *Stamford Sales* did hold, consistently with *Maharaj*, was that it was not necessary for the deponent to the founding affidavit to have first-hand knowledge of all the material facts. Swain AJA used the term "personal knowledge" at para 11, but I think it is quite clear from the context that by that the learned judge meant first-hand knowledge, as distinct from knowledge derived from relevant and prima facie reliable sources.

[20] The potential for uncertainty arising out of the use interchangeably in *Maharaj* of the terms "personal knowledge" and "direct knowledge" (to which might have been added "first-hand knowledge") when the rule does not employ any of those expressions was remarked upon in *Delsheray* at para 54. The rule requires the deponent to be able to "swear positively" to the facts.

[21] Corbett JA held that for a person to be able to swear positively to the facts they had, "generally speaking", to be within his "personal knowledge". The learned judge of appeal's quotation with approval of the extract from Miller J's judgment in *Love* supra, *loc. cit.*, made it apparent, however, that he did not equate "personal knowledge" with knowledge necessarily based on actual personal involvement in, or first-hand experience of, the underlying transactions. Thus, evidence predicated on personal knowledge derived from reference to records, which in the circumstances a court might reasonably accept would have been kept reliably and accurately, would be admissible for the purposes of compliance with rule 32(2).

[22] The judgment in *Stamford Sales* did no more than confirm that incidence of the judgment in *Maharaj*. It was in that context that it pointed out that "[t]hose high court decisions which have required personal knowledge of all of the material facts on the part of the deponent to the verifying affidavit are accordingly not in accordance with the principles laid down by this court in *Maharaj*" and further "[t]o insist on personal knowledge by the deponent to the verifying affidavit on behalf of the cessionary of all of the material facts of the claim of the cedent against the debtor, emphasises formalism in procedural matters at the expense of commercial pragmatism".

[23] The axiom that adequate compliance with rule 32(2) is important is also confirmed in the Full Court's judgment in *Delsheray* supra, where at para 33, the court disapproved the approach adopted in *FirstRand Bank Ltd v Huganel Trust* 2012 (3) SA 167 (WCC), on the basis of its inconsistency with the reasoning of Wallis J at para 25 of *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC* 2010 (5) SA 112 (KZP). On the approach in *Huganel Trust*, non-compliance with rule 32(2) could never be raised by a defendant as a self-sufficient basis for opposing an

application for summary judgment. It is, of course, quite apparent from the judgment in *Maharaj* that an allegation of substantial non-compliance with the requirements of rule 32(2) was treated as a point *in limine*, quite distinct from the allegations in the opposing affidavit set forth in terms of rule 32(3). Adequate compliance by the plaintiff with rule 32(2) is a juristic prerequisite to a court's ability to entertain an application for summary judgment. The supporting affidavit is, after all, the evidence adduced by the plaintiff in support of its case. Indeed, that is the reason why it was necessary for the appeal court in *Maharaj* first to dispose of the question as a point *in limine* before it engaged with the question whether a defence had been made out prima facie. Were the legal effect of non-compliance with rule 32(2) different, *Maharaj* could have been decided solely on the basis that the defendant had not made out a sustainable defence; a determination of the adequacy of the plaintiff's compliance with the sub-rule would not have been necessary.'

An affidavit by a trustee was held to be insufficient where the particulars of claim related to a period of time prior to the appointment of the trustee in the plaintiff's insolvent estate and in respect whereof the plaintiff had had no dealings whatsoever. [149] If the cessionary of a debt sued the debtor on the debt and applied for summary judgment on the strength of an affidavit signed by a director of the cessionary company, and there was nothing in the affidavit to indicate that he had any connection with the cedent of the claim and, consequently, that the facts relating to the claim were within his knowledge, summary judgment was refused. [150]

Where the secretary of a government department was the plaintiff, an affidavit by the deputy-secretary of the department was held to be sufficient explicitly despite the fact that the deponent had not stated that he had personal knowledge of the facts. [151] If the affidavit is

made by the attorney of record for the plaintiff, the court should satisfy itself that the deponent has personal knowledge of the facts and is not merely repeating information given to him by his client. [152]

If the claim is for a balance due and in arrear on an open account over a stated period, it is generally looked upon as a combined cause of action and an affidavit verifying the cause of action 'based on the grounds referred to in the summons', or words to that effect, is sufficient compliance with the rule. [153]

'To the facts.' In High Court practice the cause of action is set out in a declaration or in a combined summons, depending upon the nature of the claim. [154] The 'facts' referred to in this subrule must clearly relate to facts on which the cause of action is based, viz those facts in the declaration or particulars of claim. The deponent is not required to have personal knowledge of the facts on which a defendant might seek to base a defence. [155]

Subrule (2)*(b)*: 'Verify the cause of action ... identify any point of law relied upon and the facts upon which the plaintiff's claim is based ... explain briefly why the defence as pleaded does not raise any issue for trial.' In order to comply with subrule (2)*(b)*, the affidavit must contain:

(a) a verification of the cause of action and the amount, if any, claimed;

(b) an identification of any point of law relied upon;

(c) an identification of the facts upon which the plaintiff's claim is based; and

(d) a brief explanation as to why the defence as pleaded does not raise any issue for trial.

It is submitted that the court will have to be satisfied that each of these requirements has been fulfilled before it can hold that there has been proper compliance with subrule (2)*(b)*.

In *ABSA Bank Ltd v Coventry* [156] it was held in regard to a verifying affidavit made under the former rule 32(2) that if *ex facie* the affidavit the requisite verification has not occurred, the court would have no jurisdiction to grant summary judgment. In *Standard Bank of South Africa Ltd v Roestof* [157] it was, however, held that if 'the papers are not technically correct due to some obvious and manifest error which causes no prejudice to the defendant, it is difficult to justify an approach that refuses the application, especially in a case ... where a reading of the defendant's affidavit opposing summary judgment makes it clear beyond doubt that he knows and appreciates the plaintiff's case against him'. The *Standard Bank* decision was criticized and not followed in *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC*: [158]

> 'Insofar as the learned judge suggested that a defective application can be cured because the defendant or defendants have dealt in detail with their defence to the claim set out in the summons, that is not in my view correct. That amounts to saying that defects will be overlooked if the defendant deals with the merits of the defence. It requires a defendant who wishes to contend that the application is defective to confine themselves to raising that point, with the concomitant risk that if the technical point is rejected, they have not dealt with the merits. It will be a bold defendant that limits an opposing affidavit in summary judgment proceedings to technical matters when they believe that they have a good defence on the merits. The fact that they set out that defence does not cure the defects in the application, and to permit an absence of prejudice to the defendant to provide grounds for overlooking defects in the application itself seems to me unsound in principle. The proper starting point is the application. If it is defective, then *cadit quaestio.* Its defects do not disappear because the respondent deals with the merits of the claim set out in the summons.'

It is submitted that the approach in the *Schackleton* case is to be preferred and to be applied if the occasion arises in regard to an affidavit made under subrule (2)*(b)* of rule 32 in its amended form.

***(a)* Verification.** Verification is done simply by referring to the facts alleged in the summons; it is unnecessary to repeat the particulars. [159] All the facts supporting the cause of action must be verified. [160] It is hardly necessary to add that what the deponent must verify must be a

completed (perfected) cause of action; a deponent cannot be said to 'verify' a cause of action which is not a complete cause of action. [161] If there are two or more claims in the summons and summary judgment is sought on all of them, all must be verified; if only one is verified, the court can grant summary judgment on the verified claim. [162] It has also been held that it is in order in a verifying affidavit to verify a cause of action based on alternative claims; what is objectionable is verifying a cause of action based on two mutually destructive alternative versions. [163] If it is uncertain which of two defendants sued in the alternative is liable, summary judgment cannot be granted. [164] If a summons is capable of two constructions, either of which discloses a cause of action, a defence that it does not disclose a cause of action will fail. [165] If *ex facie* the document upon which the claim is founded there appears a defect in the cause of action (and the issue has not been dealt with by way of an exception), the court must refuse to enter summary judgment whether or not the defendant has filed an affidavit to oppose it. [166]

***(b)* Identification of any point of law relied upon.** This, it is submitted, refers to an identification of a point of law in relation to the plaintiff's claim upon which summary judgment is sought and not in relation to the defence as pleaded by the defendant. This view is fortified by the wording of the third requirement, viz 'and the facts upon which the plaintiff's claim is based'. Furthermore, it is trite that a pleader's duty includes the duty to set out separately the conclusions of law which the pleader claims follow from the pleaded facts. [167]

***(c)* Identification of the facts upon which the plaintiff's claim is based.** Subrule (2)*(b)* itself does not provide for 'amplification' of the cause of action as set out in the declaration or particulars of claim, in the plaintiff's affidavit.

The reasons for this seem to be obvious:

(i) in terms of rule 18(3) a plaintiff's declaration or particulars of claim must contain a clear and concise statement of the material facts upon which the plaintiff relies for his claim, with sufficient particularity to enable the defendant to reply thereto;

(ii) as is pointed out under paragraph *(b)* above, it is trite that a pleader's duty includes the duty to set out separately the conclusions of law which the pleader claims follow from the pleaded facts. Thus, a plaintiff's particulars of claim must, apart from the material facts upon which the plaintiff relies for his claim, contain the relevant conclusions of law;

(iii) in terms of rule 20(2) a plaintiff's declaration must set forth the nature of the claim, the conclusions of law which the plaintiff shall be entitled to deduce from the facts stated therein, and a prayer for the relief claimed;

(iv) in terms of rule 18(6) a plaintiff who in his pleading (whether it be a declaration or particulars of claim) relies upon a contract must state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written, a true copy thereof or of the part relied on in the pleading must be annexed to the pleading.

***(d)* A brief explanation as to why the defence as pleaded does not raise any issue for trial.** Subrule (2)*(b)* imposes a duty on the plaintiff to explain *briefly* why the defence as pleaded does not raise any issue for trial. Lengthy explanations may frustrate the object of the summary procedure envisaged by the rule and may for that reason amount to an abuse of the process, as such resulting in an appropriate costs order being made against the plaintiff. Thus, for example, if the defendant raises a defence of reckless credit in an action based on a credit agreement falling under the National Credit Act 34 of 2005, and resists an application for summary judgment on the basis of such a defence, the plaintiff will in terms of subrule (2)*(b)* be entitled to set out facts, supported by the necessary documents, to briefly explain why the defence as pleaded does not raise any issue for trial.

Apart from the facts referred to in *(a)*, *(c)* and *(d)* above, the affidavit by the plaintiff or other person who can swear positively to the facts should therefore not set out other evidence. Rule 32(4) clearly provides that no evidence may be adduced by the plaintiff 'otherwise than by the affidavit referred to in subrule (2)'. The inclusion of other evidence in the affidavit will not invalidate the application; such evidence will simply be ignored by the court. [168]

Subrule (2)*(c)*: 'If the claim is founded on a liquid document a copy ... shall be annexed.' The object of the provision that a copy of the liquid document must be annexed to the affidavit is to ensure that a defendant against whom summary judgment is sought should be allowed at least to see a copy of the document which forms a vitally important part of the case which is being made against him. [169] The need to annex a document to the affidavit exists only in the event of that document being a liquid document. A plaintiff who believes that his claim is not founded on a liquid document can draw his application without annexing any document unless the nature of the document or the allegations which appear in the summons prima facie indicate that the claim is based on a liquid document. [170]

If an endorsement has been crossed out on the original document, there is no need to reproduce the crossed-out endorsement on the copy served, and if a signature is illegible there is no need to reproduce the indecipherable hieroglyph: a few question marks are commonly used to indicate, on a copy, the fact that on the original the signature is illegible. [171] In the latter case, however (where a signature is illegible), it is preferable to serve a photostat copy or exhibit the original, [172] for as a general rule the omission of vital signatures (e g those of the Registrar of Deeds and the conveyancer from a copy of a bond or those of certain sureties and co-principal debtors from a copy of a promissory note) [173] completely destroy the liquidity of the document sued upon.

In an application for summary judgment on a cheque a notarial certificate of presentment is not required, provided due presentment does appear from the documents before the court. [174]

'Notice of application ... on a stated day not being less than 15 days from the date of the delivery thereof.' The days referred to in the subrule are court days, to be computed with the exclusion of the date of delivery and the inclusion of the day before the stated date of set-down, so as to allow the full prescribed number of days to run.

Subrule (3): General. The defendant can attack an application for summary judgment on any ground, including the admissibility of evidence in the plaintiff's affidavit. [175] An affidavit should be filed even if only legal objections to the application for summary judgment are raised. [176] If the plaintiff fails to verify his cause of action with clarity and exactitude, it is defective and his claim will fail. [177]

In terms of this subrule the defendant may *(a)* satisfy the court by affidavit or, with the leave of the court, by oral evidence that he has a bona fide defence to the action; or *(b)* give security to the plaintiff to the satisfaction of the court for any judgment, including costs, which may be given.

If the plaintiff's claim does not fall within the categories laid down in subrule (1), but he nevertheless applies for summary judgment thereon, the defendant is not required to comply with the procedure laid down in this subrule, but may simply raise the point in argument that the plaintiff has no right to apply for summary judgment upon his claim. [178] It is submitted that if the plaintiff's affidavit in support of the application for summary judgment does not meet the requirements of subrule (2)*(b)*, the defendant should deliver an affidavit in compliance with this subrule and deal with the shortcomings in the plaintiff's affidavit by means of points *in limine* raised in the defendant's affidavit.

A defendant, after filing an affidavit, may change his mind and offer security. [179] In such a case summary judgment will be refused.

A defendant resisting an application for summary judgment is not confined to the issues raised in his opposing affidavit. [180]

If, pursuant to this subrule, the defendant files an affidavit in opposition to an application for summary judgment, the court is not entitled to ignore such affidavit and it cannot be said that the defendant is in default because he (or his counsel) fails to appear when the application is heard. [181]

Subrule (3)*(a)*: 'Give security.' The words 'give security' in this subrule mean that the security must be sufficient to meet the demands set out in the summons. [182] The defendant must also give security for costs in terms of this subrule. The security must be given to the satisfaction of the court.

There is no reason in principle why a defendant who has initially elected to file an affidavit deposing to a bona fide defence should not be allowed to change his mind at the hearing of the application and give security instead under this subrule. [183]

'To the satisfaction of the court.' Prior to its amendment which came into operation on 1 July 2019 [184] this subrule provided that the defendant could provide security to the satisfaction of the *registrar* for any judgment and costs which might be given. That was in line with a general trend to require of the registrar to determine an amount of security as illustrated by, for example, *(a)* rule 47(3) which provides in regard to security for costs that 'if the amount of security only is contested the registrar shall determine the amount to be given and his decision shall be final'; and *(b)* rule 49(13)*(b)* which provides in regard to security for the costs of an appeal that '[i]n the event of failure by the parties to agree on the amount of security, the registrar shall fix the amount and the appellant shall enter into security in the amount so fixed'. It is submitted that the subrule as currently framed will require of a defendant to file an affidavit and appear at the hearing of an application for summary judgment in order to satisfy the court that the security provided is sufficient, and to address any questions raised by the court. This will not only increase the workload of the courts but will also increase costs for the defendant. The position under the subrule in its amended form is therefore unsatisfactory.

Subrule (3)*(b)*: 'Satisfy the court by affidavit.' The defendant's affidavit must be made by the defendant himself or by any other person who can swear positively to the fact that the defendant has a bona fide defence to the action. [185] The court must ascertain that an affidavit is not filed on behalf of the defendant by a person not authorized to do so. [186]

'Satisfy' does not mean 'prove'. What the rule requires is that the defendant set out in his affidavit facts which, if proved at the trial, will constitute an answer to the plaintiff's claim. [187] Only facts which the court can take account of must be alleged. Thus, for example, it was held that secondary evidence as to documents [188] and hearsay evidence are inadmissible. [189] If the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons are disputed or new facts are alleged constituting a defence, the court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. [190]

The defence must be put before the court on affidavit and not merely orally from the bar with reference to the plea. It is submitted that

where all conditions have been fulfilled by the plaintiff entitling him to summary judgment, a mere statement from the bar that the defendant has a defence on the merits as demonstrated by the plea, is insufficient to stay judgment. [191]

The defendant's affidavit should set out material facts and particulars. [192] It is not sufficient for a defendant to state that he has no knowledge of the allegations in the plaintiff's summons, [193] nor to state that the plaintiff's allegations must be subject to grave suspicion, when he has had ample time to test whether the suspicion is well founded or not. It seems that he must take positive steps to confirm his suspicions, for a suspicion by itself is not sufficient ground upon which to refuse summary judgment. [194]

While it is not incumbent upon the defendant to formulate his opposition to the summary judgment application with the precision that would be required in a plea, [195] none the less when he advances his contentions in resistance to the plaintiff's claim he must do so with a sufficient degree of clarity to enable the court to ascertain whether he has deposed to a defence which, if proved at the trial, would constitute a good defence to the action. [196] Affidavits in

summary judgment proceedings are customarily treated with a certain degree of indulgence, [197] and even a tersely stated defence may be a sufficient indication of a bona fide defence for the purpose of the rule. [198] If, however, the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the court to consider in relation to the requirement of bona fides. [199] If a defendant had difficulty in dealing with pleadings because they were not technically correct, that had to be stated in his affidavit filed as a justification for his inability to present an affidavit disclosing the nature and grounds of the defence and the material facts relied upon therefor as required by the subrule. [200] This does not, on the other hand, mean that lengthy and prolix affidavits are required in summary judgment cases. [201] It is not the intention of the subrule to provide the plaintiff with the unilateral advantage of a preview of the defendant's evidence, [202] especially not where, under rule 32 in its amended form since 1 July 2019, an application for summary judgment may only be made after the delivery of the defendant's plea. It has also been recognized that what a defendant can reasonably be expected to set out in his affidavit depends, to some extent, upon the manner in which the plaintiff's claim, to which he is seeking an answer, has been formulated. [203] If the affidavit lacks particularity regarding the material facts relied upon and falls short of the requirements of the subrule, the court may not be able to assess the defendant's bona fides but it may still, in an appropriate case, exercise its discretion in favour of the defendant if there is doubt whether the plaintiff's case is unanswerable. [204]

'Delivered five days before the day on which the application is to be heard.' To deliver means to serve copies on all parties and file the original with the registrar. [205]

The days referred to in the subrule are court days, to be computed with the exclusion of the date of delivery and the inclusion of the day before the stated date of hearing of the application, so as to allow the full prescribed number of days to run.

The court can condone the late filing by the defendant of an affidavit. [206]

'Or with the leave of the court by oral evidence.' The subrule allows the defendant, by leave of the court, to present oral evidence as an alternative to an opposing affidavit, not in addition to it.

'*Bona fide* defence.' All that the court enquires, in deciding whether the defendant has set out a bona fide defence, is: *(a)* whether the defendant has disclosed the nature and grounds of his defence; and *(b)* whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is bona fide and good in law. [207]

Bona fides in the subrule cannot be given its literal meaning; [208] the subrule does not require the defendant to establish his bona fides; it is the *defence* which must be bona fide, [209] and whether it is bona fide or not depends upon the merits of that defence as raised in the defendant's affidavit. [210] The subrule does not require the defendant to satisfy the court that his allegations are believed by him to be true. [211] It will be sufficient if the defendant swears to a defence, valid in law, in a manner which is not inherently or seriously unconvincing; [212] or, put differently, if his affidavit shows that there is a reasonable possibility that the defence he advances may succeed on trial. [213] If, for example, the defendant omits facts upon which a defence can be based, or sets out the facts upon which he does rely in such a manner that the court is unable to say that if they are established they will constitute a defence to their action or some part of it, [214] he will fail in his defence. [215]

If it is apparent from his affidavit that the *defendant* is not bona fide, he will fail in his defence because in such a case his *defence*, too, cannot be bona fide in the sense set out in the previous paragraph. A defendant will therefore fail if it is clear from his affidavit that he is advancing a defence simply to delay the obtaining of a judgment to which the defendant well knows that the plaintiff is justly entitled. [216]

The defendant is not at this stage required to persuade the court of the correctness of the facts stated by him or, where the facts are disputed, that there is a preponderance of probabilities in his favour, [217] nor does the court at this stage endeavour to weigh or decide disputed

factual issues or to determine whether or not there is a balance of probabilities in favour of the one party or another. [218] The court merely considers whether the facts alleged by the defendant constitute a good defence in law and whether that defence appears to be bona fide. [219] In order to enable the court to do this, the court must be apprised of the facts upon which the defendant relies with sufficient particularity and completeness as to be able to hold that if these statements of fact are found at the trial to be correct, judgment should be given for the defendant. [220]

The subrule does not require that a defendant, who relied on the excipiability of the claim, had to have filed the exception in terms of rule 23. He merely needed to base his opposition on the excipiability of the claim as formatted. [221]

The defendant is entitled to attack the application on any aspect, including the *locus standi in judicio* of the plaintiff [222] or the admissibility of the evidence tendered in the plaintiff's affidavit. [223] In general the defence raised must comply with the following principles:

(i) The defence must go to the merits of the application and not consist merely of an attack on the language of the summons and the plaintiff's affidavit, [224] nor is it sufficient for a defendant merely to state that he has no knowledge of the allegations in the plaintiff's summons or that he cannot comment on the plaintiff's claim. [225]

(ii) The defence raised must be valid in law, [226] not merely an unenforceable moral right [227] or inability to pay. [228] However, the procedure for summary judgment is not intended to

replace the exception as a test of one or other of the parties' legal contentions. [229] It has been held [230] that when a real difficulty as to a matter of law arises, the court should grant summary judgment only if it is satisfied that the point is really unarguable, [231] and also that it is not depriving the defendant of the right he would have had, in an appropriate case, had the point of law been decided against him on exception, of amending his pleadings. [232] A different view holds that a court hearing the summary judgment application is in just as good a position as the trial court to consider a matter of law. [233]

(iii) The defendant is not required to disclose the whole of his defence; it is sufficient if he discloses the 'nature and grounds' of a bona fide defence and the 'material facts relied upon therefor'. [234]

(iv) Purely technical defences are not permitted. [235]

The defendant may rely on a claim in reconvention ('counterclaim') in an unliquidated amount which exceeds the plaintiff's claim [236] and must state the extent of such counterclaim. [237] This defence is also available to a surety/co-principal debtor under circumstances where it is alleged

that the principal debtor has a counterclaim exceeding the plaintiff's claim and set-off is invoked. [238] In the event of the counterclaim being less than the plaintiff's claim, the defendant will have a defence if he pays the difference into court. [239] Because the counterclaim is less than the plaintiff's claim, it cannot be said that a defence to the whole of the plaintiff's claim has been established. A defendant who fails to pay the balance into court runs the risk that summary judgment may be granted for the balance together with the costs resulting

from the summary judgment application. [240] In order to avoid this risk a defendant may be well advised by paying the balance into court. [241] The counterclaim need not arise from the same set of facts as the claim in convention.

If the plaintiff claims the delivery of specified movable property which at all times was his own property (although handed over to the defendant in terms of a contract since cancelled) and the defendant has no legal right to retain the property, the mere fact that the defendant has an unliquidated counterclaim for damages against the plaintiff affords him no defence to an application for summary judgment. [242] If the defendant fails to set out his counterclaim fully the court may be unable to deduce a bona fide defence therefrom and may grant summary judgment against him. [243] Although a counterclaim in an unliquidated amount which exceeds the sum claimed by a plaintiff can be a defence to an application for summary judgment, the defendant must set out the grounds of his defence with sufficient particularity to satisfy the court that the defence is bona fide. [244] Where a defendant simply states that he does not know what amount is owing, the bona fides of the defendant is tested by contextualising the averments in their totality, rather than simply selecting a particular averment and then characterizing it as bald, vague or laconic. [245]

Summary judgment was refused where the plaintiff's claim arose from a cession intended to frustrate the debtor's counterclaim against the cedent. [246]

If a defendant counterclaims for the payment of usurious interest pursuant to a money-lending transaction, the disputed averment that the transactions were money-lending ones must be established in a proper trial and summary judgment should accordingly be refused. [247]

It has been held that the obligation of a defendant in terms of this subrule to disclose a bona fide defence does not infringe his right not to be compelled to give self-incriminating evidence in terms of s 35(3)*(j)* of the Constitution of the Republic of South Africa, 1996. [248] The fact that criminal charges had been preferred against the defendant does not justify the stay of the application pending the conclusion of the criminal proceedings as the provisions of the subrule did not compel a defendant to show his hand before the criminal trial had been concluded. [249] In such case the defendant can also avoid summary judgment being taken against him by furnishing security for the plaintiff's claim in terms of subrule 32(3)*(a)*. [250]

If the defendant admits part of the plaintiff's claim but discloses a bona fide defence to the balance thereof, the plaintiff is entitled to summary judgment in respect of the part admitted. [251]
'Disclose fully the nature and grounds of the defence and the material facts relied upon therefor.' The defendant must disclose fully the 'nature' and the 'grounds' of his defence and

the 'material facts relied upon therefor'. [252] It is submitted that the 'nature' of the defence relates to the character or kind of the defence; [253] it is further submitted that 'grounds' as the word is used in the subrule relates to the facts upon which the defence is based. [254] Thus, in order to meet the requirements laid down in the subrule, there must be a sufficiently full disclosure of the material facts to persuade the court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff's claim. [255] On the one hand, it is not required of the defendant to give a complete or exhaustive account of the facts, in the sense of giving a preview of all the evidence; on the other hand, the defence must not be averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy. [256] It is submitted that in the light of the requirements of the subrule it is insufficient

for a defendant to merely refer to the plea that has been delivered without, in his affidavit, disclosing fully the nature and grounds of his defence and the material facts relied upon therefor.

In High Court practice a defendant has been allowed to supplement his affidavit by a further affidavit where, for instance, the first affidavit was defective, even though the supplementary affidavit was out of time. [257] It is submitted that there must be some basis for granting leave to file a supplementary affidavit, for example, an adequate explanation by the defendant for the deficiencies in his opposing affidavit, and at least some indication that the proposed supplementary affidavit is likely to clear the deficiencies. [258]

In an application for condonation for the late filing of the opposing affidavit in summary judgment proceedings, an applicant would normally file an affidavit in support of such application. The introduction in such affidavit of additional evidential material, which did not appear in the affidavit filed in opposition to the summary judgment application, was held to be impermissible on the ground that it was irrelevant. The prospects of success in such condonation application had to be determined with reference to what was contained in the affidavit opposing summary judgment to ward off the granting of summary judgment read with the affidavit in support of summary judgment. [259]

The court should ignore any matters referred to in argument which are not included in the statement of facts. [260]

Subrule (4): 'No evidence may be adduced by the plaintiff.' This is an absolute prohibition and the plaintiff must stand or fall by his affidavit delivered in terms of subrule (2). [261]

The inclusion of evidence in the affidavit will not invalidate the application; such evidence will simply be ignored by the court. [262] In *Rossouw v FirstRand Bank Ltd* [263] the Supreme Court of Appeal, however, held that a certificate of balance handed up to a court in summary judgment proceedings performs a useful function and is not hit by the provisions of this subrule.

The court may take judicial notice of any Government Notice, or of any other matter which has been published in the *Gazette*. [264]

'Otherwise than by the affidavit referred to in subrule (2).' The plaintiff is not entitled to file a further affidavit or to present oral evidence.

'Nor may either party cross-examine ... may elucidate the matter.' Neither party may under this subrule cross-examine any person who gives evidence orally or on affidavit. [265]

A defendant may require the plaintiff to give oral evidence in terms of s 169(1) of the National Credit Act 34 of 2005 and may cross-examine the plaintiff under that section. [266]

Subrule (5): 'The court may enter summary judgment.' The word 'may' in this subrule confers a discretion on the court, so that even if the defendant's affidavit does not measure up fully to the requirements of subrule (3)*(b)*, the court may nevertheless refuse to grant summary judgment if it thinks fit. [267]

The discretion, clearly, is not to be exercised capriciously, so as to deprive a plaintiff of summary judgment when he ought to have that relief. [268] From the decided cases the following principles governing the exercise of the discretion, can be distilled:

(a) In considering an opposed summary judgment application, there are three questions to be answered:

(i) Are the defendant's defences good in law?

(ii) Are the defendant's defences bona fide? It is in relation to this question that the fullness (or lack thereof) of the disclosure of the material facts relied upon by the defendant are relevant.

(iii) If either or both of the aforesaid questions are answered against the defendant, the next question is whether the court's discretion should be exercised in the defendant's favour. At this stage the enquiry is whether there is a reasonable possibility that the defendant's defence may be good. [269]

(b) If it is reasonably possible that the plaintiff's application is defective or that the defendant has a good defence, the issue must be decided in favour of the defendant. [270]

(c) If it is clear that the defence carries no reasonable possibility of eventually succeeding, the discretion should not be exercised against granting summary judgment. [271]

(d) The discretion should not be exercised on the basis of mere conjecture or speculation; it should be exercised on the basis of the material before the court. [272] The court should have regard to the nature of the cause of action and of the defence as disclosed in the documents before it, and to the peculiar nature of the facts involved in the case. [273]

(e) If, on the material before it, the court sees a reasonable possibility that an injustice *may* be done if summary judgment is granted, that is a sufficient basis on which to exercise its discretion in favour of the defendant. [274]

(f) If the defendant raises a claim in reconvention for a lesser amount than the plaintiff's claim as a defence, the court's overriding discretion pertains not only to that part of the claim which would be extinguished by the claim in reconvention, but also to the balance of the claim. [275]

Subrule (6)*(b)*(i): 'The court shall give leave to defend.' It has been held that in terms of this subrule a superior court has no discretion to grant summary judgment if the defendant is otherwise entitled to defend; there is only a discretion to refuse. [276]

Subrule (6)*(b)*(ii): The purpose of this subrule is that the plaintiff's claim is not to be defeated by what is only a partial defence.

The affidavit by a defendant resisting a claim to summary judgment should set out the amount by which the plaintiff's claim should be reduced. The plaintiff will then be entitled to summary judgment for the undisputed balance. [277]

Subrule (7): 'If the defendant finds security or satisfies the court as provided in subrule (3).' The court is empowered to give leave to defend in both cases, i e whether the defendant finds security *or* satisfies the court of his bona fide defence by way of affidavit. [278]

'The court shall give leave to defend.' It is clear from the wording of this subrule that if the defendant finds security or satisfies the court that he has a bona fide defence as provided in subrule (3), the court is bound to give him leave to defend. It has been held [279] that it would be unfair and therefore improper to leave standing a summary judgment which was given without consideration of all the relevant facts and circumstances, where those facts were not placed before the court by the defendant due to its misunderstanding of the law (a misunderstanding shared by the plaintiff and the court) apparently occasioned by its acceptance of the correctness of a judgment of the court subsequently held by the Supreme Court of Appeal to be incorrect.

If the defendant raises a defence based on s 3 of the Conventional Penalties Act 15 of 1962, or if the court *mero motu* raises the question of a penalty, [280] the court would have to give leave to defend under subrule (7), for summary judgment proceedings are not appropriate for deciding whether a penalty is out of proportion to the prejudice suffered or for determining the extent to which a penalty should be reduced. [281]

It is submitted that if leave to defend is given unconditionally in terms of subrule (8), it means that the date of such leave to defend is the operative date of the defendant's plea, i e the periods provided for in other rules within which other steps are to be taken (for example, delivery of a replication or a plea to a claim in reconvention) run from the date leave to defend is given. [282]

'And the action shall proceed as if no application for summary judgment had been made.' This phrase has been held [283] to mean that the trial on the merits had to go forward in a normal manner.

Subrule (8): 'Leave ... may be given unconditionally or ... subject to ... terms.' The terms imposed may include ordering the defendant to give security if there is good ground for believing that a sham defence is being set up, [284] or that the plaintiff be permitted to set the

action down for trial before the close of pleadings. In terms of the subrule, the court has a discretion when granting leave to defend to make orders in regard to the delivery of further pleadings and may, for example, put the plaintiff on terms with regard to the delivery of a replication or a plea to a claim in reconvention. [285]

'As to security.' The security referred to in this subrule is not the same as the security referred to in subrule (3)*(a)* but security that a court may order as part of its general discretion when giving leave to defend. [286]

Subrule (9): 'Such order as to costs as to it may seem just.' The court hearing the application for summary judgment may make such order as to costs as to it may seem just. When summary judgment is refused and leave to defend is given, the usual order for costs is that costs should be costs in the cause. [287] This is, however, not an inflexible rule and the court has a wide discretion to make such order as to it may seem just. [288]

Subrule (9)*(a)*: If the plaintiff applies for summary judgment in respect of a claim not falling within the terms of subrule (1), the court may order that the action be stayed until the plaintiff has paid the defendant's costs and may further order that such costs be taxed as between attorney and client. [289] Such an order may also be made if, in the opinion of the court, the plaintiff knew that the defendant relied on a contention which would entitle him to leave to defend. [290] The court ordered the plaintiff to pay the defendant's taxed costs on the scale as between attorney and client and that the main action be stayed pending taxation of such costs and payment thereof where the plaintiff had totally disregarded the defendant's right to defend the action by putting the latter through unnecessary trouble and expense to oppose the application and thereafter conceding that leave to defend had to be given. [291]

Subrule (9)*(b)*: In any case in which summary judgment was refused and in which the court after trial gives judgment for the plaintiff substantially as prayed, and the court finds that summary judgment should have been granted had the defendant not raised a defence which

in its opinion was unreasonable, the court may order the plaintiff's costs of the action to be taxed as between attorney and client. [292]

The purpose of this subrule is, on the one hand, to discourage unnecessary or unjustified applications for summary judgment, and, on the other, to discourage defendants from setting up unreasonable defences. In regard to the first of these it is to be borne in mind that in many instances the object of bringing an application for summary judgment is to force the defendant to put his defence on affidavit. A plaintiff is not entitled to do this unless it is clear that there are good grounds for making the application. [293]

If it is thought that the application for summary judgment is likely to dispose of the defendant's defences for good because the issues involved do not depend on evidence which might be disputed at the trial but comprise questions of law alone, there is no reason why the plaintiff, if unsuccessful, should not pay the costs of the application. [294]

Rescission of summary judgment. A summary judgment can be rescinded under the common law. [295] A summary judgment, if erroneously granted, may be rescinded in terms of rule 42. [296] If the summary judgment application was unopposed, the judgment consequently granted in the absence of the defendant cannot be rescinded under rule 31(2)*(b).* [297]

It has been held [298] that a court is empowered to grant on application for security for costs in terms of rule 47(1), or under s 13 of the (now repealed) Companies Act 61 of 1973, in respect of an application for the rescission of a judgment granted by agreement between the parties in summary judgment proceedings.

Appeal. The refusal of summary judgment is an interlocutory order and is not appealable. [299] The grant of summary judgment is a final order and appealable. [300] The refusal to rescind a summary judgment that was granted by default is appealable. [301]

Summary judgment under the National Credit Act 34 of 2005 ('the NCA'). The notes that follow are not intended to be exhaustive of summary judgment under the NCA and the reader is referred to the works on the NCA for a more comprehensive discussion of the law.

In *BMW Financial Services (South Africa) (Pty) Ltd v Dr MB Mulaudzi Inc?* [302] the defendant defaulted on his rental payments for the lease of a motor vehicle from the plaintiff. The plaintiff sent it a notice in terms of s 129(1) of the NCA, notifying it of the default. After expiry of the ten-day period stipulated in the notice, the defendant paid an amount in excess of the arrears to the plaintiff. That payment notwithstanding, the plaintiff proceeded to cancel the agreement and issue a summons for payment of such additional amounts of money as might then be due. In due course, the plaintiff applied for summary judgment. In resisting the application, the defendant raised two defences: (1) that, when it paid all of the arrears under the agreement before it was cancelled, the agreement had been reinstated; and (2) that, when it paid the arrears, the notice in terms of s 129(1) fell away and, if the plaintiff wished to claim such arrears as might have existed when it issued summons, it had to issue a new notice in terms of s 129(1). The court held that the defendant had disclosed a bona fide defence to the plaintiff's claim and the defendant was given leave to defend the action.

In *FirstRand Bank Ltd v Olivier?* [303] the plaintiff sought summary judgment for the defendant's arrears on a mortgage bond. The defendant resisted the application on the basis that he was over-indebted as defined in s 79(1) of the NCA, in that he was unable to satisfy all of his obligations under the bond in a timely manner and, in terms of s 85 of the NCA, he therefore sought an order referring the matter directly to a debt counsellor with the request that the debt counsellor evaluate his circumstances and make a recommendation to the court in terms of s 86(7) of the NCA. At the hearing of the matter counsel for the plaintiff argued that it was relevant to the exercise of the court's discretion that the defendant had failed to apply to a debt counsellor in terms of s 86(1) of the NCA to have himself declared over-indebted prior to institution of the proceedings; that the defendant was required to explain that failure to the court; and that his action in awaiting legal debt enforcement by the plaintiff, rather than voluntarily taking steps to have himself declared over-indebted, amounted to an abuse of the court process.

AR Erasmus J held that—

(i) while a defendant's failure to make application in terms of s 86(1) might, in proper circumstances, influence the court in the exercise of its discretion, in the present matter the defendant could not be faulted for not acting timeously in terms of s 86(1). The relevant portions of the NCA commenced on 1 June 2007. Summons was served on the defendant on 23 October 2007. There was no indication of how long before that date the s 129(1) notice was served on the defendant. It was not clear whether the defend-ant had sufficient time before receiving the s 129(1) notice to act in terms of s 86(1). That procedure was, at the time, still very new and not generally known;

(ii) it was also relevant to the exercise of the court's discretion in terms of s 85 that the defendant had failed to act upon receipt of the s 129(1) notice and that he furthermore failed to explain or ask for condonation of his failure;

(iii) the defendant's alleged over-indebtedness was due largely to his maintenance of the credit agreement with the plaintiff. If he sold the property, he would no longer be over-indebted;

(iv) in the circumstances, the defendant had failed to show good and sufficient reasons for the granting of the relief sought by him.

In *Standard Bank of South Africa Ltd v Panayiotts* [304] Masipa J declined to follow *FirstRand Bank Ltd v Olivier*. [305] In the *Standard Bank* case the plaintiff sought summary judgment in the amount of the arrears on a mortgage bond, plus an order declaring the immovable property over which the bond was held to be specifically executable. The defendant admitted his indebtedness to the plaintiff, but in resisting the application raised his 'over-indebtedness' as intended in s 79(1) of the NCA as defence to the plaintiff's application for summary judgment. The defendant counter-applied for a referral of the matter to a debt counsellor as intended in s 85*(a)* of the NCA, alternatively for a declaration of over-indebtedness as intended in s 85*(b)* of the NCA.

Masipa J held that—

(i) a consumer who raised a defence of over-indebtedness had to plead and prove that this was indeed the case;

(ii) in exercising its discretion under s 85, the court had to bear in mind the rules governing the summary judgment process, in particular the provisions of rule 32;

(iii) the application in terms of s 85 had to be bona fide and not raised solely as a delaying tactic. The debtor had to provide sufficient information to support his allegation of over-indebtedness. That meant such a consumer had to plead and prove, on a balance of -probabilities, that he was over-indebted as intended in s 79;

(iv) the bona fide requirement meant that the defendant's allegations could not be inherently and seriously unconvincing;

(v) the defendant had not shown that he was over-indebted as intended in s 79. Such facts as had been disclosed were so vague and bald that they did not amount to a bona fide defence; the NCA did not envisage that a consumer could claim to be over-indebted while he retained possession of the goods which formed the subject matter of the agreement. The goods had to be sold to reduce the defendant's indebtedness;

(vi) the longer the property remained in the hands of the defendant, the more likely it was that the plaintiff would suffer prejudice. Considerations of fairness required that the circumstances of both the defendant and the plaintiff be given equal consideration. Where it was clear that the credit provider was likely to be greatly prejudiced if the protection measures provided by the provisions of the NCA were implemented, courts should be reluctant to assist the defendant;

(vii) the defendant had failed to show that he was over-indebted or make out a case for the relief sought.

Summary judgment was accordingly granted against the defendant.

In *FirstRand Bank Ltd v Carl Beck Estates* [306] the plaintiff sought summary judgment for the first defendant's arrears on a mortgage bond, as against both the first defendant and its surety (the second defendant), jointly and severally. In resisting the application, the defendants alleged three defences: (1) the plaintiff had failed to comply with the provisions of the NCA by failing to give notice to each of them in terms of s 129 of the NCA prior to commencement of legal proceedings; (2) the amount claimed by the plaintiff was incorrect inasmuch as it failed to take into account a single payment made by the first defendant after issue of summons; and (3) the plaintiff had given no advance warning of changes in the variable interest rates agreed to be levied on the capital amount of the first defendant's indebtedness.

Satchwell J held—

(i) as to (1), that the NCA did not apply to the credit agreement entered into between the parties. The first defendant, a juristic person, had entered into a large credit agreement, and thus one of the exemptions in s 4 had to apply to it — either the value or turnover exceeded the threshold and s 4(1)*(a)* exempted the application of the NCA to the agreement, or the value or turnover was below the threshold and s 4(1)*(b)* exempted the application of the NCA;

(ii) accordingly, that the plaintiff was not obliged to provide the first defendant with notice in terms of s 129 before instituting legal proceedings;

(iii) that while a suretyship agreement did fall within the definition of 'credit agreement' in the guise of a 'credit guarantee', s 8(5) required the

credit guarantee to apply to the obligations of another consumer in terms of 'a credit transaction to which this Act applies'. Since the first defendant's obligations to the plaintiff were not incurred in terms of a 'credit transaction' to which the NCA applied, the second defendant could not claim that the NCA applied to him on the basis that his obligations arose in terms of a 'credit guarantee' as intended in s 8(5);

(iv) as to (2), that the first defendant had disclosed a defence in respect of part of the plaintiff's claim, namely the payment after issue of summons and before filing of the application for summary judgment. There was no reason why the court could not itself reduce the amount in respect of which summary judgment was granted where it was apparent from the papers that there had been a reduction in the amount claimed in the summons;

(v) as to (3), that there was no merit in the submission: properly construed the relevant clause did not mean that the mortgagor was entitled to advance notification of a variation in interest rates before it became effective.

Judgment was accordingly granted in favour of the plaintiff for that part of the claim that had been proved, and the defendant given leave to defend the balance of the claim.

In *Standard Bank of South Africa Ltd v Van Vuuren* [307] the court, in dismissing an application for summary judgment and granting leave to defend, stated: [308]

> 'Although the respondent did not raise this defence initially, it is clear as a matter of law that a s 129(1)*(b)* notice is a mandatory requirement. A reference to such a notice was included in the summons and it is stated that it was served upon the respondent. The notice was handed to a sheriff and he affixed the notice, according to his return of service, to the main gate of the premises. The problem is, however, that he attached it to the main gate of a property other than the mortgaged property. There is, accordingly, no evidence that the notice in terms of s 129 reached the respondent. This is a bona fide defence.'

In *Nelson Mandela Bay Metropolitan Municipality v Nobumba NO* [309] the court, in reviewing and setting aside a decision of a magistrate to strike an application for summary judgment from the roll, summarized its findings as follows: [310]

> 'This judgment has made three principal findings. They are: first, that, as the power of a municipality to levy rates is derived from s 2(1) of the Rates Act [i e the Local Government: Municipal Property Rates Act 6 of 2004], and the obligation on the part of a property owner to pay arises from this source and not from an agreement, the NCA, being

> concerned only with credit agreements, does not apply to proceedings instituted by a municipality to recover due but unpaid rates; secondly, as the entitlement of a municipality to claim interest on due but unpaid rates also arises from legislation, the NCA does not apply to the municipality's claim for interest *a tempora* [*sic*] *morae*; and thirdly, because the municipality has not established that its standard form service agreement meets the requirement of s 4(6)*(b)*(ii) of the NCA, it consequently did not establish that the agreement is exempted by s 4(6)*(b)* from the definition of a credit facility and that the NCA did not apply to claims for due but unpaid service charges.
>
> In striking the matter from the roll and not granting summary judgment for the claim of R28 708,45 in respect of due but unpaid rates, as well as interest on that amount, the magistrate committed a gross irregularity. He was, however, entitled to conclude as he did that, in respect of the claim for due but unpaid service charges and interest thereon, the municipality had not established that the NCA did not apply. He committed a gross irregularity in striking the matter from the roll, rather than dismissing the application for summary judgment in relation to this claim.'

In *Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd and Another (No 1)* [311] the plaintiff applied for summary judgment on four mortgage bonds and an order declaring the immovable property specially executable. The defendants resisted the application on the ground, *inter alia*, that paragraphs *(a)*, *(b)* and *(c)* of s 4(1) of the NCA were unconstitutional in so far as they provided that the NCA does not apply to a juristic person. The court held that these paragraphs are constitutional and valid, and granted summary judgment. In *Standard Bank of South Africa Ltd v Hunkydory Investments 188 (Pty) Ltd and Others (No 2)* [312] the National Credit Regulator and the Minister of Trade and Industry filed affidavits in opposition to a constitutional challenge in the summary judgment proceedings. The court observed [313] that affidavits should not have been filed and that if interested parties wished to be heard, their contribution should be confined to making legal submissions on the papers filed in accordance with rule 32.

In *Carter Trading (Pty) Ltd v Blignaut* [314] the defendant opposed an application for summary judgment on the basis *(a)* that the acknowledgment of debt in question was a credit agreement described in s 8(4)*(f)* of the NCA and *(b)* that the plaintiff had failed to comply with the provisions of ss 129 and 130 of the NCA. The court held [315] that the acknowledgment of debt was indeed a credit agreement as envisaged in the NCA, and because of the plaintiff's failure to comply with the provisions of ss 129 and 130, the summons had to be regarded as having been prematurely issued, and so summary judgment could not be considered. It was further held [316] that the provisions of s 130(4) of the NCA could in the circumstances find application, since, bearing in mind that the merits of the case were not in dispute, the plaintiff might resume its application for summary judgment after the remedies referred to in s 129(1)*(a)* (if resorted to) had been exhausted. The application was accordingly postponed *sine die* with costs and it was ordered that the plaintiff may not set the application down until it has:

(i) complied with the provisions of ss 129(1)*(a)* and 130 of the NCA; and

(ii) become entitled to resume the application upon completion of the remedies referred to in s 129(1)*(a)* of the NCA (if resorted to or otherwise).

In *Standard Bank of South Africa Ltd v Rockhill* [317] Epstein AJ held that s 129(1)*(a)* of the NCA requires the credit provider to draw the default to the notice of the consumer in writing and does not require the consumer to receive the notice. A credit provider will therefore discharge its obligation of *delivering* the notice (as required by s 129) by sending it to the postal address selected by the consumer. The court further held [318] that non-compliance with s 129(1)*(a)* does not constitute a bona fide defence for purposes of summary judgment. The following order was made:

> '1. The application for summary judgment is adjourned *sine die*.
> 2. The plaintiff is afforded an opportunity to provide a notice to the defendants as contemplated in ss 129 and 130 of the NCA. If such notice is sent by registered mail to the defendants it shall be deemed to have been delivered to them 14 days after posting by the plaintiff.
> 3. The plaintiff may set down the application for summary judgment on notice to the defendants not less than 10 days after the notice in terms of s 129 has been delivered.
> 4. Save for the direction herein given relating to the sending of the notice contemplated in s 129, the defendants' rights in terms of the NCA remain unaffected.
> 5. The plaintiff is directed to pay the defendants' wasted costs caused by the adjournment of the application for summary judgment.'

In *Rossouw v FirstRand Bank Ltd* [319] the Supreme Court of Appeal laid down that:

(i) there is compliance with the provisions of s 129(1)*(a)* of the NCA if the credit provider *despatches* the required notice to the consumer in the manner chosen by the latter (e g, by sending it to the consumer's last known address by registered mail);

(ii) actual receipt of the notice is the consumer's responsibility;

(iii) for purposes of summary judgment, the summons must contain sufficient allegations regarding the method employed in delivering the notice in accordance with the provisions of s 65(2) of the NCA and the agreement.

The Supreme Court of Appeal further held [320] that:

(i) s 130(2) of the NCA does not limit a credit provider's claim under a mortgage agreement to only the proceeds of the sale of the mortgaged property;

(ii) a certificate of balance handed up to a court in summary judgment proceedings perform a useful function and is not hit by the provisions of rule 32(4).

In *Sebola v Standard Bank of South Africa Ltd* [321] the Constitutional Court qualified the decision of the Supreme Court of Appeal in the *Rossouw* case and laid down that:

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> 'The requirement that a credit provider provide notice in terms of s 129(1)*(a)* to the consumer must be understood in conjunction with s 130, which requires delivery of the notice. The statute, though giving no clear meaning to "deliver", requires that the credit provider seeking to enforce a credit agreement aver and prove that the notice was delivered to the consumer. Where the credit provider posts the notice, proof of registered despatch to the address of the consumer, together with proof that the notice reached the appropriate post office for delivery to the consumer, will in the absence of contrary indication constitute sufficient proof of delivery. If, in contested proceedings the consumer avers that the notice did not reach him, the court must establish the truth of the claim. If it finds that the credit provider has not complied with s 129(1), it must in terms of s 130(4)*(b)* adjourn the matter and set out the steps the credit provider must take before the matter may be resumed.'

In *Kubyana v Standard Bank of South Africa Ltd* [322] the Constitutional Court finally laid the matter concerning notice of default to a consumer to rest, albeit not in respect of proceedings that originated as an application for summary judgment. Having considered the relevant provisions of the NCA and the judgment in *Sebola*, the Constitutional Court came to the following conclusion: [323]

> '[39] In sum, the Act does not require a credit provider to bring the contents of a section 129 notice to the subjective attention of a consumer. Rather, delivery consists of taking certain steps, prescribed by the Act, to apprise a reasonable consumer of the notice. Thus, a credit provider's obligation may be to make the section 129 notice available to the consumer by having it delivered to a designated address. When the consumer has elected to receive notices by way of the postal service, the credit provider's obligation to deliver generally consists of dispatching the notice by registered mail, ensuring that the notice reaches the correct branch of the Post Office for collection and ensuring that the Post Office notifies the consumer (at her designated address) that a registered item is awaiting her collection. This is subject to the narrow qualification that, if these steps would not have drawn a reasonable consumer's attention to the section 129 notice, delivery will not have been effected. The ultimate question is whether delivery as envisaged in the Act has been effected. In each case, this must be determined by evidence.

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> [54] The Act prescribes obligations that credit providers must discharge in order to bring section 129 notices to the attention of consumers. When delivery occurs through the postal service, proof that these obligations have been discharged entails proof that—
>
> *(a)* the section 129 notice was sent via registered mail and was sent to the correct branch of the Post Office, in accordance with the postal address nominated by the consumer. This may be deducted from a track and trace report and the terms of the relevant credit agreement;
>
> *(b)* the Post Office issued a notification to the consumer that a registered item was available for her collection;
>
> *(c)* the Post Office's notification reached the consumer. This may be inferred from the fact that the Post Office sent the notification to the consumer's correct postal address, which inference may be rebutted by an indication to the contrary as set out in [52] above; and
>
> *(d)* a reasonable consumer would have collected the section 129 notice and engaged with its contents. This may be inferred if the credit provider has proven *(a)*–*(c)*, which inference may, again, be rebutted by a contrary indication: an explanation of why, in the circumstances, the notice would not have come to the attention of a reasonable consumer.'

In *Nedbank Ltd v Wizard Holdings (Pty) Ltd* [324] it was, *inter alia*, held that the NCA does not apply to a suretyship only if the principal debt does not arise from a credit agreement which falls within the scope of the NCA. Summary judgment was accordingly granted against the defendants.

In *Nedbank Limited v Mokhonoana* [325] it was held that, for purposes of summary judgment proceedings, it will suffice if the ten business day-period required by s 130(1)*(a)* of the NCA for the delivery of the notice contemplated in s 129(1)*(b)* thereof, has elapsed between delivery of the said notice and service of the summons.

In *FirstRand Bank Ltd v Collett* [326] the court, in granting summary judgment, held that a credit provider is entitled to give notice to terminate a debt review after the debt counsellor's proposal had been referred to a magistrate's court, and pending a declaration of reckless credit, or an order of rearrangement in terms of the NCA. After such termination the credit provider may issue summons and, if a notice of intention to defend is delivered, [327] apply for summary judgment. In *FirstRand Bank Ltd t/a First National Bank v Seyffert and three similar cases* [328]

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and *FirstRand Bank Ltd v Mvelase* [329] summary judgment was granted on the basis of similar conclusions.
In *FirstRand Bank Ltd v Fillis* [330] it was held that—

(i) once the credit review process has commenced in terms of the NCA, s 88(3) of the NCA prevents a credit provider from exercising or enforcing, by litigation or other judicial process, any right or security under any credit agreement until—
   '*(a)* the consumer is in default under the credit agreement; and
   (b) one of the following has occurred: (i) an event contemplated in subsection (1)*(a)* through *(c)*; or (ii) the consumer defaults on any obligation in terms of a re-arrangement agreed between the consumer and credit providers, or audit by a court or the Tribunal';

(ii) it follows, as a matter of interpretation, that once the jurisdictional requirement set out in s 88(3)*(a)* coexists with any of the jurisdictional requirements set out in s 88(3)*(b)*, the credit provider is at liberty to proceed and to exercise and enforce, by litigation or other judicial process, any right or security under his credit agreement without further notice;

(iii) the restraint placed upon a credit provider in consequence of a credit review process and a rearrangement order in terms of s 86(7)*(c)* of the NCA does, where the consumer has defaulted on the debt rearrangement order, fall away on the express authority of s 88(3).

Summary judgment was accordingly granted.

In *SA Taxi Securitisation (Pty) Ltd v Mbatha and two similar cases* [331] it was held that since the enactment of the NCA, there seems to be a tendency for defendants, in opposing applications for summary judgment, to make bland allegations that they are 'over-indebted' or that there has been 'reckless credit'. These allegations, like any other allegations made in a defendant's affidavit opposing summary judgment, should not, in view of the principles enunciated in *Breitenbach v Fiat* [332] be 'inherently and seriously unconvincing', should contain a reasonable amount of verificatory detail, and should not be 'needlessly bald, vague or sketchy'. Consequently, a bald allegation that there was 'reckless credit' or there is 'over-indebtedness' will not suffice. [333]

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It was held [334] that the NCA does not permit a consumer to retain the security (i e vehicle), while at the same time suspending the consumer's obligations under the credit agreement in anticipation of an order setting and suspending the credit agreement on the basis of recklessness. Consequently, the applications for summary judgment were granted and the defendants ordered to return the respective vehicles in question.

In *Collett v FirstRand Bank Ltd*, [335] the Supreme Court of Appeal held, *inter alia*, the following:

> 'Overindebtedness is not a defence on the merits. However, because of its extraordinary and stringent nature, a court has an overriding discretion to refuse an application for summary judgment. It would be proper for a defendant to raise termination of the debt review by reason of the credit provider's failure to participate or its bad faith in participating when application for summary judgment is made. These issues may be raised, not as a defence to the claim, but as a request to the court not to grant summary judgment in the exercise of its over-riding discretion. Of course, sufficient information on which the request for a resumption of the debt review is based must be placed before the court.'

In *Mercedes Benz Financial Services South Africa (Pty) Ltd v Dunga* [336] the court, in exercising its residual discretion whether to grant or refuse summary judgment, refused it on the basis that:

(i) the plaintiff's termination of the debt review in terms of s 86(10) of the NCA was valid;

(ii) in terms of s 86(11) of the NCA, the defendant would still be able to ask for an order, in the present proceedings, that the debt review resume;

(iii) in summary judgment proceedings, therefore, the defendant would have been able to raise the defence that he intends to ask for such an

order;

(iv) in order to show that he has a bona fide defence, the defendant would presumably have to allege that he has reasonable prospects of obtaining a favourable order in the debt review application;

(v) it was apparent from the defendant's opposing affidavit, that he did not have in mind a defence based on s 86(11) of the NCA;

(vi) the defendant may yet be able to make out a defence based on the provisions of s 86(11), and should accordingly be afforded an opportunity to do so.

In *FirstRand Bank Ltd v Adams* [337] it was held that a court may, during summary judgment proceedings initiated by a credit provider, on application by the consumer in terms of s 86(11) of the NCA, order an adjournment to allow the consumer an opportunity to argue that the debt-review process should be resumed so as to provide an opportunity for further negotiations between the parties. In order to decide whether there would be any benefit in so postponing the summary judgment application, the court must strike a balance between the interests of the parties, taking into consideration the nature of the dispute, whether the parties acted in good faith during their negotiations, and the prospect of a rearrangement that, within the parameters of the NCA, will ensure the discharge of the consumer's obligations. Any proposal in this regard by the consumer has to fall within the parameters of the NCA, so that it may not be based on a reduction of the contracted interest rate.

In *Hattingh v Hattingh* [338] the plaintiff and defendant had for many years conducted business. In 2009 they decided to terminate their commercial relationship and common business interests by means of a written termination agreement which, *inter alia*, provided that the defendant would pay to the plaintiff an amount of R6.6 million by means of annual instalments of R734 000. In default of timeous payment the entire unpaid balance would become due together with interest calculated at the overdraft rate. In an application for summary judgment in an action subsequently instituted by the plaintiff against the defendant for payment of the unpaid balance together with interest, the defendant argued that the agreement amounted to an acknowledgement of debt and that the plaintiff should have served a notice under s 129 of the NCA before issuing summons. The plaintiff contended that the agreement was not governed by the NCA. The court held that, although the plaintiff prima facie fell within the definition of a 'credit provider' as intended in s 1 of the NCA, the relationship between the parties was not governed by the NCA and, accordingly, notice under s 129 was not required. Summary judgment was therefore granted.

In *Hardenberg v Nedbank Ltd* [339] the appellants, in an appeal against summary judgment granted against them pursuant to the credit provider's termination of their debt review in terms of s 86(10) of the NCA, advanced as the sole a ground of appeal that they had not been in default of the credit agreement concerned at the time that they applied for debt review, and therefore that the credit provider had not been entitled to terminate the debt review. They based their appeal on the dictum in *Collett v FirstRand Bank Ltd* [340] that '(i)f the consumer applies for debt review before he is in default the credit provider may not terminate the process'. The full court, however, held [341] that nothing in the formulation of s 86(10) suggested that the default must exist at the time that the consumer applied to be declared over-indebted. The court held [342] that in the context of what the SCA was asked to decide in *Collett*, it was not the intention to hold that the default must exist at the time that the consumer applied for debt review, in order for a credit provider to be entitled to exercise the right of termination conferred by s 86(10), and even if it were, such a finding could not be regarded as part of the *ratio* of the judgment of the SCA. The appeal accordingly fell to be dismissed.

In *Land and Agricultural Development Bank v Chidawaya* [343] it was held that for the purposes of compliance with the notice requirements in terms of s 129 of the NCA, the service of a s 129 notice by means of attaching it to the summons does not suffice. It is clear from the wording of the NCA that a s 129 notice is a pre-litigation step and must accordingly precede litigation. If litigation is embarked upon without compliance with s 129 then s 130(4) of the NCA provides the procedural mechanism to remedy this defect. To hold otherwise, and dispense with the requirement of the pre-litigation notice, would render s 130(4) irrelevant and would ignore the directives of the legislature, as well as undermine the purpose of the NCA as set out in s 3, namely to address issues such as overindebtedness and debt restructuring.

The application for summary judgment was accordingly postponed *sine die* and the plaintiff was directed to serve s 129(1)*(a)* notices on the defendants.

1 See RSC Ord 14; *Meek v Kruger* 1958 (3) SA 154 (T) at 156–8; *Edwards v Menezes* 1973 (1) SA 299 (NC) at 303; and see Hoppenstein (1958) 75 *SALJ* 211; *Sekretaris van Landboukrediet en Grondbesit v Loots* 1973 (3) SA 296 (NC) at 298.

2 *Eisenberg's v OFS Textile Distributors (Pty) Ltd* 1949 (3) SA 1047 (O) at 1054; *Lombard v Van der Westhuizen* 1953 (4) SA 84 (C) at 89; *Shingadia v Shingadia* 1966 (3) SA 24 (R) at 25–6; *Chrismar (Pvt) Ltd v Stutchbury* 1973 (4) SA 123 (R) at 124–5; *Barclays National Bank Ltd v Smith* 1975 (4) SA 675 (D) at 684; *Bonnet v Snaar Dorpsontwikkelaars (Edms) Bpk* 1978 (4) SA 212 (D) at 217; *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) at 11C–G. See also *Dane v Mortgage Insurance Corp* [1894] 1 QB 54 (CA); *Robinson & Co v Lynes* [1894] 2 QB 577; *Roberts v Plant* [1895] 1 QB 597 (CA).

3 In *Anglo-Italian Bank v Wells & Davis* 38 LT 197 (CA) at 199 it was held that the procedure 'is intended to prevent a man clearly entitled to money from being delayed, where there is no fairly arguable defence to be brought forward'; and see *Meek v Kruger* 1958 (3) SA 154 (T) at 156 and 158; *Edwards v Menezes* 1973 (1) SA 299 (NC) at 303; *Sekretaris van Landboukrediet en Grondbesit v Loots* 1973 (3) SA 296 (NC) at 298F; *Paul v Peter* 1985 (4) SA 227 (N) at 230E; *First National Bank of South Africa Ltd v Myburgh* 2002 (4) SA 176 (C) at 180C; *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) at 11C–G; *Majola v Nitro Securitisation 1 (Pty) Ltd* 2012 (1) SA 226 (SCA) at 232F–G.

4 1958 (3) SA 154 (T).

5 At 157.

6 *Meek v Kruger* 1958 (3) SA 154 (T) at 159–60; *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) at 11C–G; *Majola v Nitro Securitisation 1 (Pty) Ltd* 2012 (1) SA 226 (SCA) at 232F–G. How this came about is clearly stated by Van den Heever J in *Edwards v Menezes* 1973 (1) SA 299 (NC) at 303. See also *Sekretaris van Landboukrediet en Grondbesit v Loots* 1973 (3) SA 296 (NC) at 298.

7 See *Jacobs v Booth's Distillery Co* 85 LT 262 (HL) in which case Lord James of Herford said that there was a fair issue to be tried; and see the authorities referred to in n 1 above. In *Majola v Nitro Securitisation 1 (Pty) Ltd* 2012 (1) SA 226 (SCA) the following was stated (at 232F–G):
'It is a procedure that is intended "to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights".'

8 See, for example, *Eisenberg's v OFS Textile Distributors (Pty) Ltd* 1949 (3) SA 1047 (O) at 1054; *Skead v Swanepoel* 1949 (4) SA 763 (T) at 767; *Mowschenson & Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W) at 366; *Edwards v Menezes* 1973 (1) SA 299 (NC) at 303; *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 304–5; *Shepstone v Shepstone* 1974 (2) SA 462 (N) at 467; *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 423; *Fourlamel (Pty) Ltd v Maddison* 1977 (1) SA 333 (A) at 347; *Van Wyngaardt NO v Knox* 1977 (2) SA 636 (T); *Border Concrete Engineering Co (Pty) Ltd v Knickelbein* 1982 (2) SA 648 (E) at 651; *Gulf Steel (Pty) Ltd v Rack-Write Bop (Pty) Ltd* 1998 (1) SA 679 (O) at 683G–H; *Tesven CC v South African Bank of Athens* 2000 (1) SA 268 (SCA) at 275H–I; *Marsh v Standard Bank of SA Ltd* 2000 (4) SA 947 (W) at 950A; *First National Bank of South Africa Ltd v Myburgh* 2002 (4) SA 176 (C) at 180C–D; *Mercantile Bank Ltd v Star Power CC* 2003 (3) SA 309 (T) at 312G; *Absa Bank Ltd v Le Roux* 2014 (1) SA 475 (WCC) at 476H–477J and 478I–J. In *Dowson & Dobson Industrial Ltd v Van der Werf* 1981 (4) SA 417 (C) it is said at 419:
'An ever increasing reluctance to grant summary judgment in the face of opposition is evident from the more recent decisions in the South African Courts.'
See also *District Bank Ltd v Hoosain* 1984 (4) SA 544 (C) at 550; *Standard Krediet Korporasie v Botes* 1986 (4) SA 946 (SWA) and 1987 *De Rebus* 163–7.

9 2009 (5) SA 1 (SCA) at 11G–12D.

10 In *Absa Bank Ltd v Le Roux* 2014 (1) SA 475 (WCC) Binns-Ward J observed (at 477I–J and 478I–J):
'The judgment of the Supreme Court of Appeal in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA), in which it was suggested (at paragraph 33) that perhaps the time had come to stop describing summary judgment as a "drastic" remedy, did not purport to derogate from the explanation of the proper application of rule 32 set out in *Maharaj*. On the contrary, Navsa JA coupled that suggestion with the enjoinder to defendants that, instead of seeking refuge under the labels that suggest a draconian character to the remedy, in the hope of making the courts reluctant to grant summary judgment, they should "concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the *Maharaj* case at 425G–426E". (Corbett JA was treating of subrule 32(3) at the passage referred to by Navsa JA. Rule 32(3) prescribes the requirement that must be satisfied by a defendant that delivers an affidavit in opposition to an application for summary judgment.)'
In *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) Corbett JA said (at 425G–426E):
'Under Rule 32(3), upon the hearing of an application for summary judgment, the defendant may either give security to the plaintiff for any judgment which may be given, or satisfy the Court by affidavit or, with the leave of the Court, by the oral evidence of himself or any other person who can swear positively to the fact that he has a *bona fide* defence to the action.
Such affidavit or evidence must disclose fully the nature and grounds of the defence and the material facts relied upon therefor. If the defendant finds security or satisfies the Court in this way, then, in terms of Rule 32(7), the Court is bound to give leave to defend and the action proceeds in the ordinary way. If the

defendant fails either to find security or to satisfy the Court in this way, then, in terms of Rule 32(5), the Court has a discretion as to whether to grant summary judgment or not (see *Gruhn v M Pupkewitz & Sons (Pty) Ltd* 1973 (3) SA 49 (A) at p.58). If on the hearing of the application it appears that the defendant is entitled to defend as to part of the claim, then, in terms of Rule 32(6), the Court is bound to give him leave to defend as to that part and to enter judgment against him for the balance of the claim, unless he has paid such balance into Court.

Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a *bona fide* defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: *(a)* whether the defendant has "fully" disclosed the nature and grounds of his defence and the material facts upon which it is founded, and *(b)* whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both *bona fide* and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be. The word "fully", as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a *bona fide* defence. (See generally *Herb Dyers (Pty) Ltd v Mohamed* 1965 (1) SA 31 (T); *Caltex Oil (SA) Ltd v Webb and Another*, 1965 (2) SA 914 (N); *Arend v Astra Furnishers (Pty) Ltd*, *supra* at pp. 303–4; *Shepstone v Shepstone* 1974 (2) SA 462 (N)). At the same time the defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea; nor does the Court examine it by the standards of pleading. (See *Estate Potgieter v Elliott* 1948 (1) SA 1084 (C) at p. 1087; *Herb Dyers* case, *supra* at p. 32.)'

11 *Maisel v Strul* 1937 CPD 128; *Mowschenson & Mowschenson v Mercantile Acceptance Corpo-ration of SA Ltd* 1959 (3) SA 362 (W); *Gruhn v M Pupkewitz & Sons (Pty) Ltd* 1973 (3) SA 49 (A); *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C); *Shepstone v Shepstone* 1974 (2) SA 462 (N); *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A); *Bank van die Oranje Vrystaat Bpk v OVS Kleiwerke (Edms) Bpk* 1976 (3) SA 804 (O) at 806–7; *District Bank Ltd v Hoosain* 1984 (4) SA 544 (C) at 550; *Pansera Builders Suppliers (Pty) Ltd v Van der Merwe (t/a Van der Merwe's Transport)* 1986 (3) SA 654 (C) at 669; *SA Bank of Athens Ltd v Van Zyl* 2005 (5) SA 93 (SCA) at 102E; *Nair v Chandler* 2007 (1) SA 44 (T) at 46H–47B. In *Gulf Steel (Pty) Ltd v Rack-Hire Bop (Pty) Ltd* 1998 (1) SA 679 (O) it was held (at 683H–684B) that, before even considering whether the defendant has established a bona fide defence, the court must be satisfied that the plaintiff's claim has been clearly established and that his pleadings are technically in order; if either of these two requirements is not met, the court is obliged to refuse summary judgment, even if the defendant has failed to put up any defence or has put up a defence which did not meet the standard required to resist summary judgment. In *Buttertum Property Letting (Pty) Ltd v Dihlabeng Local Municipality* [2016] 4 All SA 895 (FB) Moloi J and Daffue J held (at paragraph [31]) that the *Gulf Steel* case 'has put the bar a bit too high for a plaintiff' and (at paragraphs [31]–[34] and the cases there referred to) that prejudice to a defendant resulting from a defective application is a material factor to be taken into account by a court in deciding to refuse summary judgment.

12 *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 227D–H; *Marsh v Standard Bank of SA Ltd* 2000 (4) SA 947 (W) at 950A–B.

13 *Maisel v Strul* 1937 CPD 128; *Skead v Swanepoel* 1949 (4) SA 763 (T) at 767; and see *Standard Bank of SA Ltd v Naude* 2009 (4) SA 669 (E) at 672C–676D. See also *Sekretaris van Landboukrediet en Grondbesit v Loots* 1973 (3) SA 296 (NC) at 298.

14 *Mowschenson & Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W); *Misid Investments (Pty) Ltd v Leslie* 1960 (4) SA 473 (W) at 474; *Fischereigesellschaft F Busse & Co KG v African Frozen Products (Pty) Ltd* 1967 (4) SA 105 (C) at 111; *Pillay v Andermain (Pty) Ltd* 1970 (1) SA 531 (T) at 534; *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C); *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 423; *Lohrman v Vaal Ontwikkelingsmaatskappy (Edms) Bpk* 1979 (3) SA 391 (T) at 394–6; *Bill Troskie Motors v Motor Spares Centre (Edms) Bpk* 1980 (2) SA 961 (O) at 963; *District Bank Ltd v Hoosain* 1984 (4) SA 544 (C); *Pansera Builders Supplies (Pty) Ltd v Van der Merwe (t/a Van der Merwe's Transport)* 1986 (3) SA 654 (C).

15 *W M Mentz & Seuns (Edms) Bpk v Katzake* 1969 (3) SA 306 (T) at 311–12; *Charsley v Avbob (Begrafnisdiens) Bpk* 1975 (1) SA 891 (E) at 893; *Van den Bergh v Weiner* 1976 (2) SA 297 (T); *Bank van die Oranje Vrystaat Bpk v OVS Kleiwerke (Edms) Bpk* 1976 (3) SA 804 (O) at 807; *Lohrman v Vaal Ontwikkelingsmaatskappy (Edms) Bpk* 1979 (3) SA 391 (T) at 395–6; *Visser v De la Rey* 1980 (3) SA 147 (T) at 149; *Joubert, Owens, Van Niekerk Ing v Breytenbach* 1986 (2) SA 357 (T) at 359–60; *Standard Bank of South Africa Ltd v Roestof* 2004 (2) SA 492 (W) at 497C–F; *Coetzee v Nassimov* 2010 (4) SA 400 (WCC) at 402B–403A. See, however, *ABSA Bank Ltd v Coventry* 1998 (4) SA 351 (N) at 353D–F and *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC* 2010 (5) SA 112 (KZP) at 122F–G, 122I and 123C–D; *Dass and Others NNO v Lowewest Trading (Pty) Ltd* 2011 (1) SA 48 (KZD) at 53C–F.

16 1973 (1) SA 299 (NC) at 304–5.

17 *Edwards v Menezes* 1973 (1) SA 299 (NC) at 304–5.

18 In *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) the Supreme Court of Appeal held (at 12C–D) that the time had perhaps come to discard labels such as 'drastic' and 'extraordinary' and rather to concentrate on the proper application of rule 32.

19 *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd* 2004 (6) SA 29 (SCA) at 35D–F.

20 GN R842 published in *GG* 42497 of 31 May 2019.

21 Paragraph 3 of the Task Team's Memorandum to Role-Players in Respect of Proposed Changes to the Summary Judgment Rule (Rule 32), distributed to role-players under cover of a letter of the Secretary of the Rules Board for Courts of Law dated 27 June 2016.

22 Paragraph 3 of the Task Team's Memorandum to Role-Players in Respect of Proposed Changes to the Summary Judgment Rule (Rule 32), distributed to role-players under cover of a letter of the Secretary of the Rules Board for Courts of Law dated 27 June 2016.

23 Paragraphs 8 and 9 of the Task Team's Memorandum to Role-Players in Respect of Proposed Changes to the Summary Judgment Rule (Rule 32), distributed to role-players under cover of a letter of the Secretary of the Rules Board for Courts of Law dated 27 June 2016.

24 See *Venter v Cassimjee* 1956 (2) SA 242 (N).

25 Rule 32(4).

26 Rule 32(4).

27 *Uranovsky v Pascal* 1964 (2) SA 348 (C); *Hodgetts Timbers (East London) (Pty) Ltd v HBC Properties (Pty) Ltd* 1972 (4) SA 208 (E); *Howff (Pvt) v Tromp's Engineering (Pvt) Ltd* 1977 (2) SA 267 (R) and *Flamingo General Centre v Rossburgh Food Market* 1978 (1) SA 586 (D).

28 See *Edwards v Menezes* 1973 (1) SA 299 (NC) at 304.

29 *Edwards v Menezes* 1973 (1) SA 299 (NC) at 304, where some of the authorities reflecting the opposing attitudes are collected. See also *Sekretaris van Landboukrediet en Grondbesit v Loots* 1973 (3) SA 296 (NC) at 298; *Shepstone v Shepstone* 1974 (2) SA 462 (N) at 462; *Ronnie Reed & Co (OFS) (Pty) Ltd v Kimberley Brake & Clutch (Pty) Ltd* 1977 (3) SA 364 (NC) at 367.

30 *Business Partners Ltd v Trustees, Riaan Botes Family Trust* 2013 (5) SA 514 (WCC) at 519F–G; *Absa Bank Ltd v Expectra 423 (Pty) Ltd* 2017 (1) SA 81 (WCC) at 85G–88C.

31 *Cape Business Bureau (Pty) Ltd v Van Wyk* 1981 (4) SA 433 (C) at 439.

32 By GN R842 in *GG* 42497 of 31 May 2019.

33 *Esso Standard South Africa (Pty) Ltd v Virginia Oils and Chemicals Co (Pty) Ltd* 1972 (2) SA 81 (O) at 83.

34 Cf *Hire-Purchase Discount Co (Pty) Ltd v Ryan Scholz & Co (Pty) Ltd* 1979 (2) SA 305 (SE); *B W Kuttle & Association Inc v O'Connell Manthe and Partners Inc* 1984 (2) SA 665 (C). See also *Northern Cape Scrap & Metals (Edms) Bpk v Upington Radiators & Motor Graveyard (Edms) Bpk* 1974 (3) SA 788 (NC) at 793–4; *Cape Business Bureau (Pty) Ltd v Van Wyk* 1981 (4) SA 433 (C) at 439 and the notes to subrule (2)*(a)* s v 'Within 15 days after the date of delivery of the plea' below; but see *Jacobs v FPJ Finans (Edms) Bpk* 1975 (3) SA 345 (O).

35 *Weinkove v Botha* 1952 (3) SA 178 (C). See also *Abbott v Nolte* 1951 (2) SA 419 (C); *Du Toit v De Beer* 1955 (1) SA 469 (T); *H I Lockhat (Pty) Ltd v Domingo* 1979 (3) SA 696 (T); *Standard Bank of SA Ltd v SA Fire Equipment (Pty) Ltd* 1984 (2) SA 693 (C).

36 See the notes to rule 32(2)*(a)* s v 'Notice of application' below.

37 *Bonugli v Standard Bank of South Africa Ltd* 2012 (5) SA 202 (SCA) at 208E–210B.

38 *Rief v Hofmeyr* (1924) 45 NLR 375; and see *Hugo Franco (Pty) Ltd v Gordon* 1956 (4) SA 482 (SR); *Van Wyngaardt NO v Knox* 1977 (2) SA 636 (T) at 639. See also *Allied Building Society v Malic Construction and Development Co CC* 1991 (4) SA 432 (T) where Heyns J held (at 436D) that rule 32(1) does not permit summary judgment to be granted for an order declaring property specially hypothecated to be executable. It is respectfully submitted that this judgment should not be followed: an order declaring property specially hypothecated to be executable is ancillary relief to the main claim, which must, of course, fall within the ambit of rule 32(1). See also *Nedperm Bank Ltd v Verbri Products CC* 1993 (3) SA 214 (W) at 218–9; *First National Bank of SA Ltd v Ngcobo* 1993 (3) SA 490 (D) at 491–2; *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; *Nedcor Bank Ltd v Lisinfo 61 Trading (Pty) Ltd* 2005 (2) SA 432 (C) at 438H–439D; *Standard Bank of SA Ltd v Snyders and Eight Similar Matters* 2005 (5) SA 610 (C) at 620A, overruled on appeal (but not on this point) in *Standard Bank of South Africa Ltd v Saunderson* 2006 (2) SA 264 (SCA); *Ivoral Properties (Pty) Ltd v Sheriff, Cape Town* 2005 (6) SA 96 (C) at 110B–D; *Nedbank Ltd v Mortinson* 2005 (6) SA 462 (W) at 469J–470A; *Absa Bank Ltd v Ntsane* 2007 (3) SA 554 (T) at 557G; *FirstRand Bank Ltd v Lenea* 2008 (3) SA 491 (E) at 492F–493D. See further the notes to rule 46(1)*(a)*(ii) s v 'Immovable property has been declared to be specially executable by the court' and to rule 46A(1) s v 'This rule applies whenever' below.

39 *Spilhaus & Co Ltd v Coreejees* 1966 (1) SA 525 (C) at 528; *Evelyn Haddon & Co Ltd v Leojanko (Pty) Ltd* 1967 (1) SA 662 (O); *Nichas & Son (Pty) Ltd v Papenfus* 1970 (2) SA 316 (O); *All Purpose Space Heating Co of SA (Pty) Ltd v Schweltzer* 1970 (3) SA 560 (D) at 562–3; *Leymac Distributors (Pty) Ltd v Hoosen* 1974 (4) SA 524 (D) at 528. A claim for the delivery and transfer of immovable property is outside the scope of summary judgment (*Van Wyngaardt NO v Knox* 1977 2 SA 636 (T)). Summary judgment proceedings are inappropriate for deciding whether a penalty is out of proportion to the prejudice suffered, or the extent to which it should be reduced in terms of the Conventional Penalties Act 15 of 1962, and the plaintiff who applies for summary judgment in such circumstances may be ordered to pay the defendant's costs (*Premier Finance Corp Ltd v Steenkamp* 1974 (3) SA 141 (D)). See also, in this regard, *Von Zahn v Credit Corporation of South Africa Ltd* 1963 (3) SA 554 (T) at 557; and see *Peters v Janda NO* 1981 (2) SA 339 (Z) at 343. A claim for delivery of specific movable property or alternatively for payment therefor does not fall within the rule (cf *Hugo Franco (Pty) Ltd v Gordon* 1956 (4) SA 482 (SR) at 483; *All Purpose Space Heating Co of SA (Pty) Ltd v Schweltzer* 1970 (3) SA 560 (D) at 562).

40 1984 (1) SA 297 (W) at 299E.

41 2009 (4) SA 68 (SCA) at 70I–71A.

42 Cf *Wolhuterskop Beleggings (Edms) Bpk v Bloemfontein Engineering Works (Pty) Ltd* 1965 (2) SA 122 (O).

43 *Nedcor Bank Ltd v Hennop* 2003 (3) SA 622 (T) at 626A–C.

44 *Nedbank Ltd v Van der Berg* 1987 (3) SA 449 (W), applying the *dicta* in *Astra Furnitures (Pty) Ltd v Arend* 1973 (1) SA 446 (C) at 450. See further *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A); *Nedbank Ltd v Abstein Distributors (Pty) Ltd* 1989 (3) SA 750 (T); *Donelly v Barclays National Bank Ltd* 1990 (1) SA 375 (W); *Interland Durban (Pty) Ltd v Walters NO* 1993 (1) SA 223 (C).

45 *Rossouw v FirstRand Bank Ltd* 2010 (6) SA 439 (SCA) at 454C.

46 *Lester Investments (Pty) Ltd v Narshi* 1951 (2) SA 464 (C); *Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd* 1962 (1) SA 736 (T). In *Botha v W Swanson & Company (Pty) Ltd* 1968 (2) PH F85 (CPD) Corbett J put the test as follows:
'[A] claim cannot be regarded as one for "a liquidated amount in money" unless it is based on an obligation to pay an agreed sum of money or is so expressed that the ascertainment of the amount is a mere matter of calculation.'
See also Commercial Bank of Namibia Ltd v Trans Continental Trading (Namibia) 1992 (2) SA 66 (NmHC) at 72–3; First National Bank of South Africa Ltd v Myburgh 2002 (4) SA 176 (C) at 186E–H; Nedcor Bank Ltd v Lisinfo 61 Trading (Pty) Ltd 2005 (2) SA 432 (C) at 437H; Tredoux v Kellerman 2010 (1) SA 160 (C) at 166D–E; Blakes Maphanga Inc v Outsurance Insurance Co Ltd 2010 (4) SA 232 (SCA) at 240D–241C.

47 *Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd* 1962 (1) SA 736 (T) at 739; and see *Erasmus v Arcade Electric* 1962 (3) SA 418 (T) at 419; *Lombard v Pongola Sugar Milling Co Ltd* 1963 (4) SA 119 (D) at 128; *Adcorp Spares PE (Pty) Ltd v Hydromulch (Pty) Ltd* 1972 (3) SA 663 (T) at 665 and 668.

48 *Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd* 1962 (1) SA 736 (T), disapproving of *Kark v Proctor* 1961 (1) SA 752 (W), in which a doctor's claim for a specified sum 'in respect of professional services rendered ... at defendant's special instance and request' was not allowed.

49 At 738–9.

50 At 738, relying on *Whelan v Oosthuizen* 1937 TPD 304 at 311 and *Lester Investments (Pty) Ltd v Narshi* 1951 (2) SA 464 (C) at 470. In *Standard Bank of South Africa Ltd v Renico Construction (Pty) Ltd* 2015 (2) SA 89 (GJ) at 91I–94B Sutherland J found it 'hard to admire or to genuinely appreciate' the fact that a critical dimension of the concept of 'liquidity' is 'an intrinsically uncertain and unavoidable variable component: a randomly selected judge's discretion'. According to Sutherland J liquidity ought, ideally, to be a hard fact, and a judicial discretion about a fact provoked some misgivings. Nevertheless, he considered himself bound by the weight of authority that the decision as to whether the amount of a debt is capable of speedy and prompt ascertainment is a matter left to the discretion of the court in each particular case.

51 *Conradie v Landro en Van der Hoff (Edms) Bpk* 1965 (2) SA 304 (GW); *Windsor Diesels (Pvt) Ltd v Shangani Sawmills (Pvt) Ltd* 1969 (3) SA 145 (R); *International Harvester v Ferreira* 1975 (3) SA 831 (SE) applied in *Border Concrete Engineering Co (Pty) Ltd v Knickelbein* 1982 (2) SA 648 (E); *Quality Machine Builder v M I Thermocouples (Pty) Ltd* 1982 (4) SA 591 (W) (criticizing the conflicting judgment in *Oos-Randse Bantoesakeadministrasieraad v Santam Versekeringsmaatskappy Bpk (2)* 1978 (1) SA 164 (W)); *Shane & Stoler v Munro-Scott t/a House of Bernardi* 1984 (2) SA 507 (W); and see *Kleynhans v Van der Westhuizen NO* 1970 (1) SA 565 (O).

52 *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); *Botha v W Swanson & Co (Pty) Ltd* 1968 (2) PH F85 (CPD); *Leymac Distributors (Pty) Ltd v Hoosen* 1974 (4) SA 524 (D); but see the earlier Cape decision in *Lester Investments (Pty) Ltd v Narshi* 1951 (2) SA 464 (C).

53 In *S Dreyer & Sons Transport v General Services* 1976 (4) SA 922 (C) at 923.

54 1962 (1) SA 736 (T).

55 In *S Dreyer & Sons Transport v General Services* 1976 (4) SA 922 (C) Diemont J distinguished the *Consolidated Fish Distributors (Pty) Ltd v Sargeant, Jones, Valentine & Co* 1966 (4) SA 427 (C) on the ground that the former case was concerned with a business contract between two commercial firms and there was nothing to suggest that the charges were vague or flexible, whereas in the latter case the problem related to what a reasonable fee would be for an audit. With respect, the distinction appears to be highly artificial, but it appears likely (especially in view of what is said at 924 *in fine*) that in future the Western Cape Division of the High Court will follow the decision in the *Fatti's Engineering* case.

56 *Neves Builders & Decorators v De la Cour* 1985 (1) SA 540 (C) at 543C–544F; *Tredoux v Kellerman* 2010 (1) SA 160 (C) at 166G. If from the defence as disclosed it appears to the court that proof of the claim may be protracted and difficult rather than prompt, that is a factor which may be taken into account in deciding whether or not the claim is liquidated (*Neves's* case at 544G and *Tredoux's* case at 166G–167A).

57 *Paver Bros v De Beer* 1916 OPD 236. See also *Mahomed Essop (Pty) Ltd v Sekhukhulu & Son* 1967 (3) SA 728 (D) and *Jacobsen Van den Berg SA (Pty) Ltd v Triton Yachting Supplies* 1974 (2) SA 584 (O).

58 *Highman & Marks v Graham & Smith* (1903) 13 CTR 219.

59 *Oblewitz v Cortis* (1902) 19 SC 162.

60 *Becker v Forster* 1913 CPD 962.

61 *Rooknadien v Khan* 1915 CPD 394.

62 *Paver Bros v De Beer* 1916 OPD 236. See also *Ermelo Mills (Pty) Ltd v Federated Farmers Agency* 1956 (2) SA 24 (D).

63 *Bester v Wheeler* 1913 OPD 37.

64 *Lundy v Carter* (1881) 2 NLR 132.

65 *Wilson v Power* (1886) 7 NLR 165.

66 See *Arkell & Douglas v Hoffman* (1905) 22 SC 1.

67 *Meddent Medical Scheme v Avalon Brokers (Pty) Ltd* 1995 (4) SA 862 (D).

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

69 *London & Lancashire Insurance Co v De Wet* 1938 CPD 577.

70 If interest is claimed at a rate above the legal rate (prescribed under s 1(2) of the Prescribed Rate of Interest Act 55 of 1975) or from a date prior to the date of summons, the summons must allege the ground justifying such claim, e g agreement or customary dealing (*Shuster v Von Alvensleben* 1922 SWA 47; *Renaults v Mayekiso* 1922 EDL 89; *Cape Town Board of Executors v Van Eeden* 1922 CPD 168; *Standard Bank of South Africa Ltd v Lotze* 1950 (2) SA 698 (C); *Borten v Peninsula Construction Co (Pty) Ltd* 1959 (4) SA 366 (C); *Hendricks v Barnett* 1975 (1) SA 765 (N) at 771).

71 *Martin v Le Vatte* 1914 CPD 212.

72 *Boezak v Calvert's Executor* (1906) 23 SC 57. See also *Saayman v Grady* (1900) 10 CTR 588.

73 *Warmsley v James* (1889) 15 SC 120; *Union Government (Minister of Railways & Harbours) v Saayman* 1914 CPD 612; *Berringer v Berringer* 1953 (1) SA 38 (E); *Standwin Investments (Pvt) Ltd v Helfer* 1961 (4) SA 470 (SR); *Belingwe Stores (Pvt) Ltd v Munyembe* 1972 (4) SA 460 (R); and see *Supreme Diamonds (Pty) Ltd v Du Bois; Regent Neckware Manufacturing Co (Pty) Ltd v Ehrke* 1979 (3) SA 444 (W).

74 *Wolhuterskop Beleggings (Edms) Bpk v Bloemfontein Engineering Works (Pty) Ltd* 1965 (2) SA 122 (O).

75 *Brown Bros & Taylor (Pty) Ltd v Smeed* 1957 (2) SA 498 (C); *Kleynhans v Van der Westhuizen NO* 1970 (2) SA 742 (A); *International Hardware Corp (Rhod) (Pvt) Ltd v Appleton* 1971 (1) SA 404 (R); *S Polwarth & Co (Pvt) Ltd v Zanombairi* 1972 (2) SA 688 (R); *Colrod Motors (Pty) Ltd v Bhula* 1976 (3) SA 836 (W). In a claim for summary judgment for money allegedly stolen, the fact of a conviction or acquittal is highly relevant. If the defendant was granted leave to appeal against his conviction of theft, summary judgment proceedings may be instituted against him only after the appeal or after the lapsing of the time for appealing (*Tomes v Sithole* 1982 (1) SA 62 (Z)). See also (1982) 99 *SALJ* 355; *Nedcor Bank Ltd v Behardien* 2000 (1) SA 307 (C) at 311G.

76 *National Milling Co Ltd v Mohamed* 1966 (3) SA 22 (R).

77 *Meddent Medical Scheme v Avalon Brokers (Pty) Ltd* 1995 (4) SA 862 (D) at 865F–G.

78 *Ford Bros v Clayton* 1906 TS 2025.

79 *Hughes v Johnston* 1 LLR 339.

80 *Per* Ward J in *Paver Bros v De Beer* 1916 OPD 236. An allegation that a principal is dead and has left no estate liquidates the debt.

81 *Rief v Hofmeyr* (1924) 45 NLR 375.

82 *National Bank v Marx & Aaronson* 1923 TPD 69, overruled in *LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd* 1974 (1) SA 747 (A) but not on this point. In a more recent decision, however, default judgment was granted on a client's untaxed bill. The court held that in order to establish a liquidated claim for the purposes of default judgment, an attorney suing for fees and disbursements need not allege that the amount of his client's untaxed bill of costs is fair and reasonable, or usual or normal, as these allegations will be implied from the averment that the attorney's mandate has been duly performed and that the fees are due (*Deeb v Pimter; Shane & Stoler v Munroe-Scott t/a House of Bernardi* 1984 (2) SA 507 (W) at 509B–C, cited with approval in *Chapman Dyer Miles & Moorhead Inc v Highmark Investment Holdings CC* 1998 (3) SA 608 (D) at 612 (C)). In *Tredoux v Kellerman* 2010 (1) SA 160 (C) (cited with approval in *Blakes Maphanga Inc v Outsurance Insurance Co Ltd* 2010 (4) SA 232 (SCA) at 240D–241C) the full court held (at 166D–167E) that claims for payment of their untaxed professional fees instituted by an advocate and an attorney against a lay client were not for liquidated amounts of money and did not fall within the ambit of rule 32(1). It was also held (at 167E–G) that neither the advocate nor the attorney could recover fees in the absence of prior agreement with the client or taxation.

83 *Lucke v Luyt* (1899) 16 SC 268, not followed in *Cloete v Boshoff* 1924 GWL 4, where costs of transfer in similar circumstances were ordered to be paid.

84 *Du Toit v Grobler* 1947 (3) SA 213 (SWA), but see the criticism of this decision in *Colrod Motors (Pty) Ltd v Bulha* 1976 (3) SA 836 (W).

85 *SA Fire and Accident Insurance Co Ltd v Hickman* 1955 (2) SA 131 (C).

86 See *Leymac Distributors (Pty) Ltd v Hoosen* 1974 (4) SA 524 (D); *Oos-Randse Bantoesakeadministrasie-raad v Santam Versekeringsmaatskappy Bpk (2)* 1978 (1) SA 164 (W) at 168; *Probert v Baker* 1983 (3) SA 229 (D); *Pick 'n Pay Retailers (Pty) Ltd h/a Hypermarkets v Dednam* 1984 (4) SA 673 (O).

87 *Kleynhans v Van der Westhuizen NO* 1970 (2) SA 742 (A) at 750–1. See also the judgment of the court *a quo* in the *Kleynhans* case (1970 (1) SA 565 (O) at 567–8), and *Gratus & Gratus (Prop) Ltd v Jackelow* 1930 WLD 226; *Ex parte Sustor Manufacturing Industries (Pty) Ltd* 1983 (4) SA 364 (E).

88 *All Purpose Space Heating Co of SA (Pty) Ltd v Schweltzer* 1970 (3) SA 560 (D) at 564–5.

89 *Lewis and Sachs v Meyer* 1904 TS 898; *Kelhor v Samuels* (1890) 7 *CLJ* 52; *Van der Vyver v Gee* (1908) 25 SC 632; *Lansdell v Sam* 1912 CPD 335.

90 *Werdmuller v Joubert* (1900) 14 EDC 164. See also the notes to subrule (1) s v 'Such claims in the summons as is only' above.

91 *Smit Kruger Inc v Benvenuti Tiles (Pty) Ltd* [1999] 1 All SA 242 (C).

92 *Field NNO v Compuserve* 1991 (4) SA 490 (Z); *Smit Kruger Inc v Benvenuti Tiles (Pty) Ltd* [1999] 1 All SA 242 (C).

93 One of the common-law incidents of ownership is that the owner 'may claim his property wherever found from whomsoever holding it' (*Chetty v*

Naidoo 1974 (3) SA 13 (A) at 20A–E; *Yarram Trading CC t/a Tijuana Spur v Absa Bank Ltd* 2007 (2) SA 570 (SCA) at 577F).

94 *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at 21D–F; *Wormald NO v Kambule* 2006 (3) SA 562 (SCA) at 568E.

95 *Belmont House (Pty) Ltd v Gore and Another NNO* 2011 (6) SA 173 (WCC) at 178A and 178D–F; *AJP Properties CC v Sello* 2018 (1) SA 535 (GJ) at 539D.

96 *AJP Properties CC v Sello* 2018 (1) SA 535 (GJ) at 539D-541E. See also *Lovius and Shtein v Sussman* 1947 (2) SA 241 (O); *Van Reenen v Kruger* 1949 (4) SA 27 (W) at 29; and see *Voortrekker Pers Bpk v Rautenbach* 1947 (2) SA 47 (A); *EP du Toit Transport (Pty) Ltd v Windhoek Municipality* 1976 (3) SA 818 (SWA)178B–D; *Belmont House (Pty) Ltd v Gore and Another NNO* 2011 (6) SA 173 (WCC) at 178B–C.

97 *Belmont House (Pty) Ltd v Gore and Another NNO* 2011 (6) SA 173 (WCC) at 178D–F.

98 2003 (1) SA 113 (SCA).

99 *Wedge Steel (Pty) Ltd v Wepener* 1991 (3) SA 444 (W).

100 If interest is claimed at a rate above the legal rate (prescribed under s 1(2) of the Prescribed Rate of Interest Act 55 of 1975) or from a date prior to the date of summons, the summons must allege the ground justifying such claim, e g agreement or customary dealing (*Shuster v Von Alvensleben* 1922 SWA 47; *Renaults v Mayekiso* 1922 EDL 89; *Cape Town Board of Executors v Van Eeden* 1922 CPD 168; *Standard Bank of South Africa Ltd v Lotze* 1950 (2) SA 698 (C); *Borten v Peninsula Construction Co (Pty) Ltd* 1959 (4) SA 366 (C); *Hendricks v Barnett* 1975 (1) SA 765 (N) at 771).

101 See *All Purpose Space Heating Co of SA (Pty) Ltd v Schweltzer* 1970 (3) SA 560 (D) at 562–3.

102 Cf *Vesta Estate Agency v Schlom* 1991 (1) SA 593 (C); and see *Steeledale Reinforcing (Cape) v Ho Hup Corporation SA (Pty) Ltd* 2010 (2) SA 580 (ECP) at 583H and the notes to subrule (1) s v 'A plea' above.

103 Rule 32(2)*(c)*. See *Papenfus v Nichas & Son (Pty) Ltd* 1969 (4) SA 234 (O), not following and reversing *Nichas & Son (Pty) Ltd v Papenfus* 1969 (2) SA 494 (O).

104 *FirstRand Bank Ltd v Beyer* 2011 (1) SA 196 (GNP) at 200D.

105 *Absa Bank Ltd v Botha NO* 2013 (5) SA 563 (GNP) at 564D–565B, 565H–566E, 567B–E, 568C–H and 570D–E. On the question of compliance with the regulations governing the administration of an oath or affirmation, see *Lohrman v Vaal Ontwikkelingsmaatskappy (Edms) Bpk* 1979 (3) SA 391 (T) at 396–8; *Cape Sheet Metal Works (Pty) Ltd v J J Calitz Builder (Pty) Ltd* 1981 (1) SA 697 (O); *Standard Bank of SA Limited v Redmond* (unreported, GP case no 80438/2015 dated 2 June 2016). In *Macsteel Services Centres SA (Pty) Ltd v Profin Trading 35 CC* (unreported, GP case no 96119/2015 dated 17 June 2016) the affidavit opposing summary judgment was deposed to by a male person but the certificate of the commissioner of oaths read as if the deponent were a female. In allowing an affidavit by the commissioner of oaths explaining the error, the court (at paragraphs [5]–[9]) distinguished *Absa Bank Ltd v Botha (supra*) and was not prepared to adopt 'a highly technical approach to the affidavit' (at paragraph [9]). In *FirstRand Bank Limited t/a Fnb Home Loans v Freddie* (unreported, FB case no 4075/2016 dated 16 November 2016) it was held (at paragraphs [5]–[14]) that the plaintiff was entitled to file supplementary affidavits of the deponent to the plaintiff's affidavit in support of its application for summary judgment and the commissioner of oaths before whom the deponent appeared, explaining that the deponent in fact appeared before the commissioner at Johannesburg (as stated in the commissioner's certificate) despite the latter's stamp having reflected her business address as being at Boksburg.

106 *Engineering Requisites (Pty) Ltd v Adam* 1977 (2) SA 175 (O); *Nkondo v Minister of Police* 1980 (2) SA 362 (O).

107 *International Shipping Co (Pty) Ltd v F C Bonnet (Pty) Ltd* 1975 (1) SA 853 (D).

108 Rule 32(2)*(c)*. See *W M Mentz & Seuns (Edms) Bpk v Katzake* 1969 (3) SA 306 (T); *Western Bank Bpk v De Beer* 1975 (3) SA 772 (T); *Credcor Bank Ltd v Thomson* 1975 (3) SA 916 (D); *Bank van die Oranje Vrystaat Bpk v OVS Kleiwerke (Edms) Bpk* 1976 (3) SA 804 (O). If the cause of action is founded in part on a liquid document, a copy of such document must still be annexed to the affidavit (*Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A)).

109 *Sand & Co Ltd v Kollias* 1962 (2) SA 162 (W) at 164–5; *Barclays National Bank Ltd v Love* 1975 (2) SA 514 (D) at 515. See also *Forhat Stud Farm (Edms) Bpk v Barclays Nasionale Bank Bpk* 1978 (3) SA 118 (T) at 120–1.

110 See the notes to this subrule s v 'Who can swear positively' below.

111 *Sand & Co Ltd v Kollias* 1962 (2) SA 162 (W) at 165; *Barclays National Bank Ltd v Love* 1975 (2) SA 514 (D) at 515; *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 423. See also *Forhat Stud Farm (Edms) Bpk v Barclays National Bank Bpk* 1978 (3) SA 118 (O) at 120–1.

112 *Sand & Co Ltd v Kollias* 1962 (2) SA 162 (W) at 165; *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 423H; and see *Trust Bank van Afrika Bpk v Haarhoff* 1986 (4) SA 446 (NC).

113 *FirstRand Bank Ltd v Fillis* 2010 (6) SA 565 (ECP) at 569C–G.

114 This requirement precludes the affidavit being deposed to by someone whose knowledge of the facts is purely a matter of hearsay (*Mowschenson & Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W) at 366D; *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC* 2010 (5) SA 112 (KZP) at 115F–G; *FirstRand Bank Ltd v Mvelase* 2011 (1) SA 470 (KZP) at 487E–F; *Old Mutual Life Assurance Co (SA) Ltd v Simtrade 4 CC t/a OBC Chicken* 2013 (6) SA 571 (GSJ) at 573A–B). In *Absa Bank Ltd v Le Roux* 2014 (1) SA 475 (WCC) Binns-Ward J observed that s 15(4) of the Electronic Communications and Transactions Act 25 of 2002 could have been of assistance to the plaintiff in that case. He stated the following (at 484E–486A):
'[19] The requirements of subrule 32(2) might, on the basis of the approach explained in *Maharaj*, and applied in cases such as *Shackleton Credit Management* and *Han-Rit Boerdery*, appear on their face to place an impossible burden on institutional plaintiffs such as banks, particularly in the modern age in which much of their business is conducted facelessly on computer networks and recorded electronically. This much was in fact suggested in so many words by Monama J in *FirstRand Bank Ltd t/a Wesbank v Ego Specialised Services CC* [2012] ZAGPJHC 47 (3 April 2012) in paras 8–11. I do not believe, however, that this is necessarily so. Electronically stored data falling within the defined meaning of "data message" in s 1 of the Electronic Communications and Transactions Act 25 of 2002 is admissible in evidence in terms of s 15 of the Act. Section 15(4) of the Act provides:
"A data message made by a person in the ordinary course of business, or a copy or printout of or an extract from such data message certified to be correct by an officer in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self regulatory organisation or any other law or the common-law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract."
Section 15(4) has a twofold effect. It creates a statutory exception to the hearsay rule and it gives rise to a rebuttable presumption in favour of the correctness of electronic data falling within the definition of the term "data message".
[20] Ordinarily, only a witness with direct knowledge of the facts is competent to testify to their existence. It was for that reason that the word "positively" has generally been construed in the manner explained in the passage from *Maharaj* quoted earlier. But what is the position when, by way of an exception to the general rule, hearsay evidence is admissible to prove the facts in issue? If the hearsay evidence would be admissible to prove the facts at the trial, why should a deponent who is qualified to produce the hearsay evidence not be able to depose to an affidavit in support of summary judgment on the basis of such evidence? Provided that he is appropriately qualified to give the evidence, why should he be regarded as disabled from swearing positively to the facts? After all, the evidence he could produce at the trial would, notwithstanding its hearsay character, nevertheless positively establish the facts, subject, of course, to the effect of any rebutting evidence adduced by the defendant. In my view, on a proper construction thereof, subrule 32(2) does not preclude the deponent to the supporting affidavit from relying on hearsay evidence to swear positively to the facts when he could permissibly, as a matter of law, adduce such hearsay evidence for the purpose of proving the facts at a trial of the action. The case in support of such a construction is made even stronger when there is a statutory presumption in favour of the correctness of such evidence. Thus, if the deponent to a supporting affidavit in summary judgment proceedings were to be able to aver that he is (i) an officer in the service of the plaintiff, (ii) that the salient facts — which should be particularised — are electronically captured and stored in the plaintiff's records, (iii) that he had regard thereto, (iv) that he is authorised to certify and has executed a certificate certifying the facts contained in such record to be correct, and (v) on the basis thereof is able to swear positively that the plaintiff will — having regard to the provisions of s 15(4) of Act 25 of 2002 — be able to prove the relevant facts at the trial of the action by producing the electronic record or an extract thereof, the requirements of subrule 32(2) would be satisfied. I think that it would be salutary for the deponent to any such affidavit also to explain why the evidence is not being adduced by means of the affidavit of someone with direct personal knowledge of the facts.
[21] It is not necessary, however, to determinatively decide whether the Electronic Communications and Transactions Act could have been of assistance to the plaintiff in the current matter. The supporting affidavit did not identify the nature and content of the records to which the deponent had reference. It did not identify the facts established by reference to the records, or contain any averments that would indicate the admissibility of their content in terms of s 15 of Act 25 of 2002. As a result it was inadequate on any approach; its content did not assure the court that the deponent could swear positively to the facts and verify the cause of action and the amount claimed.
[22] In the circumstances the application for summary judgment falls to be dismissed by reason of the plaintiff's non-compliance with subrule 32(2). Counsel were agreed that in that event it would not be necessary B to deal with the second defendant's application in terms of s 165 of the Companies Act, or the first defendant's application for the postponement thereof. The point in limine holds good for all three defendants. The application for a postponement of the summary judgment application in respect of the third defendant therefore obviously falls away.'

115 *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 423A–B; *Standard Bank of SA Ltd v Secatsa Investments (Pty) Ltd* 1999 (4) SA 229 (C) at 234B; *Absa Bank Ltd v Le Roux* 2014 (1) SA 475 (WCC) at 477B–H and 478A–B.

116 *Kurz v Ainhirn* 1995 (2) SA 408 (D) at 410B.

117 *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 423; *Joel's Bargain Store v Shorkend Bros (Pty) Ltd* 1959 (4) SA 263 (E) at 266; *Misid Investments (Pty) Ltd v Leslie* 1960 (4) SA 473 (W); *Sand & Co Ltd v Kollias* 1962 (2) SA 162 (W); *Fischereigesellschaft F Busse & Co KG v African Frozen Products (Pty) Ltd* 1967 (4) SA 105 (C) at 109–10; *Flamingo Knitting Mills (Pty) Ltd v Clemans* 1972 (3) SA 692 (D) at 694–5; *Sekretaris van Landboukrediet en Grondbesit v Loots* 1973 (3) SA 296 (NC); *Barclays National Bank Ltd v Love* 1975 (2) SA 514 (D) at 515–16; *Jeffrey v Andries Zietsman (Edms) Bpk* 1976 (2) SA 870 (T) at 871; *Bank van die Oranje Vrystaat Bpk v OVS Kleiwerke (Edms) Bpk* 1976 (3) SA 804 (O) at 808; *Bowman NO v Howe* 1980 (2) SA 226 (W) at 228; *Paddy's Investments (Pty) Ltd v Moolman Bros Construction Co (Pty) Ltd* 1982 (1) SA 249 (D) at 250–1; *Mmabatho Food Corporation (Pty) Ltd v Fourie* 1985 (1) SA 318 (T) at 320–1; *Kurz v Ainhirn* 1995 (2) SA 408 (D) at 410C; *Kaplan Estates (Pty) Ltd v Eastern Metropolitan Substructure* 1999 (2) SA 1017 (W) at 1020–2.

118 *Fischereigesellschaft F Busse & Co KG v African Frozen Products (Pty) Ltd* 1967 (4) SA 105 (C) at 109–10; *Barclays National Bank Ltd v Love* 1975 (2) SA 514 (D) at 515–16; *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 423; *Standard Bank of SA Ltd v Secatsa Investments (Pty) Ltd* 1999 (4) SA 229 (C) at 234C; *Cape Town Transitional Metropolitan Substructure v Ilco Homes Ltd* 1996 (3) SA 492 (C) at 496A–498F.

119 *Lagos v Grunwaldt* [1910] 1 KB 41 (CA), followed in *Fischereigesellschaft F Busse & Co KG v African Frozen Products (Pty) Ltd* 1967 (4) SA 105 (C); and see *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC* 2010 (5) SA 112 (KZP) at 115E–F. In *Jeffrey v Andries Zietsman (Edms) Bpk* 1976 (2) SA

870 (T) the deponent stated that he was 'under the impression' ('onder die indruk') that the defendant had no bona fide defence. The affidavit was held to be sufficient.

120 *FirstRand Bank Ltd v Beyer* 2011 (1) SA 196 (GNP) at 202D–F.

121 *Conradie v Landro en Van der Hoff (Edms) Bpk* 1965 (2) SA 304 (GW) at 309; and see *Joel's Bargain Store v Shorkend Bros (Pty) Ltd* 1959 (4) SA 263 (E) at 266. These decisions have been criticized on the ground that, especially in the case of a big company with branch offices, the probabilities are that the managing director or general manager will not necessarily have personal knowledge of all transactions entered into by his firm, and that the deponent has to be a person who would be a competent *viva voce* witness to the facts were he to be called (*Pinepipe (Pty) Ltd v Nolec (Pty) Ltd* 1975 (4) SA 932 (W); *Jeffrey v Andries Zietsman (Edms) Bpk* 1976 (2) SA 870 (T)).

122 *Northern Cape Scrap & Metals (Edms) Bpk v Upington Radiators & Motor Graveyard (Edms) Bpk* 1974 (3) SA 788 (NC); *Jeffrey v Andries Zietsman (Edms) Bpk* 1976 (2) SA 870 (T); *Meddent Medical Scheme v Avalon Brokers (Pty) Ltd* 1995 (4) SA 862 (D) at 866I–867A.

123 *Joel's Bargain Store v Shorkend Bros (Pty) Ltd* 1959 (4) SA 263 (E); *Misid Investments (Pty) Ltd v Leslie* 1960 (4) SA 473 (W); *Trekker Investments (Pty) Ltd v Wimpy Bar* 1977 (3) SA 447 (W).

124 *Sand & Co Ltd v Kollias* 1962 (2) SA 162 (W); *Pick 'n Pay Retailers (Pty) Ltd h/a Hypermarkets v Dednam* 1984 (4) SA 673 (O) at 679; *Trust Bank van Afrika Bpk v Haarhoff* 1986 (4) SA 446 (NC) at 449. A deponent who elects not to state that he has personal knowledge of the facts, but relies on an inference to be drawn from the facts that he has such personal knowledge, is the author of his own misfortune if such inference cannot be drawn (*Pinepipe (Pty) Ltd v Nolec (Pty) Ltd* 1975 (4) SA 932 (W)).

125 *Barclays National Bank Ltd v Love* 1975 (2) SA 514 (D) (see especially the remarks of Miller J at 516–17, which have been approved by the Appellate Division in *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 424); *Barclays Western Bank Ltd v Bill Jonker Factory Services (Pty) Ltd* 1980 (1) SA 929 (SE) at 936.

126 *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A), a 'borderline case' (at 424). See also *Trust Bank van Afrika Bpk v Haarhoff* 1986 (4) SA 446 (NC), a case falling 'aan die verkeerde kant van die draad' (at 451).

127 *Standard Bank of SA Ltd v Secatsa Investments (Pty) Ltd* 1999 (4) SA 229 (C) at 234H–235C.

128 *Millman NO v Klein* 1986 (1) SA 465 (C).

129 *Nedcor Bank Ltd v Behardien* 2000 (1) SA 307 (C) at 310F–311C. See, however, *BOE (NBS) Bank Ltd v Baccarella Investments (Pty) Ltd* (unreported, CPD case no 6348/2001 dated 7 September 2001) where Ngwenya J, in refusing summary judgment, held that *ex facie* the affidavit in support of summary judgment, which was deposed to by the provincial manager of the plaintiff's legal department, it did not appear that the facts of the matter fell within the personal knowledge of the deponent and that he could swear positively to the facts as contemplated by this subrule. It was held that, at the very least, it must be apparent from the facts set out in the affidavit that by nature of his position within an enterprise, the deponent had access to the documents and records upon which the cause of action is founded.

130 *Old Mutual Life Assurance Co (SA) Ltd v Simtrade 4 CC t/a OBC Chicken* 2013 (6) SA 571 (GSJ) at 574A–575H.

131 2014 (1) SA 475 (WCC).

132 *Absa Bank Ltd v Le Roux* 2014 (1) SA 475 (WCC) at 479B–H (footnotes omitted).

133 *FirstRand Bank Ltd v Beyer* 2011 (1) SA 196 (GNP) at 199B–F and 200A–C, not following *Wright v McGuinness* 1956 (3) SA 184 (C). See also the unreported cases referred to in *FirstRand Bank Ltd v Huganel Trust* 2012 (3) SA 167 (WCC) at 175H–176H.

134 2012 (3) SA 167 (WCC).

135 *FirstRand Bank Ltd v Huganel Trust* 2012 (3) SA 167 (WCC) at 171F–176H.

136 *FirstRand Bank Ltd v Huganel Trust* 2012 (3) SA 167 (WCC) at 178A–C.

137 2014 (1) SA 475 (WCC).

138 2012 (3) SA 167 (WCC).

139 *Absa Bank Ltd v Le Roux* 2014 (1) SA 475 (WCC) at 481F–482F (footnotes omitted).

140 2014 (4) SA 220 (SCA).

141 See *Rees v Investec Bank Ltd* 2014 (4) SA 220 (SCA) at 221I.

142 *Rees v Investec Bank Ltd* 2014 (4) SA 220 (SCA) at 222E–223B.

143 *Rees v Investec Bank Ltd* 2014 (4) SA 220 (SCA) at 223C–G.

144 *Rees v Investec Bank Ltd* 2014 (4) SA 220 (SCA) at 223G–H.

145 *Rees v Investec Bank Ltd* 2014 (4) SA 220 (SCA) at 223H–I.

146 *Per* Saldulker JA at 224B–228E.

147 Unreported, WCC case no 20266/2015 dated 12 September 2016. See also *Absa Bank Limited v Smith* (unreported, WCC case no 014508/2016 dated 21 October 2016).

148 At paragraphs [5]–[23] (footnotes omitted).

149 *Bowman NO v Howe* 1980 (2) SA 226 (W). See also *Millman NO v Klein* 1986 (1) SA 465 (C) at 470.

150 *Trekker Investments (Pty) Ltd v Wimpy Bar* 1977 (3) SA 447 (W); *Paddy's Investments (Pty) Ltd v Moolman Bros Construction Co (Pty) Ltd* 1982 (1) SA 249 (D) at 250–1. See also *Shell Zimbabwe (Pvt) Ltd v Webb* 1981 (4) SA 749 (Z) at 751–2.

151 *Sekretaris van Landboukrediet en Grondbesit v Loots* 1973 (3) SA 296 (NC). The decision was based on the fact that the defendant's liability to the state could be deposed to only by persons with control over and access to the relevant files of the department concerned, and the defendant had not denied that the deponent had such control and access.

152 *Raphael & Co v Standard Produce Co (Pty) Ltd* 1951 (4) SA 244 (C) at 245; *Fischereigesellschaft F Busse & Co KG v African Frozen Products (Pty) Ltd* 1967 (4) SA 105 (C) at 110; *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC* 2010 (5) SA 112 (KZP) at 115F–117I; and see *Mowschenson & Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W); *Old Mutual Life Assurance Co (SA) Ltd v Simtrade 4 CC t/a OBC Chicken* 2013 (6) SA 571 (GSJ) at 575A–H.

153 *Raphael & Co v Standard Produce Co (Pty) Ltd* 1951 (4) SA 244 (C) at 245; *Fischereigesellschaft F Busse & Co KG v African Frozen Products (Pty) Ltd* 1967 (4) SA 105 (C) at 110; and see *Mowschenson & Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W); *Meddent Medical Scheme v Avalon Brokers (Pty) Ltd* 1995 (4) SA 862 (D) at 866B–G.

154 See rule 17(2) and the notes thereto above.

155 *Barclays Western Bank Ltd v Bill Jonker Factory Services (Pty) Ltd* 1980 (1) SA 929 (SE); *Standard Merchant Bank Ltd v Rowe* 1982 (4) SA 671 (W) at 680.

156 1998 (4) SA 351 (N) at 353D–E; and see *Mowschenson & Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W) at 366C–D. In *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC* 2010 (5) SA 112 (KZP) at 123I–J doubt was expressed as to whether it is entirely correct to say that the court would have no jurisdiction if the required verification has not occurred.

157 2004 (2) SA 492 (W) at 496F–H, followed in *Coetzee v Nassimov* 2010 (4) SA 400 (WCC) at 402B–403A.

158 2010 (5) SA 112 (KZP) at 122F–I.

159 *Strydom v Kruger* 1968 (2) SA 226 (GW); *All Purpose Space Heating Co of SA (Pty) Ltd v Schweltzer* 1970 (3) SA 560 (D); *Trust Bank of Africa Ltd v Hansa* 1988 (4) SA 102 (W). In *Van den Bergh v Weiner* 1976 (2) SA 297 (T) the full court held (at 299G) that the following words appearing in an affidavit in support of an application for summary judgment substantially complied with the provisions of the former rule 32(2):
'(T)he first defendant is truly and lawfully indebted to the plaintiff on the grounds as set out in the summons'.
This decision has been referred to with approval in, inter alia, Lohrman v Vaal Ontwikkelingsmaatskappy (Edms) Bpk 1979 (3) SA 391 (T) at 395; Joubert, Owens, Van Niekerk Ing v Breytenbach 1986 (2) SA 357 (T) at 359; Kruger v Standard Krediet Korporasie Bpk 1988 (1) SA 570 (T) at 573. In Standard Bank of SA Ltd v Secatsa Investments (Pty) Ltd 1999 (4) SA 229 (C) at 235H–236H Van Reenen J distinguished that case on the facts from Van den Bergh v Weiner (supra).

160 *All Purpose Space Heating Co of SA (Pty) Ltd v Schweltzer* 1970 (3) SA 560 (D) at 563; and see *Northern Cape Scrap & Metals (Edms) Bpk v Upington Radiators & Motor Graveyard (Edms) Bpk* 1974 (3) SA 788 (NC); *Dowson & Dobson Industrial Ltd v Van der Werf* 1981 (4) SA 417 (C) at 426–8.

161 *Caltex Oil (SA) Ltd v Crescent Express (Pty) Ltd* 1967 (1) SA 466 (D); *LS Enterprises (Pty) Ltd v Couck* 1971 (1) SA 438 (T); *Dowson & Dobson Industrial Ltd v Van der Werf* 1981 (4) SA 417 (C) at 423; *Trust Bank of Africa Ltd v Hansa* 1988 (4) SA 102 (W).

162 *Pillay v Andermain (Pty) Ltd* 1970 (1) SA 531 (T). This decision is consistent with the approach followed by Watermeyer J in *Spilhaus & Co Ltd v Coreejees* 1966 (1) SA 525 (C), that under the rule as it stands today the plaintiff no longer has to stand or fall by his summons as a whole, but can pick out those claims which fall within the rule and ask for summary judgment on them, to the exclusion of those that do not come within the ambit of the rule.

163 *Diesel Power Plant Hire CC v Master Diggers (Pty) Ltd* 1992 (2) SA 295 (W). See also *Freeball Construction (Pty) Ltd v Lipschitz* 1987 (2) SA 633 (D); *Visser v Incorporated General Insurances Ltd* 1994 (1) SA 472 (T) at 475A–D.

164 *Cape Business Bureau (Pty) Ltd v Van Wyk* 1981 (4) SA 433 (C).

165 *Astra Furnishers (Pty) Ltd v Arend* 1973 (1) SA 446 (C) at 450–1; this decision was overruled on appeal to the full court (see 1974 (1) SA 298 (C)) but not on the principles stated in the text.

166 *Transvaal Spice Works & Butchery Requisites (Pty) Ltd v Conpen Holdings (Pty) Ltd* 1959 (2) SA 198 (W) at 200; and see *Geyer v Geyer's Transport Services (Pty) Ltd* 1973 (1) SA 105 (T).

167 *Prinsloo v Woolbrokers Federation Ltd* 1955 (2) SA 298 (N) at 299E.

168 Cf *Venter v Kruger* 1971 (3) SA 848 (N) at 851; *AE Motors (Pty) Ltd v Levitt* 1972 (3) SA 658 (T); *Rossouw v FirstRand Bank Ltd* 2010 (6) SA 439 (SCA) at 453I–J.

169 *Credcor Bank Ltd v Thomson* 1975 (3) SA 916 (D) at 919G. Due to the difference in wording between this subrule and former magistrates' courts rule

14(2), the decision in *Van Eeden v Sasol Pensioenfonds* 1975 (2) SA 167 (O) at 173D does not apply to High Court practice.

170 *Bank van die Oranje Vrystaat Bpk v OVS Kleiwerke (Edms) Bpk* 1976 (3) SA 804 (O); *Dowson & Dobson Industrial Ltd v Van der Werf* 1981 (4) SA 417 (C) at 420E.

171 *Venter v Cassimjee* 1956 (2) SA 242 (N) at 245.

172 *Fouché v Ehlers* 1957 (4) SA 35 (T), where the signatures of the Registrar of Deeds and the responsible conveyancer were omitted from the copy of the bond served in provisional sentence proceedings. A postponement was allowed in order to effect proper service.

173 See *De Waal v Benson* 1939 OPD 159; *Fouché v Ehlers* 1957 (4) SA 35 (T); *Harding & Parker Ltd v Beukes & Papenfus Ondernemings (Edms) Bpk* 1959 (3) SA 965 (O).

174 *Abraham v Du Plessis* 1962 (3) SA 162 (T); *Van Zyl v Wheeler* 1964 (3) SA 758 (O); *Finansbank Bpk v Klopper* 1981 (1) SA 106 (T) at 113; *Nampak Products Ltd t/a Nampak Flexible Packaging v Sweetcor (Pty) Ltd* 1981 (4) SA 919 (T) at 927.

175 *Raphael & Co v Standard Produce Co (Pty) Ltd* 1951 (4) SA 244 (C); *Mowschenson & Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W) at 366; *H K Gokal (Pty) Ltd v Muthambi* 1967 (3) SA 89 (T) at 89H–90A; *Northern Cape Scrap & Metals (Edms) Bpk v Upington Radiators & Motor Graveyard (Edms) Bpk* 1974 (3) SA 788 (NC) at 793; *Cape Business Bureau (Pty) Ltd v Van Wyk* 1981 (4) SA 433 (C) at 439; *Millman NO v Klein* 1986 (1) SA 465 (C) at 469.

176 *H K Gokal (Pty) Ltd v Muthambi* 1967 (3) SA 89 (T) at 90G–H; but see *Northern Cape Scrap & Metals (Edms) Bpk v Upington Radiators & Motor Graveyard (Edms) Bpk* 1974 (3) SA 788 (NC) at 793–4 and the cases there referred to; *Cape Business Bureau (Pty) Ltd v Van Wyk* 1981 (4) SA 433 (C) at 439.

177 *Visser v De la Rey* 1980 (3) SA 147 (T) at 150.

178 *Rief v Hofmeyer* (1924) 45 NLR 375. It is submitted that it is good practice to give notice thereof to the applicant/plaintiff. Where *ex facie* the document upon which the claim is founded there appears a defect in the cause of action, the court may refuse to enter summary judgment whether or not the defendant has filed an affidavit to oppose it (*Transvaal Spice Works and Butchery Requisites (Pty) Ltd v Conpen Holdings (Pty) Ltd* 1959 (2) SA 198 (W) at 200; and see *Geyer v Geyer's Transport Services (Pty) Ltd* 1973 (1) SA 105 (T)).

179 *Spring and Van den Berg Construction (Pty) Ltd v Banfrevan Properties (Pty) Ltd* 1968 (1) SA 326 (D). See also *Bank van die Oranje Vrystaat Bpk v OVS Kleiwerke (Edms) Bpk* 1976 (3) SA 804 (O). In the former case the defendant was ordered to pay the costs of the application for summary judgment, in the latter costs were reserved for determination in the main action.

180 *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C). The judgment leaves open the question whether there is any duty on such a defendant to give notice of his intention to raise such an issue. It is submitted that the giving of such notice to the applicant constitutes good practice.

181 *Morris v Autoquip (Pty) Ltd* 1985 (4) SA 398 (W) at 399C–400G. See also *Verrijdt v Honeydew Tractors & Implements (Pty) Ltd* 1981 (1) SA 787 (T) at 789E–H; *Slabbert v Volkskas Beperk* 1985 (1) SA 141 (T) at 145F–146C.

182 *Mervis Bros v Schmidt t/a Programmed Language Course* 1991 (1) SA 313 (W). See further *Cinemark (Pty) Ltd v Alfetta Tune-Up Centre* 1979 (4) SA 802 (W).

183 *Spring and Van den Berg Construction (Pty) Ltd v Banfrevan Properties (Pty) Ltd* 1968 (1) SA 326 (D). See also *Bank van die Oranje Vrystaat Bpk v OVS Kleiwerke (Edms) Bpk* 1976 (3) SA 804 (O). In the former case the defendant was ordered to pay the costs of the application for summary judgment, in the latter costs were reserved for determination in the main action.

184 GN R842 published in *GG* 42497 of 31 May 2019.

185 *Oos-Randse Bantoesakeadministrasieraad v Santam Versekeringsmaatskappy Bpk (2)* 1978 (1) SA 164 (W). It is submitted that the defendant may file affidavits by more than one person when one person alone cannot depose to the facts constituting a bona fide defence to the claim. See in this regard the reasoning in *International Shipping Co (Pty) Ltd v F C Bonnet (Pty) Ltd* 1975 (1) SA 853 (D) at 854, where it is stated that a plaintiff may file more than one affidavit if one person alone cannot swear positively to the facts verifying the cause of action and the amount claimed.

186 *Slabbert v Volkskas Bpk* 1985 (1) SA 141 (T) at 144.

187 *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T); *Gilinsky v Superb Launderers and Dry Cleaners* 1978 (3) SA 807 (C); *District Bank Ltd v Hoosain* 1984 (4) SA 544 (C); *Standard Bank of SA v Friedman* 1999 (2) SA 456 (C); *Marsh v Standard Bank of South Africa Ltd* 2000 (4) SA 947 (W) at 949C.

188 *Standard Merchant Bank Ltd v Rowe* 1982 (4) SA 671 (W) at 676–7.

189 *Nedbank Ltd v Van der Berg* 1987 (3) SA 449 (W) at 452G; *Chairperson, Independent Electoral Commission v Die Krans Ontspanningsoord (Edms) Bpk* 1997 (1) SA 244 (T) at 247F–249G; and see *Mayibuye Centre–CD-Rom Publications v Workgroup Holdings (Pty) Ltd* [1998] All SA 105 (A) at 109*d*. See, however, *Johnstone v Wildlife Utilisation Services (Pvt) Ltd* 1966 (4) SA 685 (R).

190 *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426; and see *Die Afrikaanse Pers Bpk v Neser* 1948 (2) SA 295 (C) at 297; *Mowschenson & Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W) at 366; *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 303; *Venter v Kruger* 1971 (3) SA 848 (N) at 852.

191 Cf *Stofberg v Lochner* 1946 OPD 333 and *Loots v Van Staden* 1962 (1) SA 152 (O).

192 See the notes s v 'Disclose fully the nature and grounds' below.

193 *Hendricks v Saacks* 1945 CPD 270; *Van Zyl v Wheeler* 1964 (3) SA 758 (O) at 760; *Herb Dyers (Pty) Ltd v Mahomed* 1965 (1) SA 31 (T) at 32; *Border Concrete Engineering Co (Pty) Ltd v Knickelbein* 1982 (2) SA 648 (E) at 651.

194 *Hendriks v Saacks* 1945 CPD 270; *Western Province Hardware & Timber Co (Pty) Ltd v Frank Fletcher* 1971 (2) PH F77.

195 *Estate Potgieter v Elliott* 1948 (1) SA 1084 (C) at 1087; *Wright v Van Zyl* 1951 (3) SA 488 (C) at 492; *Herb Dyers (Pty) Ltd v Mahomed* 1965 (1) SA 31 (T) at 32; *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426; *First National Bank of South Africa Ltd v Myburgh* 2002 (4) SA 176 (C) at 184C–D.

196 See, *inter alia*, *Wright v Van Zyl* 1951 (3) SA 488 (C); *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A); *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T); *Gilinsky v Superb Launderers and Dry Cleaners* 1978 (3) SA 807 (C); *Barclays Western Bank Ltd v Bill Jonker Factory Services (Pty) Ltd* 1980 (1) SA 929 (SE); *District Bank Ltd v Hoosain* 1984 (4) SA 544 (C).

197 *Koornklip Beleggings (Edms) Bpk v Allied Minerals Ltd* 1970 (1) SA 674 (C) at 678.

198 *Von Zahn v Credit Corporation of South Africa Ltd* 1963 (3) SA 554 (T); and see *Herbert v Steele* 1953 (3) SA 271 (T) at 274; *Evelyn Haddon & Co Ltd v Leojanko (Pty) Ltd* 1967 (1) SA 662 (O).

199 *Chambers v Jonker* 1952 (4) SA 635 (C) at 638; *Herb Dyers (Pty) Ltd v Mahomed* 1965 (1) SA 31 (T) at 33; *Edwards v Menezes* 1973 (1) SA 299 (NC) at 304; *Van Eeden v Sasol Pensioenfonds* 1975 (2) SA 167 (O) at 178; *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 228; *Neuhoff v York Timbers Ltd* 1981 (4) SA 666 (T); *Standard Merchant Bank Ltd v Rowe* 1982 (4) SA 671 (W) at 678; *District Bank Ltd v Hoosain* 1984 (4) SA 544 (C) at 548; *Joubert, Owens, Van Niekerk Ing v Breytenbach* 1986 (2) SA 357 (T) at 361–2; *Standard Bank of SA Ltd v Friedman* 1999 (2) SA 456 (C) at 462G–H; confirmed in *Friedman v Standard Bank of SA Ltd* 1999 (4) SA 928 (SCA) at 938D–H; *Muller v Botswana Development Corporation Ltd* 2003 (1) SA 651 (SCA) at 656C–657G; *Standard Bank of South Africa Ltd v Roestof* 2004 (2) SA 492 (W) at 499C–E.

200 *Standard Bank of South Africa Ltd v Roestof* 2004 (2) SA 492 (W) at 497H–I.

201 *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 229.

202 *Edwards v Menezes* 1973 (1) SA 299 (NC) at 304.

203 *Gruhn v M Pupkewitz & Sons (Pty) Ltd* 1973 (3) SA 49 (A). See also *Jacobsen Van den Berg SA (Pty) Ltd v Triton Yachting Supplies* 1974 (2) SA 584 (O); *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 229; *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 427.

204 *Tesven CC v South African Bank of Athens* 2000 (1) SA 268 (SCA).

205 See the definition of 'deliver' in rule 1 above.

206 See *Terry's Motors Ltd v Seeck* 1962 (2) SA 262 (SWA); *Badenhorst v Poultides* 1963 (1) SA 471 (T); *Van Aswegen v Kruger* 1974 (3) SA 204 (O); *South African Breweries Ltd v Rygerpark Props (Pty) Ltd* 1992 (3) SA 829 (W); *Klipton Industries Ltd v Kersten* 1995 (1) SA 182 (W); *Maloney's Eye Properties BK v Bloemfontein Board Nominees Bpk* 1995 (3) SA 249 (O).

207 *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426. In *Jacobsen Van den Berg SA (Pty) Ltd v Triton Yachting Supplies* 1974 (2) SA 584 (O) Erasmus J said (at 587) that the defence must not merely 'appear' to be bona fide and the learned judge disapproved of the formulation adopted by Corbett J in *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 303 and 304. It is submitted with respect that the test is put too high by Erasmus J. In *Maharaj*'s case (*supra*) the Appellate Division stated that it is sufficient if on the facts disclosed the defendant 'appears' to have a bona fide defence. See also *District Bank Ltd v Hoosain* 1984 (4) SA 544 (C) at 547–8 and *Nedbank Ltd v Zevoli 208 (Pty) Ltd* 2017 (6) SA 318 (KZP) at 323F–323A.

208 *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T).

209 *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 227.

210 *Silverleaf Pastry & Confectionery Co (Pty) Ltd v Joubert* 1972 (1) SA 125 (C) at 129.

211 As Colman J points out in *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 228, there is no magic whereby the veracity of an honest deponent can be made to shine out of his affidavit.

212 *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T); *Standard Bank of SA Ltd v Friedman* 1999 (2) SA 456 (C) at 462G; confirmed in *Friedman v Standard Bank of SA Ltd* 1999 (4) SA 928 (SCA) at 938D–H; *Marsh v Standard Bank of South Africa Ltd* 2000 (4) SA 947 (W) at 954E–F. See, in general, *Flugel v Swart* 1979 (4) SA 493 (E) at 497–8.

213 See, *inter alia*, *Wright v Van Zyl* 1951 (3) SA 488 (C); *Lombard v Van der Westhuizen* 1953 (4) SA 84 (C); *Soorju v Pillay* 1962 (3) SA 906 (N); *Shepstone v Shepstone* 1974 (2) SA 462 (N) at 467; *Citibank NA, South Africa Branch v Paul NO* 2003 (4) SA 180 (T) at 200J–201A.

214 See *Border Concrete Engineering Co (Pty) Ltd v Knickelbein* 1982 (2) SA 648 (E) at 651.

215 *Trust Bank of Africa Ltd v Wassenaar* 1972 (3) SA 139 (D) at 144, following *Caltex Oil (SA) Ltd v Webb* 1965 (2) SA 914 (N) at 916–17. See also *Van Eeden v Sasol Pensioenfonds* 1975 (2) SA 167 (O) at 178 and the authorities there referred to; *Steynberg v Labuschagne* [1998] 3 All SA 384 (O) at 389*h*–390*a*.

216 *Skead v Swanepoel* 1949 (4) SA 763 (T) at 766–7. See also *Van Eeden v Sasol Pensioenfonds* 1975 (2) SA 167 (O).

217 *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 303–4. In *Evelyn Haddon & Co Ltd v Leojanko (Pty) Ltd* 1967 (1) SA 662 (O) at 667G Erasmus J

said:
'By die beoordeling van die posisie sal ek ook in gedagte hou dat ek nie op 'n oorwig van waarskynlikhede moet oordeel of die verweerder suksesvol sal wees nie.'
See also *Nair v Chandler* 2007 (1) SA 44 (T) at 47B–C.

218 *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426; and see *Die Afrikaanse Pers Bpk v Neser* 1948 (2) SA 295 (C) at 297; *Mowschenson & Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W) at 366; *Venter v Kruger* 1971 (3) SA 848 (N) at 852; *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 303; *Marsh v Standard Bank of South Africa Ltd* 2000 (4) SA 947 (W) at 949C–H. The court is not called upon to consider whether the defence is likely or unlikely to succeed (*Davis v Terry* 1957 (4) SA 98 (SR)).

219 *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 303 and 304; *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426; *Cronjé v Cooper* 1978 (1) SA 268 (N); *District Bank Ltd v Hoosain* 1984 (4) SA 544 (C) at 547–8.

220 *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426; and see *Die Afrikaanse Pers Bpk v Neser* 1948 (2) SA 295 (C) at 297; *Mowschenson & Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W) at 366; *Venter v Kruger* 1971 (3) SA 848 (N) at 852; *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 303; *Marsh v Standard Bank of South Africa Ltd* 2000 (4) SA 947 (W) at 949I–J; *First National Bank of South Africa Ltd v Myburgh* 2002 (4) SA 176 (C) at 180A–B. For the position where the defendant admits portion of the claim, see *Gralio (Pty) Ltd v D E Claassen (Pty) Ltd* 1980 (1) SA 816 (A).

221 *South African Bureau of Standards v GGS/AU (Pty) Ltd* 2003 (6) SA 588 (T) at 592E–H.

222 See, for example, *Round v Klopper* 1957 (4) SA 688 (T); *Joel's Bargain Store v Shorkend Bros (Pty) Ltd* 1959 (4) SA 263 (E).

223 *Raphael & Co v Standard Produce Co (Pty) Ltd* 1951 (4) SA 244 (C); *Mowschenson & Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W) at 366–7; *Northern Cape Scrap & Metals (Edms) Bpk v Upington Radiators & Motor Graveyard (Edms) Bpk* 1974 (3) SA 788 (NC) at 793; *Cape Business Bureau (Pty) Ltd v Van Wyk* 1981 (4) SA 433 (C) at 439; *Millman NO v Klein* 1986 (1) SA 465 (C) at 469. This passage is authority for the proposition that the *plaintiff's* affidavit can be assailed on the ground that it contains hearsay evidence.

224 *Caxton Ltd v Barrigo* 1960 (4) SA 1 (T); and see *H K Gokal (Pty) Ltd v Muthambi* 1967 (3) SA 89 (T).

225 *Hendricks v Saacks* 1945 CPD 270; *Van Zyl v Wheeler* 1964 (3) SA 758 (O) at 760; *Herb Dyers (Pty) Ltd v Mahomed* 1965 (1) SA 31 (T); *Western Province Hardware & Timber Co (Pty) Ltd v Frank Fletcher* 1971 (2) PH F77. See also *Border Concrete Engineering Co (Pty) Ltd v Knickelbein* 1982 (2) SA 648 (E) at 651.

226 See, *inter alia*, *Soorju v Pillay* 1962 (3) SA 906 (N) at 908; *Edwards v Menezes* 1973 (1) SA 299 (NC) at 304; *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 303; *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426; *Jarrosson Estates (Edms) Bpk v Oosthuizen* 1985 (3) SA 550 (NC) at 552; *Handel v Josi* 1986 (4) SA 838 (D) at 842.

227 *Wilson v Bained WN* (76) 74.

228 *Desart v Townsend* 22 LR Ir 389.

229 *Edwards v Menezes* 1973 (1) SA 299 (NC) at 304; and see *Shingadia v Shingadia* 1966 (3) SA 24 (R).

230 *Shingadia v Shingadia* 1966 (3) SA 24 (R) at 25H, 26A; *Hollandia Reinsurance Co Ltd v Nedcor Bank Ltd* 1993 (3) SA 574 (W) at 576H–I.

231 *Nkungu v Johannesburg City Council* 1950 (4) SA 312 (T) at 314; *Shingadia v Shingadia* 1966 (3) SA 24 (R). See *Ebrahim v Kahn* 1979 (2) SA 498 (N) in which it was held that there does not seem to be an objection in principle to the use of the procedure for summary judgment with the object of testing the defendant's defences where it is thought that the application is likely to dispose of them for good because the issues involved do not depend on evidence which might be disputed at the trial, but comprise questions of law alone. Indeed, it may sometimes be appropriate so to use the summary judgment procedure. There is, however, no reason, when this is done, why the unsuccessful plaintiff should not share the fate of an unsuccessful excipient and pay for his failure.

232 *Skead v Swanepoel* 1949 (4) SA 763 (T) at 768; *Edwards v Menezes* 1973 (1) SA 299 (NC) at 305. See also *Barclays National Bank Ltd v Brownlee* 1981 (3) SA 579 (D) at 581. It is submitted that this consideration is overlooked in *Lovemore v White* 1978 (3) SA 254 (E).

233 *One Nought Three Craighall Park (Pty) Ltd v Jayber (Pty) Ltd* 1994 (4) SA 320 (W) at 323A–B.

234 *Venter v Cassimjee* 1956 (2) SA 242 (N); *Venter v Kruger* 1971 (3) SA 848 (N); *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426.

235 *W M Mentz & Seuns (Edms) Bpk v Katzake* 1969 (3) SA 306 (T) at 311; and see *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 278; *Teale & Sons (Pty) Ltd v Vrystaatse Plantediens (Pty) Ltd* 1968 (4) SA 371 (O); *Jacobsen Van den Berg SA (Pty) Ltd v Triton Yachting Supplies* 1974 (2) SA 584 (O); *Charsley v Avbob (Begrafnisdiens) Bpk* 1975 (1) SA 891 (E); *Van den Bergh v Weiner* 1976 (2) SA 297 (T); *Lohrman v Vaal Ontwikkelingsmaatskappy (Edms) Bpk* 1979 (3) SA 391 (T); *Liberty Group Ltd v Singh* 2012 (5) SA 526 (KZD) at 537G–538G.

236 *Weinkove v Botha* 1952 (3) SA 178 (C); *Herb Dyers (Pty) Ltd v Mahomed* 1965 (1) SA 31 (T); *Spilhaus & Co Ltd v Coreejees* 1966 (1) SA 525 (C); *AE Motors (Pty) Ltd v Levitt* 1972 (3) SA 658 (T); *Credé v Standard Bank of SA Ltd* 1988 (4) SA 786 (E); and see *Abbott v Nolte* 1951 (2) SA 419 (C); *Du Toit v De Beer* 1955 (1) SA 469 (T); *H I Lockhat (Pty) Ltd v Domingo* 1979 (3) SA 696 (T). See, however, *Trotman v Edwick* 1950 (1) SA 376 (C). It is not a defence if the unliquidated counterclaim is less than the plaintiff's claim (*Citibank NA South Africa Branch v Paul NO* 2003 (4) SA 180 (T) at 196I).

237 See *Caltex Oil (SA) Ltd v Webb* 1965 (2) SA 914 (N); *Jacobsen Van den Berg SA (Pty) Ltd v Triton Yachting Supplies* 1974 (2) SA 584 (O).

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

239 See *Koornklip Beleggings (Edms) Bpk v Allied Minerals Ltd* 1970 (1) SA 674 (C); *Stassen v Stoffberg* 1973 (3) SA 725 (C); and see *Wilson v Hoffman* 1974 (2) SA 44 (R); *Citibank NA South Africa Branch v Paul NO* 2003 (4) SA 180 (T).

240 *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd* 2004 (6) SA 29 (SCA) at 34F–H.

241 *Koornklip Beleggings (Edms) Bpk v Allied Minerals Ltd* 1970 (1) SA 674 (C).

242 *Spilhaus & Co Ltd v Coreejees* 1966 (1) SA 525 (C).

243 *Traut v Du Toit* 1966 (1) SA 69 (O). See also *Barclays Western Bank Ltd v Bill Jonker Factory Services (Pty) Ltd* 1980 (1) SA 929 (SE) at 933; *Credé v Standard Bank of SA Ltd* 1988 (4) SA 786 (E).

244 See *A E Motors (Pty) Ltd v Levitt* 1972 (3) SA 658 (T); and see *Stassen v Stoffberg* 1973 (3) SA 725 (C); *Globe Engineering Works Ltd v Ornelas Fishing Co (Pty) Ltd* 1983 (2) SA 95 (C) at 102.

245 *Mercantile Bank Ltd v Star Power CC* 2003 (3) SA 309 (T) at 311I–J.

246 *Beukes v Claassen* 1986 (4) SA 495 (O).

247 *Trinity Engineering (Pvt) Ltd v Anglo African Shipping Co (Pvt) Ltd* 1986 (1) SA 700 (ZS), applying *Tucker v Ginsburg* 1962 (2) SA 58 (W) at 65–6.

248 *Nedcor Bank Ltd v Behardien* 2000 (1) SA 307 (C).

249 *Davis v Tip NO* 1996 (1) SA 1152 (W); *Nedcor Bank Ltd v Behardien* 2000 (1) SA 307 (C).

250 *Nedcor Bank Ltd v Behardien* 2000 (1) SA 307 (C).

251 *Brand House Ltd v Sasfin Bank Ltd; Brandhouse Beverages (Pty) Ltd v Sasfin Bank Ltd* [2009] 1 All SA 22 (SCA); and see 2010 (July) *De Rebus* 23.

252 The provisions of the rule are peremptory (*PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd* 2009 (4) SA 68 (SCA) at 73B–C). The word 'fully' causes difficulty (see *Lombard v Van der Westhuizen* 1953 (4) SA 84 (C); *Herb Dyers (Pty) Ltd v Mahomed* 1965 (1) SA 31 (T); *Caltex Oil (SA) Ltd v Webb* 1965 (2) SA 914 (N); *Shepstone v Shepstone* 1974 (2) SA 462 (N); *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T); *Gilinsky v Superb Launderers & Dry Cleaners* 1978 (3) SA 807 (C)). As to what a surety should state in his affidavit when he raises the defence that the deed of suretyship, or certain clauses thereof, are contrary to public policy, see *Pangbourne Properties Ltd v Nitor Construction (Pty) Ltd* 1993 (4) SA 206 (W) at 217G–J. As to the defence of fraud raised in the opposing affidavit, see *Nedperm Bank Ltd v Verbri Products CC* 1993 (3) SA 214 (W). See the discussion of the legal principles in *Mnweba v Maharaj* [2001] All SA 265 (C) at 271–4.

253 According to *The Oxford English Dictionary* and *Chambers' Dictionary*, the word 'nature' denotes, *inter alia*, the essential qualities of anything, for example, the 'nature' of the defence may be illegality of a contract or unenforceability of a claim by reason of usury.

254 See *Chairperson, Independent Electoral Commission v Die Krans Ontspanningsoord (Edms) Bpk* 1997 (1) SA 244 (T) at 249G–250F. As to the difference in meaning between 'grounds' and 'material facts', see *Lurlev (Pty) Ltd v Unifreight General Services (Pty) Ltd* 1978 (1) SA 74 (D) at 77.

255 See *Shepstone v Shepstone* 1974 (2) SA 462 (N) at 467; *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426; *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 228, and the numerous other decisions referred to in these judgments. See also *Handel v Josi* 1986 (4) SA 838 (D) at 842.

256 The following are examples of cases in which the defence was held to have been inadequately set out: *Cassim Bros (Pvt) Ltd v Cassim* 1964 (1) SA 651 (SR): bare denial of the authority of the person who had brought the proceedings on behalf of a company; *Herb Dyers (Pty) Ltd v Mahomed* 1965 (1) SA 31 (T): no comment in respect of plaintiff's claim for services rendered due to lack of details, but see *Border Concrete Engineering Co (Pty) Ltd v Knickelbein* 1982 (2) SA 648 (E) at 651; *Nichas & Son (Pty) Ltd v Papenfus* 1969 (2) SA 494 (O): bare denial of correctness of amounts claimed; *Trust Bank of Africa Ltd v Wassenaar* 1972 (3) SA 139 (D): facts upon which defence founded not set out; *Petlen Properties (Pty) Ltd v Boland Construction Co (Pty) Ltd* 1973 (4) SA 557 (C): bare statement that amount of indebtedness unknown to defendant; *Appliance Hire (Natal) (Pty) Ltd v Natal Fruit Juices (Pty) Ltd* 1974 (2) SA 287 (D): facts upon which defence founded not set out; *Jacobsen Van den Berg SA (Pty) Ltd v Triton Yachting Supplies* 1974 (2) SA 584 (O): bare statement of payment; *Premier Finance Corporation (Pty) Ltd v Rotainers (Pty) Ltd* 1975 (1) SA 79 (W): failure to make necessary averments to establish that the lease was a disguised money-lending transaction; *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T): bare statement of payment; *Bank of Lisbon v Botes* 1978 (4) SA 724 (W): bare statement that detailed account not received and accordingly amount claimed disputed; *Pansera Builders Suppliers (Pty) Ltd v Van der Merwe (t/a Van der Merwe's Transport)* 1986 (3) SA 654 (C): failure to allege that option to renew lease for further period exercised; *Standard Bank of SA v Friedman* 1999 (2) SA 456 (C): details with regard to counterclaim for damages or extent thereof not stated and failure to state unequivocally that counterclaim will be filed. In *Fourlamel (Pty) Ltd v Maddison* 1977 (1) SA 333 (A) the Appellate Division held that a defence raised by a surety that what he *signed* was not a written agreement or undertaking of suretyship in favour of the plaintiff, but a 'blank form' constitutes a bona fide defence. In *Jurgens v Volkskas Bank Ltd* 1993 (1) SA 214 (A) the Appellate Division held that the court in the *Fourlamel* case had been solely concerned with the situation where the creditor, after the document in question had been delivered to him by the surety in blank, had unilaterally completed it by filling in some of the contractual terms. Accordingly the court was at liberty to state its view untrammelled by what was said in the *Fourlamel* case. The court thus held that the relevant time for considering whether a suretyship is complete is the time of *delivery* thereof and not the time of signature. Consequently, the affidavit resisting summary judgment should deal with the position as at the time of delivery of the suretyship. If there is no suggestion that a suretyship was at that stage in any respect incomplete, the defence should fail. The decision in *Standard Bank of SA Ltd v Jaap de Villiers Beleggings (Edms) Bpk* 1978 (3) SA 955 (W) was accordingly approved.

257 *Gani v Crescent Finance Corporation (Pty) Ltd* 1961 (1) SA 222 (W), not following *Meek v Kruger* 1958 (3) SA 154 (T); *Berks v Birjou Investment Co (Pty) Ltd* 1961 (1) SA 225 (W); and see *Hugh Holdings (Pvt) Ltd v Gamberini* 1968 (3) SA 157 (R) and *Central News Agency Ltd v Cilliers* 1971 (4) SA 351 (NC). The court has a discretion in an appropriate case to allow an additional affidavit by the defendant in order to improve a defective attempt to set out a defence to the plaintiff's claim or to prove his bona fides (*Juntgen t/a Paul Juntgen Real Estate v Nottbusch* 1989 (4) SA 490 (W); and see *Bank of Lisbon v Botes* 1978 (4) SA 724 (W); *Empire Fresh Meat Supply (Pty) Ltd v Ilic* 1980 (4) SA 23 (W); *Pansera Builders Suppliers (Pty) Ltd v Van der Merwe (t/a Van der Merwe's Transport)* 1986 (3) SA 654 (C) at 660. However, see *Joubert, Owens, Van Niekerk Ing v Breytenbach* 1986 (2) SA 357 (T)). A defendant who asks for a postponement so that he can, for example, search for evidence or file an affidavit, has to make out a case for postponement. He must, among other considerations, touch upon the question as to why evidence was not timeously produced and what special circumstances exist for the court to grant an indulgence (*Empire Fresh Meat Supply (Pty) Ltd v Ilic* 1980 (4) SA 23 (W); *Juntgen t/a Paul Juntgen Real Estate v Nottbusch* 1989 (4) SA 490 (W)). See also *James Brown & Hamer (Pty) Ltd (previously named Gilbert Hamer & Co Ltd) v Simmons NO* 1963 (4) SA 656 (A). In *Macsteel Services Centres SA (Pty) Ltd v Profin Trading 35 CC* (unreported, GP case no 96119/2015 dated 17 June 2016) the defendant was allowed to file an affidavit by the commissioner of oaths who attended to the commissioning of the defendant's affidavit opposing summary judgment, explaining an error in the commissioning of the affidavit.

258 See *Trust Bank of Africa Ltd v Wassenaar* 1972 (3) SA 139 (D) at 144 and *Juntgen t/a Paul Juntgen Real Estate v Nottbusch* 1989 (4) SA 490 (W). In *Mahomed Essop (Pty) Ltd v Sekhukhulu & Son* 1967 (3) SA 728 (D) the plaintiff was ordered to file a declaration in clarification of the details of his claim, and the defendant was granted leave to file a further affidavit in reply thereto. The procedure of allowing a plaintiff to file a declaration has been criticized and not followed in *Steeledale Reinforcing (Cape) v Ho Hup Corporation SA (Pty) Ltd* 2010 (2) SA 580 (ECP) at 584C–585F.

259 *Stocks & Stocks Properties (Pty) Ltd v City of Cape Town* 2003 (5) SA 140 (C) at 144–5.

260 *Thirion v Upington Trust Maatskappy (Edms) Bpk* 1966 (1) SA 401 (A). However, where the documents sued upon clearly disclose a defence, summary judgment should not be granted, even though the matter has not been raised by the defendant (*Geyer v Geyer's Transport Services (Pty) Ltd* 1973 (1) SA 105 (T)).

261 *Nepet (Pty) Ltd v Van Aswegen's Garage* 1974 (3) SA 441 (O); and see *MAN Truck & Bus (SA) (Pty) Ltd v Singh (1)* 1976 (4) SA 264 (N); *Rossouw v FirstRand Bank Ltd* 2010 (6) SA 439 (SCA) at 451A–B and 453E–J.

262 Cf *Venter v Kruger* 1971 (3) SA 848 (N) at 851; *A E Motors (Pty) Ltd v Levitt* 1972 (3) SA 658 (T); *Rossouw v FirstRand Bank Ltd* 2010 (6) SA 439 (SCA) at 453I–J.

263 2010 (6) SA 439 (SCA) at 454A–C.

264 Section 5(1) of the Civil Proceedings Evidence Act 25 of 1965. In terms of s 5(2) a copy of the *Gazette* or a copy of such Government Notice or other matter purporting to be printed under the superintendence or authority of the government printer, shall, on its mere production, be evidence of the contents of such law, notice or other matter, as the case may be.

265 See *Janirae (Pty) Ltd v Stretch* 1978 (4) SA 920 (N) at 922.

266 For a discussion of s 169(1), see the notes to rule 14(5) s v 'Evidence under the National Credit Act 34 of 2005' in Jones & Buckle *Civil Practice* vol II.

267 *Gruhn v M Pupkewitz & Sons (Pty) Ltd* 1973 (3) SA 49 (A) at 58 and the authorities there referred to, to which may be added *Spring and Van den Berg Construction (Pty) Ltd v Banfrevan Properties (Pty) Ltd* 1968 (1) SA 326 (D); *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 304; *Jacobsen Van den Berg SA (Pty) Ltd v Triton Yachting Supplies* 1974 (2) SA 584 (O) at 589–90; *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 229; *Sylko Paper Co (Pty) Ltd v Castle Supermarket* 1977 (3) SA 698 (N) at 700; *Gilinsky v Superb Launderers and Dry Cleaners* 1978 (3) SA 807 (C); *Standard Bank National Industrial Credit Corp Ltd v Postmasburg Metal & Mining Supplies (Pty) Ltd* 1978 (3) SA 812 (NC); *Barclays Western Bank Ltd v Bill Jonker Factory Services (Pty) Ltd* 1980 (1) SA 929 (SE) at 935; *Neuhoff v York Timbers Ltd* 1981 (4) SA 666 (T) at 682–3; *Border Concrete Engineering Co (Pty) Ltd v Knickelbein* 1982 (2) SA 648 (E) at 652; *Pansera Builders Suppliers (Pty) Ltd v Van der Merwe (t/a Van der Merwe's Transport)* 1986 (3) SA 654 (C) at 659; *Handel v Josi* 1986 (4) SA 838 (D) at 842–3; *Diesel Power Plant Hire CC v Master Diggers (Pty) Ltd* 1992 (2) SA 295 (W); *Wonder Flooring v Northwest Development Corporation Ltd* 1997 (1) SA 476 (BSC) at 482A; *Tesven CC v South African Bank of Athens* 2000 (1) SA 268 (SCA) at 277H–I; *First National Bank of South Africa Ltd v Myburgh* 2002 (4) SA 176 (C) at 180D–E.

268 *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T); *Jili v FirstRand Bank Ltd* 2015 (3) SA 586 (SCA) at 591B and the authorities there referred to.

269 *Mnweba v Maharaj* [2001] All SA 265 (C) at 272*c–e*.

270 The words in the text are based on the oft-cited dictum of Marais J in *Mowschenson & Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W) at 366. While this formulation has not always met with unqualified approval (see, for example, *W M Mentz & Seuns (Edms) Bpk v Katzake* 1969 (3) SA 306 (T) at 310–11; *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 227), it has nevertheless been held that the dictum gives 'positive guidance as to the manner in which the court should exercise the discretion vested in it' (*Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 305), and that it 'embodies a necessary and important warning for the guidance of the courts which have to determine the rights of litigants in applications for summary judgment' (*Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T)). See *Lohrman v Vaal Ontwikkelingsmaatskappy (Edms) Bpk* 1979 (3) SA 391 (T) where the various authorities are discussed. See also *Trekker Investments (Pty) Ltd v Wimpy Bar* 1977 (3) SA 447 (W); *Barclays Western Bank Ltd v Bill Jonker Factory Services (Pty) Ltd* 1980 (1) SA 929 (SE) at 935; *Bowman NO v Howe* 1980 (2) SA 226 (W) at 227–8; *District Bank Ltd v Hoosain* 1984 (4) SA 544 (C) at 550.

271 *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 229E; *Jili v FirstRand Bank Ltd* 2015 (3) SA 586 (SCA) at 591B–C.

272 *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T); *Jili v FirstRand Bank Ltd* 2015 (3) SA 586 (SCA) at 591C–D; and see *Vitamax (Pty) Ltd v Executive Catering Equipment CC* 1993 (2) SA 556 (W); *First National Bank of South Africa Ltd v Myburgh* 2002 (4) SA 176 (C) at 184H.

273 *Jacobsen Van den Berg SA (Pty) Ltd v Triton Yachting Supplies* 1974 (2) SA 584 (O).

274 *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) in which Colman J does not approve of the formulation adopted in *Jacobsen Van den Berg SA (Pty) Ltd v Triton Yachting Supplies* 1974 (2) SA 584 (O) at 589, viz that the discretion should be exercised only when the court feels that an injustice *would* be done if it does not exercise its discretion; *First National Bank of South Africa Ltd v Myburgh* 2002 (4) SA 176 (C) at 184H.

275 *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd* 2004 (6) SA 29 (SCA) at 34I–J.

276 *A E Motors (Pty) Ltd v Levitt* 1972 (3) SA 658 (T) at 660. See also *Gralio (Pty) Ltd v D E Claassen (Pty) Ltd* 1980 (1) SA 816 (A) at 827.

277 *J N O G Teale & Sons (Pty) Ltd v Vrystaatse Plantediens (Pty) Ltd* 1968 (4) SA 371 (O). Cf *Skead v Swanepoel* 1949 (4) SA 763 (T) at 768–9.

278 *Kgatle v Metcash Trading Ltd* 2004 (6) SA 410 (T) at 417J–418E.

279 *SA Bank of Athens Ltd v Van Zyl* 2005 (5) SA 93 (SCA) at 102E–G.

280 See *Western Credit Bank Ltd v Kajee* 1967 (4) SA 386 (N) at 391; *Western Bank Ltd v Meyer* 1973 (4) SA 697 (T) at 699. See also *Plumbago Financial Services (Pty) Ltd t/a Toshiba Rentals v Janap Joseph t/a Project Finance* 2008 (3) SA 47 (C) at 53A–C.

281 *Premier Finance Corp Ltd v Steenkamp* 1974 (3) SA 141 (D). See also *Von Zahn v Credit Corporation of South Africa Ltd* 1963 (3) SA 554 (T) at 557; and see *Peters v Janda NO* 1981 (2) SA 339 (Z) at 343.

282 See *Van Heerden v Samarkand Motion Picture Productions* 1979 (3) SA 786 (T) at 789C–790B; *Khayzif Amusement Machines CC v Southern Life Association Ltd* 1998 (2) SA 958 (D); *Dass and Others NNO v Lowewest Trading (Pty) Ltd* 2011 (1) SA 48 (KZD) at 51D–H and 52I.

283 *Kgatle v Metcash Trading Ltd* 2004 (6) SA 410 (T) at 417–418E.

284 *Maisel v Strul* 1937 CPD 128.

285 See *Khayzif Amusement Machines CC v Southern Life Association Ltd* 1998 (2) SA 958 (D) at 961E.

286 *Kgatle v Metcash Trading Ltd* 2004 (6) SA 410 (T) at 417J–418E.

287 *Ebrahim v Kahn* 1979 (2) SA 498 (N) at 505; *Tredoux v Kellerman* 2010 (1) SA 160 (C) at 165E–F.

288 *Tredoux v Kellerman* 2010 (1) SA 160 (C) at 165F. In appropriate circumstances each party may be ordered to pay its own costs (see, for example, the costs order made in *Thembani Wholesalers (Pty) Ltd v September* 2014 (5) SA 51 (ECG) at 58C–E).

289 *Tredoux v Kellerman* 2010 (1) SA 160 (C) at 165F.

290 Subrule (9)*(a)*. See, for example, *Meek v Kruger* 1958 (3) SA 154 (T) at 159G; *Nelson v Hodgetts Timbers (East London) (Pty) Ltd* 1973 (3) SA 37 (A) at 46G–47A; *Floridar Construction Co (SWA) (Pty) Ltd v Kriess* 1975 (1) SA 875 (SWA) at 878E; *Spes Bona Bank v Portals Water Treatment* 1981 (1) SA 618 (W) at 636E–H; *Absa Bank Ltd (Volkskas Bank Division) v S J du Toit & Sons Earthmovers (Pty) Ltd* 1995 (3) SA 265 (C); *Citibank NA, South Africa Branch v Paul No* 2003 (4) SA 180 (T) at 190A–E; *Tredoux v Kellerman* 2010 (1) SA 160 (C) at 165F–166A; *Senekal Motor Ingenieurs BK v Setsoto Local Municipality* (unreported, FB case no 1083/2017 dated 12 October 2017). See also *H H Robertson (Africa) (Pty) Ltd v N L Builders and Construction Co (Pty) Ltd* 1974 (3) SA 776 (N) at 777C–D. The suggestion in *Flamingo General Centre v Rossburgh Food Market* 1978 (1) SA 586 (D) that the court should be reluctant to award attorney and client costs under this rule because it would, *inter alia*, be a strong indication that the court favoured the defendant's case on the merits, has not met with approval (see *Absa Bank Ltd (Volkskas Bank Division) v S J du Toit & Sons Earthmovers (Pty) Ltd* 1995 (3) SA 265 (C) at 268E–G).

291 *South African Bureau of Standards v GGS/AU (Pty) Ltd* 2003 (6) SA 588 (T) at 592I–593D.

292 Subrule (9)*(b)*.

293 This paragraph, which appeared in the predecessor of this work, was cited with approval in *Floridar Construction Co (SWA) (Pty) Ltd v Kriess* 1975 (1) SA 875 (SWA) at 878A and in *Absa Bank Ltd (Volkskas Bank Division) v S J du Toit & Sons Earthmovers (Pty) Ltd* 1995 (3) SA 265 (C) at 267J–268A. See also *Evelyn Haddon & Co Ltd v Leojanko (Pty) Ltd* 1967 (1) SA 662 (O); *Koornklip Beleggings (Edms) Bpk v Allied Minerals Ltd* 1970 (1) SA 674 (C).

294 *Ebrahim v Kahn* 1979 (2) SA 498 (N) at 505.

295 *Louis Joss Motors (Pty) Ltd v Riholm* 1971 (3) SA 452 (T) at 455A–B; *Nyingwa v Moolman NO* 1993 (2) SA 508 (Tk) at 511B–512B; *Saxum Group (Pty) Ltd v Dalefern Properties (Pty) Ltd* 2011 (1) SA 230 (GSJ) at 232I; and see *Sundra Hardware v Mactro Plumbing* 1989 (1) SA 474 (T) at 476I.

296 *Nyingwa v Moolman NO* 1993 (2) SA 508 (Tk) at 510B–511A. In *Louis Joss Motors (Pty) Ltd v Riholm* 1971 (3) SA 452 (T) it was held (at 454G–H) that in an application under rule 42 the grounds are limited to those set out in subrule (1)*(a)* and *(b)*.

297 *Louis Joss Motors (Pty) Ltd v Riholm* 1971 (3) SA 452 (T) at 454A–I. See also *Tlholoe v Maury (Edms) Bpk h/a Franelle Gordyn Boutique* 1988 (3) SA 922 (O) at 925G–H; and see Horn 1992 (55) *THRHR* 87. The position in magistrates' courts practice under s 36 of the Magistrates' Courts Act 32 of 1944 and rule 49(1) is different. See the notes to rule 14 sv 'Rescission of summary judgment' in Jones & Buckle *Civil Practice* vol II.

298 *Saxum Group (Pty) Ltd v Dalefern Properties (Pty) Ltd* 2011 (1) SA 230 (GSJ) at 232A–233I.

299 *Polliack & Co Ltd v Pennink* 1936 TPD 167; *Kgatle v Metcash Trading Ltd* 2004 (6) SA 410 (T) at 416C. See also *Sekgala v Steve's Auto Clinic (Pty) Ltd* (unreported, GP case no 56238/2016 dated 3 February 2017).

300 *Arend v Astra Furnishers (Pty) Ltd* 1973 (1) SA 849 (C); *Van Wyngaardt NO v Knox* 1977 (2) SA 636 (T). In regard to the grant of leave to appeal in cases where summary judgment has been granted, it should be borne in mind that the purpose of summary judgment is to 'enable a plaintiff with a clear case to obtain swift enforcement of a claim against a defendant who has no real defence to that claim'. It is a procedure that is intended 'to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights'. If a court hearing an application for summary judgment is satisfied that the defendant has no bona fide defence to a plaintiff's claim and grants summary judgment as a consequence, it should be slow thereafter to grant leave to appeal, lest it undermine the very purpose of the procedure (*Majola v Nitro Securitisation 1 (Pty) Ltd* 2012 (1) SA 226 (SCA) at 232F–H).

301 Cf *Mopicon Construction CC v Van Jaarsveld & Heyns* 2004 (3) SA 215 (T).

302 2009 (3) SA 348 (BPD).

303 2009 (3) SA 353 (SE).

304 2009 (3) SA 363 (W).

305 2009 (3) SA 353 (SE).

306 2009 (3) SA 384 (T).

307 2009 (5) SA 557 (T).

308 At 562B–D.

309 2010 (1) SA 579 (ECG).

310 At 594C–G.

311 2010 (1) SA 627 (C).

312 2010 (1) SA 634 (C).

313 At 638B–E.

314 2010 (2) SA 46 (ECP). See also 2010 (August) *De Rebus* 45.

315 At 521D.

316 At 52I–53B.

317 2010 (5) SA 252 (GSJ) at 255D and 255F, applying *Munien v BMW Financial Services (SA) (Pty) Ltd* 2010 (1) SA 549 (KZD).

318 At 258E–F.

319 2010 (6) SA 439 (SCA) at 450C–D, 450G–451G and 454I–457D.

320 *Rossouw v FirstRand Bank Ltd* 2010 (6) SA 439 (SCA) at 444F–447A, 452B–E and 454A–C.

321 2012 (5) SA 142 (CC) at 159H–168F. In *Nedbank Ltd v Binneman and 13 Similar Cases* 2012 (5) SA 569 (WCC) the court, in dealing with applications for default judgment, held that the *Sebola* case did not overrule the principles confirmed in the *Rossouw* case, but what it did was to clarify that 'despatch' per se was insufficient; there should, in addition, be proof that the notice had reached the appropriate post office. Once such proof is provided, the fact that the s 129 letter had been returned to the sender is of no consequence to the credit provider, the risk of non-receipt resting squarely with the defendant. In *Absa Bank Ltd v Mkhize and Another and Two Similar Cases* 2012 (5) SA 574 (KZD) a different conclusion was reached. The court held (at 585E–G, 587I–588I, 589G–590B, 590C–D, 591F–G, 592C–F and 593E–G) that it might be concluded from paragraphs 57 and 60 of the *Sebola* case that the Constitutional Court had held that actual notice to the consumer was indeed the standard set by s 129(1) of the NCA; and that paragraph 79 of the *Sebola* case put it beyond doubt that the Constitutional Court had not endorsed the decision in the *Rossouw* case that the risk of non-delivery rested with the defendant (consumer). Accordingly, if in contested proceedings the consumer asserted that the notice to the consumer went astray after reaching the post office, or had not been collected or attended to once collected, the court had to make a finding whether, despite the credit provider's proven efforts, the consumer's allegations were true, and, if so, had to adjourn the proceedings in terms of s 130(4)*(b)* of the NCA. The discretion given to the court by s 130(4)*(b)*(ii) of the NCA was wide enough to permit an order which appeared to the court to offer a reasonable prospect to the credit provider of achieving compliance with s 129(1) in order to generate proof, upon a balance of probabilities, that there had been compliance with that section. For that purpose the credit provider had to provide information on oath which would enable the court to decide which of the options furnished by s 65(2) of the NCA were likely to generate the decision that, on the probabilities, the notice had reached the consumer. As regards actions instituted after the *Sebola* case, the court stated:

'However, as the precursor to actions instituted after *Sebola*, it might be a good idea for the credit provider not only to send the s 129 notice by registered post — that being compulsory in the light of the decision in *Sebola* and probably mandatory also by virtue of the provisions of most credit agreements — but also, and at the same time, to send the same notice by ordinary post to the selected address and to any other address which may appear to hold out a prospect of delivery to the consumer. The summons could then be endorsed with words drawing the consumer's attention to the fact that the litigation instituted by service of the summons is only permissible in the event of the annexed s 129 notice having come to the consumer's attention, and to the consumer's right to defend the action upon the basis that the notice was not received, even if the consumer otherwise admits liability for the claim. If that is done, then, despite a negative track and trace report eventuating, the credit provider may be able to persuade the court that it ought to be satisfied that there was compliance with s 129(1) in the light of —

(a) an explanation on oath as to the significance of the address or addresses to which the notice was directed by ordinary post, coupled with evidence of posting, and

(b) the quality of service achieved which together may point to a probability that the absence of opposition supports a conclusion that the notice did reach the consumer.'

In *Balkind v Absa Bank* 2013 (2) SA 486 (ECG) it was common cause that the s 129(1) notice was sent by registered mail to the applicant's (for rescission of default judgment) chosen *domicilium* address, that the 'track and trace' report showed that it reached the correct post office, and also that the notice never came to the applicant's attention because he had moved from the *domicilium* address without notifying the respondent thereof. In issue was whether, as the respondent contended, these facts constituted compliance with the requirements laid down in the *Sebola* case. In finding that they did not, the court, *inter alia*, stated:

'Effectively, on my understanding of *Sebola*, it ruled that the s 129 notice must either be brought to the attention of the consumer or have reached the consumer (paras 74, 75, 76, 77, 83, 85, 86, 87). Since the Act does not require proof of actual receipt or proof of actual delivery to the address, averments must be made in the combined summons, "that will satisfy the court from which enforcement is sought that notice, on balance of probabilities, reached the consumer" (para 74). Hence, mere dispatch is not enough. Not only is registered mail essential, but averments must be made "that will satisfy a court that the notice probably reached the consumer, as required by s 129(1)" (para 75).' (at 494G–H); 'The essence is therefore that the court must be satisfied on averments made by the credit provider that the notice in fact reached the consumer (para 74). The proof is secondary. Proof is established, on balance of probability, on averments in the papers, and those averments will depend on the facts of each case. (Except, of course, where delivery by mail is the chosen manner of communication, in which case proof of dispatch by registered mail and receipt by the correct post office are essential averments . . .)' (at 495B–C); '*Rossouw* held that receipt of the notice is the responsibility of the consumer, and once the notice is dispatched by registered mail then the requirement of s 129 had been satisfied. On my interpretation of the *Sebola* judgment, it established the principle that the notice must reach the consumer or be brought to his or her attention. The jurisdictional requirements of s 129 are therefore only satisfied once this principle is proved. And this principle is "ordinarily" established by registered mail coupled with proof that the notice was delivered to the correct post office. However, if there are indications to the contrary, the court must make a factual finding and, if not satisfied that the notice came to the attention of the consumer, the claim cannot be enforced.' (at 496E–G); 'The difference between *Rossouw* and *Sebola* is this: *Rossouw* established that the jurisdictional requirements of s 129 are satisfied on proof that the notice was dispatched to the consumer by registered post. *Sebola* established that the jurisdictional requirements of s 129 are satisfied only on proof on a balance of probability that the notice either reached the consumer or came to the attention of the consumer. So, on the test in *Rossouw*, the credit provider was required to allege in the summons and prove dispatch of the notice by registered post. On the test in *Sebola*, the credit provider is required to allege and prove on balance of probability that the notice reached the consumer or at least came to the attention of the consumer.' (at 496I–497A).

The court therefore did not follow the decision in the *Binneman* case, and held that the *Mkhize* case was correctly decided (at 497H–I).

Lastly, the court held (at 497J–498D) that the degree of proof required in the *Sebola* case leaves room for a finding of fictional fulfilment of the principle that the s 129 notice had come to the attention of the consumer. Where, for instance, a recalcitrant debtor deliberately avoids the notification to collect a registered item, or having received the notification, deliberately avoids collecting it, he cannot hide behind non-receipt of the notice or be heard to say that it did not come to his attention. If the facts show that the consumer was residing at the chosen *domicilium* and was in residence at the time the notification to collect the registered item was posted to that address from the correct post office, or that he was telephonically informed by a bank official to collect the item and was supplied with the correct tracking number, then in the absence of a satisfactory explanation why he did not collect same, the *Sebola* judgment permits a finding of fictional fulfilment of the principle, notwithstanding that the notice may have been returned to the bank without being collected by the consumer.

In *Standard Bank of South Africa Ltd v Van Vuuren* (unreported, GSJ case no 32847/2012 dated 26 February 2013), the court held (at paragraph 5) that the judgment in the *Mkhize* case correctly interpreted the *Sebola* case, and that actual service of the s 129 notice on the consumer was required. It was further held (at paragraphs 9 to 18) that the identification of the post office, serving the address where the s 129 notice was sent, could sufficiently be proved by an official letter issued by a responsible employee of the South African Post Office confirming that the particular post office served the consumer's address.

322 2014 (3) SA 56 (CC).

323 At 71G–72D and 76D–G.

324 2010 (5) SA 523 (GSJ) at 526H–I.

325 2010 (5) SA 551 (GNP) at 554E–G.

326 2010 (6) SA 351 (ECG) at 353E and 363A–D, confirmed on appeal *sub nomine Collett v FirstRand Bank Ltd* 2011 (4) SA 508 (SCA). See also *Hardenberg v Nedbank Ltd* 2015 (3) SA 470 (WCC) at 472G–477I where the full court, after an analysis of the judgment in *Collett v FirstRand Bank Ltd (supra)*:

(a) rejected the appellants' argument, based on the dictum in *Collett*'s case, that they had not been in default of the credit agreement concerned at the time that they applied for debt review, that Nedbank Ltd was therefore not entitled to terminate the debt review, and that summary judgment should not have been granted against them;

(b) held that nothing in the formulation of s 86(10) of the NCA suggested that the default of the consumer must have existed at the time that the consumer applied to be declared overindebted;

(c) held, further, that in the context of what the Supreme Court of Appeal was asked to decide in *Collett*'s case, it was not the intention to hold that the default must exist at the time that the consumer applied for debt review in order for a credit provider to be entitled to exercise the right of termination conferred by s 86(10) of the NCA;

(d) dismissed the appeal against the granting of summary judgment.

327 Since 1 July 2019 an application for summary judgment may only be made after the delivery of a plea. See the notes to rule 32 s v 'General' above.

328 2010 (6) SA 429 (GSJ) at 436B, confirmed on appeal *sub nomine Seyffert v FirstRand Bank Ltd t/a First National Bank* 2012 (6) SA 581 (SCA).

329 2011 (1) SA 470 (KZP) at 480C–481D and 483G–487D. In this case it was also held (at 487G–488A) that a defendant who opposes an application for summary judgment on the basis that the credit agreement on which a summary judgment application is based, is subject to debt review, either before a debt counsellor or a magistrate, must allege sufficient facts to satisfy the court that the debt review is bona fide and not a tactic to delay final judgment for payment of the debt. In addition, failure to disclose sufficient information to persuade the court that a proposed scheme for repayment of a debt is reasonable, and capable of meeting the purpose of the NCA, to prioritise consumers satisfying their obligations, will fall short of the requirement of good faith.

330 2010 (6) SA 565 (ECP) at 569J–570C and 570F.

331 2011 (1) SA 310 (GSJ) at 315E–G. See, however, *Collett v FirstRand Bank Ltd* 2011 (4) SA 508 (SCA) in which it was, *inter alia*, held (at 518G) that over-indebtedness is not a defence in summary judgment proceedings.

332 1976 (2) SA 226 (T).

333 For a defence of over-indebtedness, a defendant should provide some of the following information in his affidavit opposing summary judgment:

(i) an outline of his assets and liabilities, income and expenditure in a way sufficient to enable the court to ascertain whether the allegation of over-indebtedness is bona fide;

(ii) the date when he approached the debt counsellor and identity of the latter;

(iii) copies of documents that he submitted to the debt counsellor, or an explanation for their absence;

(iv) to the extent that it is maintained that the debt counsellor did an assessment and found the defendant over-indebted, copies of the documents that he received from the debt counsellor (or an explanation for the absence of such documents) and details concerning the debt counsellor's findings;

(v) details concerning when the debt counsellor allegedly approached the plaintiff for information concerning the defendant's indebtedness, as well as of the proposal that the debt counsellor sent to the plaintiff;

(vi) copies of all documents generated by the debt counsellor, or an explanation for the absence of such documents.

(SA Taxi Securitisation (Pty) Ltd v Mbatha and two similar cases 2011 (1) SA 310 (GSJ) at 324C–G).

334 *SA Taxi Securitisation (Pty) Ltd v Mbatha and two similar cases* 2011 (1) SA 310 (GSJ) at 320H.

335 2011 (4) SA 508 (SCA) at 518G.

336 2011 (1) SA 374 (WCC) at 387G–388C.

337 2012 (4) SA 14 (WCC) at 18G–I, 19B–C and 19I–20E.

338 2014 (3) SA 162 (VB) at 174A–G and 175G.

339 2015 (3) SA 470 (WCC).

340 2011 (4) SA 508 (SCA) at 516C–E.

341 At 475C.

342 At 476H–477I.

343 2016 (2) SA 115 (GP) at 120B–E.

33 Special cases and adjudication upon points of law

(1) The parties to any dispute may, after institution of proceedings, agree upon a written statement of facts in the form of a special case for the adjudication of the court.

(2)*(a)* Such statement shall set forth the facts agreed upon, the questions of law in dispute between the parties and their contentions thereon. Such statement shall be divided into consecutively numbered paragraphs and there shall be annexed thereto copies of documents necessary to enable the court to decide upon such questions. It shall be signed by an advocate and an attorney on behalf of each party or, where a party sues or defends personally, by such party.

(b) Such special case shall be set down for hearing in the manner provided for trials or opposed applications, whichever may be more convenient.

[Paragraph *(b)* as inserted by GN R2021 of 5 November 1971.]

(c) If a minor or person of unsound mind is a party to such proceedings the court may, before determining the questions of law in dispute, require proof that the statements in such special case so far as concerns the minor or person of unsound mind are true.

(3) At the hearing thereof the court and the parties may refer to the whole of the contents of such documents and the court may draw any inference of fact or of law from the facts and documents as if proved at a trial.

(4) If, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately.

[Subrule (4) substituted by GN R2164 of 2 October 1987, by GN R2642 of 27 November 1987 and by GN R1883 of 3 July 1992.]

(5) When giving its decision upon any question in terms of this rule the court may give such judgment as may upon such decision be appropriate and may give any direction with regard to the hearing of any other issues in the proceeding which may be necessary for the final disposal thereof.

(6) If the question in dispute is one of law and the parties are agreed upon the facts, the facts may be admitted and recorded at the trial and the court may give judgment without hearing any evidence.

Commentary

General. Rule 33 makes provision for the following distinct procedures:

(a) a special case in the form of a written statement of facts agreed upon by the parties to any dispute after institution of proceedings (subrules (1)–(3));

(b) the separation of a question of law or fact which may conveniently be decided either before any evidence is led or separately from any question at the instance of the court or on application of any party (subrule (4));

(c) the disposal of a question of law without hearing any evidence where the facts are, by agreement between the parties, admitted and recorded at the trial (subrule (6)).

When giving its decision upon any question in terms of rule 33, the court may give such judgment as may upon such decision be appropriate and may give any direction with regard

to the hearing of any other issues in the proceeding which may be necessary for the final disposal thereof. [1]

Rule 33, it is submitted, is aimed at facilitating the expeditious disposal of litigation.

Subrule (1): General. In *Mtokonya v Minister of Police* [2] the Constitutional Court discussed rule 33(1), (2)*(a)*, (3), (5) and (6) for purposes of understanding the adjudication of a special case submitted to court for adjudication. The Court stated: [3]

> '[13] Rule 33(1) contemplates that parties to pending proceedings may submit to the court "a special case for the adjudication of the court". That means that the parties submit to the court the case that they want the court to adjudicate. Rule 33 tells us that the statement agreed to between the parties by way of which the special case is submitted to court "*shall set forth the facts agreed upon, the questions of law in dispute between the parties and their contentions thereon*".
>
> [14] From rule 33(1) and (2)*(a)* it is clear that what is contemplated in a special case is that there must be a question of law that the parties require the court to decide on the agreed facts and in the light of their contentions which must be set forth in the agreed statement. Rule 33(2)*(a)* provides that the parties may annex to the statement "copies of *documents necessary to enable the court to decide upon such questions*". The reference to "such questions" in rule 33(2)*(a)* is a reference to "the questions of law in dispute between the parties" which one finds early in the provision. That, in turn, is a reference to the question or questions of law identified by the parties as the questions that they are asking the court to decide.
>
> [15] Rule 33(5) proceeds from this understanding when it says:
>
> > "When giving its decision *upon any question in terms of this rule* the court may give such judgment as may upon such decision be appropriate … ."
>
> From rule 33(5) it is clear that the decision of the court is required to be "upon any question in terms of this rule". As I have said, the reference to the "question in terms of this rule" in rule 33(5) is a reference to the question or questions of law that the parties have submitted to the court for a decision. A court that is called upon to decide a special case under rule 33 is required to decide the question of law presented to it and has no right to travel outside the four corners of the agreed statement and decide a different question that it wishes the parties had submitted to it to decide, but did not, or that it may wish the parties had included as one of the questions of law they had submitted to it to decide, but did not.
>
> [16] There is a good reason for this. In terms of rule 33 parties to pending proceedings agree upon a certain set of facts in the light of what the question is that the court is called upon to decide and in the light of the particular contentions that both parties will pursue. So, if a court were to change the question to be decided from the one that the parties had agreed upon, there would be prejudice to one or both of the parties because, for the different questions, one or both may have wished to add certain facts to the case or withdraw their agreement to certain facts. It would, therefore, be fundamentally unfair to at least one of the parties, but, possibly, to both, if, in a special case, the court were to change the question to be decided. It would be both a serious misdirection and a gross irregularity for a court to do so. It is, therefore, important that the court should study the agreed statement carefully to identify the question of law that the parties are asking it to decide, so that it should not decide a different question from the question the parties asked it to decide.'

'The parties to any dispute may.' The parties may proceed under this subrule as of right and the court is obliged to hear the special case as formulated by the parties in terms thereof. [4] This is in contrast with the procedure under subrule (4) where the court must be satisfied that it will be convenient to decide a question of fact or law separately before such order is granted. See the notes to subrule (4) below.

'Agree upon a written statement of facts.' This subrule (and subrule (2)) provides a means of disposing of a case without the necessity of leading evidence. [5] There must be actual agreement between the parties on the stated facts, at least for the purposes of the special case. [6] The subrule makes it clear that the resolution of a stated case proceeds on the basis of a written statement of *agreed facts*. [7] A case drafted on the basis of factual 'assumptions' is contrary to the basic object of the subrule. [8]

An appeal court will not entertain anything beyond that contained in the statement of agreed facts. [9]

'A special case for the adjudication of the court.' This subrule, read with subrule (2), makes provision for a procedure whereby the whole dispute which exists between the parties (its totality as determined by the pleadings) is to be adjudicated upon in the manner prescribed in the subrule. [10] In other words, this subrule is invoked when the entire dispute is to be dealt with; if the parties wish to select one issue for separate treatment, they must make use of the procedure under subrule (4). [11]

The aforegoing also applies to disputes defined by a special plea. In other words, where the procedure under subrule (1) is invoked, the

entire dispute defined by the special plea must be dealt with. Where only the issues raised by the special plea are dealt with in terms of the subrule, it is not necessary to go further and to include in the stated case other issues which may have been raised needlessly in an unnecessary plea over. [12]

Subrule (2)*(a)*: 'The facts agreed upon, the questions of law in dispute between the parties.' The agreement contemplated by subrules (1) and (2)*(a)* relates primarily to the facts and not to the questions of law in dispute between the parties. As regards questions of law, this subrule requires that the written statement shall set forth the questions of law in dispute between the parties and their contentions thereon. If the parties were to overlook a question of law arising from the facts agreed upon, a question fundamental to the issues they have discerned and stated, the court is not confined to the issues of law explicitly raised in the stated case. [13]

A court faced with a request to determine a special case where the facts are inadequately stated should decline the request. [14]

Subrule (2)*(b)*: 'Set down ... convenient.' The manner of set down of trials is not uniform and is dealt with in the local rules or practice directives of the various divisions of the High Court. [15] The manner of set down of opposed motions is dealt with in rule 6(5)*(f)* and the notes thereto above. [16] The test in respect of the manner of set down is one of convenience.

Subrule (2)*(c)*: 'A minor or person of unsound mind is a party to such proceedings.' This subrule is not, it is submitted, intended to do away with the necessity for appointing a *curator ad litem* to a minor or person of unsound mind in those cases where it is the practice to do so. If necessary, the court may appoint a *curator ad litem* to represent the interests of minors and unborn issue. [17]

Subrule (3): 'The court may draw any inference of fact.' This subrule does not have the effect of altering the onus which rests on a party, normally the plaintiff, to prove his case on a balance of probabilities. [18]

Subrule (4): General. The entitlement to seek the separation of issues was created in the rules so that an alleged *lacuna* in the plaintiff's case can be tested; or simply so that a factual issue can be determined which can give direction to the rest of the case and, in particular, to obviate the leading of evidence. The purpose is to determine the plaintiff's claim without the costs and delays of a full trial. It has been held [19] that this procedure is so important that an attorney should as soon as pleadings have closed make a strategic assessment of the real trial needs of the case bearing in mind the duty to eliminate avoidable delays and costs.

'If, in any pending action.' This subrule applies only to a pending action between the parties concerned. [20] A pending action is one in which the issues between the parties have not yet been finally decided or disposed of. [21] The subrule does not apply to applications. [22]

The subrule does not apply to the Supreme Court of Appeal. [23]

'It appears to the court *mero motu*.' It is only after careful thought has been given to the anticipated course of the litigation as a whole that it will be possible for the court, either *mero motu* or on application by any party to the action, to properly determine whether it is convenient to try an issue separately. [24] Thus, the court should only *mero motu* make such an order once it has properly determined whether it is convenient to try an issue separately. See further the notes to this subrule s v 'Which may conveniently be decided' below.

'A question of law.' This refers to an issue which arises from the pleadings. [25] To an extent the procedure envisaged by the subrule and the procedure of exceptions may overlap, but it does not seem to have been contemplated that questions of law arising from the pleadings and capable of being resolved on exception should be the subject of the rather more cumbersome procedure of an application under the subrule. [26] A party who failed to raise an exception at the stage when he could have done so and at the trial invokes the procedure under this subrule may be mulcted in costs. In *Allen and Others NNO v Gibbs* [27] the defendants were awarded only the costs of an opposed exception, such costs being in fact the costs of the argument on the point raised under this subrule and which should have been raised by way of exception at a much earlier stage in the proceedings.

Although in principle a question of law regarding onus of proof falls within the scope of the subrule, a court in the exercise of its discretion will seldom, if ever, use the rule to decide the question of onus at the opening of a case. [28]

'Or fact.' This refers to an issue which arises from the pleadings. [29] The subrule is applicable to any question of fact and not only to a question of fact which is of very narrow compass and scope. [30]

'Which may conveniently be decided.' The procedure is aimed at facilitating the convenient and expeditious disposal of litigation. [31] The word 'convenient' within the context of the subrule conveys not only the notion of facility or ease or expedience, but also the notion of appropriateness and fairness. [32] It is not the convenience of any one of the parties or of the court, but the convenience of all concerned that must be taken into consideration. [33]

It should not be assumed that the aim of the procedure is always achieved by separating the issues. In *Denel (Edms) Bpk v Vorster* [34] the Supreme Court of Appeal stated:

> 'In many cases, once properly considered, the issues will be found to be inextricably linked, even though, at first sight, they might appear to be discreet. And even where the issues are discreet, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing, particularly where there is more than one issue that might be readily dispositive of the matter. It is only after careful thought has been given to the anticipated course of the litigation as a whole that it will be possible properly to determine whether it is convenient to try an issue separately.'

The function of the court in an application under the subrule is to gauge to the best of its ability the nature and extent of the advantages which would flow from the granting of the order sought and of the disadvantages. [35] If it appears that the advantages would outweigh the disadvantages, the court would normally grant the order. [36]

An important consideration will usually be whether or not a preliminary hearing for the separate decision of specified issues will materially shorten the proceedings, [37] though the nature of a particular case may be such that proper consideration of overall convenience may involve factors other than those relating only to the actual duration of a hearing. [38] The grant of the application, although it may result in the saving of many days of evidence in court, may nevertheless cause considerable delay in the reaching of a final decision in the case because of the possibility of a lengthy interval between the first hearing at which the special questions are canvassed and the commencement of the trial proper. [39]

Another consideration would be that the plaintiff's case does not appear to be strong and the defendant's prospects of recovering costs poor. [40] In fact, it has been suggested that a plaintiff, as *dominus litis*, will rarely be able to persuade the court, contrary to the wishes of the defendant, to grant an application under the subrule for the very reason that the weaker the plaintiff's case the better his prospects of obtaining a separation of issues. [41]

Another consideration is whether there are prospects of an appeal on the separated issues, particularly if the issues sought to be separated are controversial and appear to be of importance: if so, an appeal will only exacerbate any delay and negate the rationale for a separation. [42]

Another consideration is whether the evidence required to prove any of the issues in respect of which a separation is sought will overlap with the evidence required to prove any of the remaining issues: a court will not grant a separation where it is apparent that such an overlap will occur. Such a situation will result in witnesses having to be recalled to cover issues which they had already testified about. Where there is such a duplication of evidence, a court will not grant a separation because it will result in the lengthening of the trial, the wasting of costs, potential conflicting findings of fact and credibility of witnesses, and it will also hinder the opposing party in cross-examination. [43]

The convenience must be demonstrated and sufficient information must be placed before the court to enable it to exercise its discretion in a proper and meaningful way. [44] The relief is not a mere formality and the convenience must be demonstrated. [45] If grave prejudice may result for the opposing party should separation be ordered, it would be a further factor, which the court will take into account when considering a separation. [46]

'The court may make an order.' The purpose of this subrule is to confer on the court the power of shortening the duration, or facilitating the final determination of actions. [47] The court has a wide discretion under the subrule and it can decide any question of law or fact separately from any other question in the dispute in a case if it is convenient to do so. [48] There is no room in the rule for a court, on ordering of separation of issues, to make an order in respect of what evidence may or may not be relevant. [49] The fashioning of an order assists in defining the precise ambit of the enquiry to be undertaken. [50] Unless an order is made, the court is required to deal with the action as a whole. [51]

Where a judge presides in a matter wherein an application for consolidation of two actions had previously been granted and, in one of the matters there had been a separation of issues and judgment given by the same judge, that judge is entitled to make credibility findings on the basis of the evidence that he had heard in the previous matter. [52]

'Directing the disposal of such questions.' It is imperative at the start of a trial that there should be clarity on the questions that the court is being called upon to answer. If separate issues are to be determined, the questions to be determined must be expressed by the court

with clarity and precision in its order. [53] A failure by the court to specify an issue with clarity (combined with a failure to make an order) would impact on the ability of the court to arrive at a proper decision on the issue. [54]

'That all further proceedings be stayed.' This was done in, for example, *Glass v Santam Insurance Co Ltd*. [55]

'Until such question has been disposed of.' Leave has been granted under s 20 of the (now repealed) Supreme Court Act 59 of 1959 to appeal against a decision of an issue reserved for determination under this subrule where such decision had been definitive of the rights of the parties and had the effect of disposing of a portion of the relief claimed in the main action. [56] In some cases the decisions in question were interpreted as declaratory orders and appealable as such. [57] See further the notes to s 16 of the Superior Courts Act 10 of 2013 in Volume 1, Part A2.

Where a court has made an order on an issue reserved for determination under this subrule and such decision had a final and decisive effect on the litigation between the parties, the party in whose favour such decision was made is, as a successful party, entitled to its costs in terms of the general principles applicable to awards of costs. [58]

'The court shall on the application of any party make such order.' Under this subrule in its present form [59] the court is obliged to grant the application of a party for separation unless it appears that the questions cannot be conveniently decided separately. [60] It is incumbent on the party who opposes the application to satisfy the court that such order should not be granted. [61] Agreement between the parties does not entitle them to adopt the procedure provided by the subrule as of right. [62] A court approached to sanction a separation of issues has a

duty to satisfy itself that the separation will serve the purpose of the subrule before making an order of separation.See further, in this regard, the notes s v 'Which may be conveniently decided' above.

The application may be brought on notice in the usual way before the trial. [63] Ordinarily an application for an order under the subrule will be made orally at the beginning of the trial, but an order in terms thereof can be made at any time up to judgment. [64]

It is not acceptable that the parties adopt, and the court sanction, an informal procedure based on rule 33(4). [65]

'Unless it appears that the questions cannot conveniently be decided separately.' It is encumbent on the party who opposes an application for separation made under this subrule to satisfy the court that the questions sought to be separated cannot conveniently be decided separately and, accordingly, that the application should not be granted. [66]

Subrule (5): 'The court may give such judgment.' It has been held that the effect of an order that the merits and *quantum* be decided separately, is that the issues on the pleadings would be resolved in two separate and self-contained trials, and that an order made by the court after the first trial (for example issues other than *quantum*) was a final decision, definitive of the rights of the parties and appealable, in respect of which the court was *functus officio*. [67] The court could therefore not thereafter grant an amendment of the pleadings which related to that trial. [68] In *Road Accident Fund v Krawa* [69] the full court expressed its concern about this approach. The full court had to decide, in a claim for damages for loss of support by a dependant, whether, having conceded the merits of the plaintiff's claim at a pre-trial conference, the defendant (i e the Road Accident Fund) was nevertheless entitled, via an amendment to its plea, to dispute the plaintiff's assertion that the deceased had been under a duty to support the plaintiff. In giving leave to the Road Accident Fund to amend its plea, the full court, *inter alia*, held that:

(i) in the procedural context of a separation of issues on the pleadings for trial, the nature of those issues had in the first place to be determined from the pleadings;

(ii) in this context the enquiry relating to *quantum*/damages was not always limited to a mere calculation, but could also (unless admitted by the defendant) include matters relevant to the *existence* of patrimonial loss or damage;

(iii) since an essential feature of the dependant's action was his right to support by the deceased, a failure to prove a duty of support would mean a failure to prove patrimonial loss requiring compensation;

(iv) the existence of a legal duty and concomitant right to support were therefore inexplicably bound up with the question of damages, as the term was understood in the context of a separation of issues for trial;

(v) in conceding the merits of the case, the Road Accident Fund did not, given the ordinary meaning of the term in this context, concede that the plaintiff had suffered patrimonial loss, and accordingly matters pertaining to the deceased's duty of support remained in issue despite the concession;

(vi) the application to amend its plea by the Road Accident Fund had to be granted in so far as it related to the plaintiff's allegation that the deceased had been under a legal duty to support him.

Subrule (6): 'The question in dispute is one of law.' This subrule is designed to meet the case where the facts are not in issue but are agreed upon, and the only question is as to what the legal consequences are that flow from them. The procedure under the subrule differs from both that provided for in subrule (1) and that in subrule (4). It differs from the procedure provided for in subrule (1) in that the agreed facts are admitted and recorded at the trial. It differs from the procedure provided for in subrule (4) in that it does not require an application to court nor an order of court.

Although it is permissible to raise a point of law *in limine* at the trial, the procedure should not be adopted where it would be appropriate to raise an exception to a pleading under rule 23 [70] unless proper notice of the point *in limine* is given. [71]

'The facts may be admitted ... and the court may give judgment without hearing any evidence.' This subrule postulates that the facts admitted and recorded at the trial are the true facts and that they are admitted seriously for the purpose of shortening the trial. [72] The court is confined to the agreed facts and cannot take cognizance of the allegations made by a party or his attorney during argument on the stated facts. [73] This does not mean, however, that tacit provisions which necessarily flow from the expressly agreed facts, as in the case of any other

written agreement, cannot and should not be read into the stated case. [74] A court faced with a request to determine a stated case where the facts are inadequately stated should decline the request. [75]

1 Rule 33(5).

2 2018 (5) SA 22 (CC).

3 At 31C–32B.

4 *Sibeka v Minister of Police* 1984 (1) SA 792 (W) at 795B. In *Minister of Police v Mboweni* 2014 (6) SA 256 (SCA) it was, however, held (at 261H) that a court faced with a request to determine a special case where the facts are inadequately stated should decline the request.

5 *Bane v D'Ambrosi* 2010 (2) SA 539 (SCA) at 543E–F; *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd* 2016 (1) SA 621 (CC) at 638B; *Mtokonya v Minister of Police* 2018 (5) SA 22 (CC) at 30D–33B.

6 *Montsisi v Minister van Polisie* 1984 (1) SA 619 (A) at 631A–F.

7 *Bane v D'Ambrosi* 2010 (2) SA 539 (SCA) at 543E–F; *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd* 2016 (1) SA 621 (CC) at 637G–638B.

8 *Bane v D'Ambrosi* 2010 (2) SA 539 (SCA) at 543D–H.

9 *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd* 2016 (1) SA 621 (CC) at 638D–F.

10 *Sibeka v Minister of Police* 1984 (1) SA 792 (W) at 795B.

11 *Sibeko v Minister of Police* 1985 (1) SA 151 (W) at 158I–159A.

12 *Sibeko v Minister of Police* 1985 (1) SA 151 (W) at 159B–C.

13 *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 24C.

14 *Minister of Police v Mboweni* 2014 (6) SA 256 (SCA) at 261.

15 See Volume 3, Parts F–N.

16 Various divisions of the High Court have their own requirements for the set down of applications. See, in this regard, Volume 3, Parts F–N.

17 See, for example, *Ex parte Sadie* 1940 AD 26 at 30.

18 See *Shell South Africa (Pty) Ltd v Alexene Investments (Pty) Ltd* 1980 (1) SA 683 (W) at 689C–D, as explained in *Moni v Mutual & Federal Versekeringsmaatskappy Bpk* 1992 (2) SA 600 (T) at 604G–605A.

19 *Rauff v Standard Bank Properties* 2002 (6) SA 693 (W) at 703I–J.

20 *Transvaal Canoe Union v Butgereit* 1990 (3) SA 398 (T) at 410I.

21 *King v King* 1971 (2) SA 630 (O) at 634G; *Groenewald v Minister van Justisie* 1972 (4) SA 223 (O) at 225B; *Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd* 1977 (1) SA 316 (T) at 329D.

22 *Louis Pasteur Holdings (Pty) Ltd v Absa Bank Ltd* 2019 (3) SA 97 (SCA) at 106C–J, where it was also held that the High Court may deal with seperate issues in applications *in limine* and in its inherent jurisdiction apply to them a procedure similar to the one in the subrule. This must, however, be done with circumspection.

23 *Pharmaceutical Society of South Africa v Tshabalala-Msimang; New Clicks South Africa (Pty) Ltd v Minister of Health* 2005 (3) SA 238 (SCA) at 252B n 11.

24 *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) at 485B–C. See also *Transalloys (Pty) Ltd v Mineral-Loy (Pty) Ltd* (unreported, SCA case no 781/2016 dated 15 June 2017) at paragraphs [6] and [7].

25 *FirstRand Bank Ltd v Clear Creek Trading 12 (Pty) Ltd* 2018 (5) SA 300 (SCA) at 305C–D.

26 *Minister of Agriculture v Tongaat Group Ltd* 1976 (2) SA 357 (D) at 362H–363A. In *Imprefed (Pty) Ltd v National Transport Commission* 1990 (3) SA 324 (T) the court upon an application of the defendant under the subrule heard and decided a plea of prescription and three exceptions to different claims in the summons.

27 1977 (3) SA 212 (E).

28 *Groenewald v Minister van Justisie* 1972 (4) SA 223 (O) at 225D–226C. See also *Avex Air (Pty) Ltd v Borough of Vryheid* 1972 (4) SA 676 (N).

29 *FirstRand Bank Ltd v Clear Creek Trading 12 (Pty) Ltd* 2018 (5) SA 300 (SCA) at 305C–D.

30 *Vermeulen v Phoenix Assurance Co Ltd* 1967 (2) SA 694 (O) at 697C.

31 *Bank van die Oranje Vrystaat Bpk v OVS Kleiwerke (Edms) Bpk* 1976 (3) SA 804 (O); *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) at 485A–E.

32 *Minister of Agriculture v Tongaat Group Ltd* 1976 (2) SA 357 (D) at 363D; *Mota v Moloantoa* 1984 (4) SA 761 (O) at 786D–787E; *S v Malinde* 1990 (1) SA 57 (A) at 67J–68E; *Braaf v Fedgen Insurance Ltd* 1995 (3) SA 938 (C) at 940C; *Tudoric-Ghemo v Tudoric-Ghemo* 1997 (2) SA 246 (W) at 251B; *ABSA Bank Bpk v Botha* 1997 (3) SA 510 (O) at 513D–I; *Optimprops 1030 CC v First National Bank of Southern Africa Ltd* [2001] 2 All SA 24 (D) at 26*f–g*.

33 *Minister of Agriculture v Tongaat Group Ltd* 1976 (2) SA 357 (D) at 362F; *S v Malinde* 1990 (1) SA 57 (A) at 67F–G; *Braaf v Fedgen Insurance Ltd* 1995 (3) SA 938 (C) at 939H; *Pharmaceutical Society of South Africa v Tshabalala-Msimang; New Clicks South Africa (Pty) Ltd v Minister of Health* 2005 (3) SA 238 (SCA) at 252C–E; *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) at 354J–355C; *African Bank Ltd v Covmark Marketing CC; African Bank Ltd v Soodhoo* 2008 (6) SA 46 (D) at 51G–H; *Huang v Bester NO* 2012 (5) SA 551 (GSJ) at 559A and 559E–F.

34 2004 (4) SA 481 (SCA) at 485A–B. See also *Privest Employee Solutions (Pty) Ltd v Vital Distribution Solutions (Pty) Ltd* 2005 (5) SA 276 (SCA) at 282I; *Consolidated News Agencies (Pty) Ltd (In Liquidation) v Mobile Telephone Networks (Pty) Ltd* 2010 (3) SA 382 (SCA) at 408H; *Absa Bank Ltd v Bernert* 2011 (3) SA 74 (SCA) at 79B–C; *Adlem v Arlow* 2013 (3) SA 1 (SCA) at 3E–F; *FirstRand Bank Ltd v Clear Creek Trading 12 (Pty) Ltd* 2018 (5) SA 300 (SCA) at 404G–305C; *Copperzone 108 (Pty) Ltd v Gold Port Estates (Pty) Ltd* (unreported, WCC case no 7234/2013 dated 27 March 2019) at paragraphs [23], [24] and [25].

35 *Minister of Agriculture v Tongaat Group Ltd* 1976 (2) SA 357 (D) at 364D; *Grindrod Cotts Stevedoring v Brock's Stevedoring Services* 1979 (1) SA 239 (D) at 241A; *Sharp v Victoria West Municipality* 1979 (3) SA 510 (NC) at 512A; *Internatio (Pty) Ltd v Lovemore Brothers Transport CC* 2000 (2) SA 408 (SE) at 410J–411A; *Berman & Fialkov v Lumb* 2003 (2) SA 674 (C) at 618A–B; *African Bank Ltd v Covmark Marketing CC; African Bank Ltd v Soodhoo* 2008 (6) SA 46 (D) at 51H–I.

36 *S v Malinde* 1990 (1) SA 57 (A) at 68C–E.

37 See *Santam Versekeringsmaatskappy Bpk v Ntshona* 1974 (4) SA 290 (C); *Canadian Superior Oil Ltd v Concord Insurance Co Ltd* 1992 (4) SA 263 (W) at 266F–H; *Optimprops 1030 CC v First National Bank of Southern Africa Ltd* [2001] 2 All SA 24 (D) at 26*f–g*; *Copperzone 108 (Pty) Ltd v Gold Port Estates (Pty) Ltd* (unreported, WCC case no 7234/2013 dated 27 March 2019) at paragraph [25]. In *Braaf v Fedgen Insurance Ltd* 1995 (3) SA 938 (C) it is said (at 941D) that despite the wording of the subrule, it remains axiomatic that the 'interests of expedition and finality' are better served by disposal of the whole matter in one hearing (*Sharp v Victoria West Municipality* 1979 (3) SA 510 (NC) at 511H).

38 *Minister of Agriculture v Tongaat Group Ltd* 1976 (2) SA 357 (D) at 363C.

39 *Minister of Agriculture v Tongaat Group Ltd* 1976 (2) SA 357 (D) at 363E; *Grindrod Cotts Stevedoring v Brock's Stevedoring Services* 1979 (1) SA 239 (D) at 241B–D; *Copperzone 108 (Pty) Ltd v Gold Port Estates (Pty) Ltd* (unreported, WCC case no 7234/2013 dated 27 March 2019) at paragraph [25]. See also *Netherlands Insurance Co of SA Ltd v Simrie* 1974 (4) SA 287 (C) at 289B–C.

40 *Santam Versekeringsmaatskappy Bpk v Ntshona* 1974 (4) SA 290 (C); *Sharp v Victoria West Municipality* 1979 (3) SA 510 (NC) at 512B.

41 *Sharp v Victoria West Municipality* 1979 (3) SA 510 (NC) at 512C–D.

42 *Copperzone 108 (Pty) Ltd v Gold Port Estates (Pty) Ltd* (unreported, WCC case no 7234/2013 dated 27 March 2019) at paragraph [25].

43 *Copperzone 108 (Pty) Ltd v Gold Port Estates (Pty) Ltd* (unreported, WCC case no 7234/2013 dated 27 March 2019) at paragraph [25].

44 *Sibeka v Minister of Police* 1984 (1) SA 792 (W) at 795H; *Internatio (Pty) Ltd v Lovemore Brothers Transport CC* 2000 (2) SA 408(SE) at 411A–B; *African Bank Ltd v Covmark Marketing CC; African Bank Ltd v Soodhoo* 2008 (6) SA 46 (D) at 51G–H; *CC v CM* 2014 (2) SA 430 (GJ) at 436E–G; *Copperzone 108 (Pty) Ltd v Gold Port Estates (Pty) Ltd* (unreported, WCC case no 7234/2013 dated 27 March 2019) at paragraph [24].

45 *Sibeka v Minister of Police* 1984 (1) SA 792 (W) at 795H; *Internatio (Pty) Ltd v Lovemore Brothers Transport CC* 2000 (2) SA 408 (SE) at 411B.

46 *Internatio (Pty) Ltd v Lovemore Brothers Transport CC* 2000 (2) SA 408 (SE) at 411C–D.

47 *King v King* 1971 (2) SA 630 (O) at 634F.

48 *Vermeulen v Phoenix Assurance Co Ltd* 1967 (2) SA 694 (O) at 697A–B.

49 *Van der Burgh v Guardian National Insurance Co Ltd* 1997 (2) SA 187 (E) at 189J–190A.

50 *FirstRand Bank Ltd v Clear Creek Trading 12 (Pty) Ltd* 2018 (5) SA 300 (SCA) at 305H.

51 *FirstRand Bank Ltd v Clear Creek Trading 12 (Pty) Ltd* 2018 (5) SA 300 (SCA) at 305G–H.

52 *Customs Tariff Consultants CC v Mustek Ltd* 2002 (6) SA 403 (W). In terms of paragraph 22 of the *Practice Manual: Natal* (see Volume 3, Part I2) a matter will be regarded as partly heard before a judge who granted an order for separation of issues in terms of rule 33(4). Should that judge not be available at the resumed hearing of the trial, and provided the parties agree thereto in writing, the matter may proceed before another judge. Should the latter judge, however, not be satisfied that his decision will not depend on the credibility of any witness whose credibility was also in issue at the first hearing, the second hearing will have to proceed before the first judge. It is submitted that the aforesaid practice should, as a general rule, be followed in other divisions of the High Court. It accords with the principles relating to part-heard matters in general (see, for example, *P Lorillard Co v Rembrandt Tobacco Co (Overseas) Ltd* 1967 (4) SA 353 (T) at 355A). See also (2005) 122 *SALJ* 44.

53 *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) at 485C–E; *Absa Bank Ltd v Bernert* 2011 (3) SA 74 (SCA) at 79C; *Adlem v Arlow* 2013 (3) SA 1 (SCA) at 3E–G.

54 *FirstRand Bank Ltd v Clear Creek Trading 12 (Pty) Ltd* 2018 (5) SA 300 (SCA) at 306C–E. In the *FirstRand Bank* case evidence of relevant and admissible

context, including the circumstances in which an agreement came into being, was crucial. However, the parties failed to place agreed facts before the court (by way of rule 33(1)) or to lead any evidence. At the commencement of the trial they merely agreed to deal with the question whether the National Credit Act 34 of 2005 was applicable to their agreement. No order was made separating the issues, and the issue to be determined was not stated at all nor raised in the pleadings. On appeal it was held (at 307H–I) that the issue could not have been properly decided on the basis it was dealt with in the court *a quo*. Consequently, the eventual order of the court *a quo* was set aside and substituted by the following (at 308B):
'No order is made on the separated issue, save that the costs arising from the separated issue shall be costs in the cause.'

55 1992 (1) SA 901 (W).

56 *Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration* 1987 (4) SA 569 (A); *Marsay v Dilley* 1992 (3) SA 944 (A). See, however, *Elida Gibbs (Pty) Ltd v Colgate Palmolive (Pty) Ltd (2)* 1988 (2) SA 360 (W); *David Hersch Organisation (Pty) Ltd v ABSA Insurance Brokers (Pty) Ltd* 1998 (4) SA 783 (T).

57 *SA Eagle Versekeringsmaatskappy Bpk v Harford* 1992 (2) SA 786 (A) at 791H–792H. See also *Constantia Insurance Co Ltd v Nohamba* 1986 (3) SA 27 (A) at 35H–J where the proceedings were brought before the court by way of a stated case under subrule (1) of this rule.

58 *Baptista v Stadsraad van Welkom* 1996 (3) SA 517 (O).

59 The subrule was cast into its present form by GN R1883 of July 1992.

60 *Braaf v Fedgen Insurance Ltd* 1995 (3) SA 938 (C) at 939G; *Edward L Bateman Ltd v C A Brand Projects (Pty) Ltd* 1995 (4) SA 128 (T) at 132D.

61 *Berman & Fialkov v Lumb* 2003 (2) SA 674 (C) at 680H–I.

62 *Sibeka v Minister of Police* 1984 (1) SA 792 (W) at 794H; *Sibeko v Minister of Police* 1985 (1) SA 151 (W) at 159A; and see the notes to this subrule s v 'Which may be conveniently decided' above. However, both *Kroon v J L Clark Cotton Co (Pty) Ltd* 1983 (2) SA 197 (E) at 199E and *Chisnall and Chisnall v Sturgeon and Sturgeon* 1993 (2) SA 642 (W) at 647F–H seem to proceed from the assumption that parties may by agreement submit a separate issue to the court for consideration under the subrule.

63 See, for example, *Sibeka v Minister of Police* 1984 (1) SA 792 (W) at 795G–H; *McLelland v Hulett* 1992 (1) SA 456 (D) at 463B–H.

64 *Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd* 1977 (1) SA 316 (T) at 329D; *Sibeka v Minister of Police* 1984 (1) SA 792 (W) at 794H.

65 *Adlem v Arlow* 2013 (3) SA 1 (SCA) at 3C.

66 *Braaf v Fedgen Insurance Ltd* 1995 (3) SA 938 (C) at 939G.

67 *David Hersch Organisation (Pty) Ltd v ABSA Insurance Brokers (Pty) Ltd* 1998 (4) SA 783 (T) at 787*c–g*; *Schmidt Plant Hire (Pty) Ltd v Pedrelli* 1990 (1) SA 398 (D); *Tolstrup NO v Kwapa NO* 2002 (5) SA 73 (W) at 77I–J and 78A.

68 *Tolstrup NO v Kwapa NO* 2002 (5) SA 73 (W) at 77I–J and 78A.

69 2012 (2) SA 346 (ECG) at 359C–360B and 366E–370B.

70 *Kriel v Hochstetter House (Edms) Bpk* 1988 (1) SA 220 (T) at 230G–231D.

71 *Imprefed (Pty) Ltd v National Transport Commission* 1990 (3) SA 324 (T) at 332I–332A.

72 Cf *Minister of Police v Mboweni* 2014 (6) SA 256 (SCA) at 260B–261I.

73 *Union Trustmaatskappy (Edms) Bpk v Thirion* 1965 (3) SA 648 (GW) at 651; *Thirion v Upington Trustmaatskapy (Edms) Bpk* 1966 (1) SA 401 (A) at 404; *Naboomspruit Munisipaliteit v Malati Park (Edms) Bpk* 1982 (2) SA 127 (T) at 131D.

74 *Naboomspruit Munisipaliteit v Malati Park (Edms) Bpk* 1982 (2) SA 127 (T) at 131D.

75 See *Minister of Police v Mboweni* 2014 (6) SA 256 (SCA) at 261.

34 Offer to settle

(1) In any action in which a sum of money is claimed, either alone or with any other relief, the defendant may at any time unconditionally or without prejudice make a written offer to settle the plaintiff's claim. Such offer shall be signed either by the defendant himself or by his attorney if the latter has been authorised thereto in writing.

(2) Where the plaintiff claims the performance of some act by the defendant, the defendant may at any time tender, either unconditionally or without prejudice, to perform such act. Unless such act must be performed by the defendant personally, he shall execute an irrevocable power of attorney authorising the performance of such act which he shall deliver to the registrar together with the tender.

(3) Any party to an action who may be ordered to contribute towards an amount for which any party to the action may be held liable, or any third party from whom relief is being claimed in terms of rule 13, may, either unconditionally or without prejudice, by way of an offer of settlement —

(a) make a written offer to that other party to contribute either a specific sum or in a specific proportion towards the amount to which the plaintiff may be held entitled in the action; or

(b) give a written indemnity to such other party, the conditions of which shall be set out fully in the offer of settlement.

(4) One of several defendants, as well as any third party from whom relief is claimed, may, either unconditionally or without prejudice, by way of an offer of settlement make a written offer to settle the plaintiff's or defendant's claim or tender to perform any act claimed by the plaintiff or defendant.

(5) Notice of any offer or tender in terms of this rule shall be given to all parties to the action and shall state —

(a) whether the same is unconditional or without prejudice as an offer of settlement;

(b) whether it is accompanied by an offer to pay all or only part of the costs of the party to whom the offer or tender is made, and further that it shall be subject to such conditions as may be stated therein;

(c) whether the offer or tender is made by way of settlement of both claim and costs or of the claim only;

(d) whether the defendant disclaims liability for the payment of costs or for part thereof, in which case the reasons for such disclaimer shall be given, and the action may then be set down on the question of costs alone.

(6) A plaintiff or party referred to in subrule (3) may within 15 days after the receipt of the notice referred to in subrule (5), or thereafter with the written consent of the defendant or third party or order of court, on such conditions as may be considered to be fair, accept any offer or tender, whereupon the registrar, having satisfied himself that the requirements of this subrule have been complied with, shall hand over the power of attorney referred to in subrule (2) to the plaintiff or his attorney.

(7) In the event of a failure to pay or to perform within 10 days after delivery of the notice of acceptance of the offer or tender, the party entitled to payment or performance may, on five days' written notice to the party who has failed to pay or perform apply through the registrar to a judge for judgment in accordance with the offer or tender as well as for the costs of the application.

(8) If notice of the acceptance of the offer or tender in terms of subrule (6) or notice in terms of subrule (7) is required to be given at an address other than that provided in rule 19(3), then it shall be given at an address, which is not a post office box or *poste restante*, within 15 kilometres of the office of the registrar at which such notice must be delivered.

[Subrule (8) substituted by GN R464 of 22 June 2012.]

(9) If an offer or tender accepted in terms of this rule is not stated to be in satisfaction of a plaintiff's claim and costs, the party to whom the offer or tender is made may apply to the court, after notice of not less than five days, for an order for costs.

(10) No offer or tender in terms of this rule made without prejudice shall be disclosed to the court at any time before judgment has been given. No reference to such offer or tender shall appear on any file in the office of the registrar containing the papers in the said case.

(11) The fact that an offer or tender referred to in this rule has been made may be brought to the notice of the court after judgment has been given as being relevant to the question of costs.

(12) If the court has given judgment on the question of costs in ignorance of the offer or tender and it is brought to the notice of the registrar, in writing, within five days after the date of judgment, the question of costs shall be considered afresh in the light of the offer or tender: Provided that nothing in this subrule contained shall affect the court's discretion as to an award of costs.

(13) Any party who, contrary to this rule, personally or through any person representing him, discloses such an offer or tender to the judge or the court shall be liable to have costs given against him even if he is successful in the action.

(14) This rule shall apply *mutatis mutandis* where relief is claimed on motion or claim in reconvention or in terms of rule 13.

[Rule 34 substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

Commentary

General. The practice of paying money into court is derived from the English and not from the Roman-Dutch practice. [1] It is said to have been first introduced to avoid the hazard and difficulty of pleading a tender, [2] which in English law is a more complicated procedure than in Roman-Dutch law. The object of a payment into court was to limit costs and to act as a deterrent against the prosecution by a plaintiff of unnecessary litigation. [3]

The practice of actual payment into court was abolished in 1987 and the rule was amended to make provision for a system of offer and tender. The offer of settlement procedure is the direct successor of the payment into court procedure, and the principles and cases applicable to the latter remain applicable to the former. [4] Both create a formal procedure for the defendant to offer to terminate or curtail the litigation, unconditionally or without prejudice,

by making an offer to satisfy the plaintiff's claim. The present procedure is less cumbersome, and involves less bureaucratic complexity, than its predecessor. [5] If the defendant fails to perform in terms of an offer or tender which has been accepted, the plaintiff is entitled to apply for judgment. [6] The rule is, therefore, designed to enable a defendant to avoid further litigation, and failing that to avoid liability for the costs of such litigation. [7] The rule is there not only to benefit a particular defendant, but for the public good, generally, as well. [8] Courts should take account of the purpose behind the rule and not give orders which undermine it. [9]

Offers of settlement and tenders to perform made under rule 34 must comply with the requirements thereof. An offer of settlement made under the rule must therefore be *(a)* a written offer; *(b)* signed personally by the defendant or by the defendant's attorney if the latter has been authorized thereto in writing; [10] and *(c)* comply with the provisions of subrule (5).

By virtue of the provisions of subrule (14), this rule applies *mutatis mutandis* to motion proceedings, claims in reconvention and a third party procedure under rule 13.

An offer to settle need not be made in terms of rule 34. A tender can be made before action is brought and, if sufficient, will protect the defendant from all the costs incurred in the action, from summons onwards. [11] If the defendant wishes to avail himself of a tender made before action was brought in order to disavow liability for costs, the tender should be pleaded. [12] Rule 34 does not provide, expressly or by necessary implication, that a secret tender made by the plaintiff outside the rules, cannot be relied upon when it comes to costs. [13] See further the notes to rule 35(2)*(b)* s v 'Statements without prejudice' below.

Offer of compromise and conditional payment. A careful distinction must be drawn between an offer of compromise (i e an offer to settle the claim made *animo contrahendi*) and a so-called conditional payment [14] which are both not made in terms of rule 34. The consequences of the acceptance and rejection of a conditional payment, on the one hand, and of an offer of compromise, on the other, are entirely different. Conditional payment takes place where the debtor pays an admitted debt, or an admitted portion of a debt, but in so paying purports to impose a condition on the creditor's acceptance. Any such condition is invalid, for the debtor, in paying what is admittedly due, cannot engraft upon such payment a condition which was not agreed upon between the parties or is not implied by law. [15] This is equally so if the condition which

the debtor purports to impose is that the creditor should accept the money paid in full settlement of his claim, and should forgo the balance, which may or may not be disputed. Such a condition is valid if the debtor is making an offer to effect a compromise of a disputed debt, [16] but is invalid if he is paying what is admittedly due. The creditor is entitled to disregard the invalid condition, to retain the money paid, and to sue for the balance. [17]

It often happens that an offer of compromise is accompanied by money or a cheque. In such cases the distinction between a conditional payment and an offer to effect a compromise becomes blurred. Such money or cheque is offered to the creditor conditionally, the condition being that he can retain it only if he accepts the offer of settlement and abandons the balance of his claim. [18] In this case the condition is valid; indeed it is inherent in the nature of the tender. [19] The creditor can neither object to it nor disregard it. It follows that if he keeps the money, he will be regarded as having accepted the offer and will be debarred from proceeding to recover the balance of his claim. [20] If he refuses such an offer, he is refusing a valid offer with a valid condition and therefore runs the risk of bearing the costs of any subsequent action.

The question whether money or a cheque sent to the creditor 'in settlement' or 'in full settlement' is intended to accompany an offer to compromise, or is sent in payment of an admitted debt, but subject to a condition, is not always an easy one. [21] The following general propositions may be of assistance: [22]

(a) Whether an offer to compromise or the payment of an admitted debt was intended is a matter to be settled upon the facts of each case, and the intention of the parties. [23]

(b) The words 'in full settlement' are ambiguous. [24] They indicate prima faciethat the offer is one of compromise, [25] but they are not conclusive, and may indicate a conditional payment. [26]

(c) When a debtor offers to make payment 'in full and final settlement', he may impose conditions as to the mode of acceptance, such as that the payment or cheque, as the case may be, should be returned by the creditor if the offer is not accepted. In case of doubt the construction should be against the debtor, since he has it in his power to make his meaning clear. [27]

(d) If the answer to the above question is that the money was intended to accompany an offer of compromise, the creditor is not entitled to accept it on his own conditions, which differ from those imposed by the debtor. [28]

(e) If the answer to the preliminary question is that the money was intended to constitute a conditional payment, the question may arise whether the creditor, in retaining it, has accepted or disregarded the invalid condition.

(f) The essential issue is whether an agreement of compromise was concluded: one is concerned simply with the principles of offer and acceptance. [29] In this regard it has been pointed out that although, generally, a contract is founded on consensus, contractual liability could also be incurred in circumstances where there is no real agreement between the parties but one of them is reasonably entitled to assume from the words or conduct of the other that they were in agreement. [30]

The person who alleges the compromise bears the onus of establishing it. [31]

Subrule (1): 'At any time.' The offer to settle or the tender must clearly be made before judgment.

'Unconditionally.' An unconditional offer is designed for the case where the defendant admits liability on the plaintiff's claim, in whole or in part, entitling the plaintiff to accept the offer and to sue for the balance of his claim at his peril. [32] In *Visser v Visser* [33] the court, in an *obiter dictum*, remarked [34] that the nature of liability where an offer to settle had been accepted was 'not uncomplicated' and pointed out that in *Orton v Collins* [35] it was held that the obligation that arose was not primarily contractual but was *sui generis*. On the analogy of *Modise v Standard General Insurance Co Ltd,* [36] *Erasmus v Santam Insurance Ltd* [37] and *Hassett v Santam Insurance Co Ltd* [38] it seems, however, that the acceptance of an unconditional offer creates a settlement agreement which could be enforced.

The effect of an unconditional offer is to place the plaintiff in a position where he, if he rejects it, will run the risk of having to pay the costs subsequently incurred, unless he is able to prove an amount in excess of the sum tendered. [39] Once the plaintiff has rejected the offer, he cannot fall back on it: the offer neither creates a cause of action nor fixed minimum liability in the amount offered. [40] To hold otherwise would be to defeat the entire purpose of the rule. [41]

In High Court practice an action is neither stayed nor terminated by an unconditional offer; the plaintiff is entitled to reject the offer and to increase the amount of his claim by amendment of his summons. [42]

'Without prejudice.' An offer made without prejudice is an offer of settlement under denial of liability. If the plaintiff accepts the offer, his claim is extinguished and he has no further recourse against the defendant except, if applicable, for costs as provided in subrule (9). [43]

'A written offer.' The offer must comply with the provisions of subrule (5).

'Shall be signed . . . attorney.' Offers of settlement and tenders to perform made under the rule must comply with the requirements thereof. This means that it is obligatory for an offer made under the rule to be signed by the attorney *only* when he has been given written authority to do so by the defendant. [44]

Subrule (2): 'The performance of some act.' For example, the passing of transfer of property, to vacate property or to do/abstain from doing something claimed in interdict proceedings.

'At any time.' See the notes to subrule (1) s v 'At any time' above.

'Unconditionally.' See the notes to subrule (1) s v 'Unconditionally' above which apply *mutatis mutandis* to the performance of an act.

'Without prejudice.' See the notes to subrule (1) s v 'Without prejudice' above.

'Tender . . . to perform such act.' This subrule does not state that the tender must be in writing or that it must be signed by the defendant himself or by his attorney. Subrule (5), however, clearly contemplates a written tender.

Subrule (3): 'Any party . . . who may be ordered to contribute . . . or any third party.' This subrule enables a party who is sued as a joint wrongdoer or any other party who may be ordered to contribute, for example, under the Apportionment of Damages Act 34 of 1956, towards an amount for which any party to the action may be held liable, to make an offer or give an indemnity to such party. In many such cases it would make little sense to make an offer to the plaintiff. [45]

Subrule (4): 'One of several defendants, as well as any third party.' This subrule overcomes the difficulties caused by the decision in *Tsitsi v British Overseas Insurance Co Ltd* [46] in which it was held that one of two defendants could not make a tender.

Subrule (5): 'Notice . . . shall state.' The provisions of this subrule are peremptory. The notice must comply with the provisions of the subrule and, where applicable, deal explicitly with the matters referred to in paragraphs *(a)* to *(d)*. [47] The object of the notice is to eliminate factual disputes as to the nature and content of the offer or tender. [48]

Subrule (5)*(b)*: 'Shall be subject to such conditions.' This subrule makes it clear that the decision in *Van Rensburg v AA Mutual Insurance Co Ltd*, [49] in which it was held impermissible for a defendant to impose conditions on the acceptance of a payment into court without prejudice, does not apply to an offer or tender made in terms of rule 34.

Subrule (5)*(d)*: 'Disclaims liability for the payment of costs.' This subrule makes it possible for an offeror to raise special issues relating to costs; for example, that he should not be liable for the wasted costs of a postponement. [50] The subrule obviates the problem adverted to in *Erasmus v Viljoen* [51] where it is said that it is 'heeltemaal sinneloos dat 'n eiser wat tevrede is met die bedrag wat inbetaal is ter skikking van die eis as sulks, 'n hele verhoor moet voortsit bloot teneinde sekere spesiale bevele van die Hof te verkry betreffende koste'.

Subrule (6): 'May within 15 days after receipt of the notice.' This subrule affords the offeree a *spatium deliberandi* whether or not to accept the offer or tender and during that period the offeror is not entitled to resile from the offer or tender. [52] It has, however, been suggested that there may be 'very exceptional cases', such as fraud, genuine error or that no legal basis exists for any claims by the plaintiff against the defendant, in which the defendant may withdraw his offer of settlement. [53]

The subrule does not allow the plaintiff to keep the defendant waiting while costs mount up — in the exercise of its discretion in regard to costs the court will determine whether the plaintiff acted reasonably in delaying the acceptance of the offer. [54]

'With the written consent of . . . or order of court.' If the plaintiff wishes to accept an offer or tender after the expiry of the period of fifteen days provided for in the subrule, he needs the consent of the offeror or an order of court. [55] There is nothing in the rule which obliges the defendant to allow his offer or tender to stand after the expiry of the period of fifteen days. [56]

'On such conditions as may be considered to be fair.' The court will exercise its discretion under the subrule according to the circumstances of the case before it. [57]

'Accept any offer or tender.' The offer or tender must be accepted on the terms upon which it was made. [58] If the costs issues have been settled by agreement between the parties in terms of a tender made in terms of this rule which has been accepted, the court has no discretion to go outside the agreement between the parties. [59] The court has no discretion to award a plaintiff costs other than those which the defendant undertook to pay in terms of the tender. However, costs incurred subsequent to the date of tender and not covered by the settlement agreement constituted by the acceptance of the tender, are to be dealt with in accordance with the discretion of the court. [60]

Subrule (7): '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.

Subrule (9): 'Is not stated to be in satisfaction of a plaintiff's claim and costs.' If the offer or tender does include costs and the plaintiff wishes to accept the offer, he must do so on the terms upon which it is made. [61] Once such an offer or tender has been accepted under subrule (6) the court has no power under this subrule to grant the plaintiff costs other than those contained in the offer or tender that has been accepted. [62]

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

'For an order for costs.' This subrule does not create a substantive right to costs — it prescribes the procedure to be adopted by a party who has accepted an offer in terms of the rule and who believes that he is entitled to an order for costs. [63]

Subrule (10): 'Shall be disclosed to the court.' The prohibition against disclosure applies only to an offer or tender made without prejudice; it does not apply to an unconditional offer or tender. The idea underlying this subrule is that the court should approach a question of damages unaffected by the knowledge of an offer made by the defendant, thus avoiding the

possibility of the court being influenced by such knowledge to award something more than the amount paid in or tendered, in order that the judgment should carry costs. [64] The provisions of the subrule are imperative both in form and in the sense that a court cannot grant dispensation in advance from its requirements. [65] The court, however, has a discretion in a proper case to condone a breach of the provisions of the rule and to order a trial to continue before it. [66]

The question whether or not an offer or tender in terms of the rule should be disclosed to a court of appeal was left open in *Bruwer v Joubert*. [67]

Subrule (12): 'The question of costs shall be considered afresh.' The object of this subrule is to enable the court to take into account the fact that what, in the event, proved to be a generous offer of settlement had been refused by the plaintiff or by one of the defendants, when it exercised its discretion as to what order as to costs would be fair in all the circumstances of the case. As the court would have been unaware of the circumstances of the offer when judgment was delivered it would have been unable at that stage to take it into account, and the subrule gives the court an opportunity to consider the matter afresh after it has learned about the secret tender. [68]

If the award of the court *a quo* is increased on appeal so as to beat the tender, the court of appeal will refer the question of the costs in the court *a quo* to that court for reconsideration unless (*semble*) the court of appeal is in possession of all the relevant facts. [69]

'Provided that nothing ... shall affect the court's discretion as to an award of costs.' The trial court has an overriding discretion on costs under the rule. [70] The proviso to the subrule makes it clear that when the court is required to reconsider the question of costs, the court's discretion remains unfettered despite the fact that it had already given a judgment on the costs. [71] In the exercise of its discretion on how costs should be apportioned when a tender has been made, the starting point for the court will ordinarily be whether the tender beats the amount awarded. This means that, apart from determining the *spatium deliberandi*, the discretion at this stage of the proceedings is fairly limited. [72] The usual practice is, if the offer or tender exceeds the amount of the judgment, to order the defendant to pay the plaintiff's costs incurred up to the date of the offer or tender, and the plaintiff to pay the defendant's costs incurred thereafter. [73] In appropriate circumstances the court may make a

different apportionment of the costs in the exercise of the discretion that it retains under the subrule. [74]

If an appellant achieves substantial success on appeal by obtaining an increased award of damages, the fact that an offer of settlement had been made prior to the trial which exceeds the award as increased by the court of appeal, does not affect the issue of the costs of appeal. The appellant who has achieved substantial success on appeal is entitled to the costs of appeal. [75]

1 *Frenkel, Wise & Co v Cuthbert Ltd* 1946 CPD 735 at 741; *Van Rensburg v AA Mutual Insurance Co Ltd* 1969 (4) SA 360 (E) at 363C; *Kgolokwane v Smit* 1987 (2) SA 421 (O) at 425–6. See also Cilliers *Costs* paragraph 7.08 and H J Erasmus 'Restrictions on disclosure of without prejudice offers' 2012 (January/February) *De Rebus* 30.

2 *Shepherd v Commissioner of Railways* 1905 TS 189 at 195.

3 *Van Rensburg v AA Mutual Insurance Co Ltd* 1969 (4) SA 360 (E) at 367A. See also *Doyle v Salgo (2)* 1958 (1) SA 41 (FC); *Nicholaides v Marcus Stores (Pty) Ltd* 1960 (4) SA 694 (SR); *Gush v Protea Insurance Co Ltd* 1973 (4) SA 286 (E) at 288H.

4 *Turbo Prop Service Centre CC v Croock t/a Honest Air* 1997 (4) SA 758 (W) at 764G.

5 *Turbo Prop Service Centre CC v Croock t/a Honest Air* 1997 (4) SA 758 (W) at 764C.

6 See subrules (6) and (7) and the notes thereto below.

7 *Naylor v Jansen* 2007 (1) SA 16 (SCA) at 22I–23A. See also H J Erasmus 'Restrictions on disclosure of without prejudice offers' 2012 (January/February) *De Rebus* 30.

8 *Naylor v Jansen* 2007 (1) SA 16 (SCA) at 23A–B.

9 *Naylor v Jansen* 2007 (1) SA 16 (SCA) at 23B–C.

10 *Van der Merwe v FirstRand Bank Ltd t/a Wesbank and Barloworld Equipment Finance* 2012 (1) SA 480 (ECG) at 483D–E.

11 *King v Sikonyela* (1891) 12 NLR 245; *Duggan v Brownlee* 1910–17 GWL 118; *Odendaal v Du Plessis* 1918 AD 470; *Boland Bank Bpk v Steele* 1994 (1) SA

259 (T) at 265D–266C; *Unit Inspection Co of SA (Pty) Ltd v Hall Longmore & Co (Pty) Ltd* 1995 (2) SA 795 (A) at 801F. In *Origo International (Pty) Ltd v Smeg South Africa (Pty) Ltd* 2019 (1) SA 267 (GJ) it was reiterated (at 270E) that in order to qualify as a proper tender for payment, the tender must be unconditional and made 'met openbeurs en klinkende munt'. It must be for payment of the full amount owing. It was held (at 271F–I) that although a tender to pay is a promise or undertaking to pay and not actual payment, it is not without legal effect. By way of analogy to an offer to settle and tender under rule 34, the tender for payment has the following consequence: should it be found that the admitted amount (or the lesser amount subsequently paid) was in fact the true amount owing, the party making the tender will be protected from the consequences of non-compliance set forth in the demand for payment (i e, *in casu*, cancellation of the agreement between the parties).

12 *Naudé v Kennedy* 1909 TS 799 at 808–9; *Foord v Lake and Others NNO* 1968 (4) SA 395 (W) at 399A; *De Beer v Rondalia Versekeringskorporasie van SA Bpk* 1971 (3) SA 614 (O) at 616C; *Unit Inspection Co of SA (Pty) Ltd v Hall Longmore & Co (Pty) Ltd* 1995 (2) SA 795 (A) at 802I. These cases were considered in *AD v MEC for Health and Social Development, Western Cape* 2017 (5) SA 134 (WCC) at 147B–148C, after which the court concluded as follows (at 148D–F): 'In my respectful view, those cases in which *Naudé* was applied to without prejudice offers failed to appreciate the need to distinguish between open tenders and without prejudice offers. It is inherent in a without prejudice offer that it will not be made known to the court, at least not until judgment has been delivered. It is self-defeating to say that if a defendant wishes to rely on a without prejudice offer as protection against costs he must plead it. … A defendant cannot permissibly plead and prove the making of the without prejudice offer, at least not without the consent of the plaintiff. The defendant could, of course, make the same tender in his plea, i e as an open tender, but his protection would then operate only from the date of the plea. He could not allege that the tender in his plea was a repetition of a without prejudice offer made at an earlier stage.'

13 *AD v MEC for Health and Social Development, Western Cape* 2017 (5) SA 134 (WCC) at 145I–146A.

14 The problem is fully considered in *Harris v Pieters* 1920 AD 644; *Van Breukelen v Van Breukelen* 1966 (2) SA 285 (A); *SA Scottish Finance Corporation Ltd v Smit* 1966 (3) SA 629 (T); *Blumberg v Atkinson* 1974 (4) SA 551 (T). See De Villiers (1954) 17 *THRHR* 217 and 220; Zeffertt (1972) 89 *SALJ* 35.

15 *Harris v Pieters* 1920 AD 644 at 650.

16 If the condition is accepted, a compromise (*transactio*) results (*Rielly v Seligson and Clare Ltd* 1976 (2) SA 847 (W) at 850D; *ABSA Bank Ltd v Van de Vyver NO* 2002 (4) SA 397 (SCA) at 404H). If the creditor proceeds with his claim to recover anything over and above the amount tendered, he will be met with the plea that he has accepted a compromise which has the effect of *res judicata (Cachalia v Harberer & Co* 1905 TS 457 at 464; *Western Assurance Co v Caldwell's Trustee* 1918 AD 262 at 270; *Mothle v Mathole* 1951 (1) SA 785 (T); *Van Zyl v Niemann* 1964 (4) SA 661 (A) at 669H; *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd* 1978 (1) SA 914 (A) at 922B–C).

17 *Harris v Pieters* 1920 AD 644 at 650; *SA Scottish Finance Corporation Ltd v Smit* 1966 (3) SA 629 (T) at 635; *ABSA Bank Ltd v Van de Vyver NO* 2002 (4) SA 397 (SCA) at 404A–B and 404H–I.

18 De Villiers (1954) 17 *THRHR* 217 points out (at 220) that '[i]n sulke gevalle maak die aanbieder in werklikheid gelyktydig 'n skikkingsaanbod en 'n voldoeningsaanbod, maar dit moet in gedagte gehou word dat so 'n voldoeningsaanbod nie gemaak word ten opsigte van 'n bestaande verpligting nie; dit is eintlik 'n voldoeningsaanbod in anticipando, nl ten opsigte van 'n verbintenis wat die aanbieder verwag sal ontstaan met die aanname van sy skikkingsaanbod'. See further *Paterson Exhibitions CC v Knights Advertising and Marketing CC* 1991 (3) SA 523 (A) at 528G.

19 *Odendaal v Du Plessis* 1918 AD 470 at 475; *Van Breukelen v Van Breukelen* 1966 (2) SA 285 (A) at 289F.

20 *Neville v Plasket* 1935 TPD 115; *Tractor & Excavator Spares (Pty) Ltd v Lucas J Botha (Pty) Ltd* 1966 (2) SA 740 (T); *Andy's Electrical v Laurie Sykes (Pty) Ltd* 1979 (3) SA 341 (N); *Paterson Exhibitions CC v Knights Advertising and Marketing CC* 1991 (3) SA 523 (A) at 529C; *ABSA Bank Ltd v Van de Vyver NO* 2002 (4) SA 397 (SCA) at 402B–F.

21 *Paterson Exhibitions CC v Knights Advertising and Marketing CC* 1991 (3) SA 523 (A) at 528B; *Bam v Rafedam Boerdery BK* 2004 (1) SA 484 (O) at 489F–G.

22 For a full discussion, see Zeffertt (1972) 89 *SALJ* 35. The authorities are also considered in some detail in *Andy's Electrical v Laurie Sykes (Pty) Ltd* 1979 (3) SA 341 (N) and in the judgment of Kroon J in *Kei Brick & Tile Co (Pty) Ltd v AM Construction* 1996 (1) SA 150 (E) at 152H–158B.

23 *Harris v Pieters* 1920 AD 644; *Burt NO v National Bank of South Africa Ltd* 1921 AD 59 at 62; *Boustred Ltd v Standard Bank of SA Ltd* 1927 WLD 88; *Moosa v Essa* 1931 NPD 365; *SA Scottish Finance Corporation Ltd v Smit* 1966 (3) SA 629 (T) at 635D; *Cecil Jacobs (Pty) Ltd v MacLeod & Sons* 1966 (4) SA 41 (N) at 46C; *Andy's Electrical v Laurie Sykes (Pty) Ltd* 1979 (3) SA 341 (N); *Paterson Exhibitions CC v Knights Advertising and Marketing CC* 1991 (3) SA 523 (A) at 529D; *ABSA Bank Ltd v Van de Vyver NO* 2002 (4) SA 397 (SCA) at 404H; *Bam v Rafedam Boerdery BK* 2004 (1) SA 484 (O) at 491G–492B. In *ABSA Bank Ltd v Van de Vyver NO* 2002 (4) SA 397 (SCA) the Supreme Court of Appeal remarked (at 405A–B) that sending one's creditor a cheque 'in full settlement' coupled with a denial of liability would almost certainly signify an offer of compromise. See also *Gerolomou Constructions (Pty) Ltd v Van Wyk* 2011 (4) SA 500 (GNP) at 503G–505G.

24 *Harris v Pieters* 1920 AD 644 at 654; *Briggs v Titlestad* 1938 NPD 446 at 451–2; *Cecil Jacobs (Pty) Ltd v MacLeod & Sons* 1966 (4) S A 41 (N) at 46C. In *ABSA Bank Ltd v Van de Vyver NO* 2002 (4) SA 397 (SCA) the Supreme Court of Appeal held (at 404F–I) that the expression 'in full settlement' is not in itself ambiguous because it always serves to do no more, legally speaking, than import the condition that on acceptance the creditor has no further claim to any balance of the debt. With regard to the two different situations in which it is employed (i e offer of compromise or conditional payment), however, its effect differs.

25 *Attwell & Co v Purcell, Yallop and Everett* (1897) 14 SC 368 at 372; *African Agricultural and Finance Corporation Ltd v Bougenon* 1904 TS 535; *Woolf v Kalter & Flymen* 1908 TS 529 at 533; *Nel v Von Molkte* 1910 OPD 17 at 23; *Hurwitz v Rhodesia Railways Ltd* 1911 AD 698; *Gordon v Botha* 1916 OPD 218; and *dicta* in *Odendaal v Du Plessis* 1918 AD 470; *Harris v Pieters* 1920 AD 644; *Burt NO v National Bank of South Africa Ltd* 1921 AD 59; *Turgin v Atlantic Clothing Manufacturers* 1954 (3) SA 527 (T); *Cecil Jacobs (Pty) Ltd v MacLeod & Sons* 1966 (4) SA 41 (N) at 46C; *Tractor & Excavator Spares (Pty) Ltd v Lucas J Botha (Pty) Ltd* 1966 (2) SA 740 (T); *Van Breukelen v Van Breukelen* 1966 (2) SA 285 (A) at 289F.

26 *Lewis v Sutton* 1912 TPD 117; *Richardson v Central News Agency* 1915 CPD 347; *Warren v Union Government* 1916 TPD 695; *Harris v Pieters* 1920 AD 644; *Moosa v Essa* 1931 NPD 365; *Liebenberg v Loubser* 1938 TPD 414; *Briggs v Titlestad* 1938 NPD 446; *David & Co (Pty) Ltd v Coetzee & Jordaan (Pty) Ltd* 1966 (2) PH A80 (GW); *SA Scottish Finance Corporation Ltd v Smit* 1966 (3) SA 629 (T) at 635D, where it is stressed that the words 'in full settlement' are often used merely to assert the payer's view of the extent of his liability rather than to stipulate a condition of acceptance.

27 *Harris v Pieters* 1920 AD 644 at 655; *Briggs v Titlestad* 1938 NPD 446 at 453; *Cecil Jacobs (Pty) Ltd v MacLeod & Sons* 1966 (4) SA 41 (N) at 48H; *Kei Brick & Tile Co (Pty) Ltd v AM Construction* 1996 (1) SA 150 (E) at 157G; *Be Bop A Lula Manufacturing & Printing CC v Kingtex Marketing (Pty) Ltd* 2006 (6) SA 379 (C) at 393A–B; and see *ABSA Bank Ltd v Van de Vyver NO* 2002 (4) SA 397 (SCA) at 405C–D.

28 *Van Breukelen v Van Breukelen* 1966 (2) SA 285 (A) at 289F, following *Harris v Pieters* 1920 AD 644 at 648–9. See also *Burt NO v National Bank of South Africa Ltd* 1921 AD 59 at 67; *Van Coller v Swartz* 1921 TPD 40 at 43–4; *Briggs v Titlestad* 1938 NPD 446 at 452–3; *Turgin v Atlantic Clothing Manufacturers* 1954 (3) SA 527 (T) at 532; *Paterson Exhibitions CC v Knights Advertising and Marketing CC* 1991 (3) SA 523 (A) at 528D.

29 *ABSA Bank Ltd v Van de Vyver NO* 2002 (4) SA 397 (SCA) at 404I–405A; *Be Bop A Lula Manufacturing & Printing CC v Kingtex Marketing (Pty) Ltd* 2008 (3) SA 327 (SCA) at 332A–B. In *Gerolomou Constructions (Pty) Ltd v Van Wyk* 2011 (4) SA 500 (GNP) at 505E–F the facts were held to be distinguishable from those in the *Be Bop* case (*supra*).

30 *Sonap Petroleum SA (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A) at 238I–240B; *Be Bop A Lula Manufacturing & Printing CC v Kingtex Marketing (Pty) Ltd* 2008 (3) SA 327 (SCA) at 332D–E.

31 *The Torch Moderne Binnehuis Vervaardiging Venn (Edms) Bpk v Husserl* 1946 CPD 548; *Hubbard v Mostert* 2010 (2) SA 391 (WCC) at 395H–I.

32 *Van Rensburg v AA Mutual Insurance Co Ltd* 1969 (4) SA 360 (E) at 364E; *Gush v Protea Insurance Co Ltd* 1973 (4) SA 286 (E) at 288H; *Rielly v Seligson and Clare Ltd* 1976 (2) SA 847 (W) at 850G.

33 2012 (4) SA 74 (KZD).

34 At 89H–I.

35 [2007] 3 All ER 863 (Ch).

36 1989 (2) SA 276 (W).

37 1992 (1) SA 893 (W).

38 2000 (1) SA 403 (C).

39 *Visser v Visser* 2012 (4) SA 74 (KZD) at 89B–90F.

40 *Visser v Visser* 2012 (4) SA 74 (KZD) at 89B–90A.

41 *Visser v Visser* 2012 (4) SA 74 (KZD) at 89B–90A.

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

43 *Van Rensburg v AA Mutual Insurance Co Ltd* 1969 (4) SA 360 (E) at 364F; *Henry v AA Mutual Insurance Association Ltd* 1979 (1) SA 105 (C) at 112D.

44 *Van der Merwe v FirstRand Bank Ltd t/a Wesbank & Barloworld Equipment Finance* 2012 (1) SA 480 (ECG) at 483D–G.

45 See the remarks of James J in *Bloom v General Accident and Life Assurance Corporation Ltd* 1967 (2) SA 116 (D) at 120A–E.

46 1960 (4) SA 337 (W).

47 As to the meaning of 'state' in the subrule, see *Erasmus v Santam Insurance Ltd* 1992 (1) SA 893 (W) at 895C.

48 *Rielly v Seligson and Clare Ltd* 1976 (2) SA 847 (W) at 850C.

49 1969 (4) SA 360 (E).

50 *Erasmus v Santam Insurance Ltd* 1992 (1) SA 893 (W) at 895J–896A.

51 1968 (3) SA 496 (GW) at 499B.

52 *Frenkel, Wise & Co v Cuthbert Ltd* 1946 CPD 735 at 742; *Scott v Norwich Union Fire Insurance Society Ltd* 1966 (1) SA 72 (SR) at 73B–F; *Omega Africa Plastics (Pty) Ltd v Swisstool Manufacturing Co (Pty) Ltd* 1978 (4) SA 675 (A) at 678G; *Henry v AA Mutual Insurance Association Ltd* 1979 (1) SA 105 (C) at 113F.

53 *Ngwalangwala v Auto Protection Insurance Co Ltd (in liquidation)* 1965 (3) SA 601 (A) at 608H–609B; *Turbo Prop Service Centre CC v Croock t/a Honest Air* 1997 (4) SA 758 (W) 762I–764I.

54 *Scott v Norwich Union Fire Insurance Society Ltd* 1966 (1) SA 72 (SR); *Kakana v Commercial Union Assurance Co of SA Ltd* 1975 (3) SA 230 (C) at 232B; *Henry v AA Mutual Insurance Association Ltd* 1979 (1) SA 105 (C) at 111C–114A. See also *Minister van Bantoe Administrasie en Ontwikkeling v Makhfula* 1971

(4) SA 568 (T).

55 *Minister van Landboukrediet en Grondbesit v McDonald* 1969 (2) SA 473 (A); *Omega Africa Plastics (Pty) Ltd v Swisstool Manufacturing Co (Pty) Ltd* 1978 (4) SA 675 (A) at 678H; *Henry v AA Mutual Insurance Association Ltd* 1979 (1) SA 105 (C) at 113E; *Tinta v AA Mutual Insurance Association Ltd* 1979 (4) SA 203 (E) at 205F.

56 *Tinta v AA Mutual Insurance Association Ltd* 1979 (4) SA 203 (E) at 207D.

57 *Minister van Landboukrediet en Grondbesit v McDonald* 1969 (2) SA 473 (A) at 481A; *Tinta v AA Mutual Insurance Association Ltd* 1979 (4) SA 203 (E) at 205F.

58 *Modise v Standard General Insurance Co Ltd* 1989 (2) SA 276 (W) at 278E.

59 *Hassett v Santam Insurance Co Ltd* 2000 (1) SA 403 (C) at 406C–E.

60 *Hassett v Santam Insurance Co Ltd* 2000 (1) SA 403 (C) at 406C–E.

61 *Modise v Standard General Insurance Co Ltd* 1989 (2) SA 276 (W) at 278E.

62 *Modise v Standard General Insurance Co Ltd* 1989 (2) SA 276 (W) at 278I. The decision to the contrary in *Moyer v Shield Insurance Co Ltd* 1980 (3) SA 468 (C) is, it is submitted, not correct (see *Erasmus v Santam Insurance Ltd* 1992 (1) SA 893 (W) at 899H).

63 *Erasmus v Santam Insurance Ltd* 1992 (1) SA 893 (W) at 895G.

64 See the remarks of Baker J in *Jacobs v Santam Insurance Co Ltd* 1974 (3) SA 455 (C) at 463C–E.

65 *Jacobs v Santam Insurance Co Ltd* 1974 (3) SA 455 (C) at 464G. See also H J Erasmus 'Restrictions on disclosure of without prejudice offers' 2012 (January/February) *De Rebus* 30 at 31.

66 *Jacobs v Santam Insurance Co Ltd* 1974 (3) SA 455 (C) at 462G and 464H. See also H J Erasmus 'Restrictions on disclosure of without prejudice offers' 2012 (January/February) *De Rebus* 30 at 31–2.

67 1966 (3) SA 334 (A) at 339C. See also H J Erasmus 'Restrictions on disclosure of without prejudice offers' 2012 (January/February) *De Rebus* 30 at 32.

68 *Bloom v General Accident and Life Assurance Corporation Ltd* 1967 (2) SA 116 (D) at 118H–119A.

69 *Radell v Multilateral Motor Vehicle Accidents Fund* 1995 (4) SA 24 (A) at 30I–J.

70 *Omega Africa Plastics (Pty) Ltd v Swisstool Manufacturing Co (Pty) Ltd* 1978 (4) SA 675 (A) at 678H; *Griffiths v Mutual & Federal Insurance Co Ltd* 1994 (1) SA 535 (A) at 549B.

71 *Oliveira v Kurvarjer* 1977 (3) SA 918 (W) at 920D.

72 *Winlite Aluminium Windows & Doors (Pty) Ltd v Pyramid Freight (Pty) Ltd t/a UTI* 2011 (1) SA 571 (SCA) at 573G–H.

73 *Van Rensburg v AA Mutual Insurance Co Ltd* 1969 (4) SA 360 (E) at 366H–367A; *Omega Africa Plastics (Pty) Ltd v Swisstool Manufacturing Co (Pty) Ltd* 1978 (4) SA 675 (A) at 677H–678A; *Naylor v Jansen* 2007 (1) SA 16 (SCA) at 23D–E, where it is also pointed out that there is no 'rule' to this effect from which departure is only justified in the case of 'special circumstances' as was suggested in the *Van Rensburg* case (*supra*) at 366H–367B and *Mdlalose v Road Accident Fund* 2000 (4) SA 876 (N) at 885B–C.

74 *Van Rensburg v AA Mutual Insurance Co Ltd* 1969 (4) SA 360 (E) at 367A; *Omega Africa Plastics (Pty) Ltd v Swisstool Manufacturing Co (Pty) Ltd* 1978 (4) SA 675 (A) at 678A; *Naylor v Jansen* 2007 (1) SA 16 (SCA) at 23E–24F. See also *Doyle v Salgo (2)* 1958 (1) SA 41 (FC); *Nicholaides v Marcus Stores (Pty) Ltd* 1960 (4) SA 694 (SR); *Erasmus v Viljoen* 1968 (3) SA 496 (GW); and see *Dumbe Transport CC v Alex Carriers* 2011 (3) SA 664 (KZP) at 669D–G. Where the court gives judgment in a foreign currency but the tender was expressed in rands, the award must be converted into rands in order to decide whether or not the award exceeds the tender. For the purposes of this subrule the conversion has to be made at the date of judgment (*Radell v Multilateral Motor Vehicle Accidents Fund* 1995 (4) SA 24 (A) at 30C–E).

75 *Griffiths v Mutual & Federal Insurance Co Ltd* 1994 (1) SA 535 (A) at 549C–E, not approving *Kgolokwane v Smit* 1987 (2) SA 421 (O) at 434–5.

34A Interim payments

(1) In an action for damages for personal injuries or the death of a person, the plaintiff may, at any time after the expiry of the period for the delivery of the notice of intention to defend, apply to the court for an order requiring the defendant to make an interim payment in respect of his claim for medical costs and loss of income arising from his physical disability or the death of a person.

(2) Subject to the provisions of rule 6 the affidavit in support of the application shall contain the amount of damages claimed and the grounds for the application, and all documentary proof or certified copies thereof on which the applicant relies shall accompany the affidavit.

(3) Notwithstanding the grant or refusal of an application for an interim payment, further such applications may be brought on good cause shown.

(4) If at the hearing of such an application the court is satisfied that—

(a) the defendant against whom the order is sought has in writing admitted liability for the plaintiff's damages; or

(b) the plaintiff has obtained judgment against the respondent for damages to be determined,

the court may, if it thinks fit but subject to the provisions of subrule (5), order the respondent to make an interim payment of such amount as it thinks just, which amount shall not exceed a reasonable proportion of the damages which in the opinion of the court are likely to be recovered by the plaintiff taking into account any contributory negligence, set off or counterclaim.

(5) No order shall be made under subrule (4) unless it appears to the court that the defendant is insured in respect of the plaintiff's claim or that he has the means at his disposal to enable him to make such a payment.

(6) The amount of any interim payment ordered shall be paid in full to the plaintiff unless the court otherwise orders.

(7) Where an application has been made under subrule (1), the court may prescribe the procedure for the further conduct of the action and in particular may order the early trial thereof.

(8) The fact that an order has been made under subrule (4) shall not be pleaded and no disclosure of that fact be made to the court at the trial or at the hearing of questions or issues as to the quantum of damages until such questions or issues have been determined.

(9) In an action where an interim payment or an order for an interim payment has been made, the action shall not be discontinued or the claim withdrawn without the consent of the court.

(10) If an order for an interim payment has been made or such payment has been made, the court may, in making a final order, or when granting the plaintiff leave to discontinue his action or withdraw the claim under subrule (9) or at any stage of the proceedings on the application of any party, make an order with respect to the interim payment which the court may consider just and the court may in particular order that:

(a) the plaintiff repay all or part of the interim payment;

(b) the payment be varied or discharged;

(c) a payment be made by any other defendant in respect of any part of the interim payment which the defendant, who made it, is entitled to recover by way of contribution or indemnity or in respect of any remedy or relief relating to the plaintiff's claim.

(11) The provisions of this rule shall apply *mutatis mutandis* to any claim in reconvention.

[Rule 34A inserted by GN R2164 of October 1987 and GN R2642 of November 1987.]

Commentary

General. Under this rule a plaintiff in certain actions for damages and under certain conditions may apply for an interim payment. The rule regulates procedure and, accordingly, is not *ultra vires* the authority conferred on the Rules Board by s 6 of the Rules Board for Courts of Law Act 107 of 1985. [1]

The introduction of the rule to some extent alleviated the hardship which a plaintiff may suffer as a result of having to lay out or borrow funds pending the determination of a claim. However, the rule does not go far enough and in an appropriate case (such as where there has been no interim payment), the court should have the power to grant interest on damages which it has awarded for loss of earnings or support. [2]

Subrule (1): 'In respect of his claim.' An interim payment can be made only in relation to claims of the nature mentioned in the subrule — no interim payment in respect of a claim for general damages can be ordered. [3]

'For medical costs and loss of income.' It was held in *Karpakis v Mutual & Federal Insurance Co Ltd* [4] that there is nothing in the rule which prohibits an interim payment in respect of future medical costs and future loss of earnings. However, the subsequent amendment [5] of art 45 of the schedule to the (now repealed) Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 [6] limited the liability of the Multilateral Motor Vehicle Accidents Fund in regard to interim payments to past costs and losses already incurred or suffered. [7] Section 17(6) of the Road Accident Fund Act 56 of 1996 imposes a similar limitation on the liability of the Road Accident Fund.

'Loss of income arising from . . . the death of a person.' The loss of income referred to in the subrule also covers the loss of support suffered by dependants as a result of the death of their breadwinner. [8]

Subrule (2): 'All documentary proof or certified copies thereof . . . shall accompany the affidavit.' Though the subrule is phrased in peremptory terms, substantial compliance with the provisions thereof is sufficient. [9] Where it is apparent from the applicant's founding affidavit and from the papers before the court that the relevant documentation had been supplied to the respondent before the application was launched, it is unnecessary for the applicant to append such documents or copies to his founding affidavit. [10] However, sight should not be

lost of the fact that documentation is to be annexed also for the information of the court. It has been held that the standard of proof at this stage of the proceedings is not as high as it will be when the action goes on trial and that the *quantum* of evidence required by the court will depend on the circumstances of each case. [11]

Subrule (3): 'On good cause shown.' As in the case of an order for an interim payment under subrule (1), an order for a further interim payment under this subrule is also within the court's judicial discretion and in both cases the criteria set out in subrule (4) apply. [12] See further the notes to subrule (4) below.

An applicant who has already received an interim payment and applies for a further such payment must set out what he has done with the first payment. [13]

Subrule (4): 'If at the hearing . . . the court is satisfied.' Paragraphs *(a)* and *(b)* of the subrule are imperative and put the respondent (defendant) in a strong position in so far as an interim payment can only be ordered if the requisites set out in either of these paragraphs have been met. [14]

'Has in writing admitted liability.' Subrule (4)*(a)* does not require any formal document to be executed by the defendant; in fact, it is not even required that the admission be signed by the defendant or his representative. All that is required is a form of writing, such as a letter, [15] which constitutes proof that the defendant has admitted liability for the plaintiff's damages. [16]

'Liability for the plaintiff's damages.' This subrule distinguishes between 'liability' and 'damages'. An agreement of finding on liability disposes of everything bar the *quantum* of damages and hence the willingness to afford the plaintiff interim payments. [17]

'The court may.' In proceedings under rule 34A the court has a discretion which is to be exercised judicially upon a consideration of all the facts [18] and taking into consideration the criteria set out in subrules (4) and (5). [19] In the exercise of its discretion the court will not order an interim payment to be made where the defendant raises some doubt as to the damages or as to whether the plaintiff will be able to prove any damages. [20]

'To make an interim payment.' When the court grants an application for an interim payment, it does not in any way quantify or assess the plaintiff's damages in the way it would do when giving judgment after having heard all the evidence relating to the *quantum* of damages. [21]

Subrule (6): 'Shall be paid in full to the plaintiff.' This subrule does not prohibit a plaintiff from paying any amount of an interim payment to his attorney for the defrayment of legal costs. [22] The payment ordered by the court must, of course, be in respect of the claims set out in subrule (1), but once the payment has been made to the plaintiff, he may spend it as he

sees fit. [23] The way in which a first payment has been spent will, in an application for a further interim payment under subrule (3), be taken into consideration in the exercise of the court's discretion. [24]

Subrule (10)*(a)*: 'Repay all or part of the interim payment.' The court in ordering an interim payment will obviously endeavour, in the light of all the circumstances of a particular case, to tailor the payment in such a way as to avoid as far as possible the eventuality of an order for repayment. [25]

1 *Karpakis v Mutual & Federal Insurance Co Ltd* 1991 (3) SA 489 (O) at 491H–499D; *Fair v SA Eagle Insurance Co Ltd* 1995 (4) SA 96 (E) at 98F–99D.
2 *Muller v Mutual and Federal Insurance Co Ltd* 1994 (2) SA 425 (C) at 448J–449A. Statutory reform will, however, be necessary to achieve this (see *SA Eagle Insurance Co Ltd v Hartley* 1990 (4) SA 833 (A) at 841G–842A).
3 *Karpakis v Mutual & Federal Insurance Co Ltd* 1991 (3) SA 489 (O) at 499C.
4 1991 (3) SA 489 (O) at 501C.
5 By Proc 62 of 16 July 1993 (*GG* 15004).
6 The Act was repealed by s 27 of the Road Accident Fund 56 of 1996.
7 *Fair v SA Eagle Insurance Co Ltd* 1995 (4) SA 96 (E) at 100B–I.
8 *Nel v Federated Versekeringsmaatskappy Bpk* 1991 (2) SA 422 (T) at 426H.
9 *Karpakis v Mutual & Federal Insurance Co Ltd* 1991 (3) SA 489 (O) at 503D.
10 *Nel v Federated Versekeringsmaatskappy Bpk* 1991 (2) SA 422 (T) at 427G–I.
11 *Van Wyk v Santam Bpk* 1997 (2) SA 544 (O) at 547B–C.
12 *Karpakis v Mutual & Federal Insurance Co Ltd* 1991 (3) SA 489 (O) at 505A–B.
13 *Karpakis v Mutual & Federal Insurance Co Ltd* 1991 (3) SA 489 (O) at 504H.
14 *Karpakis v Mutual & Federal Insurance Co Ltd* 1991 (3) SA 489 (O) at 497E.
15 See *Nel v Federated Versekeringsmaatskappy Bpk* 1991 (2) SA 422 (T) at 427C.
16 See, by way of analogy, the words of Williamson JP (as he then was) in *David v Naggyah* 1961 (3) SA 4 (N) at 6, cited with approval in *Hydromar (Pty) Ltd v Pearl Oyster Shell Industries (Pty) Ltd* 1976 (2) SA 384 (C) at 387G, relating to s 45 of the Magistrates' Courts Act 32 of 1944.
17 *Tolstrup NO v Kwapa NO* 2002 (5) SA 73 (W) at 77F.
18 *Nel v Federated Versekeringsmaatskappy Bpk* 1991 (2) SA 422 (T) at 427J–428A.
19 *Karpakis v Mutual & Federal Insurance Co Ltd* 1991 (3) SA 489 (O) at 496G.
20 *Karpakis v Mutual & Federal Insurance Co Ltd* 1991 (3) SA 489 (O) at 498G.
21 *Karpakis v Mutual & Federal Insurance Co Ltd* 1991 (3) SA 489 (O) at 496F–H.
22 *Karpakis v Mutual & Federal Insurance Co Ltd* 1991 (3) SA 489 (O) at 506G–507C.
23 *Karpakis v Mutual & Federal Insurance Co Ltd* 1991 (3) SA 489 (O) at 507B.
24 *Karpakis v Mutual & Federal Insurance Co Ltd* 1991 (3) SA 489 (O) at 504H–505B.
25 *Karpakis v Mutual & Federal Insurance Co Ltd* 1991 (3) SA 489 (O) at 498I–499D.

35 Discovery, inspection and production of documents

(1) Any party to any action may require any other party thereto, by notice in writing, to make discovery on oath within twenty days of all documents and tape recordings relating to any matter in question in such action (whether such matter is one arising between the party requiring discovery and the party required to make discovery or not) which are or have at any time been in the possession or control of such other party. Such notice shall not, save with the leave of a judge, be given before the close of pleadings.

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

(2) The party required to make discovery shall within twenty days or within the time stated in any order of a judge make discovery of such documents on affidavit as near as may be in accordance with Form 11 of the First Schedule, specifying separately—

(a) such documents and tape recordings in his possession or that of his agent other than the documents and tape recordings mentioned in paragraph *(b)*;

(b) such documents and tape recordings in respect of which he has a valid objection to produce;

(c) such documents and tape recordings which he or his agent had but no longer has in his possession at the date of the affidavit. A document shall be deemed to be sufficiently specified if it is described as being one of a bundle of documents of a specified nature, which have been initialled and consecutively numbered by the deponent. Statements of witnesses taken for purposes of the proceedings, communications between attorney and client and between attorney and advocate, pleadings, affidavits and notices in the action shall be omitted from the schedules.

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

(3) If any party believes that there are, in addition to documents or tape recordings disclosed as aforesaid, other documents (including copies thereof) or tape recordings which may be relevant to any matter in question in the possession of any party thereto, the former may give notice to the latter requiring him to make the same available for inspection in accordance with subrule (6), or to state on oath within ten days that such documents are not in his possession, in which event he shall state their whereabouts, if known to him.

[Subrule (3) substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

(4) A document or tape recording not disclosed as aforesaid may not, save with the leave of the court granted on such terms as to it may seem meet, be used for any purpose at the trial by the party who was obliged but failed to disclose it, provided that any other party may use such document or tape recording.

[Subrule (4) substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

(5) *(a)* Where a registered company as defined in the Motor Vehicle Insurance Act, 1942, as amended, is a party to any action by virtue of the provisions of the said Act, any party thereto may obtain discovery in the manner provided in paragraph *(d)* of this subrule against the driver or owner (as defined in the said Act) of the vehicle insured by the said company.

(b) The provisions of paragraph *(a)* shall apply *mutatis mutandis* to the driver of a vehicle owned by a person, state, government or body of persons referred to in sub-section (3) of section *nineteen* of the said Act.

(c) Where the plaintiff sues as a cessionary, the defendant shall *mutatis mutandis* have the same rights under this rule against the cedent.

(d) The party requiring discovery in terms of paragraph *(a)*, *(b)* or *(c)* shall do so by notice as near as may be in accordance with Form 12 of the First Schedule.

(6) Any party may at any time by notice as near as may be in accordance with Form 13 of the First Schedule require any party who has made discovery to make available for inspection any documents or tape recordings disclosed in terms of subrules (2) and (3). Such notice shall require the party to whom notice is given to deliver to him within five days a notice as near as may be in accordance with Form 14 of the First Schedule, stating a time within five days from the delivery of such latter notice when documents or tape recordings may be inspected at the office of his attorney or, if he is not represented by an attorney, at some convenient place mentioned in the notice, or in the case of bankers' books or other books of account or books in constant use for the purposes of any trade, business or undertaking, at their usual place of custody. The party receiving such last-named notice shall be entitled at the time therein stated, and for a period of five days thereafter, during normal business hours and on any one or more of such days, to inspect such documents or tape recordings and to take copies or transcriptions thereof. A party's failure to produce any such document or tape recording for inspection shall preclude him from using it at the trial, save where the court on good cause shown allows otherwise.

[Subrule (6) substituted by GN R2004 of 15 December 1967, by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

(7) If any party fails to give discovery as aforesaid or, having been served with a notice under subrule (6), omits to give notice of a time for inspection as aforesaid or fails to give inspection as required by that subrule, the party desiring discovery or inspection may apply to a court, which may order compliance with this rule and, failing such compliance, may dismiss the claim or strike out the defence.

(8) Any party to an action may after the close of pleadings give notice to any other party to specify in writing particulars of dates and parties of or to any document or tape recording intended to be used at the trial of the action on behalf of the party to whom notice is given. The party receiving such notice shall not less than fifteen days before the date of trial deliver a notice—

(a) specifying the dates of and parties to and the general nature of any such document or tape recording which is in his possession; or

(b) specifying such particulars as he may have to identify any such document or tape recording not in his possession, at the same time furnishing the name and address of the person in whose possession such document or tape recording is.

[Subrule (8) substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

(9) Any party proposing to prove documents or tape recordings at a trial may give notice to any other party requiring him within ten days after the receipt of such notice to admit that those documents or tape recordings were properly executed and are what they purported to be. If the party receiving the said notice does not within the said period so admit, then as against such party the party giving the notice shall be entitled to produce the documents or tape recordings specified at the trial without proof other than proof (if it is disputed) that the documents or tape recordings are the documents or tape recordings referred to in the notice and that the notice was duly given. If the party receiving the notice states that the documents or tape recordings are not admitted as aforesaid, they shall be proved by the party giving the notice before he is entitled to use them at the trial, but the party not admitting them may be ordered to pay the costs of their proof.

[Subrule (9) substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

(10) Any party may give to any other party who has made discovery of a document or tape recording notice to produce at the hearing the original of such document or tape recording, not being a privileged document or tape recording, in such party's possession. Such notice shall be given not less than five days before the hearing but may, if the court so allows, be given during the course of the hearing. If any such notice is so given, the party giving the same may require the party to whom notice is given to produce the said document or tape recording in court and shall be entitled, without calling any witness, to hand in the said document, which shall be receivable in evidence to the same extent as if it had been produced in evidence by the party to whom notice is given.

[Subrule (10) substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

(11) The court may, during the course of any proceeding, order the production by any party thereto under oath of such documents or tape recordings in his power or control relating to any matter in question in such proceeding as the court may think meet, and the court may deal with such documents or tape recordings, when produced, as it thinks meet.

[Subrule (11) substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

(12) Any party to any proceeding may at any time before the hearing thereof deliver a notice as near as may be in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such document or tape recording for his inspection and to permit him to make a copy or transcription thereof. Any party failing to comply with such notice shall not, save with the leave of the court, use such document or tape recording in such proceeding provided that any other party may use such document or tape recording.

[Subrule (12) substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

(13) The provisions of this rule relating to discovery shall *mutatis mutandis* apply, in so far as the court may direct, to applications.

[Afrikaans text of subrule (13) amended by GN R2047 of 13 December 1996.]

(14) After appearance to defend has been entered, any party to any action may, for purposes of pleading, require any other party to make available for inspection within five days a clearly specified document or tape recording in his possession which is relevant to a reasonably anticipated issue in the action and to allow a copy or transcription to be made thereof.

(15) For purposes of rules 35 and 38 a tape recording includes a sound track, film, magnetic tape, record or any other material on which visual images, sound or other information can be recorded.

[Subrules (14) and (15) substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

Commentary

Forms. Discovery — form of affidavit, 11; Notice in terms of rule 35(5), 12; Discovery — Notice to procedure, 13; Discovery — Notice to

inspect documents, 14; Discovery — Notice to produce documents in pleadings, etc, 15.

General. The object of discovery was stated in *Durbach v Fairway Hotel Ltd* [1] to be 'to ensure that before trial both parties are made aware of all the documentary evidence that is available. By this means the issues are narrowed and the debate of points which are incontrovertible is eliminated.'

> 'Discovery has been said to rank with cross-examination as one of the mightiest engines for the exposure of the truth ever to have been devised in the Anglo-Saxon family of legal systems. Properly employed where its use is called for, it can be, and often is a devastating tool.' [2]

The underlying philosophy of discovery of documents is that a party in possession or custody of documents is supposed to know the nature thereof and thus carries the duty to put those documents in proper order for both the benefit of his adversary and the court in anticipation of the trial action. [3] Discovery assists the parties and the court in discovering the truth and, by doing so, helps towards a just determination of the case. It also saves costs. [4]

> 'But it must not be abused or called in aid lightly in situations for which it was not designed or it will lose its edge and become debased.' [5]

The employment of discovery should be confined to cases where parties are properly before the court and are litigating 'at full stretch'. [6] The essential feature of discovery is that the person requiring discovery is *in general* only entitled to discovery once the battle lines are drawn and the legal issues established. It is not a tool designed to put a party in a position to draw the battle lines and establish the legal issues. Rather, it is a tool used to identify factual issues once legal issues are established. [7] Discovery is not intended to be used as a sniping weapon in preliminary skirmishes. [8]

Discovery under rule 35 is a procedure whereby a party to an action can:

(a) require his opponent to specify on oath the documents in his possession or under his control which relate to the action (subrule (1)); and

(b) inspect and copy such documents (subrule (6)).

In *Nampak Glass (Pty) Ltd v Vodacom (Pty) Ltd* [9] the High Court developed the common law in terms of its inherent jurisdiction under s 173 of the Constitution and granted an order that third parties provide the applicant with information that could assist it in identifying the perpetrators of a robbery at its premises to enable it to institute an action against them. The preconditions for such an order, subject to the court's overall discretion, were held to be the following: [10]

(a) a wrong must have been committed;

(b) the order was needed to enable an action to be brought against the wrongdoers;

(c) the third party against whom the order was sought must be mixed up in the wrongdoing so as to have facilitated it; and must be able or likely to be able to provide the information.

Pre-action discovery under s 50 of the Promotion of Access to Information Act 2 of 2000 ('PAIA') is only available where the requester has shown the 'element of need' or 'substantial advantage' of access to the requested information at the pre-action stage. [11] Substantial advantage consists, for example, in the fact that the information would be decisive of the dispute between the parties, [12] i e that it would bring a sharp end to the dispute. [13] An applicant under PAIA is not entitled, as a matter of course, to all information that might assist him in evaluating his prospects against the only potential defendant. [14] PAIA is not intended to have any impact on the discovery procedure in civil cases. [15] Once court proceedings commence, the rules of discovery take over and the provisions of PAIA no longer apply between the parties. [16]

It was held that discovery of documents held by the State or any of its organs at any level of government may be obtained under s 23 of the Constitution of the Republic of South Africa

Act 200 of 1993. [17] It must, however, be stressed that the right entrenched in that section, and in s 32 of the present Constitution, [18] is not one to discovery in litigation, but a much wider right of access to 'all information' held by the State in so far as such information is required for the protection of a person's rights. [19]

It has been held [20] that a party who engages the State as referred to in s 32 of the Constitution of the Republic of South Africa, 1996, has the right to utilize s 32(1) and/or rule 35 in order to obtain access to documentation in the possession of the State. If he elects to rely on rule 35 and is not satisfied with the discovery that is made, he must discharge the onus as it applies in civil procedure. [21]

Subrule (1): 'Any party … may require any other party.' This subrule is permissive in so far as it does not oblige a party to compel his opponent to give discovery. However, discovery is a procedure designed for the benefit of the parties and failure to take advantage of the procedure may result in a disorderly presentation of the case in court. In such a case, the court may show its disapproval of a party's failure to apply for discovery by an adverse order as to costs. [22]

The subrule provides that 'any party' may deliver a notice to 'any other party' to make discovery on oath. It is clear that a plaintiff and a defendant can *inter se* demand discovery, and also that a plaintiff can require discovery from a co-plaintiff, and a defendant from a co-defendant.

'All documents and tape recordings.' The word 'documents' is not defined in the rules. Consequently, it must bear its ordinary meaning, namely 'a piece of written, printed or electronic matter that provides information or evidence or that serves as an official record'. [23] When compared with foreign developments, it is clear that the current wording of this subrule does not adequately provide for discovery of information created, stored and retrieved primarily in electronic form, and it should be appropriately amended. [24]

As to tape recordings, see subrule (15) and the notes thereto below.

'Relating to any matter in question.' This subrule requires a party to make discovery of 'all documents … relating to any matter in question in such action'. A long line of decisions, however, has established that in High Court practice there is only an obligation to make discovery of documents which *may* — not which *must* — either directly or indirectly enable the party requiring the affidavit of discovery either to advance his own case or to damage the case of his adversary. Documents which tend to advance only the case of the party making the discovery need not be disclosed, [25] provided that such a party does not intend using

the document at the trial. [26]

Relevance is a matter for the court to decide, having regard to the issues between the parties. [27] It does not depend upon the subjective views of the legal representative of the party making discovery. [28] See further the notes to subrule (3) s v 'Which may be relevant to any matter in question' below.

'In the possession or control of.' A party is not required to specify books or documents which are in the possession of his witnesses, if he is not in control thereof. Documents which are in the hands of a party's attorney should be specified. Even if 'party' in this context does not by definition include his attorney, the document is under the *control* of the party himself.

There is no procedure other than that provided for under subrule (5) whereby a third party, not one of the litigants, can be compelled to disclose documents, however relevant, before the trial. All that the third party can be required to do, by subpoena *duces tecum* under rule 38, is to bring the documents to the trial.

'Save with the leave of a judge, be given before the close of pleadings.' In terms of the definition of 'judge' in rule 1 the word 'judge' in this subrule means a judge sitting otherwise than in open court, i e a judge in chambers. An order contemplated in this subrule will only be made

where there are exceptional circumstances which require discovery to be made before the close of pleadings in order to ensure the proper prosecution of the action. [29]

In *Nampak Glass (Pty) Ltd v Vodacom (Pty) Ltd* [30] the High Court developed the common law in terms of its inherent jurisdiction under s 173 of the Constitution and granted an order that third parties provide the applicant with information that could assist it in identifying the perpetrators of a robbery at its premises to enable it to institute an action against them. The preconditions for such an order, subject to the court's overall discretion, were held to be the following: [31]

(a) a wrong must have been committed;

(b) the order was needed to enable an action to be brought against the wrongdoers;

(c) the third party against whom the order was sought must be mixed up in the wrongdoing so as to have facilitated it; and must be able or likely to be able to provide the information.

Subrule (2): 'The party required to make discovery shall.' Unless there are very special circumstances and the attorney is in a position of his own knowledge to make a comprehensive affidavit, he cannot do this on behalf of his client. [32] If this is done the circumstances on

which it is sought to justify such action should be set out in the affidavit. [33] It has been recognized that it does not follow from the fact that the party litigant has himself signed the affidavit that he must personally have made the search and decided upon the relevance of every document, and that he might not be acting on legal advice or the information of his employees. [34] Indeed, attorneys are responsible for the technical side of litigation and it is an attorney's duty to ensure that his client appreciates fully the significance and importance of a discovery affidavit before it is drawn up. [35]

'On affidavit.' If the affidavit has been made by a director or other officer of a company, the affidavit must state in terms that the *company* has not in the possession, custody or power of its attorney or other agent or any other person on the company's behalf, any document relating to the action. [36]

In an action against a Minister in his capacity as such, a discovery affidavit deposed to by the deputy-director (i e a high-ranking official) of the department concerned is adequate. [37]

In proceedings for the setting aside of dispositions, instituted in terms of s 32(1)*(b)* of the Insolvency Act 24 of 1936 by a creditor of a company in liquidation in the name of the liquidators of the company, the creditor of the company is not entitled to make discovery in terms of this subrule. It is only the liquidators who can do so. The liquidators are the plaintiffs because they are the only parties entitled to embark upon such litigation. The fact that a creditor funds and directs the litigation does not render the liquidators mere nominal plaintiffs. [38]

'In accordance with Form 11 ... specifying separately.' The provisions of this subrule are peremptory and the discovery affidavit must be in accordance with Form 11 of the First Schedule to the rules. [39] This requires the documents to be listed in two schedules, the first being in respect of documents still in the possession or power of the deponent, and the second in respect of documents no longer in his possession or power. The first of these schedules is again to be divided into two parts: the first part being in respect of which no claim for privilege or other objection to produce is made, and the second in respect of documents to which such an objection attaches. These requirements are listed, in somewhat different order, in paragraphs *(a)*, *(b)* and *(c)* of the subrule. The affidavit should further set out that the party making it has never had in his possession or under his control any document of the class mentioned in the rule, other than those specified in the schedule. [40]
Subrule (2)*(b)*: 'A valid objection to produce.' The final sentence of this subrule lists certain documents which need not be included in the discovery affidavit. The list is not exhaustive and a party is entitled to object to the discovery of other documents if he has valid grounds

for doing so. In discovery proceedings a litigant may refuse to disclose a document if he would be able to claim privilege for its contents on any grounds. There are, however, other and wider grounds upon which the discovery of documents may be refused, so that the fact that a document is 'privileged' from disclosure in discovery proceedings does not necessarily mean that its contents will be protected from disclosure in evidence. [41] Privilege is usually treated as a matter falling within the law of evidence rather than procedure; [42] the reader should refer to works on evidence for fuller discussion. [43] Here a brief statement of the main rules would be sufficient.

Privilege. It has been said that privilege is a personal right to refuse to disclose, and, in the case of professional privilege, to permit certain others to disclose, admissible evidence. [44] In discovery proceedings a litigant may refuse to disclose a document if he would be able to claim privilege for its contents on any grounds.

(a) The privilege against self-incrimination

A party is not obliged to discover a document which will tend to incriminate him or expose him to the risk of any kind of penalty or forfeiture. [45] If the document tends merely to establish a debt or to expose the party to a civil action, discovery cannot be resisted. [46] If the

party or witness bona fide [47] swears that he believes that discovery or disclosure would tend to incriminate him, and if the court is satisfied that such discovery or disclosure would have this tendency, privilege will be allowed; and the exact form of words used by the party in averring his apprehension is immaterial. [48] The refusal may be made even if the persons in a position to prosecute or sue the party have intimated that they do not intend to do so. [49]

(b) Marital privilege

In terms of s 10 of the Civil Proceedings Evidence Act 25 of 1965 no spouse can be compelled to disclose any communication made to him during the marriage. In discovery proceedings a claim for privilege may accordingly be founded upon the fact that a document is a communication from a party's spouse. The privilege may be claimed only by the spouse to whom the communication is made, [50] and a third party cannot refuse to disclose such a communication. [51] The privilege may be claimed by persons whose marriages have been 'dissolved or annulled by a competent court'. [52] The privilege cannot therefore be claimed by a surviving spouse whose marriage has been dissolved by death or by a spouse whose marriage has been dissolved extra-judicially. [53] The privilege is further extended by s 12 of the Civil Proceedings Evidence Act 25 of 1965, which allows a husband or wife to refuse to answer a question (and *a fortiori* to disclose a document) in any circumstances in which his or her spouse would be entitled to claim privilege. Under this section a spouse may refuse to disclose a communication which he had made to the other spouse during the marriage, as well as a communication which the other spouse had made to his or her legal representative. [54]

(c) Statements without prejudice

Communications made without prejudice are usually said to be privileged from disclosure. [55] The rationale of the rule is public policy: parties to disputes are encouraged to avoid litigation by resolving their differences amicably in full and frank discussions without the fear that, if the negotiations fail, any admissions made by them during such discussions will be used against them in ensuing litigation. [56]

Both the person making the statement without 'prejudice' and the person to whom the statement is addressed are entitled to the privilege. [57] Thus, the maker of the statement can prevent the disclosure by his opponent of an admission made 'without prejudice', [58] but the maker of the statement can in turn be prevented from relying upon an offer made without prejudice as a tender entitling him to subsequent costs. [59] If, however, the without prejudice offer, in cases not covered by the rules, is made subject to the qualification 'except in relation to costs' (or words to that effect), there is no reason why a litigant should not be permitted to rely on such offer in support of a particular costs

order once judgment has been granted. Such offers are generally known as 'Calderbank offers'. [60] A plaintiff who has made such an offer is not entitled to costs on an attorney and client basis merely because he made a secret offer which was less than what the court awarded. The court must still consider whether the defendant behaved unreasonably, and thus put the plaintiff to unnecessary expense, by not accepting the offer or making a reasonable counter-offer. Factors to be taken into account by the court are whether the defendant has engaged reasonably in attempting to settle; whether the plaintiff was offering a fair discount based on a realistic assessment of the case rather than holding out for the best conceivable outcome; whether the plaintiff allowed the defendant a reasonable time to consider the offer; the extent of the difference between the amount of the offer and the amount of the award; and the nature of the proceedings and resources of the litigants. [61]

The words 'without prejudice' are usually employed to indicate that the maker of a statement or writer of a letter desires the communication to be protected by the privilege. The absence of these or similar words is, however, not conclusive. If the statement forms part of genuine negotiations for the compromise of a dispute, it will be privileged even if the words have not been used. [62] On the other hand, even if the words are used, the communication is not privileged if there was no dispute between the parties or if there was no genuine negotiation to effect a compromise. [63] The court may look at a document written without prejudice for the purpose of deciding the question of its admissibility. [64]

The privilege covers not only the particular letter or oral communication itself but also all subsequent parts of the correspondence or communication on both sides, notwithstanding

that they are not said to be without prejudice. [65] The communication is privileged only if it forms an integral part of the negotiations then proceeding, but need not be relevant to the case then proceeding. [66] If negotiations for a settlement in an action for compensation related solely to the amount, an admission of liability by the defendant was held not to be subject to privilege because the parties had not intended the negotiations to be influenced by the issue of liability. [67]

If negotiations conducted without prejudice result in a settlement, the terms of the settlement can be proved by evidence about the negotiations leading up to the settlement. [68]

(d) Legal professional privilege [69]

A communication made in professional confidence to counsel, attorneys, and their clerks (i e professional assistants acting under the control and direction of the principal), [70] or to any intermediate agent of these, or to an interpreter at an interview, [71] is privileged permanently and may not be disclosed without the permission of the client — his being the privilege and his the right to waive it. This privilege extends to all communications between the client and his legal adviser for the purpose of obtaining legal advice. [72] A communication with a lawyer unconnected with the giving of legal advice is not privileged merely

because it was made in confidence. [73] An attorney's fee notes do not per se fall within the privileged category of a document. [74] If the fee notes contain references to legal advice sought and given in the course of a narration of the services in respect of which the fees have been raised, without disclosing the substance of the legal advice, such references are not privileged. [75] If a fee note sets out the substance of the privileged communications in respect of the seeking or giving of legal advice, or contains sufficient particularity of their substance to constitute secondary evidence thereof, those parts, but not the fee note as a whole, would be amenable to the privilege. In this regard the test is whether, upon an objective assessment, the references disclose the content, and not just the existence, of the privileged material. [76]

The privilege covers a party's legal adviser in his capacity as such, and not acting as a house-agent, [77] friend, [78] or business associate — a question of fact which must be judged in the light of all the circumstances. [79] The payment of a fee is an important, but not necessarily a conclusive, indication that the adviser was acting professionally. [80] Many qualified lawyers are today employed as full-time, salaried legal advisers by corporations and statutory bodies, and it has been held that privilege attaches to confidential communications between a salaried legal adviser and his 'client', i e his employer. [81]

If it is established that the communication was with the legal adviser in his professional capacity and that the communication related to the transaction upon which the client sought advice, the inference is that the communication was made in professional confidence. [82] The communication may, however, be of such a nature that this inference is rebutted. An instruction authorizing an attorney to negotiate and conclude a settlement is not privileged. [83] If a legal adviser has acted for both parties at the time when negotiations were openly being conducted in regard to a contract which is subsequently concluded, there is no ground for excluding the evidence of the legal adviser. [84] If the legal adviser is acting for both parties who are at arm's length, communications made to him by each are privileged and cannot be divulged to the other. [85]

The privilege is that of the client and not that of his legal adviser, [86] but his legal adviser is entitled, and in fact under a duty, to claim the privilege on his client's behalf. [87]

The person in whom the right vests may not be obliged to testify about the content of the privileged material. [88]

The privilege may be waived by the client either expressly or impliedly. [89] An implied waiver would be when the client himself discloses the privileged communication [90] with full knowledge of his rights and in a manner from which, objectively speaking, it can be inferred that he intended to abandon those rights. [91] In *Waterhouse v Shields* [92] the defendant pleaded that she had acted on legal advice. It was held that she had thereby waived her right to refuse to disclose the nature of that advice. Once a party has partially disclosed privileged material the question as to whether fairness requires disclosure of the remainder of the material is essentially one of fact to be decided in each case in the special circumstances of that case.

The privilege may also be waived imputedly, i e where the privilege-holder so conducts himself that, whatever his subjective intention might be, the inference must in fairness be drawn that he no longer relies on privilege. [93]

The rule is 'once privileged always privileged'. [94] The privilege attaching to a document will continue after the end of the litigation for which the document was brought into existence, and the client's successors in title may claim the privilege in a subsequent action on the same subject matter. [95]

If privileged communications have fallen into the hands of a third party, for example, where a privileged document has been intercepted or copied, such a third party cannot be prevented from disclosing their contents. [96] In *Williams v Shaw* [97] it was held that no privilege attaches to a letter which had been obtained illegally. It is uncertain whether the privilege

attaching to a document is lost if a document is taken from the client or his legal representative under compulsion of a search warrant or some other legal compulsion. [98]

Where the communications pass not between the party and his lawyers but between the party and a non-professional agent or third party, they are not privileged unless made (i) for the purpose of litigation existing or contemplated, *and* (ii) in answer to inquiries made by the party as the agent for or at the request or suggestion of his legal adviser and, though there has been no such request, for the purpose of being laid before the legal adviser for the purpose of obtaining his advice or to enable him to conduct the action. [99] In *A Sweidan and King (Pty) Ltd v Zim Israel Navigation Co Ltd* [100] it was pointed out that a document will be privileged if 'a definite purpose', but not necessarily the sole or dominant purpose, for which the document was made was submission to a legal adviser as material upon which to enable him to advise. As a general rule there is no privilege covering communications relating to the matter in issue between a head office and a branch office; [101] or from an insurance assessor to his principals; [102] or from an insured person to the company (or its agent) insuring him; [103] or from an architect to his

client; [104] or between an agent and his principal, [105] *unless* the above two requirements are fulfilled. [106]

A litigant is not obliged, either before or during a trial, to disclose any document which was brought into existence for the purpose of the litigation. The most important class of documents falling into this category are the statements of the litigant's witnesses. [107] These documents 'form part of the brief', are clearly brought into existence with a view to litigation, and they are therefore privileged from disclosure. [108] The privilege can be regarded as an

extension of legal professional privilege, for it applies equally to a party conducting his own case. [109]

If privilege is claimed to parts of a document, it should be asserted by redacting the information so as to disclose those parts of the document that are not subject to the privilege and covering up those that are. [110]

(e) Disclosures injurious to public interest

It would appear that the provisions of the Constitution of the Republic of South Africa, 1996, govern claims of state privilege in objection to the disclosure of documents, i e that the disclosure of such documents would affect the security of the State. [111] The issue would therefore have to be decided by the court under the provisions of the Constitution of the Republic of South Africa, 1996, and national legislation enacted in pursuance thereof [112] rather than the common law. [113]

Objection to the disclosure of documents on a ground of public policy that does not affect the security of the State is governed by the common law. [114] The courts have a residual power to reject an objection raised in proper form that the disclosure or production of a document would be injurious or prejudicial to the public interest. [115] The objection should be raised by the political head of the department concerned unless, in exceptional circumstances, that is not feasible. The objection will usually be raised by means of an affidavit, from which it must appear that the deponent has himself perused the relevant document, and the reasons for his decision must, in so far as public interest permits, be given with sufficient clarity to place the court in a position to judge whether it should exercise the residual power. [116]

The residual power must be exercised with strict circumspection ('nougesette omsigtig-heid'). [117] The exercise of the power is not confined to cases in which the objection is frivolous or vexatious; the court will overrule the Minister 'waar hy buite twyfel oortuig is dat die beswaar onregverdigbaar is of op geen redelike gronde gehandhaaf kan word nie'. [118] If the reasons given by the Minister appear to be deficient, the court may call upon him for amplification or clarification, either by further affidavit or oral evidence. [119] The court may also inspect the documents in order to come to a decision. [120]

Statements of witnesses and communications between attorney and client and between attorney and advocate are listed in the subrule as categories of documents which must be omitted from the schedules. See further the notes s v 'Statements of witnesses taken for the purposes of the proceedings' and 'Communications between attorney and client and between attorney and advocate' below.

The discovery affidavit must indicate the existence of documents in respect of which objection to discovery is raised and the grounds on which the objection is based must be stated sufficiently clearly for the court, if necessary, to decide whether the documents are in fact privileged from production. [121] This does not mean that such a detailed description of the documents is required as will render the privilege nugatory. [122]

If only part of a document is privileged or irrelevant, and the party obliged to produce the document for use in court or for inspection by his adversary wishes to preserve that part as secret, the proper course is for him to cover over or otherwise conceal the portion in question from the adversary. [123] The procedure requires an affidavit justifying the blotted-out portion of the document as being privileged or irrelevant. [124]

The High Court has an inherent power itself to examine any document in respect of which privilege is claimed, 'privilege' in this context including such objections as irrelevancy. [125]

Subrule (2)*(c)*: 'A document shall be deemed to be sufficiently specified.' Sufficient details of a document should be given so that it may be identified, and so that the other party can call for it, and the court may know whether the document in question has been produced. [126] In terms of this subrule a document shall be deemed to be sufficiently specified if it is described as being one of a bundle of documents of a specified nature, which have been initialled and consecutively numbered by the deponent. [127]

'Statements of witnesses taken for the purposes of the proceedings.' This subrule gives effect to the general principle that a litigant is not obliged, either before or during a trial, to disclose any document which was obtained or brought into existence for the purpose of litigation which was pending or contemplated as likely at the time. [128] Documents which fall into this category must in terms of the subrule be omitted from the schedules by the party making discovery. The most important class of documents falling into this category are the statements of the litigant's witnesses. [129] These documents 'form part of the brief', are clearly brought into existence with a view to litigation and they are therefore privileged from disclosure. [130] The privilege can be regarded as an extension of legal professional privilege for it applies equally to a party conducting his own case. [131]

The privilege against disclosure of a witness statement does not extend to an accused's statement to the police. In civil litigation the existence of such a statement should be discovered as an unprivileged document. [132]

'Communications between attorney and client and between attorney and advocate.' This subrule gives effect to the general principle that a communication made in professional confidence to counsel, attorneys, and their clerks (i e professional assistants acting under the control and direction of the principal), or to any intermediate agent of these, or to an interpreter at an interview, is privileged permanently and may not be disclosed without the permission of the client — his being the privilege and his the right to waive it. [133] See further the notes to this subrule s v 'Privilege' above.

Documents which fall into the category contemplated in the subrule must in terms thereof be omitted from the schedules by the party making discovery.

If the communications pass not between the party and his lawyers but between the party and a non-professional agent or third party they are not privileged unless made (i) for the purpose of litigation existing or contemplated, *and* (ii) in answer to inquiries made by the party as the agent for or at the request or suggestion of his legal adviser and, though there has been no such request, for the purpose of being laid before the legal adviser for the purpose of obtaining his advice or to enable him to conduct the action. [134] As a general rule there is no privilege covering communications, relating to the matter in issue, between a head office and a branch office; [135] or from an insurance assessor to his principals; [136] or from an insured person

to the company (or its agent) insuring him; [137] or from an architect to his client; [138] or between an agent and his principal, [139] *unless* the above two requirements are fulfilled. [140] See further the notes to this subrule s v 'Privilege' above.

'Shall be omitted from the schedules.' The omission of documents of the nature specified in this subrule need not be justified in the discovery affidavit. Any party may proceed under subrule (3) if he believes that the party making discovery has omitted from the schedules documents which should have been disclosed.

The list of documents which a party making discovery must omit from his schedules is not exhaustive in the sense that a party may have valid grounds for objecting to the discovery of other documents which do not fall into the categories listed. See the notes to this subrule s v 'A

valid objection to produce' above.

Subrule (3): 'In addition to documents … disclosed as aforesaid.' This subrule provides the procedure for a party dissatisfied with the discovery of another party. [141] The intention of the subrule is to provide for a procedure to supplement discovery which has already taken place but which is alleged to be inadequate. [142] It requires the former party to give notice to the latter party to make the documents or tape recordings available for inspection in accordance with subrule (6).

If a direction is made in terms of subrule (13) that the provisions of rule 35 apply to applications, a party is unable to rely on subrule (3) without first invoking the provisions of subrule (1) and receiving a discovery affidavit in accordance with subrule (2). [143]

The courts are reluctant to go behind a discovery affidavit which is regarded as conclusive, save where it can be shown either (i) from the discovery affidavit itself, (ii) from the documents referred to in the discovery affidavit, (iii) from the pleadings in the action, (iv) from any admission made by the party making the discovery affidavit, or (v) the nature of the case or the documents in issue, that there are reasonable grounds for supposing that the party has or has had other relevant documents in his possession or power, or has misconceived the principles upon which the affidavit should be made. [144]

RS 5, 2017, D1-472A

'Other documents … or tape recordings.' This subrule does not cover only objections relating to the failure to discover specific documents. Subrule (1) contemplates the discovery of all relevant documents, including documents designated as part of a bundle of documents of a specified nature and consecutively numbered by the deponent. If such a bundle of documents exists but is not discovered, its production may be obtained under the subrule. [145]

This subrule, read in conjunction with subrules (1), (2), (4) and (6), would require of a party in custody of a large volume of documentation, to comply, at the very least, with the provision set out in subrule (2)*(c)*. It would be incumbent upon a party in custody of the documents to arrange them in proper chronological order and thereafter duly initial and consecutively number them. Sufficient identificatory details of each document should be given to enable (i) the other party to call for it, and (ii) the court to know whether or not the document in question has been produced. [146]

OS, 2015, D1-473

'Which may be relevant to any matter in question.' Relevancy is determined from the pleadings and not extraneously therefrom. A party may only obtain inspection of documents relevant to the issues on the pleadings. [147] The requirement of relevance has been considered by the courts on various occasions. [148] The meaning of relevance is circumscribed by the requirement in both subrules (1) and (3) that the document or tape recording relates to or may be relevant to 'any matter in question'. The 'matter in question' is determined from the pleadings. [149] In determining the issues raised by the pleadings regard should not be had to requests for further particulars for purposes of trial and the further particulars furnished in response thereto. [150] Such particulars simply relate to the pleaded issues and do not raise further or new issues between the parties. [151]

'Give notice . . . requiring him to make the same available for inspection.' If a party is dissatisfied with discovery that has been made he must first exhaust his remedy under this subrule. [152] If the defaulting party does not comply with the notice given to him under the subrule, the party requiring discovery is entitled to bring an application to court under the provisions of subrule (7). A notice in terms of subrule (3) is not limited to a specific document. The notice may require production of any number of documents. It is important that a party who is dissatisfied with discovery should describe the documents required for inspection in such a manner that they were identifiable. Whilst a document need not be described specifically within the notice, it must be described with sufficient accuracy to enable it to be identified. This will occur where the document is described within a genus enabling it to be identified. [153]

If a party requires more time to respond to a request 'for further and better discovery', it is seeking an indulgence, and in the absence of an extension being agreed upon to by the other party, would be required to make application for an extension of time under rule 27(1). [154]

OS, 2015, D1-474

'State on oath . . . that such documents are not in his possession.' This subrule concerns documents not yet discovered and contemplates an affidavit other than and additional to one made under subrule (1). [155] The objections to an attorney deposing to a discovery affidavit under subrules (1) and (2) are equally valid to his making an affidavit under this subrule. [156]

Under the subrule a party is entitled to state in his affidavit that the documents referred to in the notice under the subrule are irrelevant to the issues in the action or that they are privileged from disclosure. [157] A party's assertion that the contents of a document are not relevant is not necessarily conclusive. [158]

Subrule (4): 'A document or tape recording not disclosed.' This refers only to documents or tape recordings which are either in the possession or under the control of the party who is called upon to specify and disclose. [159]

'Save with the leave of the court.' It has been held that leave should not be lightly granted for the use of documents not properly discovered: leave should be granted only if there is no prejudice and the defaulting party has given adequate and satisfactory reasons for its failure to make discovery in compliance with the rules. [160]

'Granted on such terms as to it may seem meet.' The terms will usually relate to postponement and the payment of wasted costs. [161] Postponements have been granted for failure to discover, [162] for late discovery [163] and for inadequate discovery. [164] A party who succeeds in obtaining a postponement is not entitled, by reason merely of inadequate discovery, to an order for costs. The order of costs depends upon the particular circumstances of each case which must be properly investigated in order to arrive at an appropriate order as to costs. [165] In several cases the defaulting party was ordered to pay the costs on the scale as between attorney and client. [166] On occasion the defaulting party was precluded from proceeding to trial in the matter until such wasted costs had been paid. [167]

RS 1, 2016, D1-475

'May not . . . be used for any purpose at the trial.' The penalty prescribed in this subrule (which obviously applies only to the party which failed to discover the document in question) for failure to disclose a document or tape recording may not be sufficient to ensure that full disclosure is timeously made. Timeous discovery is essential for proper preparation for trial. The legal representative of the party to whom discovery is made must have the opportunity to read and consider the documents, to compare the documents discovered with those in his possession, to consult with his client and witnesses in connection with the discovered documents, to consider whether there are not further documents in existence which should have been disclosed and to deliberate whether the court should not be moved to order further and better discovery. [168] Moreover, a party may be quite content not to be able to use a certain document himself if he can prevent a disclosure thereof to his opponent for whose case it may be essential. [169]

Subrule (6): 'To make available for inspection.' As a rule only the party and his attorney are entitled to inspect, but the courts have allowed an expert to do so on behalf of the party in a proper case. [170] Such a person will, however, not be allowed inspection where there is a reasonable objection to him personally. [171]

Although there is normally a full right of inspection and copying, the court has a discretion to impose appropriate limits when satisfied that there is a real danger that an unlawful appropriation of property will be made possible merely because there is litigation in progress and because litigants are entitled to see documents to which they would not otherwise have lawful access. [172]

'To take copies or transcriptions thereof.' The court expects practitioners to co-operate in making and exchanging copies of documents for each other. [173]

'Shall preclude him from using it at the trial.' See the notes to subrule (4) sv 'May not . . . be used for any purpose at the trial' above.

Subrule (7): 'Fails to give discovery.' If a party is dissatisfied with discovery that has been made he must first exhaust his remedy under subrule (3) before proceeding under this subrule. [174]

'May order compliance with this rule.' Under this subrule the court has a discretion whether or not to enforce discovery or inspection. [175] It has been held [176] that the discretion is predicated on the documents, in respect of which discovery is sought, being relevant. In an appropriate case the court may, in the exercise of its discretion, order deferment of discovery of documents relative to a contingent issue. This will be done only in exceptional circumstances where the court will not oblige the defendant to contest the issue on which discovery is claimed until the defendant has succeeded on the primary issue. [177] The issue, however, is case-specific and involves considerations such as the prejudicial nature of the information if it is revealed to the applicant. [178]

A court, in the exercise of its discretion, must remain alert to the potential abuse of the discovery process. This may arise if the procedure is utilized *in terrorem* to debilitate a respondent by requiring it to incur exorbitant expenses and to tie up large numbers of qualified staff and lawyers. [179] The greater use of electronic documentation, whether as a means of communication (such as e-mails) or as a means of storing information (such as on computer databases or central servers), exacerbates the risk of potential abuse. [180] In an appropriate case an applicant could seek a referral of the dispute to oral evidence or to a separate trial. [181] Caution needs to be exercised before an issue relating to discovery is referred to the hearing of oral evidence. The court may wish to balance the expedition of allowing the existence or otherwise of the document to be tested during the main trial against the prejudice of being unable to properly prepare for the trial itself. [182]

In ordering compliance with the rule the court may make an appropriate order as to costs, [183] including an order that the respondent pay the costs of the application on the scale as between attorney and client. [184] If the defaulting party is the plaintiff, he may be precluded from proceeding to trial in the matter until such wasted costs had been paid. [185] A party may be penalized by way of an adverse order as to costs for failing to bring a timeous application in terms of this subrule. [186]

Subrule (8): 'Any document . . . intended to be used at the trial.' It is to be noted that while a party is in terms of subrule (1) and (2) only bound to make discovery of documents which are or have at any time been in the possession or control of such a party, this subrule goes further and requires him to disclose all the documents which he intends to use at the trial. [187] These may include documents in the possession of third parties in respect of which discovery need not be made. The subrule does not require a party to disclose privileged statements which he proposes to use solely to damage the case of the other party in the event of the other party calling witnesses whose evidence conflicts with those documents. [188] The subrule also encompasses documents in the possession of the party giving the notice in terms of the subrule. [189]

No sanction is provided for failure to comply with the provisions of the subrule. A party may apply for condonation for failure to comply with the provisions of the subrule. [190] It has been suggested that the court can make any appropriate order to ensure that parties to the litigation are not prejudiced and that the hearing proceeds in an orderly manner. [191]

Subrule (9): 'To admit that … documents … were properly executed.' An admission under this subrule does not amount to an admission of the contents of the document. [192] In other words, the production of documents in terms of subrule (10), after these have been admitted in terms of this subrule, does not extend to the truthfulness of the contents of the documents. [193] The documents are not evidence that the content thereof is true, and the contents, unless admitted as true, remain hearsay evidence and inadmissible unless they qualify for admission under one of the exceptions to the hearsay rule. [194]

Subrule (10): 'To produce at the hearing.' The provisions of this subrule entitle a party to call upon his opponent to produce at the trial the originals of the documents and tape recordings which have been discovered. The provisions of the subrule do not extend to third parties; if books or documents in the hands of third parties are required, a subpoena *duces tecum* under rule 38 must be issued. See also the notes to subrule (9) sv 'To admit that … documents … were properly executed' above.

'Without calling any witness.' The subrule provides an exception to the general requirement that a document can only be admitted in evidence by a witness who is in a position to identify the document. [195]

'Shall be receivable in evidence.' The admissibility of the content of the document remains subject to the applicable rules of the law of evidence. [196]

Subrule (11): 'The court may … order the production of … such documents.' The court has a discretion under this subrule [197] but it would be an improper exercise of such a discretion to order discovery in order to determine an issue such as whether or not there is an action properly before the court. [198]

'Relating to any matter in question in such proceedings.' The phraseology is similar to that of subrule (1), and a court ordering the production of documents relating to any matter in question in the proceedings is bound by the constraints governing that subrule. See the notes to subrule (1) sv 'Relating to any matter in question' above.

Subrule (12): 'Reference is made to any document.' This subrule authorizes the production of documents which are referred to in general terms in a party's pleadings or affi-davits: the terms of the subrule do not require a detailed or descriptive reference to such documents. [199] Reference by mere deduction or inference does not, however, constitute a 'reference' as contemplated in the subrule. [200] The entitlement to see a document or tape recording arises as soon as reference is made thereto in a pleading or affidavit and a party cannot ordinarily be told to draft and file his own pleadings or affidavits before he will be given an opportunity to inspect and copy, or transcribe, a document or tape recording referred to in his adversary's pleadings or affidavits. [201] The subrule is, however, not a procedural mechanism to delay the resolution of the merits of a dispute. The purpose of the subrule is to facilitate the ventilation of disputes; it is not meant to be an end in itself. [202]

The rights under the subrule may be exercised before the respondent or defendant has disclosed his defence or even before knowing what his defence, if any, is going to be. He is entitled to have the documents or recordings produced for the specific purpose of considering his position. [203] He is not required to depose to or deliver opposing affidavits (or a plea) before having been afforded an opportunity of inspecting and copying the documents referred to in the subrule. [204] In previous services of this work, and in the light of the aforesaid, it was stated that '[t]he time period for the delivery of opposing affidavits (or a plea) is therefore suspended pending the production of the documents or recordings referred to in the subrule'. In *Potpale Investments (Pty) Ltd v Mkize* [205] Gorven J, however, held [206] that neither the *Protea* and *Unilever* cases, nor the rules, properly construed, supported the said statement. The correct position was held [207] to be as follows:

> '[18] The rules in question nowhere say that delivery of a notice in terms of rule 35(12) or (14) suspends the period referred to in rule 26 or any other rule. There are sanctions attaching to non-compliance with some parts of rule 35. That of rule 35(12), for example, is that the non-compliant party may not use the documents in question. Where documents have been appropriately referred to, in other words where they are an integral part of the case of the party concerned, the likely result of this sanction would be that that party would not be able to prove its case. A further sanction is that a non-compliant

> party becomes subject to the provisions of rule 30A. In that way if a case is made out, production of the documents can be compelled. Rule 26 provides that the period between 16 December and 15 January must not be counted in calculating the time allowed for compliance. There is no reference in that, or any other, rule that delivery of a notice in terms of rule 35(12) or (14) has any such effect. In the light of the specific mention of the period between 16 December and 15 January, one would expect such a reference if the contention of the defendant were correct.
>
> [19] The purpose of the rules is to govern procedural matters relating to litigation. They set standardised time limits within which parties must take certain steps. This relieves the court of having to do so in each case. Where a litigant in [*sic*] unable to comply with the rules, both rule 27 and the common-law jurisdiction of a High Court to govern its own procedures empower a court to condone non-compliance. The standardised

time limits are, therefore, not immutable. Where time limits cannot be complied with, the court may extend them. An adoption of the plain grammatical meaning of the rules in question, in the light of the purpose of the rules, does not lead to any absurdity. This does not support the statement in *Erasmus*.

[20] The defendant says that it has a right to the production of the documents and that this would be negated if the time to deliver a plea were not suspended. This is not so. In the first place neither *Protea Assurance* nor *Unilever* held that the entitlement to the documents was absolute and that, by necessary implication, the time to put up a plea or affidavit was suspended until the notice had been complied with. Secondly, the defendant is not without remedy. As was done in *Protea Assurance* and as is pertinently provided for in rule 27(1) and (2), the defendant could have applied to extend the time limits within which to deliver the plea and have brought an application to compel. He chose not to do so.

[21] The plaintiff relies on *Hawker v Prudential Assurance Co of South Africa Ltd* [208] in support of its stance that the rule 35 notice did not suspend the period for delivering the plea. In that matter further particulars were sought for the purposes of delivering a plea, as was allowed at the time. Further particulars were supplied but were inadequate. The defendant then applied, outside of the time within which to deliver his plea but before any notice of bar was delivered, to compel their delivery. It was submitted that the application was out of time. The court reasoned as follows:

> "It is implicit in Rule 21(1) that the pleading in respect of which further particulars may be requested is incomplete, in the sense that it is envisaged that further particulars are necessary to enable the party requesting the particulars to plead and/or to tender an amount in settlement. Where the words 'the particulars' are used in Rule 21(3), this must be construed as meaning 'the particulars envisaged in Rule 21(1)' for, until such particulars are furnished, the party who requested the further particulars must be regarded as being unable to plead and/or to tender an amount in settlement."

Applying this reasoning to the application at hand, the court went on to hold:

> "It follows from the aforegoing that in my view a defendant is not obliged to take any further step when particulars have been refused or inadequate particulars have been furnished and the particulars are strictly necessary for the purposes envisaged by Rule 21(1). Should the plaintiff in such circumstances, and upon expiration of the 14-day period mentioned in Rule 21(3), deliver a demand for plea in accordance with the provisions of Rule 26, the defendant has an election. He can either attempt to

> plead, or he can make application in terms of Rule 21(6) for an order compelling the plaintiff to furnish the particulars requested. The latter application would naturally be coupled with an application for an order extending the barring period."

[22] The reasoning, accordingly, is that without the requested necessary particulars it was not possible to plead. In other words the defendant was entitled to the particulars before being required to plead. This mirrors the submission in the present matter that the defendant was entitled to inspect and copy the documents before being obliged to plead. *Hawker*, however, held that if the defendant were placed on bar, he was obliged either to plead or to apply to compel the particulars. Where he did plead, the bar would not fall. Where he did not do so, but brought an application, the court considered that it was axiomatic that an application to extend the time to plead would accompany the application to compel. If this were not done, the clear implication is that the defendant would find himself barred from delivering a plea and subject to a default judgment. It is clear that the court did not regard the bringing of the application (let alone the request for further particulars) as suspending the time period under rule 26.

[23] This reasoning commends itself to me as applying equally to the present matter. The delivery of the rule 35 notice did not suspend the period in which the defendant was obliged to deliver a plea or other document referred to in rule 22. When he was confronted with a rule 26 notice, he was put to an election. He could either have done his best to plead and so have defeated the bar or he could have applied to extend the time within which to plead and to compel production of the documents for that purpose. If he had pleaded, it would have been open to him to apply to compel delivery of the documents and, if so advised, to thereafter seek to amend his plea. Since he did not plead or apply to extend the period in which to do so, he was ipso facto barred on 2 June 2015. There is therefore no basis for contending that setting down the application for default judgment amounted to an irregular step. The interlocutory application must be dismissed as regards that relief.'

An application for summary judgment cannot be deferred by delivery of a notice in terms of this subrule. [209]

'To produce such document.' The subrule entitles a litigant to see the whole of a document or a tape recording and not just the portion of it upon which the other party has chosen to rely. [210]

A 'proved claim' in the form of an affidavit as contemplated in s 44(4) of the Insolvency Act 24 of 1936, referred to in a founding affidavit in an application for the winding-up of a company, is a 'document' as intended in rule 35(12). [211]

A photograph is a 'document' within the meaning of the subrule. [212]

If a document is not referred to in an affidavit but in a document annexed to it, the document thus referred to falls within the ambit of the subrule. [213] The subrule also applies in respect of documents referred to in a party's affidavit but which are not in that party's possession. If such a party is unable to produce the document not in his possession, the court will not make an order against him in terms of the subrule. [214] The subrule further applies to documents referred to in an answering affidavit in summary judgment proceedings. [215]

The court has an inherent power to order a party to produce for inspection documents not referred to in that party's pleading or affidavits, and also to order a party to produce for inspection items of machinery, i e objects which are not documents. [216] Such inherent power will not, however, be exercised as a matter of course, and only when the court can be satisfied that justice cannot otherwise be properly done. [217]

The fact that other evidence may exist upon which the party may prefer to rely in advancing his case is quite irrelevant to any enquiry under the rule.

'Any party failing to comply with such notice.' The sanction in the subrule is of a negative nature and comes into operation automatically upon non-compliance with the provisions of the subrule. [218] The provisions of rule 30A apply to a failure to comply with a notice under this subrule despite the fact that the subrule itself provides a sanction for non-compliance. [219] Rule 30A provides for a positive form of relief which aims at compelling compliance with the

notice or request, and at striking out the claim or defence, as the case may be, where compliance cannot be enforced. [220]

The cases dealing with compliance are not harmonious, as pointed out by the Supreme Court of Appeal in *Centre for Child Law v Hoërskool, Fochville*. [221] In that case a provincial department of education decided that a school should admit certain children. The school and its governing body ('the school') instituted proceedings to review the decision. The Centre for Child Law ('the CCL') applied to intervene. It represented the children who had been admitted. In its affidavit it summarized the experiences of the children and it stated that the summary was sourced from questionnaires completed by the children.

The school gave notice that it would oppose the CCL's application to intervene, but before filing an answering affidavit, gave the CCL a rule 35(12) notice to produce the questionnaires for inspection. The CCL refused, asserting that the questionnaires were attorney-client communications and privileged. The court *a quo* eventually ordered the CCL to comply with the school's rule 35(12) notice by delivering up for inspection and copying the original questionnaires. [222] In framing the proper approach to an application under rule 30A to compel the production of documents under subrule (12), and overruling the decision of the court *a quo*, the Supreme Court of Appeal stated: [223]

'[16] Uniform Rule 30A reads:

> "(1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days, to apply for an order that such rule, notice or request be complied with or that the claim or defence be struck out.
>
> (2) Failing compliance within 10 days, application may on notice be made to the court and the court may make such order thereon as to it seems meet."

Under rule 30A a party making a request, or giving a notice, to which there is no response by the other party, may through a further notice to the other party warn that after the lapse of 10 days application will be made for an order that the notice or request be complied with, or that the claim or defence be struck out, as the case may be. Failing compliance within the 10 days mentioned, application may then be made to court and the court may make an appropriate order. That, as Botha J described it in *Coucourakis* (at 459H), is a "positive form of relief".

[17] In general terms, the rules exist to regulate the practice and procedure of the courts. Their object is to secure the "inexpensive and expeditious completion of litigation before the courts" and they are not an end in and of themselves. Ordinarily, strong grounds

would have to be advanced to persuade a court to act outside the powers provided for specifically in the rules. Here, having given notice in terms of rule 35(12) that has not been complied with, it was for the School to give notice in terms of rule 30A that it intended, after the lapse of 10 days, applying for an order that its rule 35(12) notice be complied with. That the School did not do. Nor did it apply to court in terms of rule 30A to compel production of the documents sought. That, in and of itself, may have been fatal to the application (see *Universal City Studios v Movie Time* 1983 (4) SA 736 (D)). In *Universal City Studios* Booysen J was urged, despite the fact that the procedure laid down in rule 30(5) (the predecessor to rule 30A) had not been followed, to nevertheless order compliance with the rule 35(12) notice. He declined, stating that —

> "a party who deliberately chooses not to claim relief of a particular nature, should in general, even if it were competent, not be granted such relief under the general prayer of alternative relief."

Whether Booysen J was correct in his approach to the matter hardly need detain us. For the real complaint in this case is that, however the application was presented, the learned judge in the court a quo failed to appreciate that he was, in truth, considering an application in terms of rule 30A. In compelling production of the questionnaires, Sutherland J "sum[med] up the law" thus:

> "[25.1] There is clear authority that confidentiality does not trump the rule.
>
> [25.2] There is some authority for the proposition that rule 35(12) must be literally interpreted, and irrelevant and privileged documents must be disclosed. I am in firm disagreement with such a view.
>
> [25.3] There is some authority, which is nevertheless obiter, to support the idea that an irrelevant or privileged document, if referred to in a pleading or affidavit, cannot be subjected to compulsory disclosure in terms of rule 35(12). I am in firm agreement with this view.
>
> [25.4] Therefore, I hold that, upon a proper interpretation of rule 35(12), a party called upon to comply with rule 35(12) is excused from so doing, if that party shows that the document sought is irrelevant to the issues in the matter, or is privileged, but cannot refuse on the grounds of confidentiality."

[18] *Universal City Studios* held (at 748A) that —

> "[this] being an application, I would say that the *onus* is to be discharged on the usual basis, i e that the applicant bears the overall *onus* of satisfying the Court that the respondent is obliged to produce the document . … Where the respondent files an opposing affidavit … and either denies relevance or avers that he is on ground of privilege not obliged to produce a document … the applicant would, in order to succeed, have to satisfy the Court on a balance of probabilities that the document is indeed relevant or not privileged."

In *Gorfinkel v Gross, Hendler & Frank* 1987 (3) SA 766 (C) Friedman J disagreed with this dictum. He took the view that the rule should be interpreted as follows:

> "*(P)rima facie* there is an obligation on a party who refers to a document … to produce it. That obligation is, however, subject to certain limitations, for example, if the document is not in his possession and he cannot produce it, the Court will not compel him to do so. … Similarly, a privileged document will not be subject to production. A document which is irrelevant will also not be subject to production. As it would not necessarily be within the knowledge of the person serving the notice whether

> the document falls within the limitations I have mentioned, the *onus* would be on the recipient of the notice to set up facts relieving him of the obligation to produce the document (774G)."

Friedman J's approach found favour with Thring J in *Unilever plc and Another v Polagric (Pty) Ltd* 2001 (2) SA 329 (C). For my part, I entertain serious reservations as to whether an application such as this should be approached on the basis of an onus. Approaching the matter on the basis of an *onus* may well be to misconceive the nature of the enquiry. I thus deem it unnecessary to attempt to resolve the disharmony on the point. That notwithstanding, it is important to point out that the term onus is not to be confused with the burden to adduce evidence (for example, that a document is privileged or irrelevant or does not exist). In my view the court has a general discretion in terms of which it is required to try to strike a balance between the conflicting interests of the parties to the case. Implicit in that is that it should not fetter its own discretion in any manner and particularly not by adopting a predisposition either in favour of or against granting production. And, in the exercise of that discretion, it is obvious, I think, that a court will not make an order against a party to produce a document that cannot be produced or is privileged or irrelevant.?
[19] In striking the appropriate balance in a case of this nature adequate weight must be accorded to the interests of the children.

…

[26] Accordingly, as I have endeavoured to show, in every weighing of rights and interests and any value judgment relating to whether the questionnaires should be produced, the best interests of the children would have to be the paramount consideration. Thus, even if the questionnaires were not protected by privilege or if the privilege had been waived, it may not have been appropriate for the court a quo to have ordered their disclosure on the basis that it would not have been in the children's best interests to do so. The CCL explained why the children specifically requested that their confidentiality be protected. The court a quo took the view that the CCL could not refuse to produce the questionnaires on the grounds of confidentiality. But as Moseneke DCJ pointed out in *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the Republic of South Africa and Another* 2008 (5) SA 31 (CC) (2008 (8) BCLR 771; [2008] ZACC 6) para 27:

> "Even before the advent of the Constitution, courts often, and correctly in my view, recognised that when there is a claim of confidentiality over information that is sought to be discovered or disclosed other considerations of fairness arise. These are well recognised by Schutz AJ in *Crown Cork & Seal Co Inc and Another v Rheem South Africa (Pty) Ltd and Others (Crown Cork*):
>
> > [A conflict arises] between the need to protect a man's property from misuse by others, in this case the property being confidential information, and the need to ensure that a litigant is entitled to present his case without unfair halters. And, although the approach of a Court will ordinarily be that there is a full right of inspection and copying, I am of the view that our Courts have a discretion to impose appropriate limits when satisfied that there is a real danger that if this is not done an unlawful appropriation of property will be made possible merely because there is litigation in progress and because the litigants are entitled to see documents to which they would not otherwise have lawful access. But it is to be stressed that care must be taken not to place undue or unnecessary limits on a litigant's right to a fair trial, of which the discovery procedures often form an important part."

[27] The concern expressed in this case is that the children may suffer prejudice should they be identified as the makers of some of the statements in the questionnaires. At the very least, the children appear to believe that they will. There is nothing to suggest that their perception in that regard is not genuinely held. In those circumstances there is much to be said for the argument that disclosure of the questionnaires would not be in their best interests. That is not to suggest, to employ the language of Sutherland J, that the best interest principle operates as a trump, because, as the Constitutional Court pointed out in *S v M* (above [24]) para 26, "the fact that the best interests of the child are paramount does not mean that they are absolute". It is thus but a starting point for any balancing of rights. Of course in appropriate circumstances and as part of that balancing act a court could endeavour to impose suitable conditions relative to the production and inspection.

[28] Here the School has failed to show why their interests should outweigh those of the children. On that score, in his replying affidavit, Mr Erasmus stated:

> "32.5 The intervening party's statement that the applicants will not be placed in a better position to answer the allegations should they be given access to the questionnaires, is denied. This is for the applicants to decide after disclosure of the documents, not for the intervening party to decide in order to evade disclosure."

Tellingly, he does not inform the court why the School could not oppose the intervention application without the benefit of the questionnaires. Ms Du Toit's affidavit captures the lived experiences of the children. It bears noting that no relief was sought against the School in respect of the incidents complained of. The School thus did not require to know the precise details of each incident in order to respond to the CCL's application to intervene. In the event, there was no justifiable basis for holding that the interests of the School in investigating the identities of the children in order to answer the allegations outweighed the interests of the children in not having their identities disclosed, especially in the light of the fact that the children had disclosed the information (which they otherwise may not have done) on condition of, and in the expectation of, their identities not being disclosed.

[29] It seems clear that the litigation concerns the children. It also seems clear that the children wish to participate in it at least to the extent that their views and perceptions of the School are considered. The question is whether the use of a summary of their sentiments in an overarching affidavit by Ms Du Toit, without supporting affidavits by them and disclosure of their individual questionnaires, is an appropriate way for them to do so. The School could point to no prejudice to it. It further cannot be said that, if the CCL is joined in the application, this is not an appropriate way for the children to participate in the litigation. The court below held that the hearsay nature of the evidence adduced by the CCL required the disclosure of the questionnaires. The CCL adduced the evidence in hearsay form so as to protect the identities of the children, conscious that the admissibility and weight of the evidence would be considered in due course on the basis that it is hearsay evidence. The questions of admissibility

and weight of the evidence were thus not issues to be determined in this application. The School obviously retained the right to oppose the admission of the hearsay evidence and to argue that it should be accorded little weight, if admitted. But those are matters that would obviously have had to be canvassed and ultimately decided in either the intervention or main application in due course.

[30] It follows, for the reasons given, that the Uniform Rule 30A application ought not to have succeeded before the court below. Accordingly, the appeal must succeed. As to costs: CCL, commendably, did not seek costs either in this court or the one below. In the result, the appeal succeeds and the order of the court below is set aside and replaced with:

"The application is dismissed." '

Subrule (13): 'Shall *mutatis mutandis* apply ... to applications.' Though the provisions of rule 35 relating to discovery apply to applications as far as the court may direct, [224] discovery is rare and unusual in application proceedings and should be ordered by the court only in exceptional circumstances. [225] In *Saunders Valve Co Ltd v Insamcor (Pty) Ltd* [226] it was held that the fact that a permanent interdict was being sought on motion constituted exceptional circumstances justifying an order obliging the applicant to make discovery prior to the filing of replying affidavits by the respondent.

The notion of exceptional circumstances does not exist in a vacuum: it is to be gauged within the broader context of the values of fairness, equity, openness and transparency. [227] The factors taken into consideration include that the claim was for a substantial amount of money, the nature of the defendant's defence, the relevance of the documentation requested, whether the application was a fishing expedition, the timing of the application, that there was a reasonable apprehension that not all the documentation was before the court for the just and fair resolution of the dispute. [228] In addition, the court will take into account the caution sounded in *The MV Urgub: Owners of the MV Urgub v Western Bulk Carriers (Australia) (Pty) Ltd* [229] that discovery is not intended to be used as a sniping weapon in preliminary skirmishes. [230]

In *STT Sales (Pty) Ltd v Fourie* [231] the court endorsed the principle that an order directing discovery will only in exceptional circumstances be made in motion proceedings and held that such an order will, as a general rule, only be made after the legal issues have been established, i e once all the affidavits have been filed.

'In so far as the court may direct.' This subrule clearly and unequivocally states that, although the provisions of rule 35 relating to discovery apply to applications, such application is subject to the proviso that the court direct that it be so. [232] Such direction is an essential prerequisite for a notice in terms of subrule (1) as well as for an application to compel compliance with a notice in terms of subrule (1). [233]

Subrule (14): 'For purposes of pleading.' This subrule was designed for the situation where a party to an action requires, for the purposes of pleading, the production of a specific document of which he has knowledge and which he can describe precisely. The test is whether the document in question is essential, not merely useful, in order to enable a party to plead. [234]

'A clearly specified document ... which is relevant to a reasonably anticipated issue.' This subrule does not provide a mechanism whereby a party, by making use of generic terms, can cast a net with which to fish for vaguely known documents. [235] In this respect the subrule differs markedly from subrule (12) and its ambit is much narrower than that of subrule (12). [236] See further the notes to this subrule s v 'For purposes of pleading' above.

The time period for the delivery of a plea (or opposing affidavits) is not suspended pending the production of the documents or recordings referred to in the subrule. See, in this regard, the notes to subrule (12) s v 'Reference is made to any document' above.

An application for summary judgment cannot be deferred by delivery of a notice in terms of this subrule. [237]

In an application by a defendant in convention for an order compelling discovery of documents to place it in a position to decide whether it wished to institute a claim in reconvention, the court held [238] that the legislature could never have envisaged that, once appearance to defend has been entered to a claim in convention, it would give a plaintiff in reconvention *carte blanche* to ask for the production of documents to establish whether he has a legal or factual foundation to formulate a claim in reconvention.

In *Nova Property Group Holdings Ltd v Cobbett* [239] Moneyweb (Pty) Ltd and Mr JP Cobbett, a financial journalist, attempted to exercise their rights in terms of s 26 of the Companies Act 71 of 2008 to access the securities registers of the Nova Group of Companies in order for Mr Cobbett to write articles for Moneyweb in regard to the Sharemax Group of Companies' controversial property-syndication investment scheme. When the requests were met with refusals, Moneyweb launched an application in the Gauteng Division of the High Court to compel the Nova Group of Companies to provide access to it for inspection and making copies of the securities registers within five days of the date of the order ('the main application'). Instead of filing an answering affidavit, the Group of Companies issued notices in terms of rule 35(12) and (11)–(14) in which they sought documents referred to in Moneyweb's founding affidavit. Dissatisfied with the response to the notices, the Group of Companies launched an application to compel compliance with the notices. The application revealed that the Group of Companies ostensibly sought these documents for purposes of interrogating the 'real motives' of Moneyweb, as they believed that Moneyweb was acting in furtherance of a 'sinister agenda' directed against them, including certain members of its executive, and that Moneyweb had embarked upon a vendetta for the sole purpose of discrediting them and undermining their integrity. The Group of Companies contended that the

documents sought would enable them to prove that Moneyweb intended to publish articles in the media not for any journalistic motive, but rather in furtherance of the 'sinister agenda' referred to above. They asserted, in this regard, that the documents sought were relevant to the anticipated issues in the main application, as they would provide them with a defence to that application. Tuchten J granted the rule 35(12) application but dismissed the Companies' rule 35(14) application. In dismissing the Companies' appeal against the dismissal of the latter application, the Supreme Court of Appeal held [240] that Moneyweb's 'motive' for seeking access to the securities registers was irrelevant and that the Group of Companies had failed to demonstrate that the documents sought in their rule 35(14) were 'relevant to a reasonably anticipated issue in the main application'.

Subrule (15): 'A tape recording includes.' The definition of 'tape recording' is wide enough to encompass all the different kinds of material on which visual images, sound and other information can be stored. In *Makate v Vodacom (Pty) Ltd* [241] it was held that 'an edocument, i e electronic material, whether it be in the form of a communication or stored data that is retrievable through a filtering process or a data search, is discoverable under rule 35 procedures' and that, even if it were not so, it would be open to utilize the provisions of rule 35(7) in order to ensure that 'the discovery process achieves its objective in the electronic age'.

1 1949 (3) SA 1081 (SR) at 1083. See also, for example, *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masethla v President of the Republic of South Africa* 2008 (5) SA 31 (CC) at 41F–42C; *Replication Technology Group v Gallo Africa Ltd* 2009 (5) SA 531 (GSJ) at 535C–I; *Bosasa Operations (Pty) Ltd v Basson* 2013 (2) SA 570 (GSJ) at 578B–D; *Bridon International GmbH v International Trade Administration Commission* 2013 (3) SA 197 (SCA) at 209I–210E; *MV* Alina II, *Transnet Ltd v MV* Alina II 2013 (6) SA 556 (WCC) at 563H–564E and the authorities there referred to. In *Arrow Nominees Inc v Blackledge* [2000] 2 BCLC 167 (CA) the English Court of Appeal (in paragraph 54) adopted an observation of Millet J in *Logicrose Ltd v Southend United Football Club Ltd* [1988] 1 WLR 1256 that, *inter alia*,'[t]he object of the rules as to discovery is to secure the fair trial of the action in accordance with the due process of the court ...'.
The aforesaid English cases were referred to in *Owners of MV Banglar Mookh v Transnet Ltd: MV Banglar Mookh* 2012 (4) SA 300 (SCA) at 322A–D.

2 *MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd* 1999 (3) SA 500 (C) at 513G–H.

3 *Copalcor Manufacturing (Pty) Ltd v GDC Hauliers (Pty) Ltd (formerly GDC Hauliers CC)* 2000 (3) SA 181 (W) at 194I.

4 *Air Canada v Secretary of State for Trade* [1983] 2 AC 394 at 445–6; *Santam Ltd v Segal* 2010 (2) SA 160 (N) at 162E–F; *MV* Alina II, *Transnet Ltd v MV* Alina II 2013 (6) SA 556 (WCC) at 563F–G.

5 *MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd* 1999 (3) SA 500 (C) at 513H–I.

6 *MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd* 1999 (3) SA 500 (C) at 513I.

7 *STT Sales (Pty) Ltd v Fourie* 2010 (6) SA 272 (GSJ) at 276C–D.

8 *The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd* 1999 (3) SA 500 (C) at 513I. See also *STT Sales (Pty) Ltd v Fourie* 2010 (6) SA 272 (GSJ) at 276B.

9 2019 (1) SA 257 (GJ).

10 At 261G–I.

11 *Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA) at 492A; *Unitas Hospital v Van Wyk* 2006 (4) SA 436 (SCA) at 445I–446A; *Claase v Information Officer, South African Airways (Pty) Ltd* 2007 (5) SA 469 (SCA) at 473G–H. See also 2006 (July) *De Rebus* 37.

12 *Unitas Hospital v Van Wyk* 2006 (4) SA 436 (SCA) at 455H; *Claase v Information Officer, South African Airways (Pty) Ltd* 2007 (5) SA 469 (SCA) at 433H–I.

13 *Claase v Information Officer, South African Airways (Pty) Ltd* 2007 (5) SA 469 (SCA) at 433I.

14 *Unitas Hospital v Van Wyk* 2006 (4) SA 436 (SCA) at 446C–D.

15 *Unitas Hospital v Van Wyk* 2006 (4) SA 436 (SCA) at 445A.

16 *Unitas Hospital v Van Wyk* 2006 (4) SA 436 (SCA) at 445A. See also *Industrial Development Corporation of South Africa Ltd v PFE International Inc (BVI)* 2012 (2) SA 269 (SCA) at 272G–273A, 273C–275E and 275I; and see the notes to rule 38 s v 'General' below.

17 *Khala v Minister of Safety and Security* 1994 (4) SA 218 (W) at 226G–H.

18 The Constitution of the Republic of South Africa, 1996.

19 *Qozeleni v Minister of Law and Order* 1994 (3) SA 625 (E) at 642E–F.

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

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

22 *Pelidis v Ndhlamuti* 1969 (3) SA 563 (R).

23 *Concise Oxford English Dictionary* 10 ed. Cf *Le Roux v Viana NO* 2008 (2) SA 173 (SCA) at 175E–G where the word 'documents' was attributed this meaning in the context of s 69(3) of the Insolvency Act 24 of 1936.

24 Joe van Dorsten 'Discovery of electronic documents and attorneys' obligations' 2012 (November) *De Rebus* 34–6. See also rule 23(1)*(a)* of the magistrates' courts rules in Jones & Buckle *Civil Practice* vol II.

25 See *Bilborough v Mutual Life Insurance Co of New York* 1906 TH 53; *Robinson v Farrar* 1907 TS 740; *Power v Wilson* 1909 TH 254; *Freeman v Freeman* 1921 WLD 1; *Maxwell v Rosenberg* 1927 WLD 1; *Northern Assurance Co Ltd v Rosenthal* 1927 WLD 209; *Caravan Cinemas (Pty) Ltd v London Film Productions* 1951 (3) SA 671 (W); *Lenz Township Co (Pty) Ltd v Munnick* 1959 (2) SA 567 (T); *Lenz Township Co (Pty) Ltd v Munnick* 1959 (4) SA 567 (T); *Ferreira v Endley* 1966 (3) SA 618 (E) at 622A; *Tractor & Excavator Spares (Pty) Ltd v Groenedijk* 1976 (4) SA 359 (W) at 362B–E; *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N) at 564A; *Carpede v Choene NO* 1986 (3) SA 445 (O) at 452; *Quintessence Co-ordinators (Pty) Ltd v Government of the Republic of Transkei* 1991 (4) SA 214 (Tk) at 216D; *MV* Alina II, *Transnet Ltd v MV* Alina II 2013 (6) SA 556 (WCC) at 564F–G; *Makate v Vodacom (Pty) Ltd* 2014 (1) SA 191 (GSJ) at 197I–198B.

26 *Carpede v Choene NO* 1986 (3) SA 445 (O) at 456B.

27 The ambit of discovery flows from the pleadings in which the parties have delineated the matters in question between them (*Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 297 (T) at 311A; *Copalcor Manufacturing (Pty) Ltd v GDC Hauliers (Pty) Ltd (formerly GDC Hauliers CC)* 2000 (3) SA 181 (W) at 194A; *Eloff v Road Accident Fund* 2009 (3) SA 27 (C) at 34A–B; *Santam Ltd v Segal* 2010 (2) SA 160 (N) at 165D–G; *MV* Alina II, *Transnet Ltd v MV* Alina II 2013 (6) SA 556 (WCC) at 564I–565C; *Makate v Vodacom (Pty) Ltd* 2014 (1) SA 191 (GSJ) at 197I–198B; *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) at 15B; *ST v CT* 2018 (5) SA 479 (SCA) at 488B).

28 *Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd* 2005 (1) SA 398 (C) at 404H–I; *Santam Ltd v Segal* 2010 (2) SA 160 (N) at 165C–D; *ST v CT* 2018 (5) SA 479 (SCA) at 488B.

29 See *Wiese v Mostert* (1893) 10 SC 137; *Ehlers v Malmesbury Board of Executors* (1909) 26 SC 406; *Teperson v Hoffman* (1910) 20 CTR 88; *Cremhold's Estate v Cohen Bros* 1923 OPD 125; *Unterhalter v Minkowitz* 1951 (2) SA 125 (W). See also, by way of analogy, *Saunders Valve Co Ltd v Insamcor (Pty) Ltd* 1985 (1) SA 146 (T).

30 2019 (1) SA 257 (GJ).

31 At 261G-I.

32 *Robinson v Farrar* 1907 TS 740; *Union Business & Estate Agency v Weiss* 1925 TPD 577 at 582; *Freedman v Bauer and Black* 1941 WLD 161; *Gerry v Gerry* 1958 (1) SA 295 (W); *Ocean Accident & Guarantee Corp Ltd v Potgieter* 1961 (2) SA 783 (O); *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N).

33 *Robinson v Farrar* 1907 TS 740; *Union Business & Estate Agency v Weiss* 1925 TPD 577 at 582; *Freedman v Bauer and Black* 1941 WLD 161; *Gerry v Gerry* 1958 (1) SA 295 (W); *Ocean Accident & Guarantee Corp Ltd v Potgieter* 1961 (2) SA 783 (O); *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N).

34 *Chester & Gibb v Big Ben GM Co* (1887) 4 HCG 374; *Strasburger v Combrinck & Co* 1913 CPD 776.

35 See *Natal Vermiculite (Pty) Ltd v Clark* 1957 (2) SA 431 (N). The importance of discovery affidavits is stressed also in *Ferreira v Endley* 1966 (3) SA 618 (E) at 621C; *Van Vuuren v Agricura Laboratoria (Edms) Bpk* 1974 (2) SA 324 (NC) at 327H–328B and *Replication Technology Group v Gallo Africa Ltd* 2009 (5) SA 531 (GSJ) at 535G–536B.

36 *Maxwell v Rosenberg* 1927 WLD 1; *Richardson's Woolwasheries Ltd v Minister of Agriculture* 1971 (4) SA 62 (E).

37 *Jacobs v Minister van Landbou* 1975 (1) SA 946 (T).

38 *Reynolds and Others NNO v Standard Bank of South Africa Ltd* 2011 (3) SA 660 (W) at 662F–G and 663C–F.

39 See *Van Vuuren v Agricura Laboratoria (Edms) Bpk* 1974 (2) SA 324 (NC) and *Carpede v Choene NO* 1986 (3) SA 445 (O) at 453G.

40 *Wallis and Wallis v Corporation of London Assurance* 1917 WLD 116; *Maxwell v Rosenberg* 1927 WLD 1. Paragraph (7) of Form 11 gives effect to these decisions.

41 *International Tobacco Co (SA) Ltd v United Tobacco Cos (South) Ltd (2)* 1953 (3) SA 879 (W). 'Privilege' within the realm of discovery is considered in great detail by the House of Lords in *D v National Society for the Prevention of Cruelty to Children* [1977] 1 All ER 589 (HL).

42 See the remarks of Jansen JA in *Mandela v Minister of Prisons* 1983 (1) SA 938 (A) at 962.

43 For full discussion of privilege within the law of evidence, see Zeffertt *Evidence* 621–782; Schmidt *Bewysreg* 551–87; Van Niekerk, Van der Merwe & Van Wyk *Privilegies passim*; Schmidt & Zeffertt *LAWSA* vol IX paragraphs 482–96.

44 Hoffmann & Zeffertt *Evidence* 235; Zeffertt *Evidence* 621. Van Niekerk, Van der Merwe & Van Wyk *Privilegies* 6 define privilege as ' 'n bevoegdheid of verpligting wat 'n gedingsparty of getuie regtens toekom of opgelê word om te weier om onder bepaalde omstandighede sekere getuienis te lewer, of om te verhoed dat iemand anders dit lewer'.

45 Zeffertt *Evidence* 627.

46 See s 14 of the Civil Proceedings Evidence Act 25 of 1965.

47 *Ex parte Reynolds* (1882) 20 ChD 294.

48 *Lamb v Munster* (1882) 10 QBD 110.

49 *Triplex Safety Glass Co Ltd v Lancegaye Safety Glass (1934) Ltd* [1939] 2 KB 395, [1939] 2 All ER 613; *Sitwell v Sun Engraving Co Ltd* [1937] 4 All ER 366 (CA).

50 Zeffertt *Evidence* 780 points out that if, for example, a wife is a competent witness and is willing to disclose a communication made to her by her husband during the marriage, there is nothing he can do to stop her.

51 In *Rumping v Director of Public Prosecutions* [1964] AC 814, [1962] 3 All ER 256 a letter written by an accused to his wife and containing a confession was not posted and fell into the hands of the police. It was held that the letter is not privileged. See also *R v Nelson* 1936 SR 121.

52 Section 10(2) of the Civil Proceedings Evidence Act 25 of 1965.

53 Zeffertt *Evidence* 781.

54 Zeffertt *Evidence* 780.

55 Hoffmann & Zeffertt *Evidence* 196 point out that 'this involves a rather different use of the word "privilege" from its usual meaning in the law of evidence — the right of a witness to refuse to disclose admissible evidence; but in connection with statements without prejudice it means the right of a party to make statements that cannot be proved against him'. See also Zeffertt *Evidence* 769–779; *LAWSA* vol IX paragraph 481; Van Niekerk, Van der Merwe & Van Wyk *Privilegie* 200–1; the remarks of Trollip JA in *Naidoo v Marine and Trade Insurance Co Ltd* 1978 (3) SA 666 (A) at 677; and *Waste-Tech (Pty) Ltd v Van Zyl and Glanville NNO* 2002 (1) SA 841 (E) at 846D–E.

56 *Kapeller v Rondalia Versekeringskorporasie van SA Bpk* 1964 (4) SA 722 (T) at 728; *Naidoo v Marine and Trade Insurance Co Ltd* 1978 (3) SA 666 (A) at 677; *Tshabalala v President Versekeringsmaatskappy Bpk* 1987 (4) SA 72 (T) at 76; *KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd* 2016 (5) SA 352 (WCC) at 492F–G; *KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd* 2017 (6) SA 55 (SCA) at 62E–F. The rule is subject to certain exceptions, which are summarized in *KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd* 2016 (5) SA 352 (WCC) at 492I–494B. In this case it was held (at 487C, 489A–C, 501D–E and 501F–G) that the introduction into evidence, for the limited purpose of establishing an interruption of prescription in terms of s 14 of the Prescription Act 68 of 1969, of a letter acknowledging liability which was written without prejudice, is not recognized as an exception to the rule. This decision was reversed on appeal in *KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd* 2017 (6) SA 55 (SCA) at 66I–67C and the exception to the rule was held to be well founded. The exception is not absolute and will depend on the facts of each case (*KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd* 2017 (6) SA 55 (SCA) at 67A). The parties may oust it in their discussions (*KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd* 2017 (6) SA 55 (SCA) at 67A). See also Herbert J D Robertson 'A "without prejudice" letter breathes new life into prescribed matter' 2018 (June) *De Rebus* 24–5.

57 *De Beers Consolidated Mines Ltd v Ettling* 1906 TS 418 at 420–1.

58 See, for example, *Pillay v New Zealand Insurance Co Ltd* 1957 (1) SA 17 (N).

59 *Magxoka v Skilingo* 1914 CPD 386; *Ovenstone Farmers (Pty) Ltd v Villiersdorp Moskonfyt en Vrugte Koöperasie Bpk* 1975 (2) SA 278 (C); *Agnew v Union and South West Africa Insurance Co Ltd* 1977 (1) SA 617 (A) at 624; *Tshabalala v President Versekeringsmaatskappy Bpk* 1987 (4) SA 72 (T) at 76; *AD v MEC for Health and Social Development, Western Cape* 2017 (5) SA 134 (WCC) at 148E–F.

60 *AD v MEC for Health and Social Development, Western Cape* 2017 (5) SA 134 (WCC) at 144F-G and 149A–B.

61 *AD v MEC for Health and Social Development, Western Cape* 2017 (5) SA 134 (WCC) at 149B–E.

62 *Millward v Glaser* 1950 (3) SA 547 (W) at 554; *Gcabashe v Nene* 1975 (3) SA 912 (D) at 914; *Jili v South African Eagle Insurance Co Ltd* 1995 (3) SA 269 (N) at 275B; *Lynn & Main Inc v Naidoo* 2006 (1) SA 59 (N) at 65B–C; *Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd* 2016 (1) SA 78 (GJ) at 90I–91A; *KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd* 2016 (5) SA 352 (WCC) at 491I–492A, reversed on appeal, but not on this point, in *KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd* 2017 (6) SA 55 (SCA).

63 *Merry v Machin* (1926) 47 NLR 236; *Brauer v Markow* 1946 TPD 344 at 350; *Jili v South African Eagle Insurance Co Ltd* 1995 (3) SA 269 (N) at 275B; *Lynn & Main Inc v Naidoo* 2006 (1) SA 59 (N) at 65B–C; and see *Ullman Bros Ltd v Kroonstad Produce Co* 1923 AD 449 at 454.

64 *Brauer v Markow* 1946 TPD 344 at 348; *Pillay v New Zealand Insurance Co Ltd* 1957 (1) SA 17 (N) at 19.

65 *Coetzee v Union Government* 1946 TPD 1; *Hoffend v Elgeti* 1949 (3) SA 91 (A) at 108; *Wemyss v Stuart* 1961 (3) SA 889 (D).

66 *Patlansky v Patlansky (2)* 1917 WLD 10; *Wemyss v Stuart* 1961 (3) SA 889 (D).

67 *Kapeller v Rondalia Versekeringskorporasie van SA Bpk* 1964 (4) SA 722 (T); *Naidoo v Marine and Trade Insurance Co Ltd* 1978 (3) SA 666 (A) at 678–80. In *Agnew v Union and South West Africa Insurance Co Ltd* 1977 (1) SA 617 (A) it was held that an offer expressly made 'with prejudice' did not gainsay an intention to tender an amount in settlement of the claim without acknowledging liability. The offer had been made with the object of being used against the plaintiff should he eventually recover less than the amount offered.

68 *Adkins and Hunter v Crosbie's Executors* 1916 EDL 357 at 361; *Gcabashe v Nene* 1975 (3) SA 912 (D) at 914.

69 Legal professional privilege is considered in detail by Van Niekerk, Van der Merwe & Van Wyk *Privilegies* 28–123 and in Zeffertt *Evidence* 679–728. The theoretical foundations of the privilege are explored by Paizes (1989) 106 *SALJ* 109–46. In this respect the judgment of Botha JA in *S v Safatsa* 1988 (1) SA 868 (A) is of 'seminal significance' (see Hoffmann & Zeffertt *Evidence* 247). See also *Bogoshi v Van Vuuren* 1993 (3) SA 953 (T) at 958H–961G; *Blue Chip Consultants (Pty) Ltd v Shamrock* 2002 (3) SA 231 (W) at 235H–I; *A Company v Commissioner, South African Revenue Service* 2014 (4) SA 549 (WCC) at 552E–553F; *South African Airways Soc v BDFM Publishers (Pty) Ltd* 2016 (2) SA 561 (GJ) at 576F–582D; *Astral Operations Ltd v Minister for Local Development, Western Cape* 2019 (3) SA 189 (WCC) at 191F–194E; Zeffertt *Evidence* 693–695; Kristen Wagner and Claire Brett 'I heard it through the grapevine: The difference between legal professional privilege and confidentiality' 2016 (September) *De Rebus* 22–4. In *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2009 (1) SA 1 (CC) at 78E–F the Constitutional Court stated the following:
'The right to legal professional privilege is a general rule of our common law which states that communications between a legal advisor and his or her client are protected from disclosure, provided that certain requirements are met. The rationale of this right has changed over time. It is now generally accepted that these communications should be protected in order to facilitate the proper functioning of an adversarial system of justice, because it encourages full and frank disclosure between advisors and clients. This, in turn, promotes fairness in litigation.'
The requirements referred to are set out as follows (at 78H–I):
' … the legal advisor must have been acting in a professional capacity at the time; the advisor must have been consulted in confidence; the communication must have been made for the purpose of obtaining legal advice; the advice must not facilitate the commission of a crime or fraud; and the privilege must be claimed.'
See also D Eloff 'Legal professional privilege and Internet hacking' 2017 (November) *De Rebus* 17–18.

70 *International Tobacco Co (SA) Ltd v United Tobacco Cos (South) Ltd (3)* 1953 (4) SA 251 (W) at 253.

71 *S v Moseli (2)* 1969 (1) SA 650 (O) at 652.

72 *General Accident, Fire & Life Assurance Corporation Ltd v Goldberg* 1912 TPD 494 at 500 and 506; *Savides v Varsamopoulos* 1942 WLD 49; *United Tobacco Companies (South) Ltd v International Tobacco Co of SA Ltd* 1953 (1) SA 66 (T) at 70; *Euroshipping Corporation of Monrovia v Minister of Agricultural Economics and Marketing* 1979 (1) SA 637 (C) at 640–1; *Mohamed v President of the Republic of South Africa* 2001 (2) SA 1145 (C) at 1154E.

73 *Minter v Priest* [1930] AC 558 at 568; *S v Kearney* 1964 (2) SA 495 (A) at 500; *Danzfuss v Additional Magistrate, Bloemfontein* 1981 (1) SA 115 (O) at 121. In *R v Davies* 1956 (3) SA 52 (A) documents were brought into existence before litigation was contemplated and before any decision was taken to obtain legal advice. The fact that the documents were subsequently handed to an attorney did not render them privileged.

74 *A Company v Commissioner, South African Revenue Service* 2014 (4) SA 549 (WCC) at 567B–C.

75 *A Company v Commissioner, South African Revenue Service* 2014 (4) SA 549 (WCC) at 567F–568B.

76 *A Company v Commissioner, South African Revenue Service* 2014 (4) SA 549 (WCC) at 570D–F and 571B.

77 *Minter v Priest* [1930] AC 558.

78 *R v Fouche* 1953 (1) SA 440 (W); the decision is considered in some detail by Van Niekerk, Van der Merwe & Van Wyk *Privilegies* 54–60.

79 See *Danzfuss v Additional Magistrate, Bloemfontein* 1981 (1) SA 115 (O).

80 *R v Fouche* 1953 (1) SA 440 (W).

81 *Van der Heever v Die Meester* 1997 (3) SA 93 (T) at 101J–102E; *Mohamed v President of the Republic of South Africa* 2001 (2) SA 1145 (C) at 1152E–1156J; *South African Airways Soc v BDFM Publishers (Pty) Ltd* 2016 (2) SA 561 (GJ) at 566C-567A. See also *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (2)* [1972] 2 QB 102 (CA), [1972] 2 All ER 353 (CA).

82 *R v Fouche* 1953 (1) SA 440 (W).

83 *Giovagnoli v Di Meo* 1960 (3) SA 393 (N) at 399; and see *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd* 1962 (2) SA 408 (C); *Conlon v Conlons Ltd* [1952] 2 All ER 462 (CA).

84 *Middeldorf v Zipper NO* 1947 (1) SA 545 (SR); *Kelly v Pickering (1)* 1980 (2) SA 753 (R) at 757.

85 *Harris v Harris* [1931] P 10.

86 *S v Moseli (2)* 1969 (1) SA 650 (O) at 652–3; *Bogoshi v Van Vuuren NO; Bogoshi v Director, Office for Serious Economic Offences* 1996 (1) SA 785 (A) at 793H–J; *Kommissaris van Binnelandse Inkomste v Van der Heever* 1999 (3) SA 1051 (SCA) at 1058A–C.

87 *Schlosberg v Attorney-General,Transvaal* 1936 WLD 59; *Ditz v Attorney-General* 1936 NPD 345; *Danzfuss v Additional Magistrate, Bloemfontein* 1981 (1) SA 115 (O) at 119; *Bogoshi v Van Vuuren NO; Bogoshi v Director, Office for Serious Economic Offences* 1996 (1) SA 785 (A) at 793H–J; *Kommissaris van Binnelandse Inkomste v Van der Heever* 1999 (3) SA 1051 (SCA) at 1058A–C; *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2009 (1) SA 1 (CC) at 79A–B.

88 *International Tobacco Co (SA) Ltd v United Tobacco Cos (South) Ltd (2)* 1953 (3) SA 879 (W) at 883; *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2009 (1) SA 1 (CC) at 79A.

89 *Ex parte Minister van Justisie: In re S v Wagner* 1965 (4) SA 507 (A) at 514; *Euroshipping Corporation of Monrovia v Minister of Agricultural Economics and Marketing* 1979 (1) SA 637 (C) at 645; *AA Mutual Insurance Association Ltd v Blom* 1979 (1) SA 491 (E) at 497; *Bank of Lisbon and South Africa Ltd v Tandrien Beleggings (Pty) Ltd (2)* 1983 (2) SA 626 (W) at 628; *S v Nhlapo* 1988 (3) SA 481 (T); *Harksen v Attorney-General, Cape* 1999 (1) SA 718 (C) at 732E–733H.

90 See *Watts v Goodman* 1929 WLD 199; *Ex parte Minister van Justisie: In re S v Wagner* 1965 (4) SA 507 (A) at 514; *AA Mutual Insurance Association v Blom* 1979 (1) SA 491 (E).

91 See, for example, *Laws v Rutherfurd* 1924 AD 261 at 263; *Borstlap v Spangenberg* 1974 (3) SA 695 (A) at 704F–H; *Harksen v Attorney-General, Cape* 1999 (1) SA 718 (C) at 732H.

92 1924 CPD 155.

93 *Attorney General, Northern Territory v Maurice* (1986) 161 CLR 475 (HCA) at 481; *Goldberg v Ng* [1996] 185 CLR 83 (HCA); *Peacock v SA Eagle Insurance Co Ltd* 1991 (1) SA 589 (C) at 591–2; *Harksen v Attorney-General, Cape* 1999 (1) SA 718 (C) at 732I–733D and 733J; *South African Airways Soc v BDFM Publishers (Pty) Ltd* 2016 (2) SA 561 (GJ) at 582E–583G. See also *A Company v Commissioner, South African Revenue Service* 2014 (4) SA 549 (WCC) at 560A–C.

94 *Estate Bliden v Sarif* 1933 CPD 271; *Euroshipping Corporation of Monrovia v Minister of Agricultural Econo-mics and Marketing* 1979 (1) SA 637 (C) at 646.

95 *Calcraft v Guest* [1898] 1 QB 759; *Jacobs v Minister van Landbou* 1975 (1) SA 946 (T) at 954.

96 *Calcraft v Guest* [1898] 1 QB 759; *Hurley and Seymour v Muller & Co* (1924) 45 NLR 121. See, however, *S v Mushimba* 1977 (2) SA 829 (A), in which an unusual breach of privilege occurred: from the date upon which the instructions had been received to the end of the case a member of the staff of the firm of attorneys who defended the accused at the trial had given copies of statements by the accused and defence witnesses and other confidential and privileged documents to the Security Branch of the police. This information was passed to the State counsel, who was unaware of the irregularities that had occurred. The Appellate Division held that legal professional privilege had simply been eliminated, that the complete elimination of privilege constituted a gross irregularity, and that a failure of justice had occurred.

97 (1884) 4 EDC 105.

98 The different views taken in *Andresen v Minister of Justice* 1954 (2) SA 473 (W), *H Heiman, Maasdorp & Barker v Secretary for Inland Revenue* 1968 (4) SA 160 (W), *Mandela v Minister of Prisons* 1983 (1) SA 938 (A) and *Cheadle, Thompson & Haysom v Minister of Law and Order* 1986 (2) SA 279 (W) are considered by Paizes in (1989) 106 *SALJ* 109 at 137–40. Hoffmann & Zeffertt *Evidence* 257 submit that, in view of the recognition by the Appellate Division in *S v Safatsa* 1988 (1) SA 868 (A) at 885–6 that 'the privilege goes beyond communications made for the purpose of litigation, and that it is a doctrine fundamental to the proper functioning of our legal system and no mere rule of evidence', the confidentiality of all documents that have been communicated to legal advisers for the purpose of obtaining legal advice is protected from seizure by the authorities. See also *Sasol III (Edms) Bpk v Minister van Wet en Orde* 1991 (3) SA 766 (T) at 785–6; *Bogoshi v Van Vuuren NO; Bogoshi v Director, Office for Serious Economic Offences* 1996 (1) SA 785 (A) at 793D–E; *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2009 (1) SA 1 (CC) at 79A; Zeffertt *Evidence* 695–698.

99 *United Tobacco Companies (South) Ltd v International Tobacco Co of SA Ltd* 1953 (1) SA 66 (T); *Potter v South British Insurance Co Ltd* 1963 (3) SA 5 (W).

100 1986 (1) SA 515 (D) at 519.

101 *Rainsford v African Banking Corp Ltd* 1912 CPD 729; *Caldwell v Western Assurance Co* 1916 WLD 111.

102 *General Accident, Fire & Life Assurance Corporation Ltd v Goldberg* 1912 TPD 494.

103 *Solomon & Co v North British and Mercantile Insurance Co* (1900) 14 EDC 165. Statements made after accidents by motorists to their insurance companies are not privileged unless the company has considered the particular case and reached the conclusion that litigation was likely or probable (*Saven v AA Mutual Insurance Association Co Ltd* 1952 (1) SA 110 (C); *Potter v South British Insurance Co Ltd* 1963 (3) SA 5 (W); *Boyce v Ocean Accident & Guarantee Corporation Ltd* 1966 (1) SA 544 (SR)). In *Dingana v Bay Passenger Transport* 1971 (1) SA 540 (E) the test is formulated rather differently (see *Bagwandeen v City of Pietermaritzburg* 1977 (3) SA 727 (N) at 732). A statement or admission made to a third party by the driver of the insured vehicle is inadmissible as evidence against the authorized insurance company (*Union and SWA Insurance Co Ltd v Quntana NO* 1977 (4) SA 410 (A)).

104 *Moffat v SA Breweries Ltd* 1912 WLD 104.

105 *United Tobacco Companies (South) Ltd v International Tobacco Co of SA Ltd* 1953 (1) SA 66 (T).

106 *United Tobacco Companies (South) Ltd v International Tobacco Co of SA Ltd* 1953 (1) SA 66 (T) at 68–70.

107 See Zeffertt *Evidence* 732–746; Schmidt *Bewysreg* 562–5.

108 *International Tobacco Co (SA) Ltd v United Tobacco Cos (South) Ltd (3)* 1953 (4) SA 251 (W) at 253–4; *R v Steyn* 1954 (1) SA 324 (A); *S v Alexander* 1965 (2) SA 796 (A) at 812; *Ex parte Minister van Justisie: In re S v Wagner* 1965 (4) SA 507 (A) at 514; *Msimang v Durban City Council* 1972 (4) SA 333 (D) at 337; *Mlamla v Marine and Trade Insurance Co* 1978 (1) SA 401 (E); *S v B* 1980 (2) SA 946 (A) at 952; *Bowes v Friedlander NO* 1982 (2) SA 504 (C); *Van den Berg v Streeklanddros, Vanderbijlpark* 1985 (3) SA 960 (T). See also *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2009 (1) SA 1 (CC) at 79A.

109 *R v Steyn* 1954 (1) SA 324 (A) at 332.

110 *A Company v Commissioner, South African Revenue Service* 2014 (4) SA 549 (WCC) at 570E–F.

111 See Zeffertt *Evidence* 889–910.

112 Section 32(1) of the Constitution of the Republic of South Africa, 1996, provides that everyone has the right of access to: *(a)* any information held by the state and *(b)* any information that is held by another person and that is required for the exercise or protection of any rights. Section 32(2) provides that national legislation must be enacted to give effect to this right, etc. See in this regard the Promotion of Access to Information Act 2 of 2000 which came into operation on 9 March 2001.

113 See Zeffertt *Evidence* 889–890.

114 See Zeffertt *Evidence* 889.

115 *Van der Linde v Calitz* 1967 (2) SA 239 (A) at 259; and see *Conway v Rimmer* [1968] AC 910, [1968] 1 All ER 874. On the rationale of public interest as a ground for non-disclosure of documents or information, see *D v National Society for the Prevention of Cruelty to Children* [1977] 1 All ER 589 (HL).

116 *Van der Linde v Calitz* 1967 (2) SA 239 (A) at 260C–D; *Geldenhuys v Pretorius* 1971 (2) SA 277 (O).

117 *Van der Linde v Calitz* 1967 (2) SA 239 (A) at 259.

118 *Van der Linde v Calitz* 1967 (2) SA 239 (A) at 260; *Geldenhuys v Pretorius* 1971 (2) SA 277 (O) at 282.

119 *Van der Linde v Calitz* 1967 (2) SA 239 (A) at 262.

120 *Van der Linde v Calitz* 1967 (2) SA 239 (A) at 260. In *Minister van Polisie v Marais* 1970 (2) SA 467 (C) the unusual procedure was followed, with the consent of the parties, of allowing the court access to the document as *evidence* in the proceedings without incorporating it in the record of the proceedings.

121 *Wallis and Wallis v Corporation of London Assurance* 1917 WLD 116 at 120; *Ferreira v Endley* 1966 (3) SA 618 (E) at 620H–621A; *Van der Linde v Calitz* 1967 (2) SA 239 (A) at 261B; *Tractor & Excavator Spares (Pty) Ltd v Groenedijk* 1976 (4) SA 359 (W) at 362H.

122 *Wallis and Wallis v Corporation of London Assurance* 1917 WLD 116 at 120.

123 See *Tanganyika Diamonds Ltd v Mwanza Development Syndicate* 1927 WLD 10 at 12–13; *Caravan Cinemas (Pty) Ltd v London Film Productions* 1951 (3) SA 671 (W) at 678E–G; *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis* 1979 (2) SA 457 (W) at 468B; *Universal City Studios v Movie Time* 1983 (4) SA 736 (D) at 749C.

124 *Moulded Components and Rotomoulding SA (Pty) Ltd v Coucourakis* 1979 (2) SA 457 (W) at 468B.

125 *Lenz Township Co (Pty) Ltd v Munnick* 1959 (4) SA 567 (T) at 574G.

126 *Wainwright & Co v Hassen Mohamed's Trustee* (1908) 29 NLR 619; *Strasburger v Combrinck & Co* 1913 CPD 776; *Estate Michel v Cullen* 1924 WLD 290 at 296; *Leo v Barclays Bank* 1931 TPD 153 at 159.

127 This provision of the subrule supersedes the decisions in *Wallis and Wallis v Corporation of London Assurance* 1917 WLD 116 and *BST Kombuise (Edms) Bpk v Abrams* 1978 (4) SA 182 (T).

128 As to the general principle, see *Competition Commission v Arcelormittal South Africa Ltd* 2013 (5) SA 538 (SCA) at 545F–I. See further Zeffertt *Evidence* 732–746; Schmidt *Bewysreg* 562–5.

129 See Zeffertt *Evidence* 732–746; Schmidt *Bewysreg* 562–5.

130 *R v Steyn* 1954 (1) SA 324 (A); *S v Alexander* 1965 (2) SA 796 (A) at 812; *Ex parte Minister van Justisie: In re S v Wagner* 1965 (4) SA 507 (A) at 514; *Msimang v Durban City Council* 1972 (4) SA 333 (D) at 337; *Mlamla v Marine and Trade Insurance Co* 1978 (1) SA 401 (E); *S v B* 1980 (2) SA 946 (A) at 952; *Bowes v Friedlander NO* 1982 (2) SA 504 (C); *Van den Berg v Streeklanddros, Vanderbijlpark* 1985 (3) SA 960 (T).

131 *R v Steyn* 1954 (1) SA 324 (A) at 332.

132 *Mazele v Minister of Law and Order* 1994 (3) SA 380 (E) at 387A–C. On the unfairness which may in civil litigation arise from the privilege attaching to the contents of a police docket, see *Mazele's* case *(supra)* at 389F–390G and *Zweni v Minister of Law and Order (1)* 1991 (4) SA 166 (W) at 169I–170C. In *Qozeleni v Minister of Law and Order* 1994 (3) SA 625 (E) it was held in an appeal against a decision of a magistrate, that cases dealing with the disclosure of police dockets in civil cases where the criminal prosecution has ended are no longer binding or applicable in view of the provisions of s 33(1) and (2) of the Constitution of the Republic of South Africa Act 200 of 1993. See also *Khala v Minister of Safety and Security* 1994 (4) SA 218 (W).

133 Legal professional privilege is considered in detail by Van Niekerk, Van der Merwe & Van Wyk *Privilegies* 28–123 and in Zeffertt *Evidence* at 679–728. The theoretical foundations of the privilege are explored by Paizes (1989) 106 *SALJ* 109–46. In this respect the judgment of Botha JA in *S v Safatsa* 1988 (1) SA 868 (A) is of 'seminal significance'. See also *Bogoshi v Van Vuuren* 1993 (3) SA 953 (T) at 958H–961G; *Blue Chip Consultants (Pty) Ltd v Shamrock* 2002 (3) SA 231 (W) at 235H–I; Zeffertt *Evidence* 693–695. In *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2009 (1) SA 1 (CC) the Constitutional Court stated (at 78E–F) the following:
'The right to legal professional privilege is a general rule of our common law which states that communications between a legal advisor and his client are protected from disclosure, provided that certain requirements are met. The rationale of this right has changed over time. It is now generally accepted that these communications should be protected in order to facilitate the proper functioning of an adversarial system of justice, because it encourages full and frank disclosurebetween advisors and clients. This, in turn, promotes fairness in litigation.'
The requirements referred to are set out as follows (at 78H–I):
'. . . the legal advisor must have been acting in a professional capacity at the time; the advisor must have been consulted in confidence; the communication must have been made for the purpose of obtaining legal advice; the advice must not facilitate the commission of a crime or fraud; and the privilege must be claimed.'

134 *United Tobacco Companies (South) Ltd v International Tobacco Co of SA Ltd* 1953 (1) SA 66 (T); *Potter v South British Insurance Co Ltd* 1963 (3) SA 5 (W); *A Sweidan and King (Pty) Ltd v Zim Israel Navigation Co Ltd* 1986 (1) SA 515 (D). Thus, in patent litigation the communications between a party and his patent agents arising out of the filing and prosecution of his patent application is not necessarily privileged (see *M J Snyman v Alert-O-Drive (Pty) Ltd* 1981 BP 213).

135 *Rainsford v African Banking Corp Ltd* 1912 CPD 729; *Caldwell v Western Assurance Co* 1916 WLD 111.

136 *General Accident, Fire & Life Assurance Corporation Ltd v Goldberg* 1912 TPD 494.

137 *Solomon & Co v North British and Mercantile Insurance Co* (1900) 14 EDC 165. Statements made after accidents by motorists to their insurance companies are not privileged, unless the company has considered the particular case and reached the conclusion that litigation was likely or probable (*Saven v AA Mutual Insurance Association Co Ltd* 1952 (1) SA 110 (C); *Potter v South British Insurance Co Ltd* 1963 (3) SA 5 (W); *Boyce v Ocean Accident & Guarantee Corporation Ltd* 1966 (1) SA 544 (SR)). In *Dingana v Bay Passenger Transport* 1971 (1) SA 540 (E) the test is formulated rather differently (see *Bagwandeen v City of Pietermaritzburg* 1977 (3) SA 727 (N) at 732). A statement or admission made to a third party by the driver of the insured vehicle is inadmissible as evidence against the authorized insurance company (*Union and SWA Insurance Co Ltd v Quntana NO* 1977 (4) SA 410 (A)).

138 *Moffat v SA Breweries Ltd* 1912 WLD 104.

139 *United Tobacco Companies (South) Ltd v International Tobacco Co of SA Ltd* 1953 (1) SA 66 (T).

140 *United Tobacco Companies (South) Ltd v International Tobacco Co of SA Ltd* 1953 (1) SA 66 (T) at 68–70.

141 *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 320–321F.

142 *MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd* 1999 (3) SA 500 (C) at 515D.

143 *Afrisun Mpumalanga (Pty) Ltd v Kunene NO* 1999 (2) SA 599 (T).

144 *Federal Wine & Brandy Co Ltd v Kantor* 1958 (4) SA 735 (E) at 749H. See also *Caravan Cinemas (Pty) Ltd v London Film Productions* 1951 (3) SA 671 (W) at 675H–676B; *United Tobacco Companies (South) Ltd v International Tobacco Co of SA Ltd* 1953 (1) SA 66 (T) at 70; *Marais v Lombard* 1958 (4) SA 224 (E) at 227; *Lenz Township Co (Pty) Ltd v Munnick* 1959 (4) SA 567 (T) at 572; *Goodman v Druker* 1961 (4) SA 131 (W); *Sandy's Construction Co v Pillai* 1965 (1) SA 427 (N) at 430E; *Continental Ore Construction v Highveld Steel & Vanadium Corporation Ltd* 1971 (4) SA 589 (W) at 597E–G; *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N) at 560G; *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 320F–H; *MV* Alina II, *Transnet Ltd v MV* Alina II 2013 (6) SA 556 (WCC) at 565C–F; *Makate v Vodacom (Pty) Ltd* 2014 (1) SA 191 (GSJ) at 197C–G.

145 *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N) at 560C. The remark in *Richardson's Woolwasheries Ltd v Minister of Agriculture* 1971 (4) SA 62 (E) at 67H that the subrule envisages a demand for the production of 'specific documents' for inspection must be read subject to this qualification.

146 *Copalcor Manufacturing (Pty) Ltd v GDC Hauliers (Pty) Ltd (formerly GDC Hauliers CC)* 2000 (3) SA 181 (W) at 194C–E.

147 *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 311A; *Copalcor Manufacturing (Pty) Ltd v GDC Hauliers (Pty) Ltd (formerly GDC Hauliers CC)* 2000 (3) SA 181 (W) at 194A; *Eloff v Road Accident Fund* 2009 (3) SA 27 (C) at 34A–B; *Santam Ltd v Segal* 2010 (2) SA 160 (N) at 165D–G; *MV* Alina II, *Transnet Ltd v MV* Alina II 2013 (6) SA 556 (WCC) at 564J–565A; *Makate v Vodacom (Pty) Ltd* 2014 (1) SA 191 (GSJ) at

197I–198B.

148 The test for relevance, as laid down by Brett LJ in *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1982) 11 QBD 55 has often been applied. See also *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N) at 564A where the full court accepted the following *dicta* with approval:
'It seems to me that every document relates to the matter in question in the action which, it is reasonable to suppose, contains information which *may* — not which *must* — either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry which may have either of these two consequences.'
See also *Continental Ore Construction v Highveld Steel & Vanadium Corporation Ltd* 1971 (4) SA 589 (W) at 596J, *Carpede v Choene NO* 1986 (3) SA 445 (O) at 452C–J and *Bosasa Operations (Pty) Ltd v Basson* 2013 (2) SA 570 (GSJ) at 579I–580B. In the latter case it was decided that under rule 35(2)*(b)* a journalist and a newspaper could validly object to revealing a source's identity.

149 *Schlesinger v Donaldson* 1929 WLD 54 at 57; *Federal Wine and Brandy Co Ltd v Kantor* 1958 (4) SA 735 (E); *SA Neon Advertising (Pty) Ltd v Claude Neon Lights (SA) Ltd* 1968 (3) SA 381 (W) at 385A–C; *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 316J–317A; *MV* Alina II, *Transnet Ltd v MV* Alina II 2013 (6) SA 556 (WCC) at 564J–565A. See also *Makate v Vodacom (Pty) Ltd* 2014 (1) SA 191 (GSJ) at 197I–198B.

150 *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T).

151 *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 317C–E. See also *De Polo v Dreyer* 1991 (2) SA 164 (W) at 174H–J; *Tweefontein United Collieries Ltd v Lockers Engineers SA (Pty) Ltd* 1964 (1) SA 186 (W).

152 See *Tractor & Excavator Spares (Pty) Ltd v Groenedijk* 1976 (4) SA 359 (W) at 363; *Chauvier v Selero* 1980 BP 222.

153 *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 323B–C.

154 *Eloff v Road Accident Fund* 2009 (3) SA 27 (C) at 34C–E.

155 *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N) at 559C.

156 *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N) at 558G–559D. See also *Richardson's Woolwasheries Ltd v Minister of Agriculture* 1971 (4) SA 62 (E) where an affidavit by a director of a company which was the agent of the litigant was found not to be in compliance with the subrule.

157 *Chauvier v Selero* 1980 BP 222 at 232A.

158 *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N) at 560G; and see *Greenberg v Pearson* 1994 (3) SA 264 (W).

159 In *Ottawa (Rhodesia) (Pvt) Ltd v Highams Rhodesia (1969) (Pvt) Ltd* 1975 (3) SA 77 (R) plaintiff's counsel was placed in an ethical dilemma by the defendant's failure to discover documents which exposed the plaintiff's main witness as a liar and effectively demolished the plaintiff's case. Goldin J held that in the circumstances plaintiff's counsel had rightly not invoked the Rhodesian equivalent of this rule, for although the rule entitled him to object to the use of the documents, to do so would have amounted to a deception of the court.

160 *Mlamla v Marine and Trade Insurance Co* 1978 (1) SA 401 (E).

161 See, for example, *Durban City Council v Minister of Justice* 1966 (3) SA 529 (D).

162 *Burger v Kotze* 1970 (4) SA 302 (W).

163 *Tarry & Co Ltd v Matatiele Municipality* 1965 (3) SA 131 (E); *Ferreira v Endley* 1966 (3) SA 618 (E); *Prinsloo v Saaiman* 1984 (2) SA 56 (O); *Webster v Webster* 1992 (3) SA 729 (E).

164 See the authorities referred to in the preceding footnote, and also *Sandy's Construction Co v Pillai* 1965 (1) SA 427 (N); *Durban City Council v Minister of Justice* 1966 (3) SA 529 (D); *Richardson's Woolwasheries Ltd v Minister of Agriculture* 1971 (4) SA 62 (E); *Van Vuuren v Agricura Laboratoria (Edms) Bpk* 1974 (2) SA 324 (NC); *Tractor & Excavator Spares (Pty) Ltd v Groenedijk* 1976 (4) SA 359 (W).

165 *Venter v Du Plessis* 1980 (3) SA 151 (T); and see the citations in this judgment (at 153 and 154) of passages from the unreported judgment of Boshoff JP in the case of *Marks v Benson* of 13 March 1979. See also *Prinsloo v Saaiman* 1984 (2) SA 56 (O) at 61H and *Webster v Webster* 1992 (3) SA 729 (E) at 734F–H.

166 See *Tarry & Co Ltd v Matatiele Municipality* 1965 (3) SA 131 (E); *Ferreira v Endley* 1966 (3) SA 618 (E); *Associated Musical Distributors (Pty) Ltd v Big Time Cycle House* 1982 (1) SA 616 (O).

167 For example, in *Ferreira v Endley* 1966 (3) SA 618 (E).

168 *Maeder v Carnes* 1944 (1) PH F18 (WLD); *Industrial Machinery Supplies (Pty) Ltd v Fourie* 1961 (1) SA 163 (O) at 166G; *Ferreira v Endley* 1966 (3) SA 618 (E) at 621; *BST Kombuise (Edms) Bpk v Abrams* 1978 (4) SA 182 (T) at 184D–E; *Prinsloo v Saaiman* 1984 (2) SA 56 (O) at 61A–D.

169 See, for example, *Board v Thomas Hedley & Co Ltd* [1951] 2 All ER 431 (CA).

170 *Supervisors of Bethelsdorp Institute v Port Elizabeth Salt Pan Co* 1918 EDL 261; *Mackenzie v Furman and Pratt* 1918 WLD 62; *Cohen and Tyfield v Hull Chemical Works* 1929 CPD 9. See also *Kope v Bourke's Luck Syndicate Ltd (in liquidation)* 1925 WLD 40; *Jacobsohn v Simon and Pienaar* 1937 (2) PH A47; *Moulded Components and Rotomoulding SA (Pty) Ltd v Coucourakis* 1979 (2) SA 457 (W).

171 *Supervisors of Bethelsdorp Institute v Port Elizabeth Salt Pan Co* 1918 EDL 261; *Crown Cork & Seal Co Inc v Rheem South Africa (Pty) Ltd* 1980 (3) SA 1093 (W); *Moulded Components and Rotomoulding SA (Pty) Ltd v Coucourakis* 1979 (2) SA 457 (W) at 469A.

172 *Moulded Components and Rotomoulding SA (Pty) Ltd v Coucourakis* 1979 (2) SA 457 (W) at 469A; *Crown Cork & Seal Co Inc v Rheem South Africa (Pty) Ltd* 1980 (3) SA 1093 (W) at 1100B; *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masethla v President of the Republic of South Africa* 2008 (5) SA 31 (CC) at 42D–G. See also *Replication Technology Group v Gallo Africa Ltd* 2009 (5) SA 531 (GSJ) at 536A–538C. In this case Malan J, after a comprehensive analysis of the law, both local and foreign, held that the use of arbitration documents to found a cause of action for contempt of court against another arbitrating party was reasonably necessary, and in the interests of justice, and that the leave of the court was not required before disclosure of the documents could be made (at 548D–549A).

173 *Khunou v M Fihrer & Son (Pty) Ltd* 1982 (3) SA 353 (W) at 362F.

174 See *Tractor & Excavator Spares (Pty) Ltd v Groenedijk* 1976 (4) SA 359 (W) at 363; *Chauvier v Selero* 1980 BP 222 at 229A; *MV* Alina II, *Transnet Ltd v MV* Alina II 2013 (6) SA 556 (WCC) at 563E–F.

175 *Rainsford v African Banking Corp Ltd* 1912 CPD 729 at 738; *Bothma v Protea Furnishers (Pty) Ltd* 1970 (3) SA 180 (O); *Continental Ore Construction v Highveld Steel & Vanadium Corporation Ltd* 1971 (4) SA 589 (W) at 594H–595E; *Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd* 2016 (1) SA 78 (GJ) at 93C–H.

176 *Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd* 2016 (1) SA 78 (GJ) at 93E–H.

177 *Continental Ore Construction v Highveld Steel & Vanadium Corporation Ltd* 1971 (4) SA 589 (W) at 595D–E.

178 *Makate v Vodacom (Pty) Ltd* 2014 (1) SA 191 (GSJ) at 199E–200E.

179 *Makate v Vodacom (Pty) Ltd* 2014 (1) SA 191 (GSJ) at 200E–F.

180 *Makate v Vodacom (Pty) Ltd* 2014 (1) SA 191 (GSJ) at 200F–I.

181 *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 311A; *Makate v Vodacom (Pty) Ltd* 2014 (1) SA 191 (GSJ) at 202D–E.

182 *Makate v Vodacom (Pty) Ltd* 2014 (1) SA 191 (GSJ) at 202E–F.

183 See *Venter v Du Plessis* 1980 (3) SA 151 (T); *Prinsloo v Saaiman* 1984 (2) SA 56 (O) at 61H; *Webster v Webster* 1992 (3) SA 729 (E) at 734F–H.

184 See *Tarry & Co Ltd v Matatiele Municipality* 1965 (3) SA 131 (E); *Ferreira v Endley* 1966 (3) SA 618 (E); *Associated Musical Distributors (Pty) Ltd v Big Time Cycle House* 1982 (1) SA 616 (O).

185 See *Ferreira v Endley* 1966 (3) SA 618 (E).

186 *Webster v Webster* 1992 (3) SA 729 (E) at 734F–H.

187 *Mazele v Minister of Law and Order* 1994 (3) SA 380 (E) at 389B.

188 *Mazele v Minister of Law and Order* 1994 (3) SA 380 (E) at 389C.

189 *Bank of Lisbon and South Africa Ltd v Tandrien Beleggings (Pty) Ltd (1)* 1983 (2) SA 621 (T).

190 *Shrosbree NO v Klerck NO* 2000 (4) SA 457 (SE).

191 See the remarks of Goldstein J in *Zweni v Minister of Law and Order (1)* 1991 (4) SA 166 (W) at 170B. It would seem that the unfairness arising in civil litigation from the privilege which attaches to police dockets cannot be resolved by the provisions of the subrule (*Mazele v Minister of Law and Order* 1994 (3) SA 380 (E) at 390F–G). However, in *Qozeleni v Minister of Law and Order* 1994 (3) SA 625 (E) it was held that cases dealing with the disclosure of police dockets in civil cases where the criminal prosecution has ended are no longer binding or applicable in view of the provisions of ss 33(1) and (2) of the Constitution of Republic of South Africa Act 200 of 1993.

192 *Selero (Pty) Ltd v Chauvier* 1982 (2) SA 208 (T) at 216.

193 *Absa Bank Bpk v ONS Beleggings BK* 2000 (4) SA 27 (SCA) at 32F–I; *Visser v 1 Life Direct Insurance Ltd* 2015 (3) SA 69 (SCA) at 80H.

194 *Visser v 1 Life Direct Insurance Ltd* 2015 (3) SA 69 (SCA) at 80H–81A.

195 *Knouwds v Administrateur, Kaap* 1981 (1) SA 544 (C) at 551G–552B; *Gihwala v Grancy Property Ltd* 2017 (2) SA 337 (SCA) at 358H–359B. See also *Shezi v Ethekwini Municipality* (unreported, KZD case no 7762/2015 dated 11 October 2017) at paragraph [20].

196 *Knouwds v Administrateur, Kaap* 1981 (1) SA 544 (C) at 552A; *Selero (Pty) Ltd v Chauvier* 1982 (2) SA 208 (T) at 216G. In the *Knouwds* case (*supra*) it was, however, pointed out (at 552B–G) that there is an exception in the case of a statement made by a third party, where there existed a privity or identity of interest between the person making the statement and the party that was the subject of the statement. See also *Gihwala v Grancy Property Ltd* 2017 (2) SA 337 (SCA) at 359A–B.

197 For a case where the court, in application proceedings, declined to exercise its discretion in favour of an applicant under this subrule, see *Potch Boudienste*

CC v FirstRand Bank Limited (unreported, GP case no 23898/15 dated 25 April 2016).

198 *Transgroup Shipping SA (Pty) Ltd v Owners of MV Kyoju Maru* 1984 (4) SA 210 (D).

199 *Erasmus v Slomowitz (2)* 1938 TPD 242 at 244; *Cullinan Holdings Ltd v Mamelodi Stadsraad* 1992 (1) SA 645 (T) at 648A–D. See also *Plastic Manufacturers Association of South Africa v Montecatini Edison* 1972 BP 233 at 242; *Plastic Manufacturers Association of South Africa v Montecatini Edison SpA* 1973 BP 410 at 414; *Adcock Ingram (Chemists) Ltd (now Adcock Ingram Ltd) v American Cyanamid Co* 1977 BP 172; *Protea Assurance Co Ltd v Waverley Agencies CC* 1994 (3) SA 247 (C) at 248H; *Penta Communication Services (Pty) Ltd v King* 2007 (3) SA 471 (C) at 476A–B; *Business Partners Ltd v Trustees, Riaan Botes Family Trust* 2013 (5) SA 514 (WCC) at 518G–519F; *Holdsworth v Reunert Ltd* 2013 (6) SA 244 (GNP) at 246I–J.

200 *Penta Communication Services (Pty) Ltd v King* 2007 (3) SA 471 (C) at 436B–C; *Holdsworth v Reunert Ltd* 2013 (6) SA 244 (GNP) at 246I–J; *Potch Boudienste CC v FirstRand Bank Limited* (unreported, GP case no 23898/15 dated 25 April 2016) at paragraph [23].

201 *Protea Assurance Co Ltd v Waverley Agencies CC* 1994 (3) SA 247 (C) at 249B.

202 *Potch Boudienste CC v FirstRand Bank Limited* (unreported, GP case no 23898/15 dated 25 April 2016) at paragraphs [12] and [14].

203 *Unilever v Polagric (Pty) Ltd* 2001 (2) SA 329 (C) at 336G–J.

204 *Unilever v Polagric (Pty) Ltd* 2001 (2) SA 329 (C) at 336C–I and the cases there referred to.

205 2016 (5) SA 96 (KZP).

206 At 101C–104C.

207 At 103D–105G (footnotes omitted).

208 *Author's note:* 1987 (4) SA 442 (C).

209 *Business Partners Ltd v Trustees, Riaan Botes Family Trust* 2013 (5) SA 514 (WCC) at 519F; *Absa Bank Ltd v Expectra 423 (Pty) Ltd* 2017 (1) SA 81 (WCC) at 85G–88C.

210 *Protea Assurance Co Ltd v Waverley Agencies CC* 1994 (3) SA 247 (C) at 249B.

211 *Holdsworth v Reunert Ltd* 2013 (6) SA 244 (GNP) at 247E–H and 248D–F.

212 *Protea Assurance Co Ltd v Waverley Agencies CC* 1994 (3) SA 247 (C) at 250G.

213 *Universal City Studios v Movie Time* 1983 (4) SA 736 (D) at 750D.

214 *Moulded Components and Rotomoulding SA (Pty) Ltd v Coucourakis* 1979 (2) SA 457 (W) at 461B–E.

215 *Gehle v McLoughlin* 1986 (4) SA 543 (W).

216 *Moulded Components and Rotomoulding SA (Pty) Ltd v Coucourakis* 1979 (2) SA 457 (W) at 461F–H.

217 *Moulded Components and Rotomoulding SA (Pty) Ltd v Coucourakis* 1979 (2) SA 457 (W) at 462H–463B.

218 *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis* 1979 (2) SA 457 (W) at 459G; *Centre for Child Law v Hoërskool, Fochville* 2016 (2) SA 121 (SCA) at 131B–C.

219 *Moulded Components and Rotomoulding SA (Pty) Ltd v Coucourakis* 1979 (2) SA 457 (W) at 459F–460H; *Universal City Studios v Movie Time* 1983 (4) SA 736 (D) at 746A; *Machingawuta v Mogale Alloys (Pty) Ltd* 2012 (4) SA 113 (GSJ) at 115F–116A.

220 *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis* 1979 (2) SA 457 (W) at 459H; *Centre for Child Law v Hoërskool, Fochville* 2016 (2) SA 121 (SCA) at 131C–G. See also Mzuvukile Sirenya and Carl van Rooyen 'Rule 35(12) of the Uniform Rules: be wary' 2017 (January/February) *De Rebus* 22.

221 2016 (2) SA 121 (SCA).

222 The judgment is reported *sub nomine Governing Body, Hoërskool Fochville v Centre for Child Law* 2014 (6) SA 561 (GJ).

223 At 131D–133E and 139C–141D (footnotes omitted). In *Astral Operations Ltd v Minister for Local Development, Western Cape* 2019 (3) SA 189 (WCC) it was undisputed that a litigant is entitled to decline to produce a document demanded in terms of subrule (12) if it is privileged (at 191D). The respondents claimed 'legal advice privilege' and/or 'litigation privilege' in respect of a certain memorandum which was disclosed by junior counsel for one of them to the attorney acting for one of the applicants. The memorandum set out counsel's advice on the development in a pending review application after receipt of the applicant's supplementary replying papers and counsel's recommendations as to how the respondents should deal with the resultant situation. It was found that the respondents had not waived privilege and that considerations of fairness did not require the disclosure of the memorandum (at 199I–202B).

224 *Pieters v Administrateur, Suidwes-Afrika* 1972 (2) SA 220 (SWA) at 228B–D; *MV Rizcun Trader (2): Manley Appledore Shipping Ltd v Owner of the MV Rizcun Trader* 1999 (3) SA 956 (C) at 961G. See also *Seale v Van Rooyen NO; Provincial Government, North West Province v Van Rooyen NO* 2008 (4) SA 43 (SCA) at 48G–I; *Machingawuta v Mogale Alloys (Pty) Ltd* 2012 (4) SA 113 (GSJ) at 115F–116A; *Potch Boudienste CC v FirstRand Bank Limited* (unreported, GP case no 23898/15 dated 25 April 2016) at paragraph [10].

225 *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis* 1979 (2) SA 457 (W) at 470D; *Saunders Valve Co Ltd v Insamcor (Pty) Ltd* 1985 (1) SA 146 (T) at 149; *FirstRand Bank Ltd t/a Wesbank v Manhattan Operations (Pty) Ltd* 2013 (5) SA 238 (GSJ) at 242F–H.

226 1985 (1) SA 146 (T).

227 *Premier Freight (Pty) Ltd v Breathetex Corporation (Pty) Ltd* 2003 (6) SA 190 (SE) at 196A–B; *FirstRand Bank Ltd t/a Wesbank v Manhattan Operations (Pty) Ltd* 2013 (5) SA 238 (GSJ) at 243C.

228 *Premier Freight (Pty) Ltd v Breathetex Corporation (Pty) Ltd* 2003 (6) SA 190 (SE) at 196–7.

229 1999 (3) SA 500 (C) at 513I.

230 *FirstRand Bank Ltd t/a Wesbank v Manhattan Operations (Pty) Ltd* 2013 (5) SA 238 (GSJ) at 243C–E.

231 2010 (6) SA 272 (GSJ) at 276D–277E. See also *Potch Boudienste CC v FirstRand Bank Limited* (unreported, GP case no 23898/15 dated 25 April 2016) at paragraph [10].

232 *Loretz v Mackenzie* 1999 (2) SA 72 (T) at 74G; *Afrisun Mpumalanga (Pty) Ltd v Kunene NO* 1999 (2) SA 599 (T) at 611G.

233 *Loretz v Mackenzie* 1999 (2) SA 72 (T) at 75A–B; *Afrisun Mpumalanga (Pty) Ltd v Kunene NO* 1999 (2) SA 599 (T) at 611G.

234 *Cullinan Holdings Ltd v Mamelodi Stadsraad* 1992 (1) SA 645 (T) at 647F; *MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd* 1999 (3) SA 500 (C) at 515C–I.

235 *Cullinan Holdings Ltd v Mamelodi Stadsraad* 1992 (1) SA 645 (T) at 648F; *MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd* 1999 (3) SA 500 (C) at 515C–I; *Quayside Fish Supplies CC v Irvin & Johnson Ltd* 2000 (2) SA 529 (C) at 534E–G; *Business Partners Ltd v Trustees, Riaan Botes Family Trust* 2013 (5) SA 514 (WCC) at 518G–519F.

236 *Cullinan Holdings Ltd v Mamelodi Stadsraad* 1992 (1) SA 645 (T) at 648E; *MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd* 1999 (3) SA 500 (C) at 515C–I.

237 *Business Partners Ltd v Trustees, Riaan Botes Family Trust* 2013 (5) SA 514 (WCC) at 519F; *Absa Bank Ltd v Expectra 423 (Pty) Ltd* 2017 (1) SA 81 (WCC) at 85G–88C.

238 *Quayside Fish Supplies CC v Irvin & Johnson Ltd* 2000 (2) SA 529 (C) at 534G–H.

239 2016 (4) SA 317 (SCA).

240 At 322H–I and 340E.

241 2014 (1) SA 191 (GSJ) at 202I–204B. Tapes on which a company backed up its electronic information were found to be discoverable in *Metropolitan Health Corporate (Pty) Ltd v Neil Harvey and Associates (Pty) Ltd* (unreported, WCC case no 10264/10 dated 19 August 2011). It has been held in England that a computer database which forms part of the business records of a company is, in so far as it contains information capable of being retrieved and converted into readable form, a 'document' for the purposes of Order 24 of the Rules of the Supreme Court and therefore susceptible to discovery (*Derby & Co Ltd v Weldon (No 9)* [1991] All ER 901 (Ch)). Joe van Dorsten 'Discovery of electronic documents and attorneys' obligations' 2012 (November) *De Rebus* 34–6 correctly contends that, when compared with foreign developments, it can be seen that the current wording of rule 35 pertaining to the discovery of documents and tape recordings does not adequately provide for discovery of information created, stored and retrieved primarily in electronic form, and that the rule should be appropriately amended. See further Herbstein & Van Winsen *Civil Practice* vol 1 810–13.

36 Inspections, Examinations and Expert Testimony

(1) A party to proceedings, in which damages or compensation in respect of alleged bodily injury is claimed, shall have the right to require any party claiming such damage or compensation, whose state of health is relevant for the determination thereof, to submit to a medical examination.

(2) *(a)* A party requiring another party to submit to a medical examination shall deliver a notice to such other party that—

(i) specifies the nature of the examination required;

(ii) specifies the person or persons who shall conduct the examination;

(iii) specifies the place where and the date (being not less than 15 days from the date of such notice) and time when it is desired that the examination shall take place; and

(iv) requires the other party to submit himself or herself for the medical examination at the specified place, date and time.

(b) The notice contemplated in paragraph *(a)* shall—

(i) state that the party being examined may have his or her own medical adviser present at the examination; and

(ii) be accompanied by a remittance in respect of the reasonable expenses to be incurred by the other party in attending the examination.

(c) The expenses referred to in paragraph *(b)*(ii) shall be tendered on the scale as if such person were a witness in a civil suit before the court: Provided that—

(i) if the party being examined is immobile, the amount to be paid shall include the cost of such person's travelling by motor vehicle and, where required, the reasonable cost of a person attending upon the person to be examined;

(ii) where the party being examined will actually lose salary, wage or other remuneration during the period of absence from work, such party shall, in addition to the aforementioned expenses, be entitled to receive an amount not exceeding the amount determined by the Minister, in terms of the relevant legislation, for witnesses in civil proceedings, per day in respect of the salary, wage or other remuneration which such person will actually lose;

(iii) any amounts paid by a party as aforesaid shall be costs in the cause unless the court otherwise directs.

(3) The person receiving the notice referred to in subrule (2) shall, within five days after the service of the notice, notify the person delivering it, in writing, of the nature and grounds of any objection which such person may have in relation to—

(a) the nature of the proposed examination;

(b) the person or persons who shall conduct the examination;

(c) the place, date or time of the examination;

(d) the amount of the expenses tendered;

and shall further—

(i) in the case of the objection being to the place, date or time of the examination, furnish an alternative date, time or place, as the case may be; and

(ii) in the case of the objection being to the amount of the expenses tendered, furnish particulars of such increased amount as may be required.

Should the person receiving the notice not deliver an objection within the said period of five days, such person shall be deemed to have agreed to the examination upon the terms set forth by the person giving the notice. Should the person giving the notice regard the objection raised by the person receiving it as unfounded in whole or in part the person giving the notice may on notice make application to a judge to determine the conditions upon which the examination, if any, is to be conducted.

(4) Any party to such an action may at any time by notice in writing require any person claiming such damages to make available in so far as such person is able to do so to the other party within 10 days, any medical reports, hospital records, X-ray photographs, or other documentary information of a like nature relevant to the assessment of such damages, and to provide copies thereof upon request.

(5) If it appears from any medical examination carried out either by agreement between the parties or pursuant to any notice given in terms of this rule, or by order of a judge, that any further medical examination by any other person is necessary or desirable for the purpose of giving full information on matters relevant to the assessment of such damages, any party may require a second and final medical examination in accordance with the provisions of this rule.

(5A) If any party claims damages resulting from the death of another person, such party shall undergo a medical examination as prescribed in this rule if this is requested and it is alleged that such party's own state of health is relevant in determining the damages.

(6) If it appears that the state or condition of any property of any nature whatsoever whether movable or immovable, may be relevant with regard to the decision of any matter at issue in any action, any party may at any stage give notice requiring the party relying upon the existence of such state or condition of such property or having such property in that party's possession or under that party's control to make it available for inspection or examination in terms of this subrule, and may in such notice require that such property or a fair sample thereof remain available for inspection or examination for a period of not more than 10 days from the date of receipt of the notice.

(7) The party called upon to submit such property for examination may require the party requesting it to specify the nature of the examination to which it is to be submitted, and shall not be bound to submit such property thereto if this will materially prejudice such party by reason of the effect thereof upon such property. In the event of any dispute whether the property should be submitted for examination, such dispute shall be referred to a judge on notice delivered by either party stating that the examination is required and that objection is taken in terms of this subrule. In considering any such dispute the judge may make such order as deemed fit.

(8) Any party causing an examination to be made in terms of subrules (1) and (6) shall—

(a) cause the person making the examination to give a full report in writing, within two months of the date of the examination or within such other period as may

be directed by a judge in terms of rule 37(8) or in terms of rule 37A, of the results of the examination and the opinions that such person formed as a result thereof on any relevant matter;

(b) within five days after receipt of such report, inform all other parties in writing of the existence of the report, and upon request immediately furnish any other party with a complete copy thereof; and

(c) bear the expense of the carrying out of any such examination: Provided that such expense shall form part of such party's costs.

(9) No person shall, save with the leave of the court or the consent of all parties to the suit, be entitled to call as a witness any person to give evidence as an expert upon any matter upon which the evidence of expert witnesses may be received unless—

(a) where the plaintiff intends to call an expert, the plaintiff shall not more than 30 days after the close of pleadings, or where the defendant intends to call the expert, the defendant shall not more than 60 days after the close of pleadings, have delivered notice of intention to call such expert; and

(b) in the case of the plaintiff not more than 90 days after the close of pleadings and in the case of the defendant not more than 120 days after the close of pleadings, such plaintiff or defendant shall have delivered a summary of the expert's opinion and the reasons therefor:

Provided that the notice and summary shall in any event be delivered before a first case management conference held in terms of rules 37A(6) and (7) or as directed by a case management judge.

(9A) The parties shall—

(a) endeavour, as far as possible, to appoint a single joint expert on any one or more or all issues in the case; and

(b) file a joint minute of experts relating to the same area of expertise within 20 days of the date of the last filing of such expert reports.

(10) *(a)* No person shall, save with the leave of the court or the consent of all the parties, be entitled to tender in evidence any plan, diagram, model or photograph unless such person shall not more than 60 days after the close of pleadings have delivered a notice stating an intention to do so, offering inspection of such plan, diagram, model or photograph and requiring the party receiving notice to admit the same within 10 days after receipt of the notice.

(b) If the party receiving the notice fails within the said period so to admit, the said plan, diagram, model or photograph shall be received in evidence upon its mere production and without further proof thereof. If such party does not admit them, the said plan, diagram, model or photograph may be proved at the hearing and the party receiving the notice may be ordered to pay the cost of their proof.

[Rule 36 substituted by GN R842 of 31 May 2019.]

Commentary

General. Rule 36 is designed to avoid a litigant being taken by surprise in relation to matters in respect of which he would in the normal course of events be unable, before trial, to prepare his case effectively so as to meet that of his opponent. [1]

The rule makes provision for the following distinct procedures:

(a) medical examinations and inspection of medical reports, hospital records, X-ray photographs and the like (subrules (1)–(5A) and (8));

(b) inspection and examination of movable or immovable property (subrules (6)–(8));

(c) expert summaries and evidence (subrule (9));

(d) discovery of plans, diagrams, models and photographs (subrule (10)).

Subrule (1): 'Any party claiming such damage.' This subrule as framed refers only to the medical examination of 'any party' claiming damage or compensation. It is submitted, however, that the rule also covers the case of, for example, a father claiming damage or compensation on behalf of his minor child. Subrule (5A) makes special provision for the medical examination of a person who claims damages resulting from the death of another person and it is alleged that such party's own state of health is relevant in determining the damages.

'To submit to a medical examination.' This subrule places an obligation on a claimant which constitutes a drastic invasion of his rights [2] and personal liberty. [3] The rule must, accordingly, be strictly construed. [4]

Subrule (2)*(a)*: 'Deliver a notice.' The rules do not contain any provision as to when a notice requiring a claimant to submit to a medical examination may be delivered. Such an examination can be required immediately after the institution of action in order to enable the defendant to estimate the amount he may wish to offer by way of an offer to settle. [5] The examination is often required after the close of pleadings when preparation for trial is made.

Subrule (2)*(a)*(iii): 'Specifies the place where and the date ... and time.' In this regard two conflicting interests must be balanced: on the one hand, the party requiring the examination should not be hampered in preparing for trial or estimating the amount he may wish to offer by way of settlement. On the other hand, the person required to be examined should be subjected to the least possible inconvenience. [6] As a general rule a qualified practitioner in the near vicinity of the person to be examined should be employed, and the plaintiff's medical adviser (who in terms of subrule (2)*(b)*(i) has the right to attend the examination) should, if possible, be spared the inconvenience of travelling a long distance. [7]

Subrule (2)*(b)*(i): 'May have his or her own medical adviser present.' The party required to undergo a medical examination who desires his own medical adviser to be present at such examination, cannot claim that expenses incurred in this regard be tendered under the subrule. In giving judgment at the end of the case the court may, in the exercise of its discretion, award the costs of the claimant's medical representation at the examination. [8]

It has been held that the plaintiff party required to undergo a medical examination is entitled to be legally represented at a medical examination held in terms of the subrule. [9] It is for the court or the taxing master to decide whether, on the facts and circumstances of the individual case, the costs in connection with a party's legal representation at a medical examination were reasonably incurred. [10]

Subrule (2)*(b)*(ii): 'A remittance in respect of the reasonable expenses.' This refers to payment and not to a mere tender to pay. See further the notes to subrule (2)*(b)*(i) s v 'May have his or her own medical adviser present' above.

Subrule (2)*(c)*: 'The expenses ... shall be tendered.' This, obviously, refers to the amount of the actual remittance. See further the notes to subrule (2)*(b)*(i) s v 'May have his or her own medical adviser present' above.

'On the scale as if such person were a witness in a civil suit.' See, in this regard, Appendix D4 below.

Subrule (2)*(c)*(ii): 'Will actually lose salary, wage or other remuneration.' This subrule makes it clear that a person is entitled to be compensated for loss of salary or wages only if he is actually earning salary, wages or other remuneration at the time of the examination. If he is in hospital or otherwise incapacitated from work, it would seem that no remittance in respect of salary, wages or other remuneration need be made.

'The amount ... for witnesses in civil proceedings.' See, in this regard, Appendix D4 below.

Subrule (3): 'The nature and grounds of any objection.' It is submitted that in this subrule the 'nature' of the claimant's objection means that he must specify in his notice whether his objection falls under paragraph *(a)*, *(b)*, *(c)* or *(d)* of this subrule; and the 'grounds' of his objection means that the reasons must be set out on which the objection is based.

Subrule (3)*(a)*: 'The nature of the proposed examination.' If a person claims damages for injury to both mental and physical health, and a defendant seeks an examination by an expert qualified in one of these fields only, an objection that a claimant should not submit to an examination because the expert would wholly or partly ignore the other disability is invalid. [11]

Subrule (3)*(b)*: 'The person ... who shall conduct the examination.' The rule does not entitle the party sought to be examined to any say in the choice of the medical expert; he may object to the medical expert suggested on such grounds as that the practitioner is not medically qualified, or is a person with whom he has had an unpleasant association in the past, [12] or was not going to be independent in conducting the examination. [13] While there is no closed list of objections that could possibly be raised against submitting to an examination by a medical practitioner nominated by the defendant, the objection raised will have to be reasonable, material and substantial. [14] This must be determined with regard to the facts or averments on which the objections are based. [15] If necessary, consideration should be given as to whether the objections would be addressed by the imposition of certain conditions during the medical examination. [16]

Subrule (3)*(c)*: 'The place, date or time of the examination.' If the objection is to the place, date or time of the examination, an alternative date, time or place must, in terms of paragraph (i) of this subrule, be suggested in the notice of objection.

Subrule (3)*(d)*: 'The amount of the expenses tendered.' If the objection is to the amount of the expenses tendered, the claimant must, in terms of paragraph (ii) of this subrule, in his notice of objection furnish particulars of such increased amount as he may require.

Though the party sought to be examined may, at the end of the case, be awarded the costs of his own medical representation at the examination, [17] such costs need not, under subrule (2)*(b)*, be tendered to him prior to the examination and he cannot object under this subrule that such costs have not been tendered to him.

'Make application to a 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. [18]

The costs of an application under this subrule are not part of the expense of carrying out the examination referred to in subrule (8)*(c)* and do not, therefore, automatically form part of the party and party costs of the applicant. [19] It is submitted that once the application has been

finally decided, the court should make an appropriate order as to the costs of the application, [20] and only in exceptional circumstances order the costs of the application to be costs in the cause. [21]

'If any.' These words (and especially the phrase 'indien wel' in the Afrikaans text) suggest that, in appropriate circumstances, the court may order that no medical examination be held.

Subrule (4): 'At any time.' The medical reports, hospital records, X-ray photographs and other documentary information of a like nature may be demanded as soon as action has been instituted. A defendant is, for example, entitled to demand the documentary information under this subrule prior to filing his plea and preparatory to doing so.

Subrule (5): 'Second and final medical examination.' The rule clearly envisages only two medical examinations although further examinations may, no doubt, be held by consent of the parties.

In *Cape Town City v Kotzé* [22] it was held that in the exercise of its discretion to make the order, a court had to weigh, amongst other things, the importance of the information sought from the examination, against the examination's likely effect on the examinee. If it were likely to be 'materially prejudicial' to the examinee, the order ought to be refused. In this regard Sher AJ stated: [23]

> '[37] In my view, given this court's inherent power to regulate its rules and procedures (both in terms of common law and in terms of s 173 of the Constitution), it should adopt a similar approach in regard to applications for the submission of a party to undergo a medical examination. In considering whether to allow such an application, the court should strive to balance the aims and objectives of affording a party an opportunity to obtain such information (pertaining to the state of health of any party in regard to matters which may relate to the assessment of a claim for damages pursuant to an alleged bodily injury), as may be necessary in order to enable it to prepare for trial, on the one hand, with the nature of the examination which is sought to be performed and the effect it may have on the party to be examined, on the other. In carrying out such a balancing exercise, and without seeking in any way to be definitive or prescriptive, the following considerations would play a part:
>
> *(a)* The importance of, and the need for obtaining, the information sought: This, in turn, will depend on the nature of the information and what evidentiary value it may have in regard to the issues in the matter which is before the court, whether it is of a general or specialised nature, and whether or not it is already established in, or has been obtained by way of, other reports, or is otherwise common cause.
>
> *(b)* Is it about obtaining further medical information which can assist the parties and/or the court at arriving at a resolution of the dispute or is it about seeking to obtain a tactical, forensic advantage over a party which one would not ordinarily obtain (e g to obtain material from which to cross-examine a party or to use as "ammunition" against such party)?
>
> *(c)* Is the examination which is proposed sought on the basis of a medically justifiable rationale or reason relevant to the issues in dispute (e g if there is no suggestion of any psychological impact being suffered as a result of a bodily injury, a party would not ordinarily be expected to subject themselves to a psychological assessment)?

> *(d)* What will be the effect of the proposed examination on the party that is to be examined? Will it result in an unnecessary invasion of the party's personal privacy and bodily integrity in circumstances where this is not necessary and the information can be obtained in another manner? Will it cause the party to suffer undue hardship or inconvenience, or emotional or psychological distress or pain, and thereby add insult to injury?
>
> *(e)* At what stage in the litigation is the examination being sought? Is the information being sought in the form of a supplementary report for the purposes of updating the results of previous examinations or is it a completely new inquiry which is to be launched on the eve of the trial?
>
> *(f)* How many other examinations has the party been subjected to, either at the instance of the party seeking the further examination or at its own instance?
>
> [38] Where a court is of the view that a medical examination is likely to result in an invasion of a party's personal privacy and bodily integrity in circumstances where this is not necessary and the information can be obtained in another manner, or it will cause the party to suffer undue hardship or inconvenience, or physical, emotional or psychological distress or pain, it should not allow the examination to go ahead, or should put conditions in place to safeguard the examinee's rights. I point out that when it comes to an examination of any property (either movable or immovable) in terms of the rule, a party is not bound to subject itself thereto if such examination will "materially prejudice" it, by reason of the effect the proposed examination will have on such property. I can see no reason why, if an examinee is likely to be materially prejudiced in the sense I have outlined in regard to any bodily or mental examination, he or she should not similarly be entitled to refuse to submit thereto.'

Subrule (5A): 'Own state of health is relevant.' The *quantum* of a person's claim for loss of support resulting from the death of his breadwinner depends, amongst other things, on the claimant's ability to work and his life expectation, both factors in respect of which the claimant's own state of health is relevant.

Subrule (6): 'Whether movable or immovable.' In *Da Mata v Menfred Properties (Pty) Ltd* [24] the respondent was ordered to make available to the applicant for examination or inspection certain tape recordings of conversations, and the applicant was permitted to record the conversations from such tapes by making use of a machine whereby the record of such conversations might be made audible.

'To make it available for inspection or examination.' This subrule contemplates that *(a)* the person who is required to make an article available has to do no more than to place it at the disposal of or make it accessible to the litigant requiring its inspection or examination; [25] and *(b)* during and after the inspection or examination the thing will remain in the possession and under the control of the party who originally had such possession and control, i e that the words 'to make it available for inspection or examination' cannot be read to include the concept 'hand over for analysis and destruction'. [26] The party merely has to keep the article available for inspection. If a party alleges that an object has been lost and cannot be made available under this rule, the onus is on him to establish this. [27]

The inspection or examination under this subrule is not confined to ocular inspection; [28] hence the provisions of subrule (7) that a party may be requested to specify the nature of the inspection or examination for which the article is to be made available.

Subrule (7): 'Materially prejudice such party by reason of the effect thereof.' Material preju-dice may arise if the nature of the proposed inspection or examination will lead to the destruction of the article, or leave it in a different condition or cause it to diminish in value. [29] Where a party seeks an examination which entails dismantling of or other experimentation with the article, he must show that the examination will not cause the destruction of, or cause damage to or reduce the value of the article.

'Referred to a 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.

'Make such an order as deemed fit.' The judge has a discretion which is exercised in the interests of justice in the particular circumstances of each case. [30] If the objection is to the nature of the proposed inspection or examination, it is submitted that the court will, amongst other things, take the following into consideration: (i) whether the examination will lead to the destruction of, cause damage to or reduce the value of the article; (ii) the qualifications and experience of the person who is to undertake the examination; (iii) whether the party seeking examination has offered to provide security against any possible damage which may result from the examination and the effectiveness of such security. [31]

Subrules (8)*(a)* and *(b)*: 'Full report ... complete copy.' A 'full report' must be obtained from the person making the examination and a 'complete copy' thereof must be furnished to the other party. The practice of obtaining an additional 'confidential report' from the person making the examination which is not furnished to the other side is not warranted by the subrule.

Subrule (8)*(a)*: 'Within two months.' For the computation of this time period, see the notes to rule 1 s v 'Court day' above.

'Such other period as may be directed by a judge in terms of rule 37(8) or in terms of rule 37A.' The provisions of rule 30A apply to a direction made in a judicial case management process referred to in rule 37A. They do not, however, apply to a direction made in terms of rule 37(8). See further, in this regard, the notes to rule 30A(1) s v 'An order or direction made in a judicial case management process referred to in rule 37A' above.

Subrule (8)*(b)*: 'Inform all other parties ... of the existence of the report.' In terms of this subrule all other parties to the proceedings must in writing be informed of the existence of the full report of the examination.

Subrule (9): General. The main purpose of this subrule is to require the party intending to call a witness to give expert evidence to give the other party such information about his evidence as will remove the element of surprise from the trial. Furthermore, proper compliance with the subrule may enable experts to exchange views before giving evidence and thus to reach agreement on at least some of the issues, thereby saving costs and the time of the court. [32] On the other hand, the subrule makes inroads upon a fundamental right of a party, viz to call a witness, and places the party at the disadvantage of having to intimate in advance what his expert is going to say. Accordingly, the subrule

should be strictly construed. [33]

The attendance of an expert witness at court when other witnesses are giving evidence regarding to issues which remain unresolved after an exchange of experts' reports as contemplated by this subrule, should be allowed on taxation. [34] With regard to fees and expenses of expert witnesses in general, see Parts D4 and D5 below.

Most of the divisions of the High Court have their own local rules of practice relating to expert witnesses. See, in this regard, Volume 3, Parts F–N.

In *Ntombela v Road Accident Fund* [35] Sutherland J [36] disallowed all costs for joint minutes (save in respect of the neurosurgeons) following non-compliance with the provisions of the Gauteng, Johannesburg, *Practice Manual* relating thereto and issued a stern warning that such failure ought in future to be met with a refusal to hear the matter concerned at all. In *Bee v Road Accident Fund* [37] the majority of the Supreme Court of Appeal held [38] that effective case management required parties to stick to the facts agreed in a joint minute. If a litigant wished to depart from it, it had to give due warning to the other side, and the same went for the experts themselves. Therefore, if the Fund's expert had wished to testify inconsistently with the agreement in the joint minute, it should have notified the other side before the start of the trial. The Fund's conduct amounted to impermissible trial by ambush. The trial court was entitled, if not bound, to accept the matters agreed by the experts, and its decision not to ask them to lead further evidence was therefore entirely justified.

'Save with the leave of the court or the consent of all parties.' It has been held that it is wrong to preclude a party from calling expert evidence when his failure to comply strictly with the subrule was not due to default on his part but was in fact caused by the conduct of the other party, however bona fide the latter's conduct may have been. [39]

Though the leave of the court or the consent of the parties may be tacit, a party is not entitled to lead expert evidence without prior compliance with the subrule and to contend thereafter that by not objecting, the court and the parties have given their tacit consent to the evidence being led. [40]

'Be entitled to call as a witness.' This subrule contains its own sanction in that the party who fails to comply with the provisions thereof is precluded from calling an expert witness. This does not mean, however, that it is the only remedy available to the other party:

in appropriate circumstances such a party would be entitled to a postponement of the trial by reason of his opponent's non-compliance with the provisions of the subrule. [41]

'Give evidence as an expert.' This subrule applies to expert witnesses who are asked to express an opinion on a particular subject. There are, therefore, two requirements for the rule to operate: first, the evidence must be in the nature of an opinion and, secondly, it must be given by a person who is an expert. [42]

In essence the function of an expert is to assist the court to reach a conclusion on matters on which the court itself does not have the necessary knowledge to decide. [43] It is not the mere opinion of the witness which is decisive but his ability to satisfy the court that, because of his special skill, training or experience, the reasons for the opinions he expresses are acceptable. [44]

The notice pursuant to this subrule has no evidential value. Accordingly, the failure of the witness to give evidence about his qualifications and expert knowledge in court is fatal, as his evidence in relation to the matter before court remains mere opinion evidence that is irrelevant. [45]

Expert evidence within the context of the subrule does not mean any evidence given by an expert but only admissible opinion evidence by such a witness. [46]

In *KPMG Chartered Accountants (SA) v Securefin* [47] the Supreme Court of Appeal expressed strong disapproval of the fact that the High Court had made no attempt to curtail the growing and undesirable practice of allowing expert witnesses to testify as to the meaning of a contract and stated the following:

> '... but the chaff is still heaping up, the undesirable practice keeps growing and courts make no effort to curtail it. An expert may be asked relevant questions based on assumptions or hypotheses put by counsel as to the meaning of a document. The witness may not be asked what the document means to him or her. The witness (expert or otherwise) may also not be cross-examined on the meaning of the document or the validity of the hypothesis about its meaning. Dealing with an argument that a particular construction of a document did not confirm to the evidence, Aldous LJ quite rightly responded with, 'So what?' (*Scanvaegt International A/S v Pelcombe Ltd* 1998 EWCA Civ 436.) All this was sadly and at some cost ignored by all.'

In *Windrush Intercontinental SA v UACC Bergshav Tankers AS: The Asphalt Venture* [48] the Supreme Court of Appeal stated the position relating to an expert on foreign law as follows:

> 'Where a court is dealing with the evidence of experts on foreign law it is entitled to consider it in the same way in which it considers the evidence of any other expert. As this court has consistently said, foreign law is a question of fact and must be proved. This is achieved by reference to the evidence of experts, i e lawyers practising in the courts of the country whose law our courts want to ascertain. But the court is not bound to accept the view of the experts and it may, for cogent reasons, accept the testimony of one as against that of another where they are at odds. And, if in their evidence the experts have referred to passages in the code of the country whose law is sought to be ascertained, the court is at liberty to look at those passages and consider their proper meaning.'

Subrule (9)*(a)*: 'Not more than 30 days ... not more than 60 days after the close of pleadings.' Prior to the substitution of rule 36 [49] this subrule imposed the same time limit on both parties, viz 15 days before the hearing for a notice of intention to call a witness to give evidence as an expert. By imposing different time limits and providing for the calculation of the time periods with reference to the close of pleadings, the subrule in its amended form is of a more efficient and practical nature, amongst other things, by allowing a defendant, on receipt of a plaintiff's notice of intention to call an expert witness, to consider its position and, if necessary, to find an expert to give evidence at the hearing.

Subrule (9)*(b)*: 'Not more than 90 days ... not more than 120 days after the close of pleadings.' Prior to the substitution of rule 36 [50] subrule (9) imposed the same time limit on both parties, viz 10 days before the trial for a summary of the expert's opinions and reasons therefor. That gave rise to questions such as if a party delivered his summary on the eleventh day before trial, was the other party entitled to lead evidence in rebuttal of the summary without complying with the rule, for in such circumstances it was impossible to file a summary of rebutting evidence in time to comply with the rule? It had been held that the rule 'was not intended to cover evidence strictly in answer to an opposing party's summary'. [51] In other words, such evidence could be led as of right and was not hit by the subrule. On the other hand, it could be argued that such evidence was hit by the subrule and was evidence which might be allowed without a summary by the leave of the court. In either event there appeared to be a *lacuna* in the subrule. This has been addressed by the subrule in its amended form: first, by introducing different time periods within which the plaintiff and the defendant must deliver their expert summaries; and, secondly, by providing that the time periods are to be calculated from the date of close of pleadings.

'The close of pleadings.' In terms of rule 29(1), pleadings are considered closed if—

(a) either party has joined issue without alleging any new matter, and without adding any further pleading;

(b) the last day allowed for filing a replication or subsequent pleading has elapsed and it has not been filed;

(c) the parties agree in writing that the pleadings are closed and such agreement is filed with the registrar; or

(d) the parties are unable to agree as to the close of pleadings, and the court upon the application of a party declares them closed.

'A summary of the expert's opinion and the reasons therefor.' The purpose and function of an expert summary that must be delivered under this subrule differ from the purpose and function of a medical report under subrule (8). In particular, this subrule does not require 'a full report' as required by subrule (8)(*a*). [52]

The meanings of the words 'summary' and 'opinion', and of the phrase 'reasons therefor' were considered by the Appellate Division in *Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH*. [53] The summary must at least state the sum and substance of the facts and data which lead to the reasoned conclusion (i e the opinion). In this regard Wessels JA stated: [54]

> 'As I see it, an expert's opinion represents his reasoned conclusion based on certain facts on [sic] data, which are either common cause, or established by his own evidence or that of some other competent witness.'

If the process of reasoning is not a matter of ordinary logic, but involves, for example, the application of scientific principles, it will ordinarily also be necessary to set out the reasoning process in summarized form. [55] In deciding whether there has been due compliance with the subrule, it is relevant to have regard to the main purpose thereof, viz to remove the element of surprise. When summarizing the facts or data on which the expert witness premises his opinions, the draftsman should ensure that no information is omitted, where omission thereof might lead to the other side being taken by surprise. [56]

In claims in which the occurrence of a psychiatric injury is in dispute, the psychiatric evidence adduced to support the proposition must be clear and cogently reasoned, and it should be preceded by summaries that properly fulfil the requirements of this subrule. [57]

Proviso: 'Be delivered before a first case management conference ... or as directed by a case management judge.' In all matters falling under rule 37A, and despite the time periods laid down in this subrule, both the notice of intention to call a person to give evidence as an expert and the summary of such person's opinion and the reasons therefor must be delivered before the first case management meeting or otherwise as directed by the case management judge. See further rule 37A and the notes thereto below.

Subrule (9A)*(a)* and *(b)*: 'Shall endeavour ... to appoint a single joint expert ... file a joint minute.' Proper compliance with the subrule will enable experts to exchange views and to reach agreement on the issues, or at least some of them, thereby facilitating the appointment of a single joint expert, on the one hand, and the preparation of a joint minute, on the other hand, thus saving costs and the time of the court.

Subrule (10)*(a)*: 'No person shall ... be entitled to tender in evidence.' The purpose of discovery under this subrule is the same as that of discovery in terms of rule 35, namely to make all parties aware of the evidence of the objects mentioned in the subrule so that the issues may be narrowed and incontrovertible points of debate eliminated. [58]

'Any plan, diagram, model or photograph.' These words apply only to representations of physical features of the relevant place or object which can be determined objectively. They do not include marks on such a plan, diagram, model or photograph which amount to an expression of opinion by the person who produced it or by any other person. [59] The statement by a policeman in the plan of the scene of an accident that the collision had taken place at a certain point is no more than an opinion or a conclusion—the statement on the plan does not constitute proof that the impact took place at the point shown on the plan. [60]

Subrule (10)*(b)*: 'Received in evidence ... without further proof.' When a plan, diagram, model or photograph is admitted or received in evidence without proof in terms of this subrule, an admission is created only (i) as to the authenticity of the plan, etc, i e the need to call the author of the plan, etc or to provide other proof of its authorship is dispensed with; and (ii) as to the physical features actually found by the author. [61] Such receiving in evidence without proof of the plan, etc does not constitute proof of statements on such plan, etc which amount to an expression of opinion. [62] Statements on such plan etc may be admissible under the Civil Proceedings Evidence Act 25 of 1965 provided the conditions set out in s 34(1) of the Act are proved. [63] In the case of photographic material the admission under this subrule is an admission of what is depicted in the photograph. [64]

1 See *Durban City Council v Mndovu* 1966 (2) SA 319 (D) at 324D; *Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH* 1976 (3) SA 352 (A) at 371D.

2 *Durban City Council v Mndovu* 1966 (2) SA 319 (D) at 324G. See in this regard *Starr v National Coal Board* [1977] 1 All ER 243 (CA).

3 *Goldberg v Union and SWA Insurance Co Ltd* 1980 (1) SA 160 (E) at 164D; *Lane v Willis* [1972] 1 All ER 430 (CA) at 435.

4 *Mgudlwa v AA Mutual Insurance Association Ltd* 1967 (4) SA 721 (E) at 723A.

5 In *Goldberg v Union and SWA Insurance Co Ltd* 1980 (1) SA 160 (E) the defendant, before filing its plea and preparatory to doing so, called for a medical examination of the plaintiff.

6 *Mgudlwa v AA Mutual Insurance Association Ltd* 1967 (4) SA 721 (E) at 723B.

7 *Mgudlwa v AA Mutual Insurance Association Ltd* 1967 (4) SA 721 (E) at 723D.

8 *Feros v Rondalia Assurance Corporation of SA Ltd* 1970 (4) SA 393 (E).

9 *Goldberg v Union and SWA Insurance Co Ltd* 1980 (1) SA 160 (E) at 164; and see *Feros v Rondalia Assurance Corporation* 1970 (4) SA 393 (E).

10 *Goldberg v Union and SWA Insurance Co Ltd* 1980 (1) SA 160 (E) at 166A–D; and see *Selamolela v President Versekeringsmaatskappy Bpk* 1981 (3) SA 1099 (T).

11 *Durban City Council v Mndovu* 1966 (2) SA 319 (D).

12 *Durban City Council v Mndovu* 1966 (2) SA 319 (D) at 325D–H. In *Starr v National Coal Board* [1977] 1 All ER 243 (CA) at 249 it is pointed out that there are in the balance two fundamental rights. On the one hand, there is the plaintiff's right to personal liberty. On the other, there is the defendant's right to defend himself in litigation as he and his advisers think fit; and this is a right which includes the freedom to choose the expert witnesses that he will call.

13 *Road Accident Fund v Chin* 2018 (3) SA 547 (WCC) at 551F. The court held (at 555B–C) that in this regard a strong case (i e a higher standard than a reasonable apprehension of bias) had to be made out.

14 *Road Accident Fund v Chin* 2018 (3) SA 547 (WCC) at 552C–D.

15 *Road Accident Fund v Chin* 2018 (3) SA 547 (WCC) at 553A.

16 *Road Accident Fund v Chin* 2018 (3) SA 547 (WCC) at 556E, 556H–C and 558C.

17 *Feros v Rondalia Assurance Corporation of SA Ltd* 1970 (4) SA 393 (E).

18 Cf *Road Accident Fund v Chin* 2018 (3) SA 547 (WCC) at 551C.

19 *Durban City Council v Mndovu* 1966 (2) SA 319 (D) at 326B.

20 This was done in, for example, *Durban City Council v Mndovu* 1966 (2) SA 319 (D) at 326; *Goldberg v Union and SWA Insurance Co Ltd* 1980 (1) SA 160 (E) at 167.

21 This was done in *Mgudlwa v AA Mutual Insurance Association Ltd* 1967 (4) SA 721 (E).

22 2017 (1) SA 593 (WCC).

23 At 606F–608B (footnotes omitted).

24 1969 (3) SA 332 (W).

25 *Zandry v Randle Yachts CC* 2006 (5) SA 301 (C) at 305B–306C.

26 *The Wellcome Foundation Ltd v Caps Industries (SA) (Pty) Ltd* 1976 BP 505 at 509E–G. In this case the judge, sitting as commissioner of patents, pleaded for a rule with a wider ambit in patent cases (at 510A).

27 *SA Neon Advertising (Pty) Ltd v Claude Neon Lights (SA) Ltd* 1968 (3) SA 381 (W).

28 *Caltex Oil Rhodesia (Pvt) Ltd v Perfecto Dry Cleaners (Pvt) Ltd* 1970 (2) SA 44 (R).

29 See *Caltex Oil Rhodesia (Pvt) Ltd v Perfecto Dry Cleaners (Pvt) Ltd* 1970 (2) SA 44 (R); *American Cyanamid Co v National Fermentation Pharmaceutical* 1967 BP 392. The decision in *Eimco (South Africa) (Pty) Ltd v Magistrate, Wynberg* 1967 (3) SA 715 (C) is also instructive for, although the case was not decided under this rule, the considerations leading to the refusal of an examination would also apply to an examination sought under this rule.

30 See *Caltex Oil Rhodesia (Pvt) Ltd v Perfecto Dry Cleaners (Pvt) Ltd* 1970 (2) SA 44 (R) at 48E.

31 These propositions are derived from *Eimco (South Africa) (Pty) Ltd v Magistrate, Wynberg* 1967 (3) SA 715 (C) and *Caltex Oil Rhodesia (Pvt) Ltd v Perfecto Dry Cleaners (Pvt) Ltd* 1970 (2) SA 44 (R). See also *The Wellcome Foundation Ltd v Caps Industries (SA) (Pty) Ltd* 1976 BP 505.

32 *Klue v Provincial Administration, Cape* 1966 (2) SA 561 (E); *Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH* 1976 (3) SA 352 (A) at 371F; *Doyle v Sentraboer (Co-operative) Ltd* 1993 (3) SA 176 (SE) at 181A–C; *Hall v Multilateral Motor Vehicle Accidents Fund* 1998 (4) SA 195 (C) at 200A.

33 *Boland Construction Co (Pty) Ltd v Lewin* 1977 (2) SA 506 (C) at 508H; *Doyle v Sentraboer (Co-operative) Ltd* 1993 (3) SA 176 (SE) at 180G–J.

34 *Tulbagh Municipality v Waveren Boukontrakteurs (Edms) Bpk* 1968 (3) SA 246 (C).

35 2018 (4) SA 486 (GJ).

36 At 496A–497E and 498B–C.

37 2018 (4) SA 366 (SCA).

38 At 386A–388A.

39 *Klue v Provincial Administration, Cape* 1966 (2) SA 561 (E); *Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH* 1976 (3) SA 352 (A) at 373D–H.

40 *Colt Motors (Edms) Bpk v Kenny* 1987 (4) SA 378 (T) at 387F.

41 *Smit v Shongwe* 1982 (4) SA 699 (T) in which Nicholas J (with respect, rightly) rejected the approach adopted in *Venter v Du Plessis* 1980 (3) SA 151 (T) at 152G–H. Both these cases deal with former magistrates' courts rules 24(9) and 31(1), the wording of which is almost identical to that of rules 24(9) and 31(1) of the present magistrates' courts rules.

42 *Uni-Erections v Continental Engineering Co Ltd* 1981 (1) SA 240 (W) at 250A; *M J Snyman v Alert-O-Drive (Pty) Ltd* 1981 BP 213. The court will not allow the provisions of the subrule to be evaded by setting itself up as an expert nor admit the evidence of an expert by allowing him to be styled non-expert (*Stewarts Lloyds of SA Ltd v Croydon Engineering & Mining Supplies (Pty) Ltd* 1979 (1) SA 1018 (W)).

43 In *Schneider NO v AA* 2010 (5) SA 203 (WCC) at 211E–214B the following was stated as regards the role of an expert:

'In this connection it is necessary to deal with the role of an expert. In Zeffertt, Paizes & Skeen *The South African Law of Evidence* at 330, the learned authors, citing the English judgment of *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The 'Ikarian Reefer')* [1993] 2 Lloyd's Rep 68 at 81, set out the duties of an expert witness thus:

"1. Expert evidence presented to the court should be, and should be seen to be, the independ-ent product of the expert uninfluenced as to form or content by the exigencies of litigation.

2. An expert witness should provide independ-ent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise. ... An expert witness should never assume the role of an advocate.

3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.

4. An expert witness should make it clear when a particular question or issue falls outside his expertise.

5. If an expert opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report."

In short, an expert comes to court to give the court the benefit of his or her expertise. Agreed, an expert is called by a particular party, presumably because the conclusion of the expert, using his or her expertise, is in favour of the line of argument of the particular party. But that does not absolve the expert from providing the court with as objective and unbiased an opinion, based on his or her expertise, as possible. An expert is not a hired gun who dispenses his or her expertise for the purposes of a particular case. An expert does not assume the role of an advocate, nor gives evidence which goes beyond the logic which is dictated by the scientific knowledge which that expert claims to possess.'

See also *Twine v Naidoo* [2018] 1 All SA 297 (GJ) at paragraphs [18] and [19]; *Dias v Petropulos* 2018 (6) SA 149 (WCC) at 173B–F; L Knoetze-le Roux 'Ways to curb expert bias' 2017 (September) *De Rebus* at 37–9.

In *Ndlovu v Road Accident Fund* 2014 (1) SA 415 (GSJ) it was remarked (at 440I–441J) that 'a time may come when a court will consider that an expert's lack of care, skill and diligence will have adverse costs consequences upon the successful litigant, or will direct that the expert is limited in what may be recovered from the instructing party (particularly where there is a contingency-fee arrangement and this may constitute an additional disbursement reducing the ultimate award received)'.

Expert evidence is only as sound as the factual evidence on which it is based. The less fixed (or more variable) the assumption and the fewer hard facts available to the expert, the greater the scope for alternative conclusions (*Harrington NO v Transnet Ltd t/a Metrorail* 2010 (2) SA 479 (SCA) at 494B–C).

44 *Menday v Protea Assurance Co Ltd* 1976 (1) SA 565 (E) at 569B. See also *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 616–17; and see, in general, 2008 (November) *De Rebus* 26.

45 *Mkhize v Lourens* 2003 (3) SA 292 (T) at 299C–G.

46 *M J Snyman v Alert-O-Drive (Pty) Ltd* 1981 BP 213.

47 2009 (4) SA 399 (SCA) at 410F–G. See also *Masstores (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd* 2016 (2) SA 586 (SCA) at 593A–B and the cases there referred to.

48 2017 (3) SA 1 (SCA) at 16B–D, and see the cases referred to at 16E–17E.

49 By GN R842 in *GG* 42497 of 31 May 2019 with effect from 1 July 2019.

50 By GN R842 in *GG* 42497 of 31 May 2019 with effect from 1 July 2019.

51 By Margo J, giving the unanimous judgment of the full court on appeal in *Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH* 1976 (3) SA 352 (A) at 371F; *Doyle v Sentraboer (Co-operative) Ltd* 1993 (3) SA 176 (SE) at 181A–C. The judgment is not reported but is referred to in a note by Brathwaite in (1976) 6 *Newsletter of the Institute of Patent Agents* at 4. The Appellate Division, whose judgment is reported at 1976 (3) SA 352 (A), did not deal with this point as it decided the case on other grounds. See further *Klue v Provincial Administration, Cape* 1966 (2) SA 561 (E) at 563A–B; *Doyle v Sentraboer (Co-operative) Ltd* 1993 (3) SA 176 (SE) at 183C–D. In *Mokhethi v MEC for Health, Gauteng* 2014 (1) SA 93 (GSJ) the court stated (at 98D–I):

'It is further trite law that the rules regarding expert notices are to be complied with, not necessarily in sequence. It is not for the defendant to wait and see if the plaintiff is going to call expert testimony before the defendant decides whether or not its case demands the calling of expert testimony to its own benefit. The attitude disclosed in the present instance by the defendant's legal representatives amounted to just such an attitude, more akin to playing a waiting game. Unfortunately the game has redounded to its own disadvantage. It is well worth quoting from the judgment of Mullins J in *Doyle v Sentraboer (Co-operative) Ltd* 1993 (3) SA 176 (SE), where at 183B–C the following is said:

"The time limits provided for in Rule 36(9) were not designed to provide a litigant with a tactical advantage over the other party. Each party must prepare for trial individually."

As correctly pointed out by Mr Liebenberg, Rule 36(9) does not, as in the case of certain other rules, provide that the plaintiff must take a certain step within a prescribed period whereafter the defendant has a further period to respond thereto. As Addleson AJ said in *Klue and Another v Provincial Administration, Cape* 1966 (2) SA 561 (E) at 563A–B:

"I do not think that Rule 36(9)(*b*) was designed to encourage one party to wait until ten days before a trial in order to satisfy himself that his opponent does not intend to call expert evidence, before himself deciding whether or not to call expert evidence on a material issue on the pleadings. Such an approach would in many cases result in a situation of stalemate and would in my view be contrary to the spirit of the Rule."

I respectfully agree with the aforesaid interpretation of the Uniform Rules of Court dealing with the requirements to enable a party to call expert witnesses.'

The court further stated (at 100H–I and 102I) that '[t]he conduct of the defendant's attorney in the present instance is also, astonishingly, reprehensible and cannot be countenanced by this court' and ordered that a copy of the judgment was to be transmitted by the registrar to the defendant and to the head of the Department of Health, Gauteng.

52 *Ndlovu v Road Accident Fund* 2014 (1) SA 415 (GSJ) at 437G–H. As to difficulties experienced with -medico-legal reports, see the *Ndlovu* case at 437H–438H.

53 1976 (3) SA 352 (A) at 371B.

54 At 371F. See also *Schneider Electric SA (Pty) Ltd v Jim Fung Industrial Limited* (unreported, GJ case no A5058/2015 dated 8 December 2016) at paragraph [69].

55 *Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH* 1976 (3) SA 352 (A) at 371–2. In *Boland Construction Co (Pty) Ltd v Lewin* 1977 (2) SA 506 (C) Vos J suggested (at 508) that 'the concept "summary" may not have received sufficient weight in *Cooper's* case'. He expressed the opinion that the rule should be restrictively construed and that 'a summary should be no more than a summary'.

56 *Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH* 1976 (3) SA 352 (A) at 371E.

57 *Hing v Road Accident Fund* 2014 (3) SA 350 (WCC) at 363G–H.

58 *Hall v Multilateral Motor Vehicle Accidents Fund* 1998 (4) SA 195 (C) at 199I.

59 *Mabalane v Rondalia Assurance Corporation of SA Ltd* 1969 (2) SA 254 (W), approved in *Shield Insurance Co Ltd v Hall* 1976 (4) SA 431 (A) at 438F.

60 *Mabalane v Rondalia Assurance Corporation of SA Ltd* 1969 (2) SA 254 (W); *Shield Insurance Co Ltd v Hall* 1976 (4) SA 431 (A).

61 *Shield Insurance Co Ltd v Hall* 1976 (4) SA 431 (A) at 438F; *Swart v Santam Versekerings-maatskappy Bpk* 1986 (2) SA 377 (T) at 380I–381A; *Hotz v University of Cape Town* 2017 (2) SA 485 (SCA) at 495H–496A and 496H–I.

62 *Mabalane v Rondalia Assurance Corporation of SA Ltd* 1969 (2) SA 254 (W); *Shield Insurance Co Ltd v Hall* 1976 (4) SA 431 (A).

63 *Shield Insurance Co Ltd v Hall* 1976 (4) SA 431 (A) at 438H.

64 *Hotz v University of Cape Town* 2017 (2) SA 485 (SCA) at 496H–I.

37 Pre-trial Conference

(1) A party who receives notice of the trial date of an action shall, if such party has not yet made discovery in terms of rule 35, within 15 days deliver a sworn statement which complies with rule 35(2).

(2) *(a)* In cases not subject to judicial case management as contemplated in rule 37A, a plaintiff who receives the notice contemplated in subrule (1) shall within 10 days deliver a notice in which such plaintiff appoints a date, time and place for a pre-trial conference.

(b) If the plaintiff has failed to comply with paragraph *(a)*, the defendant may, within 30 days after the expiration of the period mentioned in that paragraph, deliver such notice.

(3) *(a)* The date, time and place for the pre-trial conference may be amended by agreement: Provided that the conference shall be held not later than 30 days prior to the date of hearing.

(b) If the parties do not agree on the date, time or place for the pre-trial conference, the matter shall be submitted to the registrar for decision.

(4) Each party shall, not later than 10 days prior to the pre-trial conference, furnish every other party with a list of—

(a) the admissions which such party requires;

(b) the enquiries which such party will direct and which are not included in a request for particulars for trial; and

(c) other matters regarding preparation for trial which such party will raise for discussion.

(5) At the pre-trial conference the matters mentioned in subrules (4) and (6) shall be dealt with.

(6) The minutes of the pre-trial conference shall be prepared and signed by or on behalf of every party and the following shall appear therefrom:

(a) The date, place and duration of the conference and the names of the persons present;

(b) if a party feels that such party is prejudiced because another party has not complied with the rules of court, the nature of such non-compliance and prejudice;

(c) that every party claiming relief has requested such party's opponent to make a settlement proposal and that such opponent has reacted thereto;

(d) whether any issue has been referred by the parties for mediation, arbitration or decision by a third party and the basis on which it has been so referred;

(e) whether the case should be transferred to another court;

(f) which issues should be decided separately in terms of rule 33(4);

(g) the admissions made by each party;

(h) any dispute regarding the duty to begin or the onus of proof;

(i) any agreement regarding the production of proof by way of an affidavit in terms of rule 38(2);

(j) which party will be responsible for the copying and other preparation of documents;

(k) which documents or copies of documents will, without further proof, serve as evidence of what they purport to be, which extracts may be proved without proving the whole document or any other agreement regarding the proof of documents.

(7) The minutes shall be filed with the registrar not later than 25 days prior to the trial date.

(8) *(a)* A judge, who need not be the judge presiding at the trial, may, if such judge deems it advisable, at any time at the request of a party or of own accord, call upon the attorneys or advocates for the parties to hold or to continue with a conference before a judge in chambers and may direct a party to be available personally at such conference.

(b) No provision of this rule shall be interpreted as requiring a judge before whom a conference is held to be involved in settlement negotiations, and the contents of a reaction to a request for a settlement proposal shall not be made known to a judge except with the consent of the judge and all parties.

(c) The judge may, with the consent of the parties and without any formal application, at such conference or thereafter give any direction which might promote the effective conclusion of the matter, including the granting of condonation in respect of this or any other rule.

(d) Unless the judge determines otherwise, the plaintiff shall prepare the minutes of the conference held before the judge and file them, duly signed, with the registrar within five days or within such longer period as the judge may determine.

(9) *(a)* At the hearing of the matter, the court shall consider whether or not it is appropriate to make a special order as to costs against a party or such party's attorney, because such party or the party's attorney—

(i) did not attend a pre-trial conference; or

(ii) failed to a material degree to promote the effective disposal of the litigation.

(b) Except in respect of an attendance in terms of subrule (8)*(a)* no advocate's fees shall be allowed on a party-and-party basis in respect of a pre-trial conference held more than 10 days prior to the hearing.

(10) A judge in chambers may, without hearing the parties, order deviation from the time limits in this rule.

(11) A direction made in terms of this rule before the commencement of the trial may be amended.

[Rule 37 substituted by GN R842 of 31 May 2019.]

Commentary

General. The purpose of rule 37 is 'to promote the effective disposal of the litigation'. [1] The main object of the rule is 'investigating ways of avoiding costs at a stage when it can still be avoided' [2] and, like its predecessor, it is 'intended to expedite the trial and to limit the issues before the court'. [3] The rule is intended primarily to curtail the duration of a trial, narrow down issues, cut costs and facilitate settlements. [4] Parties are required to attempt, in a bona fide manner, to reach settlement either on issues which could serve to shorten the proceedings or resolve the main issues. [5] It is submitted that in this regard the parties must keep in mind that a litigant has the duty to take the most expeditious

course to bring litigation to a conclusion. [6] The pre-trial conference in terms of the rule is not meant to be a full preparation for trial; it is a stocktaking of possible co-operation in steps which will limit or prevent avoidable effort and costs; [7] it is one of the tools provided by the rules to ensure the most effective way of bringing a case before the court. [8]

A party cannot be compelled to agree to anything during the course of rule 37 proceedings. This much is evident from the fact that rule 37(8)*(c)* provides that, even in a case where a conference had been convened before a judge in chambers, the judge may give directions which might promote the effective conclusion of the matter, but only with the consent of the parties. It appears that the remedy for any party who is frustrated by the lack of co-operation from the other party during rule 37 proceedings, is to request for a conference to be convened before a judge in chambers in terms of rule 37(8). [9]

To allow a party, without special circumstances, to resile from an agreement deliberately reached at a pre-trial conference would, therefore, tend to negate the object of the rule which is to limit issues and to curtail the scope of the litigation. [10]

If the parties have formulated specific issues in the pre-trial minutes, the trial court is not entitled to go beyond the issues as formulated and decide the case on another basis. The salutary principle that unless there has been a full investigation of a matter falling outside the pleadings and there is no reasonable ground for thinking that further examination of the facts might lead to a different conclusion, the parties are held to the issues pleaded, [11] applies equally, if not more, where the parties have formulated specific issues in the pre-trial minutes. [12]

The provisions of rule 37 do not apply, save to the extent expressly provided in rule 37A, in matters which are referred for judicial case management under rule 37A. [13]

The local practice of the various divisions of the High Court relating to pre-trial conferences differs. See in this regard Volume 3, Parts F–N.

Subrule (1): 'Deliver a sworn statement which complies with rule 35(2).' Rule 35(2) deals with discovery affidavits which must be in accordance with Form 11 of the First Schedule. The effect of this subrule is that a party to an action is obliged to make discovery upon receipt

of notice of the trial date of an action even where such a party was not under rule 35(1) required to make discovery on oath. [14]

In order to ensure that it is effective, a pre-trial conference should, ideally, be held after discovery and after the parties have exchanged documents as contemplated in rule 35. In the event of discovery being made pursuant to this subrule, the fact of such discovery should be taken into account for purposes of determining the date for a pre-trial conference contemplated in subrules (2)*(a)* and (3)*(a)*.

Subrule (2)*(a)*: 'A plaintiff ... shall ... deliver a notice.' The obligation to convene a conference in terms of this subrule is in the first place upon the plaintiff. If the plaintiff fails to deliver

a notice in terms of the subrule, the defendant may do so within the period prescribed by paragraph *(b)* of the subrule.

The notice must be 'delivered', i e copies must be served on all the parties and the original filed with the registrar. [15]

It is clear from the wording of subrule (2) that it does not apply to cases which are subject to judicial case management as contemplated in rule 37A.

'Appoints a time, date and place for a pre-trial conference.' The party delivering the notice may 'appoint' the time, date and place of the pre-trial conference. Subrule (3) contemplates that the parties should reach agreement in the arrangement of the pre-trial conference. In terms of subrule (3)*(a)* the parties may, by agreement, amend the date, time and place for the pre-trial conference subject, however, to the proviso that the conference shall be held not later than 30 days prior to the date of the hearing. Subrule (3)*(b)* provides that if the parties do not agree on the date, time and place for the conference, the matter shall be submitted to the registrar for his decision.

Subrule (3)*(a)*: 'Provided that ... not later than 30 days prior to the date of hearing.' The 30 days limit in the proviso should not be lightly dishonoured for it is closely tied to the main objects of the rule, viz to facilitate settlement discussions, to encourage timeous consideration of a number of specific topics with a view to the avoidance of incurring unnecessary costs, and to protect a party against costs required to ward off an opponent who is unable to proceed to trial or is not serious about doing so. [16] However, non-compliance with the time-limit does not give rise to a duty to apply for condonation. [17]

Seeing that counsel need not participate in the conference, [18] the fact that the date of the conference does not suit counsel is not a valid reason for the late holding of a pre-trial conference (i e less than 30 days before the trial). [19]

Subrule (4): 'Each party shall ... furnish every other party with a list.' The procedure laid down by this subrule is to enable the parties to prepare properly for the conference under the rule, to facilitate the smooth running of the conference and to enable them to reach agreement on as many issues as possible without unnecessary delay. [20]

A formal notice is not envisaged; all that a party must do is to provide its opponent with a list of the items it wishes to discuss to enable such party to prepare for the conference. The procedure, which had become prevalent in some courts, of filing formal notices and replies thereto purportedly under the subrule amounts to an abuse of the process of the court. [21] The subrule contemplates a list to be provided, *inter alia*, of enquiries which a party will direct to the other party and which are not included in the request for particulars for trial, and other matters regarding preparation for trial which the party will raise for discussion. [22] The list of enquiries is, therefore, intended to relate to matters which will be discussed at the pre-trial conference. [23]

The remedy available to any party who is frustrated by a lack of co-operation or bona fides on the part of its opponent, is to request that the conference be held before the judge in chambers. [24]

Subrule (4)*(a)*: 'The admissions which such party requires.' Admissions of fact made at a pre-trial conference constitute sufficient proof of those facts. [25] More should not be read into admissions made under rule 37 than is intended by the parties, and an admission on one issue should not be construed as a concession in regard to other issues unless there are clear indications that such concessions are intended. [26]

A fact which is admitted is eliminated from the issues to be tried. Hence, by making admissions required from it, a party co-operates in limiting the issues before the court and promoting the effective disposal of the litigation. Consequently, a party should not lightly refuse to make the required admissions.

Subrule (4)*(b)*: 'The enquiries ... not included in a request for particulars for trial.' The pre-trial conference is intended to cover a wider ambit than the furnishing of further particulars for trial under rule 21. [27]

Subrule (4)*(c)*: 'Other matters regarding preparation for trial.' This would, it is submitted, include expert evidence, meetings between experts and joint minutes prepared by them; further pre-trial conferences; the matters mentioned in subrule (6)*(f)*, *(h)*, *(i)*, *(j)* and *(k)*; and, in general, any enquiry aimed at promoting the effective disposal of the litigation.

Subrule (5): 'The matters mentioned in subrules (4) and (6) shall be dealt with.' The matters to be dealt with at the pre-trial conference are those set out in subrules (4) and (6). Subrule (4) deals with matters which a party intends to raise at the pre-trial conference; subrule (6) deals with matters which must be dealt with in the minutes of the pre-trial conference and, accordingly, are to be addressed at the conference.

Subrule (6): 'The minutes ... shall be prepared.' The minutes should be drawn with care and skill. [28]

'By or on behalf of every party.' This subrule makes it clear that the obligation to prepare the minutes of the pre-trial conference in accordance with its provisions is jointly that of all the parties to the action.

'The following shall appear therefrom.' This subrule prescribes the matters which should be apparent from the minutes of the pre-trial conference. It is submitted that at the conference the parties should give their attention to all the matters listed in the subrule. It is clearly not the purpose of the pre-trial conference to agree not to agree. [29]

Subrule (6)*(d)*: 'Whether any issue has been referred ... for mediation.' In *MB v NB* [30] Brassey AJ, in limiting the fees that the attorneys could recover from their clients to the costs they could tax on a party and party scale, stated:

> 'In short, mediation was the better alternative and it should have been tried. On the facts before me it is impossible to know whether the parties knew about the benefits of mediation, but I can see no reason why they would have turned their backs on the process, especially if they had been counselled on the matter by the attorneys. What is clear, however, is that the attorneys did not provide this counsel; in fact, in the course of

> the pre-trial conference they positively rejected the use of the process. For this they are to blame and they must, I believe, shoulder the responsibility that comes from failing properly to serve the interests of their clients.'

Subrule (6)*(e)*: 'Should be transferred to another court.' The wording of this subrule is couched in wide terms and does not limit the other court to another division of the High Court. Section 27 of the Superior Courts Act 10 of 2013 provides for the removal of proceedings from one division of the High Court to another division, or from one seat of a division to another in the same division if it appears to the court that such proceedings *(a)* should have been instituted in such other division or at such other seat; or *(b)* would be more conveniently or more appropriately heard or determined by such other division or at such other seat. [31] Rule 39(22) provides that by consent the parties to a trial are entitled, at any time, before trial, on written application to a judge through the registrar, to have the case tranferred to the magistrate's court having jurisdiction whether by consent between the parties or otherwise. See further rule 39(22) and the notes thereto below.

Subrule (6)*(f)*: 'Which issues should be decided separately.' If the parties have formulated specific issues in the pre-trial minutes, the principle applies that the parties are held to the issues so agreed upon unless, as in the case of pleadings, there has been a full investigation of matter falling outside the scope of the issues agreed upon and there is no reasonable ground for thinking that further examination of the facts

might lead to different conclusions. [32] See further rule 33(4) and the notes thereto above.

Subrule (6)*(g)*: 'Admissions made by each party.' See the notes to subrule (4)*(a)* s v 'The admissions which such party requires' above.

Subrule (6)*(h)*: 'Dispute regarding the duty to begin or the onus of proof.' See the notes to rule 39(5) s v 'The burden of proof' and to rule 39(11) s v 'A ruling upon the onus of adducing evidence' below.

Subrule (6)*(i)*: 'Proof by way of an affidavit in terms of rule 38(2).' Under rule 38(2) a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing. See further rule 38(2) and the notes thereto below.

Subrule (6)*(j)*: 'The copying and other preparation of documents.' This refers to the trial bundle and includes the indexing thereof.

Subrule (6)*(k)*: General. The word 'document' is a very wide term and includes everything that contains the written or pictorial proof of something. [33] In s 33 of the Civil Proceedings Evidence Act 25 of 1965 a document is defined as including 'any book, map, plan, drawing or photograph'. In the absence of any agreement as contemplated in this subrule, and subject to the provisions of rule 36(10), the normal rules relating to documentary evidence will apply. [34] This could have a profound effect on the duration of the trial. This subrule is aimed at curtailing the duration of the trial and cutting costs. It is submitted that an agreement in respect of documents as contemplated in this subrule does not entitle a trial court to take documents (or copies thereof) forming part of the trial bundle into consideration for purposes of its judgment unless the parties have *(a)* relied upon such documents in the evidence or argument presented by them; or *(b)* agreed otherwise.

Subrule (7): 'The minutes shall be filed ... not later than 25 days prior to the trial date.' This subrule imposes a joint obligation upon the parties to the action to file the minutes with the registrar within the time prescribed in the subrule. Though the subrule is couched in peremptory terms ('shall', 'moet'), it contains no sanction for non-compliance with its terms. There is a lack of uniformity between the various divisions of the High Court in the application of the subrule.

The time limit prescribed in the subrule may be varied by an order under subrule (10).

Subrule (8): General. This subrule gives a judge an involvement in the pre-trial stage of the proceedings and authorizes the judge to give directions which might promote the effective conclusion of the matter. In terms of the definition of 'judge' in rule 1 the judge contemplated in this subrule means a judge sitting otherwise than in open court, i e a judge in chambers. In terms of subrule (10) a judge 'in chambers' may, without hearing the parties, order deviation from the time limits in this rule.

Subrule (8)*(a)*: 'At the request of a party or of own accord.' The power of a judge to call *mero motu* for a pre-trial conference to be held or to be continued will probably be rarely exercised, if for no other reason than that in most cases a judge in chambers would not know whether or not intervention is called for.

'To continue with a conference.' The request that a conference be continued before a judge in chambers affords a practical solution to a party to an action who is confronted at a pre-trial conference by an uncooperative, obstinate or recalcitrant opponent.

'Direct a party to be available personally.' The personal presence at a pre-trial conference of a party to an action may expedite agreement on certain issues.

Subrule (8)*(b)*: 'Involved in settlement negotiations.' This subrule makes it clear that the function of a judge at a pre-trial conference is not that of a mediator. The judge's function, as contemplated in subrule (8)*(c),* is to give directions which might promote the effective conclusion of the matter, i e directions which would curtail the duration of the trial, narrow down issues, cut costs, etc. The judge may only give such directions *with the consent of the parties.*

Subrule (8)*(c)*: 'May, with the consent of the parties ... give any direction.' This subrule makes it clear that a direction can only be given with the consent of the parties: [35] a judge has no power to compel a party to agree to any matter. In practice this result may be achieved by reason of the sanction of an adverse award of costs against a recalcitrant party as contemplated in subrule (9)*(a).* The wilful failure by a party to follow directions given to it at a pre-trial hearing in terms of this subrule by the judge who manages the case, is capable of being addressed through contempt proceedings. [36]

Subrule (9)*(a)*: 'Shall consider.' This subrule is clothed in peremptory language: the court is obliged at the hearing of the matter to give consideration to the question whether or not a special order as to costs should be made against a party or its attorney on the grounds set out in the subrule.

'Whether or not ... to make a special order as to costs.' In terms of this subrule a special order as to costs may be made against a party or its attorney for (i) not attending a pre-trial conference, and (ii) failing to a material degree to promote the effective disposal of the litigation. It is clear that a party/attorney who neglects unreasonably to take proper advantage of a pre-trial conference in terms of the rule or who fails unreasonably to co-operate with its opponent in doing so may attract an adverse order as to costs. [37]

'Against a party or such party's attorney.' In making an adverse order as to costs, the court should determine who bears the blame for the failure to a material degree to promote the effective disposal of the litigation. In the normal course this would be the party for, as was said in a different context, an attorney 'is the representative whom the litigant has chosen for himself'. [38] In exceptional cases, where the responsibility clearly attaches to the attorney, an award to pay costs *de bonis propriis* against the attorney would be appropriate.

Subrule (9)*(b)*: 'No advocate's fees shall be allowed.' Counsel's fees for attendance at a pre-trial conference are only allowed on a party-and-party basis when (i) a judge in terms of subrule (8)*(a)* calls upon the advocates of the parties to attend a conference before a judge in chambers, and (ii) a pre-trial conference is held within ten days prior to the hearing. Subrule (3)*(a)* requires in peremptory terms that a pre-trial conference be held not later than 30 days prior to the date of hearing. Counsel need not participate in the conference — the matters to be discussed are clearly within the competence of the attorney and to insist that counsel participate therein would justify the criticism that the rule increases costs by requiring counsel to prepare or attend twice, especially if different counsel are involved at the conference and at the trial. [39]

Subrule (10): 'A judge ... may, without hearing the parties, order deviation from the time limits in this rule.' The time limits are those contained in subrules (1), (2)*(a)* and *(b)*, (3)*(a)*, (4), (7) and (8)*(d)*. It is, therefore, not necessary to approach the court under the provisions of rule 27 for an extension of the time limits prescribed by the rule. [40] In contradistinction to subrule (8)*(c)*, this subrule does not require the consent of the parties nor need they be heard by the judge. The provision that the parties need not be heard by the judge constitutes a fundamental deviation from the principle *audi alteram partem* and it is submitted that a judge should not, as a general rule, order deviation from the time limits in rule 37 without having been appraised of the relevant facts by the parties.

Subrule (11): 'A direction made in terms of this rule ... may be amended.' In terms of subrule (8)*(c)* a judge may give a direction only with the consent of the parties. It is accordingly submitted that an amendment of a direction can also be effected only with the consent of the parties.

1 Subrule (9)*(a)*(ii). See also *MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga* 2010 (4) SA 122 (SCA) at 126E.

2 *Lekota v Editor, 'Tribute' Magazine* 1995 (2) SA 706 (W) at 708F. In this case, Flemming DJP discussed the provisions of the rule in some detail. See also *Huang v Bester NO* 2012 (5) SA 551 (GSJ) at 559H–I.

3 *Hendricks v President Insurance Co Ltd* 1993 (3) SA 158 (C) at 166E.

4 *Road Accident Fund v Krawa* 2012 (2) SA 346 (ECG) at 353H–354A; *Huang v Bester NO* 2012 (5) SA 551 (GSJ) at 559G.

5 *Kriel v Bowels* 2012 (2) SA 45 (ECP) at 48J–49A.

6 *Moila v The City of Tshwane* (unreported, SCA case no 249/2016 dated 22 March 2017) at paragraph [9], where *Scheepers & Nolte v Pate* 1909 TS 353 at 360 is referred to with approval.

7 *Lekota v Editor, 'Tribute' Magazine* 1995 (2) SA 706 (W) at 709A.

8 *Rauff v Standard Bank Properties* 2002 (6) SA 693 (W) at 704B.

9 *Kriel v Bowels* 2012 (2) SA 45 (ECP) at 49A–C.

10 *Filta-Matix (Pty) Ltd v Freudenberg* 1998 (1) SA 606 (SCA) at 614C; *MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga* 2010 (4) SA 122 (SCA) at 126E–G.

11 *Middleton v Carr* 1949 (2) SA 374 (A) at 385–6; *Van Rensburg v Van Rensburg* 1963 (1) SA 505 (A) at 509H–510B; *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 23D–24E; *Minister van Wet en Orde v Matshoba* 1990 (1) SA 280 (A) at 285E–I and 289C–D; *Sehume v Atteridgeville City Council* 1992 (1) SA 41 (A).

12 *Kerksay Investments (Pty) Ltd v Randburg Town Council* 1997 (1) SA 511 (T) at 520F–521E, confirmed on appeal on this point in *Randburg Town Council v Kerksay Investments (Pty) Ltd* 1998 (1) SA 98 (SCA) at 104A–B.

13 Rule 37A(3).

14 Rule 35(1) is permissive in so far as it does not oblige a party to compel its opponent to give discovery. See further the notes to rule 35(1) s v 'Any party may require ... any other party' above.

15 Rule 1.

16 *Lekota v Editor, 'Tribute' Magazine* 1995 (2) SA 706 (W) at 707E, 707H–708E and 708F–J.

17 *Kemp v Randfontein Estates Gold Company* 1996 (1) SA 373 (W) at 374F.

18 See the notes to subrule (9) s v 'No advocate's fees shall be allowed' below.

19 *Lekota v Editor, 'Tribute' Magazine* 1995 (2) SA 706 (W) at 706I and 709E.

20 This paragraph was referred to with approval in *Fransch v Premier, Gauteng* 2019 (1) SA 247 (GP) at 250A–B.

21 *Paterson NO v Kelvin Park Properties CC* 1998 (2) SA 89 (E) at 104D; *Kriel v Bowels* 2012 (2) SA 45 (ECP) at 48F–I and 49E–F and see *Fransch v Premier, Gauteng* 2019 (1) SA 247 (GP) at 250C.

22 This sentence was referred to with approval in *Fransch v Premier, Gauteng* 2019 (1) SA 247 (GP) at 250C–D.

23 This sentence was referred to with approval in *Fransch v Premier, Gauteng* 2019 (1) SA 247 (GP) at 250D.

24 *Kriel v Bowels* 2012 (2) SA 45 (ECP) at 49D–F.

25 *Filta-Matix (Pty) Ltd v Freudenberg* 1998 (1) SA 606 (SCA) at 614A–D; *MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga* 2010 (4) SA 122 (SCA) at 126F.

26 *Hendricks v President Insurance Co Ltd* 1993 (3) SA 158 (C) at 166E.

27 See *Bosman v AA Mutual Insurance Association Ltd* 1977 (2) SA 407 (C) at 408H–409A; *Lekota v Editor, 'Tribute' Magazine* 1995 (2) SA 706 (W) at 709 (D).

28 See *Bosman v AA Mutual Insurance Association Ltd* 1977 (2) SA 407 (C) at 408G.

29 See *Wessels v Johannesburg Municipality* 1970 (3) SA 633 (W) at 634D and *Grasso v Grasso* 1987 (1) SA 48 (C) at 61H. Both these cases deal with the former rule but it is submitted that the sentiments expressed are equally applicable to the present rule.

30 2010 (3) SA 220 (GSJ) at 238H–I.

31 See further s 27 of the Act and the notes thereto in Volume 1, Part A2.

32 *Kerksay Investments (Pty) Ltd v Randburg Town Council* 1997 (1) SA 511 (T) at 520F–521C, confirmed on appeal on this point in *Randburg Town Council v Kerksay Investments (Pty) Ltd* 1998 (1) SA 98 (SCA) at 104A–B.

33 *Seccombe v Attorney-General* 1919 TPD 270 at 277; *S v Mpumlo* 1986 (3) SA 485 (E) at 489D–F.

34 See, in general, Zeffertt *Evidence* Chapter 21.

35 *Lekota v Editor, 'Tribute' Magazine* 1995 (2) SA 706 (W) at 710C.

36 *MT v CT* 2016 (4) SA 193 (WCC) at 202F–206E.

37 See *Techni-Pak Sales (Pty) Ltd v Hall* 1968 (3) SA 231 (W) at 239G–240A; *Grasso v Grasso* 1987 (1) SA 48 (C) at 61J–62B.

38 *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141C.

39 *Lekota v Editor, 'Tribute' Magazine* 1995 (2) SA 706 (W) at 709A–C.

40 The practice direction adverted to in *Lekota v Editor, 'Tribute' Magazine* 1995 (2) SA 706 (W) at 710D has lapsed.

37A Judicial Case Management

(1) A judicial case management system shall apply, at any stage after a notice of intention to defend is filed—

(a) to such categories of defended actions as the Judge President of any Division may determine in a Practice Note or Directive; and

(b) to any other proceedings in which judicial case management is determined by the Judge President, of own accord, or upon the request of a party, to be appropriate.

(2) Case management through judicial intervention—

(a) shall be used in the interests of justice to alleviate congested trial rolls and to address the problems which cause delays in the finalisation of cases;

(b) the nature and extent of which shall be complemented by the relevant directives or practices of the Division in which the proceedings are pending; and

(c) shall be construed and applied in accordance with the principle that, notwithstanding the provisions herein providing for judicial case management, the primary responsibility remains with the parties and their legal representatives to prepare properly, comply with all rules of court, and act professionally in expediting the matter towards trial and adjudication.

(3) The provisions of rule 37 shall not apply, save to the extent expressly provided in this rule, in matters which are referred for judicial case management.

(4) In all matters designated to be subject to judicial case management in terms of subrule (1)*(a)* at any stage before the close of pleadings, the registrar may—

(a) direct compliance letters to any party which fails to comply with the time limits for the filing of pleadings or any other proceeding in terms of the rules; and

(b) in the event of non-adherence to the directions stipulated in a letter of compliance, refer a matter to a case management judge designated by the Judge President who shall have the power to deal with the matter in terms of the practice directives of the particular Division concerned.

(5) *(a)* Notwithstanding the allocation of a trial date, a case that is subject to judicial case management shall not proceed to trial unless the case has been certified trial-ready by a case management judge after a case management conference has been held, as provided for in subrule (7).

(b) A case management judge shall not certify a case as trial-ready unless the judge is satisfied—

(i) that the case is ready for trial, and in particular, that all issues that are amenable to being resolved without a trial have been dealt with;

(ii) that the remaining issues that are to go to trial have been adequately defined;

(iii) that the requirements of rules 35 and 36(9) have been complied with if they are applicable; and

(iv) that any potential causes of delay in the commencement or conduct of the trial have been pre-empted to the extent practically possible.

(c) A case management judge may order directions on the making of discovery where the judge considers that such directions may expedite the case becoming trial-ready.

(6) In every defended action in a category of case which has been identified in terms of subrule (1)*(a)* as being subject to judicial case management in which any party makes application for a trial date following the close of pleadings, the registrar shall issue a notice electronically to the parties, at the addresses furnished in terms of rules 17(3)*(b)* or 19(3)*(a)* in respect of the holding of a case management conference.

(7) The notice by the registrar in terms of subrule (6) shall inform the parties—

(a) of the date, time and place of a case management conference in the matter to be presided over by a case management judge;

(b) of the name of the case management judge, if available;

(c) that they are required to have held a pre-trial meeting before the case management conference at which the issues identified in subrule (10) in relation to the conduct and trial of the action must have been considered; and

(d) that the plaintiff is required, not less than two days before the time appointed for the case management conference, to—

(i) ensure that the court file has been suitably ordered, secured, paginated and indexed; and

(ii) deliver an agreed minute of the proceedings at the meeting held in terms of paragraph *(c)*, alternatively, in the event that the parties have not reached agreement on the content of the minute, a minute signed by the party filing the document together with an explanation why agreement on its content has not been obtained.

(8) The minute referred to in subrule (7)*(d)*(ii) shall particularise the parties' agreement or respective positions on each of the issues identified in subrule (10) and, to the extent that further steps remain to be taken to render the matter ready for trial, explicitly identify them and set out a timetable according to which the parties propose, upon a mutually binding basis, that such further steps will be taken.

(9) *(a)* In addition to the minute referred to in subrule (7)*(d)*(ii), the parties shall deliver a detailed statement of issues, which shall indicate—

(i) the issues in the case that are not in dispute; and

(ii) the issues in the case that are in dispute, describing the nature of the dispute and setting forth the parties' respective contentions in respect of each such issue.

(b) A case management judge may, upon considering the statement by the parties referred to in paragraph *(a)*, direct that appearance by one or all of the parties is dispensed with.

(10) The matters that the parties must address at the pre-trial meeting to be held in terms of subrule (7) are as follows:

(a) The matters set forth in rules 35, 36 and 37(6);

(b) the soliciting of admissions and the making of enquiries from and by the parties with a view to narrowing the issues or curtailing the need for oral evidence;

(c) the time periods within which the parties propose that any matters outstanding in order to bring the case to trial readiness will be undertaken;

(d) subject to rule 36(9), the instruction of witnesses to give expert evidence and the feasibility and reasonableness in the circumstances of the case that a single joint expert be appointed by the parties in respect of any issue;

(e) the identity of the witnesses they intend to call and, in broad terms, the nature of the evidence to be given by each such witness;

(f) the possibility of referring the matter to a referee in terms of section 38 of the Act;

(g) the discovery of electronic documents in the possession of a server or other storage device;

(h) the taking of evidence by video conference;

(i) suitable trial dates and the estimated duration of the trial; and

(j) any other matter germane to expediting the trial-readiness of the case.

(11) Without limiting the scope of judicial engagement at a case management conference, the case management judge shall—

(a) explore settlement, on all or some of the issues, including, if appropriate, enquiring whether the parties have considered voluntary mediation;

(b) endeavour to promote agreement on limiting the number of witnesses that will be called at the trial, eliminating pointless repetition or evidence covering facts already admitted; and

(c) identify and record the issues to be tried in the action.

(12) The case management judge may at a case management conference—

(a) certify the case as trial-ready;

(b) refuse certification;

(c) put the parties on such terms as are appropriate to achieve trial-readiness, and direct them to report to the case management judge at a further case management conference on a fixed date;

(d) strike the matter from the case management roll and direct that it be re--enrolled only after any non-compliance with the rules or case management directions have been purged;

(e) give directions for the hearing of opposed interlocutory applications by a motion court on an expedited basis;

(f) order a separation of issues in appropriate cases notwithstanding the absence of agreement by the parties thereto;

(g) at the conclusion of a case management conference, record the decisions made and, if deemed convenient, direct the plaintiff to file a minute thereof;

(h) make any order as to costs, including an order *de bonis propriis* against the parties' legal representatives or any other person whose conduct has conduced unreasonably to frustrate the objectives of the judicial case management process.

(13) The record of the case management conference, including the minutes submitted by the parties to the case management judge, any directions issued by the judge and the judge's record of the issues to be tried in the action, but excluding any settlement discussions and offers, shall be included in the court file to be placed

before the trial judge.

(14) The trial judge shall be entitled to have regard to the documents referred to in subrule (13) in regard to the conduct of the trial, including the determination of any applications for postponement and issues of costs.

(15) Unless the parties agree thereto in writing, the case management judge and the trial judge shall not be the same person.

(16) Any failure by a party to adhere to the principles and requirements of this rule may be penalised by way of an adverse costs order.

[Rule 37A was repealed by GN R373 of 30 April 2001 and inserted by GN R842 of 31 May 2019.]

Commentary

General. The purpose of rule 37A is, evidently, to promote the effective disposal of defended actions or other opposed proceedings which, in the discretion of a Judge President, call for case management through judicial intervention. Ultimately, however, as is clear from the provisions of rule 37A(2)*(c)*, our adversarial system of civil procedure and, in particular, party control prevails.

Rule 37A makes judicial case management after the filing of a notice of intention to defend applicable to:

(a) such categories of defended actions as a Judge President may determine in a Practice Note or Directive;

(b) such opposed proceedings as a Judge President may of own accord determine to be appropriate for case management;

(c) such opposed proceedings as a Judge President may upon the request of a party determine to be appropriate for case management.

The case management procedure in regard to *(a)* is different from the procedure in regard to *(b)* and *(c)*. In so far as *(a)* is concerned, the case management procedure commences with a trial compliance letter by the registrar in terms of rule 37A(4), followed by a referral of the matter to a case management judge designated by the Judge President in the event of non-compliance with the letter, on the one hand, or with a notice by the registrar in terms of rule 37A(6) informing the parties of the date, time, place, etc of a case management conference, on the other hand. Whereas the letter in terms of subrule (4) may be issued by the registrar at any stage before the close of pleadings, the notice in terms of subrule (6) may be issued by the registrar only after the close of pleadings. Furthermore, the letter is discretionary but the notice is compulsory. The case management proceedings must then comply with the provisions of rule 37A(7)*(c)* and *(d)*, (8), (9), (10), (11), (12) and (13). In so far as *(b)* and *(c)* are concerned it would seem that the case management process commences with the appointment of a case management judge by the Judge President, either before or after the close of pleadings. If the case management judge is appointed before the close of pleadings, it would seem that the judge shall have the power to deal with the matter in terms of the practice directives of the particular division of the High Court concerned as provided in rule 37A(4)*(b)*. If the case management judge is appointed after the close of pleadings, it would seem that the provisions of rule 37A(6)–(13) apply *mutatis mutandis*.

In terms of rule 37A(15) the case management judge and the trial judge shall not be the same person unless the parties agree thereto in writing. It is submitted that this aspect should be addressed at a case management conference.

An expert notice and summary must be delivered before a first case management conference held in terms of rule 37A(6) and (7) or as directed by a case management judge. [1]

Where a party fails to comply with an order or direction made in a judicial case management process referred to in rule 37A the provisions of rule 30A apply to such non-compliance. [2]

In terms of rule 37A(3) the provisions of rule 37 do not apply, save to the extent expressly provided in rule 37A, in matters which are referred for judicial case management.

Subrule (1)*(a)*: 'Determine in a Practice Note or Directive.' Practice notes and directives are reproduced in Volume 3, Parts F–N.

Subrule (4)*(b)*: 'Case management judge.' In terms of the definition of 'judge' in rule 1 the judge contemplated in this subrule means a judge sitting otherwise than in open court, i e a judge in chambers.

'The practice directives of the particular Division concerned.' Practice directives are reproduced in Volume 3, Parts F–N.

Subrule (7)*(a)*: 'Case management judge.' In terms of the definition of 'judge' in rule 1 the judge contemplated in this subrule means a judge sitting otherwise than in open court, i e a judge in chambers.

Subrule (8): 'A timetable ... upon a mutually binding basis.' This subrule makes it clear that a timetable can only be implemented with the consent of the parties: a case management judge has no power to compel a party to agree to a timetable. In practice this result may be achieved by reason of the sanction of an adverse award of costs against a recalcitrant party as contemplated in subrules (12)*(h)* and (16). The failure by a party to follow directions given to it at a case management conference is capable of being addressed through the provisions of rule 30A.

Subrule (10)*(h)*: 'Taking of evidence by video conference.' See the notes to rule 39(20) s v 'If it appears convenient ... may make any order with regard to the conduct of the trial' below.

Subrule (12)*(f)*: 'Order a separation of issues in appropriate cases.' The issue to be separated could be one of law or fact or both. It is submitted that a case management judge should be guided by the test in rule 33(4), viz whether the issue concerned may conveniently be decided either before any evidence is led or separately from any other question. It is submitted, further, that in ordering a separation of issues in terms of the subrule, the case management judge may make an order directing the disposal of the issue concerned in such manner as the judge may deem fit and may order that all further proceedings be stayed until such issue has been disposed of.

In terms of the subrule the case management judge may order a separation of issues notwithstanding the absence of agreement by the parties to such a separation.

1 In terms of the proviso to rule 36(9).

2 Rule 30A(1).

38 Procuring evidence for trial

(1) *(a)* (i) Any party, desiring the attendance of any person to give evidence at a trial, may as of right, without any prior proceeding whatsoever, sue out from the office of the registrar one or more subpoenas for that purpose, each of which subpoenas shall contain the names of not more than four persons, and service thereof upon any person therein named shall be effected by the sheriff in the manner prescribed by rule 4.

(ii) The process for subpoenaing a witness referred to in subparagraph (i) shall be by means of a subpoena in a form substantially similar to Form 16 in the First Schedule.

(iii) If any witness is in possession or control of any deed, document, book, writing, tape recording or electronic recording (hereinafter referred to as a "document") or thing which the party requiring the attendance of such witness desires to be produced in evidence, the subpoena shall specify such document or thing and require such witness to produce it to the court at the trial.

[Paragraph *(a)* amended by GN R2410 of 30 September 1991.]

(b) (i) The process for requiring the production of a document referred to in subrule (1)*(a)*(iii) shall be by means of a subpoena in a form substantially similar to Form 16A in the First Schedule.

(ii) Within 10 days of receipt of a subpoena requiring the production of any document, any person who has been required to produce a document at the trial shall lodge it with the registrar, unless such a person claims privilege.

(iii) The registrar shall set the conditions upon which the said document may be inspected and copied so as to ensure its protection.

(iv) Within five days of lodgement with the registrar, the party causing the subpoena to be issued for the production of the document shall inform all other parties that the said document is available for inspection and copying and of any conditions set by the registrar for inspection and copying.

(v) After inspection and copying, the person who produced the document is entitled to its return.

[Paragraph *(b)* inserted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

(c) (i) The process for requiring the production of a thing referred to in subrule (1)*(a)*(iii) shall be by means of a subpoena in a form substantially similar to Form 16A in the First Schedule.

(ii) Within 10 days of receipt of a subpoena requiring the production of any thing, any person who has been required to produce a thing at the trial shall inform the registrar of the whereabouts of the thing and make the thing available for inspection, unless such person claims privilege.

(iii) The registrar shall set the conditions upon which the said thing may be inspected and copied or photographed so as to ensure its protection.

(iv) Within five days of notification from the registrar of the whereabouts of the said thing, the party causing the subpoena to be issued for the production of the thing shall inform all other parties where and when the thing may be inspected and copied or photographed and of any conditions set by the registrar for inspection, copying and photographing.

(v) After inspection and copying or photographing, the person who produced the thing is entitled to its return.

(2) The witnesses at the trial of any action shall be orally examined, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit.

(3) A court may, on application on notice in any matter where it appears convenient or necessary for the purposes of justice, make an order for taking the evidence of a witness before or during the trial before a commissioner of the court, and permit any party to any such matter to use such deposition in evidence on such terms, if any, as to it seems meet, and in particular may order that such evidence shall be taken only after the close of pleadings or only after the giving of discovery or the furnishing of any particulars in the action.

(4) Where the evidence of any person is to be taken on commission before any commissioner within the Republic, such person may be subpoenaed to appear before such commissioner to give evidence as if at the trial.

(5) Unless the Court ordering the commission directs such examination to be by interrogatories and cross-interrogatories, the evidence of any witness to be examined before the commissioner in terms of an order granted under subrule (3), shall be adduced upon oral examination in the presence of the parties, their advocates or attorneys, and the witness concerned may be subject to cross-examination and re-examination.

[Subrule (5) substituted by GN R235 of 18 February 1966.]

(6) A commissioner shall not decide upon the admissibility of evidence tendered, but shall note any objections made and such objections shall be decided by the court hearing the matter.

(7) Evidence taken on commission shall be recorded in such manner as evidence is recorded when taken before a court and the transcript of any shorthand record or record taken by mechanical means duly certified by the person transcribing the same and by the commissioner shall constitute the record of the examination: Provided that the evidence before the commissioner may be taken down in narrative form.

(8) The record of the evidence shall be returned by the commissioner to the registrar with a certificate to the effect that it is the record of the evidence given before the commissioner, and shall thereupon become part of the record in the case.

[Rule 38 substituted by GN R1318 of 30 November 2018.]

Commentary

Forms. Subpoena, 16; Subpoena *duces tecum*, 16A.

General. Rule 38 makes provision for various procedures to procure evidence for trial. In addition, the rule makes provision for the manner in which evidence will be adduced at a trial.

The rule makes provision for the following distinct procedures:

(a) procuring the attendance of a person to give evidence at a trial by means of a subpoena (subrule (1)*(a)*(i) and (ii));

(b) procuring the attendance of a witness to produce a deed, document, writing or tape recording at the trial by means of a subpoena *duces tecum* (subrule (1)*(a)*(iii) and *(b)*);

(c) procuring the attendance of a witness to produce a thing at the trial by means of a subpoena *duces tecum* (subrule (1)*(a)*(iii) and *(c)*);

(d) the oral examination of a witness at the trial (subrule (2));

(e) the production of proof by way of affidavit (subrule (2));

(f) the taking of evidence of a witness, before or during the trial, before a commissioner (subrules (3)–(8)).

The rule should be read together with the following sections of the Superior Courts Act 10 of 2013, and the notes thereto, in Volume 1, Part A2:

(a) s 35 — Manner of securing attendance of witnesses or production of any document or thing in proceedings and penalties for failure;

(b) s 36 — Manner in which witness may be dealt with on refusal to give evidence or produce documents;

(c) s 37 — Witness fees;

(d) s 38 — Reference of particular matters for investigation by referee;

(e) s 39 — Examination by interrogatories;

(f) s 40 — Manner of dealing with commissions rogatoire, letters of request and documents for service originating from foreign countries;

(g) s 41 — A court may order removal of certain persons;

(h) s 47 — Issuing of summons or subpoena in civil proceedings against a judge.

Section 47 of the Superior Courts Act 10 of 2013 provides for the issuing of a subpoena in respect of civil proceedings against any judge of a superior court. [1] See further s 47 of the Superior Courts Act 10 of 2013 and the notes thereto in Volume 1, Part A2.

Interrogatories are not dealt with in the rules but in s 40 of the Superior Courts Act 10 of 2013, as to which see Volume 1, Part A2.

Section 7(1) of the Promotion of Access to Information Act 2 of 2000 ('PAIA') provides, *inter alia*, that PAIA cannot be used to obtain access to information where such information is required for pending trial proceedings and where access to it is provided by another 'law'. It has been held that rule 38 is a 'law' as contemplated in PAIA and, consequently, that rule 38, and not PAIA, should be applied in pending court proceedings. [2]

Subrule (1)*(a)*(i): 'Desiring the attendance of any person.' Section 35(1) of the Superior Courts Act 10 of 2013 provides that a party to proceedings before any superior court [3] in which the attendance of witnesses or the production of any document or thing is required, may procure the attendance of any witness or the production of any document or thing in the manner provided for in the rules of that court.

This subrule lays down the manner in which the attendance of any witness in civil proceedings in the High Court is to be obtained. For the procedure in other superior courts, more in particular the Labour Court and the Land Claims Court, see Volume 3, Parts Q1 and R1.

Section 47 of the Superior Courts Act 10 of 2013 sets out the manner in which the attendance of a judge of the High Court in civil proceedings is to be obtained.

It is essential that a person be subpoenaed. If the witness has merely been warned, an offence as contemplated in s 35(4) of the Superior Courts Act 10 of 2013 is not committed. [4]

'May as of right.' The party who desires the attendance of the person to be subpoenaed need not first obtain the leave of the High Court to sue out the subpoena. Such party may, in terms of this subrule, do so as of right. Section 36(5) of the Superior Courts Act 10 of 2013 provides for the setting aside of a subpoena by any judge [5] of the court out of which the subpoena was issued if it appears that:

(a) the person concerned is unable to give any evidence or to produce any book, paper or document which would be relevant to any issue in the proceedings;

(b) such book, paper or document could properly be produced by some other person;

(c) to compel the person concerned to attend would be an abuse of the process of the court.

Prior to the introduction of s 36(5) of the Superior Courts Act 10 of 2013 it has been held that a High Court has inherent power to set aside a subpoena if it is satisfied as a matter of certainty that the subpoena is unsustainable, e g that the witness who has been subpoenaed will be totally unable to be of any assistance to the court in the determination of the issues raised at the trial. [6] It has also been held that a High Court has inherent jurisdiction to protect itself (and others — i e litigants) against an abuse of its process. [7] Consequently, if the issue of a subpoena amounts to an abuse of process, a court should not hesitate to set it aside. [8] These principles have now obtained statutory force under s 36(5) of the Superior Courts Act 10 of 2013.

An abuse of process occurs 'where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that object', [9] or put differently, when 'an attempt (is) made to use for ulterior purposes machinery designed for the better administration of justice'. [10]

The onus of proof of an abuse of process rests on the party alleging such an abuse and is not an easy one to discharge. [11]

The default of a person subpoenaed may be justified by 'reasonable excuse' under s 35(2)*(a)* of the Superior Courts Act 10 of 2013.

'Sue out ... one or more subpoenas.' A subpoena has been aptly described by the Consti-tu-tional Court as 'a court order commanding the presence of a witness under a penalty of fine for failure'. [12]

The subpoena must contain the name of the person in respect of which it is to be issued and must, in terms of paragraph (ii) of this subrule, be in a form substantially similar to Form 16 in the First Schedule to the rules.

The reasonable expenses of the person subpoenaed must be paid or offered to such person. See further, in this regard, the notes to s 35(2)*(a)* of the Superior Courts Act 10 of 2013 s v 'Reasonable expenses calculated in accordance with the tariff framed under s 37(1)' and 'Paid or offered' in Volume 1, Part A2.

'Service ... shall be effected by the sheriff in the manner prescribed by rule 4.' See rule 4 and the notes thereto above.

Whenever any person subpoenaed to attend any proceedings as a witness or to produce any document or thing evades service of the subpoena, the court concerned may, in terms of s 35(2)*(a)*(ii) of the Superior Courts Act 10 of 2013, issue a warrant directing that such person be arrested and brought before the court at the time and place stated in the warrant or as soon thereafter as possible. In the context of s 35(2)*(a)*(ii) such evasion must be intentional. In terms of s 35(4) of the Superior Courts Act 10 of 2013 such person is guilty of an offence and liable upon convinction to a fine or to imprisonment for a period not exceeding three months. See further, in this regard, the notes to s 35(4) s v 'A fine or … imprisonment' in Volume 1, Part A2.

The return of service of the sheriff is, it is submitted, regarded as prima facie proof of service and of what is stated therein in terms of s 35(2)*(a)* of the Superior Courts Act 10 of 2013. See, in this regard, the notes to s 35(2)*(a)* s v 'Return of the person who served such subpoena' in Volume 1, Part A2.

Subrule (1)*(a)*(ii): 'The process for subpoenaing a witness ... shall be by means of a subpoena in a form substantially similar to Form 16.' The verbatim following of Form 16 is not required. A subpoena need only to 'substantially' comply with the form. The word 'substantially' requires, it is submitted, that the subpoena must by and large, or materially, comply with the prescribed requirements. It need not in all respects conform to the specimen. In other words, Form 16 may be used with such variation as circumstances require.

It is to be noted that Form 16 contains the following paragraph:

> 'AND INFORM each of the said persons that such person is required to produce the following documents or things:
> (1) .....
> (2) .....
> (3) .....'

The paragraph is not in harmony with the provisions of rule 38. In terms of rule 38(1)*(b)*(i) the process for requiring a witness to produce a document in evidence at the trial as provided for in subrule (1)*(a)*(iii) must be by means of a subpoena in a form substantially similar to Form 16A (i e a subpoena *duces tecum*). Rule 38(1)*(c)*(i) contains a similar provision in regard

to the production of a thing. Having regard to the provisions of rule 38(1)*(a)*(i) and (ii) the purpose of Form 16 is only to secure the attendance of a witness to give evidence at the trial and not to serve as a subpoena *duces tecum*.

Subrule (1)*(a)*(iii): 'If any witness is in possession or control of any deed ... or thing ... to be produced in evidence.' Production of a document or thing by a witness is obtained by the issuing of a subpoena *duces tecum* in a form substantially similar to Form 16A in the First Schedule to the rules.

'The subpoena shall specify such document or thing.' This subrule expressly requires that a subpoena *duces tecum* shall 'specify' the document or thing which the witness is required to produce. If a document or thing cannot be specified it is submitted that it should, at least, be sufficiently described in the subpoena *duces tecum* in order for it to be properly identified. See further the notes to s 35(2) of the Superior Courts Act 10 of 2013 s v 'Or to produce any document' in Volume 1, Part A2. Wide language which may include within its sweep a wide and ill-defined category of documents (or things) does not comply with the subrule. [13] In terms of s 36(4) of the Superior Courts Act 10 of 2013, no

person is bound to produce any document or thing not specified or otherwise sufficiently described in the subpoena *duces tecum* unless such person actually has the document or thing in court at the hearing of the proceedings.

The default of a person subpoenaed *duces tecum* may be justified by 'reasonable excuse' under s 35(2)*(a)* of the Superior Courts Act 10 of 2013.

A subpoena *duces tecum* may be set aside under the circumstances provided for in s 36(5) of the Superior Courts Act 10 of 2013. See further the notes to subrule (1)*(a)* s v 'May as of right' above.

'Require such witness to produce it to the court at the trial.' The manner in which a recalcitrant witness may be dealt with by the court at the hearing of any proceedings is set out in s 36(1) and (2) of the Superior Courts Act 10 of 2013. See further, in this regard, s 36(1) and (2), and the notes thereto, in Volume 1, Part A2. See further the notes s v 'The subpoena shall specify such document' below.

Subrule (1)*(b)*(i): 'The process for requiring the production of a document ... shall be by means of a subpoena in a form substantially similar to Form 16A.' The verbatim following of Form 16A is not required. A subpoena *duces tecum* need only to 'substantially' comply with the form. The word 'substantially' requires, it is submitted, that the subpoena must by and large, or materially, comply with the prescribed requirements. It need not in all respects conform to the specimen. In other words, Form 16A may be used with such variation as circumstances require.

Subrule (1)*(b)*(ii): 'Shall lodge it with the registrar.' The purpose of this subrule, originally inserted into the body of the rule in 1987 (and subsequently amended), is to obviate the almost inevitable delays in the conduct of a trial resulting from the production at the trial for the first time of any document for inspection and copying by the parties. [14]

'Unless such a person claims.' A bona fide claim that the document in question is privileged does not entitle the party subpoenaed to refuse to comply with the subpoena. He must satisfy the registrar or the court that his claim of privilege is legally justified. [15] As to privilege, see the notes to rule 35(2)*(b)* s v 'A valid objection to produce' above.

Subrule (1)*(c)*: General. See the notes to subrule (1)*(b)* above which apply *mutatis mutantis* to this subrule.

Subrule (2): 'The court may at any time, for sufficient reason, order ... the evidence ... to be given on affidavit.' The court has a discretion, to be exercised judicially upon a consideration of all the facts, to allow evidence to be given on affidavit. The power should be exercised carefully and there must be clear evidence in the affidavit(s) supporting the application that sufficient reason exists. [16]

In *Madibeng Local Municipality v Public Investment Corporation Ltd* [17] the Supreme Court of Appeal summarized the correct approach to this subrule as follows: [18]

> '[26] The approach to rule 38(2) may be summarised as follows. A trial court has a discretion to depart from the position that, in a trial, oral evidence is the norm. When that discretion is exercised, two important factors will inevitably be the saving of costs and the saving of time, especially the time of the court in this era of congested court rolls and stretched judicial resources. More importantly, the exercise of the discretion will be conditioned by whether it is appropriate and suitable in the circumstance to allow a deviation from the norm. That requires a consideration of the following factors: the nature of the proceedings; the nature of the evidence; whether the application for evidence to be adduced by way of affidavit is by agreement; and ultimately, whether, in all the circumstances, it is fair to allow evidence on affidavit.'

Other factors which will weigh with the court in granting such leave include lack of means, distance from the court and serious illness. [19] To this could be added, it is submitted, factors such as prejudice and fairness to the parties. In terms of rule 37(5) it is required of the parties attending a pre-trial conference, to deal with the production of proof by way of an affidavit in terms of rule 38(2). Rule 37(6)*(i)* requires of the parties to record any agreement regarding such production of proof in the minutes of the pre-trial conference. It is submitted that such an agreement does not bind the court and that, in the exercise of its discretion under this subrule, is but another factor to be taken into consideration in determining whether sufficient reason as required by this subrule exists for granting an order.

The subrule expressly provides that the order that all or any of the evidence to be adduced at the trial be given on affidavit may be made 'at any time'. Thus, it may be made prior to the commencement of the trial, at the commencement of the trial and even during the trial.

The court, in granting the application, may reserve to the opposite party the right to object to such evidence at the trial. [20]

In *New Zealand Insurance Co Ltd v Du Toit*, [21] in an application for default judgment, damages were permitted to be proved by an affidavit of a medical practitioner. It is submitted that this practice should not be extended.

In an application for default judgment, where no application was made by the defendant, who failed to appear at the hearing but had previously filed an affidavit in opposition to a summary judgment application, to receive evidence by way of affidavit, the court disregarded the evidence contained therein and granted default judgment. [22]

In terms of the proviso to this subrule evidence shall not be given on affidavit if it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and that such witness can be produced.

In *Uramin (Incorporated in British Colombia) t/a Areva Resources Southern Africa v Perie* [23] it was held to be convenient and in the interests of justice to vary the general trial procedure and receive the evidence of two witnesses from abroad via video link. The decision is discussed in more detail in the notes to rule 39(20) s v 'If it appears convenient … make any order with regard to the conduct of the trial' below.

Subrule (3): General. Subrules (3)–(8) make provision for evidence to be taken by way of commission *de bene esse*.

The basic distinction between evidence on commission and interrogatories (which is provided for in s 39 of the Superior Courts Act 10 of 2013) is that in the latter specific questions are formulated and approved by the court, while in the former the proceedings partake much more of a 'roving' commission conducted by examination and cross-examination, the evidence being given, as in a trial, orally. Section 39 of the Superior Courts Act 10 of 2013 does not refer to commissions *de bene esse*, and rather loses sight of the differences between these and interrogatories.

'A court may.' [24] The grant or refusal of a commission is a matter within the discretion of the court. [25] It is not, however, an absolute discretion but one to be exercised in accordance with recognized principles which have evolved over the years. [26]

In deciding how to exercise this discretion, it may be profitable to consider not only the decisions given in civil cases on this question but also the principles laid down in respect of the issue of a commission for the hearing of evidence in criminal trials, because, although the discretion is exercised less liberally in the latter instance than in the former, in both the fundamental consideration is whether, in particular circumstances, justice is likely to be done if evidence is placed before the court in this manner.

Where the court is faced with the problem of vital evidence being lost if a commission *de bene esse* were refused, or of allowing the production of evidence considerably weakened by the defendant's inability to cross-examine foreign witnesses, if the likelihood of a miscarriage of justice lies in the refusal of the application rather than in the granting of it, the court will grant a commission. Though there may be circumstances in which this would operate as a hardship on a party, he will always have the opportunity of arguing this before the trial judge. [27] Some prejudice is inevitable in all commissions: expense, delay, the difficulty of obtaining professional representation out of the jurisdiction — these are all matters which are inseparably attendant upon commissions. [28] As was pointed out by Wessels J in *Robinson v Randfontein Estates GM Co Ltd,* [29] the prejudice is not entirely one-sided:

> 'The person who produces on paper the evidence of a witness is as a rule at a disadvantage, because the court will pay more attention to the

evidence of witnesses who appear before it, who are examined and cross-examined before it, than to those witnesses whom it has not had the opportunity of seeing, and if a question arises as to the credibility of such a witness, or whether the court ought to accept his testimony, it would prefer to base its judgment on what it has seen and heard than on testimony about which some doubt may exist.' [30]

'On application on notice.' The affidavit in support of the application should set out:

(a) the reasons why it is necessary for the purposes of justice that the ordinary way of taking evidence (i e that all witnesses should be examined in the presence of the court, orally) [31] should be departed from. [32] In this regard the applicant should adduce sufficient evidence to support the inference that the commission is being sought on bona fide grounds to advance a legitimate case, and that he has acted with proper diligence in pursuing alternative remedies which might reasonably be available; [33]

(b) the nature of the evidence to be given and its relevance; [34]

(c) the names of the witnesses whose evidence on commission is required, for the courts are reluctant to grant a roving commission to examine an unlimited number of people. [35] The courts have, however, granted leave to take the evidence of named persons on commission, as well as the evidence of 'any other person whose evidence becomes relevant or appears to be so as a result of the evidence given at the commission.' [36]

'It appears convenient or necessary for the purposes of justice.' This is a jurisdictional fact: if it does not appear to the court that the taking of evidence on commission is indeed convenient or necessary for the purposes of justice, [37] the subrule gives it no jurisdiction to grant such an order. [38]

The convenience referred to in the subrule is the convenience not only of the applicant but also of the respondent and of the court. [39]

In the exercise of its discretion the following factors will be considered by the court:

(a) **Relevance of the evidence.** The evidence sought to be adduced on commission must be relevant to the issues in dispute. If evidence is not demonstrated to be relevant to the issues in dispute, it cannot be 'convenient or necessary for the purposes of justice' to order the hearing of such evidence before a commission. [40]

(b) **Nature of the evidence.** Before the court will authorize a commission, it must be satisfied that the required evidence is truly material to the real issues in the litigation, and likely to contribute appreciably to their determination. [41]

The court may in the exercise of its discretion secure the leading of evidence on commission on contentious factual issues in both civil and criminal cases. [42] If the court is of the opinion that the acceptability of the evidence sought to be led would depend to a great extent on the court's assessment of the witness's demeanour, personality and conduct and that, without such assessment, very little weight could be placed upon it, it might be necessary for the ends of justice to refuse the application. [43]

In cases involving allegations of fraud, the courts are reluctant to give leave for evidence to be taken on commission. [44] If the exclusion of the evidence of a witness whose

attendance cannot be enforced is more likely to lead to a miscarriage of justice than to have his testimony on paper, a commission will be granted also where fraud is alleged 'though it may make the necessity for a more careful inquiry greater'. [45] If the witness can be compelled to attend, the court will in cases involving allegations of fraud require his attendance. [46]

If the evidence sought to be led is of an involved nature, such as evidence concerning intricate matters of account, a commission will not be granted. [47]

As a general rule the court will not allow expert evidence to be taken on commission, the reason being that in the case of an expert witness it is of the utmost importance that the examination and cross-examination should be conducted before the court. [48] The mere fact that the foreign witness may be more expert than those in the Republic does not warrant a commission. [49] If there are no experts available locally, a commission will be granted. [50] A commission will not be granted where the possibility of obtaining witnesses in South Africa has not been sufficiently explored. [51]

(c) **Admissibility of the evidence.** A commission will not be granted unless the proposed evidence is relevant and admissible. [52] If it is impossible to decide until the trial whether the evidence is admissible, a commission will be granted and the question of admissibility left until the evidence is before the court. [53] If the application for a commission is made during a trial, the court must be satisfied that the evidence is admissible and material, and will scrutinize the merits of the application more closely than where such an application is made before the trial. [54]

A commission may be appointed to take evidence which is only corroborative in nature [55] if the court is of opinion that the evidence is relevant, material and necessary to do justice between the parties. [56]

(d) **Evidence likely to be lost.** Ordinarily a commission *de bene esse* will be issued where the evidence sought is necessary for the proper trial of the case and ought, if reasonably possible, to be before the court, and is likely to be lost if not taken on commission. [57] Thus, a

commission will be granted where the witness is likely to die, [58] or is about to depart from the jurisdiction of the court. [59]

(e) **Inability of witness to attend.** A commission will be granted if it can be shown that for some valid reason the witness cannot attend the court to give evidence in person. [60] Thus, a commission will be granted if a witness is unable to appear at the trial by reason of ill-health. [61] A commission will not be granted merely upon the ground of the witness's old age; it must also be shown that he is in ill-health. [62]

A commission will be granted if a witness beyond the jurisdiction refuses to attend. [63] The court cannot 'compel an unwilling person to come from a foreign country to give his evidence here and in these circumstances the next best thing that the Court can do is to take his testimony on paper'. [64]

Mere inconvenience to a witness, or the fact that a witness cannot, without loss, leave his business to give evidence is not sufficient ground for the granting of a commission, [65] though in exceptional circumstances commissions have been granted. [66]

If there is material before the court which leads the court to infer that the witness is not an honest person, the court may refuse leave to have his evidence taken on commission and require his presence. [67]

If the evidence of a witness is taken on commission but subsequently he is present at the trial, the evidence taken on commission is not used and the witness must give his evidence orally. The reason is that evidence taken on commission is said to be *de bene esse*, that is 'conditional', the condition being that the evidence shall be used only if the witness should not be present at the trial. [68]

If there is nothing before the court to show that even if the commission were granted the witness would come before it, the court will refuse the application. [69]

(f) **Evidence by plaintiff or defendant.** In general the courts are slow to grant the plaintiff the right to give evidence on commission. [70] If the defendant is resident out of the jurisdiction and has been brought into the forum by virtue of the fact that the plaintiff has been given leave to sue him by edictal citation, the court, in the exercise of its discretion, will not regard the application of the defendant with the same strictness as the case of a plaintiff who has chosen his own forum. [71] If both parties are resident out of the jurisdiction a commission is usually refused, [72] presumably on the ground that the case can better be heard in the country where either or both of them are residing. The fact that a party, knowing the case to be coming on, has left the country, is a reason for refusing to allow his evidence to be taken on commission. [73]

(g) **Opportunity for cross-examination.** Before the commissioner there must be 'opportune possibility for cross-examination'. [74] If the

witness is in a locality which no lawyers can reach, so that he can be properly examined and cross-examined, a commission will not be granted. [75]

(h) **Expenses.** The court should consider the comparative expense of the alternative methods of obtaining the evidence [76] and the capacity of the parties to bear the expense involved. [77]

(i) **The balance of prejudice.** The court must weigh the prejudice to the party seeking the commission if the application is refused against the prejudice to his adversary if it is granted. [78]

'Before a commissioner of the court.' The court names the commissioner, but is, of course, ready to accept suggestions from the parties and it is usual to state the name of the suggested commissioner in the founding affidavit. If the witness is within the Republic, the commissioner is usually a magistrate, as no fees are chargeable by such officials for taking evidence on commission. If the witness is outside the Republic, a barrister or solicitor is usually appointed as commissioner.

The Cape Supreme Court has issued a commission to a foreign country in blank, leaving it to the registrar of the local court to fill in the name of the commissioner. [79] Provision is sometimes made for the appointment of a substitute should the commissioner for some reason be unable to act. [80]

Parties cannot, by agreement and without the issue of a commission, have a witness examined before a person not qualified to administer an oath and then put in the statement as evidence. [81] Cases have occurred where the superior courts have admitted evidence so taken, where the person before whom it was taken was a justice of the peace [82] or a commissioner of oaths [83] and when the imminent departure of the witness examined had rendered it urgent to obtain his evidence without delay; but Laurence JP expressed strong disapproval of the practice and explicitly stated that his action in admitting the evidence must not in any way be regarded as a precedent. [84]

'On such terms . . . as to it seems meet.' When an order is granted for a commission, the costs incurred in and about the commission are usually ordered to be costs in the cause. There is, however, nothing to prevent the question being reserved for determination at the trial. [85] Even where the costs have been ordered to be costs in the cause, the expenses may be disallowed on taxation if unnecessarily incurred; for example, if the evidence was not relevant. [86]

If the respondent in an application for a commission is impecunious, the court may order the applicant to disburse the respondent's costs with regard to the commission, and that such costs will be costs in the cause. [87]

The costs of a commission form part of the necessary expenses of a proceeding and will be taxed as such. A fee for counsel attending a commission to take evidence abroad will be allowed as between party and party only under special circumstances, such as where there is no local agent available or the matter is one of peculiar difficulty. [88] Generally, counsel's fees for consultation as to the advisability of an application for a commission *de bene esse* will not be allowed between party and party. [89]

'Shall be taken only after the close of pleadings.' A commission is not usually granted until the pleadings are closed; until then it is not known what points are in dispute and therefore what evidence will be relevant. [90] It will, therefore, in most cases be convenient to make a special application after close of pleadings for the appointment of a commissioner, and not to set down the case for trial until the evidence has been returned, so that the whole matter may be dealt with at one sitting.

There are, however, exceptions, as where a witness is dangerously ill [91] or is about to leave the jurisdiction; [92] and generally, where there is imminent risk that delay will cause the total loss of the evidence desired. [93] In *Botha v Van der Vyver,* [94] where the defendant had not yet pleaded but the witness was dangerously ill, the commission was issued, but the examination was postponed until a plea had been filed. In *Nelson v Nelson* [95] a commission to take the evidence of sailors about a sail was issued before appearance had been entered, but only upon condition that the evidence should not be used if the defendant should appear and object to it.

If the necessity of a witness living abroad appears only at the trial, a commission may be granted at that stage. [96] In *Guggenheim v Rosenbaum (1)* [97] the court held that the power to entertain such an application in the middle of a trial should be sparingly exercised. It was also held [98] that where the application for a commission is made during a trial the court must be satisfied that the proposed evidence is admissible and material, and the court will scrutinize the merits of such an application more closely than an application made before the trial.

There should be no unnecessary delay in applying for a commission. [99] Such delay raises the suspicion that the application is not bona fide and is good ground for refusing the application. [100] If the delay in making the application would, if the application were granted, involve the postponement of the trial, the court may refuse the application, [101] or the trial may be postponed and the party requiring the adjournment be ordered to pay the costs thereof. [102]

Subrule (4): 'Before any commissioner within the Republic.' If the evidence of any person is to be taken before any commissioner within the Republic, such person may be subpoenaed to appear before the commissioner to give evidence as if at the trial. A witness who has been so subpoenaed to appear before a commissioner and fails to appear or to give evidence or to produce documents, is probably liable to the same penalties as any other witness who fails to obey a subpoena or fails to give evidence. See, in this regard, ss 35 and 36 of the Superior Courts Act 10 of 2013 and the notes thereto in Volume 1, Part A2.

If the evidence of any person is to be taken before a commissioner outside the Republic, the court cannot compel a witness either to appear before the commission or to comply with an order *duces tecum*. It merely directs that the witness be examined, and leaves it to the court in whose area the witness is to compel his attendance. [103] The following possible courses of action present themselves:

(i) In those countries where there is legislation similar or comparable to the Foreign Courts Evidence Act 80 of 1962, [104] the procedure provided for in such legislation may be adopted.

(ii) Where there is no such legislation, the procedure laid down in the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, may be followed, but only in respect of those countries which have acceded to the Convention. The Republic has acceded to the Convention under certain reservations, etc. [105]

(iii) Where there is no such legislation, as aforesaid, and the Convention cannot be applied, the only alternative will be to apply to the court before which the action is pending for the issue of a letter of request to the government of the country where the witness is and the commission is to sit. In such a letter of request the government concerned is requested to take steps to obtain the evidence of the witness. If the court grants the application, the request is forwarded to a proper authority in the foreign country through the Department of International Relations and Cooperation (formerly the Department of Foreign Affairs). Whether or not effect is given to the letter of request depends entirely upon the foreign country concerned.

Subrule (5): 'Shall be adduced upon oral examination.' Although this subrule envisages the possibility that the court may direct the commission to conduct the examination by interrogatories and cross-interrogatories, the usual and normal position is that the evidence is adduced upon oral examination before the commissioner. The subrule provides that a witness shall give his evidence under oath or affirmation in the presence of the parties and their legal representatives, and that the witness shall be subject to cross-examination and re-examination.

Subrule (6): 'Shall not decide upon the admissibility of evidence.' A commissioner does not have the power to decide on the admissibility or relevance of evidence. [106] The ordinary practice, enshrined in the provisions of this subrule, is for the commissioner to take the evidence as tendered, noting any objection taken thereto and reporting to the trial court that the objection was taken and noted by him. When the record of the evidence taken by the commissioner is presented to the trial court, any lawful objection pertaining to the admissibility or relevance of

such evidence may be raised and must be decided by the court hearing the matter. [107]

Subrule (8): 'The record of the evidence.' Evidence taken on commission for a case in a particular court, which case was afterwards withdrawn owing to lack of jurisdiction, cannot be used when the same claim is brought on another summons in another court. [108]

1 In s 1 of the Superior Courts Act 10 of 2013 the term 'Superior Court' is defined as 'the Constitutional Court, the Supreme Court of Appeal, the High Court and any court of a status similar to the High Court'. Courts of a status similar to the High Court include the Labour Court, the Land Claims Court, the Competition Appeal Court and the Electoral Court.

2 *PFE International v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 (CC) at 6I–7A, 7H–8C, 8H–10C and 11C.

3 In s 1 of the Superior Courts Act 10 of 2013 the term 'Superior Court' is defined as 'the Constitutional Court, the Supreme Court of Appeal, the High Court and any court of a status similar to the High Court'. Courts of a status similar to the High Court include the Labour Court, the Land Claims Court, the Competition Appeal Court and the Electoral Court.

4 Cf *R v Hefferman* 1924 EDL 1.

5 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.

6 *Sher v Sadowitz* 1970 (1) SA 193 (C) at 195; *Matisonn v Additional Magistrate, Cape Town* 1980 (2) SA 619 (C) at 625; *S v Matisonn* 1981 (3) SA 302 (A) at 313. See also *Meyers v Marcus* 2004 (5) SA 315 (C) at 324E; *South African Coaters (Pty) Ltd v St Paul Insurance Co (SA) Ltd* 2007 (6) SA 628 (D) at 634E–F.

7 *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 743D; *South African Coaters (Pty) Ltd v St Paul Insurance Co (SA) Ltd* 2007 (6) SA 628 (D) at 633E.

8 *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 734J–735A; *South African Coaters (Pty) Ltd v St Paul Insurance Co (SA) Ltd* 2007 (6) SA 628 (D) at 633E–634A. See also *Mostert v Nash* 2018 (5) SA 409 (SCA) at 422B–C.

9 *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 734F–G.

10 *Hudson v Hudson* 1927 AD 259 at 268. See also *De Klerk v Scheepers* 2005 (5) SA 244 (T) at 246C–D; *South African Coaters (Pty) Ltd v St Paul Insurance Co (SA) Ltd* 2007 (6) SA 628 (D) at 633F–G.

11 *South African Coaters (Pty) Ltd v St Paul Insurance Co (SA) Ltd* 2007 (6) SA 628 (D) at 634A.

12 *Minister of Police v Premier of the Western Cape* 2014 (1) SA 1 (CC) at 3I.

13 See *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 735C–F.

14 See *Trust Sentrum (Kaapstad) (Edms) Bpk v Zevenberg* 1989 (1) SA 145 (C) at 148C–J where it is also pointed out that the introduction of this subrule eliminated the conflict in procedure which had in this regard arisen between the Cape and Transvaal courts (see *Waterhouse v Shields* 1924 CPD 155; *King v Margau* 1949 (1) SA 661 (W); *Bladen v Weston* 1967 (4) SA 429 (C); *Picked Properties (Pty) Ltd v Northcliff Townships (Pty) Ltd* 1972 (3) SA 770 (W)).

15 *Trust Sentrum (Kaapstad) (Edms) Bpk v Zevenberg* 1989 (1) SA 145 (C) at 150F.

16 See *Davis v Davis* (1894) 11 SC 253; *Hartung v Hartung* 1913 EDL 62.

17 2018 (6) SA 55 (SCA).

18 At 61F–H.

19 *Brink v Wilson & Glynne* (1880) 1 SC 331; *Martin v Martin* (1885) 3 SC 330; *Knight v Knight* (1900) 14 EDC 162; *Ex parte Tyzzer* 1910 TH 185; *Ex parte Williams* 1912 CPD 708; *Hartung v Hartung* 1913 EDL 62; *Atkinson v Atkinson* 1931 WLD 212; *Ex parte Duncan* 1932 TPD 138; *Howden v Howden* 1932 NPD 764.

20 See *Atkinson v Atkinson* 1931 WLD 212.

21 1965 (4) SA 136 (T).

22 *Birgin Bower Investments (Pty) Ltd v Marketing International* 2003 (3) SA 382 (W).

23 2017 (1) SA 236 (GJ). See also *M K v Transnet Ltd t/a Portnet* [2018] 4 All SA 251 (KZD).

24 See, in general, Govender 'Taking of evidence abroad' 2007 (August) *De Rebus* 24.

25 This has been stressed on numerous occasions (see for example *Fleischer v Klassen* (1883) 3 EDC 207; *Becker v Beukes* (1885) 4 EDC 313; *Crowder v The Natal Bank* (1891) 12 NLR 191; *Botma v Norton* (1905) 22 SC 65; *Kantor v James Bell & Co* (1906) 27 NLR 363; *Hills v Hills (II)* 1933 NPD 293; *Princess Eugenie of Greece v Prince Dominique Radziwill* 1949 (2) SA 259 (C) at 261; *S v Hassim* 1973 (3) SA 443 (A) at 452; *Nxasana v Minister of Justice* 1976 (3) SA 745 (D) at 760; *Smitham v De Luca* 1977 (2) SA 582 (W); *S v Hoare* 1982 (3) SA 306 (N) at 308; *S v Mzinyathi* 1982 (4) SA 118 (T); *Meyerson v Health Beverages (Pty) Ltd* 1989 (4) SA 667 (C) at 675H; *Fernandes v Fittinghoff & Fihrer CC* 1993 (2) SA 704 (W) at 707I and 708C).

26 *S v Ffrench-Beytagh (2)* 1971 (4) SA 426 (T) at 426F.

27 *Robinson v Randfontein Estates GM Co Ltd* 1918 TPD 420; *Pountas' Trustee v Coustas* 1924 WLD 170; *Grant v Grant* 1949 (1) SA 22 (C) at 30; *Princess Eugenie of Greece v Prince Dominique Radziwill* 1949 (2) SA 259 (C); *S v Ffrench-Beytagh (2)* 1971 (4) SA 426 (T) at 428.

28 *Grant v Grant* 1949 (1) SA 22 (C) at 30; *Federated Insurance Co Ltd v Britz* 1981 (4) SA 74 (T) at 77; *Myerson v Health Beverages (Pty) Ltd* 1989 (4) SA 667 (C) at 677A; *Fernandes v Fittinghoff & Fihrer CC* 1993 (2) SA 704 (W) at 709C.

29 1918 TPD 420 at 422.

30 This statement was approved in *Grant v Grant* 1949 (1) SA 22 (C) at 30; *S v Ffrench-Beytagh (2)* 1971 (4) SA 426 (T) at 428G; *S v Hassim* 1972 (2) SA 448 (N) at 456; *Federated Insurance Co Ltd v Britz* 1981 (4) SA 74 (T) at 77H; *S v Hoare* 1982 (3) SA 306 (N) at 308E–H.

31 *Kantor v James Bell & Co* (1906) 27 (NLR) 363 at 366.

32 *Kantor v James Bell & Co* (1906) 27 NLR 363; *Rollnick v Rollnick* 1923 (2) PH F16 (W); *Hills v Hills (II)* 1933 NPD 293; *Myerson v Health Beverages (Pty) Ltd* 1989 (4) SA 667 (C) at 676C.

33 *Fernandes v Fittinghoff & Fihrer CC* 1993 (2) SA 704 (W) at 708H–709A.

34 *Stanton v Ferguson* (1885) 3 HCG 435; *Kantor v James Bell & Co* (1906) 27 NLR 363; *Botha v Van Rooyen* (1909) 30 NLR 13; *Freedman v Bauer & Black* 1941 WLD 161 at 175; *Grant v Grant* 1949 (1) SA 22 (C) at 26–7; *Guggenheim v Rosenbaum (1)* 1961 (4) SA 15 (W) at 18; *Nxasana v Minister of Justice* 1976 (3) SA 745 (D) at 760–1.

35 *Ross T Smith & Co v A Findlay & Co* (1899) 20 NLR 148. In *Freedman v Bauer & Black* 1941 WLD 161 at 175 Ramsbottom J stated that it 'is customary to require the name of one witness at any rate to be given, but I shall assume that this can be dispensed with'. However, in *De Kock v De Kock* 1924 (1) PH F22 (C) the court refused to grant a commission where the names of the witnesses were not specified.

36 *Hurwitz NO v Southern Insurance Association Ltd* 1970 (3) SA 80 (W); and see *Curator of Marais' Estate v Woodbine Cloete* (1880) Kotzé 187.

37 In *Hills v Hills (II)* 1933 NPD 293 at 294 it was held that a party seeking to dispense with the personal appearance of a witness must show that it is 'necessary for the purposes of justice that the ordinary way of taking evidence should be departed from'. See further the notes to rule 39(20) s v 'If it appears convenient … make any order with regard to the conduct of the trial' below.

38 *Fernandes v Fittinghoff & Fihrer CC* 1993 (2) SA 704 (W) at 707J–708A.

39 *Myerson v Health Beverages (Pty) Ltd* 1989 (4) SA 667 (C) at 675J–676A.

40 *Fernandes v Fittinghoff & Fihrer CC* 1993 (2) SA 704 (W) at 708B.

41 *Kantor v James Bell & Co* (1906) 27 NLR 363; *Davis v Davis* 1945 WLD 87 at 91; *Grant v Grant* 1949 (1) SA 22 (C) at 26–7; *Guggenheim v Rosenbaum (1)* 1961 (4) SA 15 (W) at 18; *Rafbros (Tvl) (Pty) Ltd v Nortier* 1968 (1) SA 160 (W); *Nxasana v Minister of Justice* 1976 (3) SA 745 (D) at 760H–761A; *Federated Insurance Co Ltd v Britz* 1981 (4) SA 74 (T) at 75; *S v Mzinyathi* 1982 (4) SA 118 (T); *Meyerson v Health Beverages (Pty) Ltd* 1989 (4) SA 667 (C) at 678A; *Fernandes v Fittinghoff & Fihrer CC* 1993 (2) SA 704 (W) at 708D–F. Upon admission by the other side of the facts to which a commission was sought, the court refused the application in *Excombe v Henderson & Scott* 1872 NLR 90.

42 See, for example, *Smitham v De Luca* 1977 (2) SA 582 (W); *S v Ffrench-Beytagh (2)* 1971 (4) SA 426 (T); *Federated Insurance Co Ltd v Britz* 1981 (4) SA 74 (T) at 77; *S v Mzinyathi* 1982 (4) SA 118 (T); *Fernandes v Fittinghoff & Fihrer CC* 1993 (2) SA 704 (W) at 708E.

43 *S v Ffrench-Beytagh (2)* 1971 (4) SA 426 (T) at 428; *S v Hassim* 1972 (2) SA 448 (N) at 456; *S v Hoare* 1982 (3) SA 306 (N) at 309; *Fernandes v Fittinghoff & Fihrer CC* 1993 (2) SA 704 (W) at 709D–E.

44 See *Robinson v Randfontein Estates GM Co Ltd* 1918 TPD 420 at 422.

45 *Robinson v Randfontein Estates GM Co Ltd* 1918 TPD 420 at 423; *Pountas' Trustee v Coustas* 1924 WLD 170 at 171–2. See also *Fernandes v Fittinghoff & Fihrer CC* 1993 (2) SA 704 (W) at 708G.

46 *Wiley v African Realty Trust Ltd* 1908 TH 86; *Biggs v Molife* (1910) 20 CTR 532.

47 *Fass & Co v Michaelson* (1884) 5 NLR 60.

48 *The Globe & Phoenix Gold Mining Co Ltd v The Rhodesian Corporation Ltd* 1932 (2) PH F103 (SR), approved of in *Hills v Hills (II)* 1933 NPD 293 at 294–5.

49 *Carnes v Maeder* 1939 WLD 207.

50 *SA Mutual Life Assurance Society v African Life Assurance Society Ltd* (1909) 19 CTR 38; *Gough v Woolley* 1912 EDL 39; *Jokl v Alexander* 1947 (3) SA 542 (W); and see *Kitchener v South African Native Trust* 1962 (2) SA 311 (T).

51 *Hind v Boswell Brothers Circus (Pty) Ltd* 1952 (2) SA 158 (N).

52 *Matthews v Hartley & Son* (1882) 1 HCG 13; *Eliovson v Magid* 1908 TS 558; *SA Mutual Life Assurance Society v African Life Assurance Society Ltd* (1909) 19 CTR 38; *James Bruce & Co v Gilbey* 1914 CPD 789.

53 *Natal Land and Colonization Co Ltd v J W Rycroft* (1906) 27 NLR 215; *Muller v Phillips & Co* (1907) 24 SC 32. If the question of admissibility is left to be decided at the trial, the court may reserve the costs of the application as also the costs of the commission for decision by the trial judge (*Zackon & Gordon v Roux* 1933 (2) PH F117 (C); *Roux v Zackon, Gordon & Sovinsky (2)* 1933 (2) PH F190 (C); and see *Rafbros (Tvl) (Pty) Ltd v Nortier* 1968 (1) SA 160 (W)).

54 *Guggenheim v Rosenbaum (1)* 1961 (4) SA 15 (W) at 18.

55 Such evidence is usually inadmissible and leave will normally not be granted to take it on commission (*Guggenheim v Rosenbaum (1)* 1961 (4) SA 15 (W)).

56 *Rafbros (Tvl) (Pty) Ltd v Nortier* 1968 (1) SA 160 (W). See also *Hespel v Hespel* 1948 (3) SA 257 (E) at 261 and *Grant v Grant* 1949 (1) SA 22 (C) at 28.

57 *Carnes v Maeder* 1939 WLD 207.

58 *McLeod v Green and Sea Point Municipality* (1899) 16 SC 398; *Botha v Van der Vyver* (1908) 18 CTR 20; *Ex parte Brunt* 1916 CPD 579; *Shield Insurance Co Ltd v Deysel* 1978 (2) SA 164 (SE); and see *Joseph v Parker* 1917 EDL 281.

59 *Cohen v Cohen* (1884) 4 EDC 40; *Luckie v Oman* (1904) 14 CTR 515; *Batchelor v SA Breweries* (1904) 14 CTR 1021; *Delany v Medefindt* 1908 EDC 48; *Roycroft v Roycroft* (1909) 30 NLR 104; *Janisch v Herold* 1914 CPD 258; *Viking Corporation v Navigatione Libera Triestina* SA 1935 CPD 151; *Lindsay-Dickson v Southern Insurance Association Ltd* 1959 (1) SA 528 (D).

60 *Robinson v Randfontein Estates GM Co Ltd* 1918 TPD 420 at 422; *Johnson NO v Guernsey & Foreign Investment Trust Ltd* 1935 CPD 448; *Princess Eugenie of Greece v Prince Dominique Radziwill* 1949 (2) SA 259 (C); *Federated Insurance Co Ltd v Britz* 1981 (4) SA 74 (T); *Fernandes v Fittinghoff & Fihrer CC* 1993 (2) SA 704 (W) at 708G.

61 *Laatz v Potgieter* (1903) 24 NLR 228; *Dhooma v Pillay* (1906) 27 NLR 248; *Botha v Van Rooyen* (1909) 30 NLR 13; *Estate Bernhardt v Kent* (1910) 20 CTR 508; *Lloyd v Finnemore* 1917 EDL 270; *Gray v Gray* 1923 OPD 111.

62 *Trollip v Tromp and Van Zweel* (1880) 1 NLR 32; *Ex parte Preller qq Viljoen* (1883) 1 SAR 54; *Grand Junction Railway v Walker* (1905) 15 CTR 599; *Becker v Wolfaardt* (1906) 16 CTR 727; *Joseph v Parker* 1917 EDL 281.

63 In *Federated Insurance Co Ltd v Britz* 1981 (4) SA 74 (T) witnesses resident in England refused to testify in South Africa unless all their expenses and losses (including loss of earnings) as well as substantial additional payments were made to them. The party requiring their evidence declined to accede to these terms and the court dealt with the matter on the basis that the witnesses had refused to testify in South Africa.

64 *Robinson v Randfontein Estates GM Co Ltd* 1918 TPD 420 at 421. Other examples of civil matters in which commissions were granted where witnesses were beyond the jurisdiction are: *National Bank of SA Ltd v Peel* (1909) 19 CTR 1011; *Pountas' Trustee v Coustas* 1924 WLD 170; *Howaldt & Volmer v Land & Agricultural Bank of SWA* 1924 SWA 91; *Hespel v Hespel* 1948 (3) SA 257 (E); *Grant v Grant* 1949 (1) SA 22 (C); *Federated Insurance Co Ltd v Britz* 1981 (4) SA 74 (T). Older cases, which should perhaps be treated with some circumspection in view of improvements in communication and transport, include *Ford v Greene* (1886) 7 NLR 136; *Escombe v Folkes* (1890) 11 NLR 68; *Raw & Co v Hugh Parker & Co* (1890) 11 NLR 112; *Bloemberger v Van Gorkum* (1894) Off Rep 159.

65 *Coronel v Cohen & Co* (1890) 11 NLR 85; *Moosajee v Randles Brothers & Hudson* (1894) 15 NLR 222; *Van Heerden v Jooste* (1917) 17 CTR 580; *Langerman v Milnerton Estates Ltd* 1912 CPD 870.

66 See *McEwan's Curators v Pietermaritzburg Corporation* (1885) 6 NLR 66; *Ex parte Wood v Wood* (1891) 6 EDC 163; *Bruhns v Frylinck* 1924 CPD 299.

67 *Robinson v Randfontein Estates GM Co Ltd* 1918 TPD 420 at 422.

68 *Janisch v Herold* 1914 CPD 258; *Shield Insurance Co Ltd v Deysel* 1978 (2) SA 164 (SE).

69 *Princess Eugenie of Greece v Prince Dominique Radziwill* 1949 (2) SA 259 (C); *Segal v Segal* 1949 (4) SA 86 (C) at 89.

70 *Kantor v James Bell & Co* (1906) 27 NLR 363; *Longe v Lageson* 1914 WLD 13; *Hespel v Hespel* 1948 (3) SA 257 (E) at 263; *Princess Eugenie of Greece v Prince Dominique Radziwill* 1949 (2) SA 259 (C); *Caldwell v Chelcourt Ltd* 1965 (2) SA 270 (N) at 272. Commissions to hear the evidence of plaintiffs were granted in *Escombe v Folkes* (1890) 11 NLR 68 and *Bloemberger v Van Gorkum* (1894) 1 Off Rep 159.

71 *Rollnick v Rollnick* 1923 (2) PH F16 (W); *Harris v Machanick* 1922 CPD 304; *Jacobson v Harkness* 1936 CPD 173; *Freedman v Bauer and Black* 1941 WLD 161 at 176; *Grant v Grant* 1949 (1) SA 22 (C) at 31; *Meyerson v Health Beverages (Pty) Ltd* 1989 (4) SA 667 (C) at 678D.

72 *Tipper & Good v Van den Burg* (1879) Kotzé 112; *Ex parte Crawford* (1885) 2 SAR 24.

73 *Morgan v Hiddingh* (1898) 8 CTR 318; a commission was granted in *Gotze v Bergl* (1904) 14 CTR 821.

74 *S v Ffrench-Beytagh (2)* 1971 (4) SA 426 (T) at 430. See also *Biet v Trubshawe* (1887) 8 NLR 35, *Pountas' Trustee v Coustas* 1924 WLD 170 at 172–3; *Rhodesian Railways Ltd v Markham & Willoughby's Consolidated Co Ltd* 1924 SR 57; *Princess Eugenie of Greece v Prince Dominique Radziwill* 1949 (2) SA 259 (C) at 264; *Hespel v Hespel* 1948 (3) SA 257 (E) at 265.

75 *Robinson v Randfontein Estates GM Co Ltd* 1918 TPD 420 at 422; and see *S v Hassim* 1972 (2) SA 448 (N) at 450E–G.

76 *Harris v Machanick* 1922 CPD 304; *Princess Eugenie of Greece v Prince Dominique Radziwill* 1949 (2) SA 259 (C); *Caldwell v Chelcourt Ltd* 1965 (2) SA 270 (N); *Federated Insurance Co Ltd v Britz* 1981 (4) SA 74 (T); *Fernandes v Fittinghoff & Fihrer CC* 1993 (2) SA 704 (W) at 709B.

77 *Montgomery v Montgomery* (1910) 20 CTR 9; *Lange v Lageson* 1914 WLD 13; *Hespel v Hespel* 1948 (3) SA 257 (E) at 265; *Federated Insurance Co Ltd v Britz* 1981 (4) SA 74 (T).

78 *Grant v Grant* 1949 (1) SA 22 (C) at 32; *Princess Eugenie of Greece v Prince Dominique Radziwill* 1949 (2) SA 259 (C) at 263; *Fernandes v Fittinghoff & Fihrer CC* 1993 (2) SA 704 (W) at 709C.

79 *Paarl Roller Flour Mills v Union Government* 1925 (1) PH F39 (C), following *Saninena Distributing Syndicate v Cape Cold Storage and Supply Co Ltd* (1908) 18 CTR 774.

80 In *Jacobson v Harkness* 1936 CPD 173 the registrar of the local court was authorized to appoint a substitute, while in *S v Ffrench-Beytagh (2)* 1971 (4) SA 426 (T) the commissioner himself was authorized to appoint a substitute in the event of it being impossible for him to attend.

81 *Wood Bros v Gardner* (1886) 5 EDC 223.

82 *Malan v Rosenburg & Bros* (1892) 6 EDC 223.

83 *'British Yeoman' v Hunt, Leuchars & Hepburn Ltd* (1912) 33 NLR 418.

84 *'British Yeoman' v Hunt, Leuchars & Hepburn Ltd* (1912) 33 NLR 418 at 419–22.

85 This was done in, for example, *Zackon & Gordon v Roux* 1933 (2) PH F117 (C); *Rafbros (Tvl) (Pty) Ltd v Nortier* 1968 (1) SA 160 (W).

86 See *Hamburg v Ohlsson's Cape Breweries Ltd* 1908 TS 924.

87 This course was adopted in *Hespel v Hespel* 1948 (3) SA 257 (E) at 265 and in *Federated Insurance Co Ltd v Britz* 1981 (4) SA 74 (T).

88 *May v Federal Supply and Cold Storage Co Ltd* (1904) 25 NLR 244.

89 *Policansky Bros v Hermann & Canard* 1911 TPD 319.

90 *Don v Erasmus* (1881) Kotzé 254; *Hall v Compagnie Francais* (1883) 1 HCG 335; *Schnitzler v Trustees of the Insolvent Estate of Schnitzler and Peyke* (1892) 6 EDC 190; *Hamburg v Ohlsson's Cape Breweries Ltd* 1908 TS 924 at 928; *Durban Corporation v Pather* (1909) 30 NLR 96.

91 *McLeod v Green and Sea Point Municipality* (1899) 16 SC 398; *Estate Bernhardt v Kent* (1910) 20 CTR 508; *Ex parte Brunt* 1916 CPD 579.

92 *Cullen v Cullen* (1887) 8 NLR 34; *Delany v Medefindt* 1908 EDC 48; *Roycroft v Roycroft* (1909) 30 NLR 104; *Kalan v Kalan* 1930 CPD 230; *Viking Corporation v Navigatione Libera Triestina SA* 1935 CPD 151; *Lindsay-Dickson v Southern Insurance Association Ltd* 1959 (1) SA 528 (D); *Smitham v De Luca* 1977 (2) SA 582 (W).

93 *Natal Land Colonization Co Ltd v Stainbank* (1884) 5 NLR 186; *Master and Owners SS 'Hilcragg' v Beckett* (1902) 23 NLR 450.

94 (1908) 18 CTR 20.

95 (1881) 1 SC 139. See also *Ex parte Aitchison* 1906 TS 7; *Ex parte Lesser* (1910) 20 CTR 165. In *Ex parte Buxbaum* (1939) 56 *SALJ* 113 leave was refused at this stage.

96 *Howaldt & Vollmer v Land & Agricultural Bank of SWA* 1924 SWA 91.

97 1961 (4) SA 15 (W).

98 *Guggenheim v Rosenbaum (1)* 1961 (4) SA 15 (W) at 18C.

99 *Grant v Grant* 1949 (1) SA 22 (C) at 30; *Meyerson v Health Beverages (Pty) Ltd* 1989 (4) SA 667 (C) at 678G.

100 *Matthews v Hartley & Son* (1882) 1 HCG 13; *Fleischer v Klassen* (1883) 3 EDC 207.

101 *Botma v Norton* (1905) 22 SC 65. See also *Fleischer v Klassen* (1883) 3 EDC 207.

102 *Shaw's Trustee v Alcott* (1886) 5 EDC 122; *Bradley v Barr* (1901) 6 HCG 120.

103 *Brittain v Pickburn* 1929 CPD 436; *Segal v Segal* 1949 (4) SA 86 (C).

104 There is such legislation in, for example, neighbouring countries such as Botswana, Lesotho, Swaziland and Zimbabwe.

105 See GN R1271 of 30 October 1997 in *GG* 18316 of 3 October 1997.

106 *Robinson v Benson and Simpson* 1918 WLD 1 at 7.

107 In *De Jong v Durbach & Co* (1923) 1 PH F3 (GW) a judgment was set aside where the only evidence justifying the judgment was hearsay evidence taken on commission.

108 *Smith v Smith* (1903) 24 NLR 38.

39 Trial

(1) If, when a trial is called, the plaintiff appears and the defendant does not appear, the plaintiff may prove his claim so far as the burden of proof lies upon him and judgment shall be given accordingly, in so far as he has discharged such burden. Provided that where the claim is for a debt or liquidated demand no evidence shall be necessary unless the court otherwise orders.

(2) When a defendant has by his default been barred from pleading, and the case has been set down for hearing, and the default duly proved, the defendant shall not, save where the court in the interests of justice may otherwise order, be permitted, either personally or by an advocate, to appear at the hearing.

(3) If, when a trial is called, the defendant appears and the plaintiff does not appear, the defendant shall be entitled to an order granting absolution from the instance with costs, but may lead evidence with a view to satisfying the court that final judgment should be granted in his favour and the court, if so satisfied, may grant such judgment.

(4) The provisions of subrules (1) and (2) shall apply to any person making any claim (whether by way of claim in reconvention or third party notice or by any other means) as if he were a plaintiff, and the provisions of subrule (3) shall apply to any person against whom such a claim is made as if he were a defendant.

(5) Where the burden of proof is on the plaintiff, he or one advocate for the plaintiff may briefly outline the facts intended to be proved and the plaintiff may then proceed to the proof thereof.

(6) At the close of the case for the plaintiff, the defendant may apply for absolution from the instance, in which event the defendant or one advocate on his behalf may address the court and the plaintiff or one advocate on his behalf may reply. The defendant or his advocate may thereupon reply on any matter arising out of the address of the plaintiff or his advocate.

(7) If absolution from the instance is not applied for or has been refused and the defendant has not closed his case, the defendant or one advocate on his behalf may briefly outline the facts intended to be proved and the defendant may then proceed to the proof thereof.

(8) Each witness shall, where a party is represented, be examined, cross-examined or re-examined as the case may be by only one (though not necessarily the same) advocate for such party.

(9) If the burden of proof is on the defendant, he or his advocate shall have the same rights as those accorded to the plaintiff or his advocate by subrule (5).

(10) Upon the cases on both sides being closed, the plaintiff or one or more of the advocates on his behalf may address the court and the defendant or one or more advocates on his behalf may do so, after which the plaintiff or one advocate only on his behalf may reply on any matter arising out of the address of the defendant or his advocate.

(11) Either party may apply at the opening of the trial for a ruling by the court upon the onus of adducing evidence, and the court after hearing argument may give a ruling as to the party upon whom such onus lies: Provided that such ruling may thereafter be altered to prevent injustice.

(12) If there be one or more third parties or if there be defendants to a claim in reconvention who are not plaintiffs in the action, any such party shall be entitled to address the court in opening his case and shall lead his evidence after the evidence of the plaintiff and of the defendant has been concluded and before any address at the conclusion of such evidence. Save in so far as the court shall otherwise direct, the defendants to any counterclaim who are not plaintiffs shall first lead their evidence and thereafter any third parties shall lead their evidence in the order in which they became third parties. If the onus of adducing evidence is on the claimant against the third party or on the defendant to any claim in reconvention, the court shall make such order as may seem convenient with regard to the order in which the parties shall conduct their cases and address the court, and in regard to their respective rights of reply. The provisions of subrule (11) shall *mutatis mutandis* apply with regard to any dispute as to the onus of adducing evidence.

(13) Where the onus of adducing evidence on one or more of the issues is on the plaintiff and that of adducing evidence on any other issue is on the defendant, the plaintiff shall first call his evidence on any issues in respect of which the onus is upon him, and may then close his case. The defendant, if absolution from the instance is not granted, shall, if he does not close his case, thereupon call his evidence on all issues in respect of which such onus is upon him.

(14) After the defendant has called his evidence, the plaintiff shall have the right to call rebutting evidence on any issues in respect of which the onus was on the defendant: Provided that if the plaintiff shall have called evidence on any such issues before closing his case he shall not have the right to call any further evidence thereon.

(15) Nothing in subrule (13) and (14) contained shall prevent the defendant from cross-examining any witness called at any stage by the plaintiff on any issue in dispute, and the plaintiff shall be entitled to re-examine such witness consequent upon such cross-examination without affecting the right given to him by subrule (14) to call evidence at a later stage on the issue on which such witness has been cross-examined. The plaintiff may further call the witness so re-examined to give evidence on any such issue at a later stage.

(16) A record shall be made of—

(a) any judgment or ruling given by the court,

(b) any evidence given in court,

(c) any objection made to any evidence received or tendered,

(d) the proceedings of the court generally (including any inspection *in loco* and any matter demonstrated by any witness in court); and

(e) any other portion of the proceedings which the court may specifically order to be recorded.

(17) Such record shall be kept by such means as to the court seems appropriate and may in particular be taken down in shorthand or be recorded by mechanical means.

(18) The shorthand notes so taken or any mechanical record shall be certified by the person taking the same to be correct and shall be filed with the registrar. It shall not be necessary to transcribe them unless the court or a judge so directs or a party appealing so requires. If and when transcribed, the transcript of such notes

or record shall be certified as correct by the person transcribing them and the transcript, the shorthand notes and the mechanical record shall be filed with the registrar. The transcript of the shorthand notes or mechanical record certified as correct shall be deemed to be correct unless the court otherwise orders.

(19) Any party to any matter in which a record has been made in shorthand or by mechanical means may apply in writing through the registrar to a judge to have the record transcribed if an order to that effect has not already been made. Such party shall be entitled to a copy of any transcript ordered to be made upon payment of the prescribed fees.

(20) If it appears convenient to do so, the court may at any time make any order with regard to the conduct of the trial as to it seems meet, and thereby vary any procedure laid down by this rule.

(21) Every stenographer employed to take down a record and every person employed to make a mechanical record of any proceedings shall be deemed to be an officer of the court and shall, before entering on his duties, take the following oath:

I, A.B., do swear that I shall faithfully, and to the best of my ability, record in shorthand, or cause to be recorded by mechanical means, as directed by the judge, the proceedings in any case in which I may be employed as an officer of the court, and that I shall similarly, when required to do so, transcribe the same or, as far as I am able, any shorthand notes, or mechanical record, made by another stenographer or person employed to make such mechanical record.

[Subrule (21) substituted by GN R235 of 18 February 1966.]

(22) By consent the parties to a trial shall be entitled, at any time, before trial, on written application to a judge through the registrar, to have the cause transferred to the magistrate's court: Provided that the matter is one within the jurisdiction of the latter court whether by way of consent or otherwise.

(23) The judge may, at the conclusion of the evidence in trial actions, confer with the advocates in his chambers as to the form and duration of the addresses to be submitted in court.

(24) Where the court considers that the proceedings have been unduly prolonged by the successful party by the calling of unnecessary witnesses or by excessive examination or cross-examination, or by over-elaboration in argument, it may penalise such party in the matter of costs.

Commentary

General. In civil proceedings a trial is the judicial investigation of the claim and defence of litigants as disclosed in the summons and plea; [1] and for that purpose, the hearing of such evidence as may be brought forward by the parties; after which the parties or their legal representatives (if they so desire) are heard in argument, and the judgment of the court is given. The term 'trial' is not necessarily confined to proceedings in which evidence is heard, [2] but may include, for example, the case where the defendant fails to enter appearance or to plead, and the plaintiff asks for default judgment; but such use of the word is unusual. [3]

Rule 39 lays down the procedure for the conduct of the trial. There are, however, other rules and sections of the Superior Courts Act 10 of

2013 which also deal with the conduct of the trial and with the various incidents that may be attendant thereon or that may arise during the course of a trial. For convenience, references to these rules and sections of the Act are set out below, more or less in the sequence in which consideration of the various matters may be required.

1. Venue of trial—s 8(6).
2. Removal of proceedings from one division to another or from one seat to another—s 27.
3. Transferral of trial to the magistrate's court—rule 39(22).
4. Recusation of judge—see the *excursus* to s 14 s v 'Recusation' in Volume 1, Part A2.
5. Proceedings to be carried on in open court—s 32.
6. Record of proceedings—rule 39(16) to (19) and (21).
7. Penalties for failure of witness to attend proceedings or to produce documents, etc—s 35.
8. Plaintiff fails to appear—rule 39(3) and (4).
9. Defendant fails to appear—rule 39(1).
10. Defendant barred from pleading—rule 39(2) and (4).
11. Special cases, separation of issues and adjudication upon point of law—rule 33.
12. Opening case—rule 39(5) and (9).
13. Ruling as to who should begin—rule 39(11).
14. Variation of procedure laid down by rule 39—rule 39(20).
15. Leading of evidence:
    (a) For plaintiff—rule 35(5), (8), (13), (14) and (15).
    (b) For defendant—rule 39(8), (9), (13) and (15).
    (c) Inspections *in loco*—rule 39(16)*(d)*.
16. Evidence upon affidavit—rule 38(2).
17. Examination by interrogatories—s 39.
18. Commissions *de bene esse*—rule 38.
19. Reference of particular matters for investigation by referee—s 38.
20. Absolution from the instance:
    (a) At the close of the case for the plaintiff—rule 39(6).
    (b) At the close of the case—see the notes to rule 39(6) s v 'Apply for absolution from the instance' below.
    (c) Where the burden of proof is on the defendant—see the notes to rule 39(6) s v 'Apply for absolution from the instance' below.
21. Opening the case for the defendant in event of absolution from the instance not applied for/refused—rule 39(7).
22. Procedure in event of third parties/defendants to a claim in reconvention who are not plaintiffs—rule 39(12).
23. Addressing the court—rule 39(10) and (23).
24. Removal of certain persons—s 41.
25. Contempt of court—see the *excursus* to s 41 s v 'Contempt of court' in Volume 1, Part A2.
26. Intervention by third party—rule 12.
27. Joinder of parties—rule 10.
28. Consolidation of actions—rule 11.
29. Amendment of pleadings during trial—rule 28.
30. Withdrawal, settlement, discontinuance, postponement and abandonment—rule 41.
31. Judgment—s 14 and rule 39(24).

Rule 39(20) provides that if it appears convenient to do so, the court may at any time make any order with regard to the conduct of the trial as to it seems meet, and thereby vary any procedure laid down by rule 39. See further the notes to that subrule below.

If parties reach an agreement to limit issues during trial they are bound by the terms of such agreement. [4]

It is the duty of the trial judge to inform the parties' counsel of a relevant point which the trial judge has come across or which was not raised by the litigants in evidence or in the written and oral submissions to the court. This is especially so where that point is, in the view of the judge, conclusive of the matter. In such instance, the trial judge should invite counsel to submit argument on the point. [5] It is undesirable for a court to deliver judgment with a substantial portion containing issues never canvassed or relied on by counsel. [6] A trial judge may only have regard to the evidence placed before the court during the course of the hearing of the matter and reliance on facts not averred in the pleadings or raised in court constituted serious misdirection. [7]

As a general rule, if the judge is unable to complete a part-heard trial, the judge's successor should recall the witnesses who have given evidence before the first judge and hear their evidence *de novo*. This applies in the unfortunate event of the judge's death before the conclusion of the trial and also where the judge resigns on grounds of ill-health and cannot complete the case. [8] The abortive hearing represents an uncompleted stage in the proceedings with which the court subsequently hearing the matter becomes seized. The second court therefore retains full jurisdiction and discretion in regard to the costs of the abortive hearing, as with all other stages and incidents in the proceedings. [9]

If the evidence has only just begun it may be practicable and unprejudicial for the parties to agree that the evidence already led should stand of record, and the trial continue from that stage. Such a procedure does not deprive the eventual judgment of its validity as such nor renders it the mere award of an arbitrator. [10] If the trial has reached an advanced stage, the general rule should apply and the evidence taken by the incapacitated judge should be led over again. This is, of course, subject to the agreement of the parties, and provided that they are satisfied to do so, they may even go to the length of agreeing that judgment be given by a judge of an entire record taken down by the predecessor. [11] In *Mondi Shanduka Newsprint (Pty) Ltd v Murphy* [12] the presiding judge in a trial passed away before giving judgment. The parties came to court asking it to finalize the matter in the way that they had agreed, rather than beginning the trial anew. The proposed procedure was that the court read all of the documents that would have been available to the deceased judge; that it hear argument from the parties; and that it then make a decision. The court refused to give effect to the proposed procedure because it would be unable to resolve the many disputes of fact in the matter without resorting to the credibility of witnesses. If it were to decide the matter on the basis agreed,

it would be in breach of its oath of office. The court directed that the trial begin *de novo* if the parties wished to continue with the matter.

On 28 February 2014 Norms and Standards for the Performance of Judicial Functions were issued by the Chief Justice. [13] The following norms and standards are, *inter alia*, contained therein:

(a) every judicial officer must dispose of cases efficiently, effectively and expeditiously (paragraph 5.1(ii));

(b) judicial officers must at all times strive to deliver quality justice as expeditiously as possible in all cases (paragraph 5.2.1(i));

(c) all judicial officers must strive to finalize all matters, including outstanding judgments, decisions or orders as expeditiously as possible. Civil cases in the High Court should be finalized within one year from the date of issue of summons (paragraph 5.2.5(i));

(d) judgments should, generally, not be reserved without a fixed date for handing down. Judicial officers have a choice to reserve judgments *sine die* where the circumstances are such that the delivery of a judgment on a fixed date is not possible. Save in exceptional cases where it is not possible to do so, every effort must be made to hand down judgments no later than three months after the last hearing (paragraph 5.2.6).

In *Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd* [14] Peter AJ observed: [15]

> 'The efficient conduct of litigation has as its object the judicial resolution of disputes, optimising both expedition and economy. The conduct and finalisation of litigation in a speedy and cost-efficient manner is a collaborative effort. The role of witnesses is to testify to relevant facts of which they have personal knowledge. The role of legal representatives has two key aspects. First is the supervision, organisation and presentation of evidence of the witnesses and, secondly, the formulation and presentation of argument in support of a litigant's case. The diligent observation of those roles facilitates the role of the judicial officer, which is to arrive at a reasoned determination of the issues in dispute, in favour of one or other of the parties. Where practitioners neglect their roles, it leads to the protracted conduct of the litigation in an ill-disciplined manner, the introduction of inadmissible evidence and the confusion of fact and argument, with the attendant increase in costs and delay in its finalisation, inimical to both expedition and economy.'

It has been held that judicial officers have an ethical duty to give judgment (or any other ruling) in a case promptly and without undue delay, and that litigants are entitled to judgments as soon as reasonably possible. [16]

It is elementary that litigants are ordinarily entitled to reasons for judgments. In *Strategic Liquor Services v Mvumbi NO* [17] it is stated:

> 'It is elementary that litigants are ordinarily entitled to reasons for a judicial decision following upon a hearing, and, when a judgment is appealed, written reasons are indispensible. Failure to supply them will usually be a grave lapse of duty, a breach of litigants' rights, and an impediment to the appeal process.'

A judgment or judicial order has at least two functional components: [18]

(i) it is a command to the party at whom it is aimed, coupled in an appropriate case with a warrant to the sheriff to enforce the command;

(ii) it regulates the legal relationship between the parties and settles their mutual rights and obligations, to the extent necessary for its grant. [19]

It is a fundamental principle of our law that a court order must be effective and enforceable, and it must be formulated in language that leaves no doubt as to what the order requires to be done. [20] Not only must the order be couched in clear terms, but its purpose must also be readily ascertainable from the language used. [21] If an order is ambiguous, unenforceable, ineffective, inappropriate, or lacks the element of bringing finality to a matter, or at least part of the case, it cannot be said that the court that granted it exercised its discretion properly. [22]

A judgment may operate as a novation of the obligation which forms the subject of the judgment, in the sense that the original debt or right of action is extinguished and replaced by entirely new rights flowing from the judgment. [23] In certain circumstances, however, a judgment does not have the effect of a novation. If the only purpose of the judgment is to enable the plaintiff to enforce certain rights, by means of execution if need be, without in any way affecting other rights arising out of the contract between the parties, the judgment does not novate the rights arising out of the contract, but rather strengthens and reinforces them. [24]

Once a court has duly pronounced a final judgment or order it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes *functus officio:* its

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jurisdiction in the case having been fully exercised, its authority over the subject matter has ceased. [25] In High Court practice certain exceptions to this rule have been recognized and,

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provided the court is approached within a reasonable time of its pronouncing the judgment or order, a division of the High Court may correct, alter or supplement it in certain cases. See further the notes to rule 42(1)*(b)* s v 'An ambiguity, or a patent error or omission' below.

In High Court practice, application may be made by one of the parties, on notice to the other, for a clarification of a judgment or order made by it in a suit between the parties. See the notes to rule 42(1)*(b)* s v 'An ambiguity, or a patent error or omission' below.

Our law does not endorse the notion that judges may decide cases on the basis of what they regard as reasonable and fair. To hold otherwise would give rise to intolerable legal uncertainty. Reasonable people, including judges, may differ on what is equitable and fair, and the outcome in any particular case would then depend on the personal idiosyncrasies of the individual judge: the law as criterion giving way to the judge. This would be intolerable. [26]

As a general rule, the court may at the end of the trial grant—

(a) judgment for the plaintiff in respect of his claim in so far as he has proved the same;

(b) judgment for the defendant in respect of his defence in so far as he has proved the same;

(c) absolution from the instance, if it appears to the court that the evidence does not justify the court in giving judgment for either party;

(d) such judgment as to costs as may be just.

A judgment must not be conditional: it must definitely determine the litigation between the parties. [27] Our courts have, however, recognized the right of a party to sue for relief on a condition to be fulfilled after issue of the court's order, and have sanctioned the institution of a claim based upon a cause of an action which will only arise conditionally upon an event occurring subsequent to the judgment. [28] Thus, the court may in its judgment order implementation of an agreement between the parties and, in the alternative, order that should the defendant fail to comply with the court's judgment for implementation of the agreement, the court may set aside the agreement and grant consequential relief. [29]

A judgment must not be for more than the prayer. [30] Thus, for example, the court cannot give judgment in excess of the amount claimed as damages, [31] nor can the court give judgment for consequential damages if only direct damages are claimed. [32]

A judgment may be expressed in foreign currency. [33] The rate of exchange is not a matter of judicial notice and should be proved. [34]

In the absence of affording the parties the aforesaid right to deal with any new aspect which a court wishes to raise, it is improper for the court to deal with a point of law or fact not raised by either party, for the first time in its judgment. [35]

Costs and the court's discretion in the award thereof are considered in the notes s v 'Costs in general' in Part D5 below.

While some reliance on an invocation of counsel's heads of argument in a judgment may not be improper, it is better if the judgment is in the judge's own words. [36] Thus, it has been stated: [37]

> 'The true test of a correct decision is when one is able to formulate convincing reasons (and reasons which convince oneself) justifying it. And there is no better discipline for the judge than writing (or giving orally) such reasons. It is only when one does so that it becomes clear whether all the necessary links in a chain of reasoning are present; whether the inferences drawn … are properly drawn; whether the relevant principles of law are what you thought them to be; whether or not counsel's argument is as well founded as it appeared to be at the hearing (or the converse); and so on.
>
> …

The very act of right of having to summarise in one's own words what a witness has said, or what is stated in an affidavit or what the document says or provides, is in itself a very good discipline and is conducive to a better and more accurate understanding of the case.'

Subrule (1): 'The defendant does not appear.' If a defendant who appeared at the commencement of the trial, failed to appear at the resumed trial hearing, default judgment was granted in circumstances where the defendant made an unequivocal admission of liability to pay an amount and had never sought leave to withdraw such admission. [38]

A defendant who appears when the hearing of a trial action starts, but thereafter withdraws and absents himself from the remainder of the proceedings, is regarded as being in default. [39]

'The plaintiff may prove his claim.' As a general rule oral evidence is not required where the claim is based on a liquid document or is for a liquidated amount in money, a debt or a liquidated demand. [40] Evidence must be led to prove an unliquidated claim. Thus, for example, in an action for damages sustained in a motor car collision, the plaintiff must lead evidence. Under certain circumstances evidence of damages may be given on affidavit. See further, in this regard, the notes to rule 31(2)*(a)* s v 'After hearing evidence' above.

'Provided that where the claim is for a debt or liquidated demand.' See the notes to this subrule s v 'The plaintiff may prove his claim' above.

Subrule (2): 'In the interests of justice.' In matrimonial causes which affect status, the court will normally permit a defendant to appear though barred.

Subrule (3): 'The plaintiff does not appear.' This is known as the *comparuit* default of the plaintiff.

'An order granting absolution from the instance.' In terms of this subrule the defendant is as of right entitled to an order granting absolution from the instance with costs. If, however,

the defendant wishes to close the door finally upon the plaintiff's case, the defendant may lead evidence with a view to satisfying the court that final judgment should be granted in his favour. See further the notes to this subrule s v 'Final judgment should be granted' below.

'Final judgment should be granted.' It has long been recognized that, where in an action a party chooses not to appear at the trial or, having appeared, withdraws from the trial, the other party remaining need not content himself with an order of absolution from the instance but may elect to lead evidence in order to satisfy the court that he is entitled to judgment on the issues raised by those claims. [41] The right to grant final judgment should, however, be exercised with caution and only in special circumstances. [42] In some cases the court have granted final judgment on the ground that the plaintiff was in deliberate default not due to circumstances beyond his control. [43]

If there is no appearance on behalf of a plaintiff close corporation due to its deregistration prior to the date of set down of the trial, a defendant wishing to bring matters to finality must give proper notice in terms of rule 15 to the Minister of Finance and, if appropriate, any other Minister with sufficient interest as the effect of the deregistration of a close corporation is that all its property, including any claims it might have against third parties, thereupon vest in the State as *bona vacantia*. If, in such a case, the State fails to take action to prosecute the action when the matter is called for trial, an order for absolution from the instance may properly be sought in terms of this subrule. [44]

Subrule (5): 'The burden of proof.' The term 'burden of proof' is used in different senses. In its primary meaning the phrase denotes 'the duty which is cast upon the particular litigant, in order to be successful, of finally satisfying the court that he is entitled to succeed on his claim or defence as the case may be'. [45] The incidence of the burden of proof in this sense is on each issue a matter of substantive law. [46]

In a secondary sense the phrase denotes the duty to adduce evidence in order to combat a prima facie case made by his opponent, sometimes called the 'evidential burden' ('weerleggingslas'). [47] The duty to adduce evidence is merely a procedural device which 'ensures that the parties give their evidence in the most logical order and allows the trial to be shortened by dispensing with the evidence of one party if his opponent has adduced no evidence which could support a finding in his favour'. [48] This secondary meaning is clearly recognized in subrules (11), (12) and (13) by the use of the phrase 'onus of adducing evidence'. [49] The duty to adduce evidence usually coincides with the onus of proof in the primary sense, [50] but there

are cases in which from the beginning the duty to adduce evidence is upon the one party but the onus is on the other. [51] The incidence of the burden of proof in this, secondary, sense is determined by the pleadings. [52]

In this subrule and in subrule (9) the phrase 'burden of proof' is probably used in its primary sense. This does not, however, mean that the two subrules impose a rigid order in which first the plaintiff and then the defendant are entitled or obliged to present their respective cases to the court. The order in which the parties present their cases and adduce their evidence may be altered by a ruling or direction under subrule (11), (12) or (13).

'Outline the facts intended to be proved.' The opening of a case by a party or his legal representative should not be accorded decisive effect in regard to the proof of facts necessary to a party's case or defence. [53]

Subrule (6): General. In Roman-Dutch practice the *conclusie tot absolusie van de instantie* was a species of exception or special plea, one of the so-called 'ongenoemde exceptiën', which was used when the defendant maintained that the plaintiff had brought the wrong action against the defendant. [54] By pleading the *conclusie* the defendant did not say that the plaintiff had no action against him, for that would have been a matter of plea or *contrarie conclusie*; by pleading in this fashion the defendant said that the plaintiff did not have this particular action against him. [55]

In South African practice the decree of absolution from the instance fulfils a different function. It is an order, granted either at the end of the plaintiff's case or at the end of the whole case, dismissing the plaintiff's claim. [56] Its effect is to leave the parties in the same position as if the case had never been brought, for a judgment of absolution from the instance does not amount to *res judicata* and the plaintiff is entitled to proceed afresh. [57]

Subrule (6) only applies to absolution from the instance at the close of the case for the plaintiff. Absolution from the instance could, however, also be granted at the end of the whole case or where the burden of proof was on the defendant.

The question as to when absolution from the instance should be decreed by a court is considered below under the following three headings:

(i) Absolution at the close of the plaintiff's case as contemplated in this subrule.

(ii) Absolution at the end of the whole case.

(iii) Absolution where the burden of proof is on the defendant.

(i) Absolution at the close of the plaintiff's case. When absolution from the instance is sought in terms of subrule (6) at the close of the plaintiff's case the test to be applied is not whether the evidence established what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, or ought to) find for the plaintiff. [58] Sufficient evidence to avert a ruling of absolution from the instance at the end of the plaintiff's case is sometimes referred to as prima facie evidence, prima facie proof, or a prima facie case (in the sense that there is evidence relating to all the elements of the claim). [59] The use of the term 'prima facie evidence' in this sense is not to be confused with another, more common, meaning of the term, viz prima facie evidence which is not only sufficient to avert a ruling of absolution from the instance but which is also sufficient to cast a duty to adduce evidence, sometimes called the 'evidential burden' ('weerleggingslas'), upon the defendant. [60] Prima facie evidence in this latter sense is

evidence which 'requires an answer' from the other party, and 'in the absence of an answer from the other side, it becomes conclusive proof and he (the party on whom lies the burden of proof) completely discharges the onus of proof'. [61]

The test for absolution from the instance at the close of the plaintiff's case has from time to time been formulated in different terms —

(a) In *Gascoyne v Paul and Hunter* [62] it was held that the court must consider whether there is evidence upon which a reasonable man might find for the plaintiff.

(b) In *Myburgh v Kelly* [63] the court stated:

> '[m]ust bring to bear upon the evidence not his own but the judgment of the reasonable man. Renouncing for the time being any tendency to exercise a judgment of his own, he is bound to speculate on the conclusion at which the reasonable man of his conception not should, but might, or could, arrive. This is the process of reasoning which, however difficult its exercise, the law enjoins upon the judicial officer.'

(c) In *Supreme Service Station (1969) (Pvt) Ltd v Fox and Goodridge (Pvt) Ltd* [64] it was suggested that in considering what a reasonable court 'might do' allowance must be made for its making a reasonable mistake and giving an incorrect judgment. This suggestion was firmly rejected by Hoexter J in *Gandy v Makhanya*. [65] In case of doubt as to what a reasonable court 'might' do, the court should lean on the side of allowing the case to proceed, [66] for the plaintiff should not be lightly deprived of his remedy without the evidence of the defendant being heard. A defendant who might be afraid to go into the witness-box should not be permitted to shelter behind the procedure of absolution from the instance. [67]

(d) In *Gordon Lloyd Page & Associates v Rivera* [68] the Supreme Court of Appeal held that the court ought not to be concerned with what someone else might think, but that it should rather be concerned with its own judgment and not that of a 'reasonable' person or court.

In deciding whether absolution should be granted at the close of the plaintiff's case it must be assumed that, in the absence of very special considerations, such as the inherent unacceptability of the evidence adduced, the evidence is true. [69] Questions of credibility should not normally be investigated at this stage of the proceedings, except 'where the witnesses have palpably broken down, and where it is clear that what they have stated is not true'. [70]

In the case of an inference the plaintiff at the close of his case need not necessarily persuade the court hearing the application that there exists an actual preponderance of probability in his favour. [71] The test at this stage of the trial is as follows: the court will refuse the application for absolution unless it is satisfied that no reasonable court could draw the inference for which the plaintiff contends. [72] The court is not required, in the case of an application for absolution at the end of the plaintiff's case, to weigh up different possible inferences, but merely to determine whether one of the reasonable inferences is in favour of the plaintiff. [73]

If the plaintiff's evidence consists of the production of a document on which he sues and the sole question is the proper interpretation of the document the distinction between the interpretation that a reasonable court [74] might give to the document and the interpretation that he ought to give to it tends to disappear. Nevertheless, even in such cases the trial court should normally refuse absolution unless the proper interpretation appears to be beyond question. [75]

If monetary damage has been suffered and the plaintiff has failed to produce all available evidence, the court is justified in granting absolution from the instance. [76] However, if the best available evidence has been produced it remains the duty of the court to assess damages in the best way possible if such evidence is not entirely of a conclusive nature. [77] Difficulty in determining what the sum should be should not tempt the court into granting absolution from the instance unless such difficulty is insurmountable. [78]

If certain facts in issue are within the knowledge of the defendant the court should take this into account and more readily refuse to grant absolution from the instance. [79]

Absolution from the instance cannot be decreed at the end of the plaintiff's case where the plaintiff has first adduced evidence because the burden of proving some of the issues was on him, but the burden of proving other issues was on the defendant. [80]

If there is a claim in reconvention arising from the same facts, [81] and if the evidence is in the nature of things bound to be inextricably interwoven, a trial court should be very chary of granting absolution from the instance at the close of the plaintiff's case, because thereafter the court has in any event to hear the defendant's (plaintiff in reconvention) evidence and to weigh the evidence given on the latter's behalf against that given for the plaintiff in regard to which it has already given a decision. [82]

The approach in a case with multiple defendants is necessarily somewhat different. In the case where there is only one defendant it can fairly be inferred that at the stage when the plaintiff has closed his case the court has heard all the evidence which is available against the defendant. Any further evidence that would be forthcoming if the case continued would be likely to operate only to the detriment of the plaintiff. That being so, it is considered unnecessary in the interests of justice to allow the case to continue any longer if, after the plaintiff has closed his case, there is no prima facie case against the defendant. If, however, the plaintiff has cited two defendants each of the defendants might have or have access to evidence adverse to the other defendant. The plaintiff, having cited both defendants, cannot expect co-operation from those whom he has made his adversaries. Thus, he may be deprived of access or free access to evidence which is material against one or other of the defendants because that evidence is possessed by or under the control of the other defendant. [83]

The court should exercise its discretion whether or not to grant absolution at the end of the plaintiff's case upon a consideration of all the facts. Thus, for example, if it has already been disclosed (e g in summary judgment proceedings or in the pleadings) that the one defendant will endeavour to establish liability on the part of the other defendants absolution should not be granted even if at the end of the plaintiff's case there is no evidence against such other defendants. The grant of absolution can in such circumstances lead to unfairness and inequities, and to further litigation *de novo* against the defendants who have been absolved. [84] Similar considerations apply when the second defendant applies for absolution after the plaintiff and the first defendant have led their evidence and closed their cases. [85] In *Mazibuko v Santam Insurance Co Ltd* [86] the Appellate Division held that in a case where the defendants have denied liability and have also reciprocally pointed to one another as being the party responsible for the plaintiff's damages, the court should not grant an application for absolution at the suit of either defendant at the end of the plaintiff's case if there is evidence upon which a court, applying its mind reasonably, could hold that it has been established that either the one or the other defendant or both of them are legally liable (it being nevertheless uncertain as to which of the alternatives is the correct one). The court should not consider in turn whether a prima facie case has been made out against the one defendant. In such a case, which is in effect a tripartite suit between three adversaries, it is in the interests of justice that the case should be decided on the evidence that all the parties may choose to place before the court, provided that the plaintiff, when presenting his case, has laid the necessary foundation of showing, prima facie, that one or other or both of the defendants are legally liable.

If, however, the evidence for the plaintiff did not support a claim against the second defendant, and no case has been made out against him, absolution from the instance against that defendant is proper. [87]

(ii) Absolution at the end of the whole case. If, in a case where the burden of proof lies on the plaintiff, the court, after hearing all the evidence, cannot decide to its satisfaction on which side the truth lies, the proper judgment is absolution from the instance. [88] Thus, if the versions of the plaintiff and of the defendant are mutually destructive in the sense that acceptance of the one version necessarily involves the total rejection of the other version, and the court is unable to accept the version of the plaintiff as true and the version of the defendant as false, the proper judgment is absolution. [89]

If the court has, on the evidence, found against the plaintiff, it is entitled to grant judgment for the defendant rather than decree absolution

from the instance. [90]

When the court comes to consider, after having heard the evidence of the plaintiff and the evidence, if any, adduced by the defendant, whether or not to grant absolution from the instance, the question to be asked is whether a reasonable man should (or ought) to give judgment in favour of the plaintiff. [91] Were absolution from the instance is granted after close of a defendant's case, the plaintiff may proceed afresh on its claim without first obtaining the court's leave to do so. If, however, the plaintiff seeks to proceed again on the same papers, it is required to obtain the court's permission to do so. [92]

(iii) Absolution where the burden of proof is on the defendant. If the defendant adduces his evidence first, either because he bears the burden of proof or because, by reason of an admission or presumption, the duty to adduce evidence is on him, there can be no question of absolution from the instance being granted. If the defendant fails to discharge the burden of proof or the duty to adduce evidence, the proper order would be judgment for the plaintiff. [93]

If the onus is on the defendant the court cannot, after he has led his evidence, give judgment for the plaintiff unless and until the plaintiff closes his case. [94]

Subrule (8): 'Each witness shall ... be examined, cross-examined or re-examined.' It is outside the scope of this work to deal with the examination, cross-examination and re-examination of witnesses. [95]

Further evidence. At common law the High Court has a discretion, which must be exercised judicially, upon a consideration of all the relevant factors, and in essence as a matter of fairness to both parties, to grant leave to a party to adduce further evidence despite this subrule not making provision for such a situation.

Over the years the courts have indicated certain guiding considerations or factors, but they must not be regarded as inflexible requirements, or as being individually decisive. Some are more cogent than others; but they should all be weighed in the scales. [96]

The considerations which usually fall to be weighed in an application to adduce further evidence include the following: [97]

(i) The reason why the evidence was not led timeously. The party who makes the application for leave to adduce further evidence must show that the fact that he has not brought it forward was not due to any remissness on his part; he must satisfy the court that he could not have obtained this evidence even had he exercised reasonable diligence. [98] Thus, for example, a party will be allowed to adduce further evidence, after the court had reserved judgment, if an eyewitness is discovered whose evidence was new, could not have been adduced before (since he was found quite accidentally), and was weighty and likely to elucidate the truth. [99]

Apart from the above cases of genuine inability to find the evidence earlier despite proper diligence, the reason for allowing production of evidence at a late stage may be justifiable misapprehension or the fact that the applicant was taken by surprise by his opponent's evidence. Thus, where a defendant's evidence discloses a defence of which the plaintiff had no notice and as to which his (the plaintiff's) witnesses were not cross-examined, further evidence should be allowed. [100]

The court will allow a party to adduce evidence which has been omitted through mere inadvertence, [101] or because it was thought unnecessary on account of a bona fide mistake of law. [102] However, a party will not be allowed to adduce further evidence if, having the evidence at his disposal, he deliberately elects not to put it before the court because he is of the opinion that it is unnecessary. [103]

(ii) The degree of materiality of the evidence. The test of materiality should be held to be satisfied where the evidence tendered, if believed, is material and likely to be weighty. [104] There is no obligation on the applicant to show that the evidence is likely to be believed. [105]

(iii) The balance of prejudice. This means the prejudice to the applicant if the application is refused, and the prejudice to the respondent if it is granted. It may include such factors as the amount or importance of the issue at stake; the fact that the respondent's witnesses may already have dispersed; the question whether the refusal might result in a judgment of absolution and expose the parties to the expense of proceedings *de novo*. [106]

(iv) The general need for finality in judicial proceedings. This factor is usually cited against the party seeking leave to adduce further evidence. However, depending on the circumstances, finality might sooner be achieved by allowing such evidence than by granting absolution and opening the way to litigation *de novo*. [107]

(v) The stage which the particular litigation has reached. In general, the application for leave to reopen should be made at the earliest opportunity. [108] In this regard Holmes JA stated: [109]

> 'Where judgment has been reserved after all the evidence has been led on both sides and, just before judgment is delivered, the plaintiff asks for leave to lead further evidence, it may well be that he will have a harder row to hoe, because of factors such as the increased possibility of prejudice to the defendant, the greater need for finality, and the undesirability of throwing the whole case into the melting pot again, and perhaps also the convenience of the court, which is usually under some pressure in its roster of cases. On the other hand, where a plaintiff closes his case and, before his opponents have taken any steps, asks for leave to add some further evidence, the case is then still *in medias res* as it were.'

In addition to the aforegoing, Holmes JA mentions [110] the following to be considered as factors to be weighed in an application to lead further evidence: the possibility that the further evidence may have been shaped 'to relieve the pinch of the shoe'; [111] the 'healing balm' of an appropriate order as to costs; the appropriateness, or otherwise, in the circumstances, of visiting the remissness of an attorney upon the head of a client.

Refusal by a court of first instance to allow the leading of supplementary evidence which is admissible in terms of the above considerations is ground for appeal. [112]

Recalling of witnesses. At common law a witness already called may always, subject to the court's discretion, be recalled, either by the court *mero motu*, or by the court on the application of a party, for further examination. [113] The calling by the court of a witness who has not been called by either party is another matter; [114] in general the court has no right to call such a witness, save with the consent of the parties. [115] Rule 39 nowhere affects or alters this principle.

The recall of a witness at the instance of a party is a matter within the discretion of the court. [116] In the exercise of its discretion the court will consider factors such as the possibility

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of prejudice to the opposing party; the risk of fabrication of evidence to remedy shortcomings in the applicant's case which had become apparent; and the need for expeditiousness in reaching finality in litigation. [117]

The recall of a witness by the court of its own motion is also a matter of discretion which, like any other discretion, must be exercised judicially, upon a consideration of all the relevant factors. In the exercise of its discretion the court will consider the adversarial nature of the South African civil process, which accords the judge a position of relative detachment. [118] The court should recall a witness of its own motion only in those cases where the further examination of a witness is necessary to clear up points that have been overlooked or left obscure.

Examination of witnesses by the court. The court should exercise its power to examine witnesses with circumspection, always keeping in mind the position of relative detachment which the judge occupies in our system of civil procedure. [119] In general the court should confine its examination to clarification of points that have been overlooked or left obscure: the court should not take over the examination and cross-examination of witnesses from the parties' legal representatives. [120]

Subrule (10): 'May address the court.' Generally, arguments for the litigants in a trial should be delivered orally in open court and not in writing to the judge in his chambers. A trial court should, therefore, not direct that the arguments be delivered in writing except in special circumstances and then only after discussion with counsel. [121] Subrule (23) provides that the judge may, at the conclusion of the evidence in trial actions, confer with the advocates in the judge's chambers as to the form and duration of the addresses to be submitted in court.

Failure to accord each party a fair opportunity of addressing the court constitutes a serious irregularity. [122] However, if the failure on the part of a court to receive argument on behalf of a party was due to the fault or supineness of that party or his legal representative, the omission might not constitute an irregularity. [123]

It is necessary for any court to inform the parties of any point of law, fact or other aspect of the case at hand which it wishes to raise in judgment that has not been dealt with previously. The way to do this is to inform the parties and/or their legal advisers of the court's desire to deal with it and call for their responses in regard thereto. The parties may wish not to respond to such invitation, in which case the court may justifiably proceed in handing down its judgment raising the new aspect. On the other hand, if the parties want to respond, they can be invited by the court to raise the issue in oral argument in open court at a time suitable to all concerned. At such an occasion a party may wish to apply for an amendment to the pleadings or apply for leave to reopen his case and lead further evidence. The court will then

have to decide on the appropriate course as justice may demand. Alternatively, the parties may wish to respond by submission of further written argument. In the latter instance it is important to allow the plaintiff or applicant the same rights normally afforded in court, i e by replying to any argument advanced by the other side.

'May reply on any matter.' A refusal of the right of reply is an irregularity, [124] but if the party who has the right to reply does not make use of it because he thinks that the court has already made up its mind for or against him, no irregularity is committed. [125] The right to reply extends to arguing facts as well as law. [126]

Subrule (11): 'A ruling by the court upon the onus of adducing evidence.' It has been held [127] that this subrule allows the court to rule at the commencement of the trial on both the duty to begin as well as the initial onus of proof on the various issues which might arise from the pleadings as they stand at that time. See further the notes to subrule (5) s v 'The burden of proof' above.

Subrule (12): 'One or more third parties.' This subrule regulates the order in which the various parties are to lead their evidence where there are one or more third parties involved in the proceedings, or if there are defendants to a claim in reconvention who are not plaintiffs in the action. The provisions of subrule (11) are *mutatis mutandis* applicable with regard to any dispute as to the onus of adducing evidence.

Where a multiple of parties is involved in proceedings it often happens that two or more parties make common cause against one or more of the other parties. In proceedings where a third party has been joined under rule 13, the third party and the defendant often join forces in resisting the claim of the plaintiff. In such cases questions arise as to *(a)* the order in which the witnesses are to be examined; and *(b)* to whom the right of cross-examination should be accorded. It was held in *Novick v Comair Holdings Ltd* [128] that the court has a discretion which should be exercised in such a manner as seems most likely to lead to a sound assessment of a witness and his testimony and a just decision upon the matters in issue. This will best be achieved by granting the right to ask leading questions only to counsel representing interests truly adverse to those of the litigants who have called the witness.

Subrule (13): 'The onus of adducing evidence on one or more of the issues is on the plaintiff.' A plaintiff who bears the onus of adducing evidence on some of the issues is entitled, after leading his evidence on the issues concerned, to call upon the defendant to proceed and to lead evidence in regard to the issues on which the onus is upon the defendant when the defendant has closed his case. [129]

Subrule (14): 'The plaintiff shall have the right to call rebutting evidence.' This subrule makes it clear that in the circumstances contemplated by it, the plaintiff has a right to call evidence in rebuttal of the evidence led by the defendant. [130]

Subrule (16): 'A record shall be made of.' It has been said, within the context of magistrates' courts practice, that it is essential that everything which is in any way relevant to the proceedings or to the merits of the case, should be fully, carefully and clearly recorded. This is so because the record is the only source from which it can be determined whether the proceedings were in accordance with justice. [131]

The record should be preserved in the form in which it was made during the course of the trial and it would be highly improper for anyone to tamper with the record. [132]

Subrule (16)*(a)*: 'Any judgment or ruling by the court.' See the notes to this rule s v 'General' above.

Subrule (16)*(b)*: 'Any evidence given in court.' Demonstrations given by witnesses during their evidence must be translated into words and incorporated into the record. [133]

Subrule (16)*(d)*: 'The proceedings of the court generally.' Exchanges between the bench and a party or his legal representative while witnesses are testifying constitute part of the general proceedings of a court which have to be recorded under this subrule and which have to be transcribed in terms of subrule (18). [134]

Arguments and addresses by legal representatives do not constitute part of the proceedings of the court generally and, consequently, should not be regarded as part of the recordable proceedings of a trial. [135]

'Including any inspection *in loco*.' The purpose of an inspection *in loco* is not only to enable the court to follow and apply the evidence, [136] but also to furnish the court with real evidence; in fact, whenever an inspection *in loco* is held, some real evidence must of necessity be led before the court. [137] A refusal to hold an inspection can therefore amount to a rejection of evidence. [138] It is within the discretion of the trial court to decide whether, [139] and at what stage of the trial an inspection should be held. [140] Inspections *in loco* should not, however, take place after all the evidence and argument have been heard, but while the case is still proceeding, so that the court may intimate to the parties the results of any observations made and they may have the opportunity of offering evidence or argument in the light of such intimations. [141]

The inspection should be held in the presence of both parties; it is irregular for an inspection to be held in the presence of only one party or his witnesses. [142] A judge is entitled to make an inspection alone, [143] or to rely upon earlier acquaintance with the property. [144] It is usually the best for the judge to record his observations and communicate them to the parties on the spot, so that if there is a dispute he can take another look and form an opinion. [145]

The record should disclose the nature of the observations made by the court. [146] This may

be done either by means of a statement framed by the court and intimated to the parties, who should be given an opportunity of dealing with it or challenging it, and if necessary of leading evidence to correct it, or by means of leading evidence from a witness who is either called or recalled to make the necessary statement. In the latter case, the parties should be allowed to examine the witness in the usual way. [147] The court is not entitled to rely on statements or explanations made by witnesses or what they pointed out at an inspection *in loco*, since they are not made under oath or subject to cross-examination. [148]

If the observations at an inspection *in loco* leave an impression on the court adverse to a party or a particular witness, the party or witness should be given an opportunity of either challenging the inference, or of making such explanation as he is capable of doing. [149]

Observations and opinions which have not been communicated to the parties and recorded must be disregarded. [150]

'Any matter demonstrated in court.' Demonstrations given by witnesses during their evidence must be translated into words and incorporated into the record. [151]

Subrule (20): 'If it appears convenient … make any order with regard to the conduct of the trial.' The paramount test laid down by this subrule is convenience. It is submitted that the overriding consideration is that of convenience of the parties, of witnesses and, last but not least, of the court. [152]

The subrule contemplates an order with regard to the conduct of the trial which will 'vary any procedure laid down by this rule'. Subrules (13), (14) and (15) lay down the procedure for the calling of evidence and the cross-examination of witnesses. In terms of these subrules, read with rule 38(2), it is envisaged that witnesses give oral evidence at the seat of the trial court in the presence of the parties and their legal representatives as well as the presiding judge and the public. [153] In *Uramin (Incorporated in British Colombia) t/a Areva Resources Southern Africa v Perie* [154] it was held to be convenient and in the interests of justice to vary the general trial procedure and receive the evidence of two witnesses from abroad via video link under circumstances where their evidence was vital to the defendant's defence but both of them were no longer in its employ and willing to travel to the seat of the trial court from abroad in order to testify. In granting an application to use video link to procure the evidence of the witnesses (based in Paris and Dubai respectively) made by the defendant at the commencement of the trial, Satchwell J stated, amongst other things: [155]

'[1] This judgment deals with one aspect of the continually developing response of our courts to the marvels of modern technology. Specifically, the use of video link to procure the evidence of witnesses based in Paris and Dubai who are not available or willing to attend at the court in Johannesburg.

…

RS 5, 2017, D1-540A

[3] Obviously, each application for the use of video linkage to procure the evidence of witnesses who are not available to a trial court must rely upon its own particular facts and circumstances. I have heard a number of such applications and heard evidence in this manner in a number of trials. My experience is that the approach of both South African courts and courts in other jurisdictions must continuously try to be relevant to and keep pace with rapidly changing demands placed upon judicial practice. On the one hand, there are the claims of globalisation of economies, worldwide dispersal of potential witnesses, dissemination of communication throughout many jurisdictions and in a multiplicity of formats, deployment of employees and the transitory nature of much employment and so on. On the other hand, there are the responses availed by expanding and more easily available technologies of which video conferencing is only one.

…

[5] Similarly, I have here included comment on the video conferencing procedures as they eventuated because I have been approached by other judges for information on this procedure and this may be of use to practitioners.

…

[13] I have no doubt that, without the evidence of either of these witnesses, the defendant would be severely handicapped in the conduct of its defence and, if necessary, its counterclaim.

[14] There is no doubt that the evidence of both Dragone and Barbaglia were vital to the defendant in response to plaintiff's claims. At the trial it was apparent that, if Dragone and Barbaglia did not give evidence, the defendant would have to rely only upon interpretation of the two written documents and would be precluded from rebutting the evidence of the plaintiff which would then go unchallenged.

[15] If the defendant were precluded from leading the evidence of these essential witnesses, I would have grave doubts about the fairness of the trial and of any judgment which I would hand down.

…

[21] Neither potential witness can be subpoenaed to testify before this court in Johannesburg.

…

[24] We rightly expect and prefer that viva voce evidence in both civil and criminal proceedings be given in a courtroom at the seat of the court in the presence of the parties and their representatives and the judicial officer and the public. [156] The reasoning is obvious. The court buildings and personnel and the procedures therein are dedicated to the process of litigation. Anyone may attend. The legitimacy of the process derives, in part, from this dedication.

[25] Yet within these stone walls staffed by personnel dressed as though they were clerics in the reign of Henry the Eighth, we have no difficulty in recognising the need for accommodating witnesses to meet the interests of justice. We utilise many different ways of procuring evidence because both the Constitution and the High Court Rules permit development of appropriate procedures. [157] We do so because we recognise that court procedures and the Rules which regulate such practices are devised to administer justice

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RS 5, 2017, D1-540B

and not hamper it. [158] Evidence is received on affidavit; [159] closed-circuit television regularly allows for evidence to be given in one room and transmitted to a courtroom; [160] inspections in loco take place [161] and judges or nominated persons take evidence on commission. [162] The test to be applied by the court in exercising its discretion is whether or not "it is convenient or necessary for the purposes of justice".

[26] These exceptions to the general rule are not limited to situations where the witness is absolutely unavailable to attend at court. We hear from child witnesses who might be distressed if called to be physically present in court; we receive affidavits from various persons because of the nature of their evidence and because this will reduce the time expended thereon; we go on inspections in loco because only then will we comprehend what a witness has said or will say; we have commissions because the court can travel while the witness cannot or will not. We have regard to both "convenience" and "the interests of justice".

[27] In summary, courts cannot be ignorant of the needs of the societies and economies within which they operate. Legal procedures must comport to the exigencies of globalisation and the availability of witnesses as I have discussed above. Courts must adapt to the requirements of the modernities within which we operate and upon which we adjudicate.

[28] To the extent that I have previously expressed the view [163] that it would be "an indulgence" to grant an application to hear evidence through video conferencing, I would restate my view to be that I still consider that the norm should be to hear witnesses in the courtroom but that relaxation of this preference should neither be considered extraordinary nor be discouraged. I can envisage, though it was not an issue in the present case, situations where the costs of bringing a witness to the courtroom would be prohibitive and that reasons of economy alone might well dictate that evidence be received outside a courtroom which does not itself have video-conferencing facilities.

[29] We do not currently limit the use of various technologies only to the dire and desperate situations where a witness cannot be physically present. We must accept that witnesses are here today and gone tomorrow and that their employers, colleagues, clients and compatriots see nothing unusual in this. Courts must accommodate this mobility or find ourselves increasingly out of sync and eventually irrelevant save for the most simple and parochial of disputes.

[30] I find that it is sufficient reason that Dragone and Barbaglia are living and working elsewhere, do not desire to travel to South Africa, and have no obligation to either party by which they can be enticed so to do to find that this court should consider receiving evidence by video link.

Technology to be employed

[31] It has been suggested that the form in which evidence is tendered is not finite. [164] After all evidence was originally only received viva voce in person and then accepted by way of affidavit and now is received through video conferencing. No doubt other means will be discovered in due course.

RS 7, 2018, D1-540C

[32] At the time that the Rules of Court were first formulated, witnesses from beyond the jurisdiction of the then Transvaal courts travelled by train from the coast and then by motorcar and then by aeroplane. They may even have arrived at the coast after week-long voyages by steamship from another continent. Urgent messages arrived at this court by way of telegrams whose contents and authors were difficult to authenticate.

[33] Neither the Uniform Rules of Court nor the Civil Proceedings Evidence Act expressly stated that more modern technologies than pen and paper or living, breathing persons are permitted in the High Court. The legislation has not needed so to do. The Constitution and the Rules enjoin us to make the necessary developments on a case-by-case and era-by-era basis.

[34] This court does not have wi-fi throughout as many other courts in South Africa and other jurisdictions; we do not yet have electronic lodgment of pleadings and documents in the office of the registrar nor do we have electronic archives; we do not have closed-circuit television in every courtroom; we do not have any video conferencing facilities in any conference room for holding case management meetings or hearing evidence. We intend to have these facilities. It is budgetary constraints not opposition to technological change which is holding us back.

[35] It is now almost trite that video conferencing "is an efficient and an effective way of providing oral evidence both in chief and in cross examination" and that this is "simply another tool for securing effective access to justice" (see para 10 of the speech of Lord Carswell in *Polanski v Conde Nast Publications Ltd* [2005] UKHL 10). This process has been utilised in numerous South African courts. [165]

[36] Where video conferencing has taken place witnesses have been viewed in person, have been heard without intermediaries, and have been viewed at the same time and in the same manner by all litigants and legal representatives and the judicial officer. The only barrier to observation has been the exigencies of the electronic medium itself where one or both of the audio or the video may be problematic to make out. In such case all parties are equally entitled to require reconnection or repair of the technology or repetition of the evidence. The witnesses can be supervised in a number of ways. They can be required to present themselves to an agreed venue, may be secluded from other persons, may be monitored by an officer of the court of the jurisdiction in which they are present, and may not view documentation without notification of the monitoring court officer.

[37] In short, I remain of the view (as previously expressed in the *Kidd v Van Heeren* judgment) that:

> "Our rules of court did not initially refer to anything other than pen and paper, they advanced to encompass the concept of the typewriter then the computer thereafter the telefax and now email. Why video conferencing or other technology should be excluded is beyond me."

Procedures followed in this trial

[38] The court reconvened in the offices of the defendant's attorneys. Proceedings were held in a conference chamber where myself, my clerk, counsel and attorneys for both plaintiff and defendant were present as well as several technology boffins.

[39] A large screen was placed against the wall at the end of the conference table. All of us in the room could see ourselves on the screen for much of the time. We could see the witness and the monitoring court officer in both Paris and Dubai. The audio component could be heard by everyone in the room.

[40] There were problems with the technology. Several times we lost the audio or the visuals. One of the witnesses and his monitor changed rooms to improve the technological message.

[41] Before any evidence was heard I asked the person accompanying the potential witness to identify himself or herself and surroundings. In Paris, Ms Marianne Kecsmar, an independent lawyer who is a member of both the Paris and the New York Bars, was present with Dragone in one of the conference rooms of solicitors Linklaters. Sometimes an IT assistant was present. In Dubai, Mr Hamid Tayseer, a Jordanian legal consultant in Dubai, was present in the offices of an independent company in Dubai Internet City. Legal representatives were offered the opportunity to question both of these supervisors or monitors as to their status, independence and understanding of their duties.

[42] I asked both Kecsmar and Tayseer as to the procedures for giving evidence under oath in their jurisdictions. Both indicated an absence of any particular format. Accordingly, I administered the oath to Dragone and Barbaglia in accordance with South African procedure.

[43] Both Dragone and Barbaglia then were led through their evidence-in-chief and were cross-examined.

[44] At the conclusion of their evidence I placed on record observations made by myself. Firstly, there was considerable audio interference prior to Dragone taking the oath. This was resolved and when he did give evidence there were no time delays or lapses in the video/audio. Both the verbal and visual evidence was clear. Secondly, the verbal evidence of Barbaglia was less clear but where there was lack of clarity he was asked to repeat his evidence. There were occasions where the whole of his face did not appear on the screen — this was by reason of the way he was sitting and he was asked to move over. Thirdly, Dragone spoke quickly and with an accent and I sometimes missed out certain words but I did not ask him to repeat himself because his meaning was clear. The same problem did not occur with Barbaglia. Plaintiff's counsel recorded his comments that the visual problems pertained to a "frozen screen" and sometimes he missed out on contemporaneous visuals with the audio.

[45] The evidence was recorded and has been transcribed. The discs were placed by me in the court file.'

In appropriate circumstances the trial judge can stop cross-examination in order 'to prevent the proceedings from degenerating into a morass of irrelevant information' [166] or impose a time limit on cross-examination (albeit not in terms of this subrule, but in the exercise of the High Court's inherent jurisdiction) and make a punitive costs order against a party who conducts the trial in an obstructive fashion. [167]

Subrule (22): 'By consent the parties to a trial shall be entitled.' This subrule provides a cheap and speedy procedure for transferring cases to the magistrate's court where both parties consent.

The rules do not provide for a procedure to transfer cases from the High Court to the magistrate's court in the absence of consent of all of the parties and to that extent the rules 'may properly be said to be deficient on the point'. [168] The case law is not harmonious as to whether the High Court has the power to order a case to be transferred to a magistrate's court without

the consent of all the parties. In *Veto v Ibhayi City Council* [169] Jones J held that subrule (22) is not intended to be exhaustive and that the High Court can, in the exercise of its inherent power, order such a transfer on application of a party where the other party does not consent to the transfer. In *Thomson v Thomson* [170] the full court on appeal ordered a case instituted in the High Court to be referred to the maintenance court for hearing without the consent of the parties. In *PT v LT* [171] Binns-Ward J found it difficult to understand how the full court could competently order such a transfer absent consent thereto by the parties and stated, amongst other things: [172]

> 'The magistrates' courts are creatures of statute, and proceedings in those courts fall to be instituted and prosecuted in accordance with the relevant statutory provisions. The same considerations apply to proceedings in the maintenance courts. A High Court has no jurisdiction, outside the applicable statutory frameworks, in proceedings instituted before it to cause those proceedings to continue in another court. Subject to the applicable statutory provisions, it is for a claimant to determine in which court of competent jurisdiction to institute and prosecute proceedings.'

Under 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'. In *Nedbank Ltd v Thobejane and Similar Matters* [173] the full court held that it is an abuse of process to allow a matter which can be decided in the magistrate's court to be heard in a division of the High Court simply because it has concurrent jurisdiction. [174] The full court declared that the High Court is entitled to transfer a matter to the magistrate's court *mero motu* if it is in the interests of justice to do so. [175] It is submitted that in the event of such a transfer, the provisions of rule 50(9) of the magistrates' courts rules, which apply in the case of a transfer under this subrule, should be applied. [176]

'On written application to a judge through the registrar.' 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.

The action taken by a judge under this subrule is a *quasi*-administrative act by a judicial officer, but not in his capacity as presiding officer in a court of law. [177] The judge is obliged to grant the application and has no discretion to override the wishes of the parties. [178]

'The cause transferred to the magistrate's court.' The procedure, where an action is transferred from the High Court to a magistrate's court, is regulated by magistrates' courts rule 50(9) and (10).

It does not follow that, because this subrule provides for the transfer of a case to the magistrate's court by consent of the parties on written application to a judge, a plaintiff cannot withdraw the action without consent before set down as provided in rule 41(1). The two rules are not in *pari materia*, nor does the one exclude the operation of the other. Nor does it follow that, because a case can be transferred by consent to the magistrate's court under this subrule, a plaintiff who has withdrawn an action under rule 41(1) cannot reinstate it by the issue of a fresh summons either in the High Court or in the magistrate's court. [179]

Subrule (24): 'By excessive … cross-examination.' A court will normally be reluctant to exercise its power to make a special order as to costs. The discretion should, however, be exercised where cross-examination developed into a wide-ranging debate on a host of issues, some of which could only with considerable ingenuity be regarded as relevant and which were never referred to again in argument or judgment. [180]

In appropriate circumstances the trial judge can impose a time limit on cross-examination (albeit not in terms of this subrule, but in the exercise of the High Court's inherent jurisdiction) and make a punitive costs order against a losing party who conducted the trial in an obstructive fashion by, *inter alia*, excessive cross-examination. [181]

1 In *Trotman v Edwick* 1950 (1) SA 376 (C) at 382 it is said that 'before there can be a trial there must be a joinder of issue and this requires, *inter alia*, the filing of a plea which discloses a defence'.

2 *Saunders v Butt* 1906 EDC 17.

3 In *S v Perskorporasie van Suid-Afrika Bpk* 1979 (4) SA 476 (T) at 478 it was held that, within the context of criminal proceedings, the meaning of the word 'trial' is reasonably well established in regard to the commencing stage thereof: that is when the judicial investigation by the court is commenced.

4 *F & I Advisors (Edms) Bpk v Eerste Nasionale Bank van SA Bpk* 1999 (1) SA 515 (A) at 524E–F.

5 *Groenewald NO v Swanepoel* 2002 (6) SA 724 (E) at 726F–I.

6 *Kauesa v Minister of Home Affairs* 1996 (4) SA 965 (Nms) at 973I–974A.

7 *Groenewald NO v Swanepoel* 2002 (6) SA 724 (E) at 727A–B.

8 *Philipp v Lindau* 1948 (1) SA 1033 (SWA) at 1036; *Protea Assurance Co Ltd v Gamlase* 1971 (1) SA 460 (E) at 465A. The order as to costs in the former case has not been followed.

9 *Charmfit of Hollywood Inc v Registrar of Companies* 1964 (2) SA 765 (T) at 770 and *Protea Assurance Co Ltd v Gamlase* 1971 (1) SA 460 (E) at 464E–H. In both these cases the court expressed disagreement with the contrary view expressed in *Philipp v Lindau* 1948 (1) SA 1033 (SWA).

10 *Samuel v Seedat* 1949 (3) SA 984 (N).

11 This was done in *Greenblo v Levitt* 1914 CPD 244; and see *Mhlanga v Mtenenyari* 1993 (4) SA 119 (ZS). In *St Paul Insurance Co SA Ltd v Eagle Ink System (Cape) (Pty) Ltd* 2010 (3) SA 647 (SCA) at 649B such a procedure was described as 'eminently sensible'.

12 2018 (6) SA 230 (KZD).

13 Under GN 147 in *GG* 37390 of 28 February 2014. The Government Notice is reproduced in Volume 3, Part E1.

14 2016 (1) SA 78 (GJ).

15 At 85D–F.

16 *Pharmaceutical Society of South Africa v Tshabalala-Msimang; New Clicks South Africa (Pty) Ltd v Minister of Health* 2005 (3) SA 238 (SCA) at 261C; *Exdev (Pty) Ltd v Pekudei Investments (Pty) Ltd* 2011 (2) SA 282 (SCA) at 291F–292C; *Louis Pasteur Holdings (Pty) Ltd v Absa Bank Ltd* 2019 (3) SA 97 (SCA) at paragraphs [30] and [31]; and see *Nkabinde v Judicial Service Commission* 2016 (4) SA 1 (SCA) at 38F–H. See also, in general, the directive in respect of norms and standards for the exercise of judicial functions of all courts (i e Directive 1/2014) issued by the Chief Justice on 28 February 2014, which is reproduced in Volume 3, Part E1. On the writing of a judgment, see Corbett 'Writing a judgment' (1998) 115 *SALJ* 116; *Calligeris and Another NNO v Parker NO* (unreported, WCC case no 7937/2017 dated 22 March 2018).

17 2010 (2) SA 92 (CC) at 96G; and see *Botes v Nedbank Ltd* 1983 (3) SA 27 (A) at 27H–28A; *Commissioner, South African Revenue Service v Sprigg Investment 117 CC t/a Global Investment* 2011 (4) SA 551 (SCA) at 561A–E. An appeal is, however, directed at the order of the court of first instance and not at the reasons for the order (see, for example, *Medox Ltd v Commissioner, South African Revenue Service* 2015 (6) SA 310 (SCA) at 313C–D and *Baliso v FirstRand Bank Ltd t/a Wesbank* 2017 (1) SA 292 (CC) at 296E where *South African Reserve Bank v Khumalo* 2010 (5) SA 449 (SCA) is referred to with approval).

18 When used in its general sense the word 'judgment' comprises both the reasons for judgment and the judgment or order; when used in its technical sense it is the equivalent of an 'order' (*Administrator, Cape v Ntshwaqela* 1990 (1) SA 705 (A) at 715). In general, an order is the operative part of the judgment (*SA Eagle Versekeringsmaatskappy Bpk v Harford* 1992 (2) SA 786 (A) at 792C–D; *Carter v Haworth* 2009 (5) SA 446 (SCA) at 450D–E).

19 *Lurlev (Pty) Ltd v Unifreight General Services (Pty) Ltd* 1978 (1) SA 74 (D) at 79A–B.

20 *Eke v Parsons* 2016 (3) SA 37 (CC) at 65E–G. See also *Von Abo v President of the Republic of South Africa* 2009 (5) SA 345 (CC) at 364D; *Proxi Smart Services (Pty) Ltd v Law Society of South Africa* 2018 (5) SA 644 (GP) at 656A.

21 *Eke v Parsons* 2016 (3) SA 37 (CC) at 58F. See also *Proxi Smart Services (Pty) Ltd v Law Society of South Africa* 2018 (5) SA 644 (GP) at 655E–F.

22 *Eke v Parsons* 2016 (3) SA 37 (CC) at 61C–D. See also *Proxi Smart Services (Pty) Ltd v Law Society of South Africa* 2018 (5) SA 644 (GP) at 65G–656A.

23 *Joosab v Tayob* 1910 TS 486 at 488 and 490, quoted with approval in *E A Gani (Pty) Ltd v Francis* 1984 (1) SA 462 (T) at 466C; *Natal Trading and Milling Co Ltd v Inglis* 1925 TPD 724 at 743; *Trust Bank of Africa Ltd v Dhooma* 1970 (3) SA 304 (N) at 309C–D; *Blaikie-Johnstone v P Hollingsworth (Pty) Ltd* 1974 (3) SA 392 (D) at 394D–E.

24 *Trust Bank of Africa Ltd v Dhooma* 1970 (3) SA 304 (N) at 310A–C, approved in *Swadif (Pty) Ltd v Dyke NO* 1978 (1) SA 928 (A). See also *Mulder v Combined Motor Finance (Pty) Ltd* 1981 (1) SA 428 (W) at 431–2; *E A Gani (Pty) Ltd v Francis* 1984 (1) SA 462 (T) at 466–7; *Le Roux v Yskor Landgoed (Edms) Bpk* 1984 (4) SA 252 (T) at 256–7; *Zygos Corporation v Salen Rederierna AB* 1984 (4) SA 444 (C) at 453–5; *North American Bank Ltd (in liquidation) v Granit* 1998 (3) SA 557 (W) at 567E.

25 *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 at 176, 178, 186–7 and 192; *Estate Gar-lick v CIR* 1934 AD 499 at 502; *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) at 306F; *Raydean Investments (Pty) Ltd v Rand NO* 1979 (4) SA 706 (N) at 710H; *Seatle v Protea Assurance Co Ltd* 1984 (2) SA 537 (C) at 541E–F; *Van Zyl v Van der Merwe* 1986 (2) SA 152 (NC) at 156D–F; *Sundra Hardware v Mactro Plumbing* 1989 (1) SA 474 (T) at 477B; *Speaker of the National Assembly v Land Access Movement of South Africa* (unreported, CC case no CCT40/15 dated 19 March 2019) at paragraph [24]. In *S v Wells* 1990 (1) SA 816 (A) at 820A–D Joubert JA refers to this as the 'strict approach' and contrasts it with 'the more enlightened approach', which permits a judicial officer to change, amend or supplement his pronounced judgment, provided that the sense or substance of his judgment is not affected thereby. See also *Transvaal Canoe Union v Butgereit* 1990 (3) SA 398 (T) at 403E–404E; *Tshivhase Royal Council v Tshivhase* 1992 (4) SA 852 (A) at 862I; *First National Bank of South Africa Ltd v Jurgens* 1993 (1) SA 245 (W) at 246J–247A; *Bekker NO v Kotzé* 1996 (4) SA 1287 (Nm) at 1290H–J; *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC) at 780C–F and 781J; *Thompson v South African Broadcasting Corporation* 2001 (3) SA 746 (SCA) at 748H–749C; *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* 2002 (1) SA 82 (SCA) at 86C–D; *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 5I–6G; *De Villiers and Another NNO v BOE Bank Ltd* 2004 (3) SA 459 (SCA) at 462H–I; *Zondi v MEC, Traditional and Local Government Affairs* 2006 (3) SA 1 (CC) at 12G–19F; *Minister of Social Development, Ex parte* 2006 (4) SA 309 (CC) at 318E–319A; *Adonis v Additional Magistrate, Bellville* 2007 (2) SA 147 (C) at 153I–154B; *MEC for Economic Affairs, Environment and Tourism v Kruisenga* 2008 (6) SA 264 (CkHC) at 276A–B; *Brown v Yebba CC t/a Remax Tricolor* 2009 (1) SA 519 (D) at 524I–525A.
The position in divorce matters was stated as follows in *PL v YL* 2013 (6) SA 28 (ECG) at 53C–55D (footnotes omitted):
'[45] With regard to the second question raised, once the court has made a consent judgment it is functus officio and the matter becomes res judicata. This means, inter alia, that as a general rule the court has no authority to correct, alter or supplement its own order that has been accurately drawn up. Subject to what is said hereunder, in divorce matters this is in practice effectively only limited to those terms of the order which deal with the proprietary rights of the parties and the payment of maintenance to one of the spouses where there is a non-variation clause. The reason for this is that the general rule is subject to a number of exceptions, in terms of the Divorce Act, the rules of court and at common law. The exceptions in the Divorce Act relate to matters which fall within the exclusive jurisdiction of the court, and which that Act requires the court to determine and to grant an order as it may find to be justified. Consequently, orders dealing with the custody, guardianship, or access to and the maintenance of any of the minor children do not assume the character of final judgments, as they are always subject to variation in terms of s 8(1) of the Divorce Act.
[46] A further exception to the general rule that an order of court, once pronounced, is final and immutable, is created by s 8(1) of the Divorce Act. As stated, in the absence of a non-variation clause in the settlement agreement, it permits the court to rescind, vary or suspend a maintenance order granted earlier. Further, there exists in principle no reason why the parties may not subsequently seek an amendment thereof by mutual consent, or in circumstances where the order through error or oversight does not correctly reflect their agreement. Not only is the mandate of the court to exercise its discretion in terms of s 7(1) of the Divorce Act derived from the settlement agreement, but the consent order itself is based on the terms of that agreement. The legal nature of a consent order was considered by the appeal court in *Swadif v Dyke*. It was held that where the purpose of the granting of the consent judgment is to enable the parties to the agreement to enforce the terms thereof through the process of the court, should the need therefor arise, the effect of the order is to replace the right of action on the agreement by a right to execute on the judgment:
"(I)t seems realistic, and in accordance with the views of the Roman-Dutch writers, to regard the judgment not as novating the obligation under the bond, but rather as strengthening or reinforcing it. The right of action … is replaced by the right to execute, but the enforceable right remains the same."
The consent order accordingly does not have the effect of eliminating the contractual basis thereof. Rather, through operation of the res judicata principle, the judgment constitutes a bar to any action or proceedings on the underlying settlement agreement. The provisions of the agreement are instead to be enforced by the remedies available to a judgment creditor on a judgment. It is of course always open to the parties to abandon the judgment in whole or in part and to enter into a new agreement. Save for the aforegoing, the effect of the consent order is otherwise that it renders the issues between the parties in relation to their proprietary rights and the payment of maintenance to a former spouse, where the agreement includes a non-variation clause, *res judicata*, and thus effectively achieves a "clean break" as envisaged by the scheme of the Divorce Act.'
See further rule 42 and the notes thereto below.

26 *Potgieter v Potgieter NO* 2012 (1) SA 637 (SCA) at 651C–E.

27 *Getz v Smit* 1914 CPD 982.

28 *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 475D; *Western Bank Ltd v Honeywill* 1974 (4) SA 148 (D) at 153G.

29 *Ras v Simpson* 1904 TS 254 at 256; *Nel v Cloete* 1972 (2) SA 150 (A); *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A); *Western Bank Ltd v Honeywill* 1974 (4) SA 148 (D).

30 *Charney v Paletz* 1924 SWA 5.

31 *Martin v Suluzweni* (1907) 17 CTR 425.

32 *New African Ice Co Ltd v Becker* 1906 TS 889. See further the notes to rule 18 s v 'General' above. As to the effect of the omission of a prayer for costs, see the notes s v 'Costs in general — No prayer for costs' in Part D5 below.

33 *Standard Permanent Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 774C–775A. See also *Murata Machinery Ltd v Capelon Yarns (Pty) Ltd* 1986 (4) SA 671 (C); *Elgen Brown and Hamer Ltd v Dampskibsselskabet Torm Ltd* 1988 (4) SA 671 (N); *Barclays Bank of Swaziland Ltd v Mnyeki* 1992 (3) SA 425 (W).

34 *Barclays Bank of Swaziland v Mnyeki* 1992 (3) SA 425 (W).

35 *Mthimkulu v Mahomed* 2011 (6) SA 147 (GSJ) at 150F–151A. See also *Kauesa v Minister of Home Affairs* 1996 (4) SA 965 (Nm) at 973I–974B.

36 *Stuttafords Stores (Pty) Ltd v Salt of the Earth Creations (Pty) Ltd* 2011 (1) SA 267 (CC) at 271B–C.

37 *Stuttafords Stores (Pty) Ltd v Salt of the Earth Creations (Pty) Ltd* 2011 (1) SA 267 (CC) at 271C–F where the court quoted from an address delivered by Corbett CJ at the first orientation course for new judges under the new constitutional dispensation. See further Corbett 'Writing a judgment' (1998) 115 *SALJ* 116.

38 *Birgin Bower Investments (Pty) Ltd v Marketing International* 2003 (3) SA 382 (W).

39 *Katritsis v De Macedo* 1966 (1) SA 613 (A). See also *Hayes v Baldachin* 1980 (2) SA 589 (R) which was, however, for other reasons set aside on appeal (*Hayes v Baldachin* 1981 (1) SA 749 (ZA)).

40 For the distinction between a liquidated amount in money and a liquidated demand, see the notes to rule 32(1)*(b)* s v 'Liquidated amount in money' above.

41 *Irish & Co (now Irish & Menell Rosenberg Inc) v Kritzas* 1992 (2) SA 623 (W) at 632I.

42 *Collins v Van der Merwe* 1908 TS 1086; *Verkouteren v Savage* 1918 AD 143; *Bosman v Du Toit's Executors* 1937 CPD 209; *Hayes v Baldachin* 1980 (2) SA 589 (R) at 592; *Sayed v Editor, Cape Times* 2004 (1) SA 58 (C) at 66H–J and 67A–E.

43 See *O'Brien v Nurick* 1930 WLD 322; *Estate De Vries v Estate De Vries* 1943 CPD 502.

44 *Walker Engineering CC t/a Atlantic Steam Services v First Garment Rental (Pty) Ltd (Cape)* 2011 (5) SA 14 (WCC) at 17H and 18D–F.

45 *Pillay v Krishna* 1946 AD 946 at 952; *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 548A; Hoffmann & Zeffertt *Evidence* 495–500; Schmidt *Bewysreg* 27–8; Zeffertt Evidence 127–128.

46 *Tregea v Godart* 1939 AD 16 at 32.

47 On the terminology, see *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 548A–C; Hoffmann & Zeffertt *Evidence* 495–500; Schmidt *Bewysreg* 27–8; Zeffertt *Evidence* 127–128.

48 Zeffertt *Evidence* 177.

49 *H A Millard & Son (Pty) Ltd v Enzenhofer* 1968 (1) SA 330 (T) at 333F; *Groenewald v Minister van Justisie* 1972 (4) SA 223 (O) at 226B.

50 See, for example, *Smith's Trustee v Smith* 1927 AD 482; *Munsamy (also known as Naidu) v Gengemma* 1954 (4) SA 468 (N); *Mobil Oil Southern Africa (Pty) Ltd v Mechin* 1965 (2) SA 706 (A) at 710F; *Topaz Kitchens (Pty) Ltd v Naboom Spa (Edms) Bpk* 1976 (3) SA 470 (A) at 473.

51 See, for example, *Kriegler v Minitzer* 1949 (4) SA 821 (A); *H A Millard & Son (Pty) Ltd v Enzenhofer* 1968 (1) SA 330 (T) at 334; *Pretorius v Van der Merwe* 1968 (2) SA 259 (N); *Groenewald v Minister van Justisie* 1972 (4) SA 223 (O) at 226B.

52 See *Mobil Oil Southern Africa (Pty) Ltd v Mechin* 1965 (2) SA 706 (A) at 710F.

53 *Standard Bank of SA Ltd v Minister of Bantu Education* 1966 (1) SA 229 (N) at 242H–243A; approved in *Saayman v Road Accident Fund* 2011 (1) SA 106 (SCA) at 114G–J.

54 See Van der Linden *Jud Prac* 2, 48; *Koopmans Handboek* 3 1 2 14:
'Dezelve komt eigentlijk dan te pas, wanneer men vermeent, dat aan de zijde van den aanlegger eene verkeerde actie is geïnstutiëerd.'
See also the remarks of De Villiers CJ in *Corbridge v Welch* (1892) 9 SC 277 at 279.

55 As Van der Linden *Koopmans Handboek* 3 1 12 15 puts it, the *conclusie* is not raised when the defendant says, *tibi adversus me non competit actio*, but when he says, *tibi adversus me non competit haec actio*.

56 An order that the plaintiff's claim is 'dismissed' amounts in law to a judgment of absolution from the instance (*Thwaites v Van der Westhuizen* (1888) 6 SC 259; *De Jager v Vorster* (1900) 10 CTR 239; *Cloete v Greyling* (1907) 24 SC 57; *Municipality of Christiana v Victor* 1908 TS 1117; *Sebastian v Brummer* 1928 TPD 679; *Miller v Larter* 1941 EDL 98; *Becker v Wertheim, Becker & Leveson* 1943 (1) PH F34 (A); *Van Rensburg v Coetzee* 1977 (3) SA 130 (T) at 136B; *De Wet v Western Bank Ltd* 1977 (2) SA 1033 (W) at 1035F–G; *Regering van die Republiek van Suid-Afrika v South African Eagle Versekeringsmaatskappy Bpk* 1985 (2) SA 42 (O) at 56J–57A; *Twins Products (Pty) Ltd v Hollywood Curl (Pty) Ltd* 1986 (4) SA 392 (T) at 394D). The decision in *Schutze v Rocher* (1896) 3 Off Rep 126 is not authority to the contrary: 'dismissal of the claim' is an incorrect translation of the Dutch order 'ontzegging van den eisch' — the case was not dismissed but the claim refused.

57 *Grimwood v Balls* (1835) 3 Menz 448; *Thwaites v Van der Westhuizen* (1888) 6 SC 259; *Corbridge v Welch* (1892) 9 SC 277 at 279; *Van Rensburg v Reid* 1958 (2) SA 249 (E) at 252; *Minister of Police v Gasa* 1980 (3) SA 387 (N) at 389D–E; and see *Sparks v Sparks* 1998 (4) SA 714 (W) at 721A–H.

58 This test was first formulated in these terms by De Villiers JP in *Gascoyne v Paul and Hunter* 1917 TPD 170 at 173, and was approved by the Appellate Division/Supreme Court of Appeal in *R v Shein* 1925 AD 6 at 9; *Gafoor v Unie Versekeringsadviseurs (Edms) Bpk* 1961 (1) SA 335 (A) at 340A–C; *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G–H; *Oosthuizen v Standard General Versekeringsmaatskappy Bpk* 1981 (1) SA 1032 (A) at 1035H–1036A; *Levco Investments (Pty) Ltd v Standard Bank of SA Ltd* 1983 (4) SA 921 (A) at 928B; *Swanee's Boerdery (Edms) Bpk (in liq) v Trust Bank of Africa Ltd* 1986 (2) SA 850 (A) at 862F–G; *Gordon Lloyd Page & Associates v Rivera* 2001 (1) SA 88 (SCA) at 92E–93A; *De Klerk v ABSA Bank Ltd* 2003 (4) SA 315 (SCA) at 323B–G; *Holtzhausen v Absa Bank Ltd* 2008 (5) SA 630 (SCA) at 635D–E; *McCarthy Ltd v Absa Bank Ltd* 2010 (2) SA 321 (SCA) at 328H. See also, *inter alia*, *Gandy v Makhanya* 1974 (4) SA 853 (N) at 856A–C; *Van der Merwe Burger v Munisipaliteit van Warrenton* 1987 (1) SA 899 (NC) at 902C–903B; *Dale Street Congregational Church v Hendrikse* 1992 (1) SA 133 (E) at 145B–F; *Build-A-Brick v Eskom* 1996 (1) SA 115 (O) at 123B–C; *Rosherville Vehicle Services (Edms) Bpk v Bloemfonteinse Plaaslike Oorgangsraad* 1998 (2) SA 289 (O) at 293B–G; *Paarlberg Motors (Pty) Ltd t/a Paarlberg BMW v Henning* 2000 (1) SA 981 (C) at 985F; *Klerk NO v SA Metal & Machinery Co (Pty) Ltd* [2001] 4 All SA 27 (E) at 34*a–c*; *Momentum Life Assurers Ltd v Thirion* [2002] 2 All SA 62 (C) at 73*h*; *Swire Pacific Offshore Service (Pty) Ltd v MV 'Roxana Bank'* [2003] 4 All SA 520 (C) at 512f; *Hanger v Regal* 2015 (3) SA 115 (FB) at 117F–118B. In *Ardecor (Pty) Ltd v Quality Caterers (Pty) Ltd* 1978 (3) SA 1073 (N) at 1076G it is pointed out that the power which a court has to grant absolution at the close of a plaintiff's case is a discretionary power.

59 See, for example, *Gascoyne v Paul and Hunter* 1917 TPD 170; *Bee v Railway Passengers Assurance Co* 1947 (4) SA 356 (N) at 358; *De Villiers NO v Summerson* 1951 (3) SA 75 (T) at 79; *Olympic Passenger Service (Pty) Ltd v O'Connor* 1954 (3) SA 906 (N) at 909E–G; *Ruto Flour Mills (Pty) Ltd v Adelson (2)* 1958 (4) SA 307 (T) at 308A; *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 39–40; *Alli v De Lira* 1973 (4) SA 635 (T) at 637G; *Dale Street Congregational Church v Hendrikse* 1992 (1) SA 133 (E) at 145E; *Gordon Lloyd Page & Associates v Rivera* 2001 (1) SA 88 (SCA) at 92G; *Momentum Life Assurers Ltd v Thirion* [2002] 2 All SA 62 (C) at 73*g*; *Hanger v Regal* 2015 (3) SA 115 (FB) at 117E and 118A–B.

60 See *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) 26 at 39–40; Zeffertt *Evidence* 137–140; Schmidt *Bewysreg* 92.

61 *Ex parte The Minister of Justice: In re Rex v Jacobson & Levy* 1931 AD 466 at 478; *Geoghegan v Pestana* 1977 (4) SA 31 (T) at 34A–B; *Terry v Senator Versekeringsmaatskappy Bpk* 1984 (1) SA 693 (A) at 699E–700A; *Hurley v Minister of Law and Order* 1985 (4) SA 709 (A) at 725H; *Rosherville Vehicle Services (Edms) Bpk v Bloemfonteinse Plaaslike Oorgangsraad* 1998 (2) SA 289 (O) at 293F–G; *Paarlberg Motors (Pty) Ltd t/a Paarlberg BMW v Henning* 2000 (1) SA 981 (C) at 985G–H.

62 1917 TPD 170 at 173, cited with approval in *Gafoor v Unie Versekeringsadviseurs (Edms) Bpk* 1961 (1) SA 335 (A) at 340A–B.

63 1942 EDL 202 at 206.

64 1971 (4) SA 90 (RA) at 92H–93C.

65 1974 (4) SA 853 (N) at 855H.

66 *Supreme Service Station (1969) (Pvt) Ltd v Fox and Goodridge (Pvt) Ltd* 1971 (4) SA 90 (RA) at 93H.

67 *Supreme Service Station (1969) (Pvt) Ltd v Fox and Goodridge (Pvt) Ltd* 1971 (4) SA 90 (RA) at 93G.

68 2001 (1) SA 88 (SCA) at 92H–J.

69 *Atlantic Continental Assurance Co of SA v Vermaak* 1973 (2) SA 525 (E) at 527C–D.

70 *Siko v Zonsa* 1980 TS 1013. See further *Leo v Geldenhuys* 1910 TPD 980; *Potgieter v Kosana* 1913 EDL 458; *Katz v Bloomfield* 1914 TPD 379; *Theron v Behr* 1918 CPD 443; *Erasmus v Boss* 1939 CPD 204; *Shenker Bros v Bester* 1952 (3) SA 664 (A); *Ruto Flour Mills (Pty) Ltd v Adelson (2)* 1958 (4) SA 307 (T); *Gafoor v Unie Versekeringsadviseurs (Edms) Bpk* 1961 (1) SA 335 (A) at 340D–E; *South Coast Furnishers CC v Secprop 30 Investments (Pty) Ltd* 2012 (3) SA 431 (KZP) at 439D–E.

71 *Barker v Bentley* 1978 (4) SA 204 (N) at 208; *Dale Street Congregational Church v Hendrikse* 1992 (1) SA 133 (E) at 145.

72 *Gandy v Makhanya* 1974 (4) SA 853 (N) at 856D–858D; *Van der Merwe Burger v Munisipaliteit van Warrenton* 1987 (1) SA 899 (NC) at 902F–903B.

73 *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 38H; *Shezi v Ethekwini Municipality* (unreported, KZD case no 7762/2015 dated 11 October 2017) at paragraph [19]. In *Du Toit v Vermeulen* 1972 (3) SA 848 (A) the Appellate Division held (at 855D) that where there are two possible inferences of more or less equal probability absolution will be refused, but doubted whether the same approach should be adopted where a variety of inferences of equal strength can be made.

74 See *Gordon Lloyd Page & Associates v Rivera* 2001 (1) SA 88 (SCA) where the Supreme Court of Appeal held (at 92H–J) that the court should not be concerned with what the reasonable man might think but rather with its own judgment.

75 *Gafoor v Unie Versekeringsadviseurs (Edms) Bpk* 1961 (1) SA 335 (A) at 340C; *Botha v Minister van Lande* 1967 (1) SA 72 (A) at 76E–G; *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 38H–39A; *Malcolm v Cooper* 1974 (4) SA 52 (C) at 59D–E; *Rosherville Vehicle Services (Edms) Bpk v Bloemfonteinse Plaaslike Oorgangsraad* 1998 (2) SA 289 (O) at 293G–I.

76 *Paarlberg Motors (Pty) Ltd t/a Paarlberg BMW v Henning* 2000 (1) SA 981 (C) at 986C.

77 *Paarlberg Motors (Pty) Ltd t/a Paarlberg BMW v Henning* 2000 (1) SA 981 (C) at 987A–B.

78 *Paarlberg Motors (Pty) Ltd t/a Paarlberg BMW v Henning* 2000 (1) SA 981 (C) at 987B.

79 *Union Government (Minister of Railways) v Sykes* 1913 AD 156 at 173–4; *Dale Street Congregational Church v Hendrikse* 1992 (1) SA 133 (E) at 145.

80 *Schoeman v Moller* 1949 (3) SA 949 (O).

81 For example, a claim and claim in reconvention for damages arising from the same collision, with allegations of negligence on both sides.

82 *Atlantic Continental Assurance Co of SA v Vermaak* 1973 (2) SA 525 (E).

83 *Putter v Provincial Insurance Co Ltd* 1963 (4) SA 771 (W) at 772H–773A, cited with approval in *Mazibuko v Santam Insurance Co Ltd* 1982 (3) SA 125 (A) at 134D–135C. See also *Ardecor (Pty) Ltd v Quality Caterers (Pty) Ltd* 1978 (3) SA 1073 (N) at 1076H–1077C.

84 *Ardecor (Pty) Ltd v Quality Caterers (Pty) Ltd* 1978 (3) SA 1073 (N) at 1078D.

85 *Putter v Provincial Insurance Co Ltd* 1963 (4) SA 771 (W) at 773C–E.

86 1982 (3) SA 125 (A); *K & S Dry Cleaning Equipment (Pty) Ltd v South African Eagle Insurance (Pty) Ltd* 1998 (4) SA 456 (W) at 460E et seq.

87 *K & S Dry Cleaning Equipment (Pty) Ltd v South African Eagle Insurance (Pty) Ltd* 1998 (4) SA 456 (W) at 461F–462F.

88 *Forbes v Golach & Cohen* 1917 AD 559; *Oliver's Transport v Divisional Council Worcester* 1950 (4) SA 537 (C); *Akoon v Kader* 1963 (2) SA 664 (N); *Sager Motors (Pvt) Ltd v Patel* 1968 (4) SA 98 (RA) at 101G.

89 *Koster Ko-operatiewe Landboumaatskappy Bpk v SA Spoorweë en Hawens* 1974 (4) SA 420 (W), applying the principle enunciated in *National Employers Mutual General Insurance Association v Gany* 1931 AD 187 at 199. In *African Eagle Life Assurance Co Ltd v Cainer* 1980 (2) SA 234 (W) at 237F Coetzee J emphasized the fact that this approach only applies in cases where there are no probabilities one way or the other. See also *S v Molautsi* 1980 (3) SA 1041 (B) at 1042–3; *Senekal v Roodt* 1983 (2) SA 602 (T) at 606C–D; *Selamolele v Makhado* 1988 (2) SA 372 (V). Thus, if the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false (*National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at 440H–I). See also *Stellenbosch Farmers' Winery Group Ltd v Martell et Cie* 2003 (1) SA 11 (SCA) at 14–15; *Dreyer NO v AXZS Industries (Pty) Ltd* [2006] 3 All SA 219 (SCA) at 228*c–h*; *Oosthuizen v Van Heerden t/a Bush Africa Safaris* 2014 (6) SA 423 (GP) at 430F–J.

90 *Corbridge v Welch* (1892) 9 SC 277 at 279, where it is pointed out that the court is bound, if the defendant asks for it and the evidence warrants it, to give judgment in the defendant's favour. On the other hand, the court is never bound to grant absolution from the instance in a case where it is deciding on the merits after hearing all the evidence, but in certain circumstances the court has a discretion (*Berkowitz v Wilson* 1922 OPD 230 at 232). This may, for example, be the position where some alternative course is open to the plaintiff, and the court does not wish to close the door finally upon the plaintiff's case (*Damont NO v van Zyl* 1962 (4) SA 47 (C) at 52, followed in *Mills Litho (Pty) Ltd v Storm Quinan t/a 'Out of the Blue'* 1987 (1) SA 781 (C) at 786I).

91 *Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Geoghehan v Pestana* 1977 (4) SA 31 (T) at 34A.

92 *Liberty Group Ltd v K&D Telemarketing CC* 2019 (1) SA 540 (GP) at 543G-546D. In this case the plaintiff did not apply to set aside the absolution order, and in consequence its claim became prescribed in terms of s 15(2) of the Prescription Act 68 of 1969.

93 See, for example, *Arter v Burt* 1922 AD 303 at 306; *Hirschfeld v Espoch* 1937 TPD 19; *Van Staden v May* 1940 WLD 198 at 203; *Sebogo v Raath* 1947 (2) SA 624 (T); *Schoeman v Moller* 1949 (3) SA 949 (O); *Challinger v Speedy Motors* 1951 (1) SA 340 (C) at 349; *Ramnath v Bunsee* 1961 (1) SA 394 (N) at 400E; *Groenewald v Minister van Justisie* 1972 (3) SA 596 (O) at 600E–F; *Sentraalwes Personeel Ondernemings (Edms) Bpk v Nieuwoudt* 1979 (2) SA 537 (C) at 546B; *Scheepers v Video & Telecommunications Services* 1981 (2) SA 490 (E) at 491H–492A. Earlier cases in which absolution was granted in such circumstances must now be regarded as incorrect.

94 *Schuster v Geuther* 1933 SWA 114.

95 The examination, cross-examination and re-examination of witnesses are dealt with in the textbooks on the law of evidence: see Zeffertt *Evidence* 1014–1043 Schmidt *Bewysreg* 291–325. As to the order in which examination and cross-examination should take place, see *Novick v Comair Holdings Ltd* 1978 (3) SA 333 (W).

96 *Oosthuizen v Stanley* 1938 AD 322 at 333; *Mkwanazi v Van der Merwe* 1970 (1) SA 609 (A) at 616B, 619D and 626E; *Barclays Western Bank Ltd v Gunas* 1981 (3) SA 91 (D) at 94B–96F.

97 See, in particular, the judgments of Holmes JA (at 616G–617D) and of Van Winsen AJA (at 626A–629G) in *Mkwanazi v Van der Merwe* 1970 (1) SA 609 (A). Though Van Winsen AJA delivered a dissenting judgment, the majority subscribed to his general approach (*per* Steyn CJ at 619C). See also *Barclays Western Bank Ltd v Gunas* 1981 (3) SA 91 (D) at 94B–96F; *Liberty Group Ltd v K&D Telemarketing CC* 2019 (1) SA 540 (GP) at 546G–H.

98 In *Mkwanazi v Van der Merwe* 1970 (1) SA 609 (A) at 627H Van Winsen AJA describes this consideration 'as een van die grondreëls met betrekking tot die uitoefening van 'n diskresie in verband met die heropening van 'n saak wat reeds gesluit is'. See also *May v May* 1931 NPD 223; *Du Plessis v Ackermann* 1932 EDL 139; *Bellstedt v SA Railways & Harbours* 1936 CPD 397; *Stephens v Liepner* 1939 WLD 26; *Epstein v Arenstein* 1942 WLD 52; *Roberts v London Assurance Co Ltd (1)* 1948 (2) SA 838 (W); *Myers v Abramson* 1951 (3) SA 438 (C) at 450; *Broderick Properties (Pty) Ltd v Rood* 1963 (2) PH F60; *Makwetlane v Road Accident Fund* 2003 (3) SA 439 (W) at 445I. In *Barclays Western Bank Ltd v Gunas* 1981 (3) SA 91 (D) at 95C, however, it is stated that 'the modern view is that an applicant's failure to show that he exercised due diligence is not decisive of the application'.

99 *Bellstedt v SA Railways & Harbours* 1936 CPD 397; and see *Oosthuizen v Stanley* 1938 AD 322; *Meyer v Meyer* 1942 CPD 4.

100 *Bosomworth v Labistour* (1914) 35 NLR 79; *Kunene v Seedat* (1915) 36 NLR 630; *Strydom v Griffin Engineering Co* 1927 OPD 47; *Hoon v Estate De Kock* 1942 CPD 472; *Myers v Abramson* 1951 (3) SA 438 (C) at 450; *Koster Ko-operatiewe Landboumaatskappy Bpk v SA Spoorweë en Hawens* 1974 (4) SA 420 (W) at 422H–424G. See also *S v Christie* 1982 (1) SA 464 (A) at 476E.

101 *Epstein v Arenstein* 1942 WLD 52 at 62; *Shange v Pearl Assurance Co Ltd* 1965 (1) SA 569 (D); *Hladla v President Insurance Co Ltd* 1965 (1) SA 614 (A) at 621H; *Witschell v Viljoen's Transport* 1966 (1) SA 702 (O); *Taylor v Savage & Lovemore (Tvl) (Pty) Ltd* 1976 (4) SA 222 (T) at 225E; *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 (1) SA 1 (A) at 6B.

102 *Coetzee v Jansen* 1954 (3) SA 173 (T); and see *Witschell v Viljoen's Transport* 1966 (1) SA 702 (O) at 708.

103 *Epstein v Arenstein* 1942 WLD 52 at 62; *Coetzee v Jansen* 1954 (3) SA 173 (T) at 177–8; and see *Odendaalsrust Gold General Investments and Extensions Ltd v Naude NO* 1958 (1) SA 381 (T) at 384–5.

104 *Oosthuizen v Stanley* 1938 AD 322 at 333. See also *Makwetlane v Road Accident Fund* 2003 (3) SA 439 (W) at 445I–J.

105 *Oosthuizen v Stanley* 1938 AD 322 at 333; *Shange v Pearl Assurance Co Ltd* 1965 (1) SA 569 (D) at 571B–G; *Gijzen v Verrinder* 1965 (1) SA 806 (D) at 814D; *Barclays Western Bank Ltd v Gunas* 1981 (3) SA 91 (D) at 96E.

106 *Oosthuizen v Stanley* 1938 AD 322 at 333; *Mkwanazi v Van der Merwe* 1970 (1) SA 609 (A) at 616H and 619G–H.

107 *Mkwanazi v Van der Merwe* 1970 (1) SA 609 (A) at 616F, 617C and 619H. See also *Witschell v Viljoen's Transport* 1966 (1) SA 702 (O) at 710G–H.

108 See *Witschell v Viljoen's Transport* 1966 (1) SA 702 (O), in which Hofmeyr J stated (at 710F) that "n ander faktor wat ook in die guns van die applikant moet geld, is dat die aansoek op die vroegste geleentheid gemaak is'.

109 In *Mkwanazi v Van der Merwe* 1970 (1) SA 609 (A) at 617A–B. See also *Gijzen v Verrinder* 1965 (1) SA 806 (D) at 814F.

110 In *Mkwanazi v Van der Merwe* 1970 (1) SA 609 (A) at 616G–617D.

111 See also *Du Plessis v Ackermann* 1932 EDL 139 at 143; *Myers v Abramson* 1951 (3) SA 438 (C) at 450.

112 See *Godloza v Smith* 1932 EDL 154; *Coetzee v Jansen* 1954 (3) SA 173 (T); *Mkwanazi v Van der Merwe* 1970 (1) SA 609 (A); *Taylor v Savage & Lovemore (Tvl) (Pty) Ltd* 1976 (4) SA 222 (T).

113 See *Heinze v Friedrich* 1927 SWA 106; *Pauley v Marine & Trade Insurance Co Ltd (2)* 1964 (3) SA 657 (W) at 658D–659D.

114 The distinction between the calling and recalling of a witness seems to have escaped the court in *Pillay v Pillay* 1961 (1) SA 699 (D) at 701—see *Pauley v Marine & Trade Insurance Co Ltd (2)* 1964 (3) SA 657 (W) at 658B–D.

115 *Raath v Smith* 1916 TPD 200; *Ward v Lea* 1924 OPD 6; *Rowe v Assistant Magistrate, Pretoria* 1925 TPD 361; *Pauley v Marine & Trade Insurance Co Ltd (2)* 1964 (3) SA 657 (W) at 658D. See also *Nzimande v MEC for Health, Gauteng* 2015 (6) SA 192 (GP) at 198B–G.

116 *Godloza v Smith* 1932 EDL 154 at 157; *Mlombo v Fourie* 1964 (3) SA 350 (T) at 357C; *Pauley v Marine & Trade Insurance Co Ltd (2)* 1964 (3) SA 657 (W) at 659A.

117 *Pauley v Marine & Trade Insurance Co Ltd (2)* 1964 (3) SA 657 (W) at 659B.

118 See *R v Roopsingh* 1956 (4) SA 509 (A), in which the decision of the English Court of Appeal in *Yuill v Yuill* [1945] 1 All ER 183 (CA) is cited with approval. In *Hamman v Moolman* 1968 (4) SA 340 (A) it was held (at 344) that the remarks in *R v Roopsingh* 1956 (4) SA 509 (A) on the limits which a judge should observe in intervening in the conduct of proceedings over which he presides apply with even greater force in the conduct of proceedings in a civil trial. On the distinction between 'adversarial', 'accusatorial' and 'inquisitorial' see Van Loggerenberg (1987) 50 *THRHR* 201–3.

119 *Hamman v Moolman* 1968 (4) SA 340 (A) at 344E–F.

120 *Hamman v Moolman* 1968 (4) SA 340 (A) at 344D–G.

121 *Transvaal Industrial Foods Ltd v BMM Process (Pty) Ltd* 1973 (1) SA 627 (A) at 628G.

122 *S v Bresler* 1967 (2) SA 451 (A) and the authorities referred to therein; *Transvaal Industrial Foods Ltd v BMM Process (Pty) Ltd* 1973 (1) SA 627 (A) at 629B–D; *Brian Kahn Inc v Samsudin* 2012 (3) SA 310 (GSJ).

123 *R v Cooper* 1926 AD 54; and see *S v Bresler* 1967 (2) SA 451 (A) and the authorities referred to therein; *Transvaal Industrial Foods Ltd v BMM Process (Pty) Ltd* 1973 (1) SA 627 (A) at 629B–D.

124 *Ablansky v Bulman* 1915 TPD 71.

125 *R v Mahambahla* 1924 EDL 2.

126 *Ablansky v Bulman* 1915 TPD 71. Early Natal practice varied in this regard. The right to reply was allowed, both as to law and facts, in *In re Thompson & Williams* (1909) 30 NLR 120, and, on review, in *Horsley v Owen & Collier* (1885) 6 NLR 27, but refused as to the facts in *Hall v Hodgson* (1892) 13 NLR 212 and *Master and Owners SS 'Hilcragg' v Beckett* (1902) 23 NLR 450 at 453.

127 *Intramed (Pty) Ltd v Standard Bank of South Africa Ltd* 2004 (6) SA 252 (W) at 256G. See also *Burchell v Anglin* 2010 (3) SA 48 (ECG) at 58G–59B.

128 1978 (3) SA 333 (W) at 336H, followed and applied in *Raditsela v Senior Magistrate, Johannesburg* 1986 (4) SA 559 (W).

129 *Merchandise Exchange (Pty) Ltd v Eagle Star Insurance Co Ltd* 1962 (3) SA 113 (C) at 114H–115A. See the remarks of Kotze AJ in *Bester v Calitz* 1982 (3) SA 864 (O) at 872E–H.

130 Cf *Meeth v Hoppan & Co* 1951 (2) SA 581 (T).

131 *S v Maxaku, S v Williams* 1973 (4) SA 248 (C) at 257E; *S v K* 1974 (3) SA 857 (C) at 858H.

132 *S v Mpopo* 1978 (2) SA 424 (A) at 429A. See also *S v Booi* 1972 (4) SA 68 (NC); *S v Brandt* 1972 (4) SA 70 (NC); *S v Ntlahla* 1977 (3) SA 109 (TSC).

133 *Arthur v Bezuidenhout and Mieny* 1962 (2) SA 566 (A) at 571E.

134 *Germani v Herf* 1975 (4) SA 887 (A) at 898E; *Mahomed v Shaik* 1978 (4) SA 523 (N) at 527F.

135 *Omega Africa Plastics (Pty) Ltd v Swisstool Manufacturing Co (Pty) Ltd* 1978 (4) SA 675 (A) at 682E–683D.

136 *R v Sewpaul* 1949 (4) SA 978 (N) at 980; *R v Robertson* 1958 (1) SA 676 (A) at 679.

137 *Goldstuck v Mappin & Webb Ltd* 1927 TPD 723; *Newell v Cronje* 1985 (4) SA 692 (E) at 697B.

138 *East London Municipality v Van Zyl* 1959 (2) SA 514 (E) at 517B.

139 *R v Sewpaul* 1949 (4) SA 978 (N) at 680; *R v Robertson* 1958 (1) SA 676 (A) at 697.

140 *East London Municipality v Van Zyl* 1959 (2) SA 514 (E) at 517B.

141 *Goldstuck v Mappin & Webb Ltd* 1927 TPD 723.

142 *Hansen v R* (1924) 45 NLR 318; *Norwitz v The Magistrate of Fauresmith* 1928 OPD 109.

143 *R v Magadia* 1924 EDL 21; *Akoon v R* (1926) 47 NLR 306; *R v Mouton* 1934 TPD 101; it is, however, a course of conduct which cannot be encouraged (see *R v Steenkamp* 1947 (1) SA 714 (SWA)).

144 *Thubela v Pretorius NO* 1961 (4) SA 506 (T).

145 *H A Millard & Son (Pty) Ltd v Enzenhofer* 1968 (1) SA 330 (T) at 334C; *Newell v Cronje* 1985 (4) SA 692 (E) at 697C.

146 *H A Millard & Son (Pty) Ltd v Enzenhofer* 1968 (1) SA 330 (T) at 334C.

147 *Kruger v Ludick* 1947 (3) SA 23 (A) at 31; *R v Holland* 1950 (3) SA 37 (C); *H A Millard & Son (Pty) Ltd v Enzenhofer* 1968 (1) SA 330 (T) at 334C; *Newell v Cronje* 1985 (4) SA 692 (E) at 697C–E.

148 *R v Van der Merwe* 1950 (4) SA 17 (O).

149 *R v Steenkamp* 1947 (1) SA 714 (SWA) at 717; and see *Newell v Cronje* 1985 (4) SA 692 (E) at 697E.

150 *R v Trotsky* 1947 (1) SA 612 (SWA) at 614; *R v Smith* 1949 (4) SA 782 (O); *R v Du Plessis* 1950 (1) SA 297 (T); *S v Barnardo* 1960 (3) SA 552 (A); *Newell v Cronje* 1985 (4) SA 692 (E) at 698.

151 *Arthur v Bezuidenhout and Mieny* 1962 (2) SA 566 (A) at 571E.

152 Cf *Rail Commuters' Action Group v Transnet Ltd* 2006 (6) SA 68 (C) at 88B.

153 Cf *Uramin (Incorporated in British Colombia) t/a Areva Resources Southern Africa v Perie* 2017 (1) SA 236 (GJ) at 241A–B.

154 2017 (1) SA 236 (GJ). See also *M K v Transnet Ltd t/a Portnet* [2018] 4 All SA 251 (KZD); and see *Hills v Hills (II)* 1933 NPD 293 at 294–5; I Knoetze 'Virtual evidence in courts — a concept to be considered in South Africa' 2017 (October) *De Rebus* 30–1.

155 At 237D–244H (footnotes included).

156 Uniform Rule 38(2).

157 Section 173 of the Constitution conjoins the inherent power of the courts to protect and regulate their own process with the power to develop the common law, taking into account the interests of justice. Rule 39(20) provides that a court is endowed with a discretion to vary any of its procedures.

158 See *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 783A.

159 Uniform Rule 38(2).

160 Section 158 of the Criminal Procedure Act.

161 Uniform Rule 39(16).

162 Uniform Rule 38(3)–(8).

163 See *Kidd v Van Heeren* (GJ 27973/1998), an unreported judgment of 3 September 2013.

164 See *S v Ndhlovu and Others* 2002 (2) SACR 325 (SCA) at 340; *S v Van der Sandt* 1997 (2) SACR 116 (W) at 132.

165 See *S v McLaggan* [2012] ZAECGHC 76; *S v Staggie and Another* 2003 (1) SACR 232 (C) (2003 (1) BCLR 43); *S v Grandhomme and Another* (WCC 18/1997); *Kidd v Van Heeren* above n10.

166 *Twine v Naidoo* [2018] 1 All SA 297 (GJ) at paragraph [32].

167 Cf *De Sousa v Technology Corporate Management (Pty) Ltd* 2017 (5) SA 577 (GJ) at 608I–610E, 652J–654B and 655C–655J.

168 *Veto v Ibhayi City Council* 1990 (4) SA 93 (SE) at 96A.

169 1990 (4) SA 93 (SE) at 95G–96D.

170 2010 (3) SA 211 (W) at 219E–H.

171 2012 (2) SA 623 (WCC) at 630E–F.

172 At 630, n 13.

173 2019 (4) SA 594 (GP). The decision is currently the subject of an appeal to the Supreme Court of Appeal, the full court having granted leave to appeal on 11 December 2018.

174 At 617G–H.

175 At 621E.

176 Rule 50(9) provides as follows:
'(9) The summons or other initial document issued in a case transferred to a court in terms of rule 39(22) of the Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa shall stand as summons commencing an action in the court to which such case has been so transferred and shall, subject to any right the defendant may have to except thereto, be deemed to be a valid summons, issued in terms of the rules and any matter done or order given in the court from which such case has been transferred and the case shall thereupon proceed from the appropriate stage following the stage at which it was terminated before such transfer.'
The predecessor of rule 50(9) included the words 'shall be deemed to have been done or given in the court from which such case has been so transferred' between the words 'has been transferred' and 'and the case shall thereupon proceed'. The words that appeared in the predecessor of this subrule have, for no apparent reason, been omitted from the subrule, thus rendering the subrule incomprehensible in that regard.

177 *Briel v Van Zyl* 1985 (4) SA 163 (T) at 167H.

178 *Veto v Ibhayi City Council* 1990 (4) SA 93 (SE) at 95H.

179 *Franco Vignazia Enterprises (Pty) Ltd v Berry* 1983 (2) SA 290 (C) at 296G.

180 *Van der Schyff v Gemeenskapontwikkelingsraad* 1984 (2) SA 497 (W) at 499F. In this case the plaintiff was ordered to pay to the defendant the costs of two days wasted by excessive cross-examination. See also *Africa Solar (Pty) Ltd v Divwatt (Pty) Ltd* 2002 (4) SA 681 (SCA) at 699A–E and *De Sousa v Technology Corporate Management (Pty) Ltd* 2017 (5) SA 577 (GJ) at 608I–610E, 652J–654B and 655C–655J.

181 Cf *De Sousa v Technology Corporate Management (Pty) Ltd* 2017 (5) SA 577 (GJ) at 608I–610E, 652J–654B and 655C–655J.

40 *In forma pauperis*

(1) *(a)* A person who desires to bring or defend proceedings *in forma pauperis*, may apply to the registrar who, if it appears to him that he is a person such as is contemplated by paragraph *(a)* of subrule (2), shall refer him to an attorney and at the same time inform the local society of advocates accordingly.

(b) Such attorney shall thereupon inquire into such person's means and the merits of his cause and upon being satisfied that the matter is one in which he may properly act *in forma pauperis*, he shall request the said society to nominate an advocate who is willing and able to act, and upon being so nominated such advocate shall act therein.

(c) Should such attorney or advocate thereafter become unable so to act, the registrar or the said society, as the case may be, may, upon request, nominate another practitioner to act in his stead.

(2) If when proceedings are instituted there be lodged with the registrar on behalf of such person—

(a) an affidavit setting forth fully his financial position and stating that, excepting household goods, wearing apparel and tools of trade, he is not possessed of property to the amount of R10 000 and will not be able within a reasonable time to provide such sum from his earnings;

[Paragraph *(a)* substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987 and amended by GN R109 of 22 January 1993.]

(b) a statement signed by the advocate and attorney aforementioned that being satisfied that the person concerned is unable to pay fees they are acting for the said person in their respective professional capacities gratuitously in the proceedings to be instituted by him; and

(c) a certificate of *probabilis causa* by the said advocate, the registrar shall issue all process and accept all documents in the said proceedings for the aforesaid person without fee of office.

(3) All pleadings, process and documents filed of record by a party proceeding *informa pauperis* shall be headed accordingly.

(4) The registrar shall maintain in his office a roster of attorneys, and in referring persons desirous of bringing or defending proceedings *in forma pauperis* to practitioners in terms of subrule (1), he shall do so as far as possible in rotation.

(5) The said advocate and attorney shall thereafter act gratuitously for the said person in their respective capacities in the said proceedings, and shall not be at liberty to withdraw, settle or compromise such proceedings, or to discontinue their assistance, without the leave of a judge, who may in the latter event give directions as to the appointment of substitutes.

(6) When a person sues or defends *in forma pauperis* under process issued in terms of this rule, his opponent shall, in addition to any other right he might have, have the right at any time to apply to the court on notice for an order dismissing the claim or defence or for an order debarring him from continuing *in forma pauperis*; and upon the hearing of such application the court may make such order thereon, including any order as to costs, as to it seems meet.

(7) If upon the conclusion of the proceedings a litigant *in forma pauperis* is awarded costs, his attorney may include in his bill of costs such fees and disbursements to which he would ordinarily have been entitled, and upon receipt thereof, in whole or in part, he shall pay out in the following order of preference: first, to the registrar, such amount in revenue stamps as would have been due in respect of his fees of office; second, to the sheriff, his charges for the service and execution of process; third, to himself and the advocate, their fees as allowed on taxation, *pro rata* if necessary.

[Subrule (7) amended by GN R2410 of 30 September 1991.]

Commentary

Subrule (1)*(a)*: 'A person.' Primarily 'person' does not include an executor [1] unless the executor is also a beneficiary and both the estate and the executor are without means. [2] An alien or a *peregrinus* may apply [3] provided he is within the jurisdiction. [4] The fact that a *peregrinus* plaintiff is proceeding *in forma pauperis* does not prevent him from being ordered to furnish security under rule 47. [5] If a minor applies he must be assisted by his guardian. [6]

'Bring or defend proceedings *in forma pauperis*.' A litigant may apply to continue *in forma pauperis* in an action already instituted. It has been held that he may do so by proceeding in terms of the provisions of this rule but that he should, in addition, set out the alteration in his circumstances which renders it necessary for him to continue his action *in forma pauperis* and he must give notice of his application to the opposite party. In the event of the opposite party intimating that he objects to the grant of the application, the applicant must apply formally to the court for such leave after giving proper notice to the other side. [7]

Subrule (1)*(b)*: 'Such attorney shall thereupon inquire.' The attorney to whom the matter has been referred for investigation and report is not necessarily obliged to go into all the evidence of both parties. He must satisfy himself from the *ex parte* statement of the applicant with such confirmatory evidence as the latter can conveniently produce and with such evidence as the opposite party may voluntarily put before him that the applicant has *prima facie* a good cause for the action or for the defence. [8]

'Into such person's means.' The test is that set out in subrule (2)*(a)*, i e whether or not such person is, excepting household goods, wearing apparel and tools of trade, possessed of property to the amount of R10 000 or will be able within a reasonable time to provide such sum from his earnings. What is relevant, therefore, is not only the actual possession of cash, but also the means of obtaining it. [9] The word 'means' covers all cash or assets to which the

applicant is entitled and includes, for example, a vested right to instalments paid by the applicant under a contract of sale. [10] A contingent asset need not be considered. [11]

The question of means where the applicant is a minor has been the subject of conflicting decisions. In *Lentzner v Friedman*, [12] where the father was possessed of some small means but the minor was a pauper, leave was refused. In other cases where the minor was a pauper but his father had some small means, leave was granted. [13] The general rule appears to be that leave will be granted to the minor to sue *in forma pauperis* if his guardian has only limited means but not if his father is well-to-do. [14] The financial position of the guardian is thus a factor to consider, but is not the governing factor. [15] Every case must be decided on its own facts and circumstances.

'And the merits of his cause.' It is not part of the attorney's function at this stage to investigate the opposite party's case or to consider where the balance of probabilities lies; he must satisfy himself from the *ex parte* statement of the applicant with such confirmatory evidence as the latter can conveniently produce and with such evidence as the opposite party may voluntarily put before him that the applicant has *prima facie* a good cause for the action or for the defence. [16]

'Request the said society to nominate an advocate.' The 'said society' is the local society of advocates adverted to in subrule (1)*(a)*. In *Hackert v Hackert* [17] the court authorized, in terms of its inherent jurisdiction, an advocate practising in another division to act *in forma pauperis* on behalf of a defendant who was subject to an order of committal in that other province.

Subrule (2)*(a)*: 'Excepting household goods.' This will not include luxury items: it was held in *Ex parte Battiss* [18] that a radiogram did not fall within the ambit of the phrase.

'And tools of trade.' The intention underlying the subrule is that persons who earn a living by working with tools and who without such tools are not able to carry on their trade should not be obliged in order to institute or defend proceedings to dispose of their only means of support. [19]

'Provide such sum from his earnings.' Leave to sue *in forma pauperis* will not be granted to a person who is able to earn good wages. [20] One case has recognized a presumption that a well-educated, healthy male adult can earn money. [21] The mere fact that an applicant is in receipt

of a salary does not necessarily debar him from relief; all the circumstances of the case must be taken into consideration. [22] Leave will not be given where the applicant is earning sufficient to enable him to save enough to proceed in the ordinary way; [23] though regard must be had to his living and other expenses. [24]

Subrule (2)*(c)*: 'A certificate of *probabilis causa*.' The object of the certificate is, on the one hand, to prevent a denial of justice to a pauper; and, on the other, to secure defendants from being improperly harassed by groundless suits in which they cannot recover their costs. [25] Counsel should take into consideration all the facts which come to his knowledge, whether he is made aware of them by the applicant or by the proposed defendant, but he is not obliged to approach the defendant if the information is not volunteered to him. [26]

The court will generally attach great importance to counsel's certificate but is not bound by it. [27]

Subrule (5): 'Shall thereafter act gratuitously.' The advocate and attorney are obliged in terms of this subrule to render their professional services free of charge. The pauper litigant is obliged, however, to provide cover for the disbursements made by the attorney on his behalf. [28] The advocate and attorney are obliged to act gratuitously until released: an attorney who has not been released is not entitled, without a directive from the court to that effect, to demand fees from his pauper client. [29]

'Withdraw, settle or compromise such proceedings.' In *Nkosi v Caledonian Insurance Co* [30] the court laid down the procedure to be followed when, in an action in which the plaintiff has been given leave to sue *in forma pauperis*, a settlement is sought to be approved. A report by the attorney incorporating the terms of the settlement and stating briefly the reasons why the settlement is recommended should be submitted to the judge. Information should also be furnished regarding the attitude of the client to the settlement and if it cannot be shown that he understands the terms of the settlement and agrees to them arrangements should be made for him to be given an opportunity to explain his attitude personally to the judge when the application is made. [31]

Although this subrule requires the leave of a judge before an advocate and an attorney are at liberty to settle *in forma pauperis* proceedings, there is nothing in the rules or the common law that deprives an *in forma pauperis* litigant of contractual capacity or the right himself to 'withdraw, settle or compromise' the proceedings. [32]

'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.

Subrule (6): 'To apply to the court on notice.' The application under this subrule is an application as envisaged by rule 6(1) read with rule 6(7)*(a)*. [33]

'An order dismissing the claim or defence.' This subrule envisages the possibility that, apart from depauperization, the claim or defence may be dismissed; but it is submitted that this would be ordered only if the action is frivolous or an abuse of the process of the court or in cases of gross impropriety or misconduct.

'An order debarring him from continuing *in forma pauperis*.' It is submitted that the onus rests upon the applicant party to show that a party should be depauperized. The court will have to be satisfied on a balance of probabilities that the party who is proceeding *in forma pauperis* has no reasonable prospect of success in the action, or that other good grounds exist for depauperizing him. Such grounds would include the following: that the most that the plaintiff is likely to recover is within the jurisdiction of the magistrate's court; [34] that the court sued in has no jurisdiction; [35] that the pauper has misrepresented his financial position to the registrar; or that the pauper has been guilty of some other improper or unfitting conduct. [36] Leave to sue or defend *in forma pauperis* is an indulgence; and this privilege may be withdrawn in suitable cases.

'Make such order . . . as to it seems meet.' Other orders which the court may make would include, for example, an order that the action or defence be not proceeded with until costs already incurred have been paid.

'Including any order as to costs.' The court may make an order as to the payment of the costs of the application against the party who was proceeding *in forma pauperis*. [37]

Subrule (7): 'Is awarded costs.' There must be an order for costs in favour of the pauper before his attorney can claim to be paid his costs. [38] This subrule clearly provides that only upon receipt of the awarded costs, the attorney shall pay out the amount received in the order of preference stipulated in the subrule.

A cession by a successful pauper of the benefit of the judgment to his attorney, subject to an undertaking to account for the balance, is not in itself invalid or reprehensible. [39]

'Such fees and disbursements to which he would ordinarily have been entitled.' It has been held that the advocate and attorney acting for a pauper may not receive from the opposing party more than the fees allowed by the taxing master on taxation. [40]

'Amount in revenue stamps.' By GN 360 of 27 March 2009 (*GG* 32059 of 27 March 2009) adhesive revenue stamps were demonetized.

1 *Gartrell NO v Southern Life Association* 1909 TH 86; *Budaza's Executor v Budaza* 1912 EDL 149; *Filmer NO v African Guarantee & Indemnity Co Ltd* 1916 WLD 7; *Bikitsha v Bikitsha* 1917 AD 546; *Uys' Executor v Van der Spuy* 1938 CPD 118.

2 *Samuels NO v African Homes Trust Ltd* 1914 CPD 626, approved in *Bikitsha v Bikitsha* 1917 AD 546; *Ex parte Nieuwenhuizen* 1950 (3) SA 125 (SWA).

3 *Gendre & Cavallera v Pagel* 1914 WLD 108; *Neal v Neal* 1959 (1) SA 828 (N); *Fourie v Ratefo* 1972 (1) SA 252 (O).

4 *Ex parte Kuttenkeuler* 1911 CPD 8; *Becker v Eastern Province Guardian Co* 1923 EDL 502; *Slocock v Plenderleith* 1927 CPD 338; *Ex parte Du Preez* 1964 (2) SA 227 (SR).

5 *Fourie v Ratefo* 1972 (1) SA 252 (O).

6 *Myburgh v J & A Jorgenson* 1914 EDL 89; *Wright v Stuttaford & Co* 1929 EDL 10; *McLoughlin v Royal Hotel Co* 1931 EDL 339.

7 *Commercial Union Assurance Co of SA Ltd v Van Zyl* 1971 (1) SA 100 (E); *Protea Assurance Co Ltd v Gamlase* 1971 (1) SA 460 (E). See also *Lax v Parity Insurance Co Ltd (in liquidation)* 1966 (3) SA 396 (E).

8 *Ormond v Jordan* (1884) 4 EDC 260; *Nkosi v Caledonian Insurance Co* 1961 (4) SA 649 (N).

9 *Behrens v Berg* (1877) 7 Buch 138.

10 *Ex parte Theron* 1946 CPD 770. See also *Theron v Gayba* 1920 CPD 292.

11 *Meyer v African Homes Trust Ltd* 1921 OPD 197; *Morley v Wicks* 1924 (2) PH F8 CPD.

12 1919 OPD 6, followed in *Grobler v Potgieter* 1954 (2) SA 188 (O). However, in *Lentzner's* case the father asked for leave to appeal against an order refusing to award him damages in his own name for the pain and suffering endured by the minor. It does not follow that had the application been for leave to institute action, leave would have been refused (see *Hodgkinson v King* 1933 EDL 219 at 221).

13 *Meyer v Mohammed* 1930 CPD 301; *Weston v Daddy Bros & Johnstone (Pty) Ltd* 1930 NPD 133; *Hodgkinson v King* 1933 EDL 219; *Bezuidenhout v Northern Assurance Co Ltd* 1948 (3) SA 629 (E).

14 *Meyer v Mohammed* 1930 CPD 301.

15 *Weston v Daddy Bros & Johnstone (Pty) Ltd* 1930 NPD 133, followed in *Hodgkinson v King* 1933 EDL 219 but differed from in *Grobler v Potgieter* 1954 (2) SA 188 (O) at 191–2.

16 *Nkosi v Caledonian Insurance Co* 1961 (4) SA 649 (N) at 653. See also *Ormond v Jordan* (1884) 4 EDC 260; *Hendricks v The Cape Tramways Co Ltd* (1905) 22 SC 548; *Du Plessis v Lamb* 1906 TH 165; *Saunders v The Cape Tramways Co Ltd* (1906) 23 SC 35; *Hendricks v Verster* 1912 CPD 435; *Williams v Nel* 1939 WLD 188; *Finchell v Finchell* 1936 NPD 630; *Plotz v African Guarantee & Indemnity Co Ltd* 1947 (4) SA 327 (E).

17 1985 (1) SA 717 (C).

18 1961 (2) SA 288 (SR).

19 *Ex parte Magwaga* 1959 (3) SA 472 (SR).

20 *In re Ismail Mahomed Jassat* (1896) 17 NLR 99; *Epstein v Epstein* (1902) 19 SC 183; *Spring v Coetzee's Executor* 1905 TS 347; *Coetzee & Coetzee v De Bruyn* 1916 OPD 71; *Obell v Zwarenstein* 1925 WLD 234.

21 *Honey v Cryer* 1910–17 GWL 112.

22 *Crowley v Crowley & Geater* 1919 TPD 426. Examples of cases in which other circumstances were taken into consideration, include *David v Abdol Rajieb* 1877 Buch 81; *Leathern v Surtees* 1879 Kotzé 100; *Potterill v Potterill* (1884) 5 NLR 250; *La Combre v Hutchins* (1892) 9 SC 155; *Wroth v Harmer* 1907 EDC 118; *In re Naga* (1907) 28 NLR 492; *Brink v Moodley* (1908) 18 CTR 331; *Campbell v Macintosh, Findlay & Co* 1910 TPD 260; *Fedder v McCreadie* 1914 WLD 128; *Foxon v Foxon* 1914 AD 176; *Honey v Cryer* 1910–17 GWL 112; *Mazwe v Presbyterian Church, Africa* 1923 EDL 141; *Poppendiek v Union Bag Co* 1923 EDL 88; *O'Connor v SAR & H* 1931 (1) PH F50 (C); *Ex parte Nieuwenhuizen* 1950 (3) SA 125 (SWA).

23 *Schneegans v Schneegans* 1876 Buch 9; *Ex parte Milne* (1907) 17 CTR 886; *Flack v Hatch* 1907 EDC 107; *Gillingham v Fehrsen* 1909 TS 671; *Hay v Nel's Executors* 1910 EDL 360; *Jensen v Lamprecht* 1912 OPD 1; *Van der Byl v Schierhout* 1914 CPD 664; *Steenkamp v Jackson* 1916 EDL 16.

24 *Otterstrom v Estate Stephan* (1907) 17 CTR 287; *Fernando v Fernando* (1908) 18 CTR 298; *Warner v Wright* (1908) 18 CTR 641; *Ex parte Dahl* (1909) 19 CTR 447; *Crowley v Crowley & Geater* 1919 TPD 426; *Liesching v SA Railways & Harbours* 1920 OPD 31.

25 *Ormond v Jordan* (1884) 4 EDC 260 at 265.

26 *Ormond v Jordan* (1884) 4 EDC 260 at 265. See also *Hendricks v The Cape Tramways Co Ltd* (1905) 22 SC 548; *Du Plessis v Lamb* 1906 TH 165; *Saunders v The Cape Tramways Co Ltd* (1906) 23 SC 35; *Hendricks v Verster* 1912 CPD 435; *Williams v Nel* 1939 WLD 188; *Finchell v Finchell* 1936 NPD 630; *Plotz v African Guarantee & Indemnity Co Ltd* 1947 (4) SA 327 (E); *Nkosi v Caledonian Insurance Co* 1961 (4) SA 649 (N) at 653.

27 *Ormond v Jordan* (1884) 4 EDC 260 at 265; *Van Zyl v Commercial Union Assurance Co of SA Ltd* 1971 (3) SA 480 (E) at 481A.

28 See *Cumberlege v Cumberlege* 1972 (2) SA 346 (E).

29 *Machenheimer v Machenheimer* 1991 (4) SA 387 (C) at 395B.

30 1961 (4) SA 649 (N) at 660G–H.

31 As a general rule the court will disallow as part of the settlement a provision for the payment of attorney and client costs (*Mtembu v Eagle Star Insurance Co* 1960 (2) SA 50 (E), and *Somaci v SA Fire Insurance and Accident Co Ltd* 1960 (3) SA 150 (E)). See also *Magaslela v Santam Insurance Co Ltd* 1962 (2) SA 398 (E) where the court disallowed the attorney's costs because it disapproved of his conduct.

32 *Machenheimer v Machenheimer* 1991 (4) SA 387 (C) at 392E–F.

33 *Da Silva v Pillay NO* 1997 (3) SA 760 (D) at 770H–J.

34 See *Frances v British & American Boot Co* 1906 TH 85; *Skippers v Bellville Bus Co* 1931 CPD 26.

35 See *Ex parte Kaiser* 1902 TH 165.

36 See *Cumberlege v Cumberlege* 1972 (2) SA 346 (E).

37 See *Goliath v Keating* (1889) 7 SC 52, followed in *Ex parte Theron* 1946 CPD 770 at 773. See also *Ex parte Brink* 1907 TS 626; *Schultz v Schultz Syndicate Ltd* 1909 TS 270; *Crowley v Crowley & Geater* 1919 TPD 426; *Du Plessis v Marais* 1931 EDL 70; *McLoughlin v Royal Hotel Co* 1931 EDL 339; *Ex parte Hartley* 1964 (4) SA 598 (W).

38 Where a pauper defendant succeeded on a claim in reconvention but, owing to her conduct, without costs, the High Court held that under its rules it was not entitled to allow her representative any fees out of the amount recovered (*London & SA Exploration Co Ltd v Moodoosoodam* (1885) 3 HCG 305).

39 *Kader v Frank & Warshaw* 1926 AD 344.

40 *Mtembu v Eagle Star Insurance Co* 1960 (2) SA 50 (E) at 51H; *Somaci v SA Fire Insurance and Accident Co Ltd* 1960 (3) SA 150 (E) at 152A.

41 Withdrawal, settlement, discontinuance, postponement and abandonment

(1) *(a)* A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs; and the taxing master shall tax such costs on the request of the other party.

(b) A consent to pay costs referred to in paragraph *(a)*, shall have the effect of an order of court for such costs.

(c) If no such consent to pay costs is embodied in the notice of withdrawal, the other party may apply to court on notice for an order for costs.

[Subrule (1) substituted by GN R2021 of 5 November 1971.]

(2) Any party in whose favour any decision or judgment has been given, may abandon such decision or judgment either in whole or in part by delivering notice thereof and such judgment or decision abandoned in part shall have effect subject to such abandonment. The provisions of subrule (1) relating to costs shall *mutatis mutandis* apply in the case of a notice delivered in terms of this subrule.

[Subrule (2) substituted by GN R2004 of 15 December 1967.]

(3) If in any proceedings a settlement or an agreement to postpone or withdraw is reached, it shall be the duty of the attorney for the plaintiff or applicant immediately to inform the registrar accordingly.

(4) Unless such proceedings have been withdrawn, any party to a settlement which has been reduced to writing and signed by the parties or their legal representatives but which has not been carried out, may apply for judgment in terms thereof on at least five days' notice to all interested parties.

[Subrule (4) substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

Commentary

General. Rule 41 makes provision for the following distinct procedures:

(a) withdrawal of proceedings by the person who instituted such proceedings at any time before the matter has been set down with or without costs (subrule (1));

(b) withdrawal of proceedings by the person who instituted such proceedings at any time after the matter has been set down, by consent of the parties or leave of the court, with or without costs (subrule (1));

(c) in the event of the withdrawal of proceedings with costs, the taxing of such costs on the request of the other party, the consent to pay the costs having the effect of an order of court (subrule (1)*(a)* and *(b)*);

(d) in the event of a withdrawal without costs, the application by the other party, on notice, for an order for costs (subrule (1)*(a)* and *(c)*);

(e) the abandonment of a decision or judgment, in whole or in part, by a party in whose favour it has been given (subrule (2));

(f) in the event of an abandonment of proceedings with costs, the taxing of such costs on the request of the other party, the consent to pay the costs having the effect of an order of court (subrule (2) read with subrule (1)*(a)* and *(b)*);

(g) in the event of an abandonment without costs, the application by the other party, on notice, for an order for costs (subrule (2) read with subrule (1)*(c)*);

(h) notification of the registrar by the attorney for the plaintiff or applicant if in any proceedings a settlement, an agreement to postpone or an agreement to withdraw is reached by the parties (subrule (3));

(i) in the event of a settlement which has been reduced to writing and signed by the parties or their legal representatives which has not been carried out, an application by any party for judgment in terms thereof on at least five days' notice to all interested parties (subrule 4)).

The rule applies to proceedings instituted by way of action as well as application.

The principles applicable to an application for the grant of a postponement of an application otherwise than by agreement between the parties are the same as those that apply to trials. [1] The principles are discussed in the *excursus* s v 'Postponement' below.

Subrule (1)*(a)*: 'A person instituting any proceedings may at any time before the matter has been set down ... withdraw such proceedings.' A person who has instituted proceedings is entitled to withdraw such proceedings without the other party's concurrence and without leave of the court at any time before the matter is set down. [2]

In *Roupell v Metal Art (Pty) Ltd* [3] the plaintiff was permitted, a dispute having arisen as to the effect of a settlement that had been entered into, to withdraw his notice of withdrawal and to reinstate the matter on the roll for hearing. It is submitted that this should be permitted only in exceptional circumstances.

The 'proceedings' referred to in this subrule are those envisaged by the rules in which there is a *lis* between parties, one of whom seeks redress or the enforcement of rights against the other. [4] The proceedings under s 276A(3) of the Criminal Procedure Act 51 of 1977 are *sui generis* and not proceedings in which one party seeks relief against the other: the *lis* between the State and the accused has come to an end, the court has given its order and that order is being enforced. These proceedings do not constitute an 'application' as envisaged by the rules and the State is therefore not bound by the subrule in withdrawing a matter instituted under the said Act. [5]

'And thereafter by consent of the parties or leave of the court.' Once a matter has been set down for hearing, it is not competent for the party who has instituted such proceedings to withdraw them without either the consent of all the parties or the leave of the court. [6] In the absence of such consent or leave, a purported notice of withdrawal will be invalid. [7] The court has a discretion whether or not to grant such leave, and the question of injustice to the other parties is germane to the exercise of the court's discretion. [8] It is, however, not ordinarily the function of the court to force a person to proceed with an action against his will or to investigate the reasons for abandoning or wishing to abandon one. [9]

Subrule (1)*(b)*: 'A consent to pay costs ... shall have the effect of an order of court for such costs.' There is no provision in rule 41 that an undertaking in a settlement to pay costs shall have the effect of an order of court. It is clear that in order to execute an undertaking in a

settlement to pay costs, a judgment will have to be obtained and the costs will have to be taxed. A taxed bill of costs alone is not enough to levy execution on an undertaking to pay costs. [10] An *allocatur* does not amount to a judgment for purposes of execution. [11] Under this subrule, however, a consent to pay costs on withdrawal of proceedings has the effect of an order of court for such costs. Thus, once the taxing master has taxed such costs on the request of the other party, the taxed bill of costs can be enforced by means of execution.

The subrule does not stipulate what course a party must follow if he wants costs on a basis other than the one in the consent. It is submitted that in such instance the party aggrieved by the scale/basis on which costs were embodied in the consent would have to approach the court on application for an order of costs on another basis (e g attorney and client costs) and that the court, in terms of its inherent jurisdiction, could make an appropriate order.

Subrule (1)*(c)*: 'Apply to court on notice for an order for costs.' An applicant for an order for costs need only deliver a notice of his intention to ask for an order as to costs — no affidavit is required since the relevant material is already before the court. [12] The respondent is entitled to oppose the application for an order for costs and to place the grounds of his opposition before the court on affidavit, [13] especially if the facts relied upon by the respondent in opposing the application do not appear from the pleadings filed in the main proceedings. [14]

Where a party brings an urgent application under rule 6(12) with service on the respondent but without notice to the registrar, and subsequently decides not to proceed with the application, the other party is entitled on notice of motion and by affidavit to place before the court the papers of the incompleted proceedings and to apply for an order of costs. [15]

The general principle is that the party withdrawing is liable, as an unsuccessful litigant, to pay the costs of the proceedings. [16] The court, however, retains a discretion to deprive the successful party of his costs. [17] In the exercise of its discretion the court should have due regard to the question whether, objectively viewed, the applicant acted reasonably in launching the main proceedings but was subsequently driven to withdraw it in order to save costs because of facts emerging for the first time from, for instance, the respondent's answering affidavit in the main proceedings or because the relief was no longer necessary or obtainable because of developments taking place after to the launching of the main proceedings. [18] In an

appropriate case the court should also have due regard to the constitutional nature of the litigation and the public interest. [19]

Subrule (2): 'May abandon such decision or judgment.' The decision or judgment referred to may be either final or interlocutory. [20] This subrule has no bearing in respect of judgments or orders which affect the status of persons. [21]

In the absence of a consent by the party abandoning to pay costs, the other party may apply on notice for an order for costs. The party abandoning will normally be held liable for costs up to the time of abandonment [22] but the court retains a discretion. [23]

Subrule (3): 'The duty of the attorney … immediately to inform the registrar.' The registrar should be informed of a settlement, postponement or withdrawal as soon as possible. If the settlement is reached at a time so close to the calling of the roll that the registrar cannot timeously be informed thereof, then, as a matter of courtesy, an explanation can be given in court.

A case cannot be said to have been postponed until the notice of postponement has been delivered to the registrar. [24]

The principles relating to postponements otherwise than by agreement between the parties as contemplated in this subrule are discussed in the *excursus* s v 'Postponement' below.

Subrule (4): 'Signed by the parties or their legal representatives.' This subrule in its present form supersedes the judgment in *Siebert & Honey v Van Tonder* [25] in which it was held that the written settlement referred to need not contain the signatures of the parties.

However, the judgment is still applicable in so far as it was held that the settlement in question must be a settlement which intends to bring an end to the suit as a whole. [26]

'May apply for judgment in terms thereof.' An application for judgment in terms of this subrule is not an application which is incidental to pending proceedings in the sense contemplated in rule 6(11); the application can be brought under rule 6(1). [27]

Once judgment had been applied for on at least five days' notice to all interested parties, a writ of execution may be issued. [28]

Postponement

The legal principles applicable to an application for the grant of a postponement by the court are as follows: [29]

(a) The court has a discretion as to whether an application for a postponement should be granted or refused. [30] Thus, the court has a discretion to refuse a postponement even when wasted costs are tendered [31] or even when the parties have agreed to postpone the matter. [32]

(b) That discretion must be exercised in a judicial manner. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons. [33] If it appears that a court has not exercised its discretion judicially, or that it has been influenced by wrong principles or a misdirection on the facts, or that it has reached a decision which could not reasonably have been made by a court properly directing itself to all the relevant

facts and principles, its decision granting or refusing a postponement may be set aside on appeal. [34]

(c) An applicant for a postponement seeks an indulgence. [35] The applicant must show good and strong reasons [36] , i e the applicant must furnish a full and satisfactory explanation of the circumstances that give rise to the application. [37] A court should be slow to refuse a postponement where the true reason for a party's non-preparedness has been fully

explained, where his unreadiness to proceed is not due to delaying tactics, and where justice demands that he should have further time for the purpose of presenting his case. [38]

(d) An application for a postponement must be made timeously, as soon as the circumstances which might justify such an application become known to the applicant. [39]

If, however, fundamental fairness and justice justify a postponement, the court may in an appropriate case allow such an application for postponement even if the application was not so timeously made. [40]

(e) An application for postponement must always be bona fide and not used simply as a tactical manoeuvre for the purpose of obtaining an advantage to which the applicant is not legitimately entitled. [41]

(f) Considerations of prejudice will ordinarily constitute the dominant component of the total structure in terms of which the discretion of the court will be exercised; the court has to consider whether any prejudice caused by a postponement can fairly be compensated by an appropriate order of costs or any other ancillary mechanism. [42]

(g) The balance of convenience or inconvenience to both parties should be considered: [43] the court should weigh the prejudice which will be caused to the respondent in such an application if the postponement is granted against the prejudice which will be caused to the applicant if it is not. [44]

(h) In *Lekolwane v Minister of Justice and Constitutional Development* [45] the court added the following factors to be considered in granting a postponement: (i) the broader public interest; and (ii) the prospects of success on the merits.

(i) In *Shilubana v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as Amici Curiae)* [46] the court held that the following factors could non-exhaustively be added to the above: (i) the reason for the lateness of the application for postponement if not timeously made; (ii) the conduct of counsel; (iii) the costs involved in the postponement; (iv) the potential prejudice to other interested parties; (v) the consequences of not granting a postponement; and (vi) the scope of the issues that must ultimately be decided.

(j) In *Grootboom v National Prosecuting Authority* [47] the Constitutional Court, with reference to *Brummer v Gorfil Brothers Investments (Pty) Ltd* [48] and *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae*), [49] held that the standard for considering an application for condonation is the 'interests of justice'. In this regard the following was stated: [50]

> 'However, the concept "interests of justice" is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of

success. It is crucial to reiterate that both *Brummer* and *Van Wyk* emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.'

(k) In *National Police Service Union and Others v Minister of Safety and Security* [51] it was stated:

'Ordinarily . . . if an application for a postponement is to be made on the day of the hearing of a case, the legal representatives . . . *must* appear and be ready to assist the Court both in regard to the application for the postponement itself and, if the application is refused, the consequences that would follow.'

(l) One of the oldest tricks in the book is the practice of some legal practitioners, whenever the shoe pinches, to withdraw from the case (and more often than not to reappear at a later stage), or of clients to terminate the mandate (more often than not at the suggestion of the practitioner), to force the court to grant a postponement because the party is then unrepresented. Judicial officers have a duty to the court system, their colleagues, the public and the parties to ensure that this abuse is curbed by, in suitable cases, refusing a postponement. Mere withdrawal by a practitioner or the mere termination of a mandate does not, contrary to popular belief, entitle a party to a postponement as of right. [52]

If the *plaintiff* is the applicant for postponement, he must adduce good and strong reasons for his request, as he is *dominus litis* and as a judgment of absolution is possible. [53] From

Greyvenstein v Neethling [54] the following rules appear: (i) when application is made for postponement, it must be made timeously; (ii) a postponement will not be granted to a plaintiff in circumstances where the postponement is occasioned by a happening or circumstance which the plaintiff, at the time of set-down, could have or should have foreseen; and (iii) the court should not grant a postponement to the plaintiff where the defendant will suffer prejudice thereby which cannot be met by an order as to costs entrenched by such safeguards as to payment and the further hearing of the matter as the circumstances may warrant.

If the *defendant* is the applicant for postponement, he also must make out a strong case in support of his application. Thus, where he applies for an adjournment to obtain further evidence he must show (i) that the evidence he desires to make available is relevant and material to an issue in the case, (ii) that there is such evidence to be had, and (iii) that it is through no fault of his that the evidence is not available at the moment. If he can establish this, he is entitled to claim that the discretion of the court be exercised in his favour. [55] The following cases illustrate the reasons which the courts have held to be adequate or otherwise for granting or refusing postponements:

(i) Illness. This will usually be regarded as an adequate ground for postponement where it is a material witness or a party who is ill. Proper medical evidence must be produced, directly and positively to the effect that the witness or party cannot attend, and disclosing the nature of his illness and the date when he will probably be able to appear. [56] In the absence of these particulars the party may have to proceed without the witness. [57]

(ii) Evidence not to hand. As a rule, the fact that evidence is not to hand should be no reason to grant a postponement, but it has been done in the absence of prejudice to the parties, [58] or where the ends of justice would not be attained without the production of certain material evidence, [59] or where a party desired to prove foreign law. [60] Postponement of a trial will not be granted upon a vague allegation that certain witnesses can be produced in corroboration of evidence already given. [61] The fact that a witness awaiting trial on a criminal charge refuses to attend consultations is not sufficient ground for a postponement. [62]

(iii) Unforeseeable circumstances. If such a circumstance arises immediately before or during the course of the trial or application, it is only equitable to grant a postponement. Postponement has been granted where, on exception, a point of law was raised which could not have been anticipated from the terms of the exception; [63] where a new defendant intervened shortly before the trial and his case presented new features; [64] where, after set-down, circumstances arose which made it impossible for the defendant to proceed with the adequate preparation of its case; [65] and where, on the day of the trial, the defendant set up an entirely new defence. [66] If the circumstances which give rise to the necessity for an application for a postponement were foreseeable, the court may, in the exercise of its discretion, refuse the application. [67]

(iv) Legal representative unavailable. The fact that the trial date does not suit the legal representative of a party is not a good ground for allowing a postponement. [68] A postponement on the ground of counsel's illness was refused where it was not shown that the services of other counsel could not be obtained. [69] A postponement was granted where counsel had fallen ill shortly before the trial of a matter involving complex legal issues. [70]

(v) Convenience and prejudice. In the exercise of its discretion to grant or refuse an application for adjournment the court will take into consideration the question of convenience and the question of prejudice. [71] Thus, where it appeared that the defendant was ignorant of the fact that the matter had been set down, and the amount in issue was small and no real inconvenience would be caused, the court postponed the hearing. [72] If a litigant can be present only at the expense of sacrificing the interests of a large number of people, the court can grant a postponement. [73] That a party has travelled a long distance to attend a hearing is a reason against postponing it. [74]

(vi) Concurrent criminal proceedings. If both civil proceedings and criminal proceedings, arising out of the same facts, are pending against the same person, the civil proceedings will, as a general rule, be stayed if—

(a) there is an element of state compulsion impacting on the accused person's right to silence; [75] and

(b) the accused person can show that he might be prejudiced in the criminal proceedings should the civil proceedings be heard first. [76]

(vii) Professional exigencies. Whether the urgency of a litigant's or witness's professional duties is sufficient to justify a postponement depends upon the circumstances of each case, and questions of prejudice and convenience will be taken into consideration. [77]

(viii) Death of a witness. This will usually be regarded as an adequate ground for postponement, provided it is a material witness who died. [78]

(ix) Lack of legal representation. The right to legal representation is a corollary of the right of access to justice. Nevertheless, a litigant may not benefit from his own misconduct or other careless approach in seeking to obtain legal representation, especially where the rights of other litigants are prejudicially affected and the scales inevitably tipped in favour of the refusal of a postponement sought for purposes of obtaining legal representation. [79]

Costs. There are three types of costs relevant to applications for postponement: [80]

(a) 'costs of postponement' means the costs for the application for postponement; [81] and does not include costs incurred in another case in consequence of the postponement; [82]

(b) 'costs of the day' are those extra costs caused by a postponement of the proceedings and which are ordered to be paid by the party responsible for the postponement and consequent waste of a day; [83]

(c) 'wasted costs' are those extra costs incurred in consequence of the postponement which have become useless and unnecessary by reason of the postponement. [84] 'Costs of the day' are in principle the same as 'wasted costs'. [85]

If a postponement has become necessary in consequence of the fault or default of a party or of his legal representative, the general rule is that the wasted costs of the postponement are awarded against the party who is at fault or in default. [86] Thus, the

respondent (in the application for postponement) will be ordered to pay the costs of the day or wasted costs when his fault or default has

forced the applicant to ask for a postponement. [87]

Generally the applicant for postponement is ordered to pay the wasted costs if the illness of a party, [88] or of a witness [89] or of counsel [90] or the death of a material witness [91] necessitates a postponement. In *Van Staden v Union and South-West Africa Insurance Co Ltd?* [92] the court, not following the earlier decisions, declined to order the eventually successful plaintiff to pay the costs of a postponement necessitated by his illness, on the ground that this was not due to the fault of either party. In *Grobbelaar v Snyman?* [93] it is pointed out that not only the fault or default of the parties but also considerations of fairness to both parties should be taken into account in determining liability for wasted costs. The latter appears to be the better view. [94] If the matter is postponed on account of the attorney at the seat of the court not being in a position to deal with a problem which arises during a court hearing, such attorney being merely a 'postbox', not having a mandate beyond indexing and paginating papers, the litigant represented by that attorney should bear the wasted costs of the postponement. [95]

Costs stand over for determination at the trial when the court hearing the application for postponement decides that, in the circumstances, the trial court will be in a better position to ascertain the facts and decide who should pay the costs of postponement. [96]

Costs are made costs in the cause, as a general rule, when it appears to the court, not that it cannot decide where the liability for costs of postponement lies, but that the postponement is not due to the fault of any party but is necessary in any event, and it will be equitable that the loser of the main action or application should pay all costs incurred, including costs of postponement. [97]

The court may, in appropriate circumstances, order that the costs to be paid by the party whose default necessitated the postponement should include attorney and client costs. [98] If the applicant for a postponement has not made his application timeously, or is otherwise to blame with respect to the procedure which he has followed, but substantial justice nevertheless justifies a postponement in the particular circumstances of the case, the court in its

discretion might allow the postponement, but direct the applicant in a suitable case to pay the wasted costs of the respondent occasioned to such respondent on the scale as between attorney and client [99] or even direct the applicant's attorney to pay the costs of the postponement *de bonis propriis* and on the basis as between attorney and client. [100]

Though the court has the power to order that wasted costs be paid before the trial be allowed to proceed, the court will be slow to place a clog upon a litigant's free access to the courts and will make such an order only where the postponement and the resultant wastage of costs are due to blameworthy conduct of a high degree. [101]

If an application for a postponement is refused, the unsuccessful applicant will ordinarily be ordered to pay the costs of the application. [102]

As to the power of a court of appeal to interfere with the decision of a lower court to grant or refuse a postponement, see the notes to s 19*(b)* sv 'Confirm, amend or set aside' in Volume 1, Part A2.

1 *Persadh v General Motors South Africa (Pty) Ltd* 2006 (1) SA 455 (SE) at 459E–G.

2 *Franco Vignazia Enterprises (Pty) Ltd v Berry* 1983 (2) SA 290 (C) at 295H.

3 1972 (4) SA 300 (W).

4 *De Lange v Provincial Commissioner of Correctional Services Eastern Cape* 2002 (3) SA 683 (SECLD) at 686F–G/H. See also *Bondev Midrand (Pty) Ltd v Madzhie* 2017 (4) SA 166 (GP) at 170E.

5 *De Lange v Provincial Commissioner of Correctional Services Eastern Cape* 2002 (3) SA 683 (SECLD) at 687G–H/I. See also *Bondev Midrand (Pty) Ltd v Madzhie* 2017 (4) SA 166 (GP) at 170E.

6 See also *Bondev Midrand (Pty) Ltd v Madzhie* 2017 (4) SA 166 (GP) at 170E.

7 *Protea Assurance Co Ltd v Gamlase* 1971 (1) SA 460 (E) at 465G.

8 *Pearson and Hutton NNO v Hitzeroth* 1967 (3) SA 591 (E) at 593D, 594H. See also *Karroo Meat Exchange Ltd v Mtwazi* 1967 (3) SA 356 (E) at 359B–G; *Huggins v Ryan NO* 1978 (1) SA 216 (R) at 218D.

9 *Levy v Levy* 1991 (3) SA 614 (A) at 620B.

10 *Road Accident Fund v Nnosa* 2005 (4) SA 575 (T) at 580C–D.

11 *Road Accident Fund v Nnosa* 2005 (4) SA 575 (T) at 580D.

12 *Nel v OVS Staalkonstruksie en Algemene Sweiswerke* 1977 (3) SA 993 (O) at 996H; *Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape* 2005 (6) SA 123 (ECD), distinguishing *Kaplan v Dunell Ebden and Co* 1924 EDL 91 at 93, and holding that it was no authority for the proposition that a court, faced with an application for costs in terms of subrule (1)*(c)*, may have no regard whatsoever to the papers filed in the main proceedings in order to resolve the cost issue (at 127J–128C).

13 *Nel v OVS Staalkonstruksie en Algemene Sweiswerke* 1977 (3) SA 993 (O) at 997C.

14 *Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape* 2005 (6) SA 123 (ECD) at 129A.

15 *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A).

16 *Germishuys v Douglas Besproeiingsraad* 1973 (3) SA 299 (NC); *Sentraboer Koöperatief Bpk v Mphaka* 1981 (2) SA 814 (O) at 818A; *Waste Products Utilisation (Pty) Ltd v Wilkes (Biccari Interested Party)* 2003 (2) SA 590 (W) at 597A; *Reuben Rosenblum Family Investments (Pty) Ltd v Marsubar (Pty) Ltd (Forward Enterprises (Pty) Ltd and Others Intervening)* 2003 (3) SA 547 (C) at 550C–D; *Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape* 2005 (6) SA 123 (ECD) at 129E–130B and 131B.

17 *Waste Products Utilisation (Pty) Ltd v Wilkes (Biccari Interested Party)* 2003 (2) SA 590 (W) at 597A; *Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape* 2005 (6) SA 123 (ECD) at 130C–131C.

18 *Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape* 2005 (6) SA 123 (ECD) at 132J–133A and 143H–144C.

19 *Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape* 2005 (6) SA 123 (ECD) at 131C–133E.

20 *Ex parte Taljaard* 1975 (3) SA 106 (O) at 108B.

21 *Ex parte Taljaard* 1975 (3) SA 106 (O) at 109A.

22 *Bonthuys v Visser's Garage* 1950 (3) SA 130 (SWA); *Durban City Council v Kistan* 1972 (4) SA 465 (N); *Sentraboer Koöperatief Bpk v Mphaka* 1981 (2) SA 814 (O) at 817F and 818A.

23 See *Vaal Investment & Trust Co (Pty) Ltd v Ladegaard (Pty) Ltd* 1973 (2) SA 799 (T).

24 *Naicker v Commercial Properties (Pty) Ltd* 1978 (3) SA 992 (D).

25 1981 (2) SA 146 (O).

26 *Siebert & Honey v Van Tonder* 1981 (2) SA 146 (O) at 148D.

27 *Massey-Ferguson (South Africa) Ltd v Ermelo Motors (Pty) Ltd* 1973 (4) SA 206 (T) at 214C–H.

28 *Brandtner v Brandtner* 1999 (1) SA 866 (W) at 868B–D.

29 *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmS) at 314F–315J; *Hall v Multilateral Motor Vehicle Accidents Fund* 1998 (4) SA 195 (C) at 200B–C; and see *Bovungana v Road Accident Fund* 2009 (4) SA 123 (E) at 131A–D; *Mokhethi v MEC for Health, Gauteng* 2014 (1) SA 93 (GSJ) at 97B–E. The principles are also applicable to an application for the grant of a postponement of an application (*Persadh v General Motors South Africa (Pty) Ltd* 2006 (1) SA 455 (SE) at 459E–G).

30 *Estate Norton v Smerling* 1936 OPD 44 at 53; *R v Zackey* 1945 AD 505; *Isaacs v University of the Western Cape* 1974 (2) SA 409 (C) at 411H; *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmS) at 314G; *Persadh v General Motors South Africa (Pty) Ltd* 2006 (1) SA 455 (SE) at 459F; *Baron Camilo Agasim-Pereira of Fulwood v Wertheim Becker Incorporated* [2006] 4 All SA 43 (E) at 49*i*; *Ketwa v Agricultural Bank of Transkei* [2006] 4 All SA 262 (Tk) at 271*f*; *Grootboom v National Prosecuting Authority* 2014 (2) SA 68 (CC) at 75G and 79B–C; *Magistrate Pangarker v Botha* 2015 (1) SA 503 (SCA) at 509E.

31 *Estate Norton v Smerling* 1936 OPD 44 at 53; *Labuschagne v Van Schalkwyk* 1949 (1) PH F34 (O); *Kentridge v Coastal Finance Co (Pty) Ltd* 1960 (2) SA 40 (D); *Vollenhoven v Hoenson & Mills* 1970 (2) SA 368 (C) at 373B.

32 *National Police Service Union v Minister of Safety and Security* 2000 (4) SA 1110 (CC) at 1112E.

33 *R v Zackey* 1945 AD 505 at 511–12; *Madnitsky v Rosenberg* 1949 (2) SA 392 (A) at 298–9; *Joshua v Joshua* 1961 (1) SA 455 (GW) at 457D; *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmS) at 314G; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at 14A–C; *Baron Camilo Agasim-Pereira of Fulwood v Wertheim Becker Incorporated* [2006] 4 All SA 43 (E) at 49*i*. See also *Venter Joubert Inc v Du Plooy* 2017 (5) SA 439 (NCK) at 442I–443A.

34 *Prinsloo v Saaiman* 1984 (2) SA 56 (O) at 61G–62A; *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmS) at 314I–315A; *National*

Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC) at 14A–C; *Baron Camilo Agasim-Pereira of Fulwood v Wertheim Becker Incorporated* [2006] 4 All SA 43 (E) at 50*i*–51*a*. In these cases it is stressed that an appeal court is not entitled to set aside the decision of a trial court granting or refusing a postponement in the exercise of its discretion merely on the ground that if the members of the court of appeal had been sitting as a trial court, they would have exercised their discretion differently.

35 *Isaacs v University of the Western Cape* 1974 (2) SA 409 (C) at 411H; *Western Bank Ltd v Lester* 1976 (3) SA 457 (E) at 460A; *Grootboom v National Prosecuting Authority* 2014 (2) SA 68 (CC) at 75F–G.

36 *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA) at 494D; *Grootboom v National Prosecuting Authority* 2014 (2) SA 68 (CC) at 76C–D; and see *Bovungana v Road Accident Fund* 2009 (4) SA 123 (E) at 131B.

37 *National Police Service Union and Others v Minister of Safety and Security* 2000 (4) SA 1110 (CC) at 1112C–F; *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA) at 494D–H; *Shilubana v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as Amici Curiae)* 2007 (5) SA 620 (CC) at 624B–C; *Magistrate Pangarker v Botha* 2015 (1) SA 503 (SCA) at 509E–F. In *Grootboom v National Prosecuting Authority* 2014 (2) SA 68 (CC) the Constitutional Court, with reference to *eThekwini Municipality v Ingonyama Trust* 2013 (5) BCLR 497 (CC) and *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae*) 2008 (2) SA 472 (CC), in dismissing the respondents' applications for condonation, *inter alia*, stated (at 75F–H, 76C–D and 78B–79C):

'The respondents were late in filing their answering affidavits, as well as their written submissions. This delay put a serious hurdle in the way of their quest to be heard in this court: they had to apply for condonation. It is axiomatic that condoning a party's non-compliance with the rules of court or directions is an indulgence. The court seized with the matter has a discretion whether to grant condonation.

The failure by parties to comply with the rules of court or directions is not of recent origin. Non-compliance has bedevilled our courts at various levels for a long time …

It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default …

I need to remind practitioners and litigants that the rules and court's directions serve a necessary purpose. Their primary aim is to ensure that the business of our courts is run effectively and efficiently. Invariably, this will lead to the orderly management of our courts' rolls, which in turn will bring about the expeditious disposal of cases in the most cost-effective manner. This is particularly important given the everincreasing costs of litigation, which if left unchecked will make access to justice too expensive.

Recently this court has been inundated with cases where there has been disregard for its directions. In its efforts to arrest this unhealthy trend, the court has issued many warnings which have gone largely unheeded …

The language used in both *Van Wyk* and *eThekwini* is unequivocal. The warning is expressed in very stern terms. The picture depicted in the two judgments is disconcerting. One gets the impression that we have reached a stage where litigants and lawyers disregard the rules and directions issued by the court with monotonous regularity. In many instances very flimsy explanations are proferred. In others there is no explanation at all. The prejudice caused to the court is self-evident. A message must be sent to litigants that the rules and the court's directions cannot be disregarded with impunity.

It is by now axiomatic that the granting or refusal of condonation is a matter of judicial discretion. It involves a value judgment by the court seized with a matter based on the facts of that particular case. In this case, the respondents have not made out a case entitling them to an indulgence. It follows that the application must fail.'

See also *Cape Town City v Aurecon (Pty) Ltd* 2017 (4) SA 223 (CC) at 238G–H.

38 *Madnitsky v Rosenberg* 1949 (2) SA 392 (A) at 398–9; *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmS) at 315B–C; *Persadh v General Motors South Africa (Pty) Ltd* 2006 (1) SA 455 (SE) at 459F.

39 *Greyvenstein v Neethling* 1952 (1) SA 463 (C); *Joshua v Joshua* 1961 (1) SA 455 (GW) at 457A–C; *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmS) at 315D; *Gwenzi v Cebekhula* 1996 (1) SA 525 (N) at 528I–529C; *National Police Service Union v Minister of Safety and Security* 2000 (4) SA 1110 (CC) at 1112E; *Baron Camilo Agasim-Pereira of Fulwood v Wertheim Becker Incorporated* [2006] 4 All SA 43 (E) at 49*i*–50e; *Shilubana v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as Amici Curiae)* 2007 (5) SA 620 (CC) at 624B.

40 *Hanson, Tomkin and Finkelstein v DBN Investments (Pty) Ltd* 1951 (3) SA 769 (N); *Greyvenstein v Neethling* 1952 (1) SA 463 (C) at 467F; *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmS) at 315D, 317C; *Ketwa v Agricultural Bank of Transkei* [2006] 4 All SA 262 (Tk) at 271*g*–274*f*. See also *Shilubana v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as Amici Curiae)* 2007 (5) SA 620 (CC).

41 *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmS) at 315E.

42 *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmS) at 315F; and see *Greyvenstein v Neethling* 1952 (1) SA 463 (C) at 467H; *Gwenzi v Cebekhula* 1996 (1) SA 525 (N) at 529G–530E; *Nelson Mandela Metropolitan Municipality v Greyvenouw CC* 2004 (2) SA 81 (SE) at 90F–G; *Persadh v General Motors South Africa (Pty) Ltd* 2006 (1) SA 455 (SE) at 459F–G; *Shilubana v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as Amici Curiae)* 2007 (5) SA 620 (CC) at 624F.

43 *Panigel v Kremetart Kliniek (Pty) Ltd* 1976 (4) SA 387 (T) — a case with rather unusual circumstances; *New Zealand Insurance Co Ltd v Stone* 1963 (3) SA 63 (C) at 72; *Murphy v SA Railways & Harbours (3)* 1946 NPD 642.

44 *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmS) at 315G; *Gwenzi v Cebekhula* 1996 (1) SA 525 (N) at 530E; *National Police Service Union v Minister of Safety and Security* 2000 (4) SA 1110 (CC) at 1112E–F; *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA) at 494H; *Shilubana v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as Amici Curiae)* 2007 (5) SA 620 (CC) at 624B–C.

45 2007 (3) BCLR 280 (CC) in paragraph [17]. See also *Shilubana v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as Amici Curiae)* 2007 (5) SA 620 (CC) at 624C–D; *Magistrate Pangarker v Botha* 2015 (1) SA 503 (SCA) at 510F–511A.

46 2007 (5) SA 620 (CC) at 624E–F. See also *Madnitsky v Rosenberg* 1949 (2) SA 392 (A) at 399; *Ngcobo v Union & South West African Insurance Co Ltd* 1964 (1) SA 42 (D) at 44F–G; *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmS) at 315B–G; *Magistrate Pangarker v Botha* 2015 (1) SA 503 (SCA) at 509G–I and the factors there referred to.

47 2014 (2) SA 68 (CC) at 75H–76C. See also *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC) at 79G; *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd* 2014 (5) SA 138 (CC) at 151F.

48 2000 (2) SA 837 (CC).

49 2008 (2) SA 472 (CC).

50 At 76A–C.

51 2000 (4) SA 1110 (CC) at 1113D.

52 *Take and Save Trading CC v Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA) at 4H–5B.

53 *Estate Norton v Smerling* 1936 OPD 44 at 53–4.

54 1952 (1) SA 463 (C) at 466A–D.

55 *Estate Norton v Smerling* 1936 OPD 44 at 54. In *Gwenzi v Cebekhula* 1996 (1) SA 525 (N) it was held (at 529B) that the principles set out in *Greyvenstein v Neethling* 1952 (1) SA 463 (C) at 466A–D in relation to an application for postponement by a plaintiff apply *a fortiori* to an application by a defendant.

56 See *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmS) at 312I–313D; and see *Baron Camilo Agasim-Pereira of Fulwood v Wertheim Becker Incorporated* [2006] 4 All SA 43 (E). If the court doubts the authenticity of a medical certificate, the matter should be allowed to stand over to have the certificate verified (*Goldman v Solomon* 1924 (2) PH L23 (T)); a mere suspicion on the part of the court that the witness's illness is pretended and that he does not intend to give evidence is no reason for refusing a postponement (*Harris v Coulson* 1926 OPD 91). A postponement will obviously not be granted where other witnesses testify that the supposedly sick witness is in fact well, notwithstanding the certificate handed in (*Venketsamy v Muller* 1924 (2) PH F35 (D), where the certificates were, however, unsworn).

57 *Gabb and Fraser v Greenshields* (1896) 13 SC 466. Sudden illness of a party or a witness may make it impossible to comply with these requirements. In *Harris v Coulson* 1926 OPD 91 the court allowed an appeal against a magistrate's refusal to act on a telegram. In *Hanson, Tomkin & Finkelstein v DBN Investments (Pty) Ltd* 1951 (3) SA 769 (N) the court accepted an affidavit handed in from the bar, but the circumstances were exceptional and in *Joshua v Joshua* 1961 (1) SA 455 (GW) the court declined to follow a similar course.

58 *The National Bank of SA Ltd v Assigned Estate Lentin and Tobias* 1924 SWA 84.

59 *Isaacs v Froomberg* (1894) 15 NLR 166; *Schapiro v Schapiro* 1904 TS 673.

60 *Schapiro v Schapiro* 1904 TS 673; *Hairman v Crawley* 1918 OPD 16.

61 *Sonkwele v Woynich* 1917 EDL 339.

62 *Hartley v Newman* 1937 CPD 143.

63 *Bekker v Hoffmann* 1918 SR 87.

64 *Hudson v Hudson* 1926 (2) PH F45 (C).

65 *Deciduous Fruit Board v Taylor* 1943 CPD 158.

66 *Standard Bank of SA Ltd v Fourie* 1924 OPD 40; and see *Van Wyk v Boedel Louw* 1957 (3) SA 481 (C) and the authorities referred to therein.

67 *Gwenzi v Cebekhula* 1996 (1) SA 525 (N) at 529G.

68 *Duncan v Roets* 1949 (1) SA 226 (T); *D'Anos v Heylon Court (Pty) Ltd* 1950 (2) SA 40 (C); *Centirugo AG v Firestone (SA) Ltd* 1969 (3) SA 318 (T); *S v Paweni* 1985 (1) SA 301 (Z), upheld on appeal *sub nomine Paweni v Acting Attorney-General* 1985 (3) SA 720 (ZS).

69 *Ecker v Dean* 1939 SWA 22; and see *Murphy v SA Railways & Harbours (3)* 1946 NPD 642; *Madnitsky v Rosenberg* 1949 (2) SA 392 (A) at 399; *Cohn v Cohn* 1965 (3) SA 203 (O); *Centirugo AG v Firestone (SA) Ltd* 1969 (3) SA 318 (T).

70 *Cosmetic Distributing Co v Industrial Products* 1944 WLD 201.

71 *Murphy v SA Railways & Harbours (3)* 1946 NPD 642; *New Zealand Insurance Co Ltd v Stone* 1963 (3) SA 63 (C) at 72; *Panigel v Kremetart Kliniek (Pty) Ltd* 1976 (4) SA 387 (T); *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmS) at 315F.

72 *Hayes v Rhoodie* (1906) 16 CTR 124.

73 *Sachs v Stuart* 1946 WLD 433.

74 *Hudson v Hudson* 1926 (2) PH F45 (C).

75 *Law Society of the Cape of Good Hope v Randel* 2013 (3) SA 437 (SCA) at 443E–G.

76 *Law Society of the Cape of Good Hope v Randel* 2013 (3) SA 437 (SCA) at 440I–J. See also *Whalley v Buchner* 1910 CPD 223; *Luyt v Preston* 1911 EDL 220; *Donaldson v Veleris* 1936 WLD 84; *Munnich v Munnich's Estate* 1942 EDL 33; *Madnitsky v Rosenberg* 1949 (2) SA 392 (A); *Du Toit v Van Rensburg* 1967 (4) SA 433 (C) at 435H–436A; *Irvin & Johnson Ltd v Basson* 1977 (3) SA 1067 (T) at 1073A; *Gwenzi v Cebekhula* 1996 (1) SA 525 (N) at 529G–530E; *Davis v Tip NO* 1996 (1) SA 1152 (W) at 1157A–E; *Gilfillan t/a Grahamstown Veterinary Clinic v Bowker* 2012 (4) SA 465 (ECG) at 468I–469A.

77 Postponements were granted in *Deciduous Fruit Board v Taylor* 1943 CPD 158; *Greyvenstein v Neethling* 1952 (1) SA 463 (C), and *Panigel v Kremetart Kliniek (Pty) Ltd* 1976 (4) SA 387 (T), but refused in *Blackburn v Union Government* 1927 CPD 127.

78 *Westbrook v Genref Ltd* 1997 (4) SA 218 (D).

79 *Magistrate Pangarker v Botha* 2015 (1) SA 503 (SCA) at 512C–H.

80 See Cilliers *Costs* paragraph 8.08.

81 See, for example, *Sanvido & Sons (Civil Engineering) (Pty) Ltd v Aglime (Pty) Ltd* 1984 (4) SA 339 (C) at 341I–343B.

82 *Kruger v Franken* 1914 TPD 276.

83 *Carlis v Hay* 1903 TS 317; *Lucas' Trustee v Ismail and Amod* 1905 TH 45; *Van der Hoven v Erasmus* 1921 TPD 383; *Suliman Ismael Mia & Co v Cajee* 1924 WLD 25; *Craig v Kopermijn Ltd* 1926 TPD 63; *Delfos en Atlas Copco (Edms) Bpk v VV Bande (Edms) Bpk* 1972 (3) SA 907 (O); *Kroonstad Verbruikers Koöp Bpk v National Egg Producers Co-op Ltd* 1981 (3) SA 674 (O).

84 *Konjillia v Govender* (1929) 50 NLR 189; *O'Reilly v Lakofski* 1933 WLD 145 at 148; *Van Heerden v Tarr* 1959 (2) SA 328 (E); *Salie v Shield Insurance Co Ltd* 1978 (2) SA 396 (T); *Greenberg v Mortimer* 1979 (4) SA 642 (T); *Sanvido & Sons (Civil Engineering) (Pty) Ltd v Aglime (Pty) Ltd* 1984 (4) SA 339 (C); *Mbekeni v Jika* 1995 (1) SA 423 (Tk) at 424F.

85 *Craig v Kopermijn Ltd* 1926 TPD 63 at 66; *Delfos en Atlas Copco (Edms) Bpk v VV Bande (Edms) Bpk* 1972 (3) SA 907 (O) at 911B; *Mbekeni v Jika* 1995 (1) SA 423 (Tk) at 424F.

86 *Jowell v Behr* 1940 WLD 63 at 64; *Botes v Potchefstroom Municipality* 1940 TPD 113; *Burger v Kotzé* 1970 (4) SA 302 (W) at 304E–G; *Cessions (Pty) Ltd v Stumrab (Pty) Ltd* 1980 (2) SA 361 (W); *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmS) at 315H; *Sublime Technologies (Pty) Ltd v Jonker* 2010 (2) SA 522 (SCA) at 524G–H.

87 *Burger v Kotze* 1970 (4) SA 302 (W); *Sublime Technologies (Pty) Ltd v Jonker* 2010 (2) SA 522 (SCA) at 524H–525A. See also *Standard Bank of SA Ltd v Fourie* 1924 OPD 40; *Greyling v Peacock* 1942 OPD 74 at 76–7.

88 *Winter v Gluckman* 1931 WLD 257; *Talinsky v Masones* 1931 WLD 259; *Pohl v De Marillac* 1941 WLD 35; *Cape Law Society v Feldman* 1979 (1) SA 930 (E) at 934A–C; *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmS); *Manong and Associates (Pty) Ltd v City of Cape Town* 2011 (2) SA 90 (SCA) at 116H–I.

89 *Pillay v Pillay* 1946 CPD 372. In *Grandin v The Curators of the person and property of GC Cato* (1892) 13 NLR 132 the costs were ordered to be costs in the cause.

90 *Cosmetic Distributing Co v Industrial Products* 1944 WLD 201 at 204; *Manong and Associates (Pty) Ltd v City of Cape Town* 2011 (2) SA 90 (SCA) at 116H–I.

91 *Westbrook v Genref Ltd* 1997 (4) SA 218 (D).

92 1972 (1) SA 758 (E).

93 1975 (1) SA 568 (O).

94 See *Cape Law Society v Feldman* 1979 (1) SA 930 (E) at 933F–934E; *Brown v Santam Insurance Co Ltd* 1979 (4) SA 370 (W) at 379F.

95 *Van der Burgh v Guardian National Insurance Co Ltd* 1997 (2) SA 187 (E) at 191A–G.

96 *Gie v Ferreira* 1943 CPD 259; *Sachs v Stuart* 1946 WLD 433; *Sublime Technologies (Pty) Ltd v Jonker* 2010 (2) SA 522 (SCA) at 525A–B. See also Beverly Shiells 'The impasse of reserved costs-the winning party does not take it all' 2018 (March) *De Rebus* 30–1.

97 See, for example, *Shaw v Williams* (1883) 3 EDC 251; *Grandin v The Curators of the person and property of GC Cato (*1892) 13 NLR 132; *Jamalodien v Ajimudien* 1917 CPD 293; *Cohn v Cohn* 1965 (3) SA 203 (O); *Helm v Helm* 1969 (1) SA 89 (O).

98 *Lakofski v O'Reilly* 1933 WLD 126; *Gerry v Gerry* 1958 (1) SA 295 (W); *Tarry & Co Ltd v Matatiele Municipality* 1965 (3) SA 131 (E) at 137G–H; *Ferreira v Endley* 1966 (3) SA 618 (E); and see *Van Dyk v Conradie* 1963 (2) SA 413 (C) at 418E–H.

99 *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmS) at 315H–J and 317C.

100 *Leibowitz t/a Lee Finance v Mhlana* 2006 (6) SA 180 (SCA) at 184F–185C.

101 See, for example, *White v The Northern Insurance Co* 1918 WLD 25; *Lakofski v O'Reilly* 1933 WLD 126; *Weiner v Matthews* 1938 WLD 273; *Boles v Potchefstroom Municipality* 1940 TPD 113; *Pillay v Pillay* 1946 CPD 372; *Solomons v Allie* 1965 (4) SA 755 (T); *Gerry v Gerry* 1958 (1) SA 295 (W); *Tarry & Co Ltd v Matatiele Municipality* 1965 (3) SA 131 (E) at 136H–137A: *Ferreira v Endley* 1966 (3) SA 618 (E) at 623G; *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmS) at 315I–J.

102 See, for example. *Murphy v SA Railways & Harbours (3)* 1946 NPD 642; *Centirugo AG v Firestone (SA) Ltd* 1969 (3) SA 318 (T); *Gwenzi v Cebekhula* 1996 (1) SA 525 (N) at 530F–G.