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THIRD EDITION

Civil Procedure

A Practical Guide

PROCEDURAL LAW

STEPHEN PETÉ | DAVID HULME
MAX DU PLESSIS | ROBIN PALMER
OMPHEMETSE SIBANDA | TONI PALMER

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Contents in brief

GENERAL INTRODUCTION

STAGE ONE: BEFORE LITIGATION

PART 1: PRELIMINARY QUESTIONS
- ACAUSE OF ACTION
- B*LOCUS STANDI*
- CJURISDICTION

PART 2: PRE-LITIGATION ISSUES
- ADEMAND
- BCALCULATION OF TIME LIMITS
- CSERVICE OF LEGAL DOCUMENTS
- DACTION OR APPLICATION?

STAGE TWO: LITIGATION

PART 1: APPLICATIONS
- INTRODUCTION
  - AGENERAL PRINCIPLES
  - BON NOTICE APPLICATIONS
  - C*EX PARTE* APPLICATIONS

PART 2: ACTIONS
- INTRODUCTION
  - APLEADINGS
  - BPRE-TRIAL PROCEDURES
  - CTRIAL
  - DJUDGMENT, INTEREST AND COSTS

STAGE THREE: AFTER LITIGATION

PART 1: APPEALS AND REVIEWS
- INTRODUCTION
  - AAPPEALS
  - BREVIEWS

PART 2: DEBT COLLECTION PROCEDURES
- INTRODUCTION
  - AWRITS AND WARRANTS OF EXECUTION
  - BSECTION 65 PROCEDURE
  - CADMINISTRATION ORDERS

STAGE FOUR: ADDITIONAL PROCEDURES

ASETTLEMENT
BPROVISIONAL SENTENCE
CINTERIM RELIEF PENDING JUDGMENT
DARREST *TANQUAM SUSPECTUS DE FUGA*
EMULTIPLE PARTIES AND ACTIONS
FINTERDICTS
GDRASTIC PROCEDURES
HDECLARATIONS OF RIGHTS AND STATED CASES
ISMALL CLAIMS COURT PROCEDURES
JOTHER CIVIL COURTS

ANNEXURES

AALTERNATIVE DISPUTE RESOLUTION (ADR) IN CIVIL PRACTICE
BIMPACT OF THE NATIONAL CREDIT ACT AND THE CONSUMER PROTECTION ACT ON CIVIL PROCEDURE
CDIAGRAMS (INDICATED IN THE TEXT WITH ICONS D1, D2, D3, etc)
DPRECEDENTS (INDICATED IN THE TEXT WITH ICONS P1, P2, P3, etc)
ECITATIONS
FSHORT FORM, PARTICULARS OF CLAIM

Contents

Contents in brief
Preface
Acknowledgements
New to this edition
The authors

GENERAL INTRODUCTION

1Civil procedure and its place within the legal system
2The court system and the officials
2.1A practical approach
2.2The Magistrates' Courts: District and Regional
2.3The High Court
Provincial Divisions
Local Divisions
Supreme Courts of the former TBVC States:
2.4The Supreme Court of Appeal
2.5The Constitutional Court
2.6The officials
3Where to find the relevant law
4The impact of the Constitution on civil procedure
5A general mind map of civil procedure
5.1The big picture
5.2The stages
Stage One: Before litigation – the beginning of the story
Stage Two: Litigation – the middle of the story
Stage Three: After litigation – the end of the story
Stage Four: Additional procedures – adding to the basic story
5.3The parts
Stage One, Part 1: Preliminary questions
A: Cause of action
B: Locus standi
C: Jurisdiction
Stage One, Part 2: Pre-litigation issues
A: Demand
B: Calculation of time limits
C: Service of legal documents
D: Action or application
Stage Two, Part 1: Applications
Stage Two, Part 2: Actions
A: Pleadings
B: Pre-trial procedures
C: Trial
D: Judgment, interest and costs

Stage Three, Part 1: Appeals and reviews
A: Appeals
B: Reviews
Stage Three, Part 2: Debt collection procedures
A: Writs and warrants of execution
B: Section 65 procedure
C: Administration orders
Stage Four: Additional procedures
A: Settlement
B: Provisional sentence
C: Interim relief pending judgment
D: Arrest *tanquam suspectus de fuga*
E: Multiple parties and actions
F: Interdicts
G: Drastic procedures
H: Declarations of rights and stated cases
I: Small Claims Court procedures
J: Other civil courts

STAGE ONE: BEFORE LITIGATION

PART 1: PRELIMINARY QUESTIONS

A: CAUSE OF ACTION

1Introduction
2Delictual claims
Example 1: Motor vehicle collision
Example 2: Assault
3Contractual claims
Example 1: Sale on credit – seller's remedies
Example 2: Sale for cash – seller's remedies
Example 3: Buyer's remedies
4Divorce actions
Example 1: Divorce
5Claims based on liquid documents
Example 1: Liquid document

PART 1: PRELIMINARY QUESTIONS

B: *LOCUS STANDI*

1Introduction
2Direct and substantial interest
2.1The common-law position
2.2Actions based on the Bill of Rights
2.2.1Class actions under section 38(*c*) of the Constitution
2.2.2Own interest standing in terms of section 38(*a*) of the Constitution

3Capacity to litigate
3.1Children
3.1.1What is a ‘child’?
3.1.2Children under the age of seven
3.1.3Children of seven years and older
3.1.4Costs
3.1.5Dual capacity
3.1.6Appointment of a *curator ad litem*
3.1.7Litigation without assistance
3.1.8The Children’s Act and Bill of Rights
3.2Married women
3.2.1Abolition of the marital power
3.2.2Consent to litigate – marriages in community of property
3.3Mentally disabled persons
3.4Prodigals
3.5Insolvents
3.6Fugitives from justice
3.7Alien enemies
3.8Diplomats and the like
3.9Judges
3.10Members of Parliament, provincial legislatures and municipal councils
3.11Trusts
3.12Partnerships, firms, associations and the like
3.12.1General overview
3.12.2High Court – rule 14
3.12.3Magistrates’ Courts – rule 54
4Representation of parties
4.1Power of attorney
4.2Representation of parties in the High Court
4.3Representation of parties in the Magistrates’ Courts
4.4Representation of indigent persons
4.4.1*In forma pauperis* proceedings in the High Court
4.4.2*Pro deo* proceedings in the Magistrates’ Courts

PART 1: PRELIMINARY QUESTIONS

C: JURISDICTION
1General introduction
1.1What is jurisdiction?
Question 1:What general type?
Question 2:Which particular one?
1.2Why focus only on jurisdiction relating to the High Court and Magistrates’ Courts?
1.2.1Specialist courts
1.2.2Small Claims Courts
1.2.3Supreme Court of Appeal

1.2.4Constitutional Court
1.3Jurisdiction relating to the High Court and Magistrates' Courts – what are the main issues?
Question 1:High Court or Magistrates' Court?
Question 1.1:What is the value of the claim?
Question 1.2:What is the nature of the claim?
Question 2:Which particular division of the High Court or Magistrates' Court must hear the matter?
1.4When is jurisdiction determined?
1.5Why is it important to get jurisdiction right?
2Magistrates' Courts jurisdiction
2.1General overview
Question 1:High Court or Magistrates' Court?
Question 1.1:What is the value of the claim?
Question 1.2:What is the nature of the claim?
Question 2:Which particular Magistrates' Court?
2.2The value of the claim – section 29
2.2.1The general rule
2.2.1(a)Section 29(1)(a) – delivery or transfer of property
2.2.1(b)Section 29(1)(b) – ejectment
2.2.1(c)Section 29(1)(c) – right of way
2.2.1(d)Section 29(1)(d) – liquid document or mortgage bond
2.2.1(e)Section 29(1)(e) – credit agreements
2.2.1(f)Section 29(1)(f) – Matrimonial Property Act
2.2.1(g)Section 29(1)(fA) – Close Corporations Act
2.2.1(h)Section 29(1)(g) – all other actions
2.2.1(i)Section 29(1B) – divorce and related matters – Regional Magistrates' Courts
2.2.2How to calculate the R200 000 and R400 000 limits
2.2.2(a)Splitting of single claims not allowed – section 40
2.2.2(b)Combining separate claims is allowed – section 43(1)
2.2.2(c)Only the amount in issue is taken into account – sections 37(1) and 37(2)
2.2.2(d)Interest and costs not taken into account – section 37(3)
2.2.3Exceptions to the general rule
2.2.3(a)Consent – section 45
2.2.3(a)(i)First limitation
2.2.3(a)(ii)Second limitation
2.2.3(b)Abandonment – section 38
Example 1
Example 2
Example 3
2.2.3(c)Deduction of an admitted debt – section 39

Scenario 1
Scenario 2
2.3The nature of the claim – section 46
2.3.1Status claims
2.3.1(a)Wills – section 46(2)(a)
2.3.1(b)Mental capacity – section 46(2)(b)
2.3.1(c)Perpetual silence – section 46(2)(d)
2.3.2Claims for specific performance
2.3.2(a)The general rule
2.3.2(b)Exceptions to the general rule
2.3.2(b)(i)Exception 1 – rendering of an account
2.3.2(b)(ii)Exception 2 – delivery or transfer of property valued at or under R200 000
2.3.2(b)(iii)Exception 3 – delivery or transfer of property valued at over R200 000
2.3.2(c)Summary
2.4The area to which the claim may be linked – section 28
2.4.1Defendant's residence or business or employment – section 28(1)(*a*)
2.4.1(a)Where does a natural person reside?
2.4.1(b)Where does a company or close corporation reside?
2.4.1(c)Where does a partnership reside?
2.4.1(d)Where does the state reside?
2.4.1(e)What does 'carries on business' mean?
2.4.1(f)What does 'is employed' mean?
2.4.2Cause of action arising 'wholly' – section 28(1)(*d*)
2.4.3Other grounds of territorial jurisdiction
2.4.3(a)Partnerships – section 28(1)(b)
2.4.3(b)Incidental proceedings – section 28(1)(c)
2.4.3(c)Interpleader proceedings – section 28(1)(e)
2.4.3(d)Consent – section 28(1)(f)
2.4.3(e)Immovable property – section 28(1)(g)
2.4.4Divorce and related matters – which particular Regional Magistrates' Court
3High Court jurisdiction
3.1General overview
3.2The doctrine of effectiveness
3.3The three most common grounds of High Court jurisdiction
3.3.1Ratione domicilii
3.3.2*Ratione rei gestae*
3.3.3*Ratione rei sitae*
3.4The two most common types of claims
3.4.1Claims relating to property
3.4.1(a)What is a claim relating to property?
3.4.1(b)Which of the grounds of jurisdiction apply?
3.4.1(b)(i)Immovable property – claims involving title

3.4.1(b)(ii)Immovable property – claims for transfer
3.4.1(b)(iii)Movable property – claims involving title
3.4.1(b)(iv)Movable property – claims for delivery
3.4.2Claims sounding in money
3.4.2(a)What is a claim sounding in money?
3.4.2(b)Which of the grounds of jurisdiction apply?
3.5The jurisdictional principles applicable to certain additional claims
3.5.1Claims sounding in money against foreign *peregrini*
3.5.1(a)Attachments to found and confirm jurisdiction
3.5.1(b)Consent to jurisdiction
3.5.2Claims for divorce and associated relief
3.5.3Claims for interdicts
3.5.4Single claims involving two or more jurisdictions
3.6Inherent jurisdiction

PART 2: PRE-LITIGATION ISSUES

A: DEMAND
1What is a demand?
2Forms of demand
3The contents of the demand
4Circumstances where demand *must* be made
4.1Demand (or notice) required by statute
4.1.1The Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 ('the Act')
4.1.2Interim interdicts against the government: the General Law Amendment Act 62 of 1955
4.1.3The Customs and Excise Act 91 of 1964
4.1.4The National Credit Act 34 of 2005
4.1.5The Small Claims Court Act 61 of 1984
4.2Demand essential to complete a cause of action
4.2.1Payable on demand
4.2.2Notice of breach clauses
4.2.3Placing a debtor *in mora*
4.2.4Demand to give right of cancellation
5Other consequences of demand: costs and interest
5.1Costs relating to the issue of summons
5.2Unliquidated debts: delivering demand to start the running of interest

PART 2: PRE-LITIGATION ISSUES

B: CALCULATION OF TIME LIMITS
1Introduction
2Time periods *within* a certain period
2.1FOLI: first out last in
2.2Court days and calendar days

3Time periods *after* a certain period
4Practical note: service of court process

PART 2: PRE-LITIGATION ISSUES

C: SERVICE OF LEGAL DOCUMENTS
1Introduction
2The issue of process and duties of the sheriff
3Methods of service in terms of the Rules of Court
3.1The usual methods of service in the High Court
3.2The methods of service in the Regional and District Magistrates' Courts
4Substituted service and edictal citation
4.1Substituted service in general
4.2Service of legal process *outside* the country
4.2.1High Court, Regional and District Magistrates' Courts: application for edictal citation
4.2.2.Substituted service via electronic media
5Jurisdiction and service distinguished

PART 2: PRE-LITIGATION ISSUES

D: ACTION OR APPLICATION?
1The decision: action or application?
2Essential differences between actions and applications
2.1Actions
2.2Applications
3The essential differences between trial courts and motion courts
4Making the choice: action or application?
5A real dispute of fact?

STAGE TWO: LITIGATION

PART 1: APPLICATIONS

INTRODUCTION
Introduction

PART 1: APPLICATIONS

A: GENERAL PRINCIPLES
1Distinguishing characteristics
1.1Interlocutory applications
1.2Urgent applications
1.3*Ex parte* applications vs on notice applications
2Notice of motion – general principles

3Affidavits – general principles
3.1Form and content of affidavits
3.2Inadmissible evidence in affidavits
3.2.1Hearsay
3.2.2Privileged communications
3.2.3Matter excluded by the rules of court
3.2.3(a)Scandalous, vexatious or irrelevant matter
3.2.3(b)Inadmissible new matter
3.2.4Matter excluded by the use of inherent jurisdiction
3.3Striking out inadmissible evidence

PART 1: APPLICATIONS

B: ON NOTICE APPLICATIONS
1When is it appropriate to bring an on notice application?
2Step 1: The applicant's notice of motion
2.1High Court: notice of motion
2.2Regional and District Magistrates' Courts: notice of motion
3Step 2: The applicant's founding and supporting affidavits
4Step 3: The service of the application papers
4.1Service in the High Court, and District and Regional Magistrates' Courts
5Step 4: Respondent's notice of intention to oppose
5.1High Court procedure
5.2Regional and District Magistrates' Courts procedure
6Step 5: The respondent's answering affidavits
7Step 6: The applicant's replying affidavits
8Step 7: Further affidavits
9Step 8: Setting the matter down for hearing
10Step 9: The hearing
10.1The court's order if no real dispute of fact has arisen on the papers
10.2The court's order if a real dispute of fact ***has*** arisen on the papers
10.2.1The court may decide the matter on the affidavits alone
10.2.2The court may refer the matter to oral evidence
10.2.3The court may refer the matter to trial
10.2.4The court may dismiss the matter, with costs
10.3In certain cases, the court may decide to make ***no order***
11Step 10: Optional further steps – counter-applications and joinder applications

PART 1: APPLICATIONS

C: *EX PARTE* APPLICATIONS
1*Ex parte* applications in the High Court
2*Ex parte* applications in the Regional and District Magistrates' Courts
3Preparing *ex parte* application papers

3.1High Court: notice of motion
3.2Regional and District Magistrates' Courts: notice of motion
4The court's options: final orders and rules *nisi*
5Intervention in *ex parte* applications
6The requirement of utmost good faith in *ex parte* applications

PART 2: ACTIONS

INTRODUCTION
1Introduction
2The stages of an action
2.1The pleadings stage
2.2The pre-trial stage
2.3The trial stage
2.4The judgment stage
3Amendments to the Magistrates' Courts Rules

PART 2: ACTIONS

A: PLEADINGS
1General overview
1.1The two sides of the argument
1.2The steps involved in pleadings
1.2.1The five basic steps
1.2.2Possible extra steps
2The basic pleadings
2.1Step 1: Summons and particulars of claim
2.1.1What is a summons?
2.1.2What are particulars of claim?
2.1.2(a)Citation of parties
2.1.2(b)Locus standi
2.1.2(c)Jurisdiction of the court
2.1.2(d)Cause of action
2.1.2(e)Prayer
2.1.3Different forms of summons
2.1.3(a)Combined summons
2.1.3(b)Simple summons
2.1.3(c)Provisional sentence summons
2.1.4Drafting a summons
2.1.4(a)High Court rule 17(1)(a) and Magistrates' Courts rule 5(1)(a) – dies induciae
2.1.4(b)High Court rule 17(1)(b) and Magistrates' Courts rule 5(1)(b) – warning to defendant
2.1.4(c)High Court rule 17(2) and Magistrates' Courts rule 5(2) – appearance of document

2.1.4(d)High Court rule 17(3) and Magistrates' Courts rule 5(3) – signatures
2.1.4(e)High Court rules 17(4)(a) and (b) and Magistrates' Courts rules 5(4)(a) and (b) – citations
2.1.5Drafting particulars of claim – High Court rule 18 and Magistrates' Courts rule 6
2.1.5(a)Signatures – High Court rule 18(1) and Magistrates' Courts rule 6(1)
2.1.5(b)Title of the action – High Court rule 18(2) and Magistrates' Courts rule 6(2)
2.1.5(c)Paragraphs – High Court rule 18(3) and Magistrates' Courts rule 6(4)
2.1.5(d)The full facts – High Court rule 18(4) and Magistrates' Courts rule 6(3)
2.1.5(e)Requirements: breach of contract – High Court rule 18(6) and Magistrates' Courts rule 6(6)
2.1.5(f)Requirements: divorce – High Court rule 18(8) and (9) and Magistrates' Courts rule 6(8)
2.1.5(g)Requirements: bodily injuries – High Court rule 18(10) and Magistrates' Courts rule 6(9)
2.1.5(h)Requirements: death – High Court rule 18(11) and Magistrates' Courts rule 6(10)
2.1.5(i)Implications of not following High Court rule 18(12) and Magistrates' Courts rule 6(13)
2.1.5(j)Further averments relating to the Magistrates' Courts only
2.1.6Provisions for summonses relating exclusively to the Magistrates' Courts
2.1.6(a)Electronic addresses
2.1.6(b)Provisions for the defendant
2.1.6(c)Provision for jurisdictional averments
2.1.6(d)Provisions relating to legislation
2.1.6(e)Suing as a cessionary
2.1.6(f)Declaration that immovable property is executable
2.1.6(g)Automatic rent interdict summons
2.1.7Lapsing and superannuation of summons and judgments
2.2Step 2: Notice of intention to defend
2.2.1The notice
2.2.2Delivery of the notice
2.2.3*Dies induciae*
2.3Step 3: Plea and counterclaim
2.3.1Plea
2.3.1(a)General overview
2.3.1(b)Plea on the merits
2.3.1(b)(i)Time limits
2.3.1(b)(ii)The different kinds of pleas on the merits
2.3.1(b)(ii)(a)Admission of facts

2.3.1(b)(ii)(b)Denial of facts
2.3.1(b)(ii)(c)Confession and avoidance
2.3.1(b)(ii)(d)Non-admission
2.3.1(b)(ii)(e)Counterclaim
2.3.1(b)(ii)(f)Alternative defence
2.3.1(b)(ii)(g)Tender
2.3.1(b)(iii)Drafting a plea on the merits
2.3.1(b)(iii)(a)Drafting the different plea responses
2.3.1(b)(iii)(b)Dealing with all the plaintiff's allegations
2.3.1(b)(iii)(c)The consequences of not observing the rules when drafting pleas
2.3.1(b)(iii)(d)Material facts: avoiding bare denials
2.3.1(c)Special pleas
2.3.1(c)(i)General overview
2.3.1(c)(ii)Dilatory special pleas
2.3.1(c)(ii)(a)Special plea of arbitration
2.3.1(c)(ii)(b)Special plea of lis pendens
2.3.1(c)(ii)(c)Special plea of premature summons
2.3.1(c)(iii)Special pleas in abatement
2.3.1(c)(iii)(a)Special plea of prescription
2.3.1(c)(iii)(b)Special plea of misjoinder or non-joinder
2.3.1(c)(iii)(c)Special plea of res judicata
2.3.1(c)(iii)(d)Special plea to jurisdiction
2.3.1(c)(iii)(e)Special plea of non locus standi in judicio
2.3.1(c)(iv)Drafting a special plea
2.3.1(c)(v)Separate hearings for special pleas
2.3.2Counterclaims
2.3.2(a)Overview
2.3.2(b)Procedure
2.3.2(c)Counterclaims in the Magistrates' Courts
2.4Step 4: Replication (and possible subsequent steps)
2.4.1Replication
2.4.2Possible steps after replication
2.5Step 5: Close of pleadings (*litis contestatio*)
3Possible extra steps: further particulars and declarations
3.1Requests for further particulars
3.1.1General overview
3.1.2High Court rule 35(12) and Magistrates' Courts rule 23(13)
3.1.3High Court rule 35(14) and Magistrates' Courts rule 23(15)
3.2Declarations
4Responses to defective pleadings and noncompliance with the rules
4.1General overview
4.2Response 1: Exception
4.2.1The two major grounds for taking an exception
4.2.1(a)Failure to disclose a cause of action or defence
4.2.1(b)Vague and embarrassing

4.2.2The prejudice requirement
4.2.3Procedure for lodging an exception
4.2.3(a)The procedure in general
4.2.3(b)Time periods
4.2.3(c)Notice
4.2.4The hearing
4.2.5The consequences of failing to lodge an exception
4.2.6The consequences of a successful exception
4.2.7The overlap between exception and special plea
4.3Response 2: Application to strike out
4.4Response 3: Application to set aside an irregular step
4.5Response 4: Enforcing compliance and condoning noncompliance
4.5.1In the High Court
4.5.1(a)Rule 30A – noncompliance with the rules
4.5.1(b)Rule 27 – extension of time, removal of bar and condonation
4.5.2In the Magistrates' Courts
4.5.2(a)Rule 60 – noncompliance with rules, including time limits and errors
4.6Response 5: Amendment of pleadings
4.6.1General overview
4.6.2Stage one: notice of intention to amend
4.6.3Stage two: objecting to the amendment
4.6.4Stage three: giving effect to the amendment
5Shortcut judgments
5.1General overview
5.2Shortcut judgment 1 – Default judgment
5.2.1Overview
5.2.2Default of appearance
5.2.2(a)Defendant's default of appearance to defend
5.2.2(b)Plaintiff's default of appearance at trial (comparuit default)
5.2.2(c)Defendant's default of appearance at trial
5.2.3Default of pleadings
5.2.3(a)Default of plea
5.2.3(a)(i)Default of plea: High Court
5.2.3(a)(ii)Default of plea: Magistrates' Courts
5.2.3(a)(iii)Default of plaintiff's plea in reconvention
5.2.3(b)Default of declaration
5.2.4Applying for default judgment
5.2.4(a)The procedure in the High Court
5.2.4(a)(i)If the claim is not for a debt or liquidated demand
5.2.4(a)(ii)If the claim is for a debt or liquidated demand
5.2.4(b)The procedure in the Magistrates' Courts
5.2.5Barring

5.2.5(a)General overview
5.2.5(b)Automatic barring
5.2.5(c)Notice of bar
5.2.5(d)Removal of bar
5.3Shortcut judgment 2 – Summary judgment
5.3.1General overview
5.3.2Permissible claims
5.3.2(a)On a liquid document
5.3.2(b)For a liquidated amount in money
5.3.2(c)For delivery of specified movable property
5.3.2(d)For ejectment
5.3.3The application
5.3.4The supporting affidavit
5.3.5Responding to an application for summary judgment
5.3.6The court hearing
5.3.7The usual order
5.3.8Special orders for costs
5.4Shortcut judgment 3: Consent and confession to judgment
5.4.1Judgment on confession in the High Court – rule 31
5.4.2Judgment by consent in the Magistrates' Courts – rule 11

PART 2: ACTIONS

B: PRE-TRIAL PROCEDURES
1Introduction
2Step 1: Set down
2.1Set down in the High Court
2.2Set down in the Magistrates' Courts
3Step 2: Discovery and related procedures
3.1What is discovery?
3.2Discovery procedures
3.2.1Notice to discover
3.2.1(a)When must discovery take place?
3.2.1(b)What must be discovered?
3.2.1(c)The discovery affidavit
3.2.1(d)Remedies for failure to discover
3.2.1(d)(i)Notice to inspect undisclosed documents – rule 35(3) (High Court)/rule 23(3) (Magistrates' Courts)
3.2.1(d)(ii)Document or tape recording may not be used – rule 35(4) (High Court)/rule 23(4) (Magistrates' Courts)
3.2.1(d)(iii)Application to compel discovery – rule 35(7) (High Court)/rule 23(8) (Magistrates' Courts)
3.2.2Notice to inspect
3.2.3Notice to specify
3.2.4Notice to produce
3.2.5Notice to admit

4Step 3: Medical examinations and technical inspections
4.1Medical examinations – claim for bodily injuries
4.1.1Arranging the examination
4.1.2Objecting to the examination
4.1.3Report on the examination
4.1.4Other medical reports, records, X-rays, etc.
4.2Technical inspection – claim relating to object
4.2.1Arranging the inspection
4.2.2Objecting to the inspection
4.2.3Report on the inspection
4.3Magistrates' and High Court procedures compared
5Step 4: Request for further particulars for trial
5.1What are further particulars for trial?
5.2The procedure
6Step 5: Subpoena of witnesses
6.1Subpoenas in the High Court
6.1.1Normal subpoena
6.1.2Subpoena *duces tecum*
6.1.3Failure to comply with a subpoena
6.1.4Calculating witness fees
6.2Subpoenas in the Magistrates' Courts
7Step 6: Special evidence
7.1Expert evidence
7.2Photographs, plans, models and diagrams
7.2.1In the High Court
7.2.2In the Magistrates' Courts
7.3Evidence on commission
7.3.1In the High Court
7.3.2In the Magistrates' Courts
7.4Evidence by means of interrogatories
7.4.1In the High Court
7.4.2In the Magistrates' Courts
7.5Evidence on affidavit
8Step 7: Pre-trial conference
8.1Pre-trial conference in the High Court
8.1.1Calling the conference
8.1.2Setting the agenda
8.1.3The conference
8.1.4The rule 37 minute
8.1.5Special order as to costs
8.2Pre-trial conference in the Magistrates' Courts
9Step 8: Final preparation for trial
9.1Advice on evidence
9.2Case-flow management
9.3Preparation of trial bundles

9.4Indexing and paginating the court file

PART 2: ACTIONS

C: TRIAL

1Trial in the High Court

1.1Introduction
1.2Parties not present
1.3Open court
1.4Recalcitrant witnesses
1.5Duty to begin
1.6Opening address
1.7Plaintiff's case
1.8Application for absolution from the instance
1.9Defendant's case
1.10Closing address
1.11Reopening the case
1.12Inspections *in loco*
1.13Reference to a referee

2Trial in the Magistrates' Courts

PART 2: ACTIONS

D: JUDGMENT, INTEREST AND COSTS

1Judgment

1.1Judgment in the High Court
1.1.1Judgment at the close of the plaintiff's case
1.1.2Judgment at the close of the defendant's case
1.1.3Interpreting the court's judgment
1.2Judgment in the Magistrates' Courts

2Variation and setting aside of the court's judgment

2.1Variation and rescission of judgment in the High Court
2.1.1Variation of judgment in the High Court
2.1.1(a)Variation in terms of common law
2.1.1(b)Variation of a judgment in terms of rule 42(1)
2.1.2Rescission of judgment in the High Court
2.1.2(a)Rescission in terms of rule 42(1)
2.1.2(b)Rescission in terms of rule 31(2)(b) and reconsideration in terms of rule 31(5)(d)
2.1.2(b)(i)A reasonable explanation for default
2.1.2(b)(ii)The existence of a bona fide defence
2.1.2(b)(iii)The application must be brought bona fide
2.1.2(c)Rescission in terms of the common law
2.1.3Void judgments
2.1.4Abandonment of a judgment
2.2Rescission and variation of judgments in the Magistrates' Courts

2.2.1Variation and rescission in general
2.2.2Rescission of default judgments in particular
2.2.2(a)Good reason
2.2.2(b)Good cause shown
3Interest
3.1General overview
3.2The rate of interest
3.2.1Simple and compound interest
3.2.2National Credit Act 34 of 2005
3.3The date from which interest runs
3.3.1Unliquidated vs liquidated debts
3.3.2Liquidated debts
3.3.2(a)The mora ex re situation
3.3.2(b)The mora ex persona situation
3.3.3Unliquidated debts
3.4The *in duplum* rule
3.5Drafting a claim for interest
4Costs
4.1Introduction
4.2General rules relating to an award of costs
4.3The tariffs of costs and the costs charged by an attorney
4.3.1The tariff
4.3.2The costs charged by an attorney to his client
4.4Types of cost awards
4.4.1Award of costs on the party-and-party scale
4.4.2Award of costs on the attorney-and-client scale
4.4.3Award of costs on the attorney-and-own-client scale
4.4.4Award of costs *de bonis propriis*
4.4.5Interim costs orders
4.4.5(a)Costs
4.4.5(b)Costs in the cause
4.4.5(c)No order as to costs
4.4.5(d)Costs to be reserved
STAGE THREE: AFTER LITIGATION
PART 1: APPEALS AND REVIEWS
INTRODUCTION
Introduction
PART 1: APPEALS AND REVIEWS
A: APPEALS
1General overview
2Preliminary issues relating to appeal

2.1What may be appealed – judgments, orders and rulings
2.1.1High Court matters
2.1.2Magistrates' Courts matters
2.2Appeal on the facts versus appeal on the law
2.3Principles governing appeals in discretionary matters
2.4The effect of a pending appeal on the judgment of the lower court
2.5Disputing the validity of law in the Magistrates' Courts
3The different routes an appeal may follow
3.1Appeals from the Magistrates' Courts
3.1.1The usual route
3.1.2Shortcut appeals directly to the Constitutional Court
3.1.2(a)Direct access cases
3.1.2(b)Declarations of invalidity in constitutional cases
3.1.2(c)The leapfrog to the Constitutional Court
3.2Appeals from the High Court
3.2.1The usual route
3.2.2Shortcut appeals directly to the Supreme Court of Appeal or Constitutional Court
3.2.2(a)Direct access in constitutional cases
3.2.2(b)Declarations of invalidity in constitutional cases
3.2.2(c)The leapfrog to the Constitutional Court
3.2.2(d)The leapfrog to the Supreme Court of Appeal
4Leave to appeal
4.1Overview
4.2Grounds for granting leave to appeal and special leave to appeal
4.3Application to the High Court for leave to appeal
4.4Petition to the Supreme Court of Appeal for special leave to appeal
5The procedure leading up to the appeal hearing
5.1Appeals to the High Court: the procedure
5.1.1Overview
5.1.2The noting of an appeal
5.1.2(a)Request for written judgment (rules 51(1) and (2) of the Magistrates' Courts Rules)
5.1.2(b)Procedure on noting an appeal (rules 51(3), (4), (7) and (8) of the Magistrates' Courts Rules)
5.1.3The prosecution of an appeal
5.1.4Preparing the court record and subsequent procedures
5.2Appeals to the full court of the High Court: the procedure
5.3Appeals to the Supreme Court of Appeal (SCA): the procedure
5.4Appeals to the Constitutional Court: the procedure
6The appeal hearing
6.1Further evidence on appeal and the raising of new points
6.2No appeal or order granted without a practical effect or result
6.3Condonation of noncompliance with rules
6.4The judgment

PART 1: APPEALS AND REVIEWS

B: REVIEWS
1General overview
2Review jurisdiction
3Grounds for review
4The procedure to bring a matter under review
5Opposing the application for review
6Time limits
7Urgent reviews
8Powers of the court on review
9Court record required

PART 2: DEBT COLLECTION PROCEDURES

INTRODUCTION
Introduction

PART 2: DEBT COLLECTION PROCEDURES

A: WRITS AND WARRANTS OF EXECUTION
1General overview and effect of the National Credit Act
2Attachment and sale of corporeals
2.1Writ of execution in the High Court
2.1.1Overview
2.1.2Attachment and sale of movables
2.1.3Attachment and sale of immovables
2.2Warrant of execution in the Magistrates' Courts
2.2.1Overview
2.2.2The warrant of execution
2.2.3Attachment – what can and cannot be attached
2.2.4The attachment
2.2.5Execution
3Attachment and sale of incorporeals
3.1Attachment of incorporeals in the High Court
3.1.1Attaching a debt owed to the judgment debtor by a third party
3.1.2The procedure for attaching incorporeal property
3.2Attachment of incorporeals in the Magistrates' Courts
3.2.1Emoluments attachment orders versus garnishee orders
3.2.2Emoluments attachment orders
3.2.2(a)What is an emoluments attachment order?
3.2.2(b)How is such an order obtained?
3.2.2(c)Out of which court must the emoluments attachment order be issued?
3.2.2(d)What is the effect of the order?

3.2.2(e)What if the judgment debtor leaves his employment?
3.2.3Garnishee orders
4Interpleader proceedings
4.1General overview
4.2Interpleader proceedings in the High Court – rule 58
4.3Interpleader claims in the Magistrates' Courts – rule 44
5Superannuation of judgments
5.1Superannuation of judgments in the High Court
5.2Superannuation of judgments in the Magistrates' Courts

PART 2: DEBT COLLECTION PROCEDURES

B: SECTION 65 PROCEDURE
1General overview
2Section 65M
3The section 65A procedure
4Juristic persons and the state

PART 2: DEBT COLLECTION PROCEDURES

C: ADMINISTRATION ORDERS
1General overview
2The procedure
2.1The application for an administration order
2.2The hearing
2.3The administration order
2.4The appointment of an administrator and his tasks
2.5Payment to the administrator and to the creditors

STAGE FOUR: ADDITIONAL PROCEDURES

A: SETTLEMENT
1General overview
2Offers at common law: unconditional offer versus offer of compromise
2.1The unconditional offer
2.2The offer of compromise
2.2.1Introduction
2.2.2Making an offer of compromise: possible pitfalls
2.2.3Accepting an offer of compromise: possible pitfalls
2.2.4Proving an offer of compromise: responding to a claim
3Offers to settle during litigation
3.1Introduction: offer to settle as a defensive weapon
3.2Settlement procedures during litigation in the High Court
3.2.1Written offers and tenders

3.2.2The consequences of a 'without prejudice' offer or tender
3.2.3The contents of a written offer or tender
3.2.4Accepting an offer or tender
3.2.5Performance in terms of an offer or tender
3.2.6Rule 41: settlement procedure
3.3Settlement procedures during litigation in the Regional and District Magistrates' Courts
4Methods of recording agreements to settle
4.1General settlement agreements and acknowledgements of debt
4.2Making settlement agreements orders of court
4.3Confession to judgment in the High Court
4.4Admission of liability and consent to judgment in the Regional and District Magistrates' Courts
4.4.1Section 57: admission of liability procedure
4.4.2Section 58: consent to judgment procedure
4.5Recording settlements during litigation in the Regional and District Magistrates' Courts – rule 27

B: PROVISIONAL SENTENCE
1Introduction
2Requisites for provisional sentence
3What is a liquid document?
4Provisional sentence in the High Court
4.1Provisional sentence summons
4.2Opposing and replying affidavits
4.3The evidentiary burden
4.4The consequences of provisional sentence
4.5Possible outcomes in provisional sentence matters
5Provisional sentence in the Regional and District Magistrates' Courts

C: INTERIM RELIEF PENDING JUDGMENT
1The two types of interim relief pending judgment
1.1Interim relief: actions for bodily injuries – rule 34A of the High Court Rules and rule 18A of the Magistrates' Courts Rules
1.2Interim relief: actions for divorce – rule 43 of the High Court Rules and rule 58 of the Magistrates' Courts Rules

D: ARREST TANQUAM SUSPECTUS DE FUGA
1The Malachi case: *tanquam suspectus de fuga* unconstitutional
2Going forward: the possibility of arrest *tanquam suspectus de fuga?*

E: MULTIPLE PARTIES AND ACTIONS
1General overview
2Joinder of parties and causes of action
2.1Introduction
2.2Joinder in the High Court

2.2.1Joinder of several causes of action
2.2.2Joinder of more than one plaintiff or defendant
2.2.3Joinder of state authorities
2.2.4Separation of trials
2.3Joinder in the Magistrates' Courts
2.3.1Joinder of several causes of action
2.3.2Joinder of more than one plaintiff or defendant
2.3.3Separation of trials
3Consolidation of actions
3.1Consolidation of actions in the High Court
3.2Consolidation of actions in the Magistrates' Courts
4Voluntary intervention in a matter
4.1Intervening in a High Court matter
4.2Intervening in a Magistrates' Court matter
5Forced intervention in a matter
5.1The need for forced intervention
Example 1
Example 2
5.2Inviting intervention in terms of the Apportionment of Damages Act 34 of 1956
5.3Magistrates' Courts – joinder in terms of rule 28(2)
5.3.1The grounds for joinder
5.3.2The procedure for effecting joinder
5.3.3The effect of joinder
5.4High Court and Magistrates' Court – third party procedure in terms of rule 13 of the High Court and rule 28A of the Magistrates' Courts Rules
5.4.1Introduction
5.4.2The grounds for joinder of a third party
5.4.3The procedure for effecting joinder of a third party
5.4.4Opposition by the third party
5.4.5The effect of a third party notice

F: INTERDICTS
1General overview
2The two types of interdicts: prohibitory and mandatory interdicts
3Final and interim interdicts
4Jurisdiction to grant interdicts
5Purposes for which an interdict may be granted
6Final interdicts
6.1What is a clear right?
6.2What is an injury actually committed or reasonably apprehended?
6.3What does the absence of any other satisfactory remedy mean?
7Interim interdicts
7.1What is a *prima facie* right?
7.2What is a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is granted?

7.3What is a balance of convenience in favour of the granting of the interim relief?
7.4What does the absence of any other satisfactory remedy mean?
7.5Treatment of interim interdicts pending an appeal or application for leave to appeal
7.6The granting of interim interdicts and separation of powers
8How to decide whether to apply for an interim or a final interdict in practice
9Applying for an interdict: the usual procedural steps in practice
10Remedies for breach of interdict
11Structural interdicts

G: DRASTIC PROCEDURES
1*Anton Piller* orders
1.1What is an *Anton Piller* order?
1.2Applying for an *Anton Piller* order
1.3Procedural requirements
1.4Procedural safeguards
1.5The form of the order contained in the notice of motion
2*Knox D'Arcy* interdicts
2.1What is a *Knox D'Arcy* interdict?
2.2General principles and procedural requirements
2.2.1The purpose of the interdict
2.2.2The justification for the interdict
2.2.3What the applicant must show
2.2.4The applicant's onus of proof
2.2.5Notice to the respondent
2.2.6Noncompliance with court orders
3The civil recovery of property: the Prevention of Organised Crime Act 121 of 1988
3.1Introduction
3.2Preservation of property in terms of POCA
3.3Forfeiture of property in terms of POCA
4Protection orders in terms of the Domestic Violence Act 116 of 1998
4.1What is a domestic violence protection order?
4.2Defining a domestic relationship
4.3The definition of domestic violence
4.4*Locus standi* to apply for a protection order
4.5Applying for a protection order: the procedure
4.6Serving the order on the respondent
4.7The orders the court may make
4.8The Older Persons' Act 13 of 2006
5Spoliation orders
5.1What is a spoliation order?
5.2The *mandament van spolie* distinguished from the *reivindicatio*
5.3The procedure for obtaining a spoliation order
5.4An example of application papers for a *mandament van spolie* order

H: DECLARATIONS OF RIGHTS AND STATED CASES
1General overview
2Declarations of rights: general principles
2.1Circumstances in which a declarator may be granted
2.2Existing, future or contingent right or obligation
2.3The court's decision
3Special cases and points of law – rule 33
3.1Special cases – rule 33(1) to (3)
3.2Separating issues in pending actions – rule 33(4)
3.3Deciding the case on a point of law – rule 33(6)
4Stated cases on appeal, in the Constitution, and other statutes

I: SMALL CLAIMS COURT PROCEDURES
1General overview
2*Locus standi*
3Jurisdiction of the Small Claims Court
3.1Area of jurisdiction
3.2Jurisdiction in respect of persons
3.3Jurisdiction in respect of causes of action
3.4Matters beyond the jurisdiction of the Small Claims Court
3.5Abandonment
3.6Concurrent jurisdiction with the District Magistrates' Courts
4Instituting legal action
4.1The letter of demand
4.2The summons and particulars of claim
4.3The defendant's response: statement of defence
5Procedure at court
6A Small Claims Court case study: *Abel Achebe v Ben Baxter*
6.1The facts
6.2The legal opinion
6.3The section 29 letter of demand
(a) Planning the letter of demand
(b) The final letter of demand
6.4Abel's particulars of claim
6.5Preparing Ben's statement of defence
6.6Ben's statement of defence

J: OTHER CIVIL COURTS
1General overview
2Admiralty Courts
3Tax Courts
4Competition Appeal Court
5Labour Courts
6The Land Claims Court

7Special Investigating Units (SIUs) and Tribunals
8Equality Courts
9Children's Courts
10Maintenance Courts
11Summary: miscellaneous other civil courts

ANNEXURES

A: ALTERNATIVE DISPUTE RESOLUTION (ADR) IN CIVIL PRACTICE
1ADR and the civil justice system
2Statutory subject-specific ADR processes
3The primary objectives of ADR
3.1ADR as a cost-cutting measure
3.2ADR results in cooperative and participatory dispute settlement
3.3ADR helps facilitate access to justice
3.4ADR helps relieve court congestion
4ADR procedures: facilitative, adjudicative and evaluative processes
4.1Facilitative processes
4.1.1Negotiation
4.1.2Mediation
4.1.3Conciliation
4.2Adjudicative processes
4.2.1Arbitration
4.2.2Types of arbitration
4.3Evaluative procedures
4.3.1Expert appraisal process
4.3.2Case evaluation
5Hybrid ADR procedures
5.1The mini-trial
5.2Med-Arb: mediation culminating in arbitration
5.3Arb-Med-Arb: arbitration followed by mediation and a final arbitration award
5.4Med-Rec: mediation followed by a recommendation
5.5MEDALOA: Mediation and last-offer arbitration
6Advantages and disadvantages of ADR processes
6.1Flexible, informal and simplified procedures
6.2Voluntariness and party autonomy
6.3Maintenance of relationships
6.4Confidentiality
6.5Reduction of costs
6.6Lack of court protection
6.7The risk of incurring double costs
6.8Lack of access to sufficient information
6.9The danger of prescription
6.10Uncooperative parties

B: IMPACT OF THE NATIONAL CREDIT ACT AND THE CONSUMER PROTECTION ACT ON CIVIL PROCEDURE

1Introduction

2The National Credit Act 34 of 2005

2.1Introduction

2.2Aspects of jurisdiction

2.3Procedures and pleadings

2.3.1Letter of demand to complete a cause of action

2.3.2Notice as a prerequisite for legal proceedings

2.3.3Summons

2.3.3(a)Averments in the summons

2.3.3(b)Nature of the summons

2.3.4The particulars of claim

2.4Judgments and orders

2.4.1Summary judgment

2.4.2Consent to judgment

2.4.3Default judgment

2.5Statutory cap on amount which can be claimed – interest (*in duplum*)

2.6The debt review procedure

2.6.1The debt review order

3The Consumer Protection Act 68 of 2008

3.1Introduction

3.2The CPA legal framework

3.3The National Consumer Commission, National Consumer Tribunal, and Consumer Courts

3.4Jurisdiction in terms of the CPA

3.5Consent to and confirmation of judgments

3.6Service and delivery of documents

3.7The applicability of the Consumer Protection Act (CPA) to credit agreements entered into in terms of the National Credit Act (NCA)

3.7.1The interpretation of section 5(2)(*d*) of the CPA

3.7.2Conclusion

3.8The Commissioner's power to summons persons

3.9The CPA plain language requirements

3.10Statutory causes of action based on the CPA

3.11General impact of the CPA on civil procedure

C: DIAGRAMS

D: PRECEDENTS

E: CITATIONS

1Citing the plaintiff

1.1Citing the plaintiff: private individuals

1.2Citing the plaintiff: business entities

1.3Citing the state as plaintiff: government departments and parastatals

2Citing the defendant
2.1Citing the defendant: private individuals
2.2Citing the defendant: business entities
2.3Citing the state as defendant: government departments and parastatals

F: SHORT FORM, PARTICULARS OF CLAIM
1Goods sold and delivered
2Balance due for goods sold and delivered
3Work done and material supplied
4Professional services rendered
5Promissory notes
6Cheques
7Bills of exchange
8Acknowledgements of debt
9Monies lent and advanced

Preface

A number of years have passed since the first edition of this book was published in 2005. In 2008, the book found a new home with its present publishers, Oxford University Press, and after the success of the second edition of the book and the various reprints, we now present the third edition. We are very pleased with the confidence displayed in the book by the present publishers, as well as with the positive reviews of the two preceding editions of the work by experts in the field. The fact that the work has established a firm niche for itself in the market is, we believe, largely due to the fact that the central ideas upon which this book is based have been well received by its main audience, consisting of students and legal practitioners in their first few years of practice.

In preparing this third edition of the work, we have tried not to tinker too much with the central ideas referred to above, in order to provide a practical guide to civil procedure in both the High Court and the Magistrates' Courts, which is: both informative and useful to students and practitioners; written in plain easy-to-understand language; paying close attention to the manner in which the work is structured so as to provide the clearest possible mind map of an area of law which can be difficult to grasp; balancing the need for academic rigour with the goal of making the material accessible; and providing a range of additional tools, including an extensive glossary and a set of useful precedents and diagrams.

We have made every effort to ensure that the law reflected in the third edition of this book is up to date as at 11 November 2016. The most important changes to the book were those changes brought about by the restructuring of the High Court, which took effect by virtue of the Constitution Seventeenth Amendment Act of 2012 and the Superior Courts Act 10 of 2013. Many of these changes have, in theory, impacted court processes, procedures and structures fairly dramatically but the practical effect of the amendments and how they translate into practice remains to be seen. We cannot predict the future and the practical responses with complete accuracy. Readers are advised to bear in mind the comments set out above when they read this book.

Specific mention must be made of the fact that this third edition of the book once again includes two valuable additional chapters contributed by Professor Omphemetse Sibanda. These two chapters deal with alternative dispute resolution and the impact of the National Credit Act and the Consumer Protection Act on civil procedure. These two additional chapters constitute Annexures A and B of this third edition of the book, and we are delighted with the contribution these additions make to the book as a whole.

We are also delighted to welcome a new author to the book, Toni Palmer, who recently completed her bar exams to join the KwaZulu-Natal Society of Advocates.

The general aim of this book

As its title suggests, this is a practical, down-to-earth guide to civil procedure. It is designed for students and legal practitioners who are establishing their practices and need a book which is both easy to understand and sufficiently detailed to provide a solid introduction to this complex area of the law. The most important aim of this book is to provide you, the reader, with an effective mind map of the way in which the different concepts involved in this difficult subject fit together. Everything about the book – from the style in which it is written and the way in which the concepts are ordered to the diagrams and glossary which are provided – is designed to assist you in developing a practical understanding of what the subject is about.

Constructing an effective mind map

We believe that an effective mind map is built up in layers: you need to start with the big picture before struggling with the details. For example, imagine trying to find your way around a strange country. It would be silly to start at one corner of a detailed map of the country, trying to memorise the names of all the roads and towns on the map. It makes more sense to start with the main cities and provinces in order to get a general idea of where things are. Only after you have an idea of the 'big picture', will you add more detail to that picture. In other words, you will start with a general mind map before going in to more specific details.

We believe that it is the same with civil procedure. In our opinion, starting at 'A' and plodding your way through to 'Z' is not the best way to approach this subject. What you need, right from the beginning, is a big picture of what civil procedure is all about. As you explore the subject in more and more detail, the big picture remains in the back of your mind, ensuring that you do not get lost in all the detail. The more you learn, the more detailed your mind map becomes. We have taken pains to convey the information contained in this book in such a way that a general mind map is firmly in place before we embark on more detailed discussion in any particular area.

Clear language

This book is written in ordinary language that everyone can understand. In fact, you may find that reading the book is more like listening to a friend explaining something to you than picking your way through a difficult legal text. The last thing an overworked law student or young legal practitioner needs is a textbook full of obscure terms. We hope that the clarity of expression makes your task of mastering this difficult subject a little easier.

Unified approach

Traditionally, civil procedure in the Magistrates' Courts and in the High Court has been taught separately, as if the two systems were completely different from one another. This is not the case. Apart from the issue of jurisdiction and appeals, the concepts and processes used in the Magistrates' Courts and the High Court are often identical nowadays. Therefore, apart from the sections on jurisdiction and appeals, we adopt a unified approach in this book: we deal with the procedures in the Magistrates' Courts and the High Court together, pointing out differences when they arise. This saves time and energy.

His/her

In order to avoid the clumsy use of his/her and he/she in the text, we have opted to use 'he' and 'his' throughout. Some of us felt strongly that we should use 'she' and 'her', but ultimately we remained with 'he' and 'his'. No slight is intended to the many female legal students and practitioners who we hope will find this book useful.

The scope of this book

This book is not designed to be an exhaustive academic reference work. Although we have endeavoured to state the law as accurately as possible as at 11 November 2016, it should be borne in mind that this work is primarily an introductory practical guide to the subject. Practitioners involved in litigation are advised to consult appropriate reference works when researching particular areas of the law of civil procedure. Practitioners will note that, at various places in this book, we set out step-by-step guidelines to the various procedures, for example, prosecuting an appeal or bringing a judgment debtor before a Magistrates' Court in terms of s 65. Practitioners are warned that these guidelines attempt to do no more than set out the most salient

steps of the procedures dealt with. Those involved in litigation should always closely scrutinise the relevant Acts, rules, case law, and, very importantly, the practice in the division as reflected in the relevant practice directive so as to ensure that they comply fully with the requirements of the law. Having said that, we hope that this work will provide practitioners with a practical point of departure, as well as a useful starting point for their research.

Acknowledgements by authors

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New to this Edition

The third edition of *Civil Procedure: A Practical Guide* provides a clear and concise introduction to the complex area of civil procedure. The civil procedures used in the High Court and District and Regional Magistrates' Courts are discussed in detail, with the new edition providing additional and more extensive references to practice directives and practice manuals of the various divisions for the legal practitioner's reference. The practice and procedures of the Supreme Court of Appeal, Constitutional Court and Small Claims Court are also discussed.

This text has been updated to reflect legal developments which have transpired since the publication date of the 2nd edition of this book. These developments include, but are not limited to, the following:

•**Structure and naming of the courts**: The impact of the Constitution Seventeenth Amendment Act of 2012 and the Superior Courts Act 10 of 2013 on all aspects of civil procedure including:

–The restructuring and rationalisation of the High Court, from many High Courts to one High Court comprising various divisions;

–The renaming of the divisions of the High Court to reflect the High Court's restructuring, including the new nomenclature of 'main' and 'local' 'seats' (instead of 'local' and 'provincial' 'divisions');

–The amended jurisdiction of various divisions (including the introduction of new divisions of the High Court);

–The amended jurisdiction of the Supreme Court of Appeal (which is no longer the final court of appeal in respect of non-constitutional matters) and the Constitutional Court (which is now the apex court in respect of all matters);

–Various amendments to the appeal process in the High Court, including the new test for leave to appeal as set out in section 17 of the Superior Courts Act 10 of 2013, and the new process for obtaining leave to appeal to the Supreme Court of Appeal from the High Court hearing an appeal from the Magistrates' Court;

•**Appealability**: The amended test for appealability of orders, incorporating the 'interests of justice' standard, in particular with reference to the judgment of the Constitutional Court in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*;

•**Execution pending appeal**: The amended test for execution of orders pending an appeal (or an application for leave to appeal), as augmented by section 18 of the Superior Courts Act 10 of 2013;

•**Prescribed rate of interest**: Amendments to the Prescribed Rate of Interest Act 55 of 1975 and, specially, the manner in which the prescribed rate of interest is determined;

•**Service**: Introduction of new rules of service in the High Court, including service by hand, registered post, facsimile and electronic mail (for process other than that initiating application proceedings) in terms of High Court rule 4A, developments in respect of substituted service by Facebook and other forms of social media, and the amendment of High Court rule 19 to require service addresses within a radius of 15 kilometres of a division of the High Court (as opposed to 8 kilometres);

•***Locus standi***: developments in case law regarding *locus standi* under section 38(*a*) of the Constitutional (constitutional own-interest standing) and developments in respect of class actions;

•**Jurisdiction**: Amended monetary jurisdiction of District and Regional Magistrates' Courts; amended monetary threshold of the Small Claims Court; the new test for the 'residence' of a company, for purposes of establishing jurisdiction, in the light of *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd* (27956/2010) [2011] ZAWCHC 439 (16 November 2011);

•**National Credit Act**: Recent decisions considering the impact of the National Credit Act 34 of 2005 on debt enforcement, including the delivery of section 129 notice and termination of debt review proceedings;

•**Emolument attachment orders**: Recent legal developments in respect of emolument attachment orders in the light of *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice And Correctional Services and Others* (16703/14) [2015] ZAWCHC 99; 2015 (5) SA 221 (WCC); [2015] 3 All SA 644 (WCC); (2015) 36 ILJ 2558 (WCC) (8 July 2015); and

•**Provisional sentence**: The Constitutional Court's developments in respect of the provisional sentence procedure in *Twee Jonge Gezellen (Pty) Ltd and Another v Land and*

Agricultural Development Bank of South Africa t/a The Land Bank [2011] ZACC 2; 2011 (5) BCLR 505 (CC); 2011 (3) SA 1 (CC).

This text offers all the content required for undergraduate LLB courses in Civil Procedure, and also serves as a useful first reference for candidate attorneys, pupil advocates, legal practitioners, magistrates and judges. Ancillary material is available to lecturers prescribing this book.

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General introduction

1 Civil procedure and its place within the legal system

The obvious place to start a book on civil procedure is to look at how it fits into the law as a whole. If law is about the *creation*and *enforcement* of rights, procedure is that part of law that deals with enforcement. In South Africa, we use a system of procedure (both civil and criminal) based on the *adversarial system*. This involves opposing parties who 'fight' a case, with the court acting as an impartial referee. The court does not involve itself in the dispute or instruct the parties how they should run their respective cases, provided that they obey the rules of court.

To keep things simple, let us start with the term 'civil procedure' itself. First, let us look at the *civil* part of the term, and then at the *procedure* part.

Civil procedure is part of civil law. The easiest way to understand what *civil* law is about is to compare it to *criminal* law:

1. In criminal cases you have the *state* versus an *accused*. In civil cases you have a *plaintiff* versus a *defendant* (in a civil *action*), or an *applicant* versus a *respondent* (in a civil *application*).
2. Criminal matters are essentially public in nature. Once a crime has been reported, the wheels of the criminal justice system (police, prosecuting authorities, criminal courts, prisons) are set in motion to apprehend, prosecute, convict and punish the criminal. Civil matters, on the other hand, are essentially private in nature. The state does provide a system of civil courts within which parties can fight out their legal battles, but it is up to the parties themselves to initiate and pursue matters. If the parties fail to pursue a matter, the state, or the court for that matter, will not intervene. For this reason, the plaintiff or applicant, as the case may be, is known as *dominus litis*, which means the 'lord' or 'master' of the litigation. Nothing will happen unless the plaintiff or applicant (usually with the help of his or her attorney) takes steps to initiate the various processes. These processes involve, *inter alia*, choosing the correct court in which to proceed; issuing and serving the summons or notice of motion; setting the matter down for trial or hearing; and so on. Although the state may be one of the parties in a civil matter, it is regarded as being on an equal footing with any other private individual or juristic person (such as a company or close corporation) involved in that matter.
3. Criminal cases are about deciding whether or not the accused is guilty of a crime or an offence. Civil cases are for the most part about deciding whether or not the defendant or respondent is liable for the plaintiff's or applicant's claim.
4. The guilt of an accused in a criminal matter must be proved *beyond a reasonable doubt*, whereas the liability of a defendant or respondent in a civil matter need only be proved on a *balance of probabilities*.
5. An accused who is found guilty of a criminal offence is usually punished either by means of a fine or imprisonment or both. A defendant or respondent who is found liable in a civil matter must usually pay damages (money) or perform some service for the plaintiff or applicant.
6. The main aims of criminal punishment are retribution, deterrence, rehabilitation and incapacitation. It is often said that criminals must 'repay their debt to society', but this is only in a metaphorical sense: the purpose of criminal punishment is not really to obtain monetary compensation from the criminal, although fines are a common form of punishment for lesser

offences. When it comes to civil liability, money plays a much greater role and the majority of civil judgments include orders for the payment of money. A common example is a 'smash and bash' case, in which the owner of a motor vehicle damaged in a collision claims the fair and reasonable cost of repairing his or her vehicle from the person who caused the accident. But not all civil cases involve claims for the payment of money. In some cases, the person who initiates a civil case wants the other party to do something. A common example is a claim for *specific performance* in terms of a contract, in which one of the parties to the contract asks the court to order the other party to carry out that party's obligations in terms of the contract. Of course, a money claim is often attached as an alternative to a claim for specific performance, and sometimes it is also possible for *damages* (i.e. money) to be claimed in addition to specific performance. In some civil cases, the order sought is aimed at preventing someone from doing something, such as a claim for a *prohibitory interdict* preventing your client's neighbour from chopping down a large tree which, when felled, is likely to fall onto your client's house. There are also many other civil claims, such as those for *ejectment, sequestration* and *divorce*, which do not necessarily involve claims for money. In practice, however, such claims are generally connected to money claims (e.g. for arrear rent in the case of ejectment, and maintenance in the case of divorce).

What is important to bear in mind is that civil procedure belongs to civil law and not to criminal law. Banish words such as 'crime', 'guilt', 'punishment' and 'accused' from your thoughts. Think rather of words such as 'claim', 'liability', 'damages', 'respondent' and 'defendant'.

This brings us to *procedure* – the second half of the term 'civil procedure'. If civil law is often (although by no means only) about a private person recovering what is due to him or her (often money), then *civil procedure* is that part of civil law which enables the person to go about doing that in *practice*. In other words, civil procedure is the 'nuts and bolts' part of civil law. Other areas of civil law, such as delict and contract, tell you whether or not you have a valid legal claim, whilst civil procedure tells you precisely how to go about enforcing that claim. The respective bodies of law relating to delict and contract, for example, are each part of *substantive* law, whereas civil procedure is part of *procedural* (sometimes referred to as *adjectival*) law. [1]

It is worth noting that, because civil law covers a much wider area than criminal law, civil procedure is wider in scope, and more complex, than criminal procedure. No single right existing outside of criminal law can be enforced without the use of civil procedure. This means, of course, that you need to possess a sound knowledge of substantive law to be able to understand civil procedure. It is not an exaggeration to state that civil procedure forms the basis for much of what most attorneys actually do in their professional lives. A sound knowledge of civil procedure is vital for any legal practitioner, and for this reason aspirant attorneys and advocates are expected to display a proper understanding of the subject in their respective professional examinations.

In conclusion, it is worthwhile bearing in mind that civil procedure and criminal procedure are both heavily influenced by the law of evidence. The main point of both civil and criminal litigation is to place evidence before the court. Evidence, therefore, dominates procedure, and the type of procedure used is determined by the manner in which evidence must be presented in each case.

2 The court system and the officials

2.1A practical approach

For those readers who may be studying this subject for the first time, it is worth emphasising that civil procedure is a *practical* subject. It may help to have a physical picture of the courts and officials in mind as you work your way through the text. As you learn a particular procedure, you should imagine the documents going back and forth between real officials and litigants. It is also a good idea to determine whether or not there are any courts situated near the area where you live. If any, you should visit these courts and find out all you can about them. In this way, when we speak about a particular type of court in this book, you will have a picture of a real place in your mind. Civil procedure is more to do with processes that take place in the real world than with abstract academic concepts.

Ignoring for the moment the various special courts which exist in South Africa (e.g. Small Claims Courts, the Labour Court, the Competition Appeal Court, Tax Courts, the Land Claims Court, the Electoral Court, etc.),[2] the basic court system, from less to more senior, consists of the following courts:[3]

1. Magistrates' Courts;[4]
2. The High Court of South Africa ('the High Court');[5]
3. The Supreme Court of Appeal; and
4. The Constitutional Court.

2.2 The Magistrates' Courts: District and Regional

The whole country is divided up into many magisterial districts and each of these magisterial districts is served by a particular Magistrates' Court. For example, the Durban magisterial area is served by the Durban Magistrates' Court. If you drive down the KwaZulu-Natal coast, you will come to the magisterial district of Umzinto, which is served by the Scottburgh Magistrates' Court, and then to the Port Shepstone magisterial district, which is served by the Port Shepstone Magistrates' Court, and so on. In addition to Magistrates' Courts for Districts (which we name 'District Magistrates' Courts' in this book), a number of Magistrates' Courts for Regional Divisions (which we name 'Regional Magistrates' Courts' in this book) have been established to deal with civil matters.[6] Think about it next time you travel around the country: at any particular time during your journey, you will be within the jurisdictional area of a specific Magistrates' Court.

Try to obtain a good legal diary as soon as possible. It should have a complete list of all the magisterial districts in South Africa, together with the names of the Magistrates' Courts that serve them, and the attorneys who practise in these areas. Remember that the names of the magisterial districts are not always the same as the names of the courts that serve them. This can make the life of a candidate attorney a bit tricky. For example, the magisterial district of Klip River in KwaZulu-Natal is served by the Ladysmith Magistrates' Court. Remember also that a single magisterial district may include more than one municipal area. For example, the magisterial district of Pinetown in KwaZulu-Natal includes the municipal areas of Pinetown as well as Westville.

Magisterial districts are in the process of being rationalised, with the aim of making their boundaries consistent with provincial and municipal boundaries. New magisterial districts and district courts have been established in Gauteng and the North West since 1 December 2014, and in Mpumalanga and Limpopo since 25 January 2016.[7] Practitioners should anticipate that the magisterial districts in the remaining provinces will also be rationalised soon.

Although not of much practical use to the average attorney, it is interesting to note that Antarctica, Prince Edward Island, and Marion Island are deemed to fall within the magisterial district of Cape Town for the purposes of the administration of justice.[8]

2.3 The High Court

In order to understand the present High Court system, it is necessary to refer briefly to the system that existed before the advent of the present constitutional dispensation.

Prior to the enactment of the 1996 Constitution, there was a single Supreme Court of South Africa, which was divided into a number of divisions. There were six provincial and three local divisions, with one appellate division, which was the highest court in the hierarchy. Each provincial division had its own territorial area over which it exercised legal control, while the appellate division served to unify the court by providing the final decision in any case taken on appeal from the provincial divisions. In addition, each of the former independent homelands (i.e. Ciskei, Transkei, Venda and Bophuthatswana – formerly known as the TBVC states) had its own superior court system. A new system of High Courts (which replaced the earlier label 'Supreme Court') was introduced with the 1996 Constitution.[9] In theory, each High Court was a separate entity within a *system* of High Courts.[10] The new appellate court, which was named the Supreme Court of Appeal, was completely separate and outside the High Court system.[11] A Constitutional Court (often referred to as the ConCourt) was also established, serving as the final arbiter in matters relating to constitutional issues.[12]

Apart from these changes, the advent of the 1996 Constitution altered little in practice as far as High Courts were concerned.[13] Schedule 6 of the Constitution made certain *transitional* arrangements, according to which each division of the former Supreme Court was to be regarded as a High Court, retaining all its previous powers, its area of authority, and its previous name.[14] During this 'transitional' period, the High Court system looked like this:

Provincial Divisions

1. The Cape Provincial Division (CPD) sat in Cape Town and had jurisdiction over the old Cape Province, excluding the areas of jurisdiction of the Eastern Cape and Northern Cape divisions.
2. The Eastern Cape Division (ECD) sat in Grahamstown and had jurisdiction over the eastern portion of the old Cape Province.
3. The Northern Cape Division (NCD) sat in Kimberley and had jurisdiction over the northern part of the old Cape Province.
4. The Natal Provincial Division (NPD) sat in Pietermaritzburg and had jurisdiction over the old province of Natal.
5. The Orange Free State Provincial Division (OPD) sat in Bloemfontein and had jurisdiction over the old province of the Orange Free State.
6. The Transvaal Provincial Division (TPD) sat in Pretoria and had jurisdiction over the old province of the Transvaal.

Local Divisions

1. The Durban and Coast Local Division (DCLD) sat in Durban and had jurisdiction over the coastal strip of KwaZulu-Natal.
2. The Witwatersrand Local Division (WLD) sat in Johannesburg and had jurisdiction over the area around Johannesburg.

3. The South-eastern Cape Local Division (SECLD) sat in Port Elizabeth and had jurisdiction over the area around Port Elizabeth.

Supreme Courts of the former TBVC States:[15]

1. The *Transkei General Division*;
2. The *Bophuthatswana General Division*;
3. The *Ciskei General Division*; and
4. The *Venda Supreme Court*.

The Supreme Courts of the former TBVC States referred to above had the status of provincial divisions.[16] The three local divisions referred to lacked certain of the jurisdictional powers of the provincial divisions (in respect of appeals and reviews), but in other respects each local division exercised *concurrent jurisdiction* with a particular provincial division.[17] So, for example, the Durban and Coast Local Division exercised concurrent jurisdiction with the Natal Provincial Division over the coastal strip of KwaZulu-Natal.

Schedule 6 of the Constitution, while preserving the structure of the past, nevertheless explicitly envisaged the rationalisation of the courts, including their structure, composition and functioning, with a view to establishing a judicial system suited to the requirements of the Constitution. The process of rationalisation turned out to be very slow, despite a provision in Schedule 6 stating that it was to occur 'as soon as practicable'.

On 1 March 2009, the outdated names of the High Courts reflected above were finally changed when the Renaming of High Courts Act[18] came into operation. This was a welcome change given the fact that many High Court names still reflected their apartheid origin.[19] In terms of the Renaming of High Courts Act, the High Courts seated in the places mentioned in the first column of the table set out below were known by the names set out in the second column of the said table:

Seat of High Court	**Name of High Court**
Bhisho	Eastern Cape High Court, Bhisho
Bloemfontein	Free State High Court, Bloemfontein
Cape Town	Western Cape High Court, Cape Town
Durban	KwaZulu-Natal High Court, Durban
Grahamstown	Eastern Cape High Court, Grahamstown
Johannesburg	South Gauteng High Court, Johannesburg
Kimberley	Northern Cape High Court, Kimberley

Mafikeng	North West High Court, Mafikeng
Mthatha	Eastern Cape High Court, Mthatha
Pietermaritzburg	KwaZulu-Natal High Court, Pietermaritzburg
Port Elizabeth	Eastern Cape High Court, Port Elizabeth
Pretoria	North Gauteng High Court, Pretoria
Thohoyandou	Limpopo High Court, Thohoyandou

The abbreviations indicating these renamed courts in the *South African Law Reports* are as follows:

Name of court	**Abbreviation**
Eastern Cape High Court, Bhisho	ECB
Eastern Cape High Court, Grahamstown	ECG
Eastern Cape High Court, Mthatha	ECM
Eastern Cape High Court, Port Elizabeth	ECP
Free State High Court, Bloemfontein	FB
KwaZulu-Natal High Court, Durban	KZD
KwaZulu-Natal High Court, Pietermaritzburg	KZP
Limpopo High Court, Thohoyandou	LT
North Gauteng High Court, Pretoria	GNP
North West High Court, Mafikeng	NWM
Northern Cape High Court, Kimberley	NCK
South Gauteng High Court, Johannesburg	GSJ

Western Cape High Court, Cape Town	WCC

The 'transitional' period ended in 2013 with the entering into force of the Constitution Seventeenth Amendment Act of 2012[20] and the Superior Courts Act 10 of 2013.[21] These two Acts are interdependent and, together, brought about significant changes to the judicial system as a whole. One notable change was the creation of a single High Court of South Africa, with amended names for the former High Courts (previously separate) to indicate that each court was now a division of a single High Court. At present, the High Court of South Africa consists of the following divisions:[22]

1. Eastern Cape Division, with its main seat in Grahamstown;
2. Free State Division, with its main seat in Bloemfontein;
3. KwaZulu-Natal Division, with its main seat in Pietermaritzburg;
4. Limpopo Division, with its main seat in Polokwane;
5. Mpumalanga Division, with its main seat in Nelspruit;
6. Northern Cape Division, with its main seat in Kimberley;
7. Gauteng Division, with its main seat in Pretoria;
8. North West Division, with its main seat in Mahikeng; and
9. Western Cape Division, with its main seat in Cape Town.

In addition to the main seats mentioned, the Superior Courts Act 10 of 2013 provides that the Minister of Justice and Correctional Services, after consultation with the Judicial Service Commission, may establish one or more *local seats* for a division.[23] At the time of writing the third edition of this book, no new local divisions have been established.

Currently, the following local divisions are provided for in terms of section 50(1) of the Superior Courts Act 10 of 2013 (which essentially re-establishes existing local High Courts as local divisions):

1. Eastern Cape Local Division, Bhisho (which replaces the Eastern Cape High Court, Bhisho);
2. Eastern Cape Local Division, Mthatha (which replaces the Eastern Cape High Court, Mthatha;
3. Eastern Cape Local Division, Port Elizabeth (which replaces the Eastern Cape High Court, Port Elizabeth);
4. Gauteng Local Division, Johannesburg (which replaces the South Gauteng High Court, Johannesburg);
5. Limpopo Local Division, Thohoyandou (which replaces the Limpopo High Court, Thohoyandou);[24] and
6. KwaZulu-Natal Local Division, Durban (which replaces the KwaZulu-Natal High Court, Durban).

Local divisions have concurrent jurisdiction with the main seats of the respective divisions. However, local divisions have jurisdiction over 'limited' geographical areas.[25] These geographical areas are the same as those which local High Courts previously had under the (now repealed) Supreme Court Act 59 of 1959. This will remain so until notice is given by the Minister, in terms of s 6(3)(*c*) of the Superior Courts Act 10 of 2013, changing the jurisdiction of a local division.[26]

When the Superior Courts Act 10 of 2013 first came into effect, the Gauteng Division, Pretoria, functioned as the Limpopo and Mpumalanga Divisions, Thohoyandou.[27] However, on 15 January 2016, the Minister of Justice and Correctional Services gave notice determining the areas of jurisdiction of the Limpopo Division.[28] The Limpopo divisions now function as all other divisions of the High Court and are staffed with a Judge President and a complement of judges.[29]

During this time of transition, care should be taken when you are considering instituting proceedings in one of the newly established divisions to ascertain where that division is operating from.[30]

To end, it is worth noting that the jurisdiction of divisions that have the coastline as one of their boundaries extends for 12 nautical miles into the sea from the coast as measured from the low-water mark.[31]

2.4T he Supreme Court of Appeal

The Supreme Court of Appeal consists of a President, a Deputy President and a number of judges of appeal.[32] This court sits in Bloemfontein and has jurisdiction over the whole of South Africa in appeal matters only (i.e. it is an appellate court).[33]

Historically, the Appellate Division was the appeal court that united the various divisions of the old Supreme Court of South Africa, and was the chief court of the land. The Appellate Division was always known as the 'AD'.

In terms of Schedule 6 of the Constitution, the Appellate Division became the Supreme Court of Appeal, known as the 'SCA'. At the time, the Supreme Court of Appeal was the highest court of appeal in South Africa, except for constitutional matters, which was in the exclusive jurisdiction of the Constitutional Court that served as a specialist court in this regard.

However, the Constitution Seventeenth Amendment Act of 2012 has brought about significant changes to the hierarchy of the South African court system: the Constitutional Court is now the highest court for *all* matters, constitutional and non-constitutional, and the Supreme Court of Appeal has become an intermediate appeal court.[34] Furthermore, the Supreme Court of Appeal may now decide appeals in any matter arising from the High Court or any court of a status similar to the High Court, *except* in respect of certain labour or competition matters.[35]

2.5 The Constitutional Court

The Constitutional Court consists of the Chief Justice of South Africa, the Deputy Chief Justice, and nine other judges.[36] The Constitutional Court sits in Johannesburg. When the court was established, it was a specialist court, which dealt purely with constitutional matters. In a few (very limited) cases, it was also possible to approach the Constitutional Court as a court of first instance. Currently, this is still the case when the matter falls within the Constitutional Court's *exclusive* jurisdiction or when the matter justifies direct access to the Constitutional Court.[37]

When the Constitution Seventeenth Amendment Act of 2012 came into effect, the jurisdiction of the Constitutional Court changed significantly. As mentioned earlier, it is now the highest court of appeal for all matters, constitutional and non-constitutional.[38] This has increased the Constitutional Court's jurisdiction but also caused it to lose its status as a 'specialist' court on constitutional matters. Despite this change in jurisdiction, the name 'Constitutional Court' has been retained.[39] The Constitutional Court has also retained its areas of exclusive jurisdiction[40] – where it functions as a court of first and final instance. Furthermore, the Constitutional Court is

still required to confirm any declaration of invalidity made by the Supreme Court of Appeal or by any division of the High Court.

Another major change introduced by the Constitution Seventeenth Amendment Act of 2012, read with the relevant provisions of the Superior Courts Act 10 of 2013, concerns the *administration* of the judiciary. The Chief Justice of the Constitutional Court, who is the designated head of the judiciary, has been charged with the administration of justice in South African courts. The Office of the Chief Justice has been established as a national government department to provide support to the Chief Justice in his performance of this function. In 2014, the Chief Justice published Norms and Standards for the Performance of Judicial Functions, which are binding on all judicial officers and applicable to all courts in South Africa.[41]

2.6 The officials

You will come across various officials who administer civil law. It is a good idea to treat all these officials with respect because they have the power to make your job much easier or more difficult, depending on your attitude. It is worth mentioning at this point that, as a matter of practice in South African courts of all types, practitioners who have not previously met a presiding judicial official in whose court they are about to appear, introduce themselves in chambers before the start of the case.

Let us have a brief look at some of the officials who form part of our judicial system:

1. The most senior judge in the country is the *Chief Justice*.[42] At the time of writing the third edition of this book, the Chief Justice of South Africa is Justice Mogoeng Mogoeng, who succeeded Justice Sandile Ngcobo. Chief Justice Mogoeng Mogoeng also presides as chairperson of the Judicial Service Commission (or often referred to as the 'JSC'), the body that is responsible for the selection of judges.[43] When reading a current law report, you will see the letters 'CJ' after his name. At the time of writing the third edition of this book, the *Deputy Chief Justice* of South Africa is Justice Dikgang Moseneke who will be retiring from the bench soon. When reading a current law report, you will see the letters 'DCJ' after his name. The other *Constitutional Court Justices* carry the letter 'J' after their names in the law reports. When addressing an individual judge in the Constitutional Court, you should use that judge's surname preceded by the word 'Justice', for example, 'Thank you, Justice Cameron, for making that important point.' When addressing all the judges, you should address your remarks to the most senior judge and use the term 'the Court', for example, 'The Court is referred to point 3 in my heads of argument.'.[44]
2. The *President of the Supreme Court of Appeal* is the most senior judge of that court. He carries the letter 'P' after his name in the law reports. At the time of writing the third edition of this book, the President of the Supreme Court of Appeal is Justice Lex Mpathi. The *Deputy President of the Supreme Court of Appeal* carries the letters 'DP' after her name. At the time of writing the third edition of this book, the Deputy President of the Supreme Court of Appeal is Justice Mandisa Maya, the first female judge to occupy the position. The other judges of the court carry the letters 'JA' after their names to indicate that they are *Judges of Appeal*. This should not be confused with the letters 'AJ', which indicate an *Acting Judge*. Before 2 May 2007, the judges of the Supreme Court of Appeal were addressed in court by making use of the expressions 'My Lord' (M'lord), 'My Lady' (M'lady), 'Your Lordship(s)' and 'Your Ladyship(s)'. After that date, however, it became practice in the Supreme Court of Appeal to address the Bench, through the presiding Judge, as 'the Court'. When referring to an individual member of the Bench, you use the Judge's surname preceded by the word 'Justice'.[45]

3. As far as the High Court is concerned, usually the most senior judge within a certain (provincial) division is appointed as the Judge President.[46] At the time of writing the third edition of this book, there is a Judge President for each of the following: North West Division; Western Cape Division; Eastern Cape Division; KwaZulu-Natal Division; Northern Cape Division; Free State Division; and the Gauteng Division. These judges carry the letters 'JP' after their names in the law reports. The other High Court Judges carry the letter 'J' after their names. Judges of the High Court are still addressed in court by making use of the expressions 'My Lord' (M'Lord), 'My Lady' (M'Lady), 'Your Lordship(s)' and 'Your Ladyship(s)'. You are advised to acquaint yourself with the correct forms of address before appearing in a division. Note that if you are referring to a judge indirectly (e.g. when quoting from the judgment of a particular judge), you should refer to that judge by his name and title, for example, 'In the judgment of Judge President Bloggs, it is stated that …' If you are speaking to a High Court Judge informally outside court, you should address him as 'Judge'.

4. The presiding officers in the District and Regional Magistrates' Courts are, of course, *magistrates*. In court, a magistrate should be addressed as 'Your Worship' (not 'Your Honour', or 'Your Excellency', or 'My Lord', or the many other incorrect forms of address you will hear in the Magistrates' Courts from time to time). Outside court, you may address a magistrate as Mr or Mrs or Ms XYZ (whatever the person's surname happens to be).
5. All the organisational work in each division of the High Court falls under the control of the *registrar of the court*.[47] The equivalent official in each of the District Magistrates' Courts is known as the *clerk of the court.*[48] In the Regional Magistrates' Courts, such official is known as the *registrar of the court*.[49] These officials are dealing with all the administrative work related to civil litigation. Treat them and their assistants with courtesy and respect. They are often very knowledgeable and have the power to make the life of a harassed attorney just that little bit easier or more difficult, as the case may be.
6. Legal documents in both the High Court and Magistrates' Court are delivered by the *sheriff of the court*. This official and his deputies also perform other duties such as carrying out civil arrests and attaching the goods of debtors.
7. The bill of costs that is drawn up at the end of most civil matters is dealt with by the *taxing master*. Once again, it is important for you to form a good working relationship with this official.

3 Where to find the relevant law

Much of the law relating to civil procedure is to be found in various *statutes* and in the *case law* that has built up around the interpretation of these statutes. The most important of these statutes are the following:

1. The Superior Courts Act 10 of 2013 (which recently replaced the Supreme Court Act 59 of 1959 and the Constitutional Court Complementary Act 13 of 1995);[50]
2. The Magistrates' Courts Act 32 of 1944; and
3. The Small Claims Courts Act 61 of 1984.

Each court (i.e. the Constitutional Court, Supreme Court of Appeal, the High Court, the Magistrates' Courts and the Small Claims Courts) also has a set of *rules* that should be read in conjunction with the applicable statute. Read together, the Acts and the rules set out the various procedures that form the core of civil procedure. In many cases, they work in tandem, so you will often find yourself having to flip between the two if you want to get to grips with a particular procedure. In addition, each division of the High Court has a *Practice Manual* (Practice

Directions or Practice Notes, as they are sometimes called) supplementing the rules, which elaborates on specific aspects of the practice and administration of that division.[51] The Constitutional Court and the Supreme Court of Appeal also have Practice Directions. Judges are, however, not bound by Practice Directions.

One point of difference between the Acts, the rules, and the practice directives is the way in which they are amended. As far as the rules are concerned, there is a body known as the *Rules Board* that reviews and amends the rules on a regular basis. The Rules Board is constituted in terms of the Rules Board for Courts of Law Act 107 of 1985 and has the power to make, amend or repeal rules for both the High Court and the Lower Courts (which includes Magistrates' Courts). The Acts, however, may only be amended by Parliament, and practice directions, on the other hand, are published at the direction of the Judge President of a particular division.

As far as the High Court Rules are concerned, you will see a set of rules referred to as the *Uniform Rules of Court* or simply the *Uniform Rules*, which we often refer to in this book as the *High Court Rules*.

It is also worth noting that there is a set of *forms* attached to each set of rules. These forms are simply *precedents*, which show you what various documents mentioned in the Acts and rules should look like. They are very useful in a practical sense.

You are strongly advised to obtain copies of all the materials referred to above, and to label them for easy reference. Make sure that you have different subdivisions for the different sets of Acts, rules and forms which relate to each of the following five types of courts: Constitutional Court, Supreme Court of Appeal; High Court, Magistrates' Court, and Small Claims Court. Attach tags to each of the subdivisions so that you can get to each subdivision easily as you work your way through this book.

4 The impact of the Constitution on civil procedure

While we do not intend to review exhaustively every instance in which the Constitution, particularly the Bill of Rights as set out in Chapter two, has had an impact on the law of civil procedure, we will, however, examine a few prominent examples that will illustrate the impact of the Bill of Rights on this area of the law.

A good example of the impact of the Bill of Rights on civil procedure is to be found in the case of *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others*.[52] In this case, the Constitutional Court held that certain sections of the Magistrates' Courts Act relating to debt collection procedures were unconstitutional, and declared the procedures to be invalid from the date on which the court made its order.[53] In terms of the debt collection procedures in force at the time, a civil debtor could find himself in prison for failing to pay his/her debt. The Constitutional Court found the provisions providing for the imprisonment of civil debtors to be overbroad for a number of reasons.[54]

As a result of the above-mentioned case, the provisions of s 65 of the Magistrates' Courts Act were completely redrafted to bring the debt collection procedures set out in this section into line with the Constitution.[55] However, in 2016, the section's constitutionality was again challenged

and found to be wanting. This time, in *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others*; *Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others*; *Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others*, the Constitutional Court declared various words in section 65J(2)(a) and (b) of the Magistrates' Courts Act 32 of 1944, which provides for emolument attachment orders, unconstitutional for failure to provide judicial oversight over the emoluments attachment order process. After finding the section unconstitutional, the Constitutional Court ordered that certain safeguards be read into section 65J(2) of the Act. The Act now requires that all emolument attachments are issued through the court (and not simply through the clerks of the court employed in various Magistrates' offices). Furthermore, it provides that the court, before granting such an order, should be satisfied that it is just an equitable to do so. Judicial oversight over the emoluments attachment order process, the Court held, would alleviate the harsh effects of an emoluments attachment order on distinctly vulnerable low-income debtors' dignity and livelihoods.[56]

Another area in which the Constitution has had a significant impact on civil procedure is in relation to litigation involving organs of the state, specifically as far as the notice requirements and prescription periods applicable to such cases are concerned. Before the introduction of the new constitutional dispensation, legislation often drastically reduced the period within which one's claim against a particular organ of the state would prescribe, and laid down strict notice requirements before action could be instituted. In actions against the police and Defence Force, for example, the prescription period was not the normal three years, but only six months. Furthermore, written notice of any legal action against either the police or Defence Force had to be given one month before legal action was instituted. Many potential claimants were denied legal relief simply because they failed to comply with these technical requirements. With the introduction of the new democratic dispensation, such provisions came under constitutional attack, and led to the redrafting of much of the legislation relating to litigation against organs of the state.[57] It was only in 2002, with the enactment of the Institution of Legal Proceedings Against Certain Organs of the State Act 40 of 2002, that this area of civil procedure was brought substantially into line with the provisions of the Constitution.[58]

A further example of the impact of the Constitution on civil procedure is in the area of access to the courts. Access is usually restricted to those with a direct and substantial interest in the matter to be brought before the court (as you will see when we discuss the topic of *locus standi* later on). In terms of s 38 of the Constitution, however, access to court in matters relating to an infringement or threat to one or more of the rights in the Bill of Rights (set out in Chapter 2 of the Constitution), has been broadened considerably. The following persons are given the right to approach the court in such cases:

1. anyone acting in their own interest;
2. anyone acting on behalf of another person who cannot act in their own name;
3. anyone acting as a member of, or in the interest of, a group or class of persons;
4. anyone acting in the public interest; and
5. an association acting in the interest of its members.[59]

The impact of the constitutional right to equality on civil procedure was considered in the decision of the High Court in *Nedcor Bank Ltd v Hennop and Another*.[60] In that matter, which was an application for summary judgment, one of the defendants' defences, raised *in limine*, was that the plaintiff's application for summary judgment was fatally defective because it did not comply with the requirements of rule 17(4) of the Uniform Rules of Court. The sub-rule, *inter*

alia, provides that every summons shall state the name of the parties and also the defendant's sex and, if a female, her marital status. The Court found that the reference to the defendant's sex and women's marital status as required by rule 17(4) is outmoded and anachronistic, and offends the equality provisions contained in the Constitution, inasmuch as the Preamble speaks of equality between men and women; s 9(1) provides that every person shall have the right to equality before the law; and s 9(3) is emphatic that no person shall be unfairly discriminated against, directly or indirectly, on the grounds of sex, gender or disability, amongst others.[61] Accordingly, the High Court found that 'in these enlightened times, the omission to state the defendants' sex and, in the case of a woman, her marital status in the summons, is of no consequence and certainly not amenable to render the plaintiff's application for summary judgment to be fatally defective.'[62]

Another good example of the impact of the Constitution on the law of civil procedure is to be found in the case of *Bid Industrial Holdings (Pty) Ltd v Strang and Another (Minister of Justice and Constitutional Development, Third Party)*.[63] In this case, the Supreme Court of Appeal held that the common-law rule requiring the arrest of foreign *peregrini* to found or confirm jurisdiction was contrary to the spirit, purport, and objects of the Bill of Rights, and should be abolished. This case is discussed in detail later in this book in Stage One, Part 1C 3.5.1 footnote 419.

The Constitution has also affected the law of civil procedure relating to arrest *tanquam suspectus de fuga*. This area of the law has been subjected to constitutional scrutiny by our courts and the practice is no longer permitted. It is discussed in detail later in this book.[64]

The Constitutional Court also considered the constitutionality of the provisional sentence procedure in *Twee Jonge Gezellen (Pty) Ltd and Another v Land and Agricultural Development Bank of South Africa t/a The Land Bank and Another*[65] and found that, in certain narrowly defined circumstances, it constitutes an unjustified limitation of a defendant's right to a fair hearing in terms of s 34 of the Constitution. To remedy this, the Court developed the common law to give the Court a discretion to refuse provisional sentence in certain specified instances.

Following the judgments of *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*; and *Gundwana v Steko Development CC and Others*, the Magistrates' Court and High Court practice for execution against immovable property have also been reshaped to better protect the right of access to adequate housing as provided in s 26(1) of the Constitution.[66]

Finally, on a related issue, note that there are a number of important pieces of legislation which have influenced civil procedure to a significant extent. The impact on civil procedure of two such pieces of legislation, i.e. the National Credit Act 34 of 2005 and the Consumer Protection Act 68 of 2009, is considered in detail in Annexure B.

D2

5A general mind map of civil procedure

5.1The big picture

We have divided the main body of this book into four stages. The first three stages tell the basic story of civil litigation and are divided as follows:

•Stage One: Before litigation (the beginning of the story).
•Stage Two: Litigation (the middle of the story).
•Stage Three: After litigation (the end of the story).

The fourth stage of the book deals with certain more specific and focused procedures, which we feel are better left until the main story has been told:

•Stage Four: Additional procedures (adding to the basic story).

On reading the book, you will notice that certain of the stages are longer than others. The reason for this is that a good mind map should, as far as possible, reflect and make sense of what happens in practice. In the same way that an accurate map of Africa will reflect that some countries are bigger than others, so an accurate mind map of civil procedure will reflect that some procedures are more complicated than others. Note that we have provided only one of many possible mind maps that would accurately reflect what happens in the practice of civil procedure. You may well develop your own mind map that differs from the one we provide. We encourage you to play around with the mind map that develops in your own mind, in order to make it your own. It is only once you have taken ownership of the mind map that you will really understand the way things fit together.

Let us examine each of the above four stages in more detail.

5.2 The stages

Stage One: Before litigation – the beginning of the story

Stage One deals with what happens before litigation starts, i.e. before the court becomes involved in the process. We have divided Stage One into two Parts, which we have named Preliminary questions and Pre-litigation issues, respectively. The preliminary questions refer to those fundamental questions every attorney needs to consider whenever he is briefed in a new matter, i.e. those issues that a good attorney will start thinking about while the client is still briefing him. The pre-litigation issues refer to those issues that must be considered as litigation approaches, i.e. the issues an attorney starts to consider after the initial briefing session with the client and he starts preparing the matter for litigation. You may want to think of Parts 1 and 2 of Stage One as a single big section that deals with all the basic issues that need to be considered before any sort of legal action is taken.

Stage Two: Litigation – the middle of the story

Stage Two deals with the litigation process itself, i.e. what happens once the court becomes involved in the case. We have divided Stage Two into two Parts, which we have named Applications and Actions, respectively. The reason that Stage Two consists of only two parts is that, broadly speaking, there are two main procedures which may be used to place a new matter before court, i.e. the application procedure and the action procedure. This distinction between applications and actions is one of the most fundamental distinctions in civil procedure. You may think of these two procedures as two distinctive legal vehicles. Which particular vehicle you use will depend upon the particular job you need it to do.

Stage Three: After litigation – the end of the story

Stage Three deals with issues that arise *after* the court case has been finalised. We have divided Stage Three into two Parts, which we have named Appeals and Reviews, and Debt Collection

Procedures, respectively. Appeals and Reviews essentially involve a 'second bite at the cherry' for those litigants who are dissatisfied with the original judgment or order of the court.[67]The Debt Collection Procedures referred to are used in those cases where a judgment debtor (i.e. the loser in a case involving a money claim) refuses to pay the judgment debt.

Stage Four: Additional procedures – adding to the basic story

Stage Four deals with certain more specific and focused procedures, which add detail to the basic story of civil procedure set out in Stages One, Two and Three. Once your mind map is fully developed, you will be able to work out where and how these procedures fit into the big picture. We believe it is important to deal with these more focused and complex issues towards the end of the book, by which time the reader should have a firm understanding of the basic concepts.

Let us now broaden your mind map by taking a closer look at each of the individual parts of the stages discussed above.

5.3 The parts

Stage One, Part 1: Preliminary questions

Part 1 of Stage One deals with the fundamental questions that a good attorney will consider from the very beginning of a matter.

A: Cause of action

Does your client have a valid cause of action? The answer to this question is to be found in substantive law. For example, in a contractual matter, is your client able to prove, in terms of the substantive law of contract, that there was a valid contract and a breach of that contract? Or, in terms of the substantive law of delict, is your client able to prove all the elements (conduct; unlawfulness, fault, causation, damage) of the particular delict that he or she alleges was committed against him or her? This section of the book will examine certain of the more common causes of action from a practical standpoint.

B: *Locus standi*

Who are the parties to the matter and do they possess the necessary *locus standi* (standing) to appear before the court? In general terms, the standing of the parties will depend upon whether or not they have a direct and substantial interest in the matter, as well as the requisite capacity to litigate. Whether or not a party has the capacity to litigate will depend upon issues such as the person's age, whether or not the person is sane, and so on.

C: Jurisdiction

Which particular court or courts possess jurisdiction to adjudicate in the matter? There are literally hundreds of different courts in South Africa so it is clearly of fundamental importance to decide correctly which of these courts may hear a particular matter. This section is concerned mainly with jurisdiction in relation to the Magistrates' Courts and the High Court.

Stage One, Part 2: Pre-litigation issues

Part 2 of Stage One deals with the issues that need to be considered as litigation approaches.

A: Demand

In most cases, demand is an important precursor to litigation. This section deals with the different types of demand and the reasons for demand.

B: Calculation of time limits

This section deals with the manner in which the various time limits prescribed in the relevant Acts and rules are calculated. You will not be able to keep to a time limit if you are unable to calculate it.

C: Service of legal documents

There are strict rules prescribing the manner in which legal documents should be served. Although strictly a part of litigation, it is easier to deal with service as one of the pre-litigation issues, before getting into the nitty-gritty of litigation procedure.

D: Action or application

This section sets out how to go about deciding whether to proceed by way of action or application. The action and application procedures are the two main legal vehicles by means of which a new civil case may be placed before the court. This section serves to introduce Stage Two, which deals with the litigation process.

Stage Two, Part 1: Applications

Part 1 of Stage Two deals with the application procedure. Basically, applications are matters in which the parties set out their respective cases in writing, and the court then decides the matter by considering the documents before it. This is very different to an action, which involves a trial at which witnesses give evidence and are cross-examined. The main difference between the two is the manner in which the evidence is placed before the court.

In the case of applications, it is placed before the court in the form of *affidavits*, and the intention is that the matter will be decided without having to lead oral evidence. In the case of an action, the facts are put before the court mainly in the form of oral evidence by calling witnesses.

Because applications do not involve a trial, they are not really suited to dealing with matters in which there is a dispute of fact. They are more suited to straightforward matters where there is no material dispute of fact. The parties involved in an application are called the *applicant* and the *respondent*. Sometimes, an application is made without notice to a respondent (for example, when an urgent interdict is being requested) and this is known as an *ex parte* application. An application in which notice is given to the respondent is termed an *on notice* application in this book.

Stage Two, Part 2: Actions

Part 2 of Stage Two deals with the action procedure. This procedure is more complex than the application procedure, and is broken down into the four sections, as set out below.

A: Pleadings

The pleadings stage of an action is a sort of paper war, during which the parties exchange a series of documents containing allegations and counter-allegations. The purpose of these

allegations and counter-allegations is to define the issues in dispute between them. Once the battle lines have been drawn, the parties are each aware of precisely which issues will be raised in the court battle to come.

B: Pre-trial procedures

Once the pleadings close, there is a pre-trial stage during which the parties prepare for the trial, for example, obtain a date for the trial (set down); inspect each other's documents (discovery); secure the attendance of witnesses (subpoenas); and so on.

C: Trial

The pre-trial stage is followed by the trial itself, during which both sides lead the evidence of witnesses, who are subject to cross-examination to test the truth of their evidence.

D: Judgment, interest and costs

The trial stage is followed by the judgment of the court. Part of this judgment will usually include an order as to interest and costs.

Stage Three, Part 1: Appeals and reviews

Part 1 of Stage Three deals with appeals and reviews. These are the procedures available if one or both parties are dissatisfied with the order or judgment handed down by the court.

A: Appeals

You will lodge an appeal against an order or judgment of the court in those cases where you are satisfied that the procedures adopted at the trial or hearing were fair, but you disagree with the *decision* reached by the presiding officer *on the merits*. In other words, you are *not* saying that the presiding officer was guilty of *bias, malice* or *corruption* in reaching his or her decision (since these are grounds for review of the decision). What you are saying is that although the presiding officer reached the decision in a fair manner, s/he reached the wrong decision, based on either the facts or the law or both.[68]

B: Reviews

An application for review is used in situations where there was a serious irregularity in the procedure adopted during the trial, for example, the presiding officer was guilty of bias, malice or corruption in reaching his or her decision.

Stage Three, Part 2: Debt collection procedures

Part 2 of Stage Three deals with various debt collection procedures. Civil procedure does not come to an end when judgment is granted in favour of one of the parties. In many cases, a party against whom a judgment has been granted simply ignores the judgment. If your client is owed a sum of money in terms of a court judgment, your client wants the money, not a piece of paper telling him that he is entitled to the money! Also, because it is a civil matter, the state will not take the initiative and send an official to recover the money on your client's behalf. It is up to the judgment creditor (i.e. the person to whom the money is owing) to take the initiative by making use of the debt collection procedures provided, which will then be enforced by the state.

A: Writs and warrants of execution

One of the main legal methods of collecting a judgment debt is to issue a *writ of execution* (High Court) or *warrant of execution*(Magistrates' Courts). The effect of such a writ or warrant is to instruct the sheriff of the court to attach the property of the judgment debtor. If the judgment debt is not paid, the attached property is eventually sold at a public auction and the proceeds are used to pay the judgment creditor. Both corporeal as well as incorporeal property may be attached. As far as corporeal property is concerned, both movable as well as immovable property may be attached.

B: Section 65 procedure

Another important legal method of collecting a judgment debt is to make use of the procedure set out in s 65 of the Magistrates' Courts Act.[69] This involves bringing the judgment debtor before court in order to conduct an enquiry into his or her financial affairs. If the enquiry reveals that s/he can afford to pay the judgment debt in installments, the court will make an order to this effect. If the debtor does not comply with the order, s/he is liable to be arrested and imprisoned for disobeying an order of court.[70]

C: Administration orders

Administration orders are sometimes referred to in practice as 'Magistrates' Courts sequestrations'. This procedure is generally used by debtors who are deeply indebted to more than one creditor. A distribution scheme is put in place, in terms of which pro-rata payments are made to all creditors.

Stage Four: Additional procedures

Stage Four deals with additional procedures that are more specific and focused.

A: Settlement

Settlement is a neglected area of civil procedure. Perhaps the majority of civil claims are settled before they ever get to court. It is important, therefore, for you to possess a good understanding of the basic principles concerning settlement. For example, you need to understand the potential pitfalls involved in making and accepting a 'without prejudice' offer, as well as how to record an agreement to settle effectively. Once litigation has started, you need to understand how to make use of a tender or payment into court as a defensive weapon.

B: Provisional sentence

The provisional sentence procedure provides a shortcut for those clients who wish to recover a debt based on a liquid document, such as a cheque, acknowledgement of debt, or mortgage bond. Claims based on liquid documents are very common, which means that this procedure is frequently used in practice.

C: Interim relief pending judgment

There are two cases in which the High and Magistrates' Courts Rules allow for relief to be granted to a plaintiff before judgment has been granted. In terms of High Court rule 34A and Magistrates' Courts rule 18A, interim relief is allowed in certain circumstances in the case of actions for bodily injuries. In terms of High Court rule 43 and Magistrates' Courts rule 58, interim relief is allowed in certain circumstances in pending divorce actions.

D: Arrest *tanquam suspectus de fuga*

In the past, in certain circumstances, persons who tried to flee the country in order to avoid paying their debts were liable to arrest *tanquam suspectus de fuga*.[71]

E: Multiple parties and actions

In practice, many cases involve more than two parties. It is important, therefore, for you to be able to deal with such cases. For example, if you are acting for the sole defendant in an action, you may find it necessary to join another party to the action, either as a co-defendant or as a third party, since you consider that person to be a joint wrongdoer together with your client.

F: Interdicts

An *interdict* is an order of court either ordering someone to do something (mandatory interdict) or to stop doing something (prohibitory interdict). Interdicts may be either temporary (interlocutory) or final, and each type of interdict has its own requirements.

G: Drastic procedures

This section deals with five different procedures that, in some way or other, may each be termed 'drastic'. *Anton Piller* orders are used to secure and preserve evidence, which is in danger of being hidden or destroyed, for the purpose of a subsequent trial. *Knox D'Arcy* interdicts (sometimes called *Mareva* injunctions) are used to prevent assets from being hidden or disposed of with the intention of defeating the applicant's claim. The Prevention of Organised Crime Act 121 of 1998 allows the National Director of Public Prosecutions to apply for a civil order for the preservation (attachment) of property suspected to have been obtained as a result of criminal activity. This property may later be forfeited to the state. The Domestic Violence Act 116 of 1998 provides certain remedies for those who are the victims of domestic violence. A *spoliation* order may be used to recover property unlawfully removed from the possession of your client.

H: Declarations of rights and stated cases

This section deals with the circumstances in which a declaration of rights may be granted by the court on application, as well as in special cases in terms of the High Court Rules. The essence of this procedure is that the parties agree on a written statement of facts, and the court then declares what the law is that applies to that set of facts.

I: Small Claims Court procedures

The Small Claims Courts deal with matters involving claims up to R15 000.[72] No legal representation is allowed in these courts, and its decisions may not be appealed.

J: Other civil courts

This section contains an overview of a variety of other civil courts, including Admiralty Courts; Tax Courts; Competition Tribunal and Appeal Court; Labour Courts; the Land Claims Court; Special Investigating Units and Tribunals; Equality Courts; Children's Courts; Maintenance Courts; the National Consumer Tribunal;[73] and Courts of Chiefs and Headmen.

1The following definition from *Salmond on Jurisprudence* is quoted with approval by Corbett, JA in the case of *Universal City Studios Inc and Others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) at 754: 'Substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained.' See also *Minister of the Interior and Another v Harris*

and Others 1952 (4) SA 769 (A) at 780-781. The courts have recognised that, while a neat distinction in theory, the dividing line between substantive and adjectival law is not always an easy one to draw.

2Certain of these special courts are discussed later in this book in Stage Four, Parts I and J.

3Section 166 of the Constitution of the Republic of South Africa Act 108 of 1996.

4Note that the Constitution Seventeenth Amendment Bill of 2010, which preceded the Constitution Seventeenth Amendment Act of 2012, proposed replacing the term 'Magistrates' Courts' with the term 'Lower Courts'. This change did not, however, appear in the Constitution Seventeenth Amendment Act of 2012.

5Note that the Constitution Seventeenth Amendment Act of 2012, read with section 6 of the Superior Courts Act 10 of 2013, establishes a single High Court of South Africa (see Section 2.3 below).

6See the definition of 'court' in s 1 of the Magistrates' Courts Act 32 of 1944, as amended by the Jurisdiction of Regional Courts Amendment Act 31 of 2008, which came into operation on 9 August 2010, read with Government Notice 670 of 29 July 2010 in *Government Gazette* 33418 of 29 July 2010, which purports to establish the following Magistrates' Courts for Regional Divisions: Eastern Cape Regional Division, Free State Regional Division, Gauteng Regional Division, KwaZulu-Natal Regional Division, Limpopo Regional Division, Mpumalanga Regional Division, Northern Cape Regional Division, North West Regional Division and Western Cape Regional Division. For a discussion on the monetary jurisdiction of Regional Magistrates' Courts, see *Minister of Police v Regional Magistrate, Oudtshoorn and Others* (15587/2013) [2014] ZAWCHC 165 (6 November 2014) at para 9.

7In respect of Gauteng and North West, see *Government Gazette* 37258, Government Notice 43 of 24 January 2014, as read with *Government Gazette* 38170, Government Notice 861 of 31 October 2014. In respect of Mpumalanga and Limpopo, see *Government Gazette* 39601, Government Notices 32 and 33 of 15 January 2016, respectively.

8Section 2(2) of the South African Citizens in Antarctica Act 55 of 1962, and s 1(2) of the Prince Edward Islands Act 43 of 1948.

99 Constitution of the Republic of South Africa, 1996. Hereafter, we will simply refer to 'the Constitution'.

10For a scholarly discussion regarding the confusion which arose as a result of the introduction of the High Court system, see Dendy, M: 'A structural and nomenclative muddle: the Superior Courts in the new constitutional order' (1997) 114 (2) *SALJ* 425. See also Hoexter, C & Oliver, M (2014) *The Judiciary in South Africa* (Juta & Co) for a comprehensive survey of the South African judiciary (including aspects of governance and transformation of the judiciary; the appointment and removal of judges; and the functioning of the Judicial Service Commission), from both a current and historical perspective.

11See s 166 of the Constitution (amended in terms of the Constitution Seventeenth Amendment Act of 2012) which sets out the new hierarchy of courts in South Africa.

12The Supreme Court of Appeal and the Constitutional Court are dealt with separately in Sections 2.4 and 2.5.

13Hoexter, C & Oliver, M *The Judiciary in South Africa* (Juta & Co) at 11 refers to an almost 'seamless transition' from the pre-Constitutional structure to the structure under the interim Constitution. Under the interim Constitution, the existing courts continued to function as before and existing judicial officers continued to hold office with very few changes.

14See in particular s 16(4)(*a*) and 16(6)(*a*) of Schedule 6 of the Constitution.

15See ss 16(1) and 16(5)(*c*) of Schedule 6 of the Constitution. See also Dendy (1997) *SALJ*, op. cit., 425–434.

16Dendy (1997) *SALJ*, op. cit., 427.

17See s 6(2) of the Supreme Court Act 59 of 1959, prior to its repeal by the Superior Courts Act 10 of 2013.

18Act 30 of 2008.

19See the preamble to the Renaming of High Courts Act 30 of 2008. The legislature foresaw that the finalisation of the comprehensive rationalisation process would require considerable time and, in the meantime, interim changes were urgently required. As a result, the legislature promulgated the Interim Rationalisation of Jurisdiction of High Courts Act 41 of 2001 to give effect to these interim changes – see *Road Accident Fund v Rampukar Road Accident Fund v Gumede* 2008 (2) SA 534 (SCA); [2007] JDR 1232 SCA at 148. The Interim Rationalisation of Jurisdiction of High Courts Act was repealed by the Superior Courts Act 10 of 2013.

20The full citation of the Constitution Seventeenth Amendment Act of 2012 is 72 of 2013, however, one will generally not find it referred to by this citation. It is known as the Constitution Seventeenth Amendment Act of 2012 and will be referred to as such in this chapter.

211 February 2013 and 23 August 2013, respectively.

22Section 169(2) of the Constitution, as amended by the Constitution Seventeenth Amendment Act of 2012, read with s 6(1) of the Superior Courts Act 10 of 2013.

23Ibid., s 6(3)(*c*).

24There is a possibility of an additional local seat being established in Lephalale in Limpopo (see Government Notice 1266 in *Government Gazette*39540 of 21 December 2015, which was withdrawn in *Government Gazette* 39601, Government Notice 31 of 15 January 2016).

25*Thembani Wholesalers (Pty) Ltd v September and Another* 2014 (5) SA 51 (ECG).

26Section 50(1) of the Superior Courts Act 10 of 2013, read with the first Schedule (as amended) of the Supreme Court Act 59 of 1959. See *Mohomed v Nomafusi* (7576/2013) [2015] ZAKZDHC 67 (2 September 2015) at paras 7 and 8 where this scheme is explained.

27Section 50(2) of the Superior Courts Act 10 of 2013. See *Molemole Municipality and Another v Mokgehle and Another (63009/2014) [2014] ZAGPPHC 821 (23 September 2014) at para 10.*

28Government Notice 30 published in *Government Gazette* No 39601. For the sake of completeness and historical reference, one should note that the Minister of Justice and Correctional Services published Government Notice 1266 in *Government Gazette* 39540 which purported to determine the areas under the jurisdiction of the divisions of the High Court, but which the Minister later withdrew. For practical purposes this can be ignored and should not cause confusion.

29Save for the fact that an application launched prior to the Minister's determination on 15 January 2016 is to be regarded as a proceeding pending in the Gauteng Division, Pretoria, in terms of s 52(1) of the Superior Courts Act, and fall to be concluded in that court. (See *Sebopetia v S* (CC 154/2013) [2016] ZAGPPHC 362 at para 17). Practice directives setting out the practice in the Limpopo Division were published on 12 August 2015, and came into effect on 1 September 2015.

30See s 166(*c*) of the Constitution which provides for the High Court of South Africa, 'and any high court of appeal that may be established by an Act of Parliament to hear appeals from any court of a status similar to the High Court of South Africa'.

31Section 2 of the Territorial Waters Act 87 of 1963 has been repealed by s 4 of the Maritime Zones Act 15 of 1994, read with *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd* 1977 (4) SA 682 (C) at 695A-696F; 1978 (2) SA 391 (C); *Genrec Mei (Pty) Ltd v Industrial Council for the Iron Steel, Engineering, Metallurgical Industry and Others* 1995 (1) SA 563 (A).

32See s 168(1) of the Constitution and s 5 of the Superior Courts Act 10 of 2013.

33In terms of s 5(1)(*b*) of the Superior Courts Act 10 of 2013, the seat of the Supreme Court of Appeal seems set to remain in Bloemfontein, although the President of the Supreme Court of Appeal will be entitled to direct that a particular sitting be held elsewhere if it is deemed expedient.

34Rautenbach, IM & Heleba, S 'The jurisdiction of the Constitutional Court in non-constitutional matters in terms of the Constitution Seventeenth Amendment Act of 2012' TSAR 2013 (3) 405–418.

35This is a consequence of the amendment to s 168 of the Constitution by the Constitution Seventeenth Amendment Act of 2012. See the minority judgment by Froneman J in *National Union of Public Service and Allied Workers obo Mani and Others v National Lotteries Board* 2014 (3) SA 544 (CC); *Sali v National Commissioner of the South African Police Service and Others* (CCT164/13) [2014] ZACC 19; 2014 JDR 1186 (CC); and *Democratic Alliance v African National Congress and Another* 2015 (2) SA 232 (CC).

36See s 167(1) of the Constitution.

37These instances are examined in greater detail in Stage One, Part 1C, Section 1.2.4 of this book. See, as an example, *Masemola Taxi Association and Others v MEC of Roads and Transport (Limpopo Province) and Another* [2016] ZAGPPHC 81. In this matter, a point *in limine* challenging the jurisdiction of the Gauteng Division, Pretoria's jurisdiction to hear a matter that occured in Limpopo was upheld.

38Note, however, that the Constitutional Court may only decide non-constitutional matters if it grants leave to appeal on grounds that the matter raises an arguable point of law of general public importance that ought to be considered by the Constitutional Court.

39See Rautenbach, IM & Heleba, S 'The jurisdiction of the Constitutional Court in non-constitutional matters in terms of the Constitution Seventeenth Amendment Act of 2012' TSAR 2013 (3) at 405–418.

40See s 167(4) of the Constitution.

41Government Notice 147 of 2014 in *Government Gazette* 37390 of 28 February 2014.

42Until 2001, the Chief Justice was the most senior judge of the Supreme Court of Appeal. In November of that year, however, legislation was passed in terms of which the title of Chief Justice was given to the most senior judge of the Constitutional Court. See the Constitution of the Republic of South Africa Amendment Act 34 of 2001. See also s 167(1) of the Constitution.

43See s 1 of the Judicial Service Commission Act 9 of 1994 and s 174(3) and (6), as well as s 178(1)(*a*) of the Constitution.

44See Constitutional Court Practice Direction 1 of 1995.

45Supreme Court of Appeal Practice Directive of 17 August 2007 and 28 February 2011.

46Section 174(6) of the Constitution provides that the President must appoint 'the judges of all other courts' on the advice of the Judicial Service Commission, which includes appointing the Judge President.

47In terms of s 11(1)(*a*) of the Superior Courts Act 10 of 2013, the Minister of Justice and Correctional Services, in consultation with the head of court, must appoint for the Constitutional Court, the Supreme Court of Appeal, and each division of the High Court the following officials: a court manager; one or more assistant court managers; a registrar; assistant registrars; and other officers and staff – whenever they may be required for the administration of justice or the execution of the powers and authorities of the court concerned.

48See s 13 of the Magistrates' Courts Act 32 of 1944.

49See s 13A of the Magistrates' Courts Act 32 of 1944, as inserted by the Jurisdiction of Regional Courts Amendment Act 31 of 2008, which came into operation on 9 August 2010.

50Note, however, that s 16 of the Constitutional Court Complementary Act 13 of 1995 was not repealed.

51*Absa Bank Limited v Lekuku* (32700/2013) [2014] ZAGPJHC 244 (14 October 2014).

521995 (4) SA 631 (CC).

53The provisions found to be unconstitutional were all related to the debt collection procedure set out in s 65 of the Magistrates' Courts Act 32 of 1944. The provisions of this section are discussed at length in Stage Three, Part 2B of this book.

54*Coetzee v Government of the Republic of South Africa*; *Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others* 1995 (4) SA 631 (CC) at 633-634.

55The provisions were enacted in terms of the Magistrates' Courts Amendment Act 81 of 1997, which was brought into operation on 10 December 1997.

56(CCT 127/15) [2016] ZACC 32 (13 September 2016).

57See, for example, *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC), which declared s 113(1) of the Defence Act 44 of 1957 to be constitutionally invalid. See also *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae)* 2001 (4) SA 491 (CC), which declared s 2(1)(*a*) of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970 to be constitutionally invalid.

58The Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 is discussed in detail in Stage One, Part 2A of the book.

59Section 38 of the Constitution. The much broader approach of the courts to the issue of standing (i.e. *locus standi* or access to the court) for the purpose of enforcing the fundamental rights set out in the Bill of Rights was confirmed in the case of *Coetzee v Comitis and Others* 2001 (1) SA 1254 (C). See also *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) at para 15, where Yacoob, J and Madlanga, AJ stated that there was 'no clarity at present' as to what the outer reaches of subsections 38(*b*)-(*e*) of the Constitition were, but confirmed that it was in accordance with constitutionalism that the principles of standing be extended beyond the common-law boundaries when dealing with challenges under the Bill of Rights. Further, see *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); and *Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa Ltd and Another* 2006 (6) SA 103 (CC) as well as our discussion of s 38 of the Constitution in Stage One, Part 1B, Section 2.2 of this book.

602003 (3) SA 622 (T).

61At 623, para 7.

62*Nedcor Bank Ltd v Hennop and Another* 2003 (3) SA 622 (T) at 623, para 7.

632008 (3) SA 355 (SCA).

64See Stage Four D. See also the case of *Malachi v Cape Dance Academy International (Pty) Ltd and Others* 2010 (6) SA 1 (CC).

652011 (5) BCLR 505 (CC) ; 2011 (3) SA 1 (CC).

662005 (2) SA 140 (CC); 2005 (1) BCLR 78 and 2011 (3) SA 608 (CC); 2011 (8) BCLR 792 (CC).

67Note that appeals are brought by means of a distinctive legal procedure, whereas reviews are brought by means of the application procedure. It may be useful for you to think of actions, applications and appeals as three major distinctive legal vehicles which may be utilised to place matters before the courts.

68The Superior Courts Act 10 of 2013 has an impact on aspects of the appeal process, which we consider in the relevant section.

69Act 32 of 1944.

70Section 106 of Act 32 of 1944.

71Note, however, that this procedure has recently been subjected to constitutional scrutiny by our courts. See our detailed discussion of this procedure in Stage Four, Part D of this book.

72*Government Gazette* 37450, Notice No 185, Reg. No 10153 of 18 March 2014; see Stage Four, Part 1 p431.
73The National Consumer Tribunal is discussed in Annexure B: 'Impact of the National Credit Act and the Consumer Protection Act on Civil Procedure'.

STAGE ONE:

BEFORE LITIGATION

PART 1: PRELIMINARY QUESTIONS

A: Cause of action

B: *Locus standi*

C: Jurisdiction

PART 2: PRE-LITIGATION ISSUES

A: Demand

B: Calculation of time limits

C: Service of legal documents

D: Action or application?

A: Cause of action

1Introduction

Assume that you are an attorney consulting with a new client. As your client explains his problem to you, one of the first questions in your mind will be whether or not he has a valid *cause of action*. The answer to this question will determine whether or not you are able to proceed with the matter at all. If he does have a valid cause of action, its nature will affect the manner in which you proceed with the case.

On one level, cause of action simply means the cause of the plaintiff's or applicant's complaint. But just as, in a criminal matter, a crime has elements which must be alleged in the charge sheet and proved in court, so it is with a civil cause of action. It is made up of different elements which must be alleged in the papers and proved in court. In other words, cause of action simply means the *elements* your client will have to prove in order to be entitled to whatever relief he is seeking. Strictly speaking, these elements are determined by *substantive law*, and fall outside the scope of civil procedure, which is a part of *adjectival law*. In practice, however, you will need to integrate your knowledge of substantive law with an ability to take the necessary procedural steps to obtain any relief to which your client is entitled. For this reason, we begin Part 1 of Stage One of the book with a brief practical overview of a few of the most common causes of action that you will encounter in practice. These causes of action will be used as examples throughout the book to illustrate the way in which various procedures work in practice.

D2

2Delictual claims

If you ask a practising attorney to name the most common types of claims he deals with, there is a good chance that he will mention claims arising in delict. Claims arising as a result of motor vehicle collisions and assaults are two of the most common delictual claims. Let us examine each in turn.

Example 1: Motor vehicle collision

Let us take the case of a typical 'smash and bash'. Assume that a drunken taxi driver, while on duty, disregards a red traffic light and crashes into the side of your client's car which was being driven at the time by his wife (assume they are married by antenuptial contract).

The first point to remember is not to confuse the criminal part of this case with the civil part. The taxi driver may well be charged with a criminal offence for reckless and negligent driving, or for driving under the influence of alcohol, but the criminal case will be *completely* separate from any civil action your client may take to recover the cost of repairs to his vehicle.

The next point to consider is whether or not your client's wife suffered any physical injuries in the collision. If she did, special rules apply. Claims for bodily injuries incurred in motor vehicle accidents are generally known as *third-party* or *MVA*claims. Special legislation requires you to sue the Road Accident Fund.[1] You may not sue the taxi driver or his employer directly for the

bodily injuries suffered by your client's wife.[2] We can do no more than allude to this specialised area of the law here.

If the wife was not injured, the next question to ask is whether it is the client or his wife who is going to sue for the damage to the car. Do not make the mistake of thinking that it is the wife who must sue simply because she was driving the vehicle at the time of the accident. Even though it is the wife who was involved in the collision, it is clearly the husband who must sue since he suffered the damage because the car belongs to him.

But who is your client going to sue? The drunken taxi driver was to blame for the collision and your client is certainly entitled to sue him. But what if the taxi driver was employed by a company which owns the taxi – may your client also sue the company? The answer is that your client may indeed be entitled to sue the company for damage to the car, not because it owns the taxi, but because the taxi driver was acting within the course and scope of his employment when the collision occurred. This is known as *vicarious liability*.[3] So in this case there would be two defendants to the action. Both would be liable to pay your client's claim, but as soon as one of them does so, the other is absolved from having to make payment.[4]

You will recall from your study of substantive law that damages for patrimonial loss, as in this case, are always recovered under the *Lex Aquilia*. The main elements of your client's cause of action against the taxi driver would be the following:

1. A *wrongful* act:[5] This is an unlawful act which causes someone prejudice. Unless you are a police officer forcing a fugitive's vehicle off the road, it is difficult to think of a situation in which crashing into someone else's vehicle would *not* be classified as a wrongful act. One way of making this allegation would be to state that on or about a certain date, at or near a certain place, a collision occurred between motor vehicle (details of plaintiff's vehicle) owned by the plaintiff, and motor vehicle (details of taxi) driven by the defendant. Note the use of the phrases 'on or about' and 'at or near', which prevents nitpicking by the defendants.

2. Fault in the form of *negligence*:[6] It is necessary to show fault, either in the form of intention or negligence. The fact that the taxi driver disregarded a red traffic light clearly indicates that he was negligent. One way of making this allegation would be to state that the taxi driver was *at fault* in that he was *negligent* in *one, or more, or all* of the following respects. You would then make a series of allegations relating to the taxi driver's alleged negligence, being careful to join these allegations with the term 'and/or', and starting from the most particular (e.g. the first defendant disregarded a red traffic light and collided with the plaintiff's vehicle) and ending with the most general (e.g. the first defendant failed to avoid a collision when, by the exercise of reasonable care, he could have done so). Note that an allegation that a defendant has committed a criminal offence (e.g. he drove over the speed limit) does not necessarily mean that he was negligent. Instead of alleging that the defendant drove over the speed limit you should rather allege, for example, that he drove at a speed that was excessive in the circumstances. By making these allegations, you will be alleging that the taxi driver was 100% at fault. Note, however, that fault is not an 'all-or-nothing' game. Frequently, the defendant allleges that he was not the only one who was at fault, alleging that the plaintiff also did something negligent which contributed to the accident. If the court concludes that both parties were negligent, damages are 'apportioned', by the court, between the parties based on each party's respective negligence (this is known as *contributory negligence*).[7]
3. *Causation*:[8] There needs to be a connection or a *causal link* between each element of the cause of action. The fact that the taxi driver drove through a red traffic light was clearly the sole cause

of the collision. This, in turn, caused damage to your client's vehicle. The wording of the particulars of the claim should refer clearly to this link.

4. *Damages*:[9] Since the action is for patrimonial loss (i.e. loss to one's patrimony or estate), it is necessary for the plaintiff to show that some loss was suffered. Neethling et al. point out that:

> **The owner of property is entitled to damages which are (theoretically) calculated on the basis of the reduction in market value of such property at the time of the inflicting of damage … In order to prove market value, a plaintiff is required to demonstrate the original value of the property and the decline in value which has taken place up to the time of the damage-causing event.[10]**

   Damage to a motor vehicle is usually quantified in the following, rather complex, way, and usually by an assessor or quantifier who would be called as an expert witness. First of all, the *pre-collision value* of the motor vehicle is determined by consulting the *Auto Dealer's Digest*, which provides both retail and trade-in values for different makes and models of motor vehicles. The market value is taken to be the average between the trade-in value and the retail value for the vehicle in question.[11] The *post-collision value* of the vehicle is then determined by asking three qualified and reputable panel beaters to assess the value of the damaged motor vehicle. The post-collision value is taken to be the highest of the three assessments. The difference between the pre- and post-collision values of the vehicle is then calculated by subtracting the post-collision value from the pre-collision value. The *fair and reasonable cost of repair* is also calculated by asking each of the three qualified and reputable panel beaters referred to above to provide a quotation for repairing the vehicle. The lowest of the three quotations is taken to be the fair and reasonable cost of repair. Finally, the fair and reasonable cost of repair is compared to the difference between the pre- and post-collision values of the vehicle. The lower of these two figures is the quantum of the damages that are claimed from the defendants. As a final point, note that a claim for damages is undetermined or *unliquidated*. In other words, the precise amount of the damages will remain uncertain until the court delivers its judgment stipulating the exact amount to be paid to the person who has suffered the damage. Once the court gives its judgment, the claim becomes determined or *liquidated*.

5. *Vicarious liability*:[12] A further element would, of course, be required to complete your client's cause of action against the owner of the vehicle, namely the *company*. The fact that the taxi driver was acting within the course and scope of his employment when the accident happened (i.e. he was not off on a 'frolic of his own' – to visit a friend, for instance – at the time) would have to be alleged.

Notice that all the elements above are linked to ('arose at') the *place where the collision occurred*. This is different from certain other cases where the various elements of a particular cause of action may arise in different places. Identifying the place or places where the different elements of a cause of action arise is important when it comes to deciding which court has *jurisdiction* to hear a particular matter. This will be discussed in detail later in the section dealing with jurisdiction. At this stage, note that it is essential to allege both jurisdiction as well as *locus standi* in every claim that you bring.

Example 2: Assault

Assume that a bouncer at a nightclub punches your client's 16-year-old son on the nose. The son has to have an operation to straighten his broken nose, which is badly scarred, and is unable to take part in two school rugby matches.

Once again, do not confuse the criminal side of this matter (possibly a criminal charge of assault with intent to do grievous bodily harm against the bouncer) with the civil case by your client and his son to recover damages.

Be careful when deciding who is going to sue in this case. Both your client and his son have been adversely affected by the assault. The son has suffered bodily injuries and the father has (presumably) paid the medical bills. Therefore, both father and son will sue in this case. But there is another problem. The son is a minor (generally speaking, the terms 'minor' and 'child' mean the same thing, i.e. a person under 18 years old)[13] and will not be able to sue unless he is 'duly assisted' or 'duly represented' by his father.[14]

When deciding who is going to be sued, the bouncer is the first obvious target since he caused the son's injuries. Of course, the owner of the nightclub may also be sued on the basis of vicarious liability if the bouncer was acting within the course and scope of his employment at the time of the assault.

The main elements of your clients' cause of action against the *bouncer* would be the following:

1. *A wrongful act*: The main issue here will clearly be whether or not the bouncer has any defence (for example, that he was acting in *private defence* when he punched your client's son on the nose).[15] If he was, his act was not wrongful and your clients will not have a valid cause of action (although, of course, you may want to bring the action anyway and dispute the bouncer's version that he was acting in self-defence).
2. *Fault in the form of intention*: It must be alleged that the bouncer intended to punch your client's son.
3. *Causation*: It must be alleged that the *punch* broke the boy's nose.
4. *Damages*: Where damages are claimed for bodily injuries, it is important to break the claim down into its various components, such as medical expenses, pain and suffering, loss of past and future income, loss of amenities of life (such as being unable to play in a rugby match), and disfigurement.[16] Note, once again, that a damages claim for bodily injuries is unliquidated until the court delivers its judgment quantifying the damages.
5. *Vicarious liability*: The action against the *bouncer's employer* would also require your clients to allege that the bouncer was acting within the course and scope of his employment at the time of the assault.

D3

3Contractual claims

Claims based on contract are very common in practice. One of the most common types of contract is a contract of purchase and sale. Let us look at some simple examples, first from the seller's perspective and then from the buyer's perspective.

D4

Example 1: Sale on credit – seller's remedies

Your client agrees to sell her second-hand skedonk (a 10-year-old bakkie with 190 000 km on the clock) to a student for R20 000. When the student arrives to pick up the bakkie, he gives your client R1 000 and promises to pay the balance within one week. Your client agrees to this arrangement. Your client explains to the student that it is important that the outstanding balance be paid on time because your client intends to use the money as a down payment on another

vehicle which she needs to get to work and back. Your client gives the bakkie to the student and waits for one week for the student to pay her the R19 000 owed. Despite numerous requests by your client, the student never pays the outstanding balance of R19 000. To complicate matters further, the student crashes the bakkie, causing approximately R2 000 damages to the front bumper.

Because your client agreed to accept payment of the balance of the purchase price one week after the date of delivery of the bakkie, it may be assumed that this was a sale *on credit*. The significance of this is that *ownership* of the bakkie would have passed to the student on the day he took the bakkie.[17] This affects the remedies available to your client. Your client has two options open to her:

> *Option 1*:She may try to *enforce* the contract by demanding that the student pay her the outstanding balance of the purchase price (i.e. R19 000) – this is a claim for *specific performance* in terms of the contract.[18]
>
> *Option 2*:She may *cancel* the contract and try to get the bakkie back – this is a claim for *cancellation* of the contract together with *restitution*.

If your client opts for option 1 (i.e. a claim for specific performance), she may also ask for damages. Because the student did not pay her, your client was unable to put a down payment on another vehicle. Let us assume that, because of this, she was forced to travel to work in a taxi for two weeks. To keep it simple, let us assume further that the cost of hiring a taxi is double the cost of your client using her own vehicle. Your client would then be entitled to claim half the cost of hiring the taxi (i.e. *damages*) in addition to payment in the amount of R19 000 (i.e. *specific performance* in terms of the contract).

If your client chooses option 2, it is clear that simply returning the vehicle to her will not put her in the same position she was in before the contract was entered into. The vehicle has been damaged and is not in the same condition it was at the time of the sale. Therefore, in addition to *restitution* (i.e. the return of the vehicle), your client will also be entitled to claim damages (i.e. R2 000 being the fair and reasonable cost of repairing the front bumper). Furthermore, your client's damages will not be restricted to recovering the fair and reasonable cost of repairs to the bumper. She will also be able to recover half the cost of taxi hire as explained in the previous paragraph. Your client will have to offer to return (*restore*) the R1 000 paid to her by the student.[19] Your client will *not* be entitled to set off this amount of R1 000 against the R2 000 damages to be paid by the student. This is because the amount of R2 000 is an unliquidated amount; only once the court gives a judgment to the effect that the damages to the bakkie amounted to R2 000 does this amount becomes a liquidated amount. Only at this stage (i.e. after judgment) can the amount of R1 000 be set off against the amount of R2 000.[20]

Whichever option she chooses, your client will have to allege and prove that there was a *valid contract of sale.* This involves proving the following:

1. There was an agreement to *buy and sell* the bakkie.
2. There was agreement on the *item to be bought and sold* – i.e. the bakkie.
3. There was agreement on the *purchase price to be paid* – i.e. R20 000.[21]

If your client decides to claim specific performance, she will have to prove not only the contract, but also that the purchase price is due and payable because she has delivered the bakkie to the student in accordance with the contract. In other words, your client is making the following plea

to the court: 'There was a valid contract. I've performed my part of the contract. I want the court to order the student to perform his part.'

If your client decides to *cancel* the contract, she will have to prove not only the contract, but also that the student *breached*the contract (i.e. by not paying the purchase price), and that she has the right to cancel the contract because the breach was *material* (refusal to pay the purchase price is certainly material). A *notice of cancellation* of the contract prior to the legal proceedings is not strictly necessary since the legal documents initiating the action will serve this purpose.

In either case, if damages are to be claimed, they will have to be proved.

D5 *Example 2: Sale for cash – seller's remedies*

Let us take the same facts as set out in the previous example, but let us assume that when your client let the student take the bakkie, she made it clear that ownership would not pass until the full amount of the purchase price had been paid to her. In this case, the sale is *for cash*, and *ownership of the bakkie remains with your client*.

Your client would have the same remedies open to her as set out in the previous example. In addition to these remedies, however, she might have a further option open to her if she wanted to recover the vehicle. An owner is entitled to reclaim possession of his or her property by making use of the *rei vindicatio* (vindicatory action). In terms of the *rei vindicatio*, all that your client would have to prove in order to get her bakkie back would be the following:

1. She is the owner of the bakkie.
2. The defendant was in possession of the bakkie at the time of the institution of the action.[22]

If your client decided to take this route, she would also want to claim R2 000 for the damage to the front bumper. This would be a delictual claim. Your client would need to return the R1 000 paid to her or else she will have been unjustly enriched.

Apart from the above, it would be wise for your client to claim *alternative relief* in case the student disposes of the bakkie while the litigation is in progress. The alternative relief would be claimed in terms of the *actio ad exhibendum* and would be for payment of the value of the bakkie from the erstwhile possessor. In terms of the *actio ad exhibendum*, your client would have to prove the following:

1. She was the owner of the bakkie when it was disposed of by the student.
2. The student had been in possession of the bakkie.
3. At the time the student disposed of the bakkie, he knew that it was owned by your client (i.e. the student's loss of possession was *mala fide*).
4. The student intentionally disposed of the bakkie.[23]

D6 *Example 3: Buyer's remedies*

Let us take the same facts as set out in the two previous examples, but assume that the student pays the seller in full. After driving the bakkie for a day the brakes fail, and the bakkie crashes into the student's surfboard which is stored in the garage. Damages of R2 000 are caused to the front bumper of the bakkie and the surfboard, worth R1 000, is completely destroyed.

The first point to note is that the defect to the vehicle seems to have been *latent* (i.e. hidden) rather than *patent* (i.e. obvious). If it had been a patent defect, the student would have had no remedy in this case, because he should have seen the defect when he bought the vehicle.

The next question to ask is whether or not the seller or the buyer *knew* about the defect.
First, let us assume that the seller knew that the brakes were defective (e.g. were being held together with a piece of wire) and deliberately withheld that information from the student buyer. In this case, the student could do either of the following:

1. Stick to the contract and claim the 'benefit of his bargain' (i.e. full repairs to the bakkie), as well as damages (i.e. the cost of replacing his surfboard).
2. Cancel the contract, return the vehicle, and claim his money back, as well as damages (i.e. the cost of replacing his surfboard).[24]

Now let us assume that neither the seller nor the student buyer was aware of the latent defect to the brakes of the vehicle. In such a case you would have to ascertain first whether or not the vehicle had been sold voetstoots (i.e. as is). If so, the student buyer would have no remedies at all under the common law[25] (although he may have a remedy if the Consumer Protection Act[26] were to apply to the transaction).[27]

If there was no voetstoots clause, the student buyer would be entitled to one of two remedies:

1. The *actio redhibitoria* (which allows the contract to be brought to an end) would be applicable if the latent defect was such that it rendered the vehicle completely unfit for its purpose – probably not the case here.
2. The *actio quanti minoris* (which allows a reduction in the purchase price) would be applicable if the latent defect was not such as to render the bakkie unfit for its purpose – which seems to fit the facts in this case.

As far as the first claim is concerned, the student would have to offer to return the bakkie to the seller in return for a full refund of the purchase price, plus any reasonable expenses incurred in relation to the vehicle. The student would not be entitled to claim for the damage to his surfboard.[28]

As far as the second claim is concerned, the student would only be able to claim a reduction in the purchase price of the vehicle. The court would look at what the vehicle was worth with its defective brakes and, if this was less than what the student paid for it, would award the difference between what the student paid and what the vehicle was worth.[29]

4 Divorce actions

Example 1: Divorce

Divorce actions are common in practice and are procedurally different from other types of action in at least three ways:

1. Special rules apply to jurisdiction in these cases.[30]
2. The courts demand that the legal documents initiating action in these matters be served in a certain way (i.e. by means of personal service only).[31]

3. It is possible to apply for a special type of *interim relief* while the divorce action is still pending (e.g. interim care of or contact with the children).[32]

With divorce matters, there are usually several claims, each constituting a separate cause of action. Of course, the most important claim will relate to the divorce itself, namely that the marriage has irretrievably broken down, but usually there are further claims related to the future maintenance of the plaintiff or defendant spouse; and/or the division of the estate; and/or the forfeiture of the benefits of the marriage; and/or the sharing of pension benefits; and/or the redistribution of the assets of the marriage; and/or the future care, maintenance and guardianship of the couple's children.[33]

In very general terms, a person claiming a divorce must satisfy the court of the following:

1. There was a valid marriage between the parties which still exists.
2. The court has jurisdiction.
3. The marital regime under which the parties are married (e.g. are they married in community of property or by antenuptial contract with or without accrual?).[34]
4. Whether or not there are children under the age of 18, or children who are still dependent on the parties; and, if so, that satisfactory provisions have been made to ensure the welfare of such children.
5. Whether or not the person suing for divorce wants to claim sole guardianship, the right to care for or maintain contact with any children, in which case allegations must be made in support of this claim.
6. The amount of maintenance required for the children.
7. That the regulations promulgated in terms of the Mediation in Certain Divorce Matters Act 24 of 1987 have been complied with.
8. The grounds upon which the divorce is being sought. The most common ground is that the marriage has irretrievably broken down. In other words, the marriage relationship has reached such a state of disintegration that there is no reasonable prospect of a normal marriage relationship being restored.[35]
9. Whether maintenance is being claimed by the person seeking the divorce, or whether the person seeking the divorce is offering to pay maintenance to the defendant.[36]
10. Whether or not the parties have drawn up a settlement agreement before the proceedings started. The basic purpose of a settlement agreement is to divide up the property between the spouses, although in practice settlement agreements frequently also record the parties' agreement as to their rights and obligations in respect of minor children.

The following proprietary claims may be encountered:

1. If the parties have jointly owned assets (e.g. they are married in community of property), then a division of the joint estate will be claimed.[37]
2. Specific performance of any outstanding obligation created by the antenuptial contract.
3. Redistribution of assets in terms of ss 7(3) to (6) of the Divorce Act.[38] These subsections basically deal with marriages out of community of property which were entered into before the new accrual system became the norm. In some such instances, hardship could result if, during the marriage, one party contributed directly or indirectly to the maintenance or increase in the estate of the other party, and was told at the end of the marriage that he or she was entitled to nothing. Section 7(3) allows the court to order that assets be transferred from one spouse to the other.

4. Forfeiture of patrimonial benefits in terms of s 9 of the Divorce Act 70 of 1979. When a decree of divorce is granted, the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the breakdown thereof and any substantial misconduct on the part of either of the parties, is satisfied that the one party, in relation to the other, will be unduly benefited if the order for forfeiture is not made.

5 Claims based on liquid documents

Example 1: Liquid document

As its name implies, a *liquid document* is a document which refers to a liquid sum. The characteristics of a liquid document are that it is an unconditional, written acknowledgment of liability for a specified amount of money, payment of which is due to the creditor.[39]

Some common examples of a liquid document are the following:

1. A cheque;
2. A written acknowledgment of debt; and
3. A mortgage bond (which is really just a special type of acknowledgment of debt where the security for the debt is a piece of land).[40]

If you have a cause of action which is based on a liquid document, you are entitled to use a special procedure to enforce your claim. This is known as the *provisional sentence procedure*.[41]

Let us look at a simple example involving a cheque. Let us say you sell someone a motor car and he pays you by cheque. You bank the cheque but a few days later it is returned to you marked 'refer to drawer'. In other words, the cheque has 'bounced'.

In this case, you may choose whether you wish to base your claim on *breach of the contract of sale* (as discussed above) or on the *liquid document* (i.e. the bounced cheque). These constitute two *separate causes of action*.

It is probably wise to base your action on the liquid document because the cause of action is much easier to prove, and you have the option of using the special provisional sentence procedure referred to above. In most cases, you will have to allege and prove the following elements:[42]

1. That the cheque was *drawn* by the defendant, i.e. the defendant filled in and signed the cheque.
2. You were the legal holder of the cheque. In other words:
    1. the cheque was made out to you (i.e. you were the *payee*); or
    2. the cheque was made out to someone else who then *endorsed* it in your name (i.e. by writing your name on the back of the cheque with the words 'endorsed to'); or
    3. if the cheque was for cash, that you were in lawful possession of the cheque (i.e. you were the lawful *bearer* of the cheque).
3. You *presented* the cheque for payment (i.e. the defendant's bank was asked to pay the amount of the cheque).[43]
4. The cheque was *dishonoured* by nonpayment. (The most common reasons for this are that there were no funds in the defendant's account, which would cause the defendant's bank to return the

cheque to the payee marked ‘refer to drawer’; or that the defendant stopped payment on the cheque, which would cause the cheque to be returned marked ‘payment stopped’).

5. Notice of dishonour of the cheque was given to the defendant (this would be necessary if the cheque was returned marked ‘refer to drawer’ since the defendant might have been unaware that there were insufficient funds in his account to cover payment of the cheque); or
6. Notice of dishonour was dispensed with for a reason set out in s 48 of the Bills of Exchange Act 34 of 1964 (e.g. notice of dishonour would not be necessary if the cheque was returned marked ‘payment stopped’ because, obviously, the defendant would already know that the cheque had been dishonoured).
7. Note that in these cases, the cause of action arises at the place where the cheque is drawn, as well as the place where it is dishonoured by nonpayment.

B: *Locus standi*

D7

1Introduction

A person who has a right to sue or be sued in a particular matter is said to possess *locus standi in iudicio* (i.e. legal standing) in that matter.[44] There are two tests to determine the *locus standi* of a party – firstly, whether or not the party concerned has a *direct and substantial interest* in the matter and, secondly, whether or not that party has *legal capacity* to litigate in the matter. To illustrate the need for these two tests, let us examine two simple problems:

> *Problem 1*:Assume you are a candidate attorney who cannot wait to get some hands-on legal experience. A friend tells you that her car was damaged in an accident some time ago, but that she decided to pay for the damage herself instead of getting involved in a legal dispute. You try to convince her to reconsider her decision, but she refuses. You then decide that *you* will sue the other party on your friend's behalf. Do you think that you should be allowed to do so?
>
> *Problem 2*:You are a famous attorney. One day you are sitting in your office when a young child walks in and tells you that he wants to sue his father for failure to pay his pocket money. You tell the child to wait outside while you think about the case. Then a man walks into your office with a fried egg on his head and two Vienna sausages behind his ears. He tells you that he is an alien and wants to sue the President of South Africa. Do you think that these two people should be entitled to litigate?

The first problem deals with whether or not a potential litigant has a *direct and substantial interest* in the proposed litigation.

The second problem deals with whether or not a potential litigant has the necessary *capacity* to litigate.

Let us look at each of these issues in turn.

2 Direct and substantial interest

2.1 The common-law position

A person wishing to institute or defend legal proceedings must have a *direct and substantial interest* in the right that is the subject matter of the litigation, and in the outcome of the litigation.[45] In other words, you cannot take over someone else's legal battle simply because you wish to litigate for the fun of it or for some other reason. Your legal standing should be determined first. Legal standing is concerned with whether or not *the particular litigants* in a matter are entitled to prosecute or defend the matter in court. The issue of standing is divorced from the substance of the case and arises as a point *in limine* (at the outset), before the merits are considered.

Furthermore, a financial interest alone is not sufficient.[46] *Jones and Buckle* sum up the requirements for a direct and substantial interest as follows:

(a)the plaintiff/applicant for relief must have an adequate interest in the subject-matter of the litigation, which is not a technical concept but is usually described as a direct interest in the relief sought;
(b)the interest must not be too far removed;
(c)the interest must be actual, not abstract or academic;
(d)the interest must be a current interest and not a hypothetical one.[47]

Sometimes, in practice, it can be difficult to decide whether or not your client has a direct and substantial interest in a matter. For example, assume that your client owns just one share in a massive publicly owned company. This would probably not be sufficient to give him *locus standi* to sue on behalf of the company. Your client's ownership of the share would be regarded as an indirect financial interest, as opposed to the direct and substantial interest required. Note, however, that a person, for example, a shareholder or director, can initiate a court action on behalf of a company in order to protect the company's legal interests. This is because of a special provision in the Companies Act[48] that allows for such actions.

As you can see, the South African common law relating to this issue is complex and detailed. You would be well advised to consult specialist texts as well as the relevant cases when dealing with particular matters in practice.

2.2 Actions based on the Bill of Rights

While the above common-law position is the general rule, it is important to bear in mind that in respect of actions based on the Bill of Rights, the provisions of the Constitution have extended and broadened *locus standi* to persons and groups who, in the past, would not have been considered to have a 'direct and substantial interest' in a matter.[49] In terms of s 38 of the Constitution, which is often referred to by practitioners as the 'standing clause' i.e. the clause which determines whether or not someone has legal standing – or *locus standi* if you prefer – in a matter, relief may be sought by:

(*a*)anyone acting in their own interest;
(*b*)anyone acting on behalf of another person who cannot act in their own name;
(*c*)anyone acting as a member of, or in the interest of, a group or a class of persons;
(*d*)anyone acting in the public interest; and
(*e*)an association acting in the interest of its members.

Although each of the above-mentioned subsections of s 38 is worthy of further comment, in a book of this kind we only have space to touch briefly on one or two.

2.2.1Class actions under section 38(*c*) of the Constitution

Section 38(*c*), which allows for so-called 'class actions', is worthy of particular focus and has been the subject of much judicial attention. While class actions have always been enshrined in s 38(*c*), nothing was done to regulate the bringing of *class actions*and the courts have had to regulate the bringing of such actions using court-made rules.[50] In the *Ngxuza* case in the Supreme Court of Appeal, Cameron JA pointed out the value of such actions in a country such as South Africa:

> **The class action was until 1994 unknown to our law, where the individual litigant's personal and direct interest in litigation defined the boundaries of the court's powers in it. If a claimant wished to participate in existing court proceedings, he or she had to become formally associated with them by compliance with the formalities of joinder … .**
>
> **The class action cuts through these complexities. The issue between the members of the class and the defendant is tried once. The judgment binds all and the benefits of its ruling accrue to all. The procedure has particular utility where a large group of plaintiffs each has a small claim that may be difficult or impossible to pursue individually. …The reason the procedure is invoked so frequently lies in the complexity of modern social structures and the attendant cost of legal proceedings.**[51]

In order to bring a class action, the group must first be 'certified' as a class by a court. In *Mukkadam v Pioneer Foods (Pty) Ltd and Others*[52] the Constitutional Court explained the reasons for requiring certification:

> **Courts must embrace class actions as one of the tools available to litigants for placing disputes before them. However, it is appropriate that the courts should retain control over class actions. Permitting a class action in some cases may, as the Supreme Court of Appeal has observed in this case, be oppressive and as a result inconsistent with the interests of justice. It is therefore necessary for courts to be able to keep out of the justice system class actions which hinder, instead of advancing, the interests of justice. In this way prior certification will serve as an instrument of justice rather than a barrier to it.**[53]

The Gauteng Local Division, Johannesburg, in a precedent-setting judgment, certified a class representing tens of thousands of present and former mineworkers who intend to bring an action for damages against gold mining companies for exposure to dust that is alleged to have caused silicosis and tuberculosis.[54]

As the law in this area is quickly developing, and class actions will be of increasing importance in future, we recommend that you consult specialist texts dealing with the topic.

2.2.2Own interest standing in terms of section 38(*a*) of the Constitution

As to the issue of standing under s 38(*a*), Chaskalson P (as he then was) stated as follows in the Constitutional Court case of *Ferreira v Levin NO*:

> **Whilst it is important that this Court should not be required to deal with abstract or hypothetical issues, and should devote its scarce resources to issues that are properly before it, I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled.**[55]

Key to establishing constitutional own-interest standing is that a litigant must show that his or her rights or interests are directly affected by the challenged law or conduct. The Constitutional

Court summarised the factors to establish own-interest standing under the Constitution as follows:[56]

1. A litigant need not show the same 'sufficient, personal and direct interest' that the common law requires but must still show that a contested law or decision directly affects his or her rights or interests(or potential rights or interests).
2. This requirement must be generously and broadly interpreted to accord with constitutional goals.
3. The interest must be real and not hypothetical or academic.
4. A purely financial self-interest may not be enough – in such a case, the interests of justice must also favour affording standing.
5. Standing is not a technical or strictly-defined concept and there is no magical formula for conferring it. It is a tool a court employs to determine whether a litigant is entitled to claim its time and to put the opposing litigant to trouble.
6. Each case depends on its own facts. There can be no general rule covering all cases. In each case, an applicant must show that he or she has the necessary interest in an infringement or a threatened infringement.
7. A measure of pragmatism is called for in determining standing.

The facts of the case of *Giant Concerts* illustrate the potential difficulties of establishing own-interest standing. The applicant, Giant Concerts CC (Giant), sought to challenge the lawfulness of a sale of land by the eThekwini Municipality to the respondent. Giant objected to the sale and indicated that any offer it made to purchase the property would be greater than the offer that had been made by the respondent, but Giant refused to disclose its exact proposal or to provide an exact figure that it would be prepared to pay. Giant relied on constitutional own-interest standing based on its right to just administrative action and it asserted a commercial interest in the property. The Constitutional Court held that Giant had failed to establish its *locus standi* because it failed to substantiate its purported 'interest' in that it failed to produce a plan, price or proposal in respect of the property.

The *Giant Concerts* case illustrates the importance of establishing, in the papers and pleadings, the nature of the interest relied on. Practitioners must also select the *correct* ground in s 38 of the Constitution on which to rely in bringing proceedings: if you are acting in the *public interest,* do not rely on own-interest standing (and vice versa), or the court may well conclude that you do not have *locus standi* and may refuse to hear you (this is known as being 'non-suited'). Note, however, that you are not confined to relying only on *one* ground of standing in s 38 – but remember to substantiate each ground on which you rely.

3 Capacity to litigate

As a general rule, both natural persons and corporate persons (such as companies and close corporations) possess the capacity to sue and to be sued.

There are, however, exceptions to this general rule. Some persons cannot sue or be sued unless they are *represented by* or *assisted by* someone else. A child, for example, must be represented or assisted by his guardian.[57] Other persons, such as those who choose to reside in enemy territory during a war, are prohibited from instituting action in our courts, but may have action taken against them. Yet others, such as diplomats, are *free to institute* legal action in our courts, but are protected by *diplomatic immunity* from having legal action taken against them.

Let us examine the various exceptions to the general rule in turn, starting with the most common.

3.1 Children[58]

A child does not have *locus standi* and must be:

1. *either*
1. duly assisted by
   or
2. represented by
3. his guardian.

The difference between 'duly assisted by' and 'represented by' may be illustrated by the two distinct ways in which the child and his guardian will be referred to (cited) in legal documents, depending upon whether the child is duly assisted by or represented by the guardian.

A child who is acting in his own capacity, *duly assisted by* his guardian, may be cited as follows in the document initiating the legal proceedings:

> **The plaintiff is John Smith, a male pre-school child,[59] who resides at 123 North Street, Durban, and who is duly assisted herein by his father and natural guardian, Peter Smith, an adult male plumber, who resides at 123 North Street, Durban.**

A child who is *represented by* his guardian may be cited as follows:

> **The plaintiff is Peter Smith, an adult male plumber, who resides at 123 North Street, Durban, and who is cited in his representative capacity as father and natural guardian of John Smith, a male pre-school child, who resides with his father at 123 North Street, Durban.**

3.1.1 What is a 'child'?

In terms of s 17 of the Children's Act 38 of 2005, a natural person attains majority at the age of 18 years. A natural person under the age of 18 years is defined as a 'child' and must, therefore, be duly assisted or represented by his guardian in civil litigation.[60]In most cases, a child's guardians will be both his biological mother and his biological father.[61] In terms of s 18(4) read with s 18(3)(*b*) of the Children's Act,[62] each of a child's guardians is competent to assist or represent that child in legal matters, subject to any other law or any order of a competent court.[63]

3.1.2 Children under the age of seven[64]

A child under the age of seven must be *represented by*, rather than assisted by, his guardian in civil litigation. In other words, actions and applications are brought and defended in the *name of the guardian* who acts in a *representative capacity* on behalf of the child.

3.1.3 Children of seven years and older

With a child who is seven or older, you have a choice whether to institute the action in the name of the *guardian* in his *representative capacity*, or in the name of the *child*, duly *assisted by the guardian*.

3.1.4 Costs

Whether the guardian duly assists the child, or represents the child, the *child is the litigant* in both instances.[65] Unless the guardian institutes an action recklessly or frivolously, he is not liable for any costs awarded against the child, or for payment of any damages which the child may be ordered to pay.[66]

3.1.5 Dual capacity

An interesting situation arises when a guardian is involved in a matter both on his own behalf, and as a representative of his child. In Latin legalese, you would say that he is involved *eo nomine* (i.e. on his own behalf), and *nomine officio* (i.e. in a representative capacity). Typically, this type of situation arises where a child has suffered injuries in an accident caused by the negligence of another party. Usually, both the child and the guardian suffer damages as a result of the child's injury. The guardian might have to pay for his child's medical expenses, and may take time off work to go to the hospital, thereby forfeiting a day's wages. The child may not have to pay any bills arising out of the accident, but will often be able to claim for pain and suffering, loss of amenities of life, loss of future income, etc. In such a case, you must distinguish carefully between those claims for which the guardian is suing on his own behalf, and those claims for which he is suing as a representative of his child. Your citation (i.e. the description of the parties in the pleadings) would look something like this:

> **The plaintiff is John Smith, an adult male advocate who resides at 123 North Street Durban, who sues herein in his personal capacity, as well as in his representative capacity as father and natural guardian of Sarah Smith, a female pre-school child who resides with her father at 123 North Street Durban.**

3.1.6 Appointment of a *curator ad litem*

In cases where:

1. a child has no guardian; or
2. the guardian refuses to act on the child's behalf;
3. the guardian of the child cannot be found; or
4. there is a conflict of interest between the child and the guardian;

you must make an application to court to appoint what is called a *curator ad litem*, to act on the child's behalf during the legal proceedings.[67] Usually, you will make this application before proceedings are instituted. If you have not done so, however, you may apply to court to appoint a *curator ad litem* after proceedings have commenced, provided it is to the child's benefit, and the court would probably have approved the application had it been made at the proper time.
Once the *curator ad litem* has been appointed, the child may be cited as follows:

> **The plaintiff is John Smith, a male pre-school child who resides at 123 North Street, Durban, duly assisted by Peter Ngcobo, an adult male advocate who resides at 345 South Street, Durban, in his capacity as *curator ad litem*.**

3.1.7 Litigation without assistance

A child may litigate unassisted by his guardian or a *curator ad litem* in the following instances:

1. when applying for the appointment of a *curator ad litem*;

2. if the court grants him permission to sue unassisted;
3. when applying for permission to marry without a parent's or guardian's consent; and
4. when the proceedings are permitted by statute.

3.1.8 The Children's Act and Bill of Rights

It is important to note that the Children's Act[68] extends *locus standi* in certain matters to a significant extent. In terms of s 15 of the Children's Act, any person listed below has the right to approach a competent court, alleging that a right in the Bill of Rights, or in the Children's Act, has been infringed or threatened:

> **(a)a child who is affected by or involved in the matter to be adjudicated;**
> **(b)anyone acting in the interests of the child or on behalf of another person who cannot act in their own name;**
> **(c)anyone acting as a member of, or in the interest of, a group or class of persons; and**
> **(d)anyone acting in the public interest.[69]**

Section 14 of the Children's Act provides that every child has the right to bring, and to be assisted in bringing, a matter to a court. Section 28(1)(*h*) of the Constitution provides that every child has the right to have a legal practitioner assigned to the child by the state, and at the state's expense, in civil proceedings affecting the child, if substantial injustice would otherwise result. The Durban and Coast Local Division (as it was then) has held that a child may apply *directly* to the Legal Aid Board for a legal representative to be appointed to him or her. As the Legal Aid Board has the power in terms of the Legal Aid Act to render legal assistance to a minor, in discharge of the state's obligation in terms of s 28(1)(*h*) of the Constitution, the Legal Aid Board is not constrained by a need to obtain either the consent of the child's guardian or that of any person exercising parental responsibilities and rights in relation to the child.[70] Wallis J (as he was then) concluded that this was necessary 'for the child's voice to be heard'.

Note that the law relating to children is complex and detailed. In a book of this kind it is not possible to summarise this area of the law comprehensively. You would be well advised, therefore, to consult the relevant legislation, case law and specialist texts before dealing with matters involving children.

3.2 Married women

3.2.1 Abolition of the marital power

The last vestiges of the 'marital power' which gave husbands certain legal rights and responsibilities in respect of their wives were abolished on 1 December 1993. Before this date, the issue of *locus standi* in relation to married women was a complex one.

Women who were married before the Matrimonial Property Act 88 of 1984 came into effect, and who did not specifically enter into an antenuptial contract to exclude the marital power, were, by operation of law, married in community of property and subject to the marital power of their husbands. Thus, they did not have *locus standi* to sue or be sued without the assistance of their husbands.

The Matrimonial Property Act 88 of 1984 abolished the marital power for those marriages entered into after the Act came into operation.[71] So, in general terms, wives married after the

1984 Act were freed from the marital power, but many wives who were married before the 1984 Act were still subject to the marital power.

On 1 December 1993 the entire issue became much less complicated when the Matrimonial Property Act was amended so as to abolish the marital power in respect of all marriages, including those entered into before the Matrimonial Property Act 88 of 1984 came into operation.[72] All married women now possess *locus standi*.

A remnant of the sexist past remained for a number of years in that High Court rule 17(4) requires the marital status of a female plaintiff or defendant to be stated in a summons. As mentioned earlier in this book, however, the High Court in the case of *Nedcor Bank Ltd v Hennop and Another*[73] found that the reference to the defendant's sex and women's marital status as required by the rule is outmoded and anachronistic. It also offends against the equality provisions contained in the Constitution, inasmuch as the preamble speaks of equality between men and women, and s 9(1) provides that every person shall have the right to equality before the law, and s 9(3) is emphatic that no person shall be unfairly discriminated against, directly or indirectly, on the grounds of sex, gender or disability.[74] Accordingly, the court found that 'in these enlightened times, the omission to state the defendants' sex and, in the case of a woman, her marital status in the summons, is of no consequence and certainly not amenable to render the plaintiff's application for summary judgment to be fatally defective.'[75]

The rule was amended in 2014 to remove any reference to the marital status of woman, although rule 17 still requires the plaintiff's gender to be stated.

3.2.2 Consent to litigate – marriages in community of property

Although the problems with regard to the *locus standi* of married women were solved by the amendment to the Matrimonial Property Act on 1 December 1993, there is another aspect that you have to bear in mind when dealing with actions by persons who are married in community of property. In terms of s 17(1) of the Matrimonial Property Act, a spouse who is married in community of property, whether husband or wife, may not institute or defend legal proceedings against another person without the *written consent* of the other spouse. Such written consent is not required, however, in respect of legal proceedings:

1. between spouses;[76]
2. in respect of a spouse's separate property;[77]
3. for the recovery of *damages*, other than damages for *patrimonial loss*, by reason of the commission of a *delict* against him.[78]For example, in a motor collision case, a spouse may have a claim for damage to the car, which is patrimonial loss, as well as a claim for pain and suffering, which is not a patrimonial loss. The spouse would need written consent from his wife to commence action to recover the cost of repairing the damage to the car, but not to commence action to claim for his pain and suffering; and
4. in respect of a matter relating to his profession, trade or business.[79]

Note that s 17 of the Matrimonial Property Act does *not* relate to *locus standi* (although it makes sense to discuss it here for the sake of your mind map). Even though a spouse does *not* have written consent in terms of s 17, he will still possess *locus standi*. In other words, he does not 'lose' his *locus standi* to commence legal proceedings because he has failed to obtain written consent from his spouse in terms of s 17. A defendant in an action brought by a spouse who does not have written consent *cannot* challenge the validity of the proceedings because of the lack of

consent. In other words, the defendant cannot raise a special plea (dealt with later in this book under actions) alleging a lack of *locus standi*.[80]

Lack of consent does, however, carry negative consequences. If a spouse fails to obtain consent in terms of s 17 and loses the case, the court may order him to pay those costs out of his separate estate (e.g. money left to him by a deceased parent, which falls outside the joint estate), or order that the costs be paid out of the joint estate, but that an adjustment be made to compensate the other spouse on division of the joint estate (e.g. on divorce).[81]

3.3 Mentally disabled persons

A person who is mentally ill and cannot appreciate the nature of legal proceedings because of some mental disorder does not possess *locus standi*.

High Court rule 57 provides a procedure whereby a person may be declared to be of unsound mind and as such incapable of managing his own affairs. The ultimate purpose behind such a declaration is to allow a *curator bonis* or *curator ad personam*to be appointed to manage that person's affairs. Before that is done, however, the rule requires that a *curator ad litem* (i.e. a curator appointed for the purpose of legal proceedings) is appointed to represent the person's interests.[82] In other words, the appointment of a *curator ad litem* usually precedes the appointment of a *curator bonis* or *curator ad personam*. The application for the appointment of a *curator ad litem* is typically brought by a family member or close friend who has the patient's well-being at heart. The applicant must establish his *locus standi* to bring the application and must provide sufficient evidence that the patient is of unsound mind and incapable of managing his affairs. Affidavits of two medical professionals are required in support of the application. In the application, the name of a person will be put forward as a suggestion for appointment as the *curator ad litem* (usually an advocate) and a consent letter from the suggested person will be attached to the application.

The powers of the *curator ad litem* are set out in the court order appointing him or her. These powers typically include the power to investigate and report on the nature and extent of the patient's mental illness, the patient's assets and liability, and any other affairs of the patient. This information will be prepared by the *curator ad litem* in a report which will be placed before the court and relied on in any subsequent application for the appointment of a *curator bonis* and/or *curator ad personam*.

The appointment of a *curator ad litem* is frequently required for Road Accident Fund claims where claimants have suffered mental impairment as a result of the road accident. Most divisions of the High Court have their own practice rules regarding the appointment of *curators ad litem*, which should be consulted before bringing an application in terms of rule 57. In practice, if you suspect that a client whom you have been instructed to defend in a civil matter is mentally unwell, the first thing to do is to find out whether or not that person has been declared to be of unsound mind by the High Court. If not, consider whether the size of the estate of the person justifies the cost of a curator. If the estimated property value of the patient is under R200 000 and his annual income is below R24 000, it may be better to proceed in terms of the Mental Health Care Act[83] which provides a cheaper and simpler mechanism for the management of the mentally impaired person's affairs. If the size of the estate does justify it, you should find out whether or not a curator has been appointed to manage your client's affairs and, if a curator was appointed, whether or not such curator was granted the power to institute or defend legal proceedings on behalf of your client (i.e. a *curator ad litem*). If no curator was appointed, or if a curator was

appointed but not granted the power to institute or defend legal proceedings on behalf of your client, an application to court will have to be made for such appointment, or for the necessary powers to be granted to such curator.[84]

3.4 Prodigals

In general terms, a *prodigal* is a spendthrift who is unable to keep his finances in order. The High Court may be approached to declare a person to be a prodigal, and, as such, incapable of managing his affairs. The appointment of a *curator ad litem* is not necessary, unless there is reason to believe that the prodigal does not understand the nature and effect of the proceedings.[85]

The order of the court will specify in what respects the legal capacity of the prodigal is limited, and he will retain his legal capacity in those areas not covered by the order.[86] All litigation relating to those areas to which the court order applies must be conducted through the prodigal's *curator bonis* (if one has been appointed) or through a *curator ad litem* specially appointed for the purpose of the litigation. A prodigal may litigate unassisted unless the court order which declared him a prodigal specifies that he may *not* do so.[87]

3.5 Insolvents

Once a person has been declared insolvent and his estate sequestrated by the court, the person's estate is placed in the hands of the master of the High Court and a trustee will be elected to administer his estate.[88]

Although the *locus standi* of the insolvent is curtailed, he may sue or be sued in his own name, without reference to the trustee of his estate, in a range of circumstances which are set out in s 23 of the Insolvency Act.[89] Such matters include, for example, matters relating to the status of the insolvent. You would be well advised to consult s 23 of the Insolvency Act[90]carefully before dealing with any matter in which an insolvent is involved. Note further that the range of circumstances set out in s 23 of the Insolvency Act is not exhaustive of all the situations in which the *locus standi* of an insolvent will be recognised.[91]

Generally speaking, in matters relating to the insolvent's estate, the trustee is the representative of the estate and it is the trustee who must sue or be sued in any matter relating to the estate. Be careful, however, not to sue a trustee in his personal capacity. He should always be cited in his representative capacity as trustee.

In cases where one of the parties to litigation is declared insolvent during the litigation process, the litigation should be stayed until a trustee has been appointed. The trustee (in his representative capacity) should then be substituted for the insolvent as a party to the litigation.[92] Note that civil proceedings against an insolvent will lapse three weeks after the first meeting of creditors *unless* the plaintiff gives notice in terms of s 75 of the Insolvency Act of his intention to continue with proceedings. Bear this in mind if you have instituted proceedings against a person who is thereafter sequestrated.

Note that the law relating to insolvency is complex and detailed. In a book of this kind it is not possible to summarise this area of the law adequately. You would be well advised, therefore, to consult the relevant legislation, case law and specialist texts, before dealing with matters involving insolvents and insolvent estates.

3.6 Fugitives from justice

The general approach of our courts has been that fugitives from justice have no *locus standi*.[93] A fugitive from justice may not institute proceedings in the courts of this country, but is entitled to defend proceedings brought against him or her.[94] If default judgment has been taken against a fugitive from justice, he is entitled to apply for rescission of that judgment so that he may defend the action against him.[95] A fugitive from justice may not enforce a judgment in his favour by means of a writ of execution.[96] Note, however, that despite the general approach of our courts, there is authority that it will not follow, as a matter of course, that the doors of the court will be closed to a fugitive from justice. Rather, the courts will deal with each case on its own facts. Closing the doors of the court to a litigant is a serious step, particularly in the light of the right of a party to have access to the courts. There must be a balancing of rights in light of competing policy considerations.[97]

3.7 Alien enemies

While a war is in progress, persons who *voluntarily reside or carry on business* in enemy territory (including South African citizens) *may not sue* in South African courts. They can, however, *be sued* in South African courts, and will then be allowed to defend the matter.[98]

If, during a war, an enemy national is living in South Africa under state protection, that person has the right to sue in South African courts.[99]

In other words, the test for *locus standi* is not dependent on your nationality, but rather on where you reside or carry on business. If you voluntarily reside or carry on business in enemy territory, you are regarded as an alien enemy, regardless of your nationality.[100]

3.8 Diplomats and the like

The Diplomatic Immunities and Privileges Act[101] confers certain immunities and privileges upon the following general categories of persons and bodies:

1. Diplomatic missions and consular posts, and the members of such missions and posts;[102]
2. Heads of state, special envoys and certain representatives;[103]
3. The United Nations, certain specialised agencies as defined in the Act, certain other international organisations, and their officials in the Republic; and[104]
4. Officials and experts of the United Nations, of any specialised agency and of any organisation,[105] and representatives of any state, participating in an international conference or meeting convened in the Republic.[106]

The Minister of International Relations and Cooperation is obliged to keep a register of all persons entitled to immunities or privileges, and must ensure that a complete list of all persons on the register is published on the website of the Department of International Relations and Cooperation, and must cause the list to be updated as frequently as may be necessary, and made publically available.[107]

If you have reason to suspect that a party in a matter in which you are involved may be entitled to immunity of some kind, you will first need to confirm your suspicions, and then determine the precise nature and extent of the immunity enjoyed by the party concerned. You would be well advised to consult the relevant sections of the Diplomatic Immunities and Privileges Act, as well as the most recent list of persons entitled to immunity published on the website of the Department of International Relations and Cooperation.

3.9 Judges

In the unlikely event that you want to institute civil legal proceedings against a judge or serve a subpoena on a judge in connection with civil legal proceedings – whether it be one of the judges of the Constitutional Court, Supreme Court of Appeal, or the High Court – you will first need *consent* to do so.[108] Section 47(1) of the Superior Courts Act[109] provides that:

> **No civil proceedings by way of summons or notice of motion may be instituted against any judge of a Superior Court, and no subpoena in respect of civil proceedings may be served on any judge of a Superior Court, except with … consent**

This section is aimed at ensuring the independence of the judiciary by protecting judges against improper and spurious interruptions of their judicial functions. It seeks to protect judges from non-meritorious civil actions.[110]

Section 47 of the Superior Courts Act[111] applies to civil proceedings instituted by way of action or application (i.e. summons or notice of motion) and civil suits against judges for damage caused both in their judicial or nonjudicial capacity. You will need the consent of the head of the particular court or division concerned. Where the matter concerns a judge of the Constitutional Court, the consent of the Chief Justice is required. Where the matter concerns a judge of the Supreme Court of Appeal, the consent of the President of the Supreme Court of Appeal is required. Where the matter concerns a judge of any one of the divisions of the High Court, the consent of the Judge President of the division concerned is required. Finally, with regard to courts that have a status similar to the High Court – such as the Labour Court – the consent of the most senior judge of the court is required.[112] In the case of civil proceedings against any of the above-mentioned heads of court – other than the Chief Justice – the consent of the Chief Justice must be obtained. In the case of proceedings against the Chief Justice, the consent of the President of the Supreme Court of Appeal must be obtained.[113]

Where consent is obtained, the date upon which the judge in question is required to attend court must be determined in consultation with the relevant head of court.[114]

Under the old Supreme Court Act, if the summons or subpoena was to be issued out of *an inferior court* (e.g. a Magistrates' Court), consent was required from the division which has jurisdiction to hear an appeal in a civil action from that inferior court.[115] However, these provisions of the Supreme Court Act have been repealed by the Superior Courts Act, which does not contain an equivalent provision. It would therefore seem that consent is no longer required, provided the summons or subpoena is emanating from an inferior court.

In practice, the way in which you obtain consent is to make an *informal application* to the *senior judge* of the relevant court or division, *giving notice* of the application to the judge who is to be summonsed or subpoenaed.[116]

Once consent has been obtained, the date on which the judge concerned is obliged to attend court, must be determined in consultation with the Judge President of the division of the court to which the judge who is being summonsed or subpoenaed belongs.[117]

In the unlikely event that you need to take civil action against a judge, you are advised to check carefully the state of the legislation pertaining to this matter.

3.10 Members of Parliament, provincial legislatures and municipal councils

When contemplating civil (or criminal) proceedings against any of the above, be careful, since special rules apply. In terms of s 58 of the Constitution, members of the Cabinet, Deputy Ministers and members of the National Assembly are not liable to civil or criminal proceedings, arrest, imprisonment or damages for anything they have said in, produced before, or submitted to Parliament or any of its committees. Furthermore, if what they have said, produced or submitted leads to a revelation of some sort, they are still protected from liability.[118] In terms of ss 71 and 117 of the Constitution, this protection is also extended to delegates of the National Council of Provinces and to members of the provincial legislatures.

You should also take note of the provisions of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act.[119] For example, special permission needs to be obtained before a summons, subpoena or other process issued by a court is served within the precincts of Parliament.[120] Further, take note that if a Member of Parliament or a Delegate to the National Council of Provinces is attending to business in Parliament, and has a certificate issued by the Speaker of the National Assembly or the Chairperson of the National Council of Provinces in terms of s 9 of the Act, it will not be possible for you to get that person to attend court as a witness in any civil or criminal proceedings, or as a defendant in any civil proceedings, until that business has been concluded.[121]

As far as municipal councillors are concerned, councillors are not liable to civil or criminal proceedings, arrest, imprisonment or damages for anything they have said in, produced before, or submitted to the council or any of its committees. Furthermore, if what they have said, produced or submitted leads to a revelation of some sort, they are still protected from liability.[122]

3.11Trusts

Trusts are strange legal entities, and are difficult to compare to other legal entities such as companies or close corporations. Because of their strange nature, they are usually referred to as *sui generis*, in other words, something different and unique. A trust does not have a legal persona like a company or close corporation. Trusts have become increasingly popular. Many family trusts are formed in an effort to reduce liability for estate duty.

A trust is a legal institution in which a group of persons known as ‘trustees’ holds and administers property separately from their own, on behalf of and for the benefit of someone else or for the furtherance of a charitable or other purpose.[123] The trustees of a trust, in their capacity as such, have no beneficial interest in the property of the trust. However, the assets and liabilities in a trust vest in the trustees. In other words, the trustees own the trust property for purposes of administration of the trust.[124] It is the trustees who must either sue or be sued since the trust itself cannot be either a plaintiff or defendant.[125] Unless one or more of the trustees are authorised by the others, you must sue *all* the trustees in their *official capacities* as trustees.[126]When trustees are acting in their official capacities, they are said to be acting *nomine officio*, and the letters *NNO* will appear after their names, or the letters *NO* if there is only one trustee. When a person is suing or being sued in his official capacity as a trustee, the words ‘in his capacity as trustee of the XYZ trust’ or ‘trustee for the time being of the XYZ trust’ should be added after that person’s name.[127]

3.12 Partnerships, firms, associations and the like

3.12.1 General overview

Very often, in practice, you will find yourself dealing with a partnership, a firm, or an association of some kind. In most cases, these bodies have no legal personality of their own, but are simply groups of individuals who associate with each other in order to achieve certain lawful objectives. They do not exist apart from or in extension to the individuals who make up the group, and because of this do not possess *locus standi*. At common law, for example, a partnership cannot sue or be sued in its own name. Common law requires every individual member of a partnership to be joined and cited by name in any action involving the partnership, failing which the summons is bad for misjoinder. As is clear from the following quotation, the life of an attorney who decides to stick to common law when suing a partnership may become rather complicated:

> **Where it is desired to sue a partnership and the names of the partners are not known, the plaintiff must ordinarily take steps to discover these names before he causes summons to be issued. He can try to discover the names by applying to any known member of the partnership to disclose them, but if the information is refused, he is obliged to apply to court, after notice to such member, for an order compelling him to disclose them … and ordinarily a plaintiff in the magistrate's court would have to move [the] High Court for relief.**[128]

Fortunately, both the High Court and Magistrates' Courts Rules make special provision for such cases, but these provisions are not without complications of their own.[129] In general terms, these special rules provide procedural relief by allowing bodies such as partnerships, firms and associations to sue or be sued in their own name, without in any way conferring legal personality on such bodies. Referring to the rule applicable in the Magistrates' Courts (rule 54), Harms JA summed up the effect of the rule as follows:

> **The rule deals with procedure and not with substantive law … It does not turn a partnership or firm into a different entity or into a juristic person, existing separately from its members or owner … It does not create rights or liabilities which otherwise would not have existed …**[130]

Let us examine the nature and effect of the rules applicable in the High Court and Magistrates' Courts, respectively.

3.12.2 High Court – rule 14

High Court rule 14 begins by defining, *inter alia*, an 'association' and a 'firm' as follows:

An *association* is defined as 'any unincorporated body of persons, not being a partnership.'[131] You may think of an association as a group of people who get together for a certain purpose, without forming themselves into a partnership or incorporating themselves into a company or close corporation. For example, your local hockey club or soccer club may be an association.

A *firm* is defined as 'a business, including a business carried on by a body corporate, carried on by the sole proprietor thereof under a name other than his own.'[132] You may think of a firm as a 'one-man business' which is carried on under a trading name.[133] For example, if you start a shoe-making business and call it Leo's Shoes, then that business may be defined as a 'firm' in terms of rule 14(1). Remember that the sole proprietor does not have to be a natural person; the sole

proprietor of a firm may be a company or a close corporation. In other words, if a company called ABC (Pty) Ltd owns a shop called Leo's Shoes, then the business known as Leo's Shoes is a firm, even though it is owned by a company.

High Court rule 14 goes on to provide that a partnership, a firm or an association may sue or be sued in its own name.[134]This is quite a radical provision since, as mentioned previously, at common law only an entity which has legal personality may sue or be sued in its own name. In order to acquire legal personality at common law, an entity must possess a certain corporate character. An entity which possesses such a corporate character is referred to as a *universitas personarum*, the chief characteristics of which are:

1. perpetual succession (i.e. the association continues to exist, even though its members change); and
2. the ability to acquire rights and incur obligations independently of its members, in particular the ability to own property.[135]

In allowing a partnership, firm or association to sue or be sued in its own name, rule 14 clearly goes beyond common law. As we noted earlier, however, the rule does not turn these entities into legal personae. When you sue a partnership, a firm or an association, you are still in effect suing the individuals behind the partnership, firm or association. The rule is simply an aid to procedure, which allows you to sue these individuals in the name of the firm, partnership or association.[136]

In terms of rule 14, if you are suing a partnership or firm, you need not allege the names of the partners or proprietor. Even if you do, and you make a mistake with their names, this does not afford a defence to the partnership or firm.[137] The rule allows the plaintiff to request the name(s) and address(es) of the person who was the proprietor of the firm, or the persons who were the partners of the partnership, at the time the plaintiff's cause of action arose.[138] The firm or partnership is obliged to supply you with a list of the names and addresses requested, failing which you may compel the firm or partnership to do so.[139] When the firm or partnership sends the list of its proprietor or partners to you, it must also serve a notice on the proprietor or the partners who it names in the list.[140] This notice must accord with High Court Form 8. The notice basically warns the alleged proprietor or partner that if he disputes that he was the proprietor or a partner at the time the plaintiff's cause of action arose, or that the period he is alleged to have been a partner is relevant to his liability as a partner, or that the firm or partnership is liable, he must enter the fray and put his case. If he fails to do this, and judgment is taken against the firm or partnership, he will not be entitled to dispute that he was the proprietor or a partner at the relevant time.[141]

If you are successful in obtaining judgment against a partnership which you have sued in terms of this rule, you should bear in mind that the assets of the partnership must be 'excussed' (in other words, taken in execution) *first* in order to satisfy the judgment debt. It is only if the partnership does not possess sufficient assets to satisfy the judgment debt that the assets of the individual partners may be excussed.[142]

With regard to proceedings against firms, do not forget that you are, in fact, proceeding against the owner of the firm at the time your cause of action arose. If that person sells the firm to someone else, you cannot ask for judgment against the new owner or against the firm. You can only get judgment against the person who was the owner of the firm at the time your cause of action arose.[143]

As far as associations are concerned, rule 14 provides inter alia that a plaintiff or defendant suing or being sued by an association, may deliver a notice to the association, calling for a true copy of its current constitution, and a list of the names and addresses of the office bearers, and their respective offices, as at the date when the cause of action arose.[144] The association must comply with this request within 10 days.[145] If it does not do so, the party requesting the information may apply to court for its delivery, or for the dismissal of the action, or the striking out of the defence.[146]

Where rule 14(2) is relied on by the plaintiff (e.g. an association sues on behalf of its members under rule 14(2)), there must be a sufficient nexus between the individual members, in their capacities as members of the association, and the right that formed the subject matter of the litigation.[147]

3.12.3 Magistrates' Courts – rule 54

Magistrates' Courts rule 54 is the equivalent of High Court rule 14, but there are significant differences between the two rules.[148] In terms of rule 54, persons who were partners in a partnership *at the time a particular cause of action arose*, may sue or be sued in the name of their partnership business[149] (referred to as a 'firm' in this rule).[150] An individual person who is *at present* conducting business in a name other than his or her own may also sue or be sued in the name he is using to conduct the business.[151] The provisions of rule 54 are also applicable in the case of unincorporated companies, syndicates, and associations (bodies with no legal personality of their own).[152]

If you are suing or being sued by such an entity, you are entitled to send a notice demanding that you be provided with the names and places of residence of the partners (who were partners when the cause of action arose), the present proprietor, or members (as the case may be) of the entity.[153] The statement of names and addresses must be provided within ten days.[154] The action then proceeds as if the persons listed in the statement had been named in the summons.[155] Note that if the statement of names is not requested by and disclosed to the plaintiff, the plaintiff may not execute against the property of the individual partners, proprietor or members (unless, as discussed below, the plaintiff makes application to court to declare such persons to be partners, a proprietor or members).[156] This area of the law is fraught with practical difficulties. For example, the notice to disclose is directed at the firm and, as a result, if there is noncompliance with it, one must apply to court to compel compliance with the notice, failing which default judgment may be granted against the firm. The same problem then arises, however, in that the default judgment is against the firm, not the individual partners.[157] Before proceeding, you would be well advised to consult the cases cited in this section, as well as a detailed reference work dealing with the procedure.

Rule 54 provides a further mechanism for linking a suspected partner, proprietor or member to the proceedings.[158] The procedure involves an application to court to declare a person to be a partner, proprietor or member of the entity suing or being sued. If the application is successful, the action proceeds as if the persons in respect of whom the application was brought had been named in the summons.[159] This is a very useful procedure to bear in mind since it may be invoked both before and after judgment. This means that, even if you have neglected to obtain the statement of names and addresses referred to earlier, which would have allowed you to execute against the personal assets of those listed, you are able to cure this omission even after judgment.

4 Representation of parties

4.1 Power of attorney

Having discussed the issue of *locus standi* in relation to parties of various kinds, we turn now to a discussion of the different rules relating to the manner in which parties may be represented in court, starting with a brief look at power of attorney.

A power of attorney is a written document which confers authority upon an agent to act for his principal. There are two kinds of power of attorney. The first kind is called a *special power of attorney* and authorises the agent to act in a specific matter or matters. The second kind gives the agent a general authority to perform all acts on behalf of the principal, which the principal might normally perform himself. Usually *a general power of attorney* is given to an attorney, a family member or a trusted friend, when the principal plans to travel or is incapacitated in some manner, and needs to have his financial affairs dealt with in his absence.

In the context of civil procedure, a special power of attorney may be given to an attorney by his client, authorising the attorney to initiate or defend a specific legal proceeding on his behalf, and to perform those functions that are incidental to such legal proceeding.[160] The purpose of a power of attorney is to protect both attorney and client. On the one hand, it prevents a client who wishes to avoid paying an attorney's legitimate fees from denying that he gave the said attorney authority to act. On the other hand, it may serve to protect a client from an unscrupulous attorney who knowingly exceeds his authority in order to earn extra fees.[161] Should an attorney conduct litigation without the authority of his client, he will not be entitled to recover his fees from the client, and may even be ordered to pay the costs of the proceedings personally.[162]

Usually, a special power of attorney giving authority to a firm of attorneys to institute or defend legal proceedings should include the following details:

1. A general description of the nature of the particular action to be instituted or defended, for which authorisation is given;
2. The nature of the relief claimed or to be claimed;
3. The names of the parties to the matter; and
4. The names of the attorneys (including both partners and professional assistants) authorised to act on the client's behalf.[163]

Note that when a juristic person such as a company, close corporation or local authority wishes to institute or defend legal proceedings, it is not sufficient for you to take instructions from a director, member, or official of the particular entity. You, as the attorney, must be officially instructed by the company, close corporation or local authority to institute or defend legal proceedings on behalf of the company, close corporation, or local authority. Usually, in the case of a company or a close corporation, you will request the board of directors of the company or the members of the close corporation to pass a resolution authorising you to institute or defend the legal proceedings. In the case of bodies such as local authorities, there are often standing resolutions which delegate the power to institute or defend legal actions to certain officials of that body. You may accept a written instruction to act from such official, together with the relevant extracts from the standing resolutions of the local authority concerned. All written instructions conferring authority upon you to act in such matters should be in the form of an

affidavit by the official or office bearer concerned, together with a copy of the supporting documentation, for example the relevant resolution of the juristic body concerned.

4.2Representation of parties in the High Court

A natural person who becomes involved in legal proceedings in the High Court, and who has *locus standi*, is entitled to conduct his own case and to appear in person at the hearing. Alternatively, he may be represented by an attorney and advocate (or by an attorney alone, if that attorney is entitled to appear in the High Court), whom he has instructed to represent him. He may not be represented by anyone else.[164] As far as juristic persons such as companies are concerned, the general rule is that they *must* be represented by an advocate and an attorney (or by an attorney alone if that attorney is entitled to appear in the High Court), and *may not* be represented by one of their officials.[165]

This general rule is, however, not inflexible. For example, the High Court may, by making use of its inherent power, allow a sole member of a close corporation to represent it in court where it is in the interests of justice to do so.[166]

The legal representative of a party in the High Court need not, as a general rule, file a power of attorney in order to prove that he possesses the necessary authority to act.[167] A power of attorney need only be filed in the case of an appeal.[168]

The authority of anyone acting on behalf of a party may be disputed at any time before judgment. This must be done within 10 days of the date on which the person disputing the authority learned that the person whose authority he is disputing was acting in the matter. If more than 10 days have passed, the leave of the court must be obtained on good cause shown. A person whose authority has been disputed may not act in the matter until he satisfies the court that he is authorised so to act.[169] One way in which he may satisfy the court that he is authorised to act is to produce a valid power of attorney.

If you are an attorney and a client appoints you to act on his behalf, the first thing you must do is notify all the other parties involved that you are acting on your client's behalf in the matter, and provide your name and address.[170] Your client may at any time terminate your authority to act. If he intends to deal with the matter further by himself, then he must notify the registrar of the court which is considering the matter and all the other parties by written notice. The written notice must include a service address which is within eight kilometres of the registrar's office,[171] where the other parties are able to serve further documents in the matter upon him. If, instead of dealing with the matter further himself, he decides to appoint another attorney to continue acting on his behalf, he must notify the registrar and all the other parties, by written notice, of the name and address of his new attorney.[172] His new attorney's address will become his new service address.[173]

The attorney who is no longer acting must forthwith deliver a notice to his former client, the registrar, and all other parties, stating that he is no longer the attorney of record.[174] In practice, this notice is known as a *notice of withdrawal as attorney of record*. After the notice of withdrawal as attorney of record has been sent out, the former client of that attorney has 10 days to send the notice referred to in the previous paragraph, informing the parties of his new address for service. If he does not do this, then the other parties may well not have an address upon which to effect service of documents upon him. In such a situation, the other parties need not serve any further documents upon him, unless the court orders otherwise.[175] So the lesson is that parties must be careful if they decide to fire their attorneys. Also, attorneys may not simply

withdraw from a case at the last minute. They have a duty towards both their client and the court to withdraw in good time.[176]

4.3 Representation of parties in the Magistrates' Courts

In terms of Magistrates' Courts rule 52(1)(*a*):

> **A party may institute or defend and may carry to completion any legal proceedings either in person or by a practitioner.**[177]

The term 'practitioner' includes an advocate, an attorney and a candidate attorney.[178] Attorneys are clearly entitled to fully represent parties in the Magistrates' Courts. Advocates, however, are prohibited from doing the work of an attorney in the Magistrates' Courts by the Attorneys Act 53 of 1979.[179] Advocates are not entitled to sign pleadings in Magistrates' Courts matters, nor any of the Magistrates' Courts forms prescribed in Annexure 1 to the Magistrates' Courts Rules.[180] The work of advocates in the Magistrates' Courts is essentially restricted to the drafting of pleadings and applications, and appearances in court.[181] Before an advocate may perform work in the Magistrates' Courts, he must be duly briefed by an attorney. As far as candidate attorneys are concerned, there is some debate as to their precise powers. It is clear that, subject to certain restrictions set out in s 8(1) of the Attorneys Act, a candidate attorney who has satisfied certain legal requirements is entitled to appear in any court, other than any division of the High Court, and before any board, tribunal or similar institution in or before which his principal is entitled to appear.[182] A candidate attorney appears instead of, and on behalf of, his principal, who is entitled to charge fees for such appearances as if the principal himself had appeared.[183] Whether or not a candidate attorney's powers go beyond this to enable him to carry to completion any legal proceeding is open to debate.[184]

In Magistrates' Courts, a local authority, company, or other incorporated body may act through one of its officers who has been nominated to act in the legal proceedings.[185] A partnership or group of persons associated for a common purpose may act through one of its members who has been nominated to act for the partnership or group in the legal proceedings.[186]

No power of attorney need be filed by the person who is appointed to act, but the authority of that person to act may be challenged by any other party to the proceedings at any time before judgment. The challenge to authority must be raised within 10 days of the date on which the person challenging the authority learned that the person whose authority he is challenging was acting in the matter. If more than 10 days have passed, the leave of the court must be obtained on good cause shown. A person whose authority has been disputed may not act in the matter until he satisfies the court that he is authorised so to act.[187] One way in which he may satisfy the court that he is authorised to act is to produce a valid power of attorney.

4.4 Representation of indigent persons

4.4.1 *In forma pauperis* proceedings in the High Court

If a person wants to bring or defend proceedings in the High Court, but does not have sufficient money to do so, he may turn to High Court rule 40 for assistance. Rule 40 sets out the rules for what are called *in forma pauperis* proceedings; in other words, proceedings where one of the parties does not have enough money to pay for his case. *In forma pauperis* proceedings are not the only option available to a person who does not have enough money to institute or defend legal action. Legal aid is also available through other avenues, for example, the Legal Aid Board, the Legal Resources Centre, the legal aid clinics at various universities, and so on. The growth of

legal aid has made *in forma pauperis* proceedings much less common, but it is a procedure which is still used.

In order to qualify for the provisions of rule 40, a person may neither possess property which is worth more than R10 000, nor be able to obtain that amount from his earnings within a reasonable time.[188] Household goods, clothing and tools of trade are not included in this calculation.[189] The procedure that is adopted is that the person wanting to proceed *in forma pauperis*makes an application to the registrar. If the registrar is satisfied that the person qualifies, he will refer that person to an attorney (whose name appears on a roster in the registrar's office), and will at the same time inform the Society of Advocates.[190] The attorney looks into the case and into the financial position of the applicant. If he is satisfied with the merits of the case, and with the lack of means of the applicant, he will request the Society of Advocates to nominate an advocate to act with him *in forma pauperis* in the matter.[191] The obligation in this regard rests on the attorney to inquire into the merits and, only if satisfied of the merits, to request an advocate to be nominated.[192] The Society of Advocates is not required to appoint an advocate if the attorney recommends that the prospects of the matter are poor.[193]

Three documents then have to be drafted:

1. When the proceedings are instituted, an *affidavit* must be lodged with the registrar on behalf of the person who is proceeding *in forma pauperis*. The affidavit must set out that person's financial position and state that, except for household goods, wearing apparel and tools of trade, that person does not possess property worth more than R10 000.[194]
2. The *advocate and the attorney* must also lodge a *statement* to the effect that they are acting gratuitously in the matter.[195]
3. Finally, the *advocate* must lodge a certificate *probabilis causa*; in other words, a certificate stating that the person has a fair or reasonable hope of success.[196]

The matter then goes ahead as normal, except that all pleadings, processes and documents filed of record by the party proceeding *in forma pauperis* must be headed accordingly.[197] The only ray of light for the legal practitioners who are doing all this work for no monetary reward is that, upon the conclusion of the proceedings, the litigant *in forma pauperis* may be awarded costs. This means his attorney may include in his bill of costs such fees and disbursements to which he would ordinarily have been entitled. Upon receipt thereof, in whole or in part, the attorney will pay out the sheriff's charges for the service and execution of process, and thereafter disburse himself and the advocate. These will be fees as allowed on taxation and may be paid pro rata, if necessary.[198]

4.4.2 *Pro deo* proceedings in the Magistrates' Courts

The equivalent of *in forma pauperis* proceedings in the Magistrates' Courts is set out in Magistrates' Courts rule 53. A person who does not possess sufficient means to institute or defend legal proceedings in the Magistrates' Court may apply to court for leave to sue or defend as a *pro deo* litigant.[199] Without going into the procedure in detail, we note simply that it is different to the *in forma pauperis* procedure followed in the High Court, and advise that you consult Magistrates' Courts rule 53, should you wish to advise someone desiring to sue or defend as a *pro deo* litigant in a Magistrates' Court.

C: Jurisdiction

D8

1General introduction

1.1What is jurisdiction?

Jurisdiction may be defined as follows:

> **The power or competence which a particular court has to hear and determine an issue between parties brought before it.**[200]

But what does this mean in practical terms? Firstly, there are many different types of courts, for example, Small Claims Courts, Magistrates' Courts, the High Court, the Supreme Court of Appeal, the Constitutional Court, the Labour Court, the Competition Appeal Court, Tax Courts, the Land Claims Court, the Electoral Court and so on. Secondly, certain of these types of courts consist of different divisions which are scattered throughout the country. For example, at the time of writing the third edition of this book, there are main seats of divisions of the High Court in Bloemfontein, Cape Town, Grahamstown, Kimberley, Mafikeng, Pietermaritzburg and Pretoria.[201] In some of these divisions there are also additional seats, known as 'local seats', which are situated in Bhisho, Durban, Johannesburg, Mthatha, Port Elizabeth and Thohoyandou.[202]

As far as Magistrates' Courts are concerned, there are Regional Magistrates' Courts (for the adjudication of civil disputes) seated in Port Elizabeth, Bloemfontein, Johannesburg, Durban, Polokwane, Mbombela, Kimberley, Mmabatho and Cape Town;[203] and there are District Magistrates' Courts seated in too many cities, towns and villages to list here.

Deciding, firstly, *what general type* of court is competent to hear your client's matter and, secondly, *which particular one* of the different divisions (or different seats of the division) of that type of court may hear the matter, is what jurisdiction is all about. It is not difficult to understand why the question of jurisdiction is so important. Until you know what type and which one of the many courts in the country has jurisdiction, you cannot take the matter any further.

Let us take a slightly more detailed look at the two crucial jurisdictional questions: 'What general type?' followed by 'Which particular one?'

Question 1: What general type?

The answer to this question will establish whether a particular matter belongs in the High Court, a Magistrates' Court, a Small Claims Court, the Labour Court, a Tax Court, the Competition Appeal Court, the Land Claims Court, or one of the many other types of courts which operate in this country. In order to answer this question, it is necessary first to answer the following two subsidiary questions:

1. What is the monetary *value* of the claim? (Generally speaking, the higher the value of the claim, the more senior is the court required to hear that claim.)

2. What is the *nature* of the matter? (By their nature, certain matters are heard by certain courts. For example, a dispute between an employer and an employee is heard usually by the Labour Court; a matter relating to the interpretation of a will by the High Court; and so on.)

Question 2: Which particular one?

Once it has been established which general type of court is competent to deal with a particular matter, the particular court or courts (within that general type) that are competent to hear the matter must be identified. This is done by linking the matter to the *geographical area of jurisdiction* of a particular court or courts. For example, if the defendant in a particular matter resides or works within the geographical area of jurisdiction of a particular court, or if the cause of action arose wholly in that area, that particular court will usually be entitled to hear the matter.

To summarise, the *value* of the claim, the *nature* of the claim, and the *area* to which the claim is linked, are all important aspects to be taken into account in determining jurisdiction in a particular matter. Let us now look at the different types of courts in more detail, in order to decide where our attention would best be focused in relation to the question of jurisdiction in a book such as this.

1.2 Why focus only on jurisdiction relating to the High Court and Magistrates' Courts?

1.2.1Specialist courts

Certain of the different types of courts mentioned above may be termed 'specialist' courts. In other words, they deal only with certain types of matters. Magistrates' Courts sitting as Children's Courts,[204] District Magistrates' Courts sitting as Maintenance Courts,[205] certain divisions of the High Court exercising admiralty jurisdiction in the determination of a maritime claim,[206]divisions of the High Court and Magistrates' Courts sitting as Equality Courts,[207] Tax Courts,[208] the Land Claims Court,[209] the Electoral Court,[210] the Competition Appeal Court,[211] and the Labour Court[212] would be examples of such courts. It is beyond the scope of this book to analyse jurisdiction in relation to each of these types of courts. If you become a 'specialist' in one of these areas of law, you will need to acquire the knowledge required to practise in the particular court concerned, including the jurisdictional principles applicable to that court.

1.2.2 Small Claims Courts

Some characteristics of the Small Claims Courts are as follows:

- •Generally speaking, the amount involved in matters before these courts may not exceed R15 000.[213]
- •Only natural persons may sue, although juristic persons (e.g. companies and close corporations) may be sued.[214]
- •The state may not be sued.[215]
- •No cross-examination of witnesses is allowed. Instead, the presiding officer proceeds *inquisitorially* (in other words, by asking questions himself) to establish the relevant facts.[216]
- •There is no appeal against the judgments of these courts.
- •Legal representation is not allowed.[217]

In light of the fact that no legal representation is allowed in the Small Claims Courts, and that this is a book aimed at present and future legal practitioners, we feel that the jurisdictional principles applicable to these courts are best dealt with later in the book.[218]

1.2.3 Supreme Court of Appeal

As its name suggests, the Supreme Court of Appeal is a court of *appeal*. This means that you do not have to worry about the jurisdiction of this court when a matter is first handed to you. We will deal with the jurisdictional principles applicable to this court later on when we deal with appeals.

1.2.4 Constitutional Court

As in the case of the Supreme Court of Appeal, most matters which come before the Constitutional Court do so on appeal, although the Constitutional Court does have *exclusive jurisdiction* in the following cases:[219]

1. Disputes between organs of the state in the national or provincial sphere concerning the constitutional status, powers or functions of those organs of state;
2. The constitutionality of any parliamentary or provincial Bill, in certain circumstances;
3. Applications by members of the national Parliament, or one of the provincial legislatures, to declare all or part of an Act of Parliament or the particular legislature to be unconstitutional;
4. The constitutionality of any amendment to the Constitution; and
5. Whether or not Parliament or the President has failed to fulfil a constitutional obligation.
6. Certification of a provincial constitution.

In addition to the above cases, the Constitutional Court may also sit as a court of first instance in matters which are sufficiently *serious and urgent* to require the immediate attention of the Constitutional Court. The permission of the Constitutional Court is required before this unusual procedure is adopted, and the Court is very reluctant to allow all but the most serious and urgent constitutional cases to come before it in this way.[220] In the circumstances, it makes sense to deal with the jurisdictional principles applicable to the Constitutional Court when we deal with appeals.

1.3J urisdiction relating to the High Court and Magistrates' Courts – what are the main issues?

All the courts referred to above may be said to be special in some way or another. At this stage of the book, we are more interested in those courts that deal with common, day-to-day civil litigation. In practice, it is the Magistrates' Courts and the High Court that deal with the great bulk of general civil litigation in South Africa. It is for this reason that we need to focus on the jurisdiction of these courts. Let us start by rephrasing the two central jurisdictional questions in a more focused way:

Question 1: What general type?
'Must I bring this matter in the High Court or a Magistrates' Court?'

Question 2: Which particular one?

'In which particular division of the High Court, or in which particular Magistrates' Court, must I bring the matter?'

Let us now examine each of these more focused questions in more detail.

Question 1: High Court or Magistrates' Court?

We have already pointed out that the answer to this question depends upon the answer to two subsidiary questions, which relate to the *value of the claim* and the *nature of the claim*.

Question 1.1: What is the value of the claim?

The *general rule* is that matters involving a claim for *more than R400 000* are heard in the High Court, whereas matters which involve a claim for *not more than R400 000* are heard in the Magistrates' Courts. In relation to matters heard in the Magistrates' Courts, those which involve claims *for not more than R200 000* are heard in Magistrates' Courts for Districts (hereafter referred to as 'District Magistrates' Courts'), whereas those which involve claims for *more than R200 000 but not more than R400 000* are heard in Magistrates' Courts for Regional Divisions (hereafter referred to as 'Regional Magistrates' Courts').[221]

Generally speaking, a matter in which a Magistrates' Court has jurisdiction may also be heard in the division of the High Court within whose area of jurisdiction that Magistrates' Court is situated. In other words, that division of the High Court will exercise *concurrent jurisdiction* with the Magistrates' Court. However, you will usually proceed in the Magistrates' Court if you are entitled to because it is cheaper and quicker to deal with a matter in the Magistrates' Courts than in the High Court.

It is important to remember that if you elect to proceed with a matter in a division of the High Court, despite the fact that a Magistrates' Court has jurisdiction to hear the matter, then even if you win the case, the High Court may decide to 'punish' you by only granting you costs calculated on the Magistrates' Courts' scale, which is less than costs calculated on the High Court scale .[222]

There are certain important *exceptions* to the general rule that matters which involve claims for *more than R400 000* belong in the High Court; that matters which involve claims for *more than R200 000 but not more than R400 000* belong in the Regional Magistrates' Courts; and that matters which involve claims for *R200 000 or less* belong in the District Magistrates' Courts. For example, in certain cases the parties may *consent* to a claim that is for *more than R400 000* being brought in a Regional Magistrates' Court as opposed to in the High Court; or to a claim that is for *more than R200 000 but not more than R400 000* being brought in a District Magistrates' Court as opposed to in a Regional Magistrates' Court (i.e. by agreement).[223] In other cases, the plaintiff in a matter may decide to *abandon* that portion of his claim in excess of the R400 000 or R200 000 limit in order to bring the matter within the jurisdiction of a Regional Magistrates' Court or a District Magistrates' Court, as the case may be.[224] In yet other cases, the plaintiff may *deduct* from his claim the amount of a debt which he admits he owes to the defendant, and thus bring the amount of his claim within the R400 000 or R200 000 limit.[225]

Question 1.2: What is the nature of the claim?

The value of a claim is not the only determinant of whether it belongs in the High Court or in the Magistrates' Courts. The *nature* of the claim is also important. Certain claims involve amounts of R400 000 or less but, due to their nature, are not allowed in the Magistrates' Courts. A matter involving the interpretation of a will is a good example. Such a matter *must* be brought in the High Court, even if R400 000 or less is at stake in the case.[226] Another example is a claim for specific performance without the alternative of damages which – barring certain exceptions – must always be heard in the High Court.[227] The *personal* nature of such claims serves to exclude them from the jurisdiction of the Magistrates' Courts, even though they may involve amounts of R400 000 or less.

Question 2: Which particular division of the High Court or Magistrates' Court must hear the matter?

Once you have established the general type of court in which the matter must be heard (the High Court or Regional Magistrates' Court or District Magistrates' Court), you must decide which *particular d*ivision of the High Court or which *particular* Magistrates' Court is competent to hear the matter.

Generally speaking, you need to tie some aspect of the matter to a particular *geographical area* in order to establish that the court which *controls that area* has jurisdiction. Usually, this is done in one of two ways:

1. You may be able to show that the person against whom you are instituting action either lives or works in that area.
2. You may be able to show that the incident or incidents which gave rise to the claim happened in that area.

1.4 When is jurisdiction determined?

Jurisdiction is determined at the time that the proceedings are *instituted*.[228] Proceedings are only deemed to have been instituted once the papers initiating those proceedings have been *served* on the other party. For example, an action cannot be said to have been instituted until summons has been served on the defendant.[229] As long as jurisdiction exists at the *start* of the proceedings, it will *continue* to exist until the proceedings end, even should the particular grounds or basis upon which jurisdiction was founded, fall away during the proceedings.[230] For example, if jurisdiction is based on the fact that the defendant resides within the area of jurisdiction of the court at the start of the proceedings, jurisdiction will not be lost if, during the proceedings, the defendant happens to move and now resides outside the area of jurisdiction of the court.

1.5 Why is it important to get jurisdiction right?

If you start legal proceedings against a person in a court which does *not* have jurisdiction, your opponent will be in a position to defeat your client's claim on this point alone without even dealing with the substance of the claim. In an action, your opponent will be entitled to raise a *special plea of lack of jurisdiction*, which effectively will bring the matter to an end.[231] In an application, the court will not hear the matter if it is not satisfied that it has jurisdiction, based on the facts stated in the papers.[232]

It is important to keep in mind that if you are acting for the applicant or plaintiff in a matter, it is up to you to make sure that you set out the grounds upon which jurisdiction is based.

2Magistrates' Courts jurisdiction

2.1 General overview

The Magistrates' Courts are *creatures of statute*, which means that they have no jurisdiction apart from that which is *conferred upon them by statute*.[233] The relevant sections of the Magistrates' Courts Act dealing with jurisdiction are *ss 26 to 50*. Let us examine the manner in which certain of these sections relate to the two fundamental questions (discussed earlier) which arise when deciding upon jurisdiction.

Question 1: High Court or Magistrates' Court?

The answer to this question depends upon the answers to two subsidiary questions: 'What is the value of the claim?' and 'What is the nature of the claim?'

Question 1.1: What is the value of the claim?

Section 29 deals (broadly speaking) with the general rule that claims for *R200 000 or less* may be heard in the District Magistrates' Courts, whereas claims for *more than R200 000 but not more than R400 000* may be heard in the Regional Magistrates' Courts. This section is your first stop in deciding whether a matter belongs in the Magistrates' Courts or the High Court.

Sections 38, 39 and 45 deal with an important set of *exceptions* to the general rule referred to above. These sections deal, respectively, with *abandonment, deduction of an admitted debt* and *consent*. These are different ways in which claims for *more than R400 000* (which would normally belong in the High Court) may be brought within the jurisdiction of the Regional Magistrates' Courts; and in which claims for *more than R200 000 but not more than R400 000* (which would normally belong in the Regional Magistrates' Courts) may be brought within the jurisdiction of the District Magistrates' Courts.

Question 1.2: What is the nature of the claim?

Section 46 is your second important stop in deciding whether a matter belongs in the Magistrates' Courts or the High Court. The section details a number of claims which, because of their nature, may *not* be brought in the Magistrates' Courts. In other words, the section lists certain claims which, although they may be for *R400 000 or less*, must nevertheless be heard in the *High Court*.

Question 2: Which particular Magistrates' Court?

Section 28 deals with the question which arises once you know that a matter belongs within the Magistrates' Courts, namely, in which *particular* Magistrates' Court or Courts may this matter be heard. The section sets out the manner in which a particular matter may be 'tied' to the *area of jurisdiction* of a particular Magistrates' Court or Courts.

With the general mind map in place, let us now deal with each section in turn.

2.2The value of the claim – section 29

2.2.1 The general rule

As a general rule, if the claim or the value of the matter in dispute is *over R400 000*, the matter falls within the jurisdiction of the *High Court*. If the claim or the value of the matter in dispute is *over R200 000 but not over R400 000*, the matter falls within the jurisdiction of the Regional Magistrates' Courts. If the claim or the value of the matter in dispute is *R200 000 or less*, the matter falls within the jurisdiction of the District Magistrates' Courts. Let us examine the provisions of s 29 more closely.

2.2.1 (a)Section 29(1)(a) – delivery or transfer of property

District Magistrates' Courts possess jurisdiction in respect of actions[234] in which is claimed the delivery or transfer of any property, movable or immovable, *not exceeding R200 000* in value.[235] Regional Magistrates' Courts possess jurisdiction in respect of actions in which is claimed the delivery or transfer of any property, movable or immovable, *exceeding R200 000 but not exceeding R400 000* in value.[236] 'Value' means the actual market value of the property.[237]

2.2.1(b)Section 29(1)(b) – ejectment

District Magistrates' Courts possess jurisdiction in respect of actions of ejectment against the occupier of any premises or land within the relevant district, provided that where the right of occupation of any such premises or land is in dispute between the parties, such right *does not exceed the amount of R200 000* in clear value to the occupier.[238] Regional Magistrates' Courts possess jurisdiction in respect of actions of ejectment against the occupier of any premises or land within the relevant regional division; provided that where the right of occupation of any such premises or land is in dispute between the parties, such right *exceeds the amount of R200 000 but does not exceed the amount of R400 000* in clear value to the occupier.[239]

By satisfying the court that there is a *bona fide* dispute as to his right of occupation, and that the clear value to him of this disputed right either exceeds R200 000 or exceeds R400 000, an occupier is able to 'oust' the jurisdiction of the District Magistrates' Courts or the Regional Magistrates' Courts, as the case may be.

The subsection specifically talks about the *clear value* of the right of occupation to the occupier. It is submitted that by clear value is meant the value over and above the rent payable.[240]

In cases of ejectment from *business* premises, an *additional* method of calculation is available, which may be used when suitable alternative premises are *not* available to the occupier of those business premises. For example, the premises in question may be specialised factory premises, which are unique in the general area. If the occupier is threatened with ejectment from the factory, he may claim that he is unable to find suitable alternative premises to carry on his business. In such a matter you would calculate the *amount of the profit* which the occupier reasonably expects to make over the period for which he claims the right to occupy the disputed premises.[241]

In conclusion, note that our courts have not approved a generally applicable formula or test which can be used to determine the value of the right of occupation. Rather, a conspectus of the whole transaction must be taken, including not only objective information but also matters which are personal to the occupier.[242] It is not possible in a book such as this to delve more deeply into

this complex area of the law. When dealing with matters involving the value of the right of occupation in practice, practitioners are advised to research the many cases dealing with this point thoroughly.

2.2.1(c)Section 29(1)(c) – right of way

Magistrates' Courts possess jurisdiction in respect of actions for the determination of a right of way, notwithstanding the provisions of s 46 (i.e. matters beyond the jurisdiction of the Magistrates' Court).[243]

The value of the right of way is not relevant to jurisdiction.[244] The Magistrates' Courts have jurisdiction not only to confirm an existing right of way, but to create a *via necessitatis* (i.e. a necessary access route).[245]

2.2.1(d)Section 29(1)(d) – liquid document or mortgage bond

District Magistrates' Courts possess jurisdiction in respect of actions on or arising out of a liquid document or a mortgage bond where the claim *does not exceed R200 000*.[246] Regional Magistrates' Courts possess jurisdiction in respect of actions on or arising out of a liquid document or a mortgage bond where the claim *exceeds R200 000 but does not exceed R400 000*.[247]

Broken down in formal terms, a liquid document is one that indicates, without the need to resort to extrinsic evidence: (1) an acknowledgement of indebtedness; (2) in an ascertained amount of money; (3) the payment of which is due to the creditor.[248]

An example of a liquid document is a piece of paper on which someone has written that he owes a specific amount of money to someone else. Liquid documents include cheques, acknowledgements of debt, mortgage bonds (which are really just a particular kind of acknowledgement of debt), and promissory notes (IOUs). Usually, if a document shows that payment is *conditional*, it will *not* qualify as a liquid document. A *simple condition* will not, however, destroy the liquidity of a document.[249] A simple condition is one that is unlikely to give rise to a dispute, or if disputed, is easily proved. For example, an acknowledgement of debt which contains a condition that notice must be given to the debtor before payment is claimed, still qualifies as a liquid document.[250]

2.2.1 (e)Section 29(1)(e) – credit agreements

Magistrates' Courts possess jurisdiction in respect of actions on or arising out of any credit agreement as defined in s 1 of the National Credit Act 34 of 2005.[251] Section 1 of the National Credit Act defines a credit agreement as an agreement that meets all the criteria set in s 8 of the Act. Section 29(1)(*e*) of the Magistrates' Courts Act read with s 172(2) of the National Credit Act appears to give the Magistrates' Courts unlimited monetary jurisdiction in relation to matters falling under the National Credit Act.[252] In terms of Government Notice 216 in *Government Gazette* 37477 of 27 March 2014,[253] however, the Minister of Justice and Correctional Services[254] purports to limit the jurisdiction of the Regional Magistrates' Courts under s 29(1)(*e*) to amounts exceeding R200 000 but not exceeding R400 000. However, s 29(1)(*e*) does not appear to give the Minister the power to make such a determination, and it is unclear, at the time of writing the third edition of this book, whether or not the monetary jurisdiction of the Regional Magistrates' Courts in respect of the actions referred to in the said section is, in fact, limited. In our view the better approach is that the monetary jurisdiction of the Regional Magistrates' Courts is *not* limited in this way.[255]

2.2.1 (f)Section 29(1)(f) – Matrimonial Property Act

District Magistrates' Courts possess jurisdiction in respect of actions in terms of s 16(1) of the Matrimonial Property Act (explained in the next paragraph),[256] where the claim or value of the property in dispute *does not exceed R200 000*.[257] Regional Magistrates' Courts possess jurisdiction in respect of actions in terms of s 16(1) of the Matrimonial Property Act, where the claim or value of the property in dispute *exceeds R200 000 but does not exceed R400 000*.[258]

Sections 15(2) and (3) of the Matrimonial Property Act require a spouse, who is married in community of property, to obtain the consent of the other spouse if he or she wishes to deal with the community property in certain ways. Section 17 of that Act requires such a spouse to obtain the consent of the other spouse before instituting or defending legal proceedings (except in certain cases). Sometimes the consent required in terms of the above-mentioned sections of the Act is unreasonably withheld by the other spouse or cannot be obtained for some other reason. Section 16(1) of the Matrimonial Property Act allows the spouse who is being frustrated by the lack of consent to apply to court for the consent needed. In such cases, if the claim or value of the property in dispute is more than R400 000, then proceedings will have to be brought in the High Court. If the claim or value of the property in dispute is more than R200 000 but not more than R400 000, then proceedings will have to be brought in a Regional Magistrates' Court. If the claim or value of the property in dispute is R200 000 or less, then proceedings will have to be brought in a District Magistrates' Court.

2.2.1 (g)Section 29(1)(fA) *– Close Corporations Act*

Magistrates' Courts possess jurisdiction in respect of actions, including an application for liquidation, in terms of the Close Corporations Act 69 of 1984.[259]

Although matters involving liquidation and insolvency are generally restricted to the High Court, the Magistrates' Courts possess jurisdiction to wind up close corporations, irrespective of the amounts involved. This fits in with the idea that close corporations are tailored to meet the needs of smaller business entities. The High Court does, however, possess concurrent jurisdiction.[260]

2.2.1(h) Section 29(1)(g) – all other actions

District Magistrates' Courts possess jurisdiction in respect of actions other than those discussed above, where the claim or the value of the matter in dispute *does not exceed R200 000*.[261] Regional Magistrates' Courts possess jurisdiction in respect of actions other than those discussed above, where the claim or the value of the matter in dispute *exceeds R200 000 but does not exceed R400 000*.[262]

Section 29(1)(*g*) is a 'catch-all'. Where a plaintiff claims delivery of property, alternatively damages, then if either the value of the property or the damages exceed R400 000, the claim will have to be brought in the High Court. Similarly, in the case of an interdict, if the value of the subject matter in dispute exceeds R400 000, such interdict will have to be sought in the High Court.[263] Matters in which the values in question exceed R200 000 but do not exceed R400 000 belong in the Regional Magistrates' Courts, whereas matters in which the values in question do not exceed R200 000, belong in the District Magistrates' Courts. As in the case of all the other subsections of s 29(1) discussed above, this subsection is subject to the provisions of s 46 which is discussed below. For example, a Magistrates' Court may not decide on the validity of a will, even if the value of the deceased estate is not more than R400 000.

2.2.1(i)Section 29(1B) – divorce and related matters – Regional Magistrates' Courts

In terms of s 29(1B)(*a*) of the Magistrates' Courts Act,[264] the Regional Magistrates' Courts[265] are granted jurisdiction to hear and determine suits relating to the nullity of a marriage or a civil union and relating to divorce between persons and to decide upon any question arising therefrom, and to hear any matter and grant any order provided for in terms of the Recognition of Customary Marriages Act.[266]

Section 29(1B)(*b*) makes it clear that a Regional Magistrates' Court hearing a matter referred to above shall have the same jurisdiction as any division of the High Court in relation to such a matter. Note therefore that what we have called the 'general rule', which stipulates a R400 000 limit for most types of claims which may be dealt with by the Regional Magistrates' Courts (and a R200 000 limit for the District Magistrates' Courts), does not apply to the types of claims referred to in s 29(1B)(*a*) discussed above.[267]

Section 29(1B)(*c*) provides that the presiding officer of a Regional Magistrates' Court hearing a matter referred to above may, in his or her discretion, summon to his or her assistance two persons to sit and act as assessors in an advisory capacity on questions of fact.

Practitioners are referred to the practice directives in respect of divorce matters which appears in para 6 of the Civil Practice Directives for the Regional Courts in South Africa.[268]
Finally, practitioners should note that the Magistrates' Courts rules have been amended, purportedly with effect from 1 December 2014, to make provision, in rules 70–87, for the voluntary submission of civil disputes to mediation in selected courts.[269]

2.2.2How to calculate the R200 000 and R400 000 limits

2.2.2 (a)Splitting of single claims not allowed – section 40

In terms of s 40, a substantive claim exceeding the jurisdiction of the particular Magistrates' Court concerned may not be split with the object of recovering the same in more than one action if the parties to all such actions would be the same and the point at issue in all such actions would also be the same.[270]

A substantive claim in the context of s 40 is a claim arising out of a *single cause of action*.[271] In other words, you cannot get around the monetary limits set for jurisdiction in the Magistrates' Courts by artificially dividing up a claim arising out of a single cause of action. For example, you cannot take a single claim for R600 000 and split it up into two separate claims for R300 000 each in order to bring the matter within the jurisdictional limit of the Regional Magistrates' Courts. This rule against the splitting of claims may give rise to certain difficulties in practice. For example, assume that you are renting a factory to a businessman at a rental of R50 000 per month. He has not paid the rent for six months and thus owes you a total amount of R300 000. Although the total amount owing is over R200 000, this matter will nevertheless fall within the jurisdiction of the District Magistrates' Courts because a *separate* claim arises each time the businessman does not pay his rent for a particular month. Each month's rent constitutes a *separate cause of action* because each payment is due on a separate date. In each instance the cause of action will arise due to the breach of the lease agreement entered into between yourself and the businessman, but remember that there is a separate breach of the agreement giving rise to a separate cause of action each time a month's rent is not paid. In short, you will be entitled to

bring *six separate claims* for R50 000 each. Each claim falls comfortably within the monetary limit set for the jurisdiction of the District Magistrates' Courts. Note that in terms of s 43(1) (discussed below) you will be entitled to include all these claims in *one summons*. Although grouped in one summons, they will remain separate claims.[272]

2.2.2(b) Combining separate claims is allowed – section 43(1)

In terms of s 43(1), if two or more claims, each based upon a different cause of action, are combined in one summons, the court shall have the same jurisdiction to decide each such claim as it would have had if each claim had formed the sole subject of a separate action.[273]

In other words, if you have a number of separate claims, each of which is based on a separate cause of action, these claims may be combined in one summons. Even though the total amount claimed in the summons may amount to more than R200 000 or R400 000, the District Magistrates' Court or the Regional Magistrates' Court (as the case may be) may still hear such a matter, provided that the amount of each individual separate claim is not more than R200 000 or R400 000 (as the case may be).

2.2.2(c)Only the amount in issue is taken into account – sections 37(1) and 37(2)

In terms of s 37(1), in actions wherein the sum claimed, being within the jurisdiction, is the balance of an account, the court may enquire into and take evidence if necessary upon the whole account, even though such account contains items and transactions exceeding the amount of the jurisdiction.[274]

Assume, for example, that you wish to institute action against a debtor for R200 000. Your original claim against the debtor was for R250 000, but she has paid back R50 000. The District Magistrates' Courts may hear this matter since the claim itself does not amount to more than R200 000.[275] The particular Magistrates' Court dealing with the matter may hear evidence in respect of the entire amount that was outstanding originally.

In terms of s 37(2), where the amount claimed or other relief sought is within the jurisdiction of a particular Magistrates' Court, such jurisdiction shall not be ousted merely because it is necessary for the court, in order to arrive at a decision, to give a finding upon a matter beyond the jurisdiction.[276]

2.2.2(d)Interest and costs not taken into account – section 37(3)

In terms of s 37(3), when considering whether or not a claim is within the jurisdiction of the Magistrates' Courts, no prayer for interest on the principal sum claimed, or for costs, or for general or alternative relief, shall be taken into account.[277]

Assume, for example, that your total claim is for R270 000. You may be inclined to think that this claim falls outside the jurisdiction of the District Magistrates' Courts. Assume further, however, that the amount of R270 000 is made up as follows:

R200 000 = principal sum claimed
R45 000 = interest
R25 000 = costs

In this case, your claim falls within the jurisdiction of the District Magistrates' Courts because your claims for interest and costs are not taken into account when assessing the amount of the claim for jurisdictional purposes.

Apart from providing that prayers for interest and costs are not taken into account for jurisdictional purposes, s 37(3) also provides that any prayer for 'general or alternative relief' should be ignored for jurisdictional purposes. Note that attorneys often add a prayer for 'further and/or alternative relief' to their other prayers to provide them with a fall-back position in case they have framed one of their prayers incorrectly or left out a prayer by mistake.

D9

2.2.3Exceptions to the general rule

Listed below are three ways to bring a matter involving a claim for over R200 000 or for over R400 000 within the jurisdiction of the District Magistrates' Courts or the Regional Magistrates' Courts, as the case may be:

1. Consent;
2. Abandonment; or
3. Deduction of an admitted debt.

2.2.3(a) Consent – section 45

One possible way in which a claim for over R200 000 or for over R400 000 may be brought within the jurisdiction of the District Magistrates' Courts or the Regional Magistrates' Courts, as the case may be, is for the parties to consent to such jurisdiction.

In terms of s 45(1), subject to the provisions of s 46, the Magistrates' Courts shall have jurisdiction to determine any action or proceeding otherwise beyond their jurisdiction if the parties consent in writing thereto. This is provided that no court other than a court having jurisdiction under s 28 – except where such consent is given specifically with reference to particular proceedings already instituted or about to be instituted in such court – shall have jurisdiction in any such matter.[278]

The first point to note is that the parties must consent in *writing*. This written consent need not, however, take the form of an express agreement which is signed by the parties. All that is required is some sort of writing or writings which amount to proof that each of the parties has consented to jurisdiction.[279]

The second point to note is that there are certain *limitations*:

2.2.3 (a)(i)First limitation

By their nature, certain claims *must* be heard in the High Court. These claims are set out in s 46.[280] Parties cannot seek to override the provisions of s 46 by means of a written consent in terms of s 45. For example, the parties to a dispute in relation to a will are *not* entitled to consent to the jurisdiction of the Magistrates' Courts. Section 46 provides that such a matter *must* be heard in the High Court. Matters excluded from the jurisdiction of the Magistrates' Courts by s 46 remain excluded, no matter what the parties agree to.

Section 90(2)(*k*)(vi)(*bb*) of the National Credit Act[281] contains a provision which has a similar effect, albeit only in respect of credit agreements to which that Act applies. In terms of this section, a provision of a credit agreement which purports, on behalf of the debtor, to consent to the jurisdiction of any court seated outside the area of jurisdiction of a court having concurrent

jurisdiction and in which the consumer resides or works or where the goods in question are ordinarily kept is unlawful. Parties also cannot seek to override the provisions of s 90 and 91 of the Act by means of a written consent in terms of s 45.[282]

2.2.3 (a)(ii)Second limitation

Section 45 allows parties to consent to the jurisdiction of the District Magistrates' Courts or the Regional Magistrates' Courts in general, i.e. to bring the matter within the jurisdiction of either the District Magistrates' Courts or the Regional Magistrates' Courts in general, even though the value of the claim may be over R200 000 or over R400 000, as the case may be. It does *not*, however, allow them to consent to the jurisdiction of a *particular* Magistrates' Court *unless* that particular Magistrates' Court has jurisdiction over the person of the defendant in terms of s 28 of the Magistrates' Courts Act.[283] However, if proceedings have *already been instituted* or are about to be instituted, the parties are entitled to consent to the jurisdiction of *any particular Magistrates' Court*, even though that particular court does not exercise jurisdiction over the defendant in terms of s 28 of the Magistrates' Courts Act.[284] In simple terms, consent in terms of s 45 may allow you to circumvent the jurisdictional provisions of s 29 (i.e. to ignore the general rule stipulating limits of R200 000 and R400 000 in respect of most claims to be brought in the District Magistrates' Courts and Regional Magistrates' Courts, respectively). However, consent will not allow you to circumvent the jurisdictional provisions of s 28 (i.e. to ignore the need to link your claim to a particular Magistrates' Court by showing that that particular court has jurisdiction over the person of the defendant),[285] *unless* proceedings have been instituted or are about to be instituted in that particular Magistrates' Court.

Let us examine a situation which often arises in practice. Assume you are drafting a contract involving amounts of over R200 000 for a client. In the event that the other party breaches the contract, you wish to afford your client the right to sue that party in the District Magistrates' Court since it is quicker and cheaper. Your client asks you to insert a clause to the effect that in the event of breach, the parties consent to the jurisdiction of the Magistrates' Court for the District of Durban. At this stage, the parties are not contemplating immediate legal action against each other. A breach of the contract may occur only at some time in the distant future, if at all. At the time the contract is being drafted, it is difficult for the parties to know whether the Magistrates' Court for the District of Durban will, at the time the contract is breached, be in a position to exercise jurisdiction, in terms of s 28 of the Magistrates' Courts Act, over the party responsible for the breach. Therefore, you should advise your client that it is preferable to insert a clause in which the parties consent to the jurisdiction of the District Magistrates' Courts in general, avoiding any reference to the Magistrates' Court for the District of Durban.[286] So, in *Van Heerden v Muir*,[287] for example, the appellant sued the respondent (defendant) in the Magistrates' Court in Bloemfontein (in those days there was no distinction between Magistrates' Courts for Districts and Magistrates' Courts for Regional Divisions) for a certain sum on a promissory note. The defendant did not reside within the area of jurisdiction of the Bloemfontein Magistrates' Court, but the appellant argued that her consent to that jurisdiction was evidenced by a section at the foot of the promissory note in which the defendant had agreed 'to the jurisdiction of the Bloemfontein Magistrates' Court in terms of s 45(1)'. According to the court in *Van Heerden v Muir*:

> **The consent in the present case purports to have been given in terms of s 45(1) of the Act … The proviso to the above subsection [which prohibits persons from consenting to the jurisdiction of a particular Magistrate's Court, unless that particular Magistrate's Court has jurisdiction over the person of the defendant in**

> **terms of s 28 of the Magistrates' Courts Act] is clearly of no assistance to the appellant, because the consent relied on by him was not given when the present proceedings had already been instituted in the Bloemfontein Magistrate's Court or were about to be instituted in that court, but were given at the time the defendant signed the promissory note.**[288]

Finally, note that in terms of s 45(2), any provision in a contract whereby a person undertakes that when proceedings have been or are about to be instituted, he will give such consent to jurisdiction as is contemplated in the proviso to s 45(1), shall be null and void.[289] In other words, the parties cannot avoid the second limitation discussed above by 'agreeing to agree' to the jurisdiction of a particular Magistrates' Court if and when a dispute arises between them. Any such provision in a contract will be null and void.

2.2.3(b) Abandonment – section 38

A second possible way in which a claim for over R200 000 or for over R400 000 may be brought within the jurisdiction of the District Magistrates' Courts or the Regional Magistrates' Courts (as the case may be) is for the plaintiff to *abandon* that part of his claim which is over R200 000 or over R400 000 (as the case may be).

In terms of s 38(1), in order to bring a claim within the jurisdiction of the Magistrates' Courts, a plaintiff may in his summons or at any time thereafter explicitly abandon part of such a claim.[290]

As to the manner in which the abandonment is effected, assume that your client's claim is for R205 000 and he wishes to abandon R5 000. You may include the following paragraph in your client's particulars of claim:

> **The defendant is indebted to the plaintiff in the amount of R205 000. In order to bring his claim within the jurisdiction of the District Magistrates' Courts in terms of s 38(1) of the Magistrates' Courts Act 32 of 1944, the plaintiff hereby abandons the amount of R5 000 of his claim.**

In terms of s 38(2), if any part of a claim is abandoned in terms of s 38(1), it is thereby finally extinguished; provided that if the claim be upheld in part only, the abandonment shall be deemed first to take effect upon that part of the claim which is not upheld.[291] Let us examine two examples to illustrate what this means.

Example 1

Someone drives through a red traffic light and crashes into your car. You have a claim against that person for damages to your motor vehicle in the amount of R210 000. Those damages are made up of R190 000 damages to the body of the vehicle, and R20 000 damages to the air-conditioning system of the vehicle. It is still *a single claim* for damages in the amount of R210 000 since there is *only one cause of action*, i.e. the delict committed against you when the other party crashed into your car.

For the sake of convenience, you decide to abandon R10 000 of your total claim in order to bring the claim within the jurisdiction of the District Magistrates' Courts. For some reason or other, during the trial in the District Magistrates' Court, you are unable to prove the damages to the air-conditioning system of your car. You are able, however, to prove the full damages to the body of the vehicle.

Were it not for the proviso to s 38(2), it might be possible to reason as follows: You have abandoned R10 000 of your claim. You have been unable to prove R20 000 damages to the air-conditioning system of your car. Therefore you are only entitled to R210 000 (total claim) − R10 000 (abandoned) − R20 000 (unproved damages) = R180 000.

The proviso, however, makes it clear that 'the abandonment shall be deemed first to take effect upon that part of the claim which is not upheld'. Therefore the abandonment of R10 000 must be set off against that part of your claim which is not upheld, and not against that part of your claim which you did actually prove. In other words, the R10 000 which you abandoned is set off against the R20 000 which you failed to prove, and not against the R190 000 which you did prove.

If you find this too difficult to digest, think of it as follows: Damages must be calculated 'positively'. In other words, *you get what you manage to prove, up to a maximum of R200 000* (in the case of claims where an amount has been abandoned to bring the claim within the jurisdictional limit of the District Magistrates' Courts) or *up to a maximum of R400 000* (in the case of claims where an amount has been abandoned to bring the claim within the jurisdictional limit of the Regional Magistrates' Courts). In the example above, you managed to prove R190 000 damages to your vehicle, so this is the amount to which you are entitled.[292]

Example 2

In some cases, the amount of your claim that is not upheld will be less than the amount of your claim which you have abandoned. Taking the above example, but using different figures, assume that you are able to prove damage to the body of your car in the amount of R205 000, but are not able to prove damage to the air-conditioning system in the amount of R5 000. After subtracting the amount of R5 000 (which you could not prove) from your full claim in the amount of R210 000, you are left with R205 000. Remember, however, that you may not claim more than R200 000 in the District Magistrates' Court. Because you chose to abandon R10 000 to bring the matter within the jurisdiction of the District Magistrates' Court, you will have to be satisfied with a claim of R200 000.

Example 3

The reasoning set out in the first two examples also applies in cases where the court awards you a *percentage* of your claim. Assume your claim is R210 000 and you abandon R10 000. At the end of the case the court decides that you are entitled to 50% of your claim. You will be entitled to 50% of R210 000, i.e. R105 000.

2.2.3(c) Deduction of an admitted debt – section 39

A third possible way in which a claim for more than R200 000 may be brought within the jurisdiction of the District Magistrates' Courts, or a claim for more than R400 000 may be brought within the jurisdiction of the Regional Magistrates' Courts, is for the plaintiff to *deduct* from her claim a debt which she owes to the defendant.

In terms of s 39, in order to bring a claim within the jurisdiction of the Magistrates' Courts, a plaintiff may, in her summons, or at any time after the issue thereof, deduct from her claim, whether liquidated or unliquidated, any amount admitted by her to be due by herself to the defendant.[293]

Assume, for example, that X crashes into Y's motor vehicle and causes damages in the amount of R220 000. Y, however, owes X an amount of R25 000 for services rendered by X to Y. If Y wishes to institute action against X, he is entitled to deduct the amount of the debt he admits he owes X (i.e. R25 000), from the amount of his claim against X (i.e. R220 000) in order to bring the matter within the jurisdiction of the District Magistrates' Courts (i.e. R220 000 − R25 000 = R195 000, which is within the jurisdictional limit of the District Magistrates' Courts).

If your claim is over the limit for either the District Magistrates' Courts or the Regional Magistrates' Courts, and you know that you owe the defendant a debt, it is always wise to deduct the amount you owe the defendant in terms of s 39, rather than abandoning part of your claim in terms of s 38, in order to bring the matter within the jurisdiction of the District Magistrates' Courts or the Regional Magistrates' Courts (as the case may be). If you do not deduct the admitted debt, but abandon it, the defendant may simply institute a counterclaim for the amount of the debt, and you may end up losing money because of your abandonment of part of your claim.

Let us take two scenarios: In Scenario 1, you use s 38 to bring your claim within the jurisdiction of the District Magistrates' Courts, even though you are aware that you owe the defendant money. In Scenario 2, you use s 39 instead. Look at what happens:

Scenario 1

Your claim is R210 000 and you *abandon* R10 000 to bring the matter within the jurisdiction of the District Magistrates' Court, even though you know that you owe the defendant R20 000 (you foolishly hope he will forget about this debt). The defendant then counterclaims for R20 000. Both you and the defendant prove the full amounts owed (i.e. you prove R210 000 and he proves R20 000). Because you have abandoned R10 000, this amount is finally extinguished, and so you are entitled only to R200 000. However, the defendant was also successful in his counterclaim, and is entitled to R20 000. In effect, you end up receiving only R180 000, (i.e. R200 000 − R20 000 = R180 000).[294]

Scenario 2

Your claim is R210 000. You know that you owe the defendant R20 000 and wisely decide to deduct this amount from your claim, in order to bring the claim within the jurisdiction of the District Magistrates' Courts in terms of s 39. You prove the full amount owed to you by the defendant, and the court awards you your full claim less the amount of the admitted debt, i.e. R210 000 − R20 000 = R190 000 in your pocket.

With Scenario 1 you receive R180 000. With Scenario 2 you receive R190 000. Which would you rather have?

The only potential drawback is that, having admitted the defendant's claim, you have to pay it, even if you cannot prove your own claim. Once you admit his claim, the defendant is no longer under an obligation to prove it. Before adopting the procedure set out in s 39, you should evaluate the defendant's claim against you. You may decide that the procedure should not be followed if it is clear that the defendant has a weak claim which is difficult to prove.

D10

2.3The nature of the claim – section 46

Section 46 of the Magistrates' Courts Act is very important because it sets out certain types of claims which, *by their nature*, may not be brought in the Magistrates' Courts. Such claims must be brought in the *High Court*, even though they are for R400 000 or under. If a claim is one of those listed in s 46, it is beyond the jurisdiction of the Magistrates' Courts. Even if the parties wish to *consent* to the jurisdiction of the Magistrates' Courts, they are not entitled to do so. The matter must be heard in the High Court.[295] If a matter which falls under s 46 is brought before a Magistrates' Court, that court must, *mero motu*, decline jurisdiction, even though the issue has not been raised in the defendant's plea.[296]

In simple terms, s 46 may be said to involve two types of claims – status claims and specific performance claims.

2.3.1 Status claims

You will notice that certain of the claims listed in s 46 affect the *personal status* of people in some way or another. Such claims are *sensitive* in nature, and it makes sense that they receive the *special consideration* which the High Court is able to afford them. Note that this does not include divorce matters, which some Regional Magistrates' Courts do have the competence to entertain.[297]

2.3.1(a) Wills – section 46(2)(a)

In terms of s 46(2)(*a*), the Magistrates' Courts shall have no jurisdiction in matters in which the validity or interpretation of a will or other testamentary document is in question.[298] It is clear, therefore, that matters relating to the validity or interpretation of a will or other testamentary document must be heard in the High Court.[299]*2.3.1(b)Mental capacity – section 46(2)(b)*

In terms of s 46(2)(*b*), the Magistrates' Courts shall have no jurisdiction in matters in which the status of a person in respect of mental capacity is sought to be affected.[300]

In certain cases, it is necessary to apply to court to declare a person to be of unsound mind and incapable of managing his own affairs. The reason for the application is to enable the court to appoint a *curator bonis* to take over the running of that person's affairs. Such matters must be heard in the High Court.[301]

2.3.1(c) Perpetual silence – section 46(2)(d)

In terms of s 46(2)(*d*), the Magistrates' Courts shall have no jurisdiction in matters in which is sought a decree of perpetual silence.[302]

In the case of *Garber NO v Witwatersrand Jewish Aged Home*, Vermooten AJ described the circumstances under which one would be entitled to seek a decree of perpetual silence as follows:

> **As a general rule a plaintiff may choose his own time within which to institute action against a defendant. Certain exceptions to this rule are recognised both by the Roman-Dutch writers and by our Courts. Thus, where a prospective plaintiff has publicly threatened the defendant that he will bring an action against him, the threatened defendant is entitled to come to Court to ask that the prospective plaintiff be put to terms in regard to the bringing of his action and to claim an**

order for perpetual silence against the latter in respect of the matter in question should he fail to institute his action within the time stipulated by the Court.[303]

Clearly, any such application *must* be heard in the High Court.

2.3.2 Claims for specific performance

In terms of s 46(2)(*c*), the Magistrates' Courts shall have no jurisdiction in matters in which is sought specific performance without an alternative of payment of damages, except in:

1. the rendering of an account in respect of which the claim does not exceed R200 000;
2. the delivery or transfer of property, movable or immovable, not exceeding R200 000 in value;
3. the delivery or transfer of property, movable or immovable, exceeding R200 000 in value, where the consent of the parties has been obtained in terms of s 45.[304]

2.3.2 (a)The general rule

The general rule, subject to the exceptions that will be dealt with below, is that the Magistrates' Courts have no jurisdiction in matters where the plaintiff claims *specific performance without an alternative of payment of damages*.[305]

For example, I agree to paint your house and you agree to pay me R25 000 for my labour. You pay me the R25 000 but I refuse to paint your house. I offer to return the R25 000 to you, but you insist that I must carry out the painting job as agreed. Your claim amounts to a claim for specific performance without the alternative of payment of damages.

There is some debate as to whether specific performance (in the context of s 46) is restricted to those instances in which the plaintiff is seeking performance in terms of a *contract,* or whether it refers to *all cases* in which the plaintiff is seeking some kind of performance.[306] **It seems settled now that the former is the correct interpretation.**[307]

If this is correct, claims for specific performance without an alternative of payment of damages which do not arise out of a *contract* are not excluded from the jurisdiction of the Magistrates' Courts in terms of s 46(2)(*c*).

In practice, however, most claims for specific performance will be for performance in terms of a *contract.*

For those who may be technically minded, note that when we speak of specific *performance* in this context, we mean performance of obligations in terms of a contract, *other than* the obligation to pay money – i.e. performance *ad factum praestandum* as opposed to performance *ad pecuniam solvendam*. To take the example we have just used, if you ask the court to order me to paint the house, that would be asking for an order of specific performance in the context of s 46. But if I ask the court to order you to pay me the R25 000 in terms of the contract, that would not be asking for an order of specific performance in the context of s 46.[308]

2.3.2(b) Exceptions to the general rule

There are three exceptions to the general rule that claims for specific performance without an alternative of payment of damages are beyond the jurisdiction of the Magistrates' Courts.

2.3.2(b)(i) Exception 1 – rendering of an account

If the claim for specific performance without an alternative of payment of damages is for the *rendering of an account*, in respect of which the claim *does not exceed R200 000*, the matter may be heard in the *Magistrates' Court*.[309]

> **A duty to account may arise in different circumstances. For example, this duty may form part of a contract between the parties, or it may arise out of the fact that the parties stand in a fiduciary relationship to one another, as in the case of partners in a partnership.[310] Note, however, that a duty to account does not arise simply because a debtor–creditor relationship exists between the parties.[311]**

Let us take the example of a partnership. Upon the dissolution of the partnership, there is a duty on the partners to account to each other for their respective management or handling of the partnership assets.[312] Even if the partnership is not dissolved, there may be a duty on the managing partner to account to his co-partners at regular intervals.[313] Assume that you are in partnership with another person. In terms of the partnership agreement, you have agreed to split the profits of the partnership 50–50. You believe the profits of the partnership to be in the region of R400 000, but your partner tells you that the profits only amount to R50 000. Your partner manages the partnership business and is responsible for keeping a record of all the income and expenses of the business. In this case, you may institute a claim against your partner in the Magistrates' Court for: (1) the rendering of an account; (2) debate of the account rendered; and (3) payment of the amount found due by the defendant, up to a maximum of R200 000.[314]

2.3.2(b)(ii) Exception 2 – delivery or transfer of property valued at or under R200 000

If the claim for specific performance without an alternative of payment of damages is for the delivery or transfer of property, movable or immovable, which does not exceed R200 000, the matter may be heard in the *Magistrates' Courts*.

This exception covers many claims which arise in practice. For example, you agree to sell me your car for R150 000. I pay you the R150 000, but you refuse to deliver the car to me. You offer to pay the R150 000 back to me, but I insist that I want the car as we agreed. This is a claim for specific performance without an alternative of payment of damages. However, since I am asking for the delivery of movable property, the matter is not beyond the jurisdiction of the Magistrates' Courts.

2.3.2(b)(iii) Exception 3 – delivery or transfer of property valued at over R200 000

If the claim for specific performance without an alternative of payment of damages is for the delivery or transfer of property, movable or immovable, which exceeds R200 000, the matter may be heard in the *Magistrates' Courts*, provided that the parties consent to the jurisdiction of the Magistrates' Courts in terms of s 45.

2.3.2(c) Summary

To sum up, the following methods may be used to decide whether or not a claim for specific performance is excluded from the jurisdiction of the Magistrates' Courts in terms of s 46(2)(*c*):

1. Does the claim for specific performance arise out of contract? If not, then the claim does not fall within the ambit of s 46(2)*(c)*.
2. Is an alternative claim for the payment of damages attached to the claim for specific performance?[315] If so, then the claim does not fall within the ambit of s 46(2)(*c*), and the claim *may* be brought in the Magistrates' Courts.
3. Is the claim for the rendering of an account? If so, then the claim is an exception to s 46(2)(*c*), and the claim may be brought in the Magistrates' Courts, *provided that* the account is for R200 000 or under.
4. Is the claim for the delivery or transfer of property? If so, then the claim is an exception to s 46(2)(*c*), and the claim *may* be brought in the Magistrates' Courts, *provided that*, if the value of the property is *over* R200 000, both parties have *consented in writing* to the jurisdiction of the Magistrates' Courts.

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2.4The area to which the claim may be linked – section 28

Once you know that a matter may be brought in the Magistrates' Courts, the next question you need to ask yourself is: *Which particular Magistrates' Court or Courts has/have jurisdiction to hear this matter?*

This issue is addressed by s 28 of the Magistrates' Courts Act 32 of 1944, and involves tying the matter in question to the *area of jurisdiction* of a particular Magistrates' Court or Courts. In most cases, the jurisdiction of a particular Magistrates' Court is established by asking the following questions:

1. Does the *defendant reside, carry on business*, or *is he employed* within this particular court's area of control?[316]
2. Did the *cause of action arise wholly* within this particular court's area of control?[317]

If the answer to either of these two questions is 'yes', then the court in question does have jurisdiction. Let us look at each of these grounds of jurisdiction, one by one.

2.4.1 Defendant's residence or business or employment – section 28(1)(*a*)

Section 28(1)(*a*) states that a Magistrates' Court will have jurisdiction over any person[318] who *resides*, or *carries on business*, or *is employed* within the district or regional division over which that particular Magistrates' Court exercises jurisdiction. Let us take a closer look at the meaning of each of the above terms.

2.4.1(a) Where does a natural person reside?

There has been much debate over what is meant by the term 'residence' when it applies to natural persons. For example, Harry is a 'gentleman of the road' who sleeps on a different park bench every night. Where does he 'reside'? The courts have not given a definitive answer to this question since it is a practical issue to be decided on the particular facts of each case. The general approach of the courts is clear enough, as is evident in the following extract from the case of *Beedle & Co v Bowley*:

> **When it is said of an individual that he resides at a place it is obviously meant that it is his home, his place of abode, the place where he generally sleeps after the work of the day is done.**[319]

When it comes to determining jurisdiction, it is not possible for a person to claim that he does not reside anywhere. As Smalberger ADCJ stated in the case of *Mayne v Main*:

> **For purposes of jurisdiction our courts do not recognise the concept of a *vagabundus*.**[320]
>
> **It is possible, however, for a person to have more than one place of residence.**[321] **For example, a student may spend part of the year residing at a university hostel or in 'digs', and the other part of the year at home with his parents. However, although the student may have more than one place of residence, it is not possible for him to reside in two places at one time.**[322] **In order for a particular court to exercise jurisdiction over the student by virtue of his place of residence, the student must have been residing within the territorial area of jurisdiction of that court at the time legal proceedings were instituted, i.e. at the time the summons or notice of motion was served.**[323] **A further point to note is that you do not become a resident of a place if you are only visiting that place for a short period. For example, if you leave your home in Johannesburg to spend a two-week holiday in Durban, you do not become a resident of Durban.**[324] **Further, do not confuse the concept of 'residence' with that of 'domicile'. While it is possible to have more than one place of residence, it is not possible to have more than one place of domicile.**[325] **Finally, note that choosing an address as *domicilium citandi et executandi* does not mean that you 'reside' at that address.**[326]

2.4.1(b)Where does a company or close corporation reside?

As strange as it may seem, for legal purposes, companies and close corporations are said to 'reside' at a particular place.[327] In the case of certain close corporations, it is even possible for the close corporation concerned to 'reside' at two different places at the same time. The best way to understand this somewhat confusing area of the law is to examine the legal position before and after the enactment of the Companies Act 71 of 2008. Prior to the enactment of the said Act, both companies and close corporations were said to reside at either of two places:

1. the place of central control of the company or close corporation
   as well as
2. the place where the registered office of the company or close corporation was located.[328]

The '*place of central control'* of a company (referred to in point 1 above) was taken to mean:

> **… the place where its general administration is located, i.e. at the seat of its central management and control, from where the general superintendence of its affairs takes place, and where, consequently, it is said that it carries on its real or principal business.**[329]

The '*registered office*' of a company or close corporation (referred to in point 2 above) was (and still is) the office listed in the official forms used when a company or close corporation was registered.

Before the enactment of the Companies Act 71 of 2008, it was possible – in the case of both companies and close corporations – for the 'registered office' to be situated in one place (often,

for convenience, the address of the financial or legal advisors who 'did the paperwork' in forming the company or close corporation), and the 'place of central control' (or 'head office' or 'principle office', if you prefer), to be situated in another place. Both places would count as the '*place of residence*' of the company or close corporation concerned. But the legal position appears to have changed with the enactment of the Companies Act 71 of 2008. Note, however, that the change appears to have affected only companies, and *not* close corporations. The 'old' legal position sketched above – i.e. two possible places of 'residence' – still seems to apply in the case of close corporations. Let us now turn our focus to companies in particular, and examine the current legal situation – i.e. after the enactment of the Companies Act 71 of 2008 – with regard to where companies may be said to 'reside' for legal purposes.'

In the important case of *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd (Nedbank Ltd Intervening)*,[330] the High Court held that, for purposes of ascertaining jurisdiction, a local company resides *only* at the place of its registered office. In other words, according to this judgment, it is no longer possible for companies operating in South Africa to 'reside' in two different places in the country at the same time. If you wish to use 'residence' as a ground for jurisdiction over a company, you must be able to show the court concerned that the 'registered office' of the company – i.e. the address which appears in the official records – is situated within the territorial jurisdiction of that court.

Section 23(3) of the Companies Act 71 of 2008 does require every company operating in South Africa to: 1. continuously maintain one office in the country; and 2. register the address of its office, or principle office, if it has more than one office. This means, in effect, that the Companies Act requires the 'registered office' of a company to be its 'principle office', with the 'principle office' indicating – using the old pre-2008 expressions which all convey the same idea – the 'place of central control' or 'head office' or 'principle place of business'. If you are proceeding against a company, however, it would seem that you do not need to concern yourself with whether or not that company has complied with this provision. If you wish to use the residence of that company to establish jurisdiction, all you need to concern yourself with is the address which is listed in the official records as the registered office of that company. The registered office is now taken to be the one and only residence of the company. It is worth quoting the *Sibakhulu Construction* case at some length in order to reinforce the above points:

> **[T]he 2008 Companies Act retains the institution of a registered office, being an address at which the outside world can transact with the company effectively. A material distinction between a 'registered office' under the 2008 Act and its predecessors, however, is that under the current Act the registered office must be the company's only office, alternatively, if it has more than one office, its 'principal office'. The term 'principal office' is not specially defined in the statute. It seems from the context – more particularly, the requirements of what must be kept or accessible there – that it is intended to denote the place where the administrative business of the company is principally conducted, in the sense of being the place where the company's general administration is centred – in other words, the company's 'principal place of business' in the sense described in *TW Beckett & Co Ltd v H Kroomer Ltd* … Thus whereas the 1973 Companies Act expressly acknowledged the possibility of a distinction between a company's registered office and its 'main place of business', the 2008 Act requires the registered office and the principal place of business for jurisdictional purposes to be at one and the same address …**
>
> **[T]he apparent object of the provision [i.e. s 23(3) of the Companies Act 71 of 2008] … appears to be to end the potential for a company to have more than one**

place of residence for jurisdictional purposes and that the statute should not be interpreted in a manner that would defeat its evident objects …

[F]or purposes of jurisdiction a local company resides only at the place of its registered office and … the reasoning which led to a different conclusion in *Dairy Board* and *Bisonboard* is no longer supported by the current statutory framework …

The place of a company's registered office is objectively ascertainable. Any dispute as to whether the registered office should be at a different address by reason of an argument that the actual location of the company's principal office is elsewhere is a matter that is not - primarily at least - intended to be one to concern the courts; being a matter, if it arises, falling instead to be determined and corrected administratively by the Companies and Intellectual Property Commission under the provisions of Part D of Chapter 7 of the 2008 Act …

2.4.1(c) Where does a partnership reside?

Unlike a company or close corporation, a partnership is not a legal person. One would think, therefore, that it is not possible for a partnership as such to have a residence, but this is not the case. In terms of s 2 of the Interpretation Act,[331] a partnership is defined as a 'person'. Although this does not make a partnership a legal or juristic person, the Supreme Court of Appeal has held that if the principal place of business of a partnership (i.e. the place of its central management and actual control) is located within the area of jurisdiction of a particular court, that should be sufficient to confer jurisdiction on that court.[332] A partnership 'resides', for jurisdictional purposes, at the place where its principal place of business is situated.[333]

2.4.1(d) Where does the state reside?

It may be argued that the residence of the state is Pretoria, but there is at present no absolute certainty on this point.[334]

2.4.1(e) What does 'carries on business' mean?

There is no general test to determine where a defendant 'carries on business'. In each case the operations of the defendant must be considered to determine what the business is (i.e. what it does). For example, a logistics company and a manufacturing business conduct very different operations, and, in determining where each 'carries on business', different considerations will be relevant. According to *Jones and Buckle*, the phrase 'carries on business' in s 28(1)(*a*) implies that business is conducted in a particular place from day to day, which involves regularity.[335]

Although a person may carry on business in more than one district or regional division at a time, a person whose permanent place of business is situated in one district or regional division, but who temporarily carries on business in another district or regional division, cannot claim that the latter district or regional division is his or her place of business.[336] For example, a building contractor who is building houses in three or four different areas cannot be said to be carrying on business in each of those areas, since his business at those places is only temporary.

An individual need not have a place of business at a particular place in order to be said to be carrying on business at that place. It is submitted, for example, that a fruit seller who sells fruit from the back of a bakkie and travels from place to place on the same fixed route year after year, may be said to carry on business at each of his stops on that fixed route. In this case, although the fruit seller does not have a particular place of business (in the sense of business premises) the

regularity with which he conducts his business at each place along his fixed route, would allow each of his stops to qualify as a place at which he carries on business.

One would think that the same reasoning would apply in the case of a company or close corporation. Assume that a clothing company has five major retail outlets. Surely each of these outlets would qualify as a place where the company carries on business? However, in the case of *Minister of Law and Order v Patterson*, Rabie CJ held that the place of business of a trading corporation is restricted, for jurisdictional purposes, to the place where its central management is exercised.[337] In the case of *General Accident Insurance Co SA Ltd v Mbonambi*, Friedman J disagreed with the decision reached in the *Patterson*case, but considered himself bound by that decision.[338] The difficulty in moving away from the position taken by Rabie CJ in the *Patterson* case was articulated by Friedman J as follows:

> **Even if I were free to reconsider the question of where a company 'carries on business' for jurisdictional purposes, I am by no means certain precisely where a line falls to be drawn. Clearly, convenience dictates that some sort of limitation should be placed upon the meaning of the expression, but to formulate such a limitation, if one abandons the notion of the place where the central management and control of the company actually abides, is fraught with evident difficulties. For every formulation one may be tempted to suggest, one can think of numerous anomalous results which could conceivably follow. It may well be, therefore, that in the case of a company one should in fact equate the place where it carries on business to its 'residence'.**[339]

The *current position*, therefore, seems to be that in relation to companies and close corporations, the phrase 'carries on business' in s 28(1)(*a*) is superfluous, because the meaning of this phrase (as interpreted by the courts) is subsumed by the meaning of 'resides' (as interpreted by the courts).

You would think that the state could be said to carry on business at every state office throughout the country. In *Minister of Law and Order v Patterson*, Rabie CJ assumed, without deciding the matter, that the state does not carry on business in the normal commercial sense of the expression. However, for the sake of convenience and certainty, the court adopted a similar approach to that pertaining to companies, i.e. the state is deemed to carry on business at the place where its central management and control abides.[340] This would seem to be Pretoria.

2.4.1(f) What does 'is employed' mean?

Here we are dealing with people who are employed by others, rather than those who carry on business for their own account. Some permanence is required. For example, a person who is normally employed in one district, but who goes to another district for a day or two to perform some task or other, cannot be said to be employed in the latter district, for jurisdictional purposes. Remember, the date of the *service* of summons, and not the *issue* of summons, is the time at which the incidence of jurisdiction is determined.

2.4.2 Cause of action arising 'wholly' – section 28(1)(*d*)

Section 28(1)(*d*) states that a Magistrates' Court will have jurisdiction over:

> **any person … if the cause of action arose wholly within the district or regional division …**

The phrase, 'if the cause of action arose wholly within the district' was defined as follows by the Appellate Division in the case of *McKenzie v Farmers' Co-operative Meat Industries Ltd*:

> **Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the 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.**[341]

In other words, if you want to rely on s 28(1)(*d*) for jurisdiction, then *every fact* which your client must prove in order to succeed in his or her claim, must have arisen within the district or regional division of the Magistrates' Court in which you want to institute action. It does not matter if certain pieces of the *evidence* which are necessary to prove those facts arose outside the district or regional division of the particular Magistrates' Court. Therefore, it is important to distinguish between:

1. the *facts* which must be proved in order to constitute a valid cause of action. In Latin, these are called the *facta probanda*; and
2. all the different bits of *evidence* that must be led to prove the *facta probanda*. In Latin, these are called the *facta probantia*.

As Ogilvie Thompson JA stated in the case of *Dusheiko v Milburn*:

> **I venture to think that most difficulties will in practice be resolved if, in applying the definition stated in *McKenzie v Farmers' Co-operative Meat Industries Ltd* (supra) to any given case, it is borne in mind that the definition relates only to 'material facts', and if at the same time due regard be paid to the distinction between the *facta probanda* and the *facta probantia*.**[342]

The crucial point to remember is that for a cause of action to arise wholly within the district or regional division of a particular Magistrates' Court, all the *facta probanda*, but not necessarily all the *facta probantia*, must have occurred within that district or regional division.

The case of *King's Transport v Viljoen* is a good illustration of the distinction between the *facta probanda* and the *facta probantia*.[343] This case involved a motor vehicle collision which had taken place between the plaintiff's vehicle and the defendant's vehicle in Somerset West. At the time of the collision, the defendant's vehicle was being driven by one of the defendant's employees within the course and scope of his employment. In other words, the defendant was being sued on the basis of vicarious liability, in *his* capacity as the employer of the driver of the defendant's vehicle. The plaintiff instituted the action in the district of Somerset West on the basis that the cause of action had arisen wholly in that district. The defendant disputed that the Magistrates' Court at Somerset West had jurisdiction to hear the matter, claiming that the cause of action had not arisen wholly in the district of Somerset West. The defendant argued that since *he* was being sued on the basis of vicarious liability, the plaintiff not only had to prove the events surrounding the collision, but also that the driver of the defendant's vehicle was in fact employed by the defendant. Since the employment contract between the defendant and the defendant's driver had been concluded in the magisterial district of Salt River, the defendant claimed that the cause of action in this case had arisen *partly* in Salt River and *partly* in Somerset

West. The Court did *not* accept this argument and found that the signing of the contract of employment between the defendant and his driver was part of the *facta probantia* of the case and not part of the *facta probanda*. It was not the fact of the signing of the employment contract, but the fact that the driver was acting within the course and scope of his employment at the time and place of the collision that formed part of the *facta probanda* of this case. The signing of the contract of employment was only part of the *facta probantia*, that is, a piece of evidence to be adduced to prove that the driver was acting within the course and scope of his employment at the time and place of the collision.

Different considerations arise when the cause of action is based on a contract and where it arises in delict. A cause of action based on delict will usually, but not always, arise wholly in the place the wrongful act was committed. Usually, the wrongful act and the damage occur at the same time and place, but this is not always the case, leading to potential problems in relation to jurisdiction based on s 28(1)(*d*). For example, assume that a manufacturer of cars negligently manufactures a car with defective brakes at a factory in Pretoria. The car is sold to someone in Durban and the brakes malfunction three months later while the car is being driven in Durban, causing serious injury to the person who bought the car. Where does the cause of action arise? The High Court grappled with a very similar problem in the case of *Thomas v BMW South Africa (Pty) Ltd* and concluded that: '*the locus of a delict for jurisdictional purposes … should be determined with reference to the materiality of and the number of the ingredients thereof which have occurred in a court's area of jurisdiction.*'[344] It may be possible, using the logic advanced in *Thomas v BMW*, to conclude that the cause of action in our example arose wholly in Durban. It must be borne in mind, however, that *Thomas v BMW* was a matter dealing with High Court jurisdiction. In a Magistrates' Court matter involving a situation similar to that described in our example, it would be much safer for you to assume that part of the cause of action arose in Pretoria and the other part in Durban. This would mean that you could not rely on s 28(1)(*d*) for jurisdiction.

Causes of action based on contract give rise to even more problems in practice. *Jones and Buckle* state, inter alia, as follows in relation to actions in contract:

> **A plaintiff suing on a contract must ordinarily prove both the conclusion of the contract and its terms. It follows from the first requirement that both offer and acceptance must have been made in the same district; and if they were not, then the whole cause of action cannot be said to have arisen in any one district.**[345]

If it is correct, however, that the conclusion of the contract is part of the *facta probanda* in cases based on contract, why does this mean that *both* the *offer* and *acceptance* must have been made in the same district? We respectfully submit that after a valid offer is made, that offer continues in existence until such time it is either accepted, rejected, or withdrawn. If the offer is accepted, it may be said that a valid contract has been concluded *at the time and place of acceptance* (that is, generally, when acceptance is communicated to the offeror).[346] It is submitted that it is at least arguable that the time and place the offer was *first* made are details which form part of the *facta probantia*.

Of course, determining the *time and place* of the acceptance of an offer (which, as we have said, for jurisdictional purposes is the time and place of the conclusion of the contract) may give rise to certain difficulties. Usually, the offer is said to have been accepted at the time and place it came to the attention of the offeror. This is the so-called 'information theory' of acceptance. For example, assume the offeror lives in Cape Town and the offeree lives in Durban. The offeror telephones the offeree and makes her an offer. The offeree says she will consider the offer. Two

weeks later, the offeree telephones the offeror and tells him that she accepts the offer. The offer may be said to have been accepted in Cape Town at the time that the offeror heard the acceptance of his offer. The place of the conclusion of the contract is therefore Cape Town.

Apart from the *conclusion* of the contract, remember that you will also have to prove that the contract was *breached*. Thus, the breach also forms part of the *facta probanda*. For jurisdictional purposes, the place of breach is usually the place where performance of the contract was due by the defendant who failed to perform, or the place where the defendant performed his obligations in a defective manner.[347] Furthermore, apart from the place of conclusion and breach, the place in which the plaintiff *performed* his obligations under the contract (assuming such obligations were due to be performed before the defendant was to perform his obligations) may also form part of the *facta probanda.*

All in all, you have a sequence of events in contractual matters which may look something like this: *offer* by the plaintiff – followed by – *acceptance* by the defendant, amounting to a *conclusion* of the contract – followed by – *performance* by the plaintiff of his obligations under the contract – followed by – failure to perform or defective performance by the defendant, amounting to a *breach* of the contract. As we have submitted above, it may be possible to argue that the time and place the offer was first made should be regarded as details which form part of the *facta probantia*. It may even be possible to extend this argument to the submission that the time and place the contract was concluded, as well as the time and place the plaintiff performed his obligations under the contract, should be regarded as details forming part of the *facta probantia*. These arguments could, perhaps, be advanced by adopting the same logic as that employed in *King's Transport v Viljoen*[348] and *Herold v Rand Debt Collecting Company*.[349] After all, is not the relevant question for jurisdictional purposes the following: 'At the time and place of the breach of the contract, was there a valid contract in existence?'

The approach outlined above would afford a much wider scope to s 28(1)(*d*) of the Magistrates' Courts Act than is at present the case. However, it is certainly not the legal position adopted by our courts at this time, and it is not our function in a book such as this to suggest changes to the law. To be safe, when relying on s 28(1)(*d*) of the Magistrates' Courts Act for jurisdiction, you are advised to ensure that each and every one of the elements listed above occurred within the district or regional division of the particular Magistrates' Court in which you intend to institute legal proceedings. We suggest that you examine the circumstances of the particular case in which you are involved, and carefully analyse the relevant case law in light of the particular circumstances, before reaching a decision in practice.

2.4.3 Other grounds of territorial jurisdiction

2.4.3(a) Partnerships – section 28(1)(b)

A Magistrates' Court possesses jurisdiction over 'any partnership which has business premises situated or any member whereof resides within the district or regional division' of that Magistrates' Court.[350]

2.4.3(b) Incidental proceedings – section 28(1)(c)

A Magistrates' Court has jurisdiction over 'any person whatever, in respect of any proceedings incidental to any action or proceeding instituted in the court by such person himself or herself.'[351] In other words, if you start legal proceedings in a particular Magistrates' Court, you cannot object to the jurisdiction of that court in respect of any proceedings which are *incidental* to those proceedings.

Deciding whether or not proceedings are incidental to the proceedings originally instituted may be difficult, especially in the case of counterclaims. You may be tempted to think that a counterclaim is *always* incidental to the original action, but this is *not* the case. According to Paterson, it is settled that 'incidental' means 'arising out of the same facts'.[352] In other words, if a claim in *reconvention* (i.e. the counterclaim by the defendant against the plaintiff) *arises out of the same facts* as the claim in *convention* (i.e. the claim by the plaintiff against the defendant), the claim in reconvention will be incidental to the claim in convention. In terms of s 28(1)(*c*), the Magistrates' Court in which the plaintiff brought his claim in convention will have jurisdiction to hear the defendant's claim in reconvention. Paterson gives the following examples of counterclaims which are incidental to the claims brought in convention:

> **Typical instances would be where the dispute concerns a breach of contract and both parties claim the other is in breach, or, where there is a claim for damages and the defendant in convention wishes to plead contributory negligence on the part of the plaintiff.**[353]

It is often the case, however, that the counterclaim has nothing to do with the claim in convention. For example, assume that A sues B for an alleged breach of contract and that B wants to counterclaim for injuries sustained during an alleged assault on him by A. The counterclaim (assault resulting in injury), did *not* arise out of the same facts as the claim in convention (breach of contract). Therefore, the counterclaim is *not* incidental to the claim in convention, and B may not rely on s 28(1)(*c*) for jurisdiction. If we assume that A does not reside, carry on business, and is not employed, in the district or regional division of the particular Magistrates' Court in which he has sued B, and that the alleged assault on B did not occur in that district or regional division, B will have to bring his action for assault not as a counterclaim, but as a separate action in a separate court which has jurisdiction to hear that claim. *Jones and Buckle* agree with this general approach and describe what they believe to be the scope of s 28(1)(*c*) as follows:

> **It is submitted that the language used in s 28(1)(*c*) points to matters which are really incidents of the claim in convention, that is, interlocutory orders, orders for costs, issue of execution, setting aside of judgment, etc, and which may have to be made against a defendant as well as against a plaintiff. In regard to such incidental matters a plaintiff may fairly be said to submit to the jurisdiction of the court wherein he issues summons; he must know that no case could be dealt with if one of the parties was at liberty to ignore necessary incidental orders of the court, and he must be taken to have agreed to that court hearing and disposing of such incidental matters.**[354]

2.4.3(c) Interpleader proceedings – section 28(1)(e)

Section 28(1)(*e*) relates to jurisdiction in respect of interpleader proceedings. Later in this book, we will be dealing with interpleader proceedings in more detail, but for the moment you may think of an *interpleader* as a procedure for dealing with the situation in which one person (the 'stakeholder') has possession of property which is not his, but which is being claimed by two other people (the 'claimants'), each of whom claims exclusive ownership of the property. The stakeholder is not sure to which claimant he should give the property, and the stakeholder then uses the interpleader procedure to ask the court to decide this issue.[355] In practice, the sheriff of the court often finds himself in the position of a stakeholder. What happens is that the sheriff goes out and attaches the property of a judgment debtor on behalf of a judgment creditor. Someone then pops out of the woodwork and claims that the property which has been attached

does not belong to the judgment debtor, but in fact belongs to him or her. For example, the spouse of a judgment debtor married out of community of property may claim that the attached property belongs to him or her and not to his or her spouse. Therefore, both the spouse and the judgment creditor lay claim to the attached property, and the sheriff is in the position of a stakeholder.

In terms of s 28(1)(*e*)(i), if the person who had the goods attached (i.e. the execution creditor), as well as all the claimants to the goods (i.e. the spouse of the execution debtor in our example), reside, or are employed, or carry on business within the district or regional division of a particular Magistrates' Court, then that court will possess jurisdiction to hear interpleader proceedings in relation to the goods attached.

In terms of s 28(1)(*e*)(ii), the court out of which the warrant of execution was issued will possess jurisdiction to hear the interpleader claim. Once a warrant of execution is issued, the property of the judgment debtor may be attached within the district of another court.[356] If this happens, it is clear from the wording of s 35(2), that an interpleader summons may be issued out of the court of the district in which the judgment debtor's property was attached.[357] In other words, when ss 28(1)(*e*)(ii) and 35(2) are read together, both the court out of which the warrant of execution was issued (usually the court which granted judgment in the matter), as well as the court within whose area the property of the judgment debtor was attached, will possess jurisdiction to hear interpleader proceedings in relation to that property.[358]

Section 28(1)*(e)*(iii) relates to interpleader proceedings taken under s 69(2) of the Magistrates' Courts Act, i.e. those situations in which 'two or more persons make adverse claims to any property in the custody or possession of a third party …' .[359] In other words, this subsection deals with interpleader claims generally, which do not involve attachments of the property claimed by the sheriff of the court. Here, the stakeholder is simply a person who has custody or possession of property which is claimed by two or more claimants. In terms of s 28(1)(*e*)(iii), the court within whose district or regional division the stakeholder resides, is employed, or carries on business, will possess jurisdiction to hear interpleader proceedings in relation to the goods in the custody or possession of the stakeholder.

In terms of s 28(1)(*e*)(iv), if all parties to an interpleader matter consent to the jurisdiction of a particular Magistrates' Court, that court will possess jurisdiction to hear the matter.

2.4.3(d) Consent – section 28(1)(f)

If you are the defendant or respondent in a Magistrates' Court matter and you enter an appearance to defend or oppose the matter, and then take no objection to the jurisdiction of that court, it will be assumed that you consent to the jurisdiction of the court. This section gives recognition to the common-law principle of submission to jurisdiction.

Note that by simply entering an appearance to defend or oppose a matter, you are not consenting to the jurisdiction of the court.[360] If you believe that the court does not possess jurisdiction, usually you will first enter an appearance to defend or oppose (to stop the other side taking default judgment against your client), and then follow up with a special plea (which will be included with your plea on the merits) claiming that the court lacks jurisdiction.[361]

Note that jurisdiction cannot be conferred under s 28(1)(*f*) where the matter is one which falls under s 46.[362] Furthermore, it would seem that s 28(1)(*f*) may not be used to circumvent the requirement that where the amount claimed is over R200 000 or R400 000 (as the case may be),

in terms of s 45(1) the parties must consent *in writing* in order to bring the matter within the jurisdiction of the Magistrates' Courts.[363] The matters listed in s 46, as well as those matters where over R200 000 or R400 000 (as the case may be) is being claimed and no written consent has been given, remain beyond the jurisdiction of the Magistrates' Courts. Even though the defendant does not object to the jurisdiction of the court in such a case, the matter remains beyond the jurisdiction of that court. The court itself (*mero motu*) must decline jurisdiction in such a case.

Section 28(1)(*f*) is thus restricted in its application. Despite this, the subsection may provide you with a very useful fall-back position if you are acting for a plaintiff or applicant in a matter. In such a case you will, of course, have relied on one of the other grounds of jurisdiction set out in s 28(1) of the Magistrates' Courts Act. It may happen that, for some reason or other, the ground of jurisdiction upon which you were relying falls away, for example, it turns out that the defendant does not reside in the district or regional division as you thought he did; or that the cause of action did not arise wholly in the district or regional division as you believed. If the defendant enters an appearance to defend or oppose the matter, and then takes no objection to the jurisdiction of the court, you may be able to rely on s 28(1)(*f*) for jurisdiction.

2.4.3(e) Immovable property – section 28(1)(g)

A Magistrates' Court has jurisdiction over any person who owns immovable property within the district or regional division served by that court, in actions in respect of such property or in respect of mortgage bonds thereon. The learned authors of *Jones and Buckle* submit that 'for the purposes of the section a direct relationship between the action and the immovable property or mortgage bond thereon is required.'[364]

2.4.4 Divorce and related matters – which particular Regional Magistrates' Court

As pointed out previously in Section 2.2.1(*i*) above, certain Regional Magistrates' Courts have been granted jurisdiction to hear and determine suits relating to the nullity of a marriage or a civil union and relating to divorce between persons and to decide upon any question arising therefrom, and to hear any matter and grant any order provided for in terms of the Recognition of Customary Marriages Act.[365] As to the issue of which particular Regional Magistrates' Court may hear a particular matter, s 28(1A) provides that for the purposes of s 29(1B), a Regional Magistrates' Court shall have jurisdiction if the parties are or if *either of the parties* is domiciled in the area of jurisdiction of the court on the date on which proceedings are instituted; or ordinarily resident in the area of jurisdiction of the court on the said date and has or have been ordinarily resident in the Republic for a period of not less than one year immediately prior to that date.

3 High Court jurisdiction

3.1 General overview

The power of the High Court is embodied in s 169 of the Constitution.[366] This section empowers the High Court to decide any matter apart from certain matters specifically excluded from its jurisdiction. As far as cases that do not involve constitutional issues are concerned, the only matters which may *not* be decided by the High Court are those assigned to another type of court by an Act of Parliament.[367] In relation to constitutional matters, there are two types of matters which may not be decided by the High Court. Firstly, it may not hear matters which only the

Constitutional Court may decide.[368] Secondly, it may not hear matters which the Constitutional Court has agreed, in the interests of justice, to hear directly in terms of s 167(6)(*a*) of the Constitution[369] and those which have been assigned by an Act of Parliament to another court of a status similar to that of the High Court.[370]

The jurisdictional power of the High Court is further regulated in terms of s 21 of the Superior Courts Act (previously s 19 of the Supreme Court Act).[371] For purposes of this introduction, it is sufficient to focus on the following important extract from this section:

> **A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance.**[372]

Our courts – referring to very similar wording in s 19 of the old Supreme Court Act – have held that the phrases used broadly restate the common-law position.[373] Crucially, our courts have interpreted the term 'causes arising', as it appears in the above extract, to mean not 'causes of action arising' but 'legal proceedings duly arising'. A proceeding which *duly arises* in a court is one over which that court has jurisdiction according to *common law*.[374] In other words (to make a long story short), the manner in which our courts have interpreted s 19(1) of the Supreme Court Act (the old statutory basis for jurisdiction) and now section 21 of the Superior Courts Act (the new statutory basis) leads us back to the common law.[375] Another way to explain this would be to point out that the intention of the legislature, in enacting s 21 of the Superior Courts Act (and its predecessor, s 19 of the Supreme Court Act – both of which are drafted in essentially identical terms) was not to 'codify' the jurisdiction of the High Court, but rather to interfere as little as possible with the common law in this area.[376] Thus, it is to *common law* that we must turn in order to establish the fundamental principles of High Court jurisdiction, bearing in mind that there may be certain statutory provisions which alter the common-law position in specific areas.[377]

D12 In approaching this complex topic, we shall start by dealing with the *doctrine of effectiveness*, the most important general principle underlying High Court jurisdiction. With this general principle in mind, we shall discuss the three foundations or grounds of High Court jurisdiction in terms of the common law, termed *rationes*in Latin, which are most commonly employed in practice to establish the jurisdiction of a particular court:

1. *Ratione domicilii* (i.e. defendant/respondent is domiciled or resident in the court's area);
2. *Ratione res gestae* (i.e. the cause of action arose in the court's area); and
3. *Ratione rei sitae* (i.e. the property involved in the claim is situated in the court's area).

Having dealt with the above three grounds of jurisdiction in the abstract, we shall discuss the practical application of these grounds in the context of the two most common types of claims which arise in practice, namely:

1. *Claims relating to property*; and
2. *Claims sounding in money*.

Then we shall proceed to discuss the jurisdictional principles applicable to certain 'additional claims', some of which are common in practice and others less so. We feel that it is advisable to deal with these claims under a separate heading, in order to keep your mind map as user-friendly as possible. The additional claims are the following:

1. *Claims against defendants/respondents who are neither domiciled nor resident in this country*: Such a defendant or respondent is termed a 'foreign *peregrinus*'. In the case of a claim sounding

in money against a foreign *peregrinus*, an attachment to found or confirm jurisdiction (*ad fundandam/confirmandam jurisdictionem*) is required. Further, the principle of consent to jurisdiction (*prorogatio*) arises most pertinently in relation to claims of this type, and will be discussed under this section.

2. Matrimonial claims: The common-law grounds of jurisdiction are not applicable in the case of claims brought in terms of the Divorce Act,[378] since jurisdiction is regulated by the said Act.
3. *Claims for interdicts*: Specific jurisdictional principles apply in such cases.
4. *Single claims involving two or more jurisdictions*: In such cases it may be possible to rely on the so-called *ratione causae continentiae* to ground jurisdiction in one or other of the courts involved.

Having dealt with the jurisdictional principles applicable to the additional claims listed above, we shall conclude our examination of High Court jurisdiction with an extended discussion of *inherent jurisdiction*. Inherent jurisdiction is a discretionary power held by the High Court to prevent injustice in certain situations.

3.2 The doctrine of effectiveness

The doctrine of effectiveness is the most important general principle underlying the jurisdiction of the High Court in the majority of cases. The basic idea behind this doctrine is that you should not waste a court's time by bringing a particular matter before it if it is clear from the outset that the court's judgment will not be effective.[379] The second edition of *Pollak on Jurisdiction* emphasises the fundamental importance of the doctrine of effectiveness, quoting the court in *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries*:

> **Save for the principle of voluntary submission to jurisdiction and possibly in the case of the exclusive competency of the court of domicile in an action affecting status, the basic principle of jurisdiction in our law is that of effectiveness.**[380]

An effective judgment is one which can be enforced. To enforce its judgment, a court needs to have control over the judgment debtor's person or property. In most cases, judgments are enforced by means of a *writ of execution* in terms of which the sheriff of the court attaches and sells the defendant's property to secure payment (in part or in full) of the judgment debt. In some cases, judgments are enforced by means of a *writ of arrest* in terms of which the judgment debtor is arrested and charged with contempt of court.[381]

Although the doctrine of effectiveness is the most important doctrine underlying High Court jurisdiction, it is not the only such doctrine. The doctrine of voluntary submission to the jurisdiction of the court (*prorogatio*) may also be regarded as underpinning High Court jurisdiction, although to a much more limited extent.[382] As Van Schalkwyk AJ stated in the case of *Utah International Inc v Honeth and Others*:

> **The doctrine of consent is, of course, largely incompatible with the doctrine of effectiveness. But, like effectiveness, it is part of our law and on the ascendancy.**[383]

We deal with the principle of submission to jurisdiction later in this section.[384]

D13

3.3The three most common grounds of High Court jurisdiction

At the outset, it is worth quoting from the seminal judgment of De Villiers CJ in the case of *Einwald v The German West African Company*, in which the learned former Chief Justice commented as follows on the various *rationes jurisdictiones* recognised by our common law:

> **What then are the grounds upon which the jurisdiction of this Court can be exercised, in respect of any contract over any defendant without his consent, express or implied? The grounds are threefold; *viz* by virtue of the defendant's domicile being here, by virtue of the contract either having been entered into here or having to be performed here, and by virtue of the subject matter in an action *in rem* being situated in this Colony.**[385]

The threefold division referred to by De Villiers CJ will be followed in our discussion of the various grounds of jurisdiction, i.e. *ratione domicilii*, *ratione rei gestae* (including the *ratione contractus* and the *ratione delicti commissi*), and *ratione rei sitae*.[386]

3.3.1 Ratione domicilii

In terms of the general common-law principle expressed by the Latin term *actor sequitur forum rei*, the plaintiff/applicant must follow the defendant/respondent to his (the defendant's/respondent's) place of domicile or residence, and institute action against him there.[387] The court which exercises territorial jurisdiction over the area within which the defendant/respondent is either resident or domiciled is known as the *forum domicilii*. In order to claim jurisdiction by virtue of the *ratione domicilii*, you must institute legal proceedings against the defendant/respondent in the *forum domicilii*.

When dealing with High Court jurisdiction, it is important to note that either domicile or residence is sufficient to constitute a particular court as the *forum domicilii*.[388] This was definitively decided by the Appellate Division in the case of *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd*, in which Hoexter JA stated as follows:

> **Provided that the defendant is an *incola*[389] of the court's area of jurisdiction, the court will be prepared to hear the case … Accordingly, if the defendant is either domiciled or resident in the area, this will be a sufficient jurisdictional connecting factor. Neither of these requirements predicates the actual physical presence of the defendant within the court's area. If the defendant is present, he may be brought to court by summons in the ordinary manner; if he is absent, then, subject to the Rules of Court, summons may be effected by edictal citation or substituted service, as the case may be. Domicile and residence suggest no more than a notional connection with the court's area. Absence is relevant only in regard to the procedural matter of service.**[390]

Having dealt with the meaning of residence in our discussion relating to the jurisdiction of the Magistrates' Courts, let us now turn to a discussion of the meaning of domicile. In terms of the Domicile Act:

> **A domicile of choice shall be acquired by a person when he is lawfully present at a particular place and has the intention to settle there for an indefinite period.**[391]

According to Chetty J in the case of *Chinatex Oriental Trading Co v Erskine*,[392] a domicile of choice may be acquired if the following two elements are satisfied:

1. Physical presence (an objective fact); and

2. An intention to remain indefinitely (a subjective test).

According to the learned judge:

> **A person's physical presence requires more than a visit or a sojourn to the country. Accordingly, the longer the person is settled at a particular place, the greater the likelihood of a court regarding him as resident there for the purposes of domicile … The second element, *animus manendi*, does not require an intention to remain permanently. The person must display a state of mind which is consistent with the intention of remaining indefinitely, which intention need not be irrevocable in order to show that a domicile of choice has been acquired.**[393]

According to one legal academic:

> **An unfortunate result of the statutory intention requirement to settle for an indefinite period is that residence for a limited period or for a specific purpose, even though it may involve a very lengthy period, will be excluded. This means that a person may reside at a particular place for a period of ten years (in terms of a contract of employment, for example) and not be able to acquire a domicile there.**[394]

Note that whereas it is possible to have more than one place of residence (e.g. a university student who resides in a university residence for part of the year and at home for the rest of the year), it is not possible to have more than one place of domicile. If you wish to institute legal proceedings against the university student mentioned in the example using his place of residence in order to found jurisdiction, you must make sure that the student is actually residing within the area of jurisdiction of the court out of which you have issued the summons or notice of motion at the time the legal proceedings are instituted, i.e. the date of service of the summons or notice of motion.[395]

Once jurisdiction has been established, it continues to exist until the end of the matter, even if the grounds on which jurisdiction was established no longer exist. For example, if a woman were to leave the jurisdiction of a division in which she had instituted divorce proceedings, the division in question would still have jurisdiction to adjudicate upon the matter.

Finally, note that a person does not lose his domicile until he has acquired another domicile.[396] So, assume that a person is domiciled in country A, but then leaves country A with the intention never to return. Assume further that he starts to travel the world looking for another country in which to settle down. In this case, he will remain domiciled in country A until he settles down in another country (i.e. he is physically present in that country) and forms the requisite intention to remain indefinitely in that other country (i.e. he has the requisite intention to acquire a domicile of choice as explained above).[397]

3.3.2 *Ratione rei gestae*

The term *res gestae* simply means 'thing done', although the term is generally used in a somewhat narrower sense to refer to the act/s or transaction/s in issue in a particular case, or the critical events – in essence, the *facta probanda*.

The idea behind the *ratione rei gestae* is that a court will have jurisdiction to hear a particular matter if the critical events relating to that matter took place within its area; in other words, if the

relevant *cause of action arose* in that area. The court which exercises jurisdiction over this area is known as the *forum rei gestae*.

As pointed out earlier, the term 'cause of action' has been defined in numerous cases.[398] In the case of *Abrahamse & Sons v SA Railways and Harbours*, for example, it was described as follows:

> **The proper legal meaning of the expression 'cause of action' is the entire set of facts which give rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action.**[399]

However, Pistorius, in *Pollak on Jurisdiction*, points out that although the term 'cause of action' has been defined, our courts 'have not attempted to define the circumstances in which the cause of action may be said to arise within a particular area …'[400]

Although it is clear that for purposes of High Court jurisdiction (unlike the Magistrates' Court), it is not necessary for *all* the *facta probanda* to have occurred within the area of jurisdiction of the relevant court,[401] it is not entirely clear whether, in a case where the different elements of a cause of action occurred in different areas of jurisdiction, a cause of action may then be said to have 'arisen' in each and every area where the different elements occurred, or whether there is one specific area where it is proper to speak of the cause of action as having arisen.

It is beyond the scope of this book to do more than allude to the difficulties involved in this area of the law, and you would be wise to conduct thorough research before litigating in practice. For practical purposes, however, it is submitted that for jurisdictional purposes:

1. A *contractual* cause of action arises:
    1. where the contract was concluded (the *locus contractus*);[402]
    and
    2. where the contract was to be performed, either in whole[403] or in part[404] (the *locus solutionis*).
2. You may therefore proceed in the *forum contractus* (i.e. the court of the place in which the contract was concluded) or the *forum solutionis* (i.e. the court of the place in which the contract was to be performed). Note, however, that the term *forum contractus* is often used in a wider sense to mean *both* the court of the place in which the contract was concluded, as well as the court of the place in which the contract was to be performed. In the case of *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd*, Kumleben J provides the following clear summary of the meaning of the term *forum contractus* in this wider sense:

> **It is well established that for breach of contract a plaintiff may sue in the Court of the place where the contract was entered into, the *forum contractus*, which in the wide sense is understood to include the place where the contract is to be performed. See *Roberts Construction Co Ltd v Willcox Bros (Pty) Ltd* 1962 (4) SA 326 (A) at 331; *Taboryski v Schweizer and Apirion NO* 1917 WLD 152; *Brooks v Maquassi Halls Ltd* 1914 CPD C 371 at 376; *Kopelowitz v West and Others* 1954 (4) SA 296 (W) at 301 and *Frank Wright (Pty) Ltd v Corticas "BCM" Ltd*[1948 (4) SA 456 (C)] … In the last-mentioned decision at 463 it is pointed out that, when the place of performance is relied upon for jurisdiction, "the breach in respect of**

which the defendant is sued must be a breach of a duty which he was bound to perform within the jurisdiction". In other words the contractual right infringed must be anchored in a contract that has a direct connection with the area of jurisdiction of the Court.[405]

3. In accordance with the above, in matters involving breach of contract, you would be wise – for jurisdictional purposes – to proceed either in the court within whose area of jurisdiction the contract was concluded, or in the court within whose area of jurisdiction the contract was to be performed. Usually, the place of breach will coincide with the latter area. If, for some reason, it does not – for example, the contract was repudiated somewhere else, and the repudiation is the breach relied on – it is probably still safer to stick to the court within whose area of jurisdiction the contract was concluded, or in the court within whose area of jurisdiction the contract was to be performed. In the *Veneta Mineraria Spa* case referred to above, Kumleben J states that:

> **Firstly, … [o]ur Courts have consistently given this ground [i.e. the *ratione contractus* in the wider sense discussed above] a circumscribed and well-defined meaning. Secondly, as a matter of policy, the fact of repudiation at a particular place does not appear to me to be sufficient reason for exercising jurisdiction when in all other respects the contract in question is unrelated to the Court of that area.**[406]

4. A *delictual cause* of action arises where the delict was committed or occurred. The court which exercises jurisdiction in this area is termed the *forum delicti commissi* and it is said to have jurisdiction by virtue of the *ratione delicti commissi*. In the vast majority of delictual cases, the damage follows the wrongful act directly and materialises at the same place. If someone negligently drives into your car and damages it, for example, it is clear that the delict was committed when and where the accident took place. Occasionally, however, the wrongful act happens in one place, while the damage arises later in another place. For example, suppose that a worker in a KwaZulu-Natal motor vehicle factory deliberately sabotages the brakes of a vehicle he is assembling. The brakes malfunction two weeks later as the vehicle is being driven at high speed in Mpumalanga, causing injury there. In such a case, the locus of the delict, for jurisdictional purposes, will be determined with reference to the materiality of and the number of the ingredients thereof which occurred within the different areas of jurisdiction. This was the position taken by Van Reenen J in the case of *Thomas v BMW South Africa (Pty) Ltd* in which he states as follows:

> **[T]he most apparent solution [to the problem of determining the locus of a delict for jurisdictional purposes] appears to be to devise qualitative and quantitative criteria to determine, with reference to the elements of the delict in question – to the extent that it is possible to break a delict up into metaphysical components – the court which is the most closely associated with the delict, the locus whereof has to be determined. Such criteria, however, should accord with the principles of our common law regarding jurisdiction, be consonant with developments in our case law and accommodate the demands of modern society. Bearing all this in mind, the locus of a delict for jurisdictional purposes, in my view, should be determined with reference to the materiality of and the number of the ingredients thereof which have occurred in a court's area of jurisdiction.**[407]

In the case of other causes of action, jurisdiction is determined according to where the *res gestae* occurred and whether there are sufficient connecting factors between the matter in question and the relevant court to enable the court to hear and determine the matter.[408]

The term *ratione rei gestae* is sometimes used in a narrow sense, and may be distinguished from the more specific *rationes contractus* and *delicti commissi*.[409] At other times, the term *ratione rei gestae* is used in a broad sense, which includes these two specific grounds of jurisdiction. It is not entirely clear which is the more appropriate use of the term, but it is as well to be aware of the different ways in which it is used.

3.3.3 *Ratione rei sitae*

The court which exercises territorial jurisdiction over the area within which is situated movable or immovable property constituting the subject matter of the claim is known as the *forum rei sitae*. In order to claim jurisdiction by virtue of the *ratione rei sitae*, the movable or immovable property constituting the subject matter of the claim must be situated within the *forum rei sitae*.[410]

3.4 The two most common types of claims

3.4.1 Claims relating to property

3.4.1(a) What is a claim relating to property?

In these cases the court is asked to make an order which directly affects specifically identified property. In practice, there are many different types of claims relating to property, but we shall restrict ourselves to those claims dealing first with title to property, and second with transfer or delivery of property. We shall deal with these two types of claims both in respect of movable and immovable property:

Claims involving *title to immovable property* include claims for ownership or possession of immovable property. For example:

> **I have occupied this piece of land for a continuous period of 30 years. Therefore I have become the owner due to acquisitive prescription. I want the court to order the Registrar of Deeds to alter the title deeds to reflect that I am now the owner of the property.**[411]

Or, a much more common claim in practice:

> **I own this house. The lease in terms of which you were occupying my house has come to an end. Since you refuse to leave, I shall seek an order of ejectment from the court in order that possession of my house may be restored to me.**

Claims for the *transfer of immovable property* in terms of a contract entered into between two parties are common in practice. For example:

> **I have bought and paid for this piece of land in terms of a contract entered into between us, but you refuse to sign the necessary documents to enable the property**

to be transferred into my name. I shall ask the court to order that the property be transferred into my name.

Claims involving *title to movable property* are also common in practice. For example:

I am the owner of this motor vehicle. You borrowed it from me, but now refuse to return it. I shall ask the court to order that the motor vehicle be returned to me.

Claims for the *delivery of movable property* are probably the most common of all claims relating to property in practice. For example:

We agreed that I would buy your car for R110 000. I have paid you the R110 000, but you have not delivered the car to me. I shall ask the court to order that you deliver the car as agreed.

In each of the above examples, the claim relates to property (either movable or immovable) and not to money.

D14

3.4.1(b)Which of the grounds of jurisdiction apply?

3.4.1(b)(i) Immovable property – claims involving title

As far as claims involving the *title* to immovable property are concerned, it is clear that the *forum rei sitae* will possess jurisdiction to hear such claims.[412] Further, despite some evidence to the contrary in the cases of *Hugo v Wessels*[413] and *Ward v Burgess*,[414] it would seem that the *forum rei sitae* is the only court which will possess jurisdiction in such matters.[415]

3.4.1(b)(ii) Immovable property – claims for transfer

In relation to claims for the *transfer* of immovable property, once again it is clear that the *forum rei sitae* will possess jurisdiction to hear such claims.[416] As to the question of whether or not any other court or courts will possess jurisdiction in such matters, the answer seems to depend upon whether the action is *in rem* or *in personam*.[417] According to the following extract from *Pollak on Jurisdiction*, it would seem that the *forum rei sitae* will exercise exclusive jurisdiction in relation to an *actio in rem* for the transfer of immovable property, but will share jurisdiction with other courts (e.g. the *forum domicilii*) in relation to an *actio in personam* for the transfer of immovable property:

It is submitted … that a provincial or local division of the Supreme Court [i.e. the High Court] has no jurisdiction to entertain an action *in rem* in which the transfer of immovable property is claimed if the property is situate outside the area over which such division exercises jurisdiction. If, however, the court has jurisdiction over the defendant on recognised common law grounds, it can, in an action *in personam*, compel him to take whatever steps are necessary to fulfil an obligation to transfer immovable property situate outside the area over which the court exercises jurisdiction.[418]

3.4.1(b)(iii) Movable property – claims involving title

As far as claims involving title to movable property are concerned, it is clear that the *forum rei sitae* will possess jurisdiction to hear such claims.[419] Note that although the property must be situated within the area over which the court exercises jurisdiction at the time legal proceedings are instituted, the court will not be deprived of jurisdiction if the property is then removed from its area of jurisdiction.[420] As to the question of whether or not any other court or courts will possess jurisdiction in such matters, the following is stated in *Pollak on Jurisdiction*:

> **The *forum rei sitae* does not … have exclusive jurisdiction to determine the title to movables within the Republic. According to Voet the *forum domicilii* of the defendant may also entertain such an action … If … the movable property, though outside the area of the court concerned is situate in the Republic, there seems to be no reason why the *forum domicilii* should not also have jurisdiction to determine the title to property in a claim where the defendant is an *incola* [i.e. is resident or domiciled within the area of jurisdiction of the court in which legal proceedings were instituted].[421]**

3.4.1(b)(iv) Movable property – claims for delivery

In relation to claims for the delivery of movable property, once again it is clear that the *forum rei sitae* will possess jurisdiction to hear such claims.[422] The *forum rei sitae* does not, however, possess exclusive jurisdiction in such matters. Provided that the property is situated within the Republic, the *forum domicilii* of the defendant will also possess jurisdiction in a claim for delivery of movable property.[423] Furthermore, according to the learned author of *Pollak on Jurisdiction*, other courts which exercise jurisdiction over the defendant on some recognised ground (e.g. *ratione contractus*) may also possess jurisdiction in such matters:

> **If … movable property, although outside the rechtskring of the court is within the Republic, it would seem that any division, though it be neither the *forum domicilii* nor the *forum rei sitae* will have power to order the delivery of movable property if it has jurisdiction over the defendant on some recognised ground. For instance, if a contract for the delivery of that property were concluded within the area over which the court exercises jurisdiction, then there is no reason in principle why the court which can exercise jurisdiction over the defendant *ratione contractus* should not also have power to order the delivery of the property.[424]**

For purposes of jurisdiction in respect of incorporeals, South African law distinguishes between movable and immovable incorporeals. In relation to immovable incorporeals, the *forum rei sitae* has exclusive jurisdiction. For this reason, the South African High Court does not have jurisdiction in respect of foreign intellectual property rights (which are territorial, immovable intangibles).[425]

D15

3.4.2Claims sounding in money

3.4.2(a)What is a claim sounding in money?

In these cases, a plaintiff is seeking payment of money. It is probably safe to say that the vast majority of actions brought in our courts ‘sound in money’. In some cases, the claim for money will be brought on its own.

For example (contractual claim):

We agreed that you would buy my car for R410 000. I have given you the car, but you have not paid me for it. Please pay me what you owe me.

Or (delictual claim):

You crashed into my car and damaged it. The fair and reasonable cost of repair amounts to R410 000, and this is less than the difference between the pre- and post-collision value of the vehicle. Please pay me the fair and reasonable cost of repair.

In certain cases, the claim for money will be brought as an *alternative* to some other claim.

For example (as an alternative to a claim for specific performance):

We agreed that I would buy your car for R410 000. I have paid you the R410 000, but you have not given me the car. Either give me the car as agreed (claim for specific performance) or else give me my money back (claim sounding in money as an alternative).

In some cases, a claim for specific performance will be brought *without* a claim for money.

For example:

You agreed to build me a house for R620 000. I gave you the R620 000, but now you refuse to build the house. I insist that you build the house as agreed.

It may seem odd to classify this last case as a 'claim sounding in money'. For the purposes of High Court jurisdiction, however, the principles applicable to such cases are the same as those applicable to claims sounding in money. Note that the 'specific performance' referred to in this example does not involve the delivery of movable or immovable property. If the 'specific performance' you were claiming involved the delivery of some kind of property, then your claim would be classified as a 'claim relating to property', discussed above.

3.4.2(b) Which of the grounds of jurisdiction apply?

The grounds of jurisdiction that apply to claims sounding in money depend, however, upon whether the defendant/respondent is an *incola* or a *peregrinus* of South Africa.

An *incola* is a person who is either resident or domiciled within the court's area of jurisdiction. A *peregrinus* is the opposite of an *incola*, and is thus a person who is *neither* domiciled *nor* resident within the court's area of jurisdiction.

It is necessary to distinguish between two kinds of *peregrini*:

1. The first kind of *peregrinus* (who may be referred to as a *local peregrinus*)[426] is a person who is a *peregrinus* of the court in question, but is resident or domiciled within the borders of South Africa. For example, a person who is resident and domiciled in Cape Town is an *incola* of the Western Cape Division, but a *peregrinus* of all the other divisions of the High Court in the country. Such person is, of course, an *incola* of South Africa.
2. The second type of *peregrinus* (who may be referred to as a *foreign peregrinus*)[427] is a person who is resident and domiciled in a foreign country, and is a *peregrinus* of South Africa as a whole. Note that *nationality has nothing to do with it*. For example, a citizen of France who has permanent residence rights in South Africa and is living in Cape Town, is an *incola* of the Western Cape Division, and is not a *peregrinus* of South Africa.

Do not be confused by the different uses of the terms *incola* and *peregrinus*. The distinction we are interested in at this stage is that between an *incola* and a *peregrinus* of South Africa.

The majority of matters brought before our courts involve defendants and respondents who are *incolae* of South Africa. In such matters (i.e. where the defendant or respondent is an *incola* of South Africa), in the case of a claim sounding in money, you may use either the *ratione domicilii*[428] or the *ratione rei gestae* (including the *ratione contractus* and the *ratione delicti commissi*)[429] to ground jurisdiction.

However, different jurisdictional principles apply when the defendant/respondent is a *peregrinus* of South Africa. In such cases an *attachment to found or confirm jurisdiction* is required. This is dealt with below in our discussion of the jurisdictional principles applicable to certain additional claims.

3.5 The jurisdictional principles applicable to certain additional claims

3.5.1Claims sounding in money against foreign *peregrini*

In terms of s 42(2) of the Superior Courts Act, the civil process of a division runs throughout the country. This means that the process issued by a particular division (e.g. a summons or notice of motion) may be served within the jurisdiction of any other division in the Republic. It also means that the judgment or order of a particular court is enforceable in the jurisdiction of any other division in the Republic. The result is that even if a defendant or his property is situated outside the jurisdiction of a particular division, that court is able to exercise control over the person or property of the defendant, provided that he is an *incola* of South Africa. In those cases in which the defendant is a *peregrinus* of South Africa, however, neither the defendant nor any of his property may be in the country when judgment is given against him. This would render the judgment ineffective. Therefore, it is not surprising that in order to establish jurisdiction in the case of a claim sounding in money against a foreign *peregrinus*, an attachment of such defendant's property is usually required.[430]

D16

3.5.1(a)Attachments to found and confirm jurisdiction

Before you are permitted to institute *a claim sounding in money* against a defendant/respondent who is a *peregrinus* of South Africa (i.e. a foreign *peregrinus*), it is usually necessary to acquire some sort of hold over that person.[431] This is usually done by attaching his property.[432]

In order to understand why such attachment is necessary, think carefully about the category of persons who are classified as *peregrini* of South Africa. It is very important to remember that these persons are foreigners who are *neither domiciled nor resident* in South Africa. In other words, we are *not* talking about the Italian citizen who owns the pasta restaurant down the street from you, or about the Zimbabwean student who is studying at the University of Cape Town or about the many other foreigners who reside in South Africa. Because these people *reside* in South Africa, they *cannot* be classified as *peregrini* of this country. A true *peregrinus* of South Africa is a person who is just passing through. His home is not here (i.e. he is not resident here) and he does not intend to stay here indefinitely (i.e. he is not domiciled here). An example of such a person would be a German tourist who is travelling around the country for a few weeks, or a member of a visiting Ugandan sports team which is in South Africa to take part in a sporting competition.

Now let us assume that you want to bring a claim sounding in money against a person who may properly be said to fall into the category of '*peregrinus* of South Africa' (i.e. a foreign *peregrinus*). For example, a German tourist who is here on holiday crashes into the back

of your client's car. Before a court takes on this kind of case, it will want to be sure that its judgment will be *effective*. One way to ensure that the court's judgment will be effective is to attach the property of the German tourist *before* he returns to Germany. Note, however, that if the foreign *peregrinus* has no property to attach, there must be service on him while he is in South Africa and there must be a sufficient connection between the suit and the court's area of jurisdiction. This 'exception' is a fairly recent development to the common law, undertaken by the Supreme Court of Appeal in the case of *Bid Industrial Holdings (Pty) Ltd v Strang and Another (Minister of Justice and Constitutional Development, Third Party)*.[433] For the purposes of your mind map you may divide attachments to found and confirm jurisdiction into four simple steps:

> *Step 1*:For jurisdictional purposes, you are only required to make an application to attach the property of a defendant to found or confirm jurisdiction if he or she is a *peregrinus* of South Africa. If the defendant is a local *peregrinus*, attachment is impermissible. In other words, attachments to found or confirm jurisdiction are only required if the defendant is *neither resident nor domiciled* in this country. According to s 28 of the Superior Courts Act:[434]
>
> > **No attachment of property to found jurisdiction shall be ordered by a division against a person who is resident in the Republic.**
>
> *Step 2*:Once you know that you are dealing with a defendant who is a *peregrinus* of South Africa (i.e. foreign *peregrinus* – which means that you are entitled to carry out an attachment to found or confirm jurisdiction) you must ask yourself the following two questions:
>
> 1. Within the territorial jurisdiction of which court/s did the *cause of action* arise?
> 2. Within the territorial jurisdiction of which court/s is the *plaintiff domiciled and/or resident*?
>
> *Step 3*:Depending on the answers to the two questions set out in step 2, you will then make an application to court to order an attachment of the defendant's goods to either *found* or *confirm* jurisdiction:

An application for an attachment to *confirm* jurisdiction (*ad confirmandam jurisdictionem*) may be brought in any court which exercises territorial jurisdiction over an area within which *part of the cause of action arose*. In other words, you are confirming a ground of jurisdiction (*ratione res gestae*) which already exists.[435]

An application for an attachment to *found* jurisdiction (*ad fundandam jurisdictionem*) may be brought in the court which exercises territorial jurisdiction over the area within which the *plaintiff* is either *domiciled* or *resides* (unless part of the cause of action also arose in that area, in which case the application will be for an attachment to *confirm* jurisdiction).[436]

You may choose whichever court is most convenient to your client. If your application is successful, the attachment may be carried out in any part of South Africa.[437]

> *Step 4*:In order for the attachment to be carried out, the defendant's property must be somewhere *within the Republic of South Africa*.

Note that s 21(3) of the Superior Courts Act deals only with attachment of property to *confirm* jurisdiction. This does not mean that attachment to found jurisdiction is no longer part of our law – rather, regard must be had to the principles of the common law in respect of attachment to *found* jurisdiction.

In conclusion, note that Magistrates' Courts are also entitled to order the attachment of property to found or confirm jurisdiction, against persons who do not reside in the Republic and in respect of actions within their jurisdiction, where the claim or the value of the matter in dispute amounts to at least R2 500, exclusive of costs.[438]

3.5.1(b) Consent to jurisdiction

As pointed out in the introduction to this section dealing with High Court jurisdiction, consent to jurisdiction may be regarded as a fundamental common-law principle of jurisdiction. Although consent to jurisdiction may be of relevance to cases other than those in which the defendant is a foreign *peregrinus*, it is in relation to this last-mentioned category of cases that the principle finds much of its practical application. It is for this reason that we deal with the principle of consent to jurisdiction in conjunction with the principles relating to claims against foreign *peregrini*.

As discussed in the previous section, when dealing with a claim sounding in money against a foreign *peregrinus*, an attachment *ad confirmandam* or *ad fundandam jurisdictionem* is usually required. The principle of consent to jurisdiction is of relevance in these cases because, should the foreign *peregrinus* defendant consent to jurisdiction, such consent renders an attachment impermissible.[439]

What happens, however, if the foreign *peregrinus* defendant consents to jurisdiction *after* the order of attachment has been granted? The answer appears to be that if he consents to jurisdiction after the order of attachment has been granted, but before it has been put into effect, then he is entitled to a discharge of the order.[440] If, however, he consents to jurisdiction only after the writ of attachment has been executed, then he is not entitled to a discharge of the order.[441]

Let us conclude with a few brief comments on the limitations of the concept of consent to jurisdiction. It is important to note that consent to jurisdiction simply acts to extend jurisdiction which is already in existence.[442]

> **In other words, consent by the parties cannot confer jurisdiction on a court when there is no other link, other than the consent, between the court, the parties, and the claim.[443]**

Despite its limitations, however, it is interesting to note that there are legal scholars who feel that the concept of consent to jurisdiction is capable of a wider legal interpretation. For example, Ellison Kahn feels that there is no good reason why, if the plaintiff is an *incola* of the court, consent to jurisdiction by a local *peregrinus* defendant should not, in the absence of any other ground of jurisdiction, be sufficient to establish jurisdiction:

> **… in *American Flag* it was decided that where an *incola* sues a *peregrine* in the Republic as a whole (a 'foreign' *peregrine*) for a judgment sounding in money, prior submission by the *peregrine* to the jurisdiction of the court suffices; attachment is neither necessary nor permissible (at 377F) … The judgment in *American Flag* is confined to 'foreign' *peregrines*, specifically excluding 'local' *peregrines* – those resident or domiciled in the area of some other [division of the] High Court of South Africa (at 359I-J) … Surely there can be no objection to a local *peregrine* submitting to jurisdiction. It would be against economic policy for jurisdiction against a local *peregrine*to be more confined than that against a foreign *peregrine*.[444]**

D17

3.5.2Claims for divorce and associated relief

The most important point to note in relation to claims for divorce and associated relief is that this area of the law is regulated by *statute*.[445] In terms of the Divorce Act, a 'divorce action' is defined as:

… an action by which a decree of divorce or other relief in connection therewith is applied for, and includes:

> **(*a*)an application *pendente lite* for an interdict or for the interim custody of, or access to, a child of the marriage concerned or for the payment of maintenance; or**
>
> **(*b*)an application for a contribution towards the costs of such action or to institute such action, or make such application, *in forma pauperis*, or for the substituted service of process in, or the edictal citation of a party to, such action or such application.[446]**

Although the Divorce Act does not derogate from the common-law jurisdiction of the courts in respect of such claims,[447] the provisions of the Act offer important *additional* grounds of jurisdiction. The most important subsection of the Divorce Act relating to jurisdiction reads as follows:

> **(1)A court shall have jurisdiction in a divorce action if the parties are or either of the parties is –**
>
> > **(*a*)domiciled in the area of jurisdiction of the court on the date on which the action is instituted; or**
> >
> > **(*b*)ordinarily resident in the area of jurisdiction of the court on the said date and have or has been ordinarily resident in the Republic for a period of not less than one year immediately prior to that date.[448]**

Jurisdiction is *not* restricted to the court within whose area the *defendant spouse* is domiciled or resides. The domicile and residence of the *plaintiff* also become relevant for jurisdictional purposes, since the subsection speaks of '*either of the parties*…' In other words, if a wife is suing her husband for divorce, she may do so where she is domiciled, or where she is ordinarily resident (provided that she has been ordinarily resident in South Africa for at least a year immediately before this date). This is a radical departure from the common-law principle of *actor sequitur forum rei*.

Jurisdiction in respect of many divorce actions that you encounter in practice will be covered by s 2(1)(*a*) of the Divorce Act set out above. The subsection refers to the *domicile* of either of the parties to the divorce action. Every person who is over 18 years old (apart from those who lack the mental capacity to make a rational choice) is entitled to acquire *a domicile of choice*.[449]This applies regardless of a person's sex or marital status, and means that married women are no longer obliged by law to adopt the domicile of their husbands. Let us assume, for example, that a wife leaves her abusive husband who lives in Cape Town, and moves to Durban where she obtains employment. Provided that she intends to settle in Durban for an indefinite period, Durban will be her domicile of choice. Therefore, she is entitled to bring an action for divorce in the KwaZulu-Natal Local Division, Durban or in the Regional Magistrates' Court, Durban (although she could, of course, choose to institute action in the KwaZulu-Natal Division, Pietermaritzburg which exercises concurrent jurisdiction with the KwaZulu-Natal Local

Division, Durban or in the Western Cape Division, Cape Town, within whose area of jurisdiction her husband is domiciled).

Section 2(1)(*b*) of the Divorce Act set out above is able to deal with those cases where s 2(1)(*a*) is not applicable. Let us take the same example as that used above, but assume that the wife has moved to Durban on a fixed one-year contract and intends to move back to Cape Town as soon as the contract terminates. In this case, it cannot be said that she is domiciled in Durban. She is, however, *ordinarily resident* in Durban and has, presumably, been ordinarily resident in *South Africa for at least one year* immediately before she moved to Durban. Therefore she is entitled, in terms of s 2(1)(*b*) of the Divorce Act, to institute action in the KwaZulu-Natal Local Division, Durban or in the Regional Magistrates' Court, Durban.

Note the provisions of s 2(2) of the Divorce Act which are as follows:

> **A court which has jurisdiction in terms of subsection (1) [as set out above] shall also have jurisdiction in respect of a claim in reconvention or a counter-application in the divorce action concerned.**[450]

Note also that jurisdiction in a divorce matter may not be conferred on a court by consent or submission.[451]

3.5.3Claims for interdicts

Interdicts are dealt with in detail later in this book. For the moment, let us just say that an interdict is an order by the court that a person either *perform* some action (a *mandatory* interdict) or *refrain* from performing some action (a *prohibitory*interdict).[452] A good example of a prohibitory interdict would be where you want the court to order your neighbour to stop digging a large hole next to your common boundary fence, which is threatening to undermine your house.

When deciding whether or not a particular High Court division has jurisdiction to hear particular interdict proceedings, two questions should be asked:

1. Is the respondent an *incola* or a *peregrinus* of the court concerned?
2. Is the act you are trying to force the respondent to perform, or refrain from performing, linked to the territorial area of jurisdiction of the court concerned?

Three different possibilities then arise in relation to jurisdiction:

1. Respondent is an *incola* + act is either within or outside area of jurisdiction:
   In such cases, the court has jurisdiction to grant an interdict (whether mandatory or prohibitory) *in personam* against the *incola*, whether the act in question is to be performed or restrained within or outside the area of jurisdiction of the court.[453]

   Respondent is a *peregrinus* + act within area of jurisdiction:
2. Because the court has power to compel or prohibit acts within its area of jurisdiction, it has jurisdiction to grant either a mandatory or a prohibitory interdict. It does not matter if the respondent is a citizen of Outer Mongolia; the court may still compel him to perform or desist from performing an act within the jurisdiction of the court.[454]

   Respondent is a *peregrinus* + act outside area of jurisdiction:
3. Because the court has no power over either the respondent or the act, it has no jurisdiction to grant either a mandatory or a prohibitory interdict. This applies whether the respondent is a local or a foreign *peregrinus*.[455]

3.5.4Single claims involving two or more jurisdictions

Occasionally, you may be confronted with a situation in which you are dealing with what you believe to be a single case, but you find that two or more courts exercise jurisdiction in respect of different parts of this single case.[456] Since it does not make sense for two or more courts to deal with a single matter, you may wish to turn to the ground of jurisdiction known as the *ratione causae continentiae*, which may allow one of the courts involved to exercise jurisdiction in respect of the whole matter. Harms provides the following useful summary:

> **More than one claim may be joined in one process before a court against different persons or in respect of different things in different jurisdictional areas if, together, they really constitute one case.**
>
> **An indivisible obligation in respect of an indivisible thing, which is situated in two different jurisdictional areas, may be enforced in any of the areas concerned.**[457]

The *causae continentia* doctrine was extended by the Supreme Court of Appeal in the *Ngxuza* judgment.[458] Application was brought on behalf of a class of persons consisting of tens of thousands of recipients of social disability grants, whose grants had been terminated, unilaterally and without notice, by the Eastern Cape provincial authorities. Not all of the persons of this class resided within the jurisdictional area of the High Court before which the application was brought, i.e. the Eastern Cape Division of the High Court. In holding that the jurisdiction of the Eastern Cape Division did indeed extend to these 'non-residents', Cameron JA invoked the *causae continentia* doctrine by stating as follows:

> **In *Roberts Construction Co Ltd v Willcox Bros (Pty) Ltd* this court held, applying the common law doctrine of cohesion of a cause of action (*continentia causae*), that where one court has jurisdiction over a part of a cause, considerations of convenience, justice and good sense justify its exercising jurisdiction over the whole cause. The partial location of the object of a contractual performance (a bridge between two provinces) within the jurisdiction of one court therefore gave that court jurisdiction over the whole cause of action. The Court expressly left open the further development and application of the doctrine of cohesion of causes. The present seems to me a matter amply justifying its further evolution. The Eastern Cape Division has jurisdiction over the original applicants and over members of the class entitled to payment of their pensions within its domain. That, in my view, is sufficient to give it jurisdiction over the whole class, who, subject to satisfactory 'opt-out' procedures, will accordingly be bound by its judgment.**[459]

3.6Inherent jurisdiction

Inherent jurisdiction is a *discretionary power* possessed by our superior courts.[460] Writing in the period before the advent of South Africa's present constitutional dispensation, it was described by one South African academic as follows:

> **The inherent jurisdiction of the Supreme Court [i.e. High Court] may be described as the unwritten power without which the Court is unable to function with justice and good reason.**[461]

The power was originally derived from English law and the following useful definition of the concept was put forward in a Canadian case:

> **… the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between parties and to secure a fair trial between them.**[462]

Traditionally, courts would make use of their inherent jurisdiction to avoid a procedural injustice from occurring, either by overriding the rules of court or providing some procedural remedy where none existed. Despite a perception that inherent jurisdiction was the power of superior courts to do whatever they wished, provided that it was not prohibited by law, Taitz pointed out that:

> **The court … does not enjoy the inherent power to change or otherwise create substantive rights which previously were not part of our law.**[463]

Although inherent jurisdiction was usually regarded as a procedural power, it was not entirely procedural in nature.[464] The power was discretionary in nature, and a court was not obliged to use its inherent jurisdiction in any particular situation. Asking the court to exercise its inherent jurisdiction was therefore unlike asking it to enforce a right.

Let us look at some practical examples in which superior courts have traditionally exercised their inherent jurisdiction:

1. *To regulate its proceedings and prevent an abuse of its process*[465]
   Superior courts are not bound by their rules and may create their own procedure. The rules are there for the court, and not the other way around. If the rules lead to injustice in a particular situation, the court need not follow them. One example of this is the fact that most divisions of the High Court insist that the defendant in a divorce matter be served *personally* with the divorce summons. This is despite the fact that there is no rule of court which requires this.[466] Taitz provides the following examples of situations in which the court has exercised its inherent jurisdiction in regard to litigation:

   > **[T]o order further particulars; to allow the registrar to act as a stakeholder pending the settlement of a dispute; to revive a superannuated provisional sentence summons; to rescind a default judgment not falling under the Rules of Court; to permit joinder of defendants; to order a party to produce documents for inspection not referred to in his discovery affidavit and also to produce for inspection items of machinery; to condone the late filing and non-compliance with Rules of Court where principles of justice and fair play demand an order to avoid hardship to a party; to control its own proceedings by refusing to accept unnecessarily prolix affidavits in rule 43 proceedings; to grant a *peregrinus* relief to sue in *forma pauperis*.**[467]

2. *To protect its dignity, repute and authority, and compel observance of its lawful orders*[468]
   Section 108 of the Magistrates' Courts Act provides for the punishment of those found guilty of contempt of court. There is no equivalent provision in the Superior Courts Act, but the High Court is able to punish such offenders by making use of its inherent jurisdiction. Taitz points out that:

> **The distinction between criminal and civil contempt of court is relevant to this section; more particularly, the wilful violation of its dignity, repute and authority amounts to criminal contempt, while civil contempt may be seen as the intentional and/or *mala fide* disregard or refusal by a party to comply with its lawful order.**[469]

3. *To control and supervise its officers*[470]

   Officers of the court include, *inter alia*, attorneys, advocates, prosecutors, deputy sheriffs, the master, the registrar and the clerks of the various courts. Magistrates and judges are not officers of the court as they comprise the court itself.

   Despite the fact that many situations pertaining to officers are provided for in legislation, the court may still resort to inherent jurisdiction where a gap exists. In the past, courts have used their inherent jurisdiction as follows:

   1. To regulate the conduct of attorneys and prescribe general rules of practice.[471]
   2. To condone noncompliance with rules relating to the procedures for the admission of attorneys.[472]
   3. To order an attorney to show cause why he should not be struck off the roll for misconduct.[473]
   4. To strike an advocate from the roll of advocates for misconduct.[474]
   5. To protect practitioners by punishing persons who unlawfully hold themselves out to be attorneys.[475]

4. *To restrain irregularities in the proceedings of inferior courts*[476]

   Although s 21(1)*(b)* of the Superior Courts Act gives the High Court the power to *review* the proceedings of Magistrates' Courts within its area of jurisdiction, Taitz notes as follows:

   > **Relief by the court in terms of its inherent powers to restrain irregularities remains of the greatest importance as an examination of the cases shows serious limitations in the exercise by the court of the statutory forms of review.**[477]

5. *To restrain irregularities in the proceedings of administrative (and like) authorities*[478]

   Historically, the courts relied on their inherent jurisdiction to review irregularities in the proceedings of administrative authorities.

   > **In … *Johannesburg Consolidated Investment Co v Johannesburg Town Council*[479] (hereinafter referred to as the *JCI* case), Innes CJ found that the court enjoyed the power of judicial review of administrative action by reason of the inherent jurisdiction it enjoyed as the Superior Court … In his much-quoted judgment in the *JCI* case, the learned Chief Justice went further than establishing the judicial power of testing the validity of administrative action. He found that through its inherent powers the court had created a remedy which enabled it not only to review the offending decision but also to grant consequential relief to an aggrieved party by either setting aside or otherwise correcting such decision.**[480]

   Today, the courts' inherent power of judicial review has been entrenched in s 33 of the Constitution (the right to administrative justice), read with the Promotion of Administrative Justice Act 3 of 2000.

6. *To create or modify remedies*

Note at the outset that the courts may not use inherent jurisdiction to create a *right.* A right either exists or it does not exist. If it does, the courts will *imply* a remedy (even if there is no apparent remedy) in terms of the common-law principle of *ubi jus ibi remedium* (i.e. where there is a right, there is a remedy). Therefore, there is no need to appeal to a court's inherent jurisdiction to secure the *enforcement* of a right. For example, the granting of an interdict is not an exercise of the court's inherent jurisdiction since, in order to be granted the interdict, you must show that you possess a right in the first place. Inherent jurisdiction enters the picture when you ask the court to create a remedy in the *absence* of a right. The courts use their inherent jurisdiction to create a remedy in those situations in which no legal right to a remedy exists, but an injustice (usually of a procedural nature) will occur if a suitable remedy is not granted.

The so-called 'Anton Piller' order is a good illustration of the use of inherent jurisdiction to create a remedy in the absence of a right.[481] Such an order usually allows an applicant to search the premises of a respondent, without notice, in order to seize and preserve evidence that the applicant will require in a subsequent trial. Such an order will only be granted if the normal procedural methods for procuring evidence will not avail the plaintiff, and an injustice will occur if the order is not granted. Note that no one has the *right* to search another person's premises and seize items without that person even knowing about it. The *Anton Piller* order is therefore a *remedy* which is granted by the court, in the *absence of a right*, in order to *prevent procedural injustice*.

Other examples of situations in which the court has used its inherent jurisdiction to create or modify remedies are cases that deal with the obtaining of blood samples for proof of paternity. No one has the right to take blood samples from someone else, but in certain cases the courts have been prepared to order that this be done in order to prevent an injustice. In other words, the courts have used their inherent jurisdiction to grant a procedural remedy in the absence of an existing right.[482] Furthermore, the courts have relied on their inherent jurisdiction to create a remedy for plaintiffs in bringing class actions.[483]

In the post-apartheid period, the traditional approach to inherent jurisdiction, discussed briefly above, must be read in light of the provisions of the South African Constitution, in particular s 173 which provides that:

> **The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.[484]**

The section builds upon the previous inherent powers of the superior courts.[485] It has enabled our superior courts, during the post-apartheid period, to develop a range of innovative new orders which promote the interests of justice.[486] It has been held that the section is an important tool enabling the superior courts to ensure their own independence and impartiality, and to regulate and protect their own processes.[487] Section 173 must be read with s 39(2) of the Constitution, which requires a court, when interpreting any legislation, and when developing the common law or customary law, to promote the spirit, purport and objects of the Bill of Rights.[488] Finally note that, although s 173 of the Constitution clearly broadened the scope for judicial activism during the post-apartheid period, due regard should be paid to the following note of caution expressed by the learned authors of *Herbstein and Van Winsen – The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*(fifth edition):

In *Krygkor Pensioenfonds v Smith* [1993 (3) SA 459 (A) at 469G-J] the Appellate Division held that only in exceptional cases will the court exercise its inherent jurisdiction to follow procedures not regulated by the ordinary law of procedure. It will do so only when the requirements of justice demand a deviation from the ordinary rules of procedure and, even when a deviation may be necessary, the court will always attempt to deviate as little as possible from established procedure. This *dictum* should be borne in mind, even though it predates the enactment of section 173 of the Constitution.[489]

1Road Accident Fund Act 56 of 1996.

2See s 21(1) of the Road Accident Fund Act 56 of 1996. But note also the provisions of s 21(2) of the Act, which set out circumstances in which s 21(1) does not apply.

3See Neethling, J, Potgieter, JM and Visser, PJ (2015) *Law of Delict* (seventh edition), 389–399.

4The defendants would be 'jointly or severally liable'. See Neethling, op. cit., 279–285.

5In general, see Neethling et al. (2015), op. cit., 33–128. See the cases of *Loureiro and Others v Imvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC) and *Za v Smith and Another* 2015 (4) SA 574 (SCA) on the meaning of wrongfulness in delict. Importantly, the element of wrongfulness and fault should not be conflated.

6In general, see Neethling et al. (2015), op. cit., 137–167.

7Apportionment of Damages Act 34 of 1956.

8In general, see Neethling et al. (2015), op. cit., 183–220.

9In general, see Neethling et al. (2015), op. cit., 221–265.

10Neethling et al. (2015), op. cit., 247.

11Take the trade-in value, add the retail value, and divide by two.

12In general see Neethling et al. (2015), op. cit., 389–399.

13See s 17 of the Children's Act 38 of 2005.

14This is discussed in detail in the next chapter dealing with *locus standi*.

15In general, see Neethling et al. (2015), op. cit., 88–97.

16These will all be discussed in detail later in Stage Two, Part 2A, Section 2.1.5(*g*) of the book.

17Sharrock, R (2011) *Business Transactions Law* (eighth edition), 271–273. This is the position at common law, although the position may be amended by agreement between the parties, for example, with the inclusion of a *pactum reservati dominii* (a clause reserving ownership). The National Credit Act 34 of 2005 now regulates most consumer credit agreements – see Annexure B where the National Credit Act 34 of 2005 is discussed.

18Christie, RH (2011) *The Law of Contract in South Africa* (sixth edition), 562.

19Sharrock, R (2011), op. cit., 143.

20On set-off see *Siltek Holdings (Pty) Ltd (in Liquidation) t/a Workgroup v Business Connexion Solutions (Pty) Ltd* [2009] 1 All SA 571 (SCA).

21Harms, LTC (2015*) Amler's Precedents of Pleadings* (eighth edition), 335.

22Harms (2015), *Amler's,* op. cit., 379–381.

23Ibid., 8–9.

24Sharrock (2011), op. cit., 296.

25Sharrock (2011), op. cit., 297.

26Consumer Protection Act 68 of 2008.

27The Consumer Protection Act 68 of 2008 contains a provision creating an implied warranty as to the quality of the goods. See Annexure B in which the Consumer Protection Act is discussed.

28Sharrock (2011), op. cit., 296 and 302.

29Sharrock (2011), op. cit., 296.

30See s 2 of the Divorce Act 70 of 1979. See also Stage One, Part 1C, Sections 2.2.1(*i*) and 3.5.2 of this book, in which we discuss certain of the jurisdictional principles applicable in relation to claims for divorce and associated relief in the Magistrates' Courts and the High Court, respectively.

31This makes sense because of the intensely personal nature of a divorce action. In this regard, see also *Spangenberg and Another v De Waal* [2008] 1 All SA 162 (T), which held that a *curator bonis* lacks *locus standi* to institute divorce proceedings on behalf of a person.

32High Court rule 43 and Magistrates' Courts rule 58. This is discussed in detail later in Stage Four, Part C, of the book.

33See, for example, Chapter 3 of the Children's Act 38 of 2005 which sets out parental responsibilities and rights in respect of children.

34Under the common law, if the parties were married outside South Africa, the matrimonial property regime would be determined according to the law of the husband's country of domicile at the time of the marriage. See *Sperling v Sperling* 1975 (3) SA 707. (A). Concerns have been raised as to the validity of this rule (*AS v CS* 2011 (2) SA 360 (WCC) at para 55). The validity of a foreign marriage is determined by application of the principle of *lex loci celebrationis.*

35See s 4 of the Divorce Act 70 of 1979.

36See s 7(2) of the Divorce Act 70 of 1979.

37Although the division of the estate is an automatic consequence of the divorce and need not be claimed in the pleadings.

3870 of 1979.

39See Erasmus, HJ and van Loggerenberg, DE (2011) *Jones and Buckle: The Civil Practice of the Magistrates' Courts in South Africa* (tenth edition), RS 12, 2016, at Rule 14A-4; Cilliers, AC, Loots, C and Nel, HC (2009) *Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (fifth edition), 1315–1328.

40For a more comprehensive list, see *Herbstein and Van Winsen* (2009), op. cit., 1328–1375.

41This is dealt with in detail later in Stage Four, Part B of this book. See High Court rule 8 and Magistrates' Courts rule 14A. See *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank and Another* (CCT 68/10) [2011] ZACC 2; 2011 (5) BCLR 505 (CC); 2011 (3) SA 1 (CC) (22 February 2011) where the Constitutional Court held that common-law remedy of provisional sentence and rule 8 of the High Court Rules were not inconsistent with the Constitution.

42Harms (2015), *Amler's*, op. cit., 71–76.

43Note, however, that presentment may be dispensed with in various circumstances. In this regard see s 44 of the Bills of Exchange Act 34 of 1964.

44In the case of *Mars Inc v Candy World (Pty) Ltd* 1991 (1) SA 567 (A) at 575, Nestadt JA confirmed the general rule of our law that an onus rests upon the party instituting proceedings to allege and prove that he has *locus standi*.

45*United Watch and Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C) at 415B; *Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 (A) at 534.

46See *Cape Town Municipality v South African Local Authorities Pension Fund and Another* 2014 (2) SA 365 (SCA) and *Kruger v President of Republic of South Africa and Others* (CCT 57/07) [2008] ZACC 17; 2009 (1) SA 417 (CC); 2009 (3) BCLR 268 (CC) (20 October 2008).

47*Jones and Buckle, Vol II, The Rules*, op. cit., RS 12, 2016 Rule-p5–17. See also the authorities cited in support of this contention by *Jones and Buckle*, including *Antares International Ltd and Another v Louw Coetzee & Malan Inc and Another* 2014 (1) SA 172 (WCC) at 186H–I.

4871 of 2008.

49On the much broader approach of the courts to the issue of standing (i.e. *locus standi*) for the purpose of enforcing the fundamental rights set out in the Bill of Rights, see the decisions of the Constitutional Court in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); and *Campus Law Clinic University of KwaZulu-Natal v Standard Bank of South Africa Ltd and Another* 2006 (6) SA 103 (CC).

50*Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA).

51*Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuza and Others* 2001 (4) SA 1184 (SCA) at 1192–1194. Note that in 1998 the South African Law Commission recommended that class actions should be introduced by means of an appropriate Act of Parliament and Rules of Court: See South African Law Commission: (1998) *Report on the Recognition of Class Actions and Public Interest Actions in South African Law*: *Project 88*, SALC, para 38 www.justice.gov.za/salrc/reports/r_prj88_classact_1998aug.pdf.

52(CCT) 131/12) [2013] ZACC 23; 2013 (5) SA 89 (CC); 2013 (10) BCLR 1135 (CC) (27 June 2013).

53See the seminal case of *Children's Resource Center Trust And Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA) where the Supreme Court of Appeal set out these procedural guidelines indicating the requirements that must be met by a party seeking to certify a class action.

54*Nkala and Others v Harmony Gold Mining Company Ltd and Others* (48226/12, 31324/12, 31526/12, 31327/12, 48226/12, 08108/13) [2016] ZAGPJHC 97; [2016] 3 All SA 233 (GJ); 2016 (7) BCLR 881 (GJ); 2016 (5) SA 240 (GJ) (13 May 2016) at para 40.

55*Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) at 1082.

56*Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* [2013 (3) BCLR 251 (CC) at para 441. See also, generally, *Tulip Diamonds FZE v Minister for Justice and Constitutional Development and Others* 2013 (10) BCLR 1180 (CC).

57In terms of the Children's Act 38 of 2005, the biological mother of a child will always be that child's guardian, apart from those situations in which she is herself an unmarried child. The biological father of a child will be that child's guardian if he is married to the child's mother. If he is not married to her, the biological father will still be the child's guardian if he was married to the biological mother at the time of the child's conception, or at the time of the child's birth, or at any time in between. See s 20 of the Children's Act 38 of 2005. See also s 21 of the Children's Act which deals with parental responsibilities and rights of unmarried fathers (*I v C and Another* (1137/2013 [2014] ZAKZDHC 11 (4 April 2014)).

58It is submitted that since the Children's Act 38 of 2005 came into operation on 1 July 2007, the terms 'child' and 'children' essentially mean the same thing as the terms 'minor' and 'minors'. Generally speaking, these terms refer to natural persons under 18 years of age – see our discussion in Section 3.1.1 below.

59Practitioners who are accustomed to making use of the term 'minor' may prefer the phrase 'minor male infant'. The technicalities of legal citation are discussed later in this book in the section dealing with actions. In *Stassen v Stassen* 1998 (2) SA 105 (W) at 108G, Wunsh J criticised the use of the term 'adult' to describe parties on the basis that *locus standi* was dependent on majority, not adulthood. The reference to 'adult' nonetheless persists.

60See the definition of 'child' in s 1 of the Children's Act 38 of 2005. Note, however, that a person who enters into a valid civil marriage or customary marriage before turning 18 becomes a major. Note further that a person who has been tacitly emancipated before turning 18 may enjoy *locus standi*, but bear in mind the following cautionary statement by the learned authors of The South African Law of Persons: 'The courts seem to assume that an emancipated minor has *locus standi*. It is however doubtful whether this assumption is correct. A guardian who consents to a minor's entering into a specific individual transaction does not automatically also consent to the minor's engaging in litigation regarding that transaction. It therefore seems inaccurate to assume that a minor who has been emancipated automatically has *locus standi* in respect of all matters falling within the sphere of the transactions to which his or her emancipation relates.' See Cronje, DSP and Heaton, J (2008) *The South African Law of Persons* (third edition by J Heaton) at 117.

61See s 19 and 20 of the Children's Act 38 of 2005.

62Act 38 of 2005.

63Note that *both* the guardians must give their consent to the following: the child's marriage; the child's adoption; the child's departure or removal from the Republic; an application for a passport for the child; and the alienation or encumbrance of any immovable property belonging to the child.

64A child below the age of seven is known as an *infans* and has no legal capacity at all. An *infans* must be represented by his guardian in litigation. See *Guardian National Insurance Co Ltd v Van Gool NO* 1992 (4) SA 61 (A) at 66G. Note, however, the change in the age of criminal capacity. In terms of s 7(1) of the Child Justice Act 75 of 2008, which came into operation on 1 April 2010, a child under the age of 10 years does not have criminal capacity. At the time of writing the third edition of this book, it is unclear whether or not this will affect the position set out in the case of *Guardian National Insurance Co Ltd v Van Gool NO* referred to above. To date, there is no authority for the proposition that it has done so.

65See *O'Linsky v Prinsloo* 1976 (4) SA 843 (O) at 847.

66*Grobler v Potgieter* 1954 (2) SA 188 (O) at 192.

67*Guardian National Insurance Co Ltd v Van Gool NO* 1992 (4) SA 61 (A) at 66F–H; *Thole v Trans-Drakensberg Bank Ltd* (*under judicial management*) 1967 (2) SA 214 (D); *Wolman and Others v Wolman* 1963 (2) SA 452 (A); *Yu Kwam v President Insurance Co Ltd* 1963 (1) SA 66 (T), confirmed *President Insurance Co Ltd v Yu Kwam* 1963 (3) SA 766 (A) at 772.

68Act 38 of 2005.

69Sections 15(1) and 15(2) of the Children's Act 38 of 2005.

70*Legal Aid Board v R and Another* 2009 (2) SA 262 (D).

71Section 11 of the Matrimonial Property Act 88 of 1984.

72Section 29 of the General Law Fourth Amendment Act 132 of 1993, which came into operation on 1 December 1993. See *Government Gazette* No 15160, 6 October 1993, Notice No 1852.

732003 (3) SA 622 (T).

74At 626, para [7].
75*Nedcor Bank Ltd v Hennop and Another* 2003 (3) SA 622 (T) at 626, para [7].
76Section 17(1) of the Matrimonial Property Act 88 of 1984.
77Section 17(1)(*a*) of the Matrimonial Property Act 88 of 1984.
78Section 17(1)(*b*) of the Matrimonial Property Act 88 of 1984.
79Section 17(1)(*c*) of the Matrimonial Property Act 88 of 1984.
80Section 17(2) of the Matrimonial Property Act 88 of 1984.
81Section 17(3) of the Matrimonial Property Act 88 of 1984.
82High Court rules 57(1) and (4). See also *Jonathan v General Accident Insurance Co of SA Ltd* 1992 (4) SA 618 (C) and *Road Accident Fund v Mdeyide (Minister of Transport intervening)* 2008 (1) SA 535 (CC).
8317 of 2002.
84*Jones and Buckle, Vol II, The Rules*, RS 10, 2016 Act-p232. Note that court proceedings involving a person of unsound mind who is not assisted by a *curator ad litem* may be void, and instructions given by such a person to an attorney may be called into question. See *Road Accident Fund v Mdeyide (Minister of Transport intervening)* 2008 (1) SA 535 (CC).
85*Delius v Delius* 1960 (1) SA 270 (N).
86*Phil Morkel Bpk v Niemand* 1970 (3) SA 455 (C).
87*Ribbens v Ribbens* 1965 (1) PH F5 (T).
88Section 54 of the Insolvency Act 24 of 1936.
89Act 24 of 1936.
90Act 24 of 1936.
91See, for example, *Marais v Engler Earthworks (Pty) Ltd; Engler Earthworks (Pty) Ltd v Marais* 1998 (2) SA 450 (E).
92*Jones and Buckle, Vol II, The Rules*, RS 12, 2016 Rule-p5–39.
93See the following cases in relation to the circumstances in which a person will be considered to be a fugitive from justice: *Maluleke v Dupont NO and Another* 1967 (1) SA 574 (RA); *Herf v Germani* 1978 (1) SA 440 (T); *Minister of Home Affairs v Bickle* 1983 (2) SA 457 (ZS).
94*Mulligan v Mulligan* 1925 WLD 164; *Maluleke v Du Pont NO* 1967 (1) SA 574 (RA); 1967 (4) SA 31 (RA); *Meyerson v Health Beverages (Pty) Ltd*1989 (4) SA 667 (C) at 673G.
95*Fraind v Nothmann* 1991 (3) SA 837 (W) at 841A–I.
96*Botes v Goslin* 1987 (2) SA 716 (C) at 721D–722A.
97*Harris and Others v Rees and Others* [2010] 4 All SA 603 (GSJ) ; 2011 (2) SA 294 (GSJ).
98*Ex Parte Savage and Others* 1914 CPD 827; *Ex Parte Naude NO* 1915 CPD 675; *Ex Parte Lezard NO* 1917 CPD 453 at 456.
99*Hoch v Scoble* 1916 TPD 642; *Wipperman v Wipperman* 1916 EDL 411; *Schultz v Schultz* 1917 CPD 459; *Matthiesen v Glas* 1940 TPD 147.
100*Stern & Co v De Waal* 1915 TPD 60; *Hehde v Estate of the Late Blum and Master of the High Court* 1940 (2) PH M87 (SWA).
101Diplomatic Immunities and Privileges Act 37 of 2001.
102Section 3 of the Diplomatic Immunities and Privileges Act 37 of 2001.
103Section 4 of the Diplomatic Immunities and Privileges Act 37 of 2001.
104Section 5 of the Diplomatic Immunities and Privileges Act 37 of 2001.
105See, for example, *World Food Programme v Emile and Another* (13927/2010) [2011] ZAGPJHC 141 (10 October 2011).
106Section 6 of the Diplomatic Immunities and Privileges Act 37 of 2001.
107Section 9 of the Diplomatic Immunities and Privileges Act 37 of 2001. See the case of *N v N* (41999/15) [2015] ZAGPPHC 465 (26 June 2015). In this case, the respondent, a senior country economist for the African Development Bank, raised a point *in limine* regarding his immunity from civil suits in terms of s 7 of the Diplomatic Immunities and Privileges Act 31 of 2001. The North Gauteng Division, Pretoria, dismissed the point based on the urgency of the matter. The correctness of this decision is debateable.
108See *Dormehl v Minister of Justice* 2000 (2) SA 987 (CC) at para [9].
10910 of 2013.
110*Soller v President of the Republic of South Africa* 2005 (3) SA 567 (T) at 573D–575G. Note that, while this case was decided under s 25(1) of the Supreme Court Act 59 of 1959 (the provision under the Supreme Court Act 59 of 1959 dealing with proceedings against judges), it is submitted that the mischief sought to be achieved by both provisions is the same.

111 10 of 2013.

112 Section 1 of the Superior Courts Act 10 of 2013.

113 Section 47(1) of the Superior Courts Act 10 of 2013.

114 Section 47(2) of the Superior Courts Act 10 of 2013.

115 Section 25(1) of the (now repealed) Supreme Court Act 59 of 1959.

116 In the case of *N v Lukoto* 2007 (3) SA 569 (T) at para [4] on p572, Ngoepe JP explains the procedure traditionally adopted in practice as follows: 'It is necessary to explain how such applications are traditionally dealt with and the reasons therefore. Normally, it is the Judge President who would receive such an application, and consider it in Chambers. This mechanism would quietly dispose of patently frivolous claims which might unjustifiably damage the reputation of a Judge. Where there appears to be at least an arguable case, the Judge President would approach the Judge concerned. In appropriate circumstances, the Judge President might even urge the Judge to oblige; for example, where there is a clear debt against the Judge. The Judge President would impress on the Judge concerned that those who are the ultimate enforcers of the law must themselves make every endeavour to observe it; also of importance is to avoid the appearance of a Judge as litigant in court, particularly in the lower courts. Where there seems to be an arguable case against the Judge but the latter remains recalcitrant, the Judge President would give the Judge the opportunity to oppose the application for leave to sue him. The matter may then be disposed of in Chambers or in an open court, depending on the intensity of the opposition. Once an applicant shows good cause, leave would be granted: *Soller v President of the Republic of South Africa* 2005 (3) SA 567 (T) at 572A.' In *Nagan v Hlophe* (10061/08) [2009] ZAWCHC 56 (19 March 2009), decided under the (old) Supreme Court Act 59 of 1959, the respondent was the Judge President of the Western Cape Division, Judge President John Hlophe. The circumstances were unique, inasmuch as the respondent in this case, being the Judge President would ordinarily have been the one to grant the consent. This clearly would not have been possible, and, in the circumstances, Judge Majiedt of the Kimberley High Court considered the application.

117 Section 47(2) of the Superior Courts Act 10 of 2013.

118 Section 58(1)(*b*) of the Constitution of the Republic of South Africa.

119 Act 4 of 2004. This was the subject of judicial attention in the matter of *Democratic Alliance v Speaker of the National Assembly and Others* 2016 (5) BCLR 577 (CC); 2016 (3) SA 487 (CC), concerning s 11 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004, the purpose of which is to prevent disturbances in the precinct. The Constitutional Court held that the section impermissibly applied to Members of Parliament and in so doing contravened ss 58(1) and 71(1) of the Constitution.

120 Section 5 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004.

121 Section 9 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004.

122 Section 28(1)(*b*)(ii) of the Local Government: Municipal Structures Act 117 of 1998, read with s 28(2) of the Act.

123 See Cameron, E et al. (2002) *Honore's South African Law of Trusts* (fifth edition), 1.

124 *Braun v Blann and Botha NNO and Another* 1984 (2) SA 850 (A) at 859–860. See also *Yarram Trading CC t/a Tijuana Spur v ABSA Bank Ltd* 2007 (2) SA 570 (SCA) in which the Supreme Court of Appeal found that the Collective Investment Schemes Control Act 45 of 2002 does not detract from a trustee's common-law entitlement to vindicate trust property and does not deprive a trustee of *locus standi* to vindicate the property held in trust. A trustee in whom ownership (albeit bare *dominium*) in the property vests has standing to apply for ejectment and to vindicate the property even though he or she is not beneficially interested in such property (at 577F-578D).

125 Note, however, that the provisions of High Court rule 14 and Magistrates' Courts rule 54, discussed below in Section 3.12 of this book, may well apply to trusts. See *First National Bank of SA Ltd v Strachan Family Trust* [2000] 3 All SA 379 (T) at 384 and *Cupido v Kings Lodge Hotel* [1999] (4) SA 257 (E) at 263E.

126 See *Goolam Ally Family Trust t/a Textile Curtaining and Trimming v Textile, Curtaining and Trimming (Pty) Ltd* 1989 (4) SA 985 (C) at 988D-E. See too Cameron et al., *Honore*, op. cit., 1. Note, however, that an application for the removal of a trustee or a beneficiary's claim against a trustee for damages for breach of trust, are claims against the trustee in his personal capacity. In *Stander and Others v Schwulst and Others* 2008 (1) SA 81 (C) at 92E–F it was stated that: 'A claim should be brought against a trustee in his representative capacity (only) where he is alleged to be liable in that capacity, for example on a contract concluded on behalf of the trust or a delict committed by the trust or to effect payment due under the trust deed to a beneficiary.'

127 Different rules may apply if the trust is a 'bewind' trust (a trust where the founder transfers ownership of the trust assets to the beneficiary but the trustee is responsible for the administration of the trust assets). We

recommend that you consult specialist texts dealing with the topic of trust law when handling matters involving trusts.

128*Jones and Buckle, Vol II, The Rules*, RS 12, 2016 Rule-p54–2.

129High Court rule 14 and Magistrates' Courts rule 54. See the comments of Harms JA on the complexity of these rules in *DF Scott (EP) (Pty) Ltd v Golden Valley Supermarket* 2002 (6) SA 297 (SCA) at para [1].

130*DF Scott (EP) (Pty) Ltd v Golden Valley Supermarket* 2002 (6) SA 297 (SCA) at 301. The learned judge refers to the following authorities in support of his contentions: *Simpson's Motors v Flamingo Motors* 1989 (4) SA 797 (W) at 798I; *Parker v Rand Motor Transport Co and Another* 1930 AD 353 at 357 *in fine; Ahmed v Belmont Supermarket* 1991 (3) SA 809 (N).

131High Court rule 14(1).

132High Court rule 14(1).

133Note that once this provision of the Consumer Protection Act 68 of 2008 is put into operation, trading names will have to be officially registered. The registration process will be carried out by the Registrar of Companies, or the official performing similar functions in terms of any subsequent legislation. See s 79 and 80 of the Consumer Protection Act 68 of 2008.

134High Court rule 14(2).

135*Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council and Others* 2002 (6) SA 66 (T) at 75. See also *Molotlegi and Another v President of Bophuthatswana and Others* 1989 (3) SA 119 (BG) as referred to by C King DJP in *Interim Ward S19 Council v Premier, Western Cape Province, and Others* 1998 (3) SA 1056 (C) at 1060F–1061B.

136See *DF Scott (EP) (Pty) Ltd v Golden Valley Supermarket* [2002] 3 All SA 1 (A) at [9] and *Afriforum v Minister of Trade and Industry and Others*2013 (4) SA 63 (GNP); [2013] 3 All SA 52 (GNP) at [33], which make it clear that rule 14 deals with procedure and not with substantive law and that it does not create rights or liabilities which otherwise would not have existed.

137High Court rules 14(3) and (4).

138High Court rule 14(5)(*a*).

139High Court rule 14(5)(*b*) read with rules 14(12) and 21(4).

140High Court rule 14(5)(*c*).

141High Court Form 8. Note that in terms of rule 14(5)(*d*), a plaintiff who alleges that a certain person was a partner or proprietor of the defendant firm or partnership at the time his cause of action arose, is also obliged to serve a notice in accordance with Form 8 on such person. Indeed, it is in the plaintiff's interests to do so since by serving the notice he is able to tie the person suspected of being a partner into the proceedings and oblige that person either to deny this or risk being estopped from doing so at a later stage.

142High Court rule 14(5)(*h*).

143*Simpson's Motors v Flamingo Motors* 1989 (4) SA 797 (W); *PK Stores (Pty) Ltd t/a Eric's Spar v Mike's Kitchen* 1994 (2) SA 322 (O); *Ahmed v Belmont Supermarket* 1991 (3) SA 809 (N); and *contra*: *Farm Fare (Pty) Ltd v Fairwood Supermarket* 1986 (4) SA 258 (C).

144High Court rule 14(9)(*a*). See, in general, *Burger v Rand Water Board and Another* 2007 (1) SA 30 (SCA).

145High Court rule 14(9)(*b*).

146High Court rule 14(2) read with rule 21(4).

147*Ex-TRTC United Workers Front and Others v Premier, Eastern Cape Province* 2010 (2) SA 114 (ECB) at [25].

148The important case of *DF Scott (EP) (Pty) Ltd v Golden Valley Supermarket* 2002 (6) SA 297 (SCA) sets out certain of these differences.

149A plaintiff citing the partnership business is in effect suing those persons who were partners at the time his cause of action arose and this applies even if they are no longer partners of that business at the time action is instituted.

150Note the different meaning attached to the word 'firm' in High Court rule 14, discussed in the previous section.

151Magistrates' Courts rule 54(4). Note that in this case (i.e. where the business is being conducted by a sole proprietor as opposed to a partnership) the rule does not help you if the business has changed hands since the time the cause of action arose. By citing the business, you are in effect suing the *present* owner of the business, who will not be liable in terms of your cause of action. See *Maisel v Anglo African Furnishing Co* 1931 CPD 223 at 225 and *DF Scott (EP) (Pty) Ltd v Golden Valley Supermarket* 2002 (6) SA 297 (SCA) at para [10].

152Magistrates' Courts rule 54(5).

153Magistrates' Courts rule 54(1) read with rules 54(4) and 54(5).

154Magistrates' Courts rule 54(2).

155Magistrates' Courts rule 54(3).

156*Vorster v John Jack Ltd* 1925 TPD 793; *Rees v Feldman* 1927 TPD 884.

157*Jones and Buckle, Vol II, The Rules*, op. cit., RS 12, 2016 Rule–p54–2.

158Magistrates' Courts rule 54(6).

159Magistrates' Courts rule 54(6) read with rule 54(3).

160See, generally, High Court rule 7 and Magistrates' Courts rule 52(2).

161This does not absolve the attorney of the duty to report to his client and take instructions with regard to the conduct of the matter on a regular basis. It is advisable for attorneys to record any advice to clients in writing, particularly with regard to the making or accepting of offers of settlement. Some clients have bad memories when it comes to unpalatable advice, and may make unfounded allegations against their attorneys when things go wrong. In *MEC For Economic Affairs, Environment And Tourism, Eastern Cape V Kruizenga And Another* 2010 (4) SA 122 (SCA), the appellant applied for rescission of a court order incorporating a settlement agreement reached in a rule 37 pre-trial conference, on the basis that the attorney was not bound by the settlement agreement because its legal representative, the State Attorney, was not expressly authorised to settle the matter on its behalf. The Supreme Court of Appeal held that the respondents had been entitled to assume that a State Attorney attending a pre-trial conference had the authority to do what attorneys usually did at rule 37 conferences, i.e. to make admissions and concessions, and to agree on compromises and settlements.

162See *Allan Pohl, Otto and Theron (Pty) Ltd v Schoeman and Another* 1954 (3) SA 589 (T).

163The names of the individual attorneys are needed in case the firm of attorneys is a partnership which does not have a legal personality apart from the individual partners. The situation may be different for those firms of attorneys which are incorporated.

164*Volkskas Motor Bank Ltd v Leo Mining Raise Bone CC and Others* 1992 (2) SA 50 (W).

165*Yates Investments (Pty) Ltd v Commissioner for Inland Revenue* 1956 (1) SA 364 (A); *Arma Carpet House (Johannesburg) (Pty) Ltd v Domestic & Commercial Carpet Fittings (Pty) Ltd and Another* 1977 (3) SA 448 (W).

166*Mittal Steel South Africa Ltd t/a Vereeniging Steel v Pipechem CC* 2008 (1) SA 640 (C); *Navy Two CC v Industrial Zone Ltd* [2006] 3 All SA 263 (SCA); and *Manong & Associates (Pty) Ltd v Minister of Public Works and Another* 2010 (2) SA 167 (SCA).

167High Court rule 7(1).

168High Court rule 7(2).

169High Court rule 7(1).

170High Court rule 16(1).

171Note that the rule still refers to eight kilometres, despite the fact that other rules (including High Court rules 6 and 17 have been amended to refer to 15 kilometres). This was likely an oversight by the Rules Board and we anticipate that it will be remedied by the Rules Board in due course.

172High Court rule 16(2).

173High Court rule 16(3).

174High Court rule 16(4)(*a*).

175High Court rule 16(4)(*b*).

176*Macdonald t/a Happy Days Cafe v Neethling* 1990 (4) SA 30 (N).

177Magistrates' Courts rule 52(1)(*a*).

178Section 1 of the Magistrates' Courts Act 32 of 1944 read with ss 21 and 22 of the said Act and with s 1 of the Attorneys Act 53 of 1979. This list includes a law agent, although since 1917, law agents have played an ever-decreasing role in the administration of the law in South Africa, and may for practical purposes be disregarded.

179See also *Society of Advocates of Natal v De Freitas and Another (Natal Law Society intervening)* 1997 (4) SA 1134 (N). This case was confirmed on appeal in *De Freitas and Another v Society of Advocates of Natal and Another* 2001 (3) SA 750 (SCA). See also *Rösemann v General Council of The Bar of South Africa* 2004 (1) SA 568 (SCA).

180*Society of Advocates of Natal v De Freitas*, supra at 1175I–1176C.

181*Society of Advocates of Natal v De Freitas*, supra at 1175.

182See s 8(1) of the Attorneys Act 53 of 1979 and, in particular, the proviso to this subsection, which restricts the appearance of candidate attorneys in certain courts unless they have certain work experience as stipulated in the proviso. Note that the whole of the Attorneys Act 53 of 1979 has been repealed by the Legal Practice

Act 28 of 2014, although the repeal is not yet effective. The provision giving effect to the repeal will come into operation on a date to be fixed by the President by proclamation in the *Government Gazette*.

183Ibid.

184See *Jones and Buckle, Vol II, The Rules*, RS 12, 2016, Rule 52–2.

185Magistrates' Courts rule 52(1)(*b*).

186Magistrates' Courts rule 52(1)(*c*).

187Magistrates' Courts rule 52(2).

188High Court rule 40(2)(*a*).

189Ibid.

190High Court rule 40(1)(*a*).

191High Court rule 40(2)(*b*).

192*Gerber v Uijs SC* (2980/10) [2010] ZAWCHC 64 (3 March 2010) at para [18].

193Ibid. at para [22].

194High Court rule 40(2)(*a*).

195High Court rule 40(2)(*b*).

196High Court rule 40(2)(*c*).

197High Court rule 40(3).

198High Court rule 40(7).

199Magistrates' Courts rule 53(1).

200*Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board* 1950 (2) SA 420 (A) at 424.

201Section 50(1) of the Superior Courts Act 10 of 2013.

202Section 50(1) of the Superior Courts Act 10 of 2013. Note that s 50(2) provides that the Gauteng Division, Pretoria, shall function as the Limpopo and Mpumalanga Divisions, respectively, until a notice published in terms of s 6 (3) in respect of those divisions comes into operation.

203See Government Notice 670 of 29 July 2010 in *Government Gazette* 33418 of 29 July 2010 (as amended, most recently by GN 3 in *GG* 39603 of 18 January 2016).

204See s 42(1) of the Children's Act 38 of 2005.

205See s 3 of the Maintenance Act 99 of 1998.

206See s 2 of the Admiralty Jurisdiction Regulation Act 105 of 1983.

207See s 16 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. See also *Government Gazette* No 25091, Government Notice 878, 13 June 2003; *Government Gazette* No 26178, Government Notice 383, 26 March 2004.

208See s 116 of the Tax Administration Act 28 of 2011. See *CSARS v Capstone 556 (Pty) Ltd* [2016] ZASCA 2; [2016] 2 All SA 21 (SCA); 2016 (4) SA 341 (SCA) (9 February 2016) at para 21 where the Supreme Court of Appeal stated that the provisions of s 86A of the Income Tax Act 58 of 1962 and of Part E of Chapter 9 of the Tax Administration Act 28 of 2011 are substantially the same.

209See s 22 of the Restitution of Land Rights Act 22 of 1994.

210See s 18 of the Electoral Commission Act 51 of 1996.

211See s 36 of the Competition Act 89 of 1998.

212See s 151 of the Labour Relations Act 66 of 1995.

213*GG* 37450, GN R185 read with s 15 of the Small Claims Courts Act 61 of 1984.

214See s 7(1) of the Small Claims Courts Act 61 of 1984.

215See s 14(2) of the Small Claims Courts Act 61 of 1984.

216See s 26(3) of the Small Claims Courts Act 61 of 1984.

217See s 7(2) of the Small Claims Courts Act 61 of 1984. Note that the plaintiff in a Small Claims Courts' matter must appear in person and may not be represented by any other person during the proceedings. If a juristic person has been sued in the Small Claims Court, that juristic person may be represented by its duly nominated director or other officer.

218See Stage Four I of this book dealing with 'Small Claims Courts Procedures'.

219Section 167(4) of the Constitution.

220Constitutional Court rule 17 read with s 167(6)(*a*) of the Constitution. See, for example, the reasons for granting direct access in *Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC) at para [15]. See also *Christian Education South Africa v Minister of Education* 1999 (2) SA 83 (CC); *Moseneke and Others v The Master and Another* 2001 (2) SA 18 (CC); *Beyers v Elf Regters van die Grondwetlike Hof* 2002 (6) SA 630 (CC); *Justice Alliance of South Africa v President of Republic of South Africa and Others* 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC);

and *Economic Freedom Fighters v Speaker of the National Assembly and Others*; *Democratic Alliance v Speaker of the National Assembly and Others* 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) in which the Democratic Alliance launched a conditional application for direct access to the Constitutional Court (conditional on the Economic Freedom Fighters being granted access to the court based on its exclusive jurisdiction under s 167(4)(*e*) of the Constitution).

221See, in general, Magistrates' Courts Act 32 of 1944, s 29 and, in particular, Magistrates' Courts Act 32 of 1944 s 29(1A), read with Government Notice 216 and 217 in *Government Gazette* 37477 of 27 March 2014. Note that the monetary limits in respect of the various causes of action in s 29 shall be determined from time to time by the Minister by notice in the *Government Gazette*. Note, also, that when we refer to either the District Magistrates' Courts or the Regional Magistrates' Courts in this book, we are referring to those courts established by the Minister of Justice in terms of s 2 of the Magistrates' Courts Act for the adjudication of civil disputes, as opposed to those courts established for the trial of persons accused of criminal offences.

222*Standard Credit Corporation Ltd v Bester and Others* 1987 (1) SA 812 (W) at 819. However, see *Sealandair Shipping and Forwarding v Slash Clothing Co (Pty) Ltd* 1987 (2) SA 635 (W), in which Coetzee DJP states as follows at 642: ' … I have no rational basis for depriving the plaintiff of any of his normal costs involved in litigating in this Court. It is here as a matter of right and as such, equally as of right and like any other litigant, entitled to its full remedy which includes its full costs.' The *Sealandair* case was criticised and not followed in the case of *Mofokeng v General Accident Versekering Bpk* 1990 (2) SA 712 (W), in which the court held that the mere fact that the High Court possesses jurisdiction to hear a case does not mean that it is obliged to grant a successful litigant his costs on the High Court scale, and that the relevant facts and circumstances must still be borne in mind with a view to the granting of a fair and justified order for costs; *Vermaak v Road Accident Fund* (2509/03, ECJ020/2006) [2006] ZAECHC 10 (3 March 2006) at para [5].

223Sections 45 and 46(2)(*c*)(iii) of the Magistrates' Courts Act 32 of 1944. Note, however, that there are limitations on such consent. For example, in terms of s 90(2)(*k*)(vi)(*aa*) of the National Credit Act 34 of 2005, a provision of a credit agreement is unlawful if it expresses consent to the jurisdiction of the High Court when the Magistrates' Court has concurrent jurisdiction.

224Section 38 of the Magistrates' Courts Act 32 of 1944.

225Section 39 of the Magistrates' Courts Act 32 of 1944.

226Section 46(2)(*a*) of the Magistrates' Courts Act 32 of 1944.

227Section 46(2)(*c*) of the Magistrates' Courts Act 32 of 1944. For other examples, refer to s 46 as a whole.

228*Boltman v Abrahams* 1947 NPD 113 at 116; *Howard v Howard* 1966 (2) SA 718 (R); *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A); *Mills v Starwell Finance (Pty) Ltd* 1981 (3) SA 84 (N) at 85.

229*Mills v Starwell Finance (Pty) Ltd* 1981 (3) SA 84 (N); *Buck v Parker* 1908 TS 1100; *Barens en 'n Ander v Lottering* 2000 (3) SA 305 (C) at 309F–G.

230*Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A) at 301; *McConnell v McConnell* 1981 (4) SA 300 (Z) at 302; *Drs Prinsloo en Mynhardt v O'Riley* 1991 (3) SA 184 (T) at 186.

231Special pleas are dealt with in detail later in this book from p211 onwards.

232*Malherbe v Britstown Municipality* 1949 (1) SA 281 (C) at 287; *Mayne v Main* 2001 (2) SA1239 (SCA) at 1242; *Terblanche NO and Others v Damji and Another* 2003 (5) SA 489 (C) at 498.

233*Riversdale Divisional Council v Pienaar* (1885) 3 SC 252; *Stork v Stork* (1903) 20 SC 138; *Gqalana and Others v Knoesen and Another* 1980 (4) SA 119 (E) at 120; *Mason Motors (Edms) Bpk v Van Niekerk* 1983 (4) SA 406 (T) at 409; *Venter v Standard Bank of South Africa* [1999] 3 All SA 278 (W) at 280; *Ndamase v Functions* [2004] JOL 12592 (SCA). Bear in mind, however, that authority may be implied as well as expressed. As is stated in *Jones and Buckle*: '… when the Act gives jurisdiction to the court on the subject in dispute its purpose is not to be defeated because the ancillary powers which are necessary to enforce the judgment have not been especially mentioned. It must, however, be remembered that the doctrine of implied jurisdiction can arise only where the Act and the rules are silent.' See *Jones and Buckle, Vol II, The Rules*, RS 13, 2016 Rule-p6.

234Note that the term 'action' as used in s 29 must be interpreted narrowly to mean legal proceedings initiated by way of summons only, and not to include legal proceedings initiated by way of application. It is only in respect of actions (in the narrow sense) that general jurisdiction is conferred on the Magistrates' Courts in terms of s 29. Specific jurisdiction in respect of specific applications is, however, conferred on the Magistrates' Courts in other sections of the Magistrates' Courts Act. As Howard J stated in the case of *In Re Pennington Health Committee* 1980 (4) SA 243 (N) at 247: 'Procedure by way of application is recognised,

but the intention appears to have been to confer jurisdiction generally in actions (in the narrow sense) while authorising application proceedings only in specific cases.'

235Section 29(1)(*a*) read with s 29(1A) of the Magistrates' Courts Act 32 of 1944, as well as with Government Notice 217 in *Government Gazette*37477 of 27 March 2014.

236Section 29(1)(*a*) read with s 29(1A) of the Magistrates' Courts Act 32 of 1944, as well as Government Notice 216 in *Government Gazette* 37477 of 27 March 2014.

237*Van der Merwe NO v Van der Merwe* 1973 (1) SA 436 (C).

238Section 29(1)(*b*) read with s 29(1A) of the Magistrates' Courts Act 32 of 1944, as well as with Government Notice 216 in *Government Gazette*37477 of 27 March 2014. Note that a minefield of statutory provisions now regulates this area of the law. In particular, practitioners are advised to pay careful attention to the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, commonly known as 'PIE'. The roots of PIE are to be found in s 26(3) of the Constitution. In this regard, the Constitutional Court stated as follows in the case of *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at 229: 'In sum, the Constitution imposes new obligations on the courts concerning the rights relating to property not previously recognised by the common law. It counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrarily to be deprived of a home.' In terms of s 4(1) of PIE, the provisions of this section of PIE must be followed whenever an owner or person in charge of land wishes to evict an unlawful occupier from that land. This includes an occupier whose occupation was originally lawful, but is now unlawful (e.g. a tenant who stops paying his rent), but does not apply in the case of commercial properties, or to land or buildings occupied by juristic persons. In this regard, see *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA), in particular at para [20], 124–125. See also the case of *Andries van der Schyff en Seuns (Pty) Ltd t/a Complete Construction v Webstrade Inv No 45 (Pty) Ltd and Others* 2006 (5) SA 327 (W). In this case, the respondents were affluent private owners of property. They had taken possession of the property while embroiled in a dispute over workmanship and money. The court held that the protection under PIE was clearly not intended to protect affluent property owners who deliberately placed themselves in unlawful occupation of their own property, and that justice and equity did not require that the respondents be protected from their unlawful conduct. In relation to jurisdiction, s 9 of PIE provides as follows: 'Notwithstanding any provision of any other law, a Magistrates' Court has jurisdiction to issue any order or instruction or to impose any penalty authorised by the provisions of this Act.' Another important Act of which practitioners should take note is the Eviction in Terms of the Extension of Security of Tenure Act 62 of 1997, commonly known as 'ESTA'. This Act applies to occupiers who occupy non-urban land or land in an urban area which has been designated for agricultural use, and had, on or after 4 February 1997, consent or another right in law to do so. The provisions of s 29(1)(*b*) of the Magistrates' Courts Act should therefore be read in conjunction with any relevant statutory provisions which may be applicable, which may alter the jurisdictional position as set out in the said subsection.

239Section 29(1)(*b*) read with s 29(1A) of the Magistrates' Courts Act 32 of 1944, as well as Government Notice 216 and 217 in *Government Gazette*37477 of 27 March 2014. See also the general comments in an earlier footnote concerning the various statutory provisions which now regulate this area of the law.

240This was confirmed in the case of *Jordaan v De Beer Scheepers and Another* 1975 (3) SA 845 (T) where the judge stated as follows at 848: 'The value to the occupier of a right of occupation of immovable property is, in my view, the economic advantage which he enjoys from the exercise of that right. In consideration of that advantage, he must, of course, pay rent if he is occupying under a lease or a statutory tenancy and, to my mind, when the Legislature, in s 29(1)(*b*) of the Magistrates' Courts Act, used the expression "clear value to the occupier", it intended by the word "clear" to convey the meaning "over and above the rent payable".' For example, assume that your client is renting a mansion at R10 000 per month, and that the lease still has 12 months to run. The landlord wants to bring an action to eject your client, who has a *bona fide* reason to dispute that the landlord has the right to terminate his occupation. Assume that it would cost your client R30 000 per month to rent a similar mansion. The clear value to your client of his right to occupation is R20 000 (which is the extra your client would have to pay each month to hire an alternative mansion)´ 12 (which is the number of months left to run on your client's lease) = R240 000 (which is beyond the jurisdiction of a District Magistrates' Court).

241*Langham Court (Pty) Ltd v Mavromaty* 1954 (3) SA 742 (T) at 746. If the profit reasonably expected is over R400 000, the matter must be heard in a division of the High Court. If the profit reasonably expected is more than R200 000 but not more than R400 000, the matter must be heard in a Regional Magistrates' Court. If the profit reasonably expected is R200 000 or less, the matter must be heard in a District Magistrates' Court. Note that the 'profit' referred to is the *net profit*, not the gross profit.

242*Jones and Buckle, Vol I, The Act*, RS 10, 2016 Act–p125

243Section 29(1)(*c*) of the Magistrates' Courts Act 32 of 1944.

244*Van Rensburg v Coetzee* 1979 (4) SA 655 (A) at 677.

245*Martins v De Waal and Others* 1963 (3) SA 787 (T); *Van Rensburg v Coetzee*, supra at 667.

246Section 29(1)(*d*) read with s 29(1A) of the Magistrates' Courts Act 32 of 1944, as well as with Government Notice 217 in *Government Gazette*37477 of 27 March 2014.

247Section 29(1)(*d*) read with s 29(1A) of the Magistrates' Courts Act 32 of 1944, as well as Government Notice 216 in *Government Gazette* 37477 of 27 March 2014.

248The definition of a liquid document in this context is the same definition that has been judicially given to liquid documents in provisional sentence cases in the High Court. See, for example, *Rich and Others v Lagerwey* 1974 (4) SA 748 (A) at 754.

249*Rich and Others v Lagerwey*, supra.

250Liquid documents are dealt with in greater detail later in Stage Four, Part B of this book. Remember that it is not the amount that is written on the liquid document that is important in determining jurisdiction; what is important is the amount claimed. Provided that this amount is R200 000 or less, the District Magistrates' Courts will possess jurisdiction, whereas if this amount is more than R200 000 but not more than R400 000, the Regional Magistrates' Courts will possess jurisdiction. For example, assume that you mortgage your property and borrow R220 000 from the bank. You pay R30 000 back to the bank, and then stop paying. The amount reflected on your mortgage bond will be R220 000, but the bank's claim against you will only be R190 000. In this case, the bank is entitled to proceed against you in the District Magistrates' Court.

251Section 29(1)(*e*) of the Magistrates' Courts Act. See also the National Credit Act 34 of 2005.

252*Nedbank Ltd v Mateman and Others; Nedbank Ltd v Stringer and Another* 2008 (4) SA 276 (T) at 284B-C. Also see Annexure B.

253See Government Notice 216 in *Government Gazette* 37477 of 27 March 2014.

254The relevant Minister is now known as the Minister of Justice and Correctional Services.

255With effect from 22 January 2014, s 29(1A) does give the Minister the power to 'determine different amounts contemplated in subsection (1)(*a*), (*b*), (*d*), (*f*) and (*g*) in respect of courts for districts and courts for regional divisions' but affords no power in terms of subsection 1(*a*)(*e*). Furthermore since s 29(1)(*e*) does not contemplate an amount to be determined by the Minister (unlike the other subsections mentioned in s 29(1A)). See also *FirstRand Bank Ltd v Maleke and Three Similar Cases* 2010 (1) SA 143 (GSJ) at 159 and the discussion in *Jones and Buckle* RS 10, 2016 Act-p140.

256Matrimonial Property Act 88 of 1984.

257Section 29(1)(*f*) read with s 29(1A) of the Magistrates' Courts Act 32 of 1944, as well as with Government Notice 216 in *Government Gazette* 37477 of 27 March 2014.

258Section 29(1)(*f*) read with s 29(1A) of the Magistrates' Courts Act 32 of 1944, as well as Government Notice 216 in *Government Gazette* 37477 of 27 March 2014.

259Section 29(1)(*f*A) of the Magistrates' Courts Act 32 of 1944.

260Section 7 of the Close Corporations Act 69 of 1984.

261Section 29(1)(*g*) read with s 29(1A) of the Magistrates' Courts Act, as well as with Government Notice 216 in *Government Gazette* 37477 of 27 March 2014.

262Section 29(1)(*g*) read with s 29(1A) of the Magistrates' Courts Act, as well as with Government Notice 217 in *Government Gazette* 37477 of 27 March 2014.

263*Botha v Andrade and Others* 2009 (1) SA 259 (SCA) at para [15], read with s 29(1)(*g*) and with s 29(1A) of the Magistrates' Courts Act 32 of 1944, Government Notice 217 in *Government Gazette* 37477 of 27 March 2014.

264Section 29(1B) of the Magistrates' Courts Act 32 of 1944 was inserted into the said Act by the Regional Courts Amendment Act 31 of 2008. The latter Act was brought into operation on 9 August 2010 in terms of Notice No 41 Regulation No 9350 in *Government Gazette* 33448 of 6 August 2010.

265In terms of s 29(1C) read with s 2(1)(iA), such courts must have been appointed by the Minister of Justice and Correctional Services as places for the adjudication of civil disputes contemplated in s 29(1B).

266Act 120 of 1998.

267See Section 2.4.4 below as to the issue of which particular Regional Magistrates' Court may hear a particular matter of the type listed in s 29(1B)(*a*) of the Magistrates' Courts Act 32 of 1944.

268Rule 6 provides, *inter alia*, that service of summons for a decree of divorce must be done personally; that the court may direct a form of substituted service; that a defendant is not permitted to waive service on the basis that he consents to a decree of divorce; that a presiding officer has the power in his discretion to dispense with any provision of the rules in terms of rule 1(3) at a pre-trial conference; that any amendment sought in terms of rule 55A to amend the prayers in a summons should preferably be served personally by the sheriff of the court unless the summons was served by way of substituted service or edictal citation; that the original marriage certificate must be produced, but a certified copy will on good grounds be acceptable.

269For more on this, see Annexure A which deals with alternative dispute resolution.

270Section 40 of the Magistrates' Courts Act 32 of 1944.

271*Mohamed & Son v Mohamed* 1959 (2) SA 688 (T) at 691; *Lochrenberg v Sululu* 1960 (2) SA 502 (E); *Marais v Du Preez* 1966 (4) SA 456 (E) at 457.

272*African Share Agency Ltd v Scott, Guthrie & Co* 1907 TS 410. See also *Cohen v Sherman & Co* 1941 TPD 134. Note, however, the following counterexample: The day before Valentine's Day, you buy five items, costing R50 000 each, from a jewellery shop and pay by cheque. The next day you realise that you are completely broke and stop payment on the cheque. Although each of the items costs less than R200 000, the owner of the jewellery shop is not entitled to sue you in the District Magistrates' Courts. The reason is that there was a single transaction of purchase and sale, amounting to a single claim, which may not be split. Note that in this case the shop owner could sue either for breach of contract, or on the cheque (by means of a provisional sentence summons which is discussed in detail later in this book), but in both cases the action would have to be brought in the Regional Magistrates' Courts.

273Section 43(1) of the Magistrates' Courts Act 32 of 1944.

274Section 37(1) of the Magistrates' Courts Act 32 of 1944.

275See *Van der Merwe NO v Van der Merwe* 1973 (1) SA 436 (C) at 440.

276Section 37(2) of the Magistrates' Courts Act 32 of 1944. See *Tshisa v Premier of the Free State and Another* 2010 (2) SA 153 (FB) at 156 and *Ntshingila v Minister of Police* 2012 (1) SA 392 (WCC) at 397.

277Section 37(3) of the Magistrates' Courts Act 32 of 1944.

278Section 45(1) of the Magistrates' Courts Act 32 of 1944.

279*David v Naggyah and Another* 1961 (3) SA 4 (N); *Neale v Edenvale Plastic Products (Pty) Ltd* 1971 (3) SA 860 (T) at 864D-865H.

280Section 46 is discussed in detail below in Section 2.3.

28134 of 2005.

282*University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others*; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others; Mavava Trading *279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others* (CCT 127/15) [2016] ZACC 32 (13 September 2016) from para 114.

283Jurisdiction in respect of *persons* is set out in s 28 of the Magistrates' Courts Act 32 of 1944, and is discussed below in Section 2.4. Jurisdiction in respect of *causes of action* is set out in s 29 of the Magistrates' Courts Act 32 of 1944. In simple terms, s 29 tells you whether or not a matter belongs within the jurisdiction of the Magistrates' Courts in general, while s 28 links the matter to a particular Magistrates' Court.

284*Van Heerden v Muir* 1955 (2) SA 376 (A).

285For example, in terms of ss 28(1)(*a*) and 28(1)(*d*) of the Magistrates' Courts Act 32 of 1944, the particular Magistrates' Court or Courts within whose area the defendant resides, is employed, or carries on business, or within whose area of jurisdiction the cause of action arose wholly, will have jurisdiction to hear the matter.

286See *Truck & Car Co (Pty) Ltd v Ewart* 1949 (4) SA 295 (T); *Skead v Swanepoel* 1949 (4) SA 763 (T).

2871955 (2) SA 376 (A).

288At 379G–H.

289Section 45(2) of the Magistrates' Courts Act 32 of 1944.

290Section 38(1) of the Magistrates' Courts Act 32 of 1944.

291Section 38(2) of the Magistrates' Courts Act 32 of 1944.

292In fact, as claims are invariably calculated in terms of what a plaintiff is able to prove (i.e. positively), the need for the section is open to some question.

293Section 39 of the Magistrates' Courts Act 32 of 1944.

294Note that the proviso to s 38(2) discussed previously does not help you in this case since the proviso only comes into operation if your claim is 'upheld in part only'. In this case, your claim was upheld in full.

295See our discussion of s 45(1) of the Magistrates' Courts Act 32 of 1944 at 2.2.3(*a*). See also *Badenhorst v Theophanous* 1988 (1) SA 793 (C) at 796. Note, however, the provisions of s 37(2) of the Magistrates' Courts Act 32 of 1944 which states: 'Where the amount claimed or other relief sought is within the jurisdiction, such jurisdiction shall not be ousted merely because it is necessary for the court, in order to arrive at a decision, to give a finding upon a matter beyond the jurisdiction.' See the case of *Le Roux v Le Roux* 1998 (2) All SA 315 (O), in which the amount claimed and the relief sought fell within the jurisdiction of the Magistrates' Courts, but the Magistrate was required to interpret a will in order to adjudicate upon a defence raised by the defendant. It was held that the court possessed jurisdiction to hear the matter.

296*Jones and Buckle, Vol I, The Act*, RS 10, 2016 Act-p80.

297Section 29(1B) of the Magistrates' Courts Act 32 of 1944 affords jurisdiction in such matters to certain Regional Magistrates' Courts.

298Section 46(2)(*a*) of the Magistrates' Courts Act 32 of 1944.

299However, see *Le Roux v Le Roux* 1998 (2) All SA 315 (O) discussed at footnote 297 above.

300Section 46(2)(*b*) of the Magistrates' Courts Act 32 of 1944.

301The procedure followed in the High Court is set out in High Court rule 57 – *De lunatico inquirendo*, appointment of curators in respect of persons under disability and release from curatorship. In general terms, rule 57 provides for the appointment first of a *curator ad litem* to assist the respondent while the matter is before court, and then of a *curator bonis* to manage the affairs of a respondent who has been declared to be of unsound mind.

302Section 46(2)(*d*) of the Magistrates' Courts Act 32 of 1944.

303*Garber NO v Witwatersrand Jewish Aged Home* 1985 (3) SA 460 (W) at 464. Note that there is specific legislation – the Vexatious Proceedings Act 3 of 1956 – which is aimed at the prevention of unnecessary and groundless legal proceedings. In this regard, see *Cohen v Cohen and Another*[2002] 4 All SA 21 (C); *Ryklof Beleggings (Edms) Bpk and Another v Du Plessis* [2006] 4 All SA 474 (C); and Absa Bank Ltd v Dlamini 2008 (2) SA 262 (T).

304Section 46(2)(*c*) of the Magistrates' Courts Act 32 of 1944.

305A claim for specific performance usually arises as a result of a breach of contract by one of the parties to the contract. It amounts to a demand that the party who breached the contract perform in terms of the contract of which he is in breach.

306An example of an order for specific performance not arising out of contract may be found in *Olivier v Stoop* 1978 (1) SA 196 (T). The order of specific performance sought was that a liquidator be appointed to liquidate a partnership. In this case the court held that the Magistrates' Courts did possess jurisdiction to make such an order.

307See *Maisel v Camberleigh Court (Pty) Ltd* 1953 (4) SA 371 (C) at 379; and *Olivier v Stoop* 1978 (1) SA 196 (T). See also *Malkiewicz v Van Niekerk and Fourouclas Investments CC* [2008] 1 All SA 57 (T).

308*Tuckers Land and Development Corporation (Edms) Bpk v Van Zyl* 1977 (3) SA 1041 (T); *Otto en 'n Ander v Basson* 1994 (2) SA 744 (C); *Wannenburg v Madamu Technologies (Pty) Ltd* (AR87/2012) [2012] ZAKZPHC 35 (13 June 2012) at para 18; *Van Der Walt v Road Accident Fund*(2014/12763) [2015] ZAGPJHC 86 (20 May 2015).

309GN 217 in *GG* 37477 of 27 March 2014.

310See, in general, *Doyle and Another v Fleet Motors PE (Pty) Ltd* 1971 (3) SA 760 (A).

311*Victor Products (SA) (Pty) Ltd v Lateulere Manufacturing (Pty) Ltd* 1975 (1) SA 961 (W) at 963B.

312*Mostert v Mostert* 1913 TPD 255; *Du Bruyn v Joubert* 1982 (4) SA 691 (W) at 694D; *Van Staden v Venter* 1992 (1) SA 552 (A) at 560D–E.

313*Countertrade Establishment (Pty) Ltd v EBN Trading (Pty) Ltd* 1995 (1) SA 762 (N) at 768.

314See *Doyle and Another v Fleet Motors PE (Pty) Ltd* 1971 (3) SA 760 (A) at 762F–763D, in which the Appellate Division set out the procedure to be followed in such claims.

315In other words, the question is whether the plaintiff has made use of the so-called 'double-barrelled' remedy. *Jones and Buckle* state: 'A procedural practice has grown up in our courts which permits a plaintiff to claim implementation of an agreement and to obtain judgment therefore, and in the same action to ask the court, should the defendant fail to comply with the court's judgment for implementation of the agreement, to set aside the agreement and grant consequential relief.' They go on to explain that: 'This so-called "double-barrelled" remedy has its origin in *Ras v Simpson* 1904 TS 254 and has often been applied.' They cite numerous cases in support of their contentions, including *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 470 and *Nel v Silicon Smelters (Edms) Bpk en 'n Ander* 1981 (4) SA 792 (A) at 800H–801A. See *Jones and Buckle, Vol I, The Act*, op. cit., *The Act* RS 10, 2016 Act-p309 including note 81.

316Section 28(1)*(a)* of the Magistrates' Courts Act 32 of 1944.

317Section 28(1)*(d)* of the Magistrates' Courts Act 32 of 1944.

318In terms of s 2 of the Interpretation Act 33 of 1957, a 'person' includes (a) any divisional council, municipal council, village management board, or like authority; (b) any company incorporated or registered as such under any law; and (c) any body of persons corporate or unincorporated. Further, in terms of s 28(2) of the Magistrates' Courts Act 32 of 1944, a 'person' as referred to in s 28 includes the state.

319*Beedle & Co v Bowley* (1895) 12 SC 401 at 403. See also *Hogsett v Buys* 1913 CPD 200 at 205; *Ex Parte Minister of Native Affairs* 1941 AD 53 at 59; *Mayne v Main* 2001 (2) SA 1239 (SCA) at 1243.

320*Mayne v Main* 2001 (2) SA 1239 (SCA) at 1243–1244. The court in this case held that a 'common-sense and realistic approach' had to be adopted when residence was being considered since: 'Modern-day conditions

and attitudes and the tendency towards a more itinerant lifestyle, particularly among business people, required this as to not do so might allow certain persons to avoid the jurisdictional nets of the courts and escape legal accountability for their wrongful actions.' See the headnote of the cited case at 1241.

321*Maritz v Erasmus* 1914 CPD 120; *Ex Parte Minister of Native Affairs* 1941 AD 53 at 58; *Barens en 'n Ander v Lottering* 2000 (3) SA 305 (C) at 309F.

322*TW Beckett & Co Ltd v H Kroomer Ltd* 1912 AD 324 at 334; *Mayne v Main* 2001 (2) SA 1239 (SCA) at 1243; *Terblanche NO and Others v Damji and Another* 2003 (5) SA 489 (C) at 499–500.

323*Barens en 'n Ander v Lottering* 2000 (3) SA 305 (C) at 309F–G.

324*Ex Parte Minister of Native Affairs* 1941 AD 53 at 59; *Tick v Broude and Another* 1973 (1) SA 462 (T) at 469F-G*; Mayne v Main* 2001 (2) SA 1239 (SCA) at 1243.

325*Langerman v Alport* 1911 CPD 376 at 379; *Tick v Broude and Another* 1973 (1) SA 462 (T) at 469; *Zwyssig v Zwyssig* 1997 (2) SA 467 (W) at 470F–471E; *Toumbis v Antoniou* 1999 (1) SA 636 (W) at 641F–I. We consider the concept of *domicile* under High Court jurisdiction.

326*Geyser v Nedbank Ltd and Others: In re Nedbank Ltd v Geyser (430/04, 430/04, 4/00430)* [2006] ZAGPHC 50 (22 May 2006); 2006 4 SA 544 (W) at 546D–E and *Durofin (Pty) Limited v Henque 4257 CC and Another* (A676/2008) [2011] ZAGPPHC 93 (15 June 2011) at para 35.

327*PMG Motors Kyalami (Pty) Ltd and Another v FirstRand Bank Ltd, Wesbank Division* 2015 (2) SA 634 (SCA) at 639.

328*Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A) at 496–499; *Leibowitz t/a Lee Finance v Mhlana and Others*2006 (6) SA 180 (SCA) at 183–4.

329*Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A) at 496.

330*Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd* (27956/2010) [2011] ZAWCHC 439 (16 November 2011).

331Act 33 of 1957.

332*Metlika Trading Ltd and Others v Commissioner, South African Revenue Service* 2005 (3) SA 1 (SCA) at 13C–G.

333*Jones and Buckle, Vol I, The Act*, op. cit., RS 10, 2016 Act-p96A.

334*Minister of Law and Order v Patterson* 1984 (2) SA 739 (A) at 756. Note, however, that this case may need to be re-examined in light of the fact that South Africa's new Constitution, unlike the old 1961 Constitution on which the *Patterson* case relied, no longer designates Pretoria as 'the seat of Government of the Republic'.

335*Jones and Buckle, Vol I, The Act*, op. cit., RS 10, 2016 Act-p97.

336*Sciacero & Co v Central South African Railways* 1910 TS 119 at 121; *Prudential Assurance Co Ltd v Swart* 1963 (2) SA 165 (E); *Parity Insurance Co Ltd v Wiid* 1964 (1) SA 216 (GW).

337*Minister of Law and Order v Patterson* 1984 (2) SA 739 (A) at 755–756.

338*General Accident Insurance Co SA Ltd v Mbonambi* 1986 (4) SA 967 (N).

339*General Accident Insurance Co SA Ltd v Mbonambi*, op. cit., at 971.

340*Minister of Law and Order v Patterson* 1984 (2) SA 739 (A) at 756.

341*McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 at 23. See *Ndlovu v Santam Ltd* 2006 (2) SA 239 (SCA) at paras [14]–[17] and *Mehlwempi v Unit Insurance Limited* (CA & R27/15, 1530/12) [2015] ZAECMHC 66 (15 September 2015) at para [6]. These cases confirm the *ratio* in *McKenzie*.

342*Dusheiko v Milburn* 1964 (4) SA 648 (A) at 658A.

343*Kings Transport v Viljoen* 1954 (1) SA 133 (C), which was cited with approval in *Makgae v Sentraboer (Kooperatief) Bpk* 1981 (4) SA 239 (T) at 244.

344See *Thomas v BMW South Africa (Pty) Ltd* 1996 (2) SA 106 (C) at p125G–H.

345*Jones and Buckle, Vol I, The Act*, RS 10, 2016 Act-p106.

346*Dietrichsen v Dietrichsen* 1911 TPD 486.

347As to the place of breach, see *Buys v Roodt (nou Otto)* 2000 (1) SA 535 (O).

348*King's Transport v Viljoen* 1954 (1) SA 133 (C).

349*Herholdt v Rand Debt Collecting Co* 1965 (3) SA 752 (T).

350Section 28(1)(*b*) of the Magistrates' Courts Act 32 of 1944.

351Section 28(1)(*c*) of the Magistrates' Courts Act 32 of 1944.

352Paterson (2005), op. cit., 22.

353Ibid.

354*Jones and Buckle, Vol I, The Act*, op. cit., RS 10, 2016 Act-p102.

355See s 69(2) of the Magistrates' Courts Act 32 of 1944.

356In terms of s 4(3) of the Magistrates' Courts Act 32 of 1944, every process issued out of any court is of force throughout the country.

357Note that s 35(2) affords this court (i.e. the court within whose district the judgment debtor's property was attached) the discretion to remit the interpleader matter for trial to the court in which the judgment was given (i.e. the court out of which the warrant of execution was issued).

358See *Jones and Buckle, Vol I, The Act*, RS 10, 2016 Act-p112; and *Paterson* (2005), op. cit., 24.

359Section 69(2) of the Magistrates' Courts Act 32 of 1944.

360*Malcomess & Co Ltd v Allkin & Co Ltd* 1914 CPD 519; *Muller v Moller and Another* 1965 (1) SA 872 (C) at 880–881.

361We will be dealing with special pleas later in the book from p211.

362Section 46 is a statutory prohibition which prevents the Magistrates' Courts from exercising jurisdiction in respect of those matters set out in the said section.

363According to *Jones & Buckle* (RS 10, 2016 Act-p299) '[d]ivergent opinions have been expressed on the effect of a consent which is not express but tacit, and on the question whether circumstances could arise in which the defendant can be deemed to have waived his rights to object to the Magistrates' Court having exceeded the jurisdictional limits prescribed by s 29 of the Act. On the one hand, it has been held that the provision that the court may not hear a matter without the written consent of the parties is a provision put in for the benefit of the parties and that their consent may be inferred from conduct which amounts to a waiver of the right to object to the jurisdiction of the court. On the other hand, it has been held that 'consent by silence' is in direct conflict with s 45 and that consent to an extension is not prohibited, but can only be given in writing … It is submitted that the latter view is to be preferred, and that the express requirement of the section of a written consent cannot be overridden by mere acquiescence or waiver.'

364*Jones and Buckle, Vol I, The Act*, RS 10, 2016 Act-p113.

365Act 120 of 1998.

366*Bannatyne v Bannatyne (Commission for Gender Equality as Amicus Curiae*) 2003 (2) SA 363 (CC) at 372 para [17].

367Section 169*(b)* of the Constitution.

368Section 167(4) of the Constitution. This includes such matters as deciding on the constitutionality of any amendment to the Constitution; deciding whether or not Parliament or the President has failed to fulfil a constitutional obligation; and so on. These matters concern sensitive issues relating to the separation of powers. It makes sense, therefore, that they should fall within the exclusive jurisdiction of the Constitutional Court. See *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) at para [24] and *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2009 (6) SA 94 (CC).

369Section 169(*a*)(i) of the Constitution.

370Section 1691(*a*)(1)(ii) of the Constitution. As O'Regan J noted in the case of *Fredericks and Others v MEC for Education and Training, Eastern Cape, and Others* 2002 (2) SA 693 (CC) at 701 para 12: '[I]t is clear that Parliament may restrict the jurisdiction of the High Court only where it assigns the relevant constitutional jurisdiction to a court of similar status to a High Court.'

371Superior Courts Act 10 of 2013.

372Extract from s 21(1) of the Superior Courts Act 10 of 2013.

373*Ewing McDonald & Co Ltd … M Products Co* 1991 (1) SA 252 (A) at 257E–G.

374*Steytler NO v Fitzgerald 1911 AD 295; Ewing McDonald & Co Ltd … M Products Co* 1991 (1) SA 252 (A) at 257E–G. Another indication that our courts have regarded the words in this section as not interfering with the common-law position, is the manner in which the words 'or being in' have been interpreted. Our courts have been clear that jurisdiction is not conferred on the High Court simply because a person happens to be within that court's area of jurisdiction when the summons is served on him. You cannot, therefore, take the words 'or being in' at face value, but must look at them through the lens of the common-law position. As Hoexter JA explained in the important Appellate Division case of *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A) at 492G, the words 'merely affirm but do not enlarge the jurisdiction endowed by "causes arising".'

375In *Gallo Africa Ltd and Others v Sting Music (Pty) Ltd and Others* 2010 (6) SA 329 (SCA), Harms DP explained succinctly the manner in which s 19(1)(*a*) of the Supreme Court Act 59 of 1959 (presently s 21 of the Superior Courts Act 10 of 2013) had always been interpreted by our courts: 'The section has a long history, which need not be related. However, our courts have for more than a century interpreted it to mean no more than that the jurisdiction of High Courts is to be found in the common law.'(See para [10].) Justice Harms then went on to point out that what was needed for jurisdiction under the common law was compliance with the principle of effectiveness, as well as some or other '*ratio jurisdictionis*': 'For purposes of

effectiveness the defendant must be or reside within the area of jurisdiction of the court (or else some form of arrest to found or confirm jurisdiction must take place). Although effectiveness 'lies at the root of jurisdiction' and is the rationale for jurisdiction, 'it is not necessarily the criterion for its existence'. What is further required is a *ratio jurisdictionis*. The *ratio*, in turn, may, for instance, be domicile, contract, delict and, relevant for present purposes, *ratione rei sitae*. It depends on the nature of the right or claim whether the one ground or the other provides a ground for jurisdiction.'(See para [10].) Note that Harms DP's comment in the quotation set out above that 'some form of arrest to found or confirm jurisdiction' might have to take place, must now be read in light of the decision of the Supreme Court of Appeal in the case of *Bid Industrial Holdings (Pty) Ltd v Strang and Another (Minister of Justice and Constitutional Development, Third Party)* 2008 (3) SA 355 (SCA) which held that arrest (but not attachment) to found or confirm jurisdiction was unconstitutional for infringing the right to freedom and security of the person entrenched in s 12(1) of the Constitution.

376As Viljoen JA stated in the case of *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (In Liquidation)* 1987 (4) SA 883 (A) at 886, as regards the provisions of the (old) Supreme Court Act 59 of 1959: 'In view of the indefinite wording of s 19(1) of the Act and its predecessors, no doubt deliberately so couched because the intention of the Legislature obviously was to interfere with the common law as little as possible, recourse must be had to the principles of the common law to ascertain what competency each of the Supreme Courts in the Republic of South Africa possesses to adjudicate effectively and pronounce upon a matter brought before and heard by it.'

377Jurisdiction in respect of matrimonial matters, for example, is regulated by statute. Section 2 of the Divorce Act 70 of 1979 provides that a court will have jurisdiction in a divorce action if the parties are, or either of the parties is, domiciled in the area of jurisdiction of the court on the date on which the action is instituted; or ordinarily resident in the area of jurisdiction of the court on the said date and have or has been ordinarily resident in South Africa for a period of not less than one year immediately prior to that date.

378Divorce Act 70 of 1979.

379Kahn, E: 'Conflict of Laws' (1969) *Annual Survey of South African Law* 409; *Steytler NO v Fitzgerald* 1911 AD 295 at 346; *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A) at 305C–310; *Minister of the Interior v Cowley NO* 1955 (1) SA 307 (N); *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (in liquidation)* 1987 (4) 883 (A); *Estate Agents Board v Lek* 1979 (3) SA 1048 (A) at 1061B–1063E.

380Pistorius, D (1993) *Pollak on Jurisdiction* (second edition), 3 and 4.

381Note, however, that the learned author Harms expresses some doubt as to whether the doctrine of effectiveness retains its importance, particularly in the light of the judgment of the Supreme Court of Appeal in *Bid Industrial Holdings v Strang* 2008 (3) SA 355 (SCA) (see Harms *Civil Procedure in the Superior Courts* RS 1 2016, A4.8). *Jones and Buckle* further note that 'the principle has been considerably eroded by the long-established practice of our courts to permit the attachment of property whose value bears no realistic relationship to the amount of the claim advanced in the proposed litigation' (RS 10, 2016 Act-p211).

382*Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A).

383*Utah International Inc v Honeth and Others* 1987 (4) SA 145 (W) at 147. Van Schalkwyk, AJ referred to the following authorities in support of this contention: Pollak, W (1937) *South African Law of Jurisdiction* (1937) 19; *Sonia (Pty) Ltd v Wheeler* 1958 (1) SA 555 (A); *Cinemark (Pty) Ltd v Transkei Hotel* 1984 (2) SA 332 (W); *Elscint (Pty) Ltd and Another v Mobile Medical Scanners (Pty) Ltd* 1986 (4) SA 552 (W). Note that the doctrine of consent is not always incompatible with the doctrine of effectiveness. John Peter points out as follows in his article 'Consent, confusion but no effect' in (1993) 110 *SALJ* 15 at 20: that: 'Jurisdiction by consent has been held to be an exception to the principle of effectiveness …, but it is submitted that this is true only insofar as it is an exception to the rule that a court must be able to give effect to its *own* judgment. It is not true that the judgment is any less effective than if jurisdiction was founded on an attachment; such a judgment is internationally enforceable, and a successful plaintiff armed with such a judgment is in a far better position to enforce it overseas than if the court had assumed jurisdiction by an attachment … Jurisdiction by consent confers on the court an internationally recognised jurisdiction …'

384In practice, the issue of submission to jurisdiction (*prorogation*) often becomes relevant in cases in which there is an attachment to found or confirm jurisdiction. Attachments to found and confirm jurisdiction are dealt with later in Section 3.5.1(*a*) below.

385*Einwald v The German West African Company* (1887–1888) 5 SC 86 at 91.

386As you examine the various *rationes* – i.e. grounds of High Court jurisdiction – bear in mind that the nature of the claim being pursued is important for the purposes of determining which of the *rationes* is required for the purposes of establishing jurisdiction in each particular case. Harms DP illustrates this point in *Gallo Africa Ltd and Others v Sting Music (Pty) Ltd and Others* 2010 (6) SA 329 (SCA), by making reference to the case of *Eilon v Eilon* 1965 (1) SA 703 (A), which concerned a marital dispute. The Appellate

Division (as it was then) held that, since the defendant was not domiciled in South Africa, local courts had no jurisdiction to grant a divorce but could grant a claim for maintenance because, being one *ad pecuniam solvendam*, the claim was justiciable where the defendant resides. (Note that jurisdiction in respect of divorce proceedings is now regulated in terms of statute, the Divorce Act.)

387*Sciacero & Co v Central SA Railways* 1910 TS 119 at 121; *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A) at 305; *Longman Distillers Ltd v Drop Inn Group of Liquor Supermarkets (Pty) Ltd* 1990 (2) SA 906 (A) at 912.

388It is interesting to note the point made in the second edition of *Pollak on Jurisdiction* that: 'The *domicilium* of the Roman and Roman-Dutch law was, in fact, often more closely akin to the residence of modern South African law than to technical domicile.' See Pistorius, op. cit., 46.

389An *incola* is a person who is either domiciled or resident within the court's area of jurisdiction. See our in-depth discussion on this point later in this section, dealing with attachments to found and confirm jurisdiction from p110.

390*Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A) at 488. Note, however, the common-law requirement that matters affecting the status of a person (e.g. marriage) be heard only in the court exercising jurisdiction over the area within which the affected person is domiciled. See *Seedat's Executors v The Master (Natal)* 1917 AD 302; *Guggenheim v Rosenbaum* (2) 1961 (4) SA 21 (W) at 32. Many matters affecting status, including the requirements for jurisdiction in such cases, are regulated by statute. See our discussion later in this section, dealing with matrimonial claims from p113.

391Section 1(2) of the Domicile Act 3 of 1992.

3921998 (4) SA 1087 (C) at 1093 and 1094.

393*Chinatex Oriental Trading Co v Erskine* 1998 (4) SA 1087 (C) at 1093 and 1094. The learned judge cites the following authorities in support of his contentions: As to the first element – *Johnson v Johnson* 1931 AD 391 at 411; as to the second element – Pollak, C (1933) 50 *SALJ*, 465; *Ley v Ley's Executors and Others* 1951 (3) SA 186 (A); *Eilon v Eilon* 1965 (1) SA 703 (A) at 721A.

394Schoeman, E: 'Domicile of choice and *animus*: how definite is indefinite?' *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* Vol 62 Part 2 (1999) 325 at 330. This article forms the second part of a two-part article in which Schoeman deals comprehensively with the topic. The first part of the article is to be found in the above-mentioned journal, vol 62, Part 2, 272–284.

395As Niles-Duner, J makes clear in the case of *Jasat v Interim National Medical and Dental Council* 1999 (1) SA 156 (N) at 159: 'Whether or not a Court has jurisdiction in a matter must be determined with reference to the facts as they were at the time of commencement of the action. *Mills v Starwell Finance (Pty) Ltd* 1981 (3) SA 84 (N) at 89C–90F. That is when the founding papers were served upon the respondent.'

396See s 3(1) of the Domicile Act 3 of 1992.

397See *Grindal v Grindal* 1997 (4) SA 137 (C).

398See, for example, *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 at 23.

399*Abrahamse & Sons v SA Railways and Harbours* 1933 CPD 626 at 637.

400Pistorius, op. cit., 64.

401*Thomas v BMW South Africa (Pty) Ltd* 1996 (2) SA 106 (C) at 118.

402*Chattanooga Tufters Supply Co v Chenille Corporation of South Africa (Pty) Ltd* 1974 (2) SA 10 (E) at 14–15; *Hugo v Wessels* 1987 (3) SA 837 (A) at 850.

403*Hugo v Wessels* 1987 (3) SA 837 (A) at 850.

404*Roberts Construction Co Ltd v Willcox Bros (Pty) Ltd* 1962 (4) SA 326 (A).

405*Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd* 1985 (3) SA 633 (D) at 643.

406*Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd* 1985 (3) SA 633 (D) at 643–644.

407*Thomas v BMW South Africa (Pty) Ltd* 1996 (2) SA 106 (C) at 125.

408See, for example, *Ongevallekommissaris v Unie en Nasionale Versekeringsmaatskappy Bpk* 1969 (3) SA 438 (O); *Estate Agents Board v Lek* 1979 (3) SA 1048 (A); *National Educare Forum v Commissioner, South African Revenue Service* 2002 (3) SA 111 (TkH) at 122.

409See, for example, *Hermes Versekeringsmaatskappy v Dartnell* 1980 (4) SA 279 (W) at 280.

410The headnote to the case of *Chong Sun Wood Products PTE Ltd VK & T Trading Ltd and Another* 2001 (2) SA 651 (D) summarises this principle as follows: 'It may be accepted that where property, which is the subject of a dispute, is within the jurisdiction of the Court, the Court as *forum rei sitae* has jurisdiction to determine a claim for the delivery of the property, whether the claim is *in rem* (to assert ownership) or *in personam*(to enforce specific performance of a contractual obligation to deliver the property).' (See 659C–661J of the judgment.)

411In terms of s 1 of the Prescription Act 68 of 1969, subject to certain provisions in the Act, 'a person shall by prescription become the owner of a thing which he has possessed openly and as if he were the owner thereof for an uninterrupted period of 30 years or for a period which, together with any periods for which such thing was so possessed by his predecessors in title, constitutes an uninterrupted period of 30 years.'

412*Rosa's Heirs v Inhambane Sugar Estates Ltd* 1905 TH 11; *Vorster v Keyser and Keyser* 1943 WLD 150 at 151–152; *Eilon v Eilon* 1965 (1) SA 703 (A) at 726H–727B.

413*Hugo v Wessels* 1987 (3) SA 837 (A) at 857.

414*Ward v Burgess and Another* 1976 (3) SA 104 (TK) at 106–107.

415The learned author of *Pollak on Jurisdiction* (second edition) Pistorius, submits at 90 that the dicta in the cases of *Hugo v Wessels* and *Ward v Burgess* were obiter in regard to questions of title, and that these judgments do not apply in regard to matters of title. He submits that the *forum rei sitae* has exclusive jurisdiction in matters involving the title to immovable property, and states as follows at 90: '[I]f a defendant were sued in his *forum domicilii* for an order declaring that the plaintiff were the owner of immovable property situated within an area over which some other division exercised jurisdiction, the *forum domicilii* could not, if it found in favour of the plaintiff, grant an effective order directing the Registrar of Deeds concerned to register the property in the name of the plaintiff. The *forum rei sitae* has exclusive jurisdiction to do so.' See also *Gallo Africa Ltd and Others v Sting Music (Pty) Ltd and Others* 2010 (6) SA 329 (SCA) at para 11.

416*Sonia (Pty) Ltd v Wheeler* 1958 (1) SA 555 (A) at 562A–C; *Ward v Burgess and Another* 1976 (3) SA 104 (TK) at 106–107; *Hugo v Wessels* 1987 (3) SA 837 (A) at 857.

417In general terms, an *actio in rem* is an action based on a real right (e.g. your right as the owner of property not to be dispossessed of that property) which is enforceable against the whole world, whereas an *actio in personam* is an action based on a personal right (e.g. arising out of a contract) which is enforceable only against a specific person or persons.

418Pistorius, op. cit., 92–93. See also *Ward v Burgess and Another* 1976 (3) SA 104 (TK) at 106–107 and *Hugo v Wessels* 1987 (3) SA 837 (A) at 857.

419Pistorius, op. cit., 101.

420Pistorius, op. cit., 101 note 5.

421Pistorius, op. cit., 102. This was confirmed in *Gallo Africa Ltd and Others v Sting Music (Pty) Ltd and Others* 2010 (6) SA 329 (SCA) at para 13.

422Ibid.

423Pistorius, op. cit., 103.

424Ibid.

425*Gallo Africa Ltd and Others v Sting Music (Pty) Ltd and Others* 2010 (6) SA 329 (SCA).

426See Pistorius, op. cit., 58.

427op. cit., 60.

428Innes CJ stated as follows in *Sciacero & Co v Central SA Railways* 1910 TS 119 at 121: 'The general rule with regard to the bringing of actions is *actor sequitur forum rei*. The plaintiff ascertains where the defendant resides, goes to his forum and serves him with the summons there.' See also *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A) at 487–488.

429Pistorius, op. cit., states as follows at 60: 'The present position in our law is, therefore, that … if the cause of action arose or the contact in respect of which the plaintiff's claim was brought was entered into within the area over which the court exercises jurisdiction, this, by itself is a sufficient ground for the court to invoke its jurisdiction in an action for a judgment sounding in money against a defendant who, though resident in the Republic (previously the Union) of South Africa is a *peregrinus* of that court.' See also the following cases referred to by the learned author: *Smit v Cramer* 1913 OPD 123; *Brooks v Maquassi Halls Ltd* 1914 CPD 371 at 376–377; and *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (in liquidation)* 1987 (4) SA 883 (A).

430We use the term 'usually required' in recognition of developments in this area of the law brought about by the important case of *Bid Industrial Holdings (Pty) Ltd v Strang and Another (Minister of Justice and Constitutional Development, Third Party)* 2008 (3) SA 355 (SCA). Before this case, it was possible not only to attach the property of a foreign *peregrinus* in order to found or confirm jurisdiction, but also to arrest the foreign *peregrinus* himself for this purpose if the attachment of his property was not possible. In the *Bid Industrial Holdings* case, the Supreme Court of Appeal held that arrest to found or confirm jurisdiction violated a person's right to freedom and security as entrenched in s 12(1) of the Constitution, and outlawed the practice. At the same time, the court held that the attachment of property in order to found or confirm jurisdiction was *not* unconstitutional. (See paras 47 and 48 of the judgment.) Therefore, in the case of a claim sounding in money against a foreign *peregrinus*, and in the event that he has property in South Africa which is susceptible to attachment, it is (still) necessary to attach such property in order to found or confirm

jurisdiction. But what if such attachment is not possible? The court in the *Bid Industrial Holdings* case seemed to open up an alternative path to deal with such situations. The learned authors of *Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (fifth edition) Cilliers, Loots and Nel sum up as follows:

'The Supreme Court of Appeal also used the power given to it by the Constitution to develop the common law to introduce a new basis upon which a court may assume jurisdiction in respect of a foreign defendant if an attachment of property to found or confirm jurisdiction is not possible. It held that a court may assume jurisdiction in respect of a foreign defendant "if the defendant is served with the summons while in South Africa and, in addition, there were an adequate connection between the suit and the area of jurisdiction of the South African court concerned from the point of view of the appropriateness and convenience of its being decided by that court."' (See *Herbstein and Van Winsen*(2009), op. cit., 95 and 96.)

431Note the case of *Manna v Lotter and Another* 2007 (4) SA 315 (C) which makes it clear at 319C–D and 320E–F that in any claim relating to immovable property, whether *in rem* or *in personam*, the court within whose territory the property is situated always has jurisdiction to entertain the claim. It is, therefore, irrelevant whether the defendant is an *incola* or a *peregrinus* of the court that entertains the claim. Accordingly, an attachment of property in order to confirm the jurisdiction of the court is not necessary.

432See *Steytler NO v Fitzgerald* 1911 AD 295; *Van Ryneveld v Paxinos* 1964 (3) SA 754 (O) at 754G–H; *Beverley Building Society v De Courcy and Another* 1964 (4) SA 264 (SR) at 267F *in fine*; *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A) at 300B–E; *Murphy v Dallas* 1974 (1) SA 793 (D) at 796B-E; *Slabbert v Herbst* 1981 (4) SA 257 (NC) at 259 *in fine*; *South African Railways and Harbours v Chairman, Bophuthatswana Central Road Transportation Board and Another; South African Transport Services v Chairman, Bophuthatswana Central Road Transportation Board and Another* 1982 (3) SA 24 (B) at 28E–F. See also the important case of *Bid Industrial Holdings (Pty) Ltd v Strang and Another (Minister of Justice and Constitutional Development, Third Party)* 2008 (3) SA 355 (SCA), which has outlawed the arrest of a person in order to found or confirm jurisdiction in High Court matters.

4332008 (3) SA 355 (SCA). The development of our common law by the *Bid Industrial Holdings* case was discussed and applied in the case of *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* 2014 (3) SA 265 (GP) at 265–266, which sets out the present legal position as follows: 'South African High Courts have jurisdiction in actions against foreign entities even in the absence of an attachment to found or confirm jurisdiction. There are two provisos: (1) the summons must have been served in South Africa; and (2) there must be an adequate connection between the suit and the court's area of jurisdiction … established by suitability and convenience.'

43410 of 2013.

435See *Tedecom Electrical Engineering Services (Pty) Ltd v Berriman* 1982 (1) SA 520 (W) at 523H-524A; *Ewing McDonald and Co Ltd v M and M Products Co* 1991 (1) SA 252 (A) at 258I–259B; *Slabber v Blanco and Others* 1991 NR 404 (HC) at 409I–410B; *Weissglass NO v Savonnerie Establishment* 1992 (3) SA 928 (A) at 933H-I; *Siemens Ltd v Offshore Marine Engineering Ltd* 1993 (3) SA 913 (A) at 929B–H; *Hulse-Reutter and Others v Godde* 2001 (4) SA 1336 (SCA) at 1340B–C as well as the numerous other references cited in Dendy 1999 (116) *SALJ 586*, op. cit., 588 notes 6, 7 and 8.

436See *Uniroyal Incorporated v Thor Chemicals SA (Pty) Ltd* 1984 (1) SA 381 (D) at 384B–C; *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (in liquidation)* 1987 (4) SA 883 (A) at 889B–E; *Ewing McDonald & Co Ltd VM & M Products Co* 1991 (1) SA 252 (A) at 258D–G; *Briscoe v Marais* 1992 (2) SA 413 (W) at 416F–G; *Siemens Ltd v Offshore Marine Engineering Ltd* 1993 (3) SA 913 (A); *Ghomeshi-Bozorg v Yousefi* 1998 (1) SA 692 (W) at 693E-G; as well as the numerous other references cited in Dendy 1999 (116) *SALJ 586*, op. cit., 587 notes 4 and 5.

437Superior Courts Act 10 of 2013.

438Section 30*bis* of the Magistrates' Courts Act 32 of 1944. Note that this section was amended with effect from 22 January 2014 to remove reference to the 'attachment of a person' to found or confirm jurisdiction in line with the case of *Bid Industrial Holdings (Pty) Ltd v Strang and Another (Minister of Justice and Constitutional Development, Third Party)* 2008 (3) SA 355 (SCA).

439*American Flag plc v Great African T-Shirt Corporation CC; American Flag plc v Great African T-Shirt Corporation CC: In re Ex Parte Great African T-Shirt Corporation CC* 2000 (1) SA 356 (W) which was confirmed in *Hay Management Consultants (Pty) Ltd v P3 Management Consultants (Pty) Ltd* 2005 (2) SA 522 (SCA) at paras [16]-[24]. The latter case dealt specifically with actions for money between a plaintiff incola of a court and a *peregrinus* when the defendant has submitted to the jurisdiction and confirmed that, in such cases, submission by a foreign *peregrinus* is sufficient to confer jurisdiction without an attachment *ad fundandam jurisdictionem* (see paras 26 and 24, respectively).

440*Jamieson v Sabingo* 2002 (4) SA 49 (SCA).

441*Tsung v Industrial Development Corporation of SA Ltd* 2006 (4) SA 177 (SCA).

442Pistorius, op. cit., (9), states as follows in note 11: 'Spiro … points out that the Roman-Dutch writers referred to submission as *prorogatio fori*, indicating an extension of a jurisdiction which is already in existence.'

443Pistorius, op. cit., 9.

444Kahn, E: 'Conflict of laws' (2000) *Annual Survey of South African Law* 871 at 871 to 872. Note that s 28(1) of the Supreme Court Act 59 of 1959 has been replaced by s 28 of the Superior Courts Act 10 of 2013, which reads as follows: 'No attachment of property to found jurisdiction shall be ordered by a Division against a person who is resident in the Republic.' The almost identical nature of the two sections indicates that the point made by the learned author Ellison Kahn in above quotation remains valid.

445The Divorce Act 70 of 1979.

446See s 1(1) of the Divorce Act 70 of 1979.

447See s 2(4) of the Divorce Act 70 of 1979.

448Section 2(1) of the Divorce Act 70 of 1979.

449Section 1 of the Domicile Act 3 of 1992. See also our discussion of domicile earlier in Section 3.3.1.

450Section 2(2) of the Divorce Act 70 of 1979.

451*Granoth v Granoth* 1983 (4) SA 50 (C) at 53–54.

452Structural interdicts also exist and are used primarily in constitutional litigation. These are interdicts which enable a court to supervise compliance with its terms.

453*Metlika Trading Ltd and Others v Commissioner, South African Revenue Service* 2005 (3) SA 1 (SCA).

454*Foize Africa (Pty) Ltd v Foize Beheer BV and Others* [2012] 4 All SA 387 (SCA) at para 15.

455*Ex Parte Goldstein* 1916 CPD 483; *Towers v Paisley* 1963 (1) SA 92 (E). See also *Foize Africa (Pty) Ltd v Foize Beheer BV and Others* [2012] 4 All SA 387 (SCA) at para 15.

456The difficulty, of course, is to decide whether you are in fact dealing with a single case, or with two or more separate cases which happen to involve the same people or things.

457Harms *Superior Courts*, op. cit., A4.19.

458*Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuza and Others* 2001 (4) SA 1184 (SCA).

459*Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuza and Others* 2001 (4) SA 1184 (SCA) at 1201. See also the case of *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* 2014 (3) SA 265 (GP) in which Fabricius J summarised the key elements of the doctrine as follows: 'This is the common-law doctrine of cohesion of a cause of action, and is applicable where a court has jurisdiction over a part of a cause of action, and considerations of convenience, justice and good sense justify its exercising jurisdiction over the whole cause … The rationale for this principle is the avoidance of an unnecessary multiplicity of actions and duplication of proceedings concerning the same subject-matter which may cause inconvenience and result in contradictory judgments.' (para 21.) See also *Geyser v Nedbank Ltd and Others: In Re Nedbank Ltd v Geyser* 2006 (4) SA 544 (W) where the court regarded convenience, justice and good sense as necessary requirements.

460The High Court, the Supreme Court of Appeal and the Constitutional Court.

461Taitz, J (1985) *The Inherent Jurisdiction of the Supreme Court*, 1.

462*Montreal Trust Co v Churchill Forrest Industries (Manitoba) Limited* (1971) 21 D.L.R. (3d) 75 (Manitoba Court of Appeal).

463Taitz, op. cit., 1.

464Ibid.

465Taitz J, op. cit., 14–19.

466*Whitfield v Van Aarde* 1993 (1) SA 332 (E) – see also Taitz, LJ and Hulme, DH: 'The inherent power of the Supreme Court to stay a sale in execution in order to prevent an abuse of its process' (1994) 111 *South African Law Journal* 45 at 45–47.

467Taitz, op. cit., 15–16.

468Taitz, op. cit., 19–23.

469Taitz, op. cit., 19.

470Taitz, op. cit., 23–26.

471*Pienaar and Versfeld v Incorporated Law Society* 1902 TS 11 at 16; *De Villiers and Another v McIntyre NO* 1921 AD 425.

472*Pesskin v The Incorporated Law Society* 1966 (3) SA 719 (T).

473*Re Cairncross* (1877) 7 Buch 122; *Trustees of Pretorius v AB* (1876) 6 Buch 205.

474*Society of Advocates of Natal and Another v Knox and Others* 1954 (2) SA 246 (N).

475*Incorporated Law Society v Chick* (1908) 25 SC 620; *Incorporated Law Society v Wessels* 1927 TPD 592; *Incorporated Law Society v Donner and Co*(1905) 22 SC 108.

476Taitz, op. cit., 26–28.

477Taitz, op. cit., 27.

478Taitz, op. cit., 28–36.

479*Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111.

480Taitz, op. cit., 35. In this regard, note the provisions of the Promotion of Administrative Justice Act 3 of 2000, read with s 33 of the Constitution of the Republic of South Africa, 1996, and see Devenish, GE, Govender, K, and Hulme, DH (2001) *Administrative Law and Justice in South Afric*a, 424–426.

481*Anton Piller KG v Manufacturing Processes Ltd* [1976] 1 All ER 779 (CA); *Universal City Studios Inc v Network Video (Pty) Ltd* 1986 (2) 734 (A); *Jafta v Minister of Law and Order and Others* 1991 (2) SA 286 (A*); Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam and Another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg and Others* 1995 (4) SA 1 (A); Erasmus, HJ 'Anton Piller orders' (1996) 113 (1) *South African Law Journal* 1. *Anton Piller* orders are discussed later in this book, see Stage Four D.

482*Seetal v Pravitha and Another NO* 1983 (3) SA 827 (D); *M v R* 1989 (1) SA 416 (O). Note, however, that this remedy may be rendered problematic by subsequent legislation and the Bill of Rights in the Constitution.

483*Mukaddam v Pioneer Foods (Pty) Ltd and Others* 2013 (5) SA 89 (CC) para [33].

484Section 173 of the Constitution.

485*Pohlman and Others v Van Schalkwyk and Others* 2001 (1) SA 690 (E) at 697C-F.

486See the many examples cited by Bertelsmann J in the case of *S v Lubisi: In re S v Lubisi and Others* 2004 (3) SA 520 (T). For example, he cites the case of *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (TkH), which confirmed the court's right to hold Ministers of State and other public officials in contempt for failing to comply and enforce an order *ad pecuniam solvendam.*

487*South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC) at paras [35]-[36].

488See *S v Lubisi: In re S v Lubisi and Others* 2004 (3) SA 520 (T) at 531 and *Dendy v University of the Witwatersrand and Others* 2005 (5) SA 357 (W) at para [25]. In terms of s 39(2) of the Constitution, when interpreting any legislation, and when developing the common law or customary law, the courts are required to promote the spirit, purport and objects of the Bill of Rights.

489*Herbstein and Van Winsen* (2009), op. cit., 50–51.

PART 2: PRE-LITIGATION ISSUES

A: Demand

1 What is a demand?

A *demand* is a request for payment, or a request for the performance of a legal obligation. A demand is made before legal proceedings start, as it is an attempt to obtain satisfaction without incurring the expense of formal litigation. The need to demand payment or performance is, of course, due to a failure to respond to informal requests for payment or performance. A valid demand may be made by a person (i.e. the future plaintiff or applicant) himself, or later by his attorney.[1] Also, a demand need only be made once – it is not necessary to prove that repeated demands, which were not complied with, were made.[2] The person sending the demand also has a legal obligation to take reasonable steps to ensure that the demand reaches the intended recipient.[3]

2 Forms of demand

The demand for payment or performance can take many forms. It may be made orally;[4] it may be made in writing in the form of a letter of demand;[5] or demand may even be constituted by the

institution of legal action (i.e. by the service of summons on a defendant, or by launching an application against a respondent).[6] Note that as the summons *itself* may constitute a legal demand, it need not be preceded by a letter of demand.[7]

A number of other forms of demand, such as sending a statement of account or invoice to the person allegedly in default, have also been recognised in our law. In such cases, however, the principle is that it must be clear to the recipient that a demand for payment or performance is, in fact, being made.[8]

In terms of certain statutes,[9] it is a legal requirement to send a letter of demand giving notice to the recipient that you intend taking legal action. In such cases, the letter of demand is also called a *notice*. Do not, however, confuse these notices with formal court notices, such as the Notice of Set Down and the Notice to Discover that are made in terms of the High Court or Magistrates' Courts Rules. Where statutes require that notice be given before litigation commences, it means merely that the letters of demand sent must comply with the time restrictions and other requirements imposed by these statutes.

3 The contents of the demand

The general rule is that the demand, whichever form it takes, has to contain sufficient detail to inform the recipient[10] of the whole cause of action.[11] In the case of a letter of demand, for example, it means that the recipient must receive information covering all the elements of the alleged claim (e.g. the four elements of a delictual Aquilian Action). The recipient must be put in possession of all the information necessary to determine his liability so that he can decide whether to defend or settle the claim.[12] In addition, the letter must contain a paragraph (sometimes called the *demand clause*) in which the actual demand for payment or performance is made, usually also indicating the time period within which payment or performance must occur, and the consequences of not complying with the demand.[13]

Always keep in mind, too, the possible evidentiary effect of the contents of the letter of demand. Should the matter go to trial, the letter of demand will be discovered in terms of the Rules of Court, and any discrepancies between the letter of demand and the particulars of the claim could be exploited in cross-examination.

In some circumstances, it may not be necessary to spell out the elements of the cause of action in detail, as previous communications may provide the context for only a brief demand for payment or performance, and in some cases, it may not be necessary to deliver a demand at all.[14]

In the next section, we consider the situations where demand is *always* necessary.

4 Circumstances where demand *must* be made

A demand is always necessary in the following circumstances:

1. Where legislation requires that notice be given, or a letter of demand be delivered prior to litigation;[15] and
2. Where demand must be made to complete a cause of action.

4.1 Demand (or notice) required by statute

The most important statutes requiring that demand[16] be given prior to the institution of litigation are the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002; the General Law Amendment Act 62 of 1955; the Customs and Excise Act 91 of 1964; the National

Credit Act 34 of 2005; the Small Claims Court Act 61 of 1984; and Road Accident Fund Act 56 of 1996.[17]

The Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 will now be considered in some detail, followed by a brief overview of some of the more important of the other statutes mentioned.

4.1.1 The Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 ('the Act')

This Act, which has been effective from 28 November 2002, consolidates the notice and time limit requirements contained in various other statutes[18] that have to be complied with when initiating civil actions against various state organs.

Any civil action[19] brought against any national, provincial or local government department, any institution exercising a function in terms of the Constitution,[20] the South African Maritime Safety Authority, the South African National Roads Agency Ltd, or even any person for whose debt an organ of state is liable, must comply with the provisions of the Act.[21]

In terms of Part 2 of the Act,[22] no legal proceedings for the recovery of a debt may be instituted against an organ of state unless the creditor has given the organ of state *notice in writing* of the intention to institute legal proceedings, or the organ of state has *consented in writing* to the institution of those proceedings.

In terms of s 3(2)(*b*) the notice must briefly set out the facts giving rise to the debt, and the particulars of the debt (e.g. amount, parties involved, date incurred, etc.) that are within the knowledge of the creditor. These requirements, in effect, make the notice a letter of demand.

The notice must be served on the organ of state concerned *within six months* from the date on which the debt[23] became due.[24] The various methods of service of the notice are contained in s 4 of the Act, which even allows for the service of the notice by electronic mail.[25] By contrast, the methods of service of court process for the purposes of this Act are contained in s 5. No court process may be served on the organ of state concerned before the *expiry of a period of 30 days* after the date on which the *notice* was served on that organ of state.[26] If any court process is served on an organ of state before the expiry of the 30-day period, the process will be regarded as having been served on the first day *after* the expiry of the 30-day period. Service before the expiry of the period will therefore not interrupt prescription.

For example, an action against the national police force (SA Police Service) will have to be preceded by the drafting of a notice in terms of s 3 of the Act, and served on the Department of Safety and Security in terms of s 4(1)(*a*).[27] Subsequent service of *process* (i.e. court documents, as opposed to the *notice* which is a letter of demand *preceding* court action), must take place in terms of s 5(1)(*b*)(ii) of the Act, which permits process to be served on the National Commissioner of the SA Police Service, or a Provincial Commissioner of the SA Police Service, instead of on the Minister of Safety and Security (who would be the usual nominal defendant in terms of s 2 of the State Liability Act 20 of 1957).

However, should the proposed legal claim arise from the actions of a metropolitan police official employed by, say, eThekwini Municipality, notice may be given to the municipal manager of the municipality.[28]

Although the notice provisions in the statutes listed in the schedule to the Act have been repealed or amended by s 2(1) of the Act, there are a number of statutes that have not been included in this schedule. The specific notice provisions contained in these unrepealed and unamended statutes must be applied in these cases, and *not* the uniform notice and service provisions contained in Part 2 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002. Note that if an organ of state relies on a creditor's failure to serve a notice in terms of s 3(2)(*a*) of the Act, the creditor may apply to court for condonation.[29]

4.1.2 Interim interdicts against the government: the General Law Amendment Act 62 of 1955

Section 35 of this Act provides that no court is permitted to issue a rule *nisi* that operates as an interdict against any branch of national or provincial government,[30] or any official as defined in the Act, unless notice[31] of the intention to apply for such a rule is served on the defendant concerned at least 72 hours before the hearing of the application.[32]

4.1.3 The Customs and Excise Act 91 of 1964

In terms of s 96 of this Act, legal action must be taken against the department within one year of the debt becoming due or the cause of action arising, and written notice of the intention to institute legal proceedings must be given at least one month before the legal proceedings are actually instituted.[33]

4.1.4 The National Credit Act 34 of 2005

This Act, which came into force on 1 June 2007, specifies various legal requirements that have to be complied with relating to the giving of notice and the commencement of legal proceedings to enforce a credit agreement to which the Act applies.

For example, a credit provider may not commence legal action against a consumer before first giving notice to the consumer in terms of s 129(*a*) or s 86(10) of the Act, and then only after having complied with other requirements contained in s 130 of the same Act.[34] Note that some High Court divisions' practice manuals require a certificate to be attached to a summons commencing action for a debt indicating compliance with the provisions of s 129. (The impact of the National Credit Act 34 of 2005 on civil procedure generally is discussed in Annexure B.)

4.1.5 The Small Claims Court Act 61 of 1984

Section 29 of the Small Claims Court Act 61 of 1984 provides that a letter of demand must be delivered by the plaintiff to the defendant by hand or registered post before legal action may be taken. Section 29 further provides that a period of 14 days must elapse after receipt of this letter by the defendant before the Small Claims Court summons may be issued.

4.2 Demand essential to complete a cause of action

Here, unlike the section above where the making of a demand was a statutory precondition to commencing legal proceedings, the making of a demand for payment or performance is required as it forms part of the cause of action. For example, the parties to a contract may agree in the written contract that a cause of action will not arise for breach of a term of that contract until a demand has been sent. Let us look at some examples of where the making of a demand is required as part of the cause of action.

4.2.1 Payable on demand

Many contracts contain a clause which states that a certain amount is payable *on demand*. Until the amount has been demanded, it is not due and payable, and no cause of action will arise for failure to pay the amount. Demand is thus necessary to complete one's cause of action.

4.2.2 Notice of breach clauses

Certain contracts contain a stipulation to the effect that the parties to the contract are not permitted to commence action for breach of a term of the contract, unless the party who intends to commence action has given written notice of his intention to do so. No cause of action will arise until such notice has been sent.

4.2.3 Placing a debtor *in mora*

In some cases, the contract between the parties may not stipulate a specific time for the performance of an obligation, or it may not be clear from the terms of the contract exactly when performance is due. In such cases, performance must be demanded, and a reasonable time for the performance of the contract given, for a cause of action to be established.[35] For example, where a debtor has failed to pay an account that was delivered to him for goods sold, you will have to send the debtor a letter of demand in which he is given a stipulated time period in which to pay. If the debtor then does not pay after the expiry of the stipulated time period, he will be *in mora* from the date on which the period expires. (*Mora* interest on the debt then begins to run from this date.)[36]

The Prescribed Rate of Interest Act 55 of 1975 was amended in 2016 and now provides that the prescribed rate of interest, which was previously a fixed rate, is to be determined with reference to the repurchase rate (i.e. repurchase rate plus 3,5%).[37] In order to be certain as to the prescribed rate, practitioners should always consult the notice published by the Minister of Justice and Correctional Services in the *Government Gazette*. The Minister will publish the amended rate in a notice whenever the repurchase rate is adjusted.[38]

4.2.4 Demand to give right of cancellation

If the contract is clear on the date of performance, or it is clear from the nature of the contract precisely when performance is due (e.g. a contract to bake a cake for a wedding which is due to take place on a certain date), and there is no express stipulation in the contract that a specific form of demand is required before action is commenced, it is not necessary to send a letter of demand.[39]

However, where the date of performance is not clear, or where an agreement does not contain a cancellation clause, you will have to send a letter of demand in which payment or performance of the obligation within a stipulated reasonable time is demanded. Should the recipient not comply with this demand, a further letter cancelling the agreement can be sent on the expiry of the stipulated time period, or the agreement can be cancelled in the particulars of claim attached to the summons. (Note that even where an agreement does contain a cancellation clause, it may nevertheless be prudent to send a letter of demand as cancellation without demand may be construed by the court to have been unreasonable.[40] The court may then decide not to award you the costs of issuing and serving of the summons. See Section 5.1 below.)

5 Other consequences of demand: costs and interest

The decision whether or not to deliver a demand for payment or performance prior to the institution of legal action may also affect the interest on the debt that may be claimed, and the legal costs that may be recovered.

5.1 Costs relating to the issue of summons[41]

Should the plaintiff decide to issue summons without first delivering a letter of demand to the defendant, he may incur unnecessary costs in two ways. In the first place, the defendant may very well have paid on receipt of the demand, thereby saving *the plaintiff* the costs of issuing and serving the summons (i.e. the payments the plaintiff would have to make to his own attorney for issuing and serving the summons). Secondly, *the defendant* could argue that he would have paid had he received a letter of demand prior to the summons, and the court may then refuse to allow the plaintiff to recover the cost of the summons. The danger of a cost order against the plaintiff in these circumstances is heightened if the debt was an unliquidated debt as the defendant could argue that he was not aware of the exact amount payable until a demand had been received. Note that in terms of section 56 of the Magistrates' Courts Act 32 of 1944, a creditor may *only* recover the costs of a letter of demand if it is sent by registered post.

The situation might well be different in the case of a liquidated debt, which is due for payment. In cases where the debtor knows that payment is due, as well as the amount that he has to pay, the creditor is clearly well within his rights to proceed directly to the issue of summons without sending a letter of demand. Even if the debtor pays the amount due immediately after he receives the summons, the creditor will probably be entitled to the costs of the summons since the debt was due and payable before the summons was issued.
The guiding principle seems to be that the court will consider whether the failure to deliver a letter of demand was reasonable in the circumstances or not.[42]

5.2 Unliquidated debts: delivering demand to start the running of interest[43]

If your action is to recover an unliquidated debt (e.g., a delictual claim for damages), the delivery of a letter of demand or summons to the debtor is sufficient to start the running of interest. It is quicker and easier to draft and deliver a letter of demand than to draft, issue and serve a summons. Therefore, as a general rule, it makes sense always to send a letter of demand before drafting particulars of claim and preparing summons.[44]

PART 2: PRE-LITIGATION ISSUES

B: Calculation of time limits

1 Introduction

Throughout this book you are going to be dealing with time periods within which various steps have to be taken. Calculating these time periods may prove difficult. For example, if a lecturer

asks a student to hand him a 20-page essay within five days, what does that mean? Does the five-day period include the day on which the lecturer makes the request, or does the period start running the day after the request is made? What happens if the last day of the five-day period happens to be a Sunday? Does it mean that the student still has to show up at the university with the essay, regardless of the fact that all the buildings will be locked and most of the staff will be at home? Similar problems relate to the calculation of time periods mentioned in the High Court and Magistrates' Courts Acts and Rules.

2 Time periods *within* a certain period

Most of the time periods mentioned in the High Court and Magistrates' Courts Acts and Rules require things to be done *within* a certain period.

2.1 FOLI: first out last in

The first point to note is that when a section or rule requires something to be done *within* a certain period, you *exclude* the first day and *include* the last day.[45] (Remember the acronym FOLI, which stands for 'first out last in'.)

Using the student's essay example, what this means is that if you are told *today* that you must hand in an essay within five days, then the five-day period starts running *tomorrow*, and ends at the end of the last day of that five-day period. In other words:

2.2 Court days and calendar days

The FOLI rule does not solve all your problems, because certain days must be *excluded* from (i.e. not counted as part of) the five-day period reflected in the example above. Precisely *which* days must be excluded from the five-day period will depend upon whether you are dealing with a period stipulated in the Acts or the rules.[46] When the *Acts* refer to *days* the reference is to normal *calendar days*.[47] But when the *rules* refer to *days*, the reference is to *court days*.[48] When, for example, the Superior Courts Act 10 of 2013 refers to five days, it means five *calendar days*, but when you see the same reference to five days in one of the High Court *Rules*, it means five *court days*.

Calendar days *include* Saturdays, Sundays and public holidays. In other words, even if any of days 2, 3, 4, 5, or 6 (i.e. the five-day period) in the above example were a Saturday, Sunday or public holiday, they would still be counted as part of the five-day period. However, if the *last day* of a period of calendar days (i.e. day 6 in the above example) happens to fall on a *Sunday* or *Public Holiday*, then that day is *not* counted as part of the period, and the period will end on the next day.[49]

Court days *do not include* Saturdays, Sundays or public holidays.[50] In other words, if any one of days 2, 3, 4, 5, or 6 were a Saturday, Sunday or public holiday, then that day will *not* be counted as part of the five-day period, and the period will only end after five full working days have passed.

3 Time periods *after* a certain period

Sometimes a section or rule provides that something may only be done *after* the lapse of a certain period. For example, if you were told that you had to hand in a 20-page essay *after five days had elapsed*, exactly when would you have to hand in your essay? In this case, you would *exclude both the first and last days* of the five-day period.

In other words, you would hand it in on the seventh day:

Whether or not you should exclude Saturdays, Sundays or public holidays from the five-day period indicated above would, of course, depend upon whether you were dealing with court days or calendar days.

4 Practical note: service of court process

There is one further factor that you must bear in mind when it comes to time limits. Although a particular time period only expires at *midnight* on the final day (as calculated in terms of the calculation rules in paragraphs 2 and 3 above), you must remember that many time periods relate to the time within which legal documents are to be *served*. It is futile to have your document ready at one minute to midnight on the final day of a particular time period, but not be able to serve the document at that hour.[51] If you have to serve the document on a *business*, ensure that the document is ready for service before the *close of business* on the final day of the time period allowed. Also keep in mind court operating hours.[52]

PART 2: PRE-LITIGATION ISSUES

C: Service of legal documents

1 Introduction

In most cases, legal proceedings are started with the delivery of court documents (also called *court process*) to the defendant or respondent. This *delivery* is called the *service* of these documents.[53] The fundamental rule is that the court must be satisfied that the defendant or respondent has received these documents (i.e. the summons or notice of motion, depending on whether an action or application is being brought, which starts the legal proceedings), and is therefore aware that legal proceedings are being brought against him.[54]

This is because of the legal maxim *audi alteram partem* (which, literally translated, means, 'hear the other side'); it means that every person is entitled to be heard before an order or judgment is granted against him. This explains why our courts meticulously enforce the requirement that an opponent should be notified timeously of the steps taken against him, and that he should be given an opportunity of replying to the case stated against him, and of placing his own version before the court.[55]

The documents which start legal proceedings (i.e. the court process) must be served by an independent official who is called the sheriff of the court.[56]

In the High Court, court process is served by the sheriff of the High Court, and in the Regional and District Magistrates' Courts by the sheriff of the Magistrates' Courts. In the past, the sheriff of the Magistrates' Courts was known as the Messenger of the Court, and you may still encounter this term in older writings and case reports.[57]

In terms of s 3 of the Sheriffs Act 90 of 1986, a sheriff is appointed to serve documents within a particular area, and may not serve outside the area for which he was appointed. The greater

Durban area, for example, has been divided into three sub-areas: Durban Central; Durban North; and Durban South. If you want to serve a summons on a firm situated in the centre of Durban, you have to use the sheriff for Durban Central, and may not use the sheriffs appointed for the other two areas. (Should you mistakenly send this summons to, say, the sheriff for Durban North, he will simply send it back to you and tell you that the service address falls outside his area of operation. Full details of the different sheriffs and the areas they serve are listed in the Hortors legal diaries or on the South African Board of Sheriffs website.)

2 The issue of process and duties of the sheriff

Before you are legally permitted to serve a court document, it must be *issued*. Historically, the 'issuing' procedure involved the attorney sticking revenue stamps on the top right-hand corner of the relevant court document and sending it to the court where the revenue stamps were date-stamped and cancelled, and the document signed.[58]

Following the demonetisation of revenue stamps, the entire rule 67 of the High Court Rules (establishing the tariff of court fees) was suspended with effect from 1 April 2009; therefore, revenue stamps are no longer used.[59]

Documents that initiate legal proceedings such as a summons or notice of motion are given a case number (a consecutive number for the year during which it is filed), and a court file is opened. (Note that if, after issuing the document, it is discovered that the address was wrong, it is necessary to amend the document, sign the amendments, and then send the document back to court where the registrar or the clerk of the court, as the case may be, will *reissue* the document by signing the amendments.)

After being issued, the following documents will be sent to the sheriff for *service*:

1. The original document (which will be returned to the court file);
2. The number of copies of the document which need to be served (e.g. if there are three defendants then you will need three copies for service); and
3. An extra copy of the document (which will be returned to you to place on your office file).

P1 The sheriff has various duties he must perform when serving court process:

1. He must explain the *nature and contents* of the document to the person being served (and state in his return that he has done so).[60]
2. The sheriff must then hand a copy of the document to that person. (If the document is a summons or a notice of motion, the sheriff must warn the defendant or respondent of the consequences of failing to defend the action or oppose the application. Also, if requested to do so, the sheriff must show the original or a certified copy of the document to the person being served. The purpose of this is to allow the person to compare the original with the copy of the document being served on him.)
3. The extra copy of the document will be returned to the attorney who requested that the service be carried out, together with the sheriff's *return of service*. (A return of service is a written report from the sheriff stating when, where and how he served the document. The 'return of service' constitutes *prima facie* proof of service.[61] It is therefore essential to always check that the return has been properly signed by the relevant sheriff.)

Where the sheriff is unable to successfully serve a summons or notice of motion in terms of the rules, he completes what is called a *return of non-service*.

Note that not *all* court process has to be served by the sheriff or his deputies. A number of court documents that follow the initial summons, such as a notice of intention to defend, a plea, or a replication, need *not* be served by the sheriff. In these cases, it is sufficient to *deliver* the documents to the *service address* indicated on the initial summons or notice of motion, either yourself or by means of a messenger employed by your law firm.

The indicated address will usually be the address of the firm of attorneys acting for your opponent. That firm will stamp the original and two copies of any document delivered to them as follows: 'Received Without Prejudice'. The original and one copy will be returned to you. You will keep the copy in your office file so that you can prove that the other side has received the document, and file the original with the registrar or clerk of the court, who will place it in the court file.

Rule 4A provides that all process, *other than process which initiates application proceedings*, may be served by hand at the physical address for service provided, registered post to the postal address provided, or facsimile or electronic mail to the respective addresses provided. Rule 4A explicitly provides that service under this rule need not be effected through the sheriff.

Furthermore, court documents which initiate *interlocutory* applications (e.g., an application to compel the other side to discover)[62] need not be served by the sheriff. The reason is that an interlocutory application is an application which is a part of proceedings that are *already* pending before the court, and addresses for the service of these documents are already indicated in the documents relating to those pending proceedings. In other words, it is usually only the *initial* court documents in legal proceedings which are served by the sheriff.

3 Methods of service in terms of the Rules of Court

In this section, we consider the usual methods of service available in terms of the Magistrates' Courts Rules and High Court Rules, followed by a consideration of specialised forms of service, such as edictal citation, substituted service, and service outside of South Africa's borders.

3.1 The usual methods of service in the High Court

The different methods of service in the High Court are set out in rule 4(1)(*a*) of the High Court Rules:

1. *Personal service*: Personal service should be used whenever possible, and the other methods of service provided for in the rules should only be used where the defendant or respondent is elusive or untraceable.[63] Here the court process is delivered to the person personally,[64] by which it is meant that the sheriff is actually in the defendant or respondent's presence, and hands the relevant document to him. Where the person to be served is a child (younger than 18 years), or is under some form of legal disability, the process must be delivered to that person's guardian, or tutor, or curator, as the case may be.[65]

   The High Court Rules do not provide for any instances where personal service is the *only* method of service permitted, but the judges of the various High Courts have used their discretionary power to make it a rule of practice that personal service is *required* in certain matters, such as in divorce proceedings, sequestration proceedings, and cases where the attorney wishes to withdraw as the attorney of record.[66] In cases where personal service is required but

not possible, application must be made for directions from the court as to substituted service, in terms of rule 4(2).

If the person to be served refuses to accept the document, it may simply be dropped at his feet.[67]

2. *Leaving a copy at the place of residence or business*: With this type of service, the document may be left with a person at the place of residence or business of the defendant or respondent, provided that the person is *apparently* in charge of the premises, and is *apparently* not younger than 16 years old.[68] Both these requirements must be satisfied for the service to be effective.

   As far as the place of residence of the person to be served is concerned, if that person resides in a hotel, boarding house or similar residential building, service on the manager of the hotel or boarding house or hostel will be sufficient. However, in the case of other types of residential buildings (e.g. a block of flats), which are occupied by more than one person or family, service must be effected in that portion of the building occupied by the person to be served.[69] For example, if the person to be served resides in a block of flats, it will not be sufficient to serve the document concerned on the caretaker of that block of flats – it must be served on an occupant of the flat in which the defendant or respondent resides. If a person has more than one place of business, or more than one residence, service may be made at any one of these.[70]

   In the case of *Cohen and Another v Lench and Another*,[71] the issue was whether a notice of cancellation affixed to the outside gate of a gated townhouse complex constituted *delivery*, in circumstances where the chosen *domicilium* was a specific unit in the complex. The court held that the chosen *domicilium* was the specific unit in the complex and not the complex itself, and the fact that access could not be gained to the chosen *domicilium* did not entitle the sellers to choose an alternative place for delivery.

   As far as the *place of business* of the person to be served is concerned, this refers to the place where that person conducts his *own* business (i.e., the person is self-employed), as opposed to the place where he is *employed* by someone else.[72]

3. *Service at the place of employment of the person to be served*: Here service is effected by delivering the document to a person who is *apparently* in authority over the person to be served, and is *apparently* not younger than 16 years old.[73] Both these requirements must be satisfied for the service to be effective.

4. *Service at the domicilium citandi et executandi*[74] *of the person to be served*:[75] A person's *domicilium citandi* is an address which has been chosen by that person for service of documents upon him. Many contracts contain a clause appointing a *domicilium citandi*, and you will usually find the term *domicilium citandi et executandi* used, which means the address for the purposes of service (*citandi*) and execution (*executandi*).

   Once a person chooses a *domicilium citandi*, service at that place will usually be good,[76] despite the fact that the person to be served no longer resides there; or has abandoned the property; or is not known at that address; or even if it is a vacant piece of land.[77] Service must be effected strictly in accordance with the relevant *domicilium* clause.[78]

   The purpose of *domicilium* addresses is that the parties should not be required to search for one another's whereabouts when wishing to litigate.

   In some cases, however, the use of *domicilium* addresses has been abused. For example, certain commercial enterprises have been known to include *their own* addresses in standard form contracts as being the *domicilium citandi* of the other contracting party. Should the other party then be sued following an alleged breach of contract, the summons on the defendant would be delivered to the *plaintiff's* address, and the first time the defendant would find out that legal proceedings had commenced against him would be after default judgment had been granted.

Such misuses of *domicilium*addresses have led the courts to treat these addresses with caution, with the Appellate Division eventually deciding that courts have a discretion whether or not to accept *domicilium* addresses.[79]

As a general rule, the courts are reluctant to allow the use of a *domicilium* address when the plaintiff is aware that the defendant is unlikely to receive notice of the proceedings if the *domicilium* address is used.[80] An example of this would be when a bank is foreclosing on a mortgage bond and the defendant has already departed from the mortgaged property that is also the *domicilium* address.

Note that the plaintiff is not *obliged* to serve at the *domicilium* address;[81] he can choose to use any of the service methods provided for in the rules.[82]

5. *Service on a company or a close corporation*: If you want to serve court documents on a company or close corporation, you may serve the process at its registered office,[83] *or* at its principal place of business within the court's jurisdiction,[84] or in any manner provided by law.[85] Service has to be effected by handing the process to a responsible employee,[86] or, if none of the employees wants to accept service, by affixing the document to the main door of the registered office or principal place of business.[87]
   (Note that the term 'principal place of business' has a different meaning in the context of *service* than it does in the context of *jurisdiction*. In the context of jurisdiction, a company or close corporation is said to reside at its 'principal place of business', which has been interpreted to mean the place at which the main management and control of the company or close corporation are situated. In the context of service, however, 'principal place of business' is interpreted to mean the chief place of business of that company or close corporation which is situated within the area of jurisdiction of the court. If the company or close corporation does not have a place of business within the area of jurisdiction of that court, the only option will be to serve summons at the *registered office* of that company or close corporation.)[88]
6. *Service on an agent duly authorised in writing to accept service*:[89] The agent must produce a *written* authorisation to accept service of the process.[90]
7. *Service on a partnership, firm or voluntary association*:[91] In these cases, the process may be left at the place of business of the partnership, firm or voluntary association with a person who is *apparently* in charge of the premises, and is *apparently*over 16 years old. If there is no place of business, then the process may be served on a partner of the partnership; or the proprietor of the firm; or the chairman or secretary of the managing body of the association. Remember that in the case of a partnership, this only applies if you are acting against the partnership *as such*. If you are acting against partners in their individual capacities, the process will have to be served on *each* partner, using one of the methods laid down in the rules.[92]
8. *Service on a local authority or a statutory body*:[93] In the case of local authorities (including municipalities), process must be delivered to the town clerk, or city manager, or mayor of the local authority.[94] In the case of statutory bodies, service may be effected by delivering the process to the secretary, or to a member of the board, of the statutory body.
9. *Service on two or more persons being sued in their joint representative capacity*:[95] Here service must be effected on each of these persons individually.
10. *Service in legal proceedings against the state*,[96] *a province, or a Minister or Deputy Minister in his or her official capacity*: In these cases, the process may be served at the office of the State Attorney situated in the area of jurisdiction of the court out of which the process was issued.[97] The office of the State Attorney of KwaZulu-Natal, for example, is situated in the MetLife Building at 391 Anton Lembede Street, Durban. This information can be easily gleaned

from the Department of Justice and Constitutional Development's website and should be checked regularly for any changes.

11. *Service on prisoners*: In these cases, the process may be served on the inmate personally. The official of Correctional Services who is in charge of the prison in which the inmate is detained must assist to facilitate the service of the process upon the inmate personally.[98]
12. *Service on foreign diplomats*: See the case of *Portion 20 of Plot 15 Athol (Pty) Ltd v Rodrigues* 2001 (1) SA 1285 (W).

In terms of High Court rule 4(1)(*b*), service must be effected as near as possible between seven o'clock in the morning and seven o'clock at night, and in terms of rule 4(1)(*c*), service may *not* be effected on a Sunday unless the court or a judge gives permission. The only exception to this rule is that a warrant of arrest may be validly served on a Sunday.

Section 44(1)(*a*) of the Superior Courts Act 10 of 2013 also provides for the service of process of court by means of fax or any other electronic medium 'as provided by the rules'.[99] However, the High Court Rules do not, as yet, provide for such means of service, and we anticipate that these rules will be amended to give effect to this provision of the Superior Courts Act in due course.

In any matter, the court has a judicial discretion to determine, based on the facts, whether service was effective.[100] If the court takes the view that service was defective, it may order the process to be served again.

As noted earlier, the sheriff has a duty to explain the nature and contents of the documents to the person on whom he serves the documents, and he has to record that he has done so on his return of service.[101]

3.2 The methods of service in the Regional and District Magistrates' Courts

The methods of service in Regional and District Magistrates' Courts matters are set out in rule 9 of the Magistrates' Courts Rules which, with minor variations, is a duplicate of the corresponding High Court Rule. The comments made in respect of the High Court Rules generally apply to the equivalent Magistrates' Courts Rules as well.

A summary of the various methods of service follows:

1. *Personal service*: In terms of rule 9(3)(*a*), as in the case of the High Court, personal service makes provision for service on a guardian, tutor, or curator when the person is a child (younger than 18 years) or under some form of disability.[102] Note also that any process through which a divorce action or action for nullity of marriage is instituted requires personal service in a Regional Magistrates' Court.
2. *Service upon a duly authorised agent*: This also takes place in terms of rule 9(3)(*a*).
3. *Service at the residence, or place of business of the defendant, in terms of rule 9(3)*(*b*): The person served must be apparently 16 years or older.
4. *Service at the defendant's place of employment in terms of rule 9(3)*(*c*):[103] Note that a person *apparently in charge* at the defendant's place of employment need not be a person who is also apparently in authority over the defendant. For example, one of the defendant's co-workers may be *in charge* of the premises when the sheriff arrives to effect service, but does not have any authority over the defendant. Service on such person would be permissible in a Regional or District Magistrates' Courts matter, but not a High Court matter. In High Court matters, service *must* be effected on a person 'apparently in authority over the defendant'.

In terms of a proviso to Magistrates' Courts rule 9(3), the court or the clerk of the court may treat service at the defendant's place of employment as *invalid* if there is reason to doubt whether the process served has come to the actual knowledge of the person to be served.

5. *Service at the defendant's domicilium citandi in terms of rule 9(3)*(*d*): The sheriff may serve at the defendant's *domicilium citandi* by delivering or leaving a copy at the chosen *domicilium*.
6. *Service upon a corporation or company*: In terms of rule 9(1)(*e*), service may be effected on a *corporation or a company*either at its registered office, or at its principal place of business, situated within the area of jurisdiction of the court concerned, on a responsible employee, or if they refuse to accept service, by affixing a copy to the main door.

   When the sheriff sends the process by registered mail, he must request that the addressee acknowledge receipt. If an acknowledgement is *not* received, the sheriff will mention this fact in his return of service. Although serving by means of registered post may seem to be an easy option, this is not necessarily the case. Many debtors do not collect registered post which is sent to them, and, as stated above, the fact that there is no acknowledgement of receipt will be mentioned in the sheriff's return of service. The lack of an acknowledgement of receipt usually gives rise to doubt as to whether the document concerned has been received, and may result in the court treating the service as invalid. Rule 9(3) specifically provides that if process is served by registered post, where there is reason to doubt that the served process has come to the actual knowledge of the person on whom it was supposed to be served, and in the absence of satisfactory evidence, the court may treat such service as invalid.
7. *Service upon state organs and state officials*: Where the defendant is a state or provincial department, or a Minister, Deputy Minister or Premier in his official capacity, rule 9(3)(*g*) permits you to serve process on the national or local offices of the State Attorney.[104]
8. *Service by affixing a copy of the document to the outer or principal door or security gate or placing a copy in the post-box*: Service in this way is allowed if the person who is going to be served with the process or document keeps his residence or business closed, thereby preventing the sheriff from serving the process upon him (in terms of rule 9(5)).
9. *Service upon a partnership*: In the case of a partnership, the sheriff may, in terms of rule 9(7)(*a*), serve at the *office or place of business* of the partnership. If the partnership does not have an office or place of business, then the sheriff may serve upon any member of the partnership (service on the member must be effected in any matter prescribed in rule 9).
10. *Service upon curators, executors, guardians, liquidators and trustees*: If two or more curators, executors, guardians, liquidators or trustees of an insolvent estate are being summonsed in their capacity as such, then service may be effected by serving on any one of them (rule 9(7)(*b*)).
11. *Service upon clubs, societies and similar bodies*: In the case of a syndicate, unincorporated company, club, society, church, public institution or public body, the sheriff may serve at the *local office or place of business* of that body. Otherwise he may serve on the *chairman* or *secretary* or *similar officer* of the body (rule 9(7)(*c*)).

Magistrates' Court rule 9(9)(*a*) makes provision for service of any notice, request, statement or other document *which is not process of the court* to be effected by hand delivery or by sending the document through registered post. Rule 9(9)(*a*) further provides that such process may *also* be served by sending it by facsimile or electronic mail, *provided* the plaintiff has so requested and the defendant has consented thereto in writing. Where service is effected by facsimile or electronic mail, Chapter III, Part 2 of the Electronic Communications and Transactions Act 25 of 2002 would be applicable to such service. Rule 9(14) provides for service in foreign countries.

As a general rule, process, notices and other documentation are not served on Sundays or public holidays. However, interdicts, warrants of arrest, and warrants of attachment of property may be *executed* on any day at any hour and at any place.

But what happens if a document is *improperly* served on your client? Let us say the sheriff serves a summons on your client while he is enjoying his Sunday dinner. Does this mean that your client may simply ignore the summons? Unfortunately for your client, he cannot simply ignore the summons. Later in the book, we will be dealing with *exceptions*, which may be described as a form of legal objection to pleadings. Improper service is one of the grounds upon which one is entitled to except to a summons.

There is one final point to note. Section 107 of the Magistrates' Courts Act[105] makes it a criminal offence to *obstruct* a sheriff in the execution of his duties;[106] dispose of goods attached by the sheriff;[107] make a false declaration;[108] fail or refuse to point out property you own;[109] or refuse or neglect to deliver the title deeds of immovable property.[110]

4 Substituted service and edictal citation

4.1 Substituted service in general

If you have documents that need to be served (e.g. a summons or a notice of motion) and you are *unable* to serve by one of the usual methods of service, you will have to make an application to court for authority to serve these documents in some other way. This is known as an application for *substituted service*. The Magistrates' Courts rule 9(10) provides for substituted service (service inside South Africa's borders) in the Regional and District Magistrates' Courts, and reads as follows:

> **Subject to rule 10, where the court is satisfied that service cannot be effected in any manner prescribed in this rule, and that the action is within its jurisdiction, it may make an order allowing service to be effected by the person and in the manner specified in such order.**

For edictal citation (service outside South Africa's borders), Magistrates' Courts rule 10 is relied on (which substantially replicates High Court rule 5).

Thus, substituted service[111] may be used only where the defendant or respondent is known or believed to be *inside* the country (and where service by one of the normal or required forms cannot be effected),[112] while service on persons *outside* South Africa's borders must be effected by way of edictal citation in the District Magistrates', Regional Magistrates' and High Court.[113] Note that it is only service of documents *commencing* legal process on persons outside South Africa's borders which must be effected by way of edictal citation.

The reasons for your inability to serve the documents may vary from not knowing the whereabouts of the defendant or respondent, to knowing the whereabouts but being unable to serve because the defendant or respondent refuses to open the door to the sheriff, or is avoiding service in some other manner.

You may suggest to the court whatever alternative method of service you like, as long as it is a *common sense* way to secure service in the particular circumstances. For example, if the

defendant has disappeared, but is known to be somewhere in the Durban area, you may suggest to the court that a shortened form of the document be published in a newspaper circulating in the Durban area. If the defendant is avoiding service, you may request the court's permission to serve on the defendant's relatives. The court will not grant an order substituting the usual method of service with another method suggested by you unless you have shown the court that you have *already* tried to locate the defendant but, despite your best efforts, are still unable to locate or serve on him.

What this amounts to is that the allegations which must be contained in an application for substituted service are often precisely the same as those which would have to be contained in an application to serve by means of edictal citation. It makes sense, therefore, to deal with these allegations in our discussion of the edictal citation application.

4.2 Service of legal process *outside* the country

P6

4.2.1 High Court, Regional and District Magistrates' Courts: application for edictal citation

In terms of Magistrates' Courts rule 10 or High Court rule 5, if you want to serve documents instituting High Court proceedings outside the Republic, then you first have to make an application to court for leave to institute proceedings by means of edictal citation. For example, if you want to institute an action in the KwaZulu-Natal Local Division in Durban against a defendant living in London, then you will first have to apply to that court for leave (i.e. permission) to sue by means of edictal citation. This is the case whether or not the defendant or respondent's address in the foreign country is known to you. If the precise address is unknown, then your application will be a dual one; in effect: (a) to ask for leave to proceed by way of edictal citation and (b) to ask leave to use a method of substituted service. An edictal citation (also called just an edict or citation) is merely a special type of summons similar in almost every respect to a normal summons except that it is addressed to the defendant directly, and not to the sheriff as is normally the case. This is because there may not be a sheriff, or similar officer, serving legal process in the foreign country in which you wish to have the document served.

Note that the need to apply to court for leave to sue by edictal citation only applies when you want to serve documents *instituting* legal proceedings in another country. If you want to serve any *other* kind of document in another country, then Magistrates' Courts rule 10(3) and High Court rule 5(3) applies, and it is not obligatory to make an application to court (you may simply request leave to do so at any hearing at which the court is dealing with the matter).

Let us now consider the *allegations* you would have to include in the affidavits supporting your application[114] (these are substantially the same allegations that would have to be made in an application for substituted service):

1. The nature and extent of the claim;
2. The grounds upon which the claim is based;
3. The grounds upon which the court has jurisdiction to hear the claim;
4. The method of service you are asking the court to authorise;
5. The last known whereabouts of the person to be served;
6. The enquiries that have been made to find out where that person currently is; and
7. Any other information which may assist the court to make a decision.

In relation to the manner of service which the court is being asked to authorise, the *affidavit* must set out a proposal for service, and motivate why this particular method of service is being proposed. For example, you may state in the affidavit that the defendant is believed to be in the London area for a particular reason, that he used to read the *The Times* newspaper regularly, and that therefore the publication of a shortened form of the summons in that newspaper should come to his notice. You will also attach the proposed shortened summons to the affidavit for the court's approval.

In relation to the steps taken to establish the person's whereabouts, you have to satisfy the court that *every reasonable step*has been taken, but to no avail.[115] Reasonable steps would usually include engaging tracing agents to do a search. A copy of their report indicating their lack of success would be annexed to the founding affidavits. Depending on the circumstances of the particular case, you may also include the following details in this regard:

1. The defendant's last known place of residence;
2. The last place from which news of the defendant was obtained;
3. The defendant's last known domicile;
4. The residences of the defendant's spouse or partner, parents and other near relatives;
5. The defendant's place of birth;
6. Details of all the enquiries made to ascertain the defendant's present whereabouts, for example:
    1. His spouse or partner, parents and relatives have been approached in order to ascertain his present whereabouts, but to no avail;
    2. His last known place of employment has been contacted but they have no idea where he is;
    3. Official sources such as the Department of Labour have no record of his present address; and
    4. Tracing agents have been appointed but have been unable to trace him; and
7. Details indicating that all possible sources of information about the defendant's whereabouts have been fully investigated, and all necessary steps have been taken to locate the defendant.

Finally, note that both an application for substituted service and an application to serve by edictal citation are brought *ex parte*. In other words, the applicant approaches the court alone, without the respondent having to be present, as these applications concern respondents who cannot be served with documents in the normal way because they cannot be traced or are out of the country.

4.2.2. Substituted service via electronic media

A court may order any manner of substituted service as is likely to bring the proceedings to the notice of the party to be served. The internet has brought about a substantial shift in the way people communicate and in how they access news and information.[116] This has an on-going and significant impact on communication within the law.

In 2008, an Australian court[117] took the bold step of authorising substituted service using Facebook, allowing service of a notice of default judgment on a defendant via Facebook. The same issue arose in the South African case of *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens*.[118] In this instance, the KwaZulu-Natal High Court in Durban held, *inter alia*, that it was not unreasonable to expect the law to recognise and accommodate technological change and thus authorised substituted service of a notice of set down by way of a Facebook message addressed to the inbox of the defendant's Facebook page. In reaching its decision, the

court examined several risks and pitfalls of such service. These included: whether it constituted an invasion of privacy; whether the identity of the defendant could be established; whether the Facebook profile was genuinely that of the defendant (and not a hoax profile); whether it complied with the Electronic Communication and Transactions Act 25 of 2002; whether there was any legal certainty of service; and whether proof of service could be provided. Although the court was – understandably enough – extremely cautious (ordering publication in a newspaper as well), it nevertheless concluded that service on the defendant's Facebook page was permissible as an alternative method when none of the prescribed methods were available, provided that certain factors were met.

Apart from showing the usual factors required for why service in terms of the rules would not be possible, a court must also consider whether there is a reasonable certainty that the social media profile is indeed that of the party who needs to be served. Furthermore, that there is reasonable certainty that the party uses the social media network (i.e. the court must be satisfied that the notice is likely to come to the party's attention) and that legal certainty of service would be achieved. Therefore, while the court may be open to new forms of service using electronic media, each case of substituted service using electronic media should be decided on its own merits. The court must also take into account the type of document that is to be served.

There are an increasing number of cases around the world in which similar approaches have been approved, for example, in Australia,[119] the USA,[120] Canada[121] and the United Kingdom,[122] while in South Africa, the KwaZulu-Natal Local Division, Durban, has also allowed service of a notice on a defendant's LinkedIn social media platform.[123]

5 Jurisdiction and service distinguished

The High Court and Magistrates' Courts Rules regulating the service of court process *cannot*, in any way, be interpreted as conferring jurisdiction on a court.

For instance, the *domicilium* addresses in a contract only appoint physical addresses for the purpose of the service of documents; the contract cannot be interpreted to hold that the court having jurisdiction over the area in which the *domicilium*address is situated will have jurisdiction in any dispute arising out of the contract.

Similarly, with regard to High Court practice, although service at a defendant's place of work or employment is permissible in terms of High Court rule 4, the court having jurisdiction over the area in which these places are situated will not have jurisdiction unless it is *also* the *forum domicilii* (i.e. the court having jurisdiction over the area in which the defendant is domiciled or resident).

For example, if a defendant were on holiday in a location that was not his place of residence, domicile, or even place of employment or business (which are additional grounds for jurisdiction in Magistrates' Courts practice in terms of s 28(1)(*a*) of the Magistrates' Courts Act), and a local sheriff was able to successfully serve a summons on the defendant personally, it would be good service, but it would *not* give the local court jurisdiction to hear the matter.

D: Action or application?

1 The decision: action or application?

In civil procedure, there are only two ways to litigate: by bringing an action, or by launching an application. In the High Court, application procedure is provided for in High Court rule 6, and by Magistrates' Courts rule 55 (which is substantially based on High Court rule 6) in the Regional and District Magistrates' Courts.

Once you have established that your client has (on the face of it) a legal remedy, you have to make the decision whether to enforce that remedy by way of action proceedings, or by way of application proceedings. The decision whether to proceed by way of action or application is crucial: if you proceed by way of application (because it is quicker and cheaper) when, by properly applying these criteria, you should have proceeded by way of action, the court may dismiss the application with costs. Even if the court is lenient,[124] and does not dismiss the application outright but refers the matter to trial or orders that oral evidence be heard to decide the specific factual dispute,[125] it will normally still make the failed applicant pay the wasted costs.[126]

We shall first consider the general differences between application and action proceedings, and thereafter briefly consider the criteria applicable when bringing High Court, Regional and District Magistrates' Courts applications.

2 Essential differences between actions and applications

2.1 Actions

Action proceedings are characterised by a clear separation between the *pleading* stage, and the *trial and evidence* stage.
The *pleadings* consist of written statements made by and delivered between the parties, setting out the material facts on which the *parties* (i.e. *the plaintiff*, who initiates the action, and *the defendant*, who defends the action) rely in support of their claim or defence, as the case may be. It is important for you to note that only the *material facts* are set out in the pleadings. This means that the main allegations on which the claim is based are set out by the plaintiff, and the defendant sets out the main allegations on which the defence is based. The various kinds of evidence that may be relied upon to support these allegations will not be referred to at this stage.

For this reason, except where a party is representing himself, he does not draft or sign the pleadings; this is done by the legal representative. Since the pleadings consist of simple statements of the material facts and do not disclose evidence, they are not affirmed under oath.

Once the process of pleading has been completed, the action is set down for trial and at the trial the parties try to prove, by means of evidence, the allegations and responses contained in the pleadings. This is done through witnesses who appear in person and give the evidence, or by handing in other evidence such as documents. The witnesses are examined-in-chief, cross-

examined and then re-examined. After the evidence has been completed, argument is addressed to the court by the parties' legal representatives, after which the court gives judgment.

2.2 Applications

In application proceedings (also called *motion proceedings*, or just *motions*), the entire procedure is paper-based (i.e. no leading of witnesses), and there is no separation between the pleadings stage and the evidence stage. Here, the evidence is not oral[127] but in writing, in the form of affidavits (i.e. statements sworn under oath or affirmation). Further documents supporting the evidence contained in the affidavits may be attached to the affidavits as annexures. The affidavits, with their annexures, are then attached to the document that sets out the order sought from the court (i.e. the notice of motion). So the affidavits not only set out the issues of fact between the parties (as would pleadings in an action), but also contain the evidence which the respective parties need to adduce in proof of their factual allegations (these factual allegations are also called *averments*). The result is that when the matter is set down for hearing, the court is already in possession of both the *pleadings* and the evidence. The hearing of an application therefore consists exclusively of legal argument by the legal representatives of the parties, and it is only in exceptional cases that oral evidence is permitted.

D18 3The essential differences between trial courts and motion courts

Another difference between action and application proceedings is that they are heard in *different types of courts*.

Action proceedings are heard in what are usually called *trial courts*. In a trial court, there is usually a raised *bench* where the judge or magistrate sits, and in front of this bench will be tables at which the plaintiff's and defendant's legal representatives sit. There will also be a witness box, usually set to the side of the judge's bench, from which witnesses will give evidence. Some trials might be over quite quickly (in a day or two), while others, which involve more complex issues, may last many weeks or even months.

Application proceedings, however, are heard in what is known as the *motion court*. The 'motion court' usually has a number of half-moon shaped tables in front of the bench to accommodate the large number of practitioners who usually appear in a motion court on any given day. There are two main types of applications – opposed applications and unopposed applications. For unopposed applications (where there is no opposition presented in court against the applicant's notice of motion), there are usually a great many cases on the motion roll, and as each case only lasts a few minutes, many legal representatives appear in court simultaneously, some in more than one matter. One case after another is called, and one practitioner after another stands up, states his or her case, and then leaves the courtroom after the judge's decision.

Sometimes an application is *opposed*. Here the respondent is at court, ready to argue against the applicant. Opposed applications are set down separately for hearing, a few days in advance, and are heard after the unopposed matters have been dealt with. When the opposed application is finally called for hearing, both the applicant and respondent have to confine themselves to arguing only the issues in the documents before the court (i.e. the issues 'on the papers'). The opposed hearing therefore consists of the two parties' legal representatives presenting argument to the court on the evidence, which is set out in the application papers. These opposed matters resemble the closing argument stage that would normally take place at the end of a trial action.

Remember that, in *essence*, the application procedure condenses the whole action process, as it requires the *pleadings* as well as the *evidence* to be contained in the application papers that are put before the court. The application procedure is therefore reserved for those matters in which the court is able to reach a *decision on the documents* put before it, without having to sit through a trial in which witnesses give evidence and are cross-examined. Applications are designed to deal with matters in which the oral evidence of various witnesses at a trial is not required because there is no real dispute between the parties about the facts of the case.

4 Making the choice: action or application?

In all civil courts, you may now use application proceedings rather than action proceedings in urgent matters – where the application procedure is required by statute, and where no real dispute of facts is anticipated. The leading case on the question is *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*,[128] in which it was held that three possible situations exist:

1. On the one hand, you have certain types of proceedings that *must, in terms of statute*, be brought by way of application. Examples would be an application to liquidate a company; or sequestrate a debtor; or rehabilitate an insolvent.[129]
2. On the other hand, there are certain types of matters which the court is *prohibited by statute* from deciding on application. Examples would be an action for divorce; or an action to recover damages which are *unliquidated* (i.e. damages which are not fixed, and which require evidence to establish their precise quantum or amount).
3. In between these two classes of cases, there is a grey area in which you must choose whether to proceed by way of action or application. The criterion which you must use to make this decision is whether or not there is any *real dispute between the parties on any material question of fact*. If there is such a dispute, then it is necessary to proceed by way of action in order to properly test and challenge the evidence. This is because it will be necessary for the parties to lead the evidence of witnesses, and for such witnesses to be cross-examined, for the court to decide whose version is the more probable. The court has to make a credibility finding after hearing and seeing the witnesses testify – this cannot be achieved merely by reading the respective versions contained in the affidavits of the parties.

This leads us to consider how to assess whether a real dispute of fact exists or not.

5 A real dispute of fact?

Whether or not a real dispute of fact exists is not always easy to determine.
Often the respondent has a weak case, and is tempted to *play for time*, delaying matters by raising disputes of fact where no disputes actually exist. Remember that not all disputes of fact are *real* disputes of fact. It is easy for a respondent to take issue with arbitrary points in an applicant's affidavit and claim that a real dispute of fact exists. So, when you are deciding whether to proceed by way of action or application, you must ask yourself whether or not it is likely that the respondent will be in a position to dispute the substance of what you are claiming in your application papers. Very few matters proceed without some sort of interchange and correspondence between the parties or their legal representatives before the matter is ready to begin. Usually, you should have at least some idea of your opponent's case as a result. If you are happy that your case is clear-cut, and that the facts which are material to your case cannot be disputed, you may proceed by way of application. If there is no real dispute of fact, and the respondent is just wasting time or being difficult, then the applicant should have nothing to fear –

at the end of the day the court will be satisfied that the application procedure was the correct procedure to use.

In the *Room Hire* case,[130] Murray AJP pointed to a number of different ways in which a dispute of fact may arise:

1. 'When the respondent denies all the material allegations made by the various deponents on the applicant's behalf, and produces or will produce, positive evidence by deponents or witnesses to the contrary.'
   This is what one would normally consider to be a dispute of fact: a simple case of two differing versions.
2. 'The respondent may admit the applicant's affidavit evidence but allege other facts which throw a different light on the applicant's allegations, which fact the applicant disputes.'
   This amounts to the classic 'confess and avoid' scenario dealt with under pleas in the section on pleadings below. It has the effect of placing the evidentiary burden on the respondent.
3. The respondent 'may concede that he has no knowledge of the main facts stated by the applicant, but may deny them, putting applicant to the proof and himself giving or proposing to give evidence to show that the applicant and his deponents are biased and untruthful or otherwise unreliable, and that certain facts upon which applicant and his deponents rely to prove the main facts are untrue.'[131]

Having explained when a dispute of fact will arise, it is also important for you to know when a dispute of fact will *not* arise. One way in which a real dispute of fact will *not* arise is if the respondent simply gives a *bare denial*[132] of the allegations in the applicant's affidavits. Price JP said the following in the case of *Soffiantini v Mould* 1956 (4) SA 150 (E):

> **If by a mere denial in general terms a respondent can defeat or delay an applicant who comes to court on motion, then motion proceedings are worthless, for a respondent can always defeat or delay a petitioner by such a device. It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the court can be hamstrung and circumvented by the most simple and blatant stratagem. The court must not hesitate to decide an issue on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits. (At 154).**

In the recent case of *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371(SCA) the court elaborated on the concept of a bare denial as follows:

> **A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will, of course, be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial, the court will generally have difficulty in finding that the test is satisfied. I say 'generally'**

because factual averments seldom stand apart from a broader matrix of circumstances, all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. (At paragraph 13).

The court added that:

an applicant who seeks final relief on motion must in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.[133]

Also, in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) (at 634E–635C), the court held that if disputes of fact become apparent on the affidavits, a final order (or relief with a final effect) may only be granted if the allegations in the applicant's affidavits, which have been admitted by the respondent, considered together with the allegations made by the respondent, justify such an order.[134]

In a nutshell, the test the court will apply to decide whether there is a real dispute of fact was stated by Watermeyer CJ in *Peterson v Cuthbert & Co Ltd* 1945 AD 420 (at 428). In every case, the court must:

… examine the alleged dispute of fact and see whether in truth there is a real issue of fact which cannot be satisfactorily determined without the aid of oral evidence.[135]

1See *George Loader & Co v Vosloo* 1939 OPD 151.

2Ibid. The Roman-Dutch law requirement of 'dunning' – i.e. repeated demands – is not required.

3See *Herbstein and Van Winsen* (2009), op. cit., 253–254.

4Note, however, that it is usually difficult to prove that an oral demand was properly made.

5In certain cases, a letter of demand may be a legal requirement: See para 4.1 below.

6This is known as *interpellatioiudicialis*. See *De Kock v Davidson and Others* 1971 (1) SA 428 (T) and *Standard Bank of South Africa Ltd v Hand*2012 (3) SA 319 (GSJ) at 22.

7Although there may be costs implications, and in some cases, like the Small Claims Court Act 61 of 1984, legislation may require that a prior letter of demand be sent.

8*Kragga Kamma Estates CC and Another CC v Flanagan* 1995 (2) SA 367 (A).

9See Section 4 below and see Annexure B.

10Note that the 'recipient' only becomes the 'defendant' after summons has been served on him.

11See *Maltz v Meyerthal* 1920 TPD 338.

12See *Administrator Transvaal v Husband* 1959 (1) SA 392 (A).

13For example, 'If payment in the sum of R20 000 is not made to me within seven days of receipt of this letter, legal action will be taken against you without further notice to you.' Note that demands made in terms of certain statutes have to comply with the time limits contained in those statutes.

14A demand is not necessary where the date or deadline for the performance of the obligation is known and undisputed. For example, the date for payment will often be fixed in an acknowledgement of debt, and in many written contracts: See *Joss v Barclays Western Bank Ltd* 1990 (1) SA 575 (T).

15See *Herbstein and Van Winsen* (2009), op. cit., 254–265 for a more detailed overview.

16Also called 'notice' in some of these statutes.

17Section 24(6) of the Road Accident Fund Act 56 of 1996.

18The Black Administration Act 38 of 1927; the Merchant Shipping Act 57 of 1951; the Defence Act 44 of 1957; the Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970; the Mental Health Act 18 of 1973; the Education and Training Act 90 of 1979; the Education Affairs Act (House of Assembly) 70 of 1988; the Audit Arrangements Act 122 of 1992; the Intelligence Services Act 38 of 1994; the Public Service Act 103 of 1994; and the South African Police Service Act 68 of 1995. Some of these statutes have been repealed (either entirely or in part) or renamed since the enactment of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002.

19In terms of s 1(4) of the Act, legal proceedings are instituted by the service of any court process on the organ of state concerned.

20The Constitution of the Republic of South Africa, 1996.

21These are 'organs of state' as defined in s 1 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002. See *Nicor IT Consulting (Pty) Ltd v North-West Housing Corporation* 2010 (3) SA 90 (NWM).

22The Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002.

23See *Thabani Zulu & Co (Pty) Ltd v Minister Of Water Affairs and Another* 2012 (4) SA 91 (KZD) where it was held that the word 'debt' in this context does not apply to a claim for an amount due in terms of a contract.

24Ibid.: s 3(2)(*a*) of the Act.

25Note that notices sent by e-mail must comply with s 4(2) of the Act: reasonable steps must be taken to ensure that the e-mail was received, and a certified copy of the notice, accompanied by an affidavit as prescribed in s 4(2)(*b*), must be delivered within seven days of the date the e-mail was sent.

26Section 5(2) of the Act.

27In terms of s 2(2) of the State Liability Act 20 of 1957, a recent amendment to the Act, a copy of the notice must also be served on the State Attorney within seven days.

28In terms of s 4(1)(*b*) of the Act.

29See *Airconditioning Design & Development (Pty) Ltd v Minister of Public Works, Gauteng Province* 2005 (4) SA 103 (T).

30The Act does not apply to municipalities or local authorities: *Fanapi v East Cape Administration Board* 1983 (2) SA 688 (E).

31The notice must be accompanied by copies of the notice of motion and supporting affidavits.

32In general, see *Jafta v Minister of Law and Order and Others* 1991 (2) SA 286 (A) at 295. It would appear that courts have the power to condone noncompliance with this rule if the application of the rule would result in prejudice (*Mphelo v Minister of Defence and Another* (4190/2014) [2014] ZAFSHC 186)(16 October 2014)).

33Note that at the time of writing the third edition of this book, this section remain operative but will be repealed by s 72 of the Customs and Excise Amendment Act 32 of 2014 once it comes into operation.

34See Van Heerden, CM and Otto, JM: 'Debt enforcement in terms of the National Credit Act 34 of 2005' (2007) 4 *Tydskrif vir die Suid-Afrikaanse Reg* 655. Also see Annexure B.

35See *Nel v Cloete* 1972 (2) SA 150 (A). See, however, *West Rand Estates Limited v New Zealand Insurance Co Ltd* 1926 AD 173 where it was stated that when the claim is for a liquidated amount of money, *mora* usually startes to run from the date of the letter of demand.

36Note that the mere delivery of an account is *not* usually sufficient to constitute demand for the purposes of *mora*: see *Dougan v Estment* 1910 TS 998. If, however, the account stipulates that the debt is payable within, say, 30 days of the date of the account, a separate letter of demand is not necessary, and interest will begin to run automatically after this 30-day period has expired.

37The repurchase rate is commonly known as the 'Repo Rate', a rate determined from time to time by the South African Reserve Bank. The Judicial Matters Amendment Act 24 of 2015, which came into effect on 8 January 2016, amended s1 of the Prescribed Rate of Interest Act 55 of 1975. Note that the prescribed rate of interest is effective from the first day of the second month following the month in which the repurchase rate is determined by the South African Reserve Bank.

38It should be noted that the rate of interest applicable to a debt is fixed at the rate which prevailed at the time when the debt arose (*Davehill (Pty) Ltd and Others v Community Development Board* [1988] (1) All SA 388 (A)).

39See *Mahomed v Nagdee* 1952 (1) SA 410 (A). Also see *ABSA Bank Ltd v De Villiers and Another* 2009 (5) SA 40 (C).

40See the judgment of *Botha and Another v Rich NO and Others* 2014 (4) SA 124 (CC); 2014 (7) BCLR 741 (CC), which considered whether enforcement of a cancellation clause was unreasonable in circumstances

where more than 50 per cent of the purchase price had been paid by the purchaser. The Constitutional Court held that granting cancellation – and forfeiture of all payments effected in terms of the agreement as provided for in the forfeiture clause – would in the circumstances be a disproportionate penalty for the breach. As to reasonableness in the enforcement of contracts generally, see *Barkhuizen v Napier* 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC).

41The same principles apply to the costs of bringing an application.

42*De Kock v Davidson and Others* 1971 (1) SA 428 (T).

43Magistrates' Courts rule 5 and High Court rule 17, which deal with simple and combined summonses.

44In terms of s 2A(2)(*a*) of the Prescribed Rate of Interest Act 55 of 1975.

45Section 4 of the Interpretation Act 33 of 1957, which reads as follows:

'When any particular number of days is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day happens to fall on a Sunday or on any public holiday, in which case the time shall be reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday.'

See *Rosslee v Rosslee* 1971 (4) SA 48 (O).

46The Superior Courts Act 10 of 2013 and the Magistrates' Courts Act 32 of 1944, on the one hand, and the High Court Rules and Magistrates' Courts Rules on the other.

47The Superior Courts Act defines 'business days' to mean days which are not a public holiday, Saturday or Sunday.

48Rule 1 of the High Court Rules defines 'court day' as 'any day other than a Saturday, Sunday or Public Holiday, and only court days shall be included in the computation of any time expressed in days prescribed by these rules or fixed by any order of court.' Rule 2(2) of the Magistrates' Courts Rules stipulates that: 'A Saturday, Sunday or public holiday shall not, unless the contrary appears, be reckoned as part of any period calculated in terms of these rules.'

49Section 4 of the Interpretation Act 33 of 1957.

50In terms of the definitions set out in footnote 48.

51Keep in mind High Court rule 4(1)(*b*), which states: 'Service shall be effected as near as possible between the hours of 07:00 and 19:00'.

52All superior courts (which includes the various divisions of the High Court) must be open to the public every business day. The offices of the registrar must be open from 9:00 to 13:00 and from 14:00 to 16:00, although for purposes of issuing any process or filing any document (other than a notice of intention to defend) the offices are only required to be open from 9:00 to 13:00 and from 14:00 to 15:00.

53Service is effected in terms of rule 9 of the Magistrates' Courts Rules, and rule 4 of the Uniform Rules of Court.

54See *Ex Parte Optimal Property Solutions CC* 2003 (2) SA 136 (C); *Skeyi v Ordemann* 1910 EDL 60 at 62; *Thornhill v Gerhardt* 1979 (2) SA 1092 (T); *Neethling v MBD Securitisation* (A809/2012, 10843/1996) [2014] ZAGPPHC 377 (17 June 2014); 2014 JDR 1315 (GP) at para 26.

55See *First National Bank of South Africa Ltd v Ganyesa Bottle Store (Pty) Ltd and Others, First National Bank of South Africa Ltd v Schweizer Drankwankel (Pty) Ltd and Another* 1998 (4) SA 565 (NC).

56In terms of the Sheriffs Act 90 of 1986. Besides the documents which start legal proceedings, there are a number of other court documents which must also be served by the sheriff of the court. These include the following: a *writ of arrest*; a *subpoena*; a *writ of execution*; a *writ of attachment*; a *writ of commitment for contempt of court*; and a *writ of attachment ad fundandam jurisdictionem*.

57In terms of ss 5 and 6 of the Sheriffs Act 1986, respectively, acting sheriffs and deputy sheriffs may be appointed to assist the sheriffs and, for purposes of the Sheriffs Act, are included in the definition of 'sheriff'.

58Rule 17(3)(*c*) of the High Court Rules and rule 5 of the Magistrates' Courts Rules require that summonses are signed and issued by the registrar. In *Noord-Kaap Lewendehawe Koöp Bpk v Lombaard* 1988 (4) SA 810 (NC) the court expressed the view that a summons that was not signed and issued by the registrar is a nullity and that, as a result, condonation could not be granted. *Erasmus Superior Court Practice* at OS, 2015, D1–326, however, takes a different view and argues that noncompliance with the rule may be condoned in terms of High Court rule 27(3). See *Chasen v Ritter* 1992 (4) SA 323 (SE) at 327.

Note that rule 3(1) of the Magistrates' Courts Rules provides that a machine facsimile of the signature of the registrar or clerk of the court is also permitted.

59*Law Society of the Northern Provinces and Another v Rules Board for Courts of Law and Others (34474/2009)* [2009] ZAGPPHC 91 (26 June 2009).

60Rule 4(1)(*d*).

61Section 43(2) of the Superior Courts Act 10 of 2013. See *Greeff v FirstRand Bank Ltd* 2012 (3) SA 157 (NCK) at para 10.

62Discovery is a process whereby the parties to an action have to disclose the documents which are in their possession and which relate to the matter in dispute between them. This procedure will be considered later in the book under the section on 'Pre-trial proceedings'.

63*O'Donoghue v Human* 1969 (4) SA 35 (E).

64Rule 4(1)(*a*)(i).

65Ibid.

66See *Canale v Canale* 1995 (4) SA 426 (SE) and *Africa v Africa* 1944 CPD 78. Many such rules are contained in practice manuals of the divisions of the High Court – for example, personal service is required in divorce proceedings in the Western Cape Division and the KwaZulu-Natal Division and in foreclosure proceedings in the Gauteng Division, Pretoria (see *Absa Bank Limited v Lekuku* 2014 JDR 2137 (GP) concerning a challenge to the legality of the Gauteng Division, Pretoria's practice directive requiring personal service in certain matters).

67*Colonial Government v Southern Lands Co Ltd* (1902) 12 CTR 3.

68Rule 4(1)(*a*)(ii).

69Ibid.

70*Barens en 'n Ander v Lottering* 2000 (3) SA 305 (C).

712007 (6) SA 132 (SCA).

72*Green v Herridge & Co* 1885 (4) EDC 358; *Smith v Smith* 1947 (1) SA 474 (W).

73Rule 4(1)(*a*)(iii).

74Usually abbreviated to '*domicilium*' or '*domicilium citandi*'.

75Rule 4(1)(*a*)(iv).

76'Good' in this sense means 'legally enforceable'. Note that more than one *domicilium* may be chosen, and service at any one of them would be good.

77*Valentine v Wardon* 1929 (13) PH F31 (W); *Hollard's Estate v Kruger* 1932 TPD 134; *United Building Society v Steinbach* 1942 WLD 3; *Lindup v Lowe* 1935 NPD 189; *Balston v Van Zyl* 1946 NPD 561; *Spencer v Du Toit* 1942 (2) PH F66 (O); *Thesen's Steamship Co Ltd v Heitmann* 1949 (2) SA 799 (SWA); *I'ons v Freeman & Frock* 1916 WLD 64.

78See *Shepard v Emmerich* 2015 (3) SA 309 (GJ) where the *domicilium* clause provided for service on a specified floor of the *domicilium* address and required that the document be marked for the attention of a specified person. Service was effected by affixing a copy of a summons to the principal door of the *domicilium* address which was not marked for the attention of the specified individual. The Gauteng Local Division, Johannesburg, held that this did not strictly comply with the *domicilium* clause and was in the result defective and invalid service.

79*Amcoal Collieries Ltd v Truter* 1990 (1) SA 1 (A) at 5I.

80Rule 4(10) of the High Court Rules.

81See *Ex Parte FirstRand Bank Ltd t/a FNB Home Loans v Sheriff, Brakpan and Others* 2007 (3) SA 194 (W) regarding the application of rule 46(3). Note that High Court rule 46(3)(*b*) was amended in March 2014 and provides that notice of attachment of immovable property is to be served according to the provisions of rule 4.

82*Sandton Square Finance (Pty) Ltd and Others v Biagi, Bertola & Vasco and Another* 1997 (1) SA 258 (W).

83Section 23(3) of the Companies Act 71 of 2008 provides that every company – including foreign companies operating in SA – must have a registered office within the Republic of South Africa, at which office all processes may be served. A company must notify the Companies and Intellectual Property Commission of a change of its registered address. Section 25 of the Close Corporations Act 69 of 1984 has a similar provision.

84Rule 4(1)(*a*)(v): the reference to 'corporation' in the rule means 'close corporation'.

85See rule 4(1)(*a*)(viii). Examples of other statutes specially providing for methods of service are s 91 of the South African National Life Assurance Company Incorporation (Private) Act 3 of 1954; s 7(2) of the Pension Funds Act 24 of 1956; s 16(3) of the Long-Term Insurance Act 52 of 1998; s 16(3) of the Short-Term Insurance Act 53 of 1998; and s 101(3) of the Collective Investments Scheme Control Act 45 of 2002.

86Which raises the interesting question of how to distinguish 'responsible' employees from the irresponsible ones: the intention appears to be that the process must be handed to an employee who will know what to do with the documents, rather than to, say, the company's gardener.

87Rule 4(1)(*a*)(v). In order to find out where the registered office of a company or close corporation is located, you will have to do a search on the Companies and Intellectual Property Commission website or at the office of the Registrar of Companies and Close Corporations in Pretoria.

88See *Federated Insurance Co Ltd v Malawana* 1986 (1) SA 751 (A), and the discussion at C7.

89Rule 4(1)(*a*)(vi).

90*Diamond Igoda View (Pty) Ltd and Another v Igoda Farm CC* (EL 790/10, ECD 1590/10) [2011] ZAECELLC 5 (14 June 2011); 2011 JDR 0718 (ECB) at para 30.

91Rule 4(1)(*a*)(vii).

92*Rothschild and Others v Greenstreet* 1883 (2) HCG 229.

93Rule 4(1)(*a*)(viii).

94Section 115(3) of the Local Government: Municipal Systems Act 32 of 2000 provides that legal process is effectively and sufficiently served on a municipality when it is delivered to the municipal manager or a person in attendance at the municipal manager's office.

95Rule 4(1)(*a*)(ix): E.g. joint trustees, liquidators, executors, administrators, curators or guardians.

96Note that in terms of the State Liability Act 20 of 1957, the Minister responsible for the government department concerned becomes the nominal defendant in actions against the state.

97Rule 4(9).

98See *Erasmus Superior Court Practice* RS 41, 2013 Rule-B1-p22. This is the position since the repeal of section 87(3) of the Correctional Services Act 8 of 1959. Section 99(4) of the Correctional Services Act 111 of 1998 provides that a sheriff or deputy sheriff must be allowed access to any inmate when this is necessary in the performance of official duties.

99Section 44(1) and (2).

100See *Arendsnes Sweefspoor CC v Botha* 2013 (5) SA 399 (SCA) at para 18.

101Rule 4(1)(*d*).

102Following the repeal of the Age of Majority Act 57 of 1972 by the Children's Act 38 of 2005, it is doubtful whether it is legally correct to refer to 'minors' or 'majors': any reference to 'minor' should be read as a reference to a child under the age of 18, and to a 'major' as an adult (18 years or older).

103Rule 9(3)(*c*).

104Note that s 3 of the State Liability Act 20 of 1957 (precluding execution, attachment or like process against the state) was declared unconstitutional in *Nyathi v MEC for Department of Health, Gauteng and Another* 2008 (5) SA 94 (CC).

105Act 32 of 1944.

106Section 107(1).

107Section 107(2).

108Section 107(3)(*a*).

109Section 107(3)(*b*).

110Section 107(4).

111Provided for in High Court rule 4(2) and Magistrates' Courts rule 9(12); also called 'service by court order'. The term 'substituted service' in the wider sense includes all forms of alternative service, but used in the narrow sense (as used here) means service on a prospective defendant *inside* the country, as opposed to service on a person outside the country, in terms of Magistrates' Courts rule 10(1)(*b*), and High Court rule 5.

112*Jones and Buckle: The Civil Practice of the Magistrates' Court in South Africa* RS 12, 2016 Rule-p10-1.

113Also to enable a debt counsellor to give effect to a referral to court in terms of s 86 of the National Credit Act 34 of 2005.

114High Court rule 5(2).

115See *Ex Parte Christiani* 1912 CPD 700.

116Schultz AL 'Superpoked and Served: Service of Process via Social Networking Sites' (2009) 43(4) *University of Richmond Law Review* 1497 1524.

117*MKM Capital Pty Ltd v Corbo & Poyser* unreported ACT Supreme Court, Master Harper 12–12–2008.

1182012 5 SA 604 (KZD).

119*MKM Capital Property Limited v Carmela Rita Corbo and Gordon Kinsley Maxwell Poyser* (*a bankrupt*) 12–12–2008 (case no SC 608 of 2008).

120*FTC v PCCare247 Inc.* 2013 WL 841037 (S.D.N.Y Mar. 7 2013); *Woodward v Chetvertakov, E.D. Mich.*, No. 2:13-cv-11943-GER-MKM and *Baidoo v Blood-Dzraku* 2015 NY Slip Op 25096 [48 Misc 3d 309] March 27, 2015.

121*Boivin and Associates v Scott* 2011 QCCQ 10324.

122*AKO Capital LLP and Another v TFS Derivatives and Others* (Feb 2012) (unreported, sourced from Beazley MJ 'Social Media and the Courts: Service of Process' Fourth Judicial Seminar on Commercial Litigation (16–18 May 2013) <http://www.supremecourt.justice.nsw.gov.au/Documents/beazley_160513.pdf> (accessed 17–01–2015)).

123*FirstRand Bank Limited t/a Wesbank v Nicolan Jason Manikkam* KZD 26–08–2015 (case no 14249/2010)(unreported).

124The court has a discretion as to how it wishes to proceed when a material dispute arises during application proceedings which cannot be resolved on the papers (see *Miloc Financial Solutions (Pty) Ltd v Logistic Technologies (Pty) Ltd and Others* 2008 (4) SA 325 (SCA)).

125High Court rule 6(5)(*g*).

126See *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd* 1982 (1) SA 398 (A). See also *Beinash and Another v Ernst & Young and Others* 1999 (2) SA 116 (CC).

127Although it is possible that a court may order that oral evidence be led to resolve a dispute of fact. This is discussed later when dealing with applications.

1281949 (3) SA 1155 (T).

129See also, for example, High Court rules 30, 32, 42, 53, 59, all read with rule 6(1).

130*Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T). Also see, *King William's Town Transitional Local Council v Border Alliance Taxi Association (BATA)* 2002 (4) SA 152 (E).

131Op. cit., 1163.

132See 'bare denial' in the Glossary.

133*Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at para [12].

134This test is called the 'Plascon-Evans Rule', and also applies where the onus rests on the respondent. See *Ocean Diamond Mining (SA) v Louw*[2001] 1 All SA 241 (C).

135This test was also applied in *Van der Merwe v Meyer* 1971 (3) SA 22 (A), and in *Da Mata v Otto* 1972 (3) SA 858 (A). See also *King Williams Town Transitional Local Council v Border Alliance Taxi Association (BATA)* 2002 (4) SA 152 (E) at 156–157.

STAGE TWO:

LITIGATION

PART 1: APPLICATIONS

Introduction

A: General principles

B: On notice applications

C: *Ex parte* applications

PART 2: ACTIONS

Introduction

A: Pleadings

B: Pre-trial procedures

C: Trial

D: Judgment, interest and costs

PART 1: APPLICATIONS

Introduction

Introduction

The application procedure is one of two main ways in which you may approach a court of first instance (as opposed to a court of appeal) for relief. Unlike the action procedure (in which oral evidence is given by witnesses at a trial), applications are decided on the papers placed before the court. All the evidence a party wishes to put forward in support of a claim must be included in his application papers.

In practical terms, High Court application papers consist of *a notice of motion* (i.e. a notice that an application is to be made to court), together with an *affidavit*, which is known as a *founding affidavit.*[1] In certain cases you will have more than one affidavit, in which case you will have a *notice of motion*, a *founding affidavit* and a number of *supporting affidavits*. You may also have supporting documentation attached to the affidavits in the form of various *annexures* to the affidavits. These annexures, together with the details set out in the affidavits, will contain not only a summary of the main facts of the claim being made (i.e. the cause of action), but also the evidence which is being put forward in support of the claim.

In terms of rule 55 of the Magistrates' Courts Rules, application proceedings in Regional and District Magistrates' Courts are substantially the same as High Court procedure in terms of rule 6 of the High Court Rules although the Magistrates' Courts Act 32 of 1944 and Magistrates' Courts Rules only provide for applications in certain limited circumstances.[2]

The application procedure is specifically designed to deal with matters which are capable of being decided by a court on the papers before it, without the need for a full-blown trial. You may think of the application procedure as a special type of legal vehicle, which is designed to bring specific types of matters before the court.

We begin this part of the book by considering the general principles applicable to applications. Then we examine *on notice*applications. Finally, we discuss *ex parte* applications.

PART 1: APPLICATIONS

A: General principles

1 Distinguishing characteristics

The normal procedure involved in bringing an application before court entails giving notice to your opponent. These applications are called *on notice* applications in this book.

Sometimes, however, applications are brought *without* giving notice to the other side at all – these are called *ex parte*applications. *Ex parte* applications are often brought on an urgent basis, which may result in noncompliance with certain rules of court. Such applications are known as urgent *ex parte* applications. Finally, note that certain types of applications are brought to achieve certain objectives *during* existing application or action proceedings – these are called *interlocutory*applications.

These distinguishing characteristics will be combined in different ways in different applications. Let us examine each of these characteristics, starting with the last.

1.1 Interlocutory applications

Interlocutory applications do not *initiate* proceedings, but are *incidental* to proceedings that are already pending. Let us assume that you are suing by way of *action*, and are busy with the pre-trial procedure. You request the other side to discover (i.e. disclose all relevant documents) in terms of High Court rule 35(1), but they fail to deliver their discovery affidavit within the required period of 20 days. In terms of rule 35(7), you may now make application to court to *compel* the opposing side to discover. This application will be an *interlocutory application* because it does not *initiate* proceedings, but is part of proceedings that are *already pending*. Since it relates to a matter that is already pending, an interlocutory application will be made under the existing case number.[3] The documents in such applications may be delivered to the service addresses provided for in the main proceedings.

Interlocutory applications may be distinguished from normal applications, which are not incidental to other proceedings, but stand on their own as the main legal vehicle for obtaining relief in a particular matter. On notice applications consist of a notice of motion together with supporting affidavits which must be served on the respondent by the sheriff, while *ex parte*applications may be brought (subject to various requirements in rule 6 of the High Court Rules and rule 55 of the Magistrates' Courts Rules) without giving prior notice to your opponent.

1.2 Urgent applications

An urgent application is just like any other application but, because it is *urgent*, it may not be possible for the applicant to comply strictly with the rules of court relating to service and notice periods. Obviously, the court will not allow the normal rules relating to applications to be disregarded without good reason, and the applicant must always strive to comply with the normal rules as far as possible, taking into account the urgency of the particular situation.[4]

The applicant must inform the court fully of the reasons why the application is urgent, and why he cannot wait in order to obtain relief by making the application in the normal way.[5] An applicant launching an urgent application may formulate his own time periods for the respondent to file an answering affidavit, which the respondent is obliged to obey until the hearing of the application. At the hearing, the respondent may object to the time periods given by the applicant. It is then for the applicant to convince the court that the matter is so urgent that it justifies those time periods.[6]

Depending on the urgency of the matter, a progressive deviation from the rules will be permitted. For example, the urgency of the matter may only be such that it is not possible to comply with the full notice requirement, meaning that the notice period will be shortened somewhat. In more urgent matters, it may not be possible to give notice at all. In other words, there may not be sufficient time to have the application papers served on the respondent. In the most urgent matters, there may not even be enough time to draft the application papers, or to have the matter heard within normal court hours. In such cases, the application will have to be made orally to a judge or magistrate after hours and may even have to take place at the judge's home (or other venue outside of the court).[7]

It is important to remember that an applicant *cannot create his own urgency*.[8] For example, an applicant cannot intentionally delay taking action until it is nearly too late, and then expect you (his lawyer) to wake the judge on duty in the middle of the night for an urgent application.

In KwaZulu-Natal, before the High Court registrar will enrol a matter for hearing on an urgent basis, an advocate (or an attorney with a right of appearance in terms of s 4 of the Right of Appearance in Courts Act 62 of 1995) must attach a *certificate of urgency* to the papers. A certificate of urgency is a short document in which an advocate certifies that he has carefully considered the merits of the matter, and that it appears to be urgent. The wording on the certificate usually reads as follows:

> **I the undersigned, Jane Thobela, an advocate of the High Court of South Africa practising as such at chambers at 6 Durban Club Place, Durban, KwaZulu-Natal, do hereby certify that I have read the notice of motion and affidavit in this matter and that I am of the view that the matter is of sufficient urgency to justify an urgent hearing and to warrant the rules relating to notice and set down being dispensed with.**

The signing of a certificate of urgency is not a mere formality, and in some divisions, the signatory of such certificates may be ordered to pay costs *de bonis propriis* if the matter is not in fact urgent.

Note that urgency may also justify a *relaxation of the rules of evidence*.[9] For example, in an urgent matter, an applicant may rely on hearsay evidence, provided that the applicant states the

source of his information, affirms under oath that he believes the information to be true, and states the full reasons for his belief. The customary phrase used when a deponent is about to make a hearsay statement in these circumstances is that he 'is informed of and verily believes' certain facts on which he relies for relief.

Note further that in terms of High Court rule 6(12)(*c*), a person against whom an order was granted in his absence in an urgent application may, by notice, set down the matter for *reconsideration* of the order.[10] Urgent applications are frequently brought *ex parte*.

1.3 *Ex parte* applications vs on notice applications

In general, if you want to make an application to court that might affect the interests of someone else, you must give notice to that person that you are going to make the application. Obviously, the reason for this is to give that person a chance to put his side of the story before the court (*audi alteram partem*). As a result, most applications are brought *on notice*.

In some cases, however, no one else may have an interest in the application, or there may be some compelling reason why it is undesirable or impossible to give notice of the application to the respondent. These applications brought without notice are known as *ex parte* applications.[11]

The rules of the High Court provide for a short-form and long-form notice of motion (Form 2 and Form 2(*a*) of the High Court Rules, respectively). Whether a long-form or a short-form notice is to be used, depends on whether the application is brought *ex parte* or on notice.

2 Notice of motion – general principles

When lawyers talk about 'bringing a notice of motion', they mean that they are 'making an application to the court'. A *notice of motion* is therefore a *notice* that a *motion* (in other words, an *application*) is going to be made to court. The party bringing the application is known as the *applicant* and the party against whom the application is brought is known as the *respondent*. A notice of motion performs the same function for an application that a summons does for an action, i.e. it calls upon the respondent to come to court to answer the applicant's claim. In the High Court, the notice of motion contains several items of information. Firstly, the identities and addresses of the applicant and the respondent are set out.[12] Secondly, it gives the respondent certain time limits within which to act. In the notice, the applicant states a date – which may not be less than five days after service of the notice on the respondent – on or before which the respondent is required to notify the applicant in writing that he intends to oppose the application.[13] Furthermore, it warns the respondent that if he does not give notice of his intention to oppose, the matter will be set down for hearing on a day not less than 10 days after service on the respondent of the notice of motion.[14] Finally, it informs the respondent of the relief or remedy sought by the applicant (i.e. the *order* sought by the applicant).[15]

The Magistrates' Courts Rules are substantially the same as its High Court equivalent, rule 6. The notice of motion is supported by written evidence, made under oath or affirmation in the form of affidavits, which will now be considered.

If a mistake appears in your notice of motion, it may be amended using the procedure set out in High Court rule 28. The amendment will generally be allowed provided it is *bona fide* and will not cause an injustice to the other side which cannot be remedied by an appropriate order for costs.[16]

3 Affidavits – general principles

3.1 Form and content of affidavits

In applications procedure, the notice of motion will be supported by the founding affidavit as well as any supporting affidavits that are necessary. An affidavit is a *statement made under affirmation or oath*[17] (also called a sworn statement), which is signed and affirmed, or sworn to, by the person making the statement (known as the *deponent*) before a commissioner of oaths.[18] The oath or affirmation is administered because the information contained in an affidavit constitutes evidence. In the same way a witness taking the witness stand in action proceedings has to take the oath or affirmation before giving evidence, a deponent testifying on paper has to take the oath or affirmation to give the written statement the status of testimony. An affidavit should be drafted in the first person (i.e. from the deponent's point of view), and, while formal and temperate, it should not be burdened with legalese. Once an affidavit is deposed to, a deponent cannot 'amend' it using the rules of court – rather, he must seek the leave of the court to submit a further affidavit to explain and correct the incorrect statement in the earlier affidavit.

As far as the *formalities* relating to affidavits are concerned, an affidavit will usually start as follows:
'I the undersigned, JOSEPH RAY SOAP, identity number 720211 5102 08 9, state under oath as follows: [statement follows …]'

Immediately after this, the following paragraph usually appears: 'Save as indicated otherwise, the facts deposed to are within my personal knowledge'.[19]

The affidavit is divided into numbered paragraphs, each of which containing a separate *averment* (or *allegation*). Where, for some reason, it is more convenient to make more than one averment in a paragraph, the paragraph should be divided into numbered subparagraphs. The idea is to make the deponent's allegations easy to follow. The same principles apply to affidavits that are written in response to other affidavits. If, for example, an applicant makes his allegations in separate and numbered paragraphs in his founding affidavit, it is easy for the respondent to respond to each of these allegations in his answering affidavit (i.e. by referring to the number of each paragraph in the founding affidavit, and briefly stating whether he *admits or denies* the allegations made). The process of responding to the allegations of the opposing side's affidavit in this manner is known as *traversing* the other side's affidavit. The statements made in the paragraphs of the affidavit may be supported further by additional documents (e.g. invoices, receipts, etc., which are attached as annexures to the affidavit and cross-referenced in the relevant paragraphs of the affidavit). Finally, the affidavit will be signed by the deponent and also by the commissioner of oaths after the commissioner has administered the oath or affirmation to the deponent.

The conclusion of the affidavit may look something like this:

……..(Signature)……..
Deponent

> **Sworn to before me at Johannesburg on this xxx day of xxx 2016, the deponent having acknowledged that:**

1.He knows and understands the contents of this affidavit.
2.He has no objection to taking the prescribed oath.
3.He considers the prescribed oath to be binding on his conscience.

……..
Commissioner of Oaths (Signature and full details)[20]

The *oath*, which the deponent swears, will take the following form:

I swear that the contents of this declaration are true, so help me God.[21]

If the deponent objects to taking the prescribed oath, or does not consider it binding on his conscience, he will be asked to make the following *affirmation*:

I truly affirm that the contents of this declaration are true.[22]

In such a case, the wording at the beginning and end of the affidavit set out above must be amended to reflect the fact that the affidavit has been affirmed rather than sworn to.

Each page of the affidavit, as well as any additions or alterations made to the affidavit, must be initialled by the deponent *and* by the commissioner of oaths. (Note that the attorney acting for the deponent, or any member of his firm, may not act as a commissioner of oaths in the deponent's matter – as a general rule, a commissioner who has an interest in a matter may not administer an oath or affirmation for that matter.)[23] If the applicant is a natural person, the founding affidavit is usually deposed to by the applicant himself. If supporting affidavits are necessary, they are usually much shorter, and confirm what the applicant has said in his affidavit regarding the person making the supporting affidavit. This is to prevent the evidence in the founding affidavit from being dismissed as hearsay. Remember, the formal requirements for documents regarding the form it should take, and the typing, binding and indexing thereof, as set out in High Court rule 62, apply to all affidavits. Also note that, as the affidavits in an application matter contain all the evidence in the case, the normal rules of evidence apply.

Furthermore, any person who knowingly makes a false statement in an affidavit is guilty of an offence. The offence carries the same penalties as that of perjury.

Having considered the formalities of the affidavit, let us take a closer look at the contents of founding and supporting affidavits:

1. *Locus standi*: The first substantive paragraph of the founding affidavit usually contains the full name and address of the applicant, and the second paragraph contains the same information in respect of the respondent. In addition, it must be clear from the affidavit that the parties have *locus standi* to bring the application. See Stage 1 Part 1 where *locus standi* is discussed in detail.[24]
2. *Legal capacity*: The legal capacity of the applicant must also be shown. If a legal guardian is assisting a child, the affidavit should state that the party suing is 'duly assisted to the extent that it is necessary'; persons suing in a capacity other than personal – such as executors of estates or an agent acting on behalf of a principal – should also indicate that they are acting 'for and on behalf of' another, and in what capacity.[25] Similarly, if the applicant is a legal person, such as a company or close corporation, the person deposing to the affidavit (usually the managing director of a company or the managing member of a close corporation) should allege that the legal action (i.e. bringing the application) has been approved by the company or close

corporation. It is *always* necessary for the directors of a company to obtain a company resolution approving the legal action before suing, and it is good practice to refer to the resolution in affidavits, and to attach it as an annexure.[26] When a deponent is a company director or deposing in some other representative capacity in an affidavit, the practice is for the deponent to state that he has been duly authorised to depose to the affidavit. Strictly speaking, the deponent does not need to be authorised to depose to the affidavit but you will frequently see this statement made in affidavits.[27] So common is the practice, that failure to indicate that the deponent is authorised to depose to the affidavit may result in your opponent taking the point against you if you do not include it. To avoid this, we see no harm in also including a statement that a deponent is duly authorised to depose thereto.

3. *Jurisdiction*: The founding affidavit must contain sufficient facts to establish the court's jurisdiction, for instance, that the respondent lives within the jurisdiction of the court, or that the cause of action has arisen within its jurisdiction. These facts need not be alleged expressly if they emerge from the facts as contained in the founding affidavit. For instance, if it is clear from the citation of the defendant that he resides within the area of jurisdiction of the court, it is not necessary to state specifically that the court has jurisdiction. See in this regard Part 1, Stage 1 in which the rules of jurisdiction are considered in detail.
4. *Urgency*: If the application is an urgent application, the founding affidavit must set out the grounds of urgency in accordance with Magistrates' Courts rule 55(5), or rule 6(12)(*b*) of the High Court Rules.
5. *Grounds for relief*: The founding and supporting affidavits will set out the grounds upon which the relief is claimed. In other words, sufficient facts must be set out to *disclose* and *prove* a cause of action. This comes from the substantive law (e.g. elements of a delict). The founding affidavit in an application matter combines both *pleadings* (which set out the cause of action) and *evidence* (which prove the cause of action).[28] All the allegations that would be contained in the written pleadings in an action matter (the *facta probanda*), together with all the facts which would be elicited from the witnesses at the trial of such action (*facta probantia*), have to be included in written form in the founding affidavit of an application.

If the founding and supporting affidavits *fail to disclose a cause of action*, the respondent is entitled to ask the court to dismiss the application on the basis that it discloses no grounds on which the relief may be granted (in other words, the respondent has no case to meet).

3.2 Inadmissible evidence in affidavits

We shall now consider some of the kinds of evidence founding and supporting affidavits may *not* contain.

3.2.1 Hearsay

The affidavits may not, as a general rule, contain *hearsay evidence*.[29] Where a deponent includes in his affidavit facts of which he does not have first-hand knowledge, this is hearsay and he must annex to the affidavit a supporting affidavit (here called a *verifying affidavit*) by someone who does have first-hand knowledge of the facts.

In the case of *urgent applications*, however, it may be impossible to obtain verifying affidavits in the limited time available. As the situation is urgent, and only temporary relief is sought prior to a further hearing when the matter will be finally decided by a court, hearsay evidence will usually be permitted. In such urgent matters, the applicant may not state the hearsay matter as if it were direct evidence, but must indicate to the court that the allegations are hearsay by stating

that the deponent '… is informed of and verily believes' the facts upon which he is relying for temporary relief.[30] The applicant must set out the facts on which he bases the grounds for his belief, and how he obtained the information,[31] as the opposing party must be able to check the source of the hearsay information in order to verify its truth.[32]

3.2.2 Privileged communications

Privileged communications are privileged from disclosure in all circumstances, and are accordingly inadmissible in affidavits as well. They include statements made or written 'without prejudice'; communications between attorney and client; certain communications between husband and wife; and state privilege.

3.2.3 Matter excluded by the rules of court

3.2.3(a) Scandalous, vexatious or irrelevant matter

In terms of Magistrates' Courts rule 55(9), and High Court rule 6(15), the affidavits may not contain matter that is scandalous, vexatious or irrelevant. The meaning of each of these terms has been defined as follows:

1. *Scandalous matter*: Allegations that may or may not be relevant, but are worded in such a way as to be abusive or defamatory. Note that certain evidence, such as an accusation of infidelity in respect of matrimonial proceedings, might be highly defamatory, and yet be acceptable in terms of this rule, because of its relevance. If, in these circumstances, the allegation is couched in unnecessarily or gratuitously insulting terms, however, it will fall foul of the rule regardless of its relevance.
2. *Vexatious matter*: Allegations that may or may not be relevant, but are worded in such a way as to convey an intention to harass or annoy.
3. *Irrelevant matter*: Allegations that do not apply to the matter in hand and do not contribute to the making of a decision in the matter.[33] This has the effect of burdening the papers by making them unnecessarily prolix (i.e. long-winded).

3.2.3(b) Inadmissible new matter

The applicant's case stands or falls by the contents of his founding affidavit. New information or issues that have not been included in the founding affidavit may not be raised in a replying affidavit. The purpose of the replying affidavit is to rebut issues raised by the respondent in his answering affidavit, and do not constitute an opportunity to include issues or information that the applicant forgot to include in the founding affidavit. All the facts needed to support a claim for relief must be set out in the founding affidavit, and new issues may only be raised in limited circumstances.[34]

3.2.4 Matter excluded by the use of inherent jurisdiction

The matters excluded by the rules of court do not comprise an exhaustive list and the High Court may use its inherent jurisdiction to exclude other matters in order to grant relief in cases where rule 6(15) is silent.[35] The following are examples:

1. *Irrelevant attacks on credibility*: An attack on the credibility of a person is generally regarded as irrelevant and is in most cases excluded by the law of evidence. For example, to embark on a personal attack on someone's trustworthiness about a matter unrelated to the case is not allowed.[36]

2. *Argumentative matter*: Only the facts of the matter should be stated, and parties should not embark on an argument on paper in relation to the facts or the law. In other words, the affidavits should not contain any legal arguments attempting to convince the court to reach the conclusion that the facts given by the other side are wrong, or that there is no legal basis for the claim or relief.[37] In practice you may see legal argument or reference to legal authority in affidavits, despite strong judicial disapproval of this.[38]

3.3 Striking out inadmissible evidence

If the affidavits *do* contain inadmissible matter, the other party may make an application for the court to *strike out* the portions of the affidavits being objected to (i.e. an order that the objectionable material in the affidavits concerned are considered deleted, rendering them inadmissible as evidence).

The court will only grant such an application, however, if it is satisfied that the applicant will be *prejudiced* in his case if the application to *strike out*[39] the evidence is not granted.[40]

An application to strike out objectionable matter is an example of an interlocutory application and, as it is based on an objection to evidence, it is heard when the merits of the matter are argued. (This application is heard, and the decision whether or not to strike out is taken, when all the affidavits have been delivered and are before the court, and the matter has been set down for hearing. This is because an application to strike out matter from an affidavit is not an objection to a *pleading*, but an objection to *evidence* proposed to be tendered to the court hearing the application.)[41]

PART 1: APPLICATIONS

B: On notice applications

D19 1When is it appropriate to bring an on notice application?

Generally speaking, when you are seeking final relief against someone, or when someone's rights or interests will be affected by the order you are seeking, the application should be made *on notice* to that person. Therefore, other than in those limited cases where it is permissible to bring an application *ex parte*, you are obliged to bring the application on notice.[42]

In all civil courts, the application is brought by *notice of motion*,[43] supported by affidavits. In terms of Magistrates' Courts rule 55(4)(*a*), interlocutory applications *must* be brought *on notice*, whereas in terms of High Court rule 6(11), High Court interlocutory applications *may* be brought *on notice*,[44] supported by affidavits.[45]

Remember that with a High Court application on notice, every single person who has a *legal interest* in the matter must be cited as a respondent.[46]

What follows below are the steps (in sequence) that must be followed in preparing, serving, responding to, and hearing an on notice application.

(Note that rule 55 of the Magistrates' Courts Rules provides similar detailed procedural guidance to rule 6 of the High Court Rules.)

The first step in all courts is to draft the notice of motion.

P3

2Step 1: The applicant's notice of motion

2.1 High Court: notice of motion

High Court Rules Form 2(*a*) sets out the details which must be contained in a notice of motion in an *on notice* High Court application.

If you look at the bottom of Form 2(*a*), you will see that it is addressed to the respondent/s and the registrar, which means that copies of the application papers have to be served on the respondent/s as well as the registrar.

In the notice of motion, the applicant must state the order that he wishes the court to make. The order prayed must be set out in such a way that the court can make it an order of court without any amendments. The first part of the order requested[47]sets out the main order you want the court to make. For example, you may ask the court for an order prohibiting your neighbour from undermining your property by digging within 10 metres of your common boundary wall. The order should not be ambiguous or open-ended.

This is usually followed by a request for costs and, finally, a prayer asking for 'further and/or alternative relief'.[48]

The next portion of Form 2(*a*) requires you to state the names of the persons who have deposed to affidavits in support of the notice of motion.

Form 2(*a*) then goes on to set out an address at which the applicant will accept service of documents in the matter. The service address must be within 15 kilometres of the office of the registrar. This is very important in practice since it ensures that parties do not have to go running all over the country to serve documents. If you are a Durban attorney who has been asked to act in a matter that is being heard in the Gauteng Local Division, Johannesburg, for example, you will have to appoint an attorney in Johannesburg who has a service address within 15 kilometres of the Gauteng Local Division, Johannesburg, to act as your *correspondent* (i.e. the attorney in Johannesburg acts as your agent to receive documents on your behalf).[49]

The next part of Form 2(*a*) sets out the respondent's options: what he must do if he wants to oppose the application, and what will happen if he does not do so. These options will be examined in detail later.

Finally, the notice of motion is signed by the applicant or his duly appointed attorney.[50]

2.2 Regional and District Magistrates' Courts: notice of motion

Magistrates' Courts Rules Form 1A of Annexure 1[51] sets out the details that must be contained in a notice of motion in a Regional or District Magistrates' Court matter.

In the notice of motion, the applicant must state the order that he wishes the court to make in such a way that the court can make it an order of court without any amendments. The first part of the order sets out the main order you want the court to make, followed by a request for costs and a prayer asking for 'further and/or alternative relief'.

The form also requires you to state the names of the persons who have deposed to affidavits in support of the notice of motion, and to state an address at which the applicant will accept service of documents in the matter. The service address must be within 15 kilometres of the office of the registrar (Regional Magistrates' Court) or clerk of the court (Magistrates' Court). The form then

indicates the respondent's options, and has to be signed by the applicant or his duly appointed attorney.

3Step 2: The applicant's founding and supporting affidavits

The main evidence in support of the notice of motion will be contained in an affidavit[52] by the applicant called the *founding affidavit*. If there are other witnesses who support the applicant's version, their affidavits are called *supporting affidavits*. Sometimes, a witness may make an affidavit merely agreeing with the version of another deponent – this kind of supporting affidavit is also called a *confirming affidavit*.[53]

The founding and supporting affidavits must cover all the elements of the area of law on which the applicant is relying, and must also contain all the evidence supporting these elements.[54] Relevant documents (e.g., copies of invoices) may also be attached to the affidavits as annexures.[55]

The equivalent provisions for the Regional and District Magistrates' Courts are contained in rule 55(1) of the Magistrates' Court Rules.

Once all the founding and supporting affidavits have been drafted, they must be attached to the notice of motion and sent to the sheriff for service.

4Step 3: The service of the application papers

4.1 Service in the High Court, and District and Regional Magistrates' Courts

Once you have drafted the notice of motion and affidavits, and have had all the affidavits duly signed before a commissioner of oaths, you will deliver the original and at least two copies of the notice of motion and founding affidavits to the registrar (or clerk) of the court to be *issued* (i.e. given a case number and date-stamped). If there is more than one respondent, you will include an extra copy of the notice of motion and affidavits for each additional respondent. Once the application has been issued, a copy of the papers will be *served on* each respondent by the sheriff. Thereafter, the sheriff will file the original notice of motion and affidavits with the registrar of the court, and deliver the remaining copy of the papers to you, together with his return of service.

5Step 4: Respondent's notice of intention to oppose

Once the application papers have been served on the respondent, the following will happen:

P4

5.1High Court procedure

If the respondent intends to oppose the application, he must file a notice of opposition. This notice states that the respondent intends to oppose the application, and sets out an address at which the respondent will accept service of documents in the matter.

In terms of High Court rule 6(5)(*b*), the respondent must be allowed at least *five* days[56] *after* he receives the application papers to deliver his notice of opposition to the applicant. Because this time period is stipulated in the High Court Rules, the days referred to are *court days*, and must be calculated as such (see the discussion in Stage One, Part 2B Section 2.2 above regarding the calculation of time).

If the notice of motion is served on the respondent at a place *outside the jurisdiction* of the division of issue, the respondent is allowed more than five days within which to deliver his/her notice of opposition. A period of *two weeks* is allowed if the place of service is *less than 150 km* from the court, and one month is allowed if, in addition to being outside the jurisdiction of the division that issued the notice of motion, it is *more than 150 km* from the court.[57] Because these two time periods are stipulated in the Superior Courts Act 10 of 2013, the days referred to are *calendar days*, and must be calculated as such.[58]

In terms of High Court rule 6(13), if the application is against a Minister, Deputy Minister, Premier, officer or servant of the state, in his capacity as such, the state or the administration of any province, then *15 court days* must be allowed within which to deliver the notice of opposition.

If you look at Form 2(*a*), you will see that the respondent is informed that if he does not deliver a notice of opposition, the application will be set down for hearing by the court on a stipulated day. In terms of High Court rule 6(5)(*b*), the date of the hearing may not be less than *10 court days* after the service of the notice of motion on the applicant. Note that even though the notice of motion states a date for the hearing, you will nevertheless have to set the matter down for the hearing. You do this by delivering a *notice of set down* to the registrar.[59] A copy should also be provided to your opponent.

5.2 Regional and District Magistrates' Courts procedure

If the respondent intends to oppose the application, he must file a notice of opposition in terms of Magistrates' Courts rule 55(1)(*g*). This notice states that the respondent intends to oppose the application, and sets out an address within 15 kilometres of the Regional Magistrates' Court's registrar or clerk of the court, in the case of the District Magistrates' Court, at which the respondent will accept service of documents in the matter.

In terms of Magistrates' Courts rule 55(*g*)(i) and (ii), the respondent must deliver his notice of opposition to the applicant, and within *10 days* of this notice, deliver his answering affidavit. Because this time period is stipulated in the Magistrates' Courts Rules, the days referred to are *court days*, and must be calculated as such (see the discussion in Stage One, Part 2B Section 2.2 above regarding the calculation of time).

If the respondent fails to deliver a notice of opposition timeously, the applicant may place the matter on the roll for hearing by the court on a stipulated day, giving at least five days' notice (in terms of rule 55(1)(*f*)).

6Step 5: The respondent's answering affidavits[60]

If the respondent, in a High Court matter, delivers a notice of opposition in time, he must deliver his *answering affidavit* within 15 court days (10 court days in Regional and District Magistrates' Courts matters)[61] of the delivery of the notice of opposition.

The answering affidavit should be supported, insofar as may be necessary, by other affidavits deposed to by witnesses who have direct knowledge of the events. In his answering affidavit, the respondent must deal paragraph by paragraph with the allegations and evidence contained in the applicant's affidavits, and state which of the allegations he admits and which he denies. He must also set out his version of the relevant facts.

7Step 6: The applicant's replying affidavits

The applicant may deliver a *replying* affidavit within 10 days after the respondent's answering affidavit has been served upon him.[62] In the replying affidavit, the applicant deals paragraph by paragraph, insofar as may be necessary, with the allegations and evidence set out in the respondent's answering affidavit. The purpose of the replying affidavit is to rebut any averments made in the answering affidavit. New matter may not be introduced at this stage, and the court will strike out any new matter contained in the replying affidavit, which should have been contained in the founding affidavit.[63]

8Step 7: Further affidavits

After receipt of the applicant's replying affidavit, further affidavits by either of the parties are permitted only at the discretion of the court.[64] This means that an oral application will have to be made in court, requesting the court to authorise the filing of further affidavits.[65]

The reason generally for not permitting further affidavits is that the applicant is expected to set out the grounds and evidence for his claim fully in his *founding* affidavits, while the respondent is expected to set out the grounds and evidence for his defence fully in his *answering* affidavits. The applicant then has the opportunity to respond to anything new that has been raised in the respondent's answering affidavit, by way of a *replying* affidavit.

The court will therefore allow the filing of further affidavits only in exceptional circumstances,[66] and will expect an explanation as to why the filing of further affidavits is necessary.[67]

Examples where the courts have held that special circumstances exist for justifying further affidavits are:

1. where a new matter or something unexpected has been raised in the replying affidavits;[68]
2. where the courts instruct that further affidavits be filed;[69]
3. where new evidence has come to the parties' attention at a late stage;[70] and
4. generally, where there is the possibility of prejudice to the respondent if further affidavits are not allowed.[71]

P5

9Step 8: Setting the matter down for hearing

The application must be set down for hearing by the delivery of a *notice of set down*. The notice of set down instructs the registrar to place the matter on the court roll for hearing.[72] In the case of opposed applications, the court will normally require the filing of heads of argument.[73]

10Step 9: The hearing

The matter will come before the court on the date on which it has been set down. The court then has a number of options, depending on the contents of the papers.

10.1 The court's order if no real dispute of fact has arisen on the papers

If no real dispute of fact is apparent on the papers, and the applicant's papers are in order (i.e. they set out a valid cause of action, supported by the evidence needed to prove the cause of action), the court will hear argument from both sides. If the court is of the view that a case has been made for the relief sought, the court will grant the order as prayed in the notice of motion.

With *ex parte* applications, the court may grant the order prayed if it is satisfied that the rights of no other person will be affected by the order, and that the papers are in order. If the order sought in an *ex parte* application will affect the rights of third parties, the court will, at most, only be prepared to grant a rule *nisi* together with temporary relief.[74]

10.2 The court's order if a real dispute of fact *has* arisen on the papers

If a real dispute of fact is apparent on the papers, the court may deal with the matter in one of four ways.

10.2.1 The court may decide the matter on the affidavits alone

Unless one of the parties requests the court to refer the matter for oral evidence or for trial, the court will usually deal with the matter on the basis of the undisputed facts.[75] If the undisputed facts in the applicant's affidavits are not sufficient to persuade the court on a balance of probabilities that the applicant is entitled to the relief sought, the court will likely dismiss the application (see Section 10.2.4 below).

10.2.2 The court may refer the matter to oral evidence[76]

Referral to oral evidence[77] is usually done only where the disputed facts are restricted to a narrow range of issues. These issues may be referred for *oral evidence*. This will happen when one fact, or only a few disputed facts, cannot be decided on the affidavits; when the issues are comparatively simple and clearly defined; and when the evidence in question has a narrow scope. The matter will usually be placed on the expedited roll and will be heard sooner than a trial brought in the usual course, depending on the case load of the division. However, the court will not refer a matter to oral evidence when complicated issues are involved and it is not possible to know how wide a field of evidence the disputed issues will cover.[78] The court will not usually exercise its discretion to refer the matter to oral evidence when a dispute of fact was within the contemplation of the applicant when he instituted the application and may, as a sign of its displeasure, dismiss the application (with or without costs) (see Section 10.2.4 below).

When the court has doubts about the credibility of a deponent of an affidavit relied on in an application, it may order him to appear for cross-examination.[79]

10.2.3 The court may refer the matter to trial[80]

If the disputed facts cover a broad range of issues, or are relatively complicated, the court will usually refer the matter to trial.[81]

In referring a matter to trial, the court may order that the founding affidavit should stand as the summons, and will give directions regarding the further exchange of pleadings. It will often treat the three sets of affidavits as pleadings and, if the answering and replying affidavits have not yet been exchanged, limit the normal time periods by instructing that the affidavits be served with only a day or so separating the exchanges.

Alternatively, the court may define the issues to be decided at trial, and the matter will proceed to trial as if the pleadings were closed. In such a case, no further trial pleadings will be exchanged between the parties.[82]

The court often orders a referral to trial where the matter, although involving a dispute of fact that is wide ranging in scope, has properly been brought by way of application because of its urgency. For example, the referral of an application to trial is often the result in cases where urgent interdicts are brought *ex parte*.[83]

10.2.4 The court may dismiss the matter, with costs

If a real dispute of fact should have been foreseen by the applicant, the court may dismiss the application, with costs.[84] If the court dismisses the application because the plaintiff failed to *make out his case*, the order is equivalent to a final judgment in favour of the respondent. However, if the application is dismissed because of the *existence of a factual dispute*, the order does not operate as a final judgment.[85]

If the applicant's negligence is not clear-cut, the court will usually refer the matter to oral evidence or to trial.[86] In the latter case, the court may still show its disapproval of the applicant's lack of diligence by awarding costs in favour of the respondent.[87]

10.3 In certain cases, the court may decide to make *no order*

The court may decline to make any order on the application itself, and give the applicant leave to renew the application on the same papers or postpone the application *sine die* (i.e. without a return date) with leave to file further affidavits.[88] The court will usually indicate the shortcomings of the pending application so that the applicant knows what evidence to obtain to supplement the existing affidavits. The effect of this order (or rather, the *lack* of an order) is that the applicant may bring the application again, but costs will normally be awarded to the respondent.[89]

11Step 10: Optional further steps – counter-applications[90] and joinder applications

High Court rule 6(7) and Magistrates' Courts rule 55(2)(*a*), require respondents to use the counterclaims procedure in actions as a guide when bringing a counter-application, or when joining another party to the application.[91] A counter-application must be made if the respondent seeks relief beyond the mere dismissal of the applicant's application. Usually, the answering affidavit serves as the founding affidavit of the respondent's counterclaim, and the counterclaim's prayers may be included in this affidavit. The applicant's replying affidavit then has the dual function of serving as the replying affidavit in the application-in-convention, *and* the answering affidavit in the application-in-reconvention.[92]

To prevent possible confusion, however, it is preferable for the respondent to file a separate notice of motion (counter-application provisions are not peremptory).

PART 1: APPLICATIONS

C: *Ex parte* applications

1 *Ex parte* applications in the High Court[93]

Ex parte applications may be brought in the following circumstances:

1. When the applicant is the *only person interested*[94] in the relief claimed, for example, an application for admission as a sworn translator (a person authorised by the court to translate legal documents from one language to another, as opposed to a court interpreter who does not

need to be as highly qualified). Sworn translators are hired by attorneys or businesses for the translation of legal documents that will be recognised by the courts as being accurate unless proven otherwise. The sworn translator who brings the application has an interest in the relief claimed, but the only other party with an interest is the court itself.

2. When the relief sought is a *preliminary step* in the proceedings, for example an application to sue by edictal citation, an application for substituted service, or an application to attach a person or property in order to found or confirm jurisdiction. All these applications simply prepare the way for the legal proceedings that are to follow, and cannot be said to take away the respondent's right to put forward his side of the story.
3. When the *nature of the relief* sought is such that giving notice may defeat the purpose of the application, for example, an application to freeze someone's bank account. The purpose of this application is to prevent a person from dissipating the funds. Giving notice to the debtor of this impending application would simply encourage him to transfer the funds!
4. When immediate relief is essential because the *harm is imminent*, for example, an urgent application for a temporary interdict. If, for example, you see that a ship which has an unpaid lien will be leaving the harbour at 16h00 that day, you need to stop it almost immediately and arrest it in order for the South African courts to exercise jurisdiction over the ship. In those circumstances, you may proceed to courts to get an order without giving the ship owner (and other interested parties) notice. The urgency is such that you do not even have enough time to give the ship owner notice, let alone wait for the required notice period in terms of the rules before bringing your application.[95]

5. Where the application is usually brought *ex parte* in terms of *established court practices*. For example, applications for provisional sequestration and liquidation are brought *ex parte* in some divisions.[96] Harms' *Civil Procedure in the Superior Courts*, however, expresses the view that these practices should not to be followed unless special circumstances exist.[97]
6. Where the *identity of the respondent is not readily ascertainable*, for example, if an application may affect the interests of some or all of the people living in a certain suburb, you cannot cite every single person living in the suburb in your papers. This kind of application has occasionally been brought to eject the occupants of informal settlements, but even here where the respondents cannot be precisely identified, the courts will often insist that some kind of notice be given.[98]

2 *Ex parte* applications in the Regional and District Magistrates' Courts

Magistrates' Courts rule 55(3) provides that *ex parte* applications may be brought in Regional and District Magistrates' Courts only where the following requirements are satisfied:

1. The giving of notice would defeat the purpose of the application; or
2. The degree of urgency is so great that the dispensing of notice is justified.[99]

In addition, all *ex parte* applications have to provide a specified return date on which cause must be shown why the order should not be confirmed, and a copy of the *ex parte* order and supporting affidavits *must* be served on the respondent.[100] Rule 55(3)(*h*) provides that *ex parte* applications may be heard in chambers. Rule 55(5) deals with urgent applications, and contains similar provisions to High Court rule 6(12).There is no form, corresponding with Form 1A for *ex parte* applications and it would appear that the same form, with appropriate variations, may be used in both cases.[101]

P2

3Preparing *ex parte* application papers

3.1 High Court: notice of motion

High Court Form 2 sets out the basic format for the notice of motion in an *ex parte* application in the High Court.[102].

Form 2 requires the following information to be included in the notice of motion:

1. *Who* the applicant is;
2. The *date* and *time* when the application will be made;
3. What *order*[103] the court will be asked to make;[104]
4. That the application is *supported by an affidavit or affidavits* attached to the notice of motion; and
5. The name and address of the *applicant's attorney*.

The form also contains an instruction to the registrar to set the matter down on the roll for hearing. In other words, a notice of set-down is incorporated into the notice of motion. This automatic notice of set-down is only possible in *ex parte* applications. With an on notice application, the date of the hearing will depend upon whether or not the respondent opposes the matter, and the notice of set-down can only be delivered to him after that.

3.2 Regional and District Magistrates' Courts: notice of motion

The Magistrates' Courts Rules do not prescribe a particular form for *ex parte* applications in Regional and District Magistrates' Courts, and the format of High Court Rules Form 2 should be followed (see Section 3.1 above).

4 The court's options: final orders and rules *nisi*

In the High Court, where the court is satisfied that the rights of no other person will be affected by the *ex parte* relief the applicant is seeking, it will grant a *final order* (provided, of course, that the court is satisfied the applicant has made out a case on the papers). Sometimes, however, the *ex parte* application, in the opinion of the court, may affect the rights of the eventual respondent or other persons. In these cases, the court will not grant a final order, but will issue a rule *nisi*.[105] (In Regional and District Magistrates' Courts, however, the courts have no discretion: rule 55(3)(*c*) states that an *ex parte* order 'shall' be of an interim nature – a rule *nisi* is peremptory.)

A rule *nisi* is a court order calling upon named respondents, other interested parties, a specified class of persons, or even the world at large,[106] to give reasons (i.e. to show *cause*), on a date set by the court,[107] why the order sought by the applicant should not be made a final order.[108]

Sometimes the applicant will need some form of relief *before* the return date. If this is the case when the applicant asks the court to issue a rule *nisi*, he will also ask the court to order some form of *temporary relief* (for example, in the form of an interim interdict), which will take effect until the return date. Another way for the court to give temporary relief is to order that the final order sought by the applicant will have *interim effect*. This means that the order sought will operate against the respondent until the return date, on which day the court will decide whether to make it a *final order*.[109] Note that in High Court, Regional and District Magistrates' Courts the

respondent may anticipate the rule *nisi* return day (ask that the matter be dealt with before the return date of the rule *nisi*) by giving not less than 24 hours' notice.[110]

5 Intervention in *ex parte* applications

In terms of rule 6(4)(*b*) of the High Court Rules, any person having an interest in an *ex parte* application may apply to the court for permission to intervene in the application.

This application to intervene must be in the form of a notice of motion requesting leave to intervene, and must be supported by an affidavit setting out his interest in the matter. Notice of the proposed intervention must also be given to the applicant, who may wish to file an affidavit opposing the proposed intervention.

The Magistrates' Courts Rules do not contain a similar provision, but rule 55(1)(*c*) provides that notice of any application must be given to any person (not party to the proceedings)[111] if it is 'necessary or proper' to do so.

6 The requirement of utmost good faith in *ex parte* applications

[112] An applicant bringing an *ex parte* application has a duty to be completely open and honest with the court, and has to reveal *all* facts that may be relevant to the matter, even those facts which may be detrimental to his case.[113]

Any breaches of this duty of utmost good faith could have extremely harmful consequences for the applicant's case as the court may dismiss the application on this ground alone, irrespective of the general merits of the case. In deciding whether there has been a breach of the duty of good faith, the court will take various factors into account, such as doing justice between the parties, the interests of innocent third parties, and the extent to which the court was influenced by the breach.[114]

Even where the breach of good faith has not been too serious, and the court does not dismiss the application, the court may nevertheless make an adverse costs order against the applicant.[115]

1All the legal elements of the applicant's case must be contained in the founding affidavit – the applicant stands or falls by his founding affidavit. *M & V Tractor & Implement Agencies Bpk v Vennootskap DSU Cilliers & Seuns en Andere (Kelrn Vervoer (Edms) Bpk Tussenbeitredend; M & V Tractor & Implement Agencies BK v Hoogwartier Landgoed (Edms) Bpk (Kelrn Vervoer (Edms) Bpk Tussenbeitredend); M & V Tractor & Implement Agencies BK v Olierivier Landgoed (Edms) Bpk (Kelrn Vervoer (Edms) Bpk Tussenbeitredend)* 2000 (2) SA 571 (N). However, the rule is not absolute and the court has a discretion to permit new material in the replying affidavit. The primary consideration in this regard is whether the applicant knew of the facts at the time when the founding affidavit was prepared or ought reasonably to have ascertained them before launching proceedings.

2Harms *Civil Procedure in Magistrates' Courts*, September 2015, SI 37 at B55.2.

3The case number of the main action or application.

4See High Court rule 6(4) and Magistrates' Courts rule 55(3).

5That is, complying fully with the relevant rules of court.

6High Court rules 6(12)(*a*) and (*b*) read as follows: '6(12)(*a*) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as it deems fit.'

'6(12)(*b*) In every affidavit or petition filed in support of any application under paragraph (*a*) of this sub-rule, the applicant must set forth explicitly the circumstances which is aversred render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.' See *Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others* 2004 (2) SA 81 (SE) at 95 and 96. Also see rule 55(3) of the Magistrates' Courts Rules.

7All divisions of the High Court have an after-hours roster in terms of which judges are on duty outside normal court hours. Similarly, there is also a roster of magistrates on duty after hours.

8*Schweizer Reneke Vleis Mkpv (Edms) Bpk v Die Minister van Landbou en Andere* 1971 (1) PH F11 (T).

9*Southern Pride Foods (Pty) Ltd v Mohidien* 1982 (3) SA 1068 (C).

10See, for example, *Rhino Hotel & Resort (Pty) Ltd v Forbes and Others* 2000 (1) SA 1180 (W).

11The normal practice is that applications are brought on notice, with *ex parte* applications being the abnormal situation. When we refer to normal applications to distinguish them from *ex parte* applications, we refer to them as on notice applications.

12High Court rule 6(5)(*b*) requires that the applicant appoint an address at which he will receive service of documents in the application. In accordance with the rule, the address must be within 15 km of the office of the registrar of the division in which the application is going to be brought.

13High Court rule 6(5)(*b*)(iii).

14Loc cit.

15High Court rule 6(3) requires that every petition shall conclude with the form of order prayed. Proceedings by way of petition were abolished by the Petition Proceedings Replacement Act 35 of 1976 and now any reference in law to the institution of application proceedings by petition must be understood to mean the institution of such proceedings by notice of motion. Rule 6(3) has effectively been rendered obsolete – see Harms *Civil Procedure in the Superior Courts*, 0ct. 2015, SI 54 at B6.1.

16*Commercial Union Assurance Co Ltd v Waymark* NO 1995 (2) SA 73 (TK) at 76D–76I. *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at para 9.

17Persons who do not wish to take an oath, may affirm their statements. An affirmation has the same legal effect as an oath.

18A person, such as a police official, attorney, advocate or certified chartered accountant, who are commissioners of oaths in terms of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 *ex officio* (by virtue of their office).

19This statement is not, however, conclusive proof of this fact and must be accompanied by some indication in the affidavit as to how that knowledge was acquired by the deponent. *President of the Republic of South Africa and Others v M & G Media Ltd* 2011 (2) SA 1 (SCA) at para 19.

20This information is often contained in a stamp which the commissioner ink-stamps onto the document being commissioned.

21Regulation 1(1) of the regulations promulgated under s 10 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 – *Government Gazette* No 3619, Government Notice R1258 of 21 July 1972.

22Ibid., Regulation 1(2).

23Harms *Civil Procedure in the Superior Courts*, 0ct. 2015, SI 54 at B6.6.

24To establish *locus standi*, a direct, personal interest in the suit has to be shown on the part of the applicant in the founding affidavit: *Witwatersrand and District Nursery Trade Association and Others v Herholdt* 1956 (4) SA 361 (T). *Locus standi* need not be specifically alleged if it emerges from the facts of the case set out in the founding affidavit. Regarding *locus standi* in constitutional matters, see the discussion on capacity to litigate at 15.

25*Murphy NO and Benjamin NO v Semphill and Others* 1954 (3) SA 450 (W).

26*Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C) at 351H–352C; *Thelma Court Flats (Pty) Ltd v McSwigin* 1954 (3) SA 457 (C) at 461D–E; *Dowson & Dobson Ltd v Evans & Kerns (Pty) Ltd* 1973 (4) SA 136 (E).

27*Eskom v Sowetan City Council* 1992 (2) SA 703 (W) at 705E; *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at 624I–625A; *Unlawful Occupiers, School Site v City of Johannesburg* [2005] 2 All SA 108 (SCA), 2005 (4) SA 199 (SCA) at [14]; *Umvoti Municipality v ANC Umvoti Council Caucus and Others* 2009 (2) SA 388 (N), 2010 (3) SA 31 (KZP) at para 12. See also Harms *Civil Procedure in the Superior Courts*, 0ct. 2015, SI 54 at B6.8.

28*SA Diamond Workers' Union v Master Diamond Cutters' Association of SA* 1948 (2) PH A83 (T) at 283; *Triomf Kunsmis (Edms) Bpk v AE & CI Bpk en Andere* 1984 (2) SA 261 (W) at 269G-H; *Saunders Valve Co Ltd v Insamcor (Pty) Ltd* 1985 (1) SA 146 (T) at 149C; *ABSA Bank Ltd v Kernsig 17 (Pty) Ltd* 2011 (4) SA 492 (SCA) at para 23.

29*Pountas' Trustee v Lahanas* 1924 WLD 67; *Levin v Saidman* 1930 WLD 256; *Cash Wholesalers Ltd v Cash Meat Wholesalers Ltd* 1933 (1) PH A24 (D). However, note that hearsay evidence contained in affidavits may be admitted in terms of the Law of Evidence Amendment Act 45 of 1988: see *Hlongwane and Others v Rector, St. Francis College, and Others* 1989 (3) SA 318 (D).

30*Galp v Tansley NO and Another* 1966 (4) SA 555 (C) at 558H–559A; *Johnstone v Wildlife Utilisation Services (PVT) Ltd* 1966 (4) SA 685 (R); *Steyn v Schabort en Andere NNO* 1979 (1) SA 694 (O) at 699G-H.

31*Mears v African Platinum Mines Ltd & Others* (1) 1922 WLD 48 at 52–54; *Grant-Dalton v Win and Others* 1923 WLD 180 at 186; *Harris's Executor v Weinberg* 1938 CPD 134; *Brighton Furnishers v Viljoen* 1947 (1) SA 39 (GW); *Geanotes v Geanotes* 1947 (2) SA 512 (C); *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C) at 353.

32*Southern Pride Foods (Pty) Ltd v Mohidien* 1982 (3) SA 1068 (C) at 1072.

33*Vaatz v Law Society of Namibia* 1991 (3) SA 563 (NM); *Helen Suzman Foundation v President of the Republic of South Africa and Others* 2015 (2) SA 1 (CC) at para 27.

34See High Court rules 6(5)(*d*) and (*e*). The inclusion of new matter in the replying affidavits will inevitably result in the need for the respondent to respond with a further set of affidavits, and the court will have to be approached to use its discretion under rule 6(5)(*e*) to provide the requisite authorisation. See also Magistrates' Courts rule 55(9)(*a*).

35*Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others* 1974 (4) SA 362 (T).

36*Duchen v Flax* 1938 WLD 119.

37*SA Railways & Harbours v Hermanus Municipality* 1931 CPD 184.

38See *Reynolds NO v Mecklenberg (Pty) Ltd* 1996 (1) SA 75 (W) at 78G–80F; *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 323D; and *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at para 17. This is, however, an exception to this general rule in the Constitutional Court where the application for leave to appeal should contain legal submissions (see *Nkabinde and Another v Judicial Service Commission and Others* [2016] ZACC 25 at para 6).

39That is, to exclude the evidence concerned from the affidavit as inadmissible.

40See *Vaatz*, supra, at 566J–567B.

41See *Elher (Pty) Ltd v Silver* 1947 (4) SA 173 (W) at 176.

42High Court rule 6(5)(*a*).

43High Court rule 6(1). Also see Magistrates' Courts rule 55(1)(*a*).

44This does not mean 'notice of motion' – it merely means that the opposing party must be informed in writing, and the notice filed with the registrar; see *Hendricks v Santam Insurance Co Ltd* 1973 (1) SA 45 (C).

45See, generally, Harms *Civil Procedure in the Superior Courts*, 0ct. 2015, SI 54 at B6.63.

46All persons who are by law deemed to be interested in a matter must be notified so that they may report to court. For instance, in certain applications under the Insolvency Act 24 of 1936, the Companies Act 61 of 1973 and the Deeds Registries Act 47 of 1937, notice to the Master, the Registrar of Companies and the Registrar of Deeds is required. Also note that a copy of every application in connection with the estate of any deceased person, or a person alleged to be a prodigal, or someone under any legal disability (mental or otherwise) must be submitted to the Master for consideration and report before it is filed with the registrar (see, in this regard, High Court rule 6(9)).

47The order requested is sometimes called the *prayer*.

48The purpose of this final prayer is to provide a vehicle for the court to come to your assistance if, for some reason, the court cannot grant the main order you are requesting. There has been some debate about the efficacy of this order. The recent trend has been to grant alternate relief only if a case for such relief is made on the papers and the party against whom such relief is to be granted has been fully apprised that relief in that particular form is being sought and has had the fullest opportunity of dealing with the claim for relief being sought under the head of further and/or alternative relief. See *Port Nolloth Municipality v Xhalisa and Others*; *Luwalala and Others v Port Nolloth Municipality* 1991 (3) SA 98 (C) at 112D–F; *Ex Parte Body Corporate of Caroline Court* 2001 (4) SA 1230 (SCA) at 1234; *Combustion Technology (Pty) Ltd v Technoburn (Pty) Ltd*2003 (1) SA 265 (C) at 268; and *City of Cape Town and Another v Mgoqi* 2006 (4) SA 355 (C) para 12.

49Note that, in practice, some practitioners appoint messenger or courier companies as their agents for this purpose. It is not clear whether this complies with the requirements of the rule.

50It is not necessary for the attorney who signs the notice of motion to have a power of attorney. If the respondent has any doubts as to the attorney's authority to sign the notice of motion, he can raise them when he responds to the application.

51Magistrates' Courts rule 55(1)(*d*).

52Regarding the drafting of affidavits in general, see Marnewick, CG (2007) *Litigation Skills for South African Lawyers* (third edition), and see Section A3 'Affidavits – general principles' above.

53In Magistrates' Court matters, the application notice need not be supported by affidavits unless the Magistrates' Courts Act 32 of 1944 or rules specifically require such support: see rule 55(2).

54For detailed practical guidance in this regard, see Marnewick, op.cit., 165–188 and Mullins, J and Da Silva, C (2010) *Morris: Technique in Litigation* (sixth edition), 309–313.

55See Section A3 'Affidavits – general principles' above.

56See Stage One, Part 2B 'Calculation of time limits'.

57High Court rule 6(5)(*b*) read with s 24 of the Superior Courts Act 10 of 2013 (which replaces s 27 of the Supreme Court Act 59 of 1959). The Supreme Court Act 59 of 1959 previously defined a 'civil summons' to include a notice of motion which had the effect of making s 27 of the Act applicable equally to applications and actions. The Superior Courts Act 10 of 2013 does not, however, define 'civil summons'. It would seem, however, that s 24 of the Superior Courts Act 10 of 2013 nonetheless remains applicable to applications and that this section should be read with High Court rule 6(5)(*b*).

58*Rosslee v Rosslee* 1971 (4) SA 48 (O).

59In terms of High Court rule 6(5)(*c*), after the cut-off date for the notice of opposition has passed, and before noon on the court day-but-one before the date of the hearing, the applicant must serve a notice of set down on the registrar.

60See Stage Two, Part 1A 3 'Affidavits – general principles' p158.

61Magistrates' Courts rule 55(1)(*g*)(ii).

62High Court rule 6(5)(*e*) and Magistrates' Courts rule 55(1)(*h*).

63See *Pountas' Trustee v Lahanas* 1924 WLD 67 at 68; *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635H–636B; *Ferreira v Premier, Free State and Others* 2000 (1) SA 241 (O).

64High Court rule 6(1)(*e*) and Magistrates' Courts rule 55(1)(*i*).

65High Court rule 6(5)(*e*).

66The test the court will apply is whether it is fair and just in the circumstances to allow the further affidavits: *South Peninsula Municipality v Evans and Others* 2001 (1) SA 271 (C).

67*James Brown & Hamer (Pty) Ltd (Previously named Gilbert Hamer & Co Ltd) v Simmons NO* 1963 (4) SA 656 (A).

68*Rens v Gutman NO* [2002] 4 All SA 30 (C); *Volkwyn v Thomsen* 1941 (2) PH F108.

69There are situations where the court desires to have fuller information on record in order to make its decision, and may order this information to be furnished. This would occur, for example, in situations where the court itself has an interest in some matter raised during the case; where the interests of a child are affected; or where the court is of the opinion that the issues have been insufficiently traversed on the existing affidavits.

70The further affidavit has to include an explanation for the late inclusion of the new information, which indicates that the party filing the affidavit was not at fault.

71See *James Brown & Hamer (Pty) Ltd. v Simmons*, op. cit.

72High Court rule 6(5)(*f*). Also see Magistrates' Courts rule 55(1)(*j*)(ii).

73Requirements for the filing of heads of argument differ greatly from jurisdiction to jurisdiction: See the practice directive or practice manual for each division.

74As to the meaning of a rule *nisi*, see Section 4 on p174.

75If the respondent's denial of a fact alleged by the applicant does not result in a real, genuine or *bona fide* dispute of fact (although there may *appear* to be a dispute of fact on the papers), the court may decide the disputed fact in the applicant's favour without hearing oral evidence. This is known as the *Plascon-Evans* rule: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634–635.

76High Court rule 6(5)(*g*).

77Magistrates' Courts rule 55(1)(*k*).

78*Standard Bank of SA Ltd v Neugarten and Others* 1987 (3) SA 695 (W) at 699D–E.

79*Klep Valves (Pty) Ltd v Saunders Valve Co Ltd* 1987 (2) SA 1 (A).

80High Court rule 6(5)(*g*).

81*Pressma Services (Pty) Ltd v Schuttler and Another* 1990 (2) SA 411 (C). Also see Magistrates' Courts rule 55(1)(*k*).

82See *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Company (Pty) Ltd* 1971 (2) SA 388 (W).

83See Stage Two, Part 1C – p172.

84*Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162; *Conradie v Kleingeld* 1950 (2) SA 594 (O) at 597; *Winsor v Dove* 1951 (4) SA 42 (N); *Blend and Another v Peri-Urban Areas Health Board* 1952 (2) SA 287 (T) at 291H–292B.

85*Purchase v Purchase 1960* (3) SA 383 (N); *Zietsman v Electronic Media Network Ltd and Another* (771/10) [2011] ZASCA 169 (29 September 2011) at para 15 and 16.

86*Pressma Services (Pty) Ltd v Schuttler and Another* 1990 (2) SA 411 (C) at 419J–420A.

87*Van Aswegen and Another v Drotskie and Another* 1964 (2) SA 391 (O).

88See Magistrates' Courts rule 55(7).

89High Court rule 6(6): see *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) 555 (A).

90High Court rule 6(7): This procedure is similar to the counterclaim procedure in actions: *Academy of Learning (Pty) Ltd v Hancock and Others*2001 (1) SA 941 (C).

91High Court rule b(7).

92Another term used for a counter-application is *application in reconvention*.

93Governed by rule 6(4) of the High Court Rules.

94High Court rule 6(2).

95See *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam and Another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg and Others*, 1995 (4) SA 1 (A).

96*Collective Investments (Pty) Ltd v Brink and Another* 1978 (2) SA 252 (N) at 254–255. For example, the Practice Manual of the KwaZulu-Natal Division provides that in sequestration and winding-up proceedings, where the applicant relies on an act of insolvency or inability to pay debts and is able to produce documentary evidence of such inability, the application may be brought *ex parte* without notice. On the other hand, the Western Cape Division's Consolidated Practice Notes provides that, unless the court in its discretion and on good cause shown dispenses with the giving of notice, notice must be given to the debtor (and, if married, to the debtors spouse, whether married in our out of community of property, who shall be joined as a respondent).

97Harms *Civil Procedure in the Superior Courts*, 0ct. 2015, SI 54 at B6.12. See also *Stride v Castelein* 2000 (3) SA 662 (W).

98In such a case, the relief sought will be in the form of a rule *nisi*, and the court will give specific directions on how service must be effected on the respondents.

99Magistrates' Courts rules 55(3)(*a*)(i) and (ii).

100Magistrates' Courts rules 55(3)(*c*) and (*e*).

101Harms *Civil Procedure in Magistrates' Courts*, Sept. 2015, SI 37 at B55.4.

102High Court Form 2 is known as the *short-form* notice of motion: Form 2(*a*), where notice of opposition is provided for, is known as the *long form*.

103The *order* is also called the *prayer*.

104With regard to the prayer for 'further and/or alternative relief', see *Combustion Technology (Pty) Ltd v Technoburn (Pty) Ltd* 2003 (1) SA 265 (C).

105For a general discussion on the nature of the rule *nisi*, see *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2003 (4) SA 1 (CC); *Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd and Others* 2003 (2) SA 253 (SCA); *Manton v Croucamp NO and Others* 2001 (4) SA 374 (W).

106*Ex Parte Nader Tuis (Edms) Bpk* 1962 (1) SA 751 (T).

107This date is called the *return date*.

108The rule *nisi* is the normal form of application for urgent applications.

109See the discussion in Harms *Civil Procedure in the Superior Courts*, 0ct. 2015, SI 54 at B6.16.

110High Court rule 6(8), and Magistrates' Courts rule 55(3)(*d*).

111See Magistrates' Courts rules 55(1)(*c*).

112The Latin term for 'utmost good faith' is *uberrimae fides*.

113*MV Rizcun Trader* (4); *MV Rizcum Trader v Manley Appledore Shipping Ltd* 2000 (3) SA 776 (C).

114*Pretoria Portland Cement Co Ltd and Another v The Competition Commission and Others* 2003 (2) SA 385 (SCA).

115*Ex Parte Madikiza et Uxor* 1995 (4) SA 433 (TkS) at 437A.

Introduction

D20

1Introduction

It is possible to think about action proceedings as a method for resolving a dispute that takes place between two (or more) people. Once the parties have clarified what the dispute is about, they go to an independent third person (the judge or magistrate) where they each give their side of the story, and the independent third person then decides who has 'won' the argument.

Consider which rules you would put in place if you wanted to ensure that an argument between two (or more) people did not degenerate into a pointless brawl. You might stipulate that each party should have a turn to speak, and that the parties should try to separate the issues on which they agree from those on which they disagree. You might also impose a time limit on the argument in order to prevent the parties from making the same points over and over again. You will find common sense provisions such as these in the statutes and rules of court that relate to actions.[1] As you learn the rules for conducting an action, it helps to bear in mind that these rules are simply a common sense way of regulating an argument between two opposing sides.

An action may be thought of as taking place in four stages:

1. *The pleadings stage*
   followed by
2. *The pre-trial stage*
   followed by
3. *The trial stage*
   followed by
4. *The judgment stage.*

2 The stages of an action

2.1 The pleadings stage

The pleadings stage is the stage during which the parties define the issues that are in dispute between them. Unlike an oral argument between two friends, with action proceedings all the issues are defined in writing and set out in documents called *pleadings*. Once a party has set down the points he wishes to make, he sends the document to the opposing side, which then replies. These documents go back and forth between the parties in a certain order. You may think of it as a *paper war* between the parties which takes place according to strict rules. Each of the pleadings has a different legal name, for example 'particulars of claim', 'plea', 'replication', 'rejoinder', 'surrejoinder', 'rebutter', 'surrebutter' and so on. But these names are merely labels for the *different stages* in the argument. By the end of the pleadings stage, the parties should be clear as to the issues which will be in dispute at the trial.

2.2 The pre-trial stage

Once the pleadings *close* (in other words, once the issues in dispute are clearly defined), the *pre-trial* stage begins. During this stage the paper war between the parties continues, but *not* for the

purpose of determining what is in dispute between them. That part of the argument is over. During the pre-trial stage the parties will be *preparing for the trial*. For example, they will be arranging a trial date (set-down), having a look at each others' documents (discovery), ordering their witnesses to court (by issuing subpoenas), organising a pre-trial conference (to discuss the upcoming trial), and so on.

2.3 The trial stage

By the time the *trial stage* is reached, the paper war between the parties is over, and the 'talking' war begins. This happens in court and involves the hearing of evidence from the witnesses and legal arguments from the parties' legal representatives. Usually, both the legal argument and the evidence are given *viva voce* (orally) and there is a comprehensive set of rules determining who talks when, and the precise manner in which the trial is run.

2.4 The judgment stage

At the end of the trial, the court will give its *judgment*. It is at this point that the parties finally discover which side (if any) has won the argument.
We begin by looking at the *pleadings stage*.

3 Amendments to the Magistrates' Courts Rules

Before beginning this section on actions, it is important to note that fundamental changes were effected to the Magistrates' Courts Act and Rules, which came into effect on 15 October 2010.[2] The intention behind the amendments was that the two sets of rules should become more uniform, the general approach being that the Magistrates' Courts Rules should conform to the High Court Rules. Therefore, the 2010 Magistrates' Courts Rules standardised Magistrates' Court and High Court practice in many instances, with a near substitution of the relevant High Court rule for the previous Magistrates' Courts rule in many cases. Examples of the harmonised practice include the abolition of further particulars for the purposes of pleading, a common set of summonses, including combined and simple summonses, the introduction of irregular proceedings and the adoption of the High Court discovery rules in the Magistrates' Court. Although many of the Magistrates' Courts Rules have been fundamentally altered, most of the rule numbers still relate to their original topics, and indeed, much does remain the same. The draftsmen have kept the same numbering and structure by consolidating topics in some instances, or utilising the numbers of obsolete rules in others. Thus Magistrates' Courts rules 5 and 6 still apply to summonses, for instance, but their contents are very different from the original rules, now incorporating rules 17 and 18 of the High Court Rules. To the extent still relevant, we point out various changes effected by the 2010 amendment. Furthermore, there continues to be regular updates and revisions to both sets of rules. In particular, the Magistrates' Courts updates have aimed to bring the rules in line with the High Court rules, and to fill lacunas that the 2010 amendments created.

A: Pleadings

D21

1General overview

1.1 The two sides of the argument

Of all the documents exchanged during the course of pleadings, it is probably fair to say that the two most important are:

1. The *particulars of claim* (in which the party who is claiming relief [known as the plaintiff] sets out the details of his claim); and
2. The *plea* (in which the party from whom relief is sought [known as the defendant] sets out his defence to the claim).

Although there are other important documents involved in the process of pleading, these two documents set out the main allegations put forward by each side to the dispute. When other pleadings are used, they tend to relate to these two fundamental documents.

The allegations of fact made in pleadings are called *averments*, from the word 'aver', which means to state positively or to assert. Another way of referring to the making of an allegation, in the context of pleadings, is to 'plead' a certain fact or set of facts.

1.2 The steps involved in pleadings

D22

1.2.1The five basic steps

Pleadings consist of more than just the particulars of claim and the plea. To simplify matters, you can say that there are *five main steps* in a typical set of pleadings in the High Court and Magistrates' Courts.[3]

Step 1:The *plaintiff* sends a *summons* and *particulars of claim*, giving details of the action and what he is claiming.

Step 2:The *defendant* sends a *notice of intention to defend*, telling the plaintiff that he wishes to defend the action.

Step 3:The *defendant* sends a *plea* in which he gives details of his defence to the plaintiff's claim.

Step 4:The *plaintiff* sometimes sends a *replication* or reply in which he responds to new facts raised in the defendant's plea. This is quite rare. The replication may be followed by other pleadings (with odd names like *rejoinder, surrejoinder, rebutter* and *surrebutter*) in which the parties respond in turn to the previous pleading of the other party. But this only happens in very complicated cases. One might practise for years without ever seeing this kind of pleading. In most cases the pleadings close after the defendant's plea or after the plaintiff's replication.

Step 5:The points at issue between the parties are clear and the pleadings *close*.

1.2.2 Possible extra steps

While the five steps set out above are common to almost all actions, certain extra steps are possible in some cases, depending upon the specific circumstances of the particular matter.

Although requests for further particulars are no longer permitted in respect of pleadings as they once were, in a very limited sense, particulars of certain documents or recordings may be obtained before close of pleadings (discussed in detail later).

In certain actions (to be discussed in detail later), the plaintiff's particulars of claim consists only of a brief summary of the claim. If the defendant enters a notice of intention to defend, the plaintiff must respond by delivering a *declaration* (the equivalent of a full particulars of claim) to the defendant.

Finally, there are a number of other steps that may be taken by either side during pleadings, but these are all related to either *defective pleadings* or *shortcut judgments*, which are discussed in detail at the end of the section dealing with pleadings.

2 The basic pleadings

2.1 Step 1: Summons and particulars of claim

2.1.1 What is a summons?

Actions are commenced by way of *summons*. A summons is a written judicial demand, issued by the registrar of a division of the High Court, the registrar of a Regional Magistrates' Court, or the clerk of a District Magistrates' Court. A summons is directed at the sheriff of the court or his lawful deputy, rather than at the defendant.[4] The summons orders the sheriff to command the defendant to enter an appearance to defend by a fixed day, in order to answer the claim made by the plaintiff. In addition, it provides all sorts of information such as who the parties are, which court is involved, what the case number is and so on. All summonses are signed by an attorney, or by the plaintiff personally if he is not represented by an attorney.[5]

All summonses contain three main elements:

1. *Citation of parties*: The *citation* identifies the parties to the action. Generally, the names, addresses and occupation of the plaintiff and defendant (if known) are required. If either party acts in any representative capacity, the summons should set forth such capacity, and if the plaintiff is a natural person, the plaintiff's gender must also be stated.
2. *Warning to defendant*: The defendant must be warned that he has a limited time within which to take steps to defend the action, or to take some other specified action, failing which the plaintiff may take default judgment against him.

    1. *Dies induciae*: *Dies induciae* is the name given to the limited period of time given to the defendant during which he must enter an appearance to defend, or take some other specified action, failing which default judgment may be taken against him.
    2. *Address for service*: The defendant is warned that if he intends to defend the matter, he must give notice of his intention to both the court and the plaintiff within the period of the *dies induciae*. This notice should provide an address at which the defendant wishes to receive service of any further documents relating to the action. This address is usually that of the defendant's attorney and must be within 15 kilometres of the court from which the summons has been issued.
3. *Particulars of claim*: The details of the plaintiff's claim are either included in the body of the summons itself or attached to it.

2.1.2 What are particulars of claim?

The plaintiff's cause of action is set out in the *particulars of claim*. There are five aspects or elements that every set of particulars of claim should contain.

2.1.2(a) Citation of parties

Each of the parties is identified by means of a citation. The citations provide the names, and addresses as well as the occupation of the plaintiff and also of the defendant, if known to the plaintiff.[6]

2.1.2(b) Locus standi

Facts must be averred which show the plaintiff's interest in the matter.

2.1.2(c) Jurisdiction of the court

Facts must be averred which show that the court from which the summons has been issued has jurisdiction. Depending on the ground for jurisdiction that the plaintiff relies on (for instance, the defendant's place of residence or domicile), the court's jurisdiction may be apparent from the addresses provided in the citation. In some circumstances, the Magistrates' Courts Rules specifically require this aspect to be pleaded.[7]

2.1.2(d) Cause of action[8]

This refers to the merits of the matter. The plaintiff should set out the material facts on which he bases his case, i.e. the *facta probanda*. It is important to bear in mind, however, that the identity of the parties, together with *locus standi* and jurisdiction, also form part of the cause of action in a broader sense.[9]

2.1.2(e) Prayer

The prayer comprises a list located at the end of the particulars, which indicates the relief that the plaintiff seeks from the court. The plaintiff may only request the relief for which a case has been made or pleaded in the main body of the particulars of claim.[10]

D23

2.1.3Different forms of summons

There are three kinds of summonses:

1. Combined summons;
2. Simple summons; and
3. Provisional sentence summons.

The first two forms of summons are provided for in High Court rule 17 and the Magistrates' Courts rule 5.[11] Rule 5 is based largely on High Court rule 17, but contains certain additions that were previously dealt with in the former versions of Magistrates' rules 5 and 6. Rules 17 and 5 deal with the formal and procedural aspects of summonses, such as citations, signatures and the time in which to deliver a plea, rather than the substantive contents of the cause of action. However, High Court rule 18 and Magistrates' Courts rule 6 deal with how the substantive contents of pleadings relating to the plaintiff's cause of action or defendant's defence should be

pleaded. Therefore rules 18 and 6 indicate the averments that need to be made in the initial pleading, namely the particulars of claim. However, certain averments used in particular situations pertaining to Magistrates' Courts practice are also provided for in rule 5, such as the mandatory jurisdictional averments required in terms of rule 5(6).

Provisional sentence summonses are provided for in terms of High Court rule 8 and Magistrates' Courts rule 14A, and are dealt with in Stage Four: 'Additional Procedures' below.[12] Notwithstanding our assertion above that there are three kinds of summonses, Magistrates' Courts rule 5(8) also makes provision for a special summons for rent in terms of s 31 of the Magistrates' Court Act, for which a form is prescribed in Annexure 1, Form 3.

P8

2.1.3(a)Combined summons

The *combined summons* is the most important form of summons and may be used for any kind of claim. It is mandatory to use a combined summons in the case of an unliquidated claim such as a claim for damages or an illiquid claim, such as divorce. It consists of two parts:

1. The *summons*, which is really just a kind of notice from the plaintiff to the defendant via the sheriff, telling him that action has been instituted, and giving him various formal details about the matter, which are discussed in detail below. Remember that a summons is a *process of court*. It is *issued* by the registrar or clerk of the court (which basically means that the registrar checks that the formalities have been complied with, gives it a case number, opens a file and stamps it with an official stamp). It is then *served* (together with the particulars of claim) by the sheriff of the court.
2. The *particulars of claim*, which are attached to the summons. The particulars of claim contain the *material facts* on which the plaintiff relies for his cause of action. These facts are set out in a concise and logical way in a separate annexure (with the heading 'Particulars of claim') which is attached to the summons. While the summons itself is drafted and signed by an attorney, the particulars of claim are usually drafted by an advocate and signed by both an advocate and an attorney in the High Court,[13] and must comply with rule 18 of the High Court and the similarly worded rule 6 of the Magistrates' Courts, which relate to pleadings generally.

The combined summons derives its name from the fact that it combines a summons and a full statement of claim in one document.

P9

2.1.3(b)Simple summons

A *simple summons* is simpler than a combined summons in that it does not have a *separate* particulars of claim attached to it. The particulars of claim are included, *in abbreviated form*, in the body of the simple summons itself.

A simple summons may only be used for those cases in which the plaintiff's claim is for a *debt or liquidated demand*,[14] in other words, where the claim is for a *fixed, certain or ascertained amount or thing*.[15] Clearly, a claim for a *specified amount of money owed* (e.g. a claim for the purchase price of goods sold and delivered) will qualify as a claim for a debt or liquidated demand. Note, however, that such claims are not restricted to claims for a specified amount of money, but also include claims for a fixed and specified *thing*.[16] For example, assume that a carpenter agrees to make a table for a dining room but fails to perform the work. A claim against the carpenter for *specific performance* (i.e. an order that he make the table) *will* qualify as a claim for a debt or liquidated demand, since the claim is cut and dried.[17] The following may also be classified as claims for a debt or liquidated demand: a claim for the cancellation of a sale

and ejectment;[18] an interdict;[19] the delivery of property;[20] and a claim for an amount due on an overdrawn account (an overdraft).[21] However, a claim for *damages* is never 'cut and dried', and does *not* qualify as a claim for a debt or liquidated demand. The reason is that the amount payable for damages (the *quantum* of the claim) is always open to dispute. A good example would be that of damages arising out of a motor vehicle collision. If you take the damaged car to three different panel beaters, each one will give you a different quote. The discrepancies between the quotes may be so great as to be shocking. In the absence of an agreement between the parties, this kind of debt will only be liquidated once a court has considered the evidence, decided the fair and reasonable cost of repair and has delivered judgment to this effect.[22] Another example of a claim that will never qualify as a claim for a debt or liquidated demand is a claim for divorce.

Usually in the case of a simple summons, both the summons and the 'particulars of claim' are drafted and signed by an attorney. Although the particulars must disclose a cause of action,[23] they are extremely brief and need not comply with the requirements of High Court rule 18 and Magistrates' Courts rule 6, which are dealt with in detail below. In fact the word 'label'[24] has been used to describe the kind of particularity required, which should be enough merely to give the defendant an indication of the kind of claim being made in sufficient detail to enable him to ward off an application for summary judgment. The particulars should include sufficient facts to show that the plaintiff has *locus standi* and that the court has jurisdiction. Over the years, a legal shorthand has been adopted for various kinds of popular and tersely described liquid claims, for instance: 'goods sold and delivered'; 'moneys lent and advanced'; 'work done and materials supplied'; and 'professional services rendered'; all at the defendant's 'special instance and request'.[25]

It is mandatory to use a simple summons for a debt or liquidated demand in the High Court, but not in the Magistrates' Courts, where a combined summons may be used instead.[26] There are advantages, though, to issuing a simple summons when the claim is liquid. The brevity of the particulars and the non-involvement of an advocate at this stage reduce the cost of the proceedings and, as the majority of liquid claims go undefended, it is generally useful to commence a matter that involves a liquid claim with a simple summons. However, because the particulars are so brief and usually fail to comply with the provisions of rules 18 and 6, the filing of a declaration is required if the matter is defended. It therefore makes more sense to issue a combined summons rather than a simple summons if the plaintiff is aware that the defendant is likely to defend the action as, in the long run, this will save time and costs. Also, there are certain liquidated claims, such as claims based on mortgage bonds, which require fairly complex pleading and do not lend themselves to the manner in which simple summonses are customarily drafted. Furthermore, the danger exists, particularly with regard to complex claims, that an attorney who does not take full instructions may draft a fairly standard set of particulars, making certain assumptions in the process. These assumptions may prove to be false in the light of more detailed instructions obtained for the purpose of drafting the declaration after an appearance to defend has been received. The result will be a simple summons that differs in a material manner from the declaration.[27]

The main differences between a *simple summons* and a *combined summons* in the High Court may be summarised as follows:

1. A simple summons is used only when claiming a debt or liquidated demand, whereas a combined summons may be used for any claim.
2. The cause of action is summarised in a simple summons and the abbreviated particulars of claim included in the summons need not comply with rule 18 of the High Court or rule 6 of the Magistrates' Courts, whereas with a combined summons the cause of action is set out in full in the separate particulars of claim which are annexed to a combined summons, which must comply with High Court rule 18 or Magistrates' Courts rule 6.

3. A simple summons is followed by a document known as a declaration once the defendant enters an appearance to defend. The declaration looks just like the particulars of claim attached to a combined summons, and must comply with rule 18 or rule 6.
4. A simple summons must be signed by the attorney who acts for the plaintiff. A combined summons in the High Court, however, must be signed by both the attorney and the advocate[28] who act for the plaintiff.[29]

2.1.3(c) Provisional sentence summons

A *provisional sentence summons* is used for those special cases where the plaintiff's claim is founded on a *liquid document*such as a cheque, a mortgage bond or an acknowledgement of debt. The provisional sentence procedure is dealt with in detail later in the book and therefore this form of summons will not be dealt with here.[30]

2.1.4 Drafting a summons

Rule 17 of the High Court Rules and rule 5 of the Magistrates' Courts Rules provide specific and detailed instructions for the contents of a summons.

2.1.4(a) High Court rule 17(1)(a) *and Magistrates' Courts rule 5(1)*(a) – dies induciae

The summons must inform the defendant that if he wishes to defend, he must give notice of his intention to defend to the plaintiff within a certain number of days. The time limit is usually 10 days, but this will be discussed in more detail below.

2.1.4(b) High Court rule 17(1)(b) *and Magistrates' Courts rule 5(1)*(b) *– warning to defendant*

With a combined summons, the summons must inform the defendant that within 20 court days of delivering a notice of intention to defend, he must take his next step in the action. The defendant's next step will be a plea, or an exception, or an application to strike out. These steps will be discussed further in due course.

2.1.4(c) High Court rule 17(2) and Magistrates' Courts rule 5(2) – appearance of document

High Court Form 9 and Magistrates' Courts Form 2B[31] set out what a *simple summons* should look like and the details it should contain. High Court Form 10 and Magistrates' Courts Form 2 set out what a *combined summons* should look like and the details it should contain.[32]

2.1.4(d)High Court rule 17(3) and Magistrates' Courts rule 5(3) – signatures

The summons must be signed by the plaintiff's attorney, or the plaintiff, if representing himself. An address for the service of further documents on the plaintiff in the matter must be set out in the summons. This address is usually that of the plaintiff's attorney and may not be less than 15 kilometres from the office of the registrar. In practice, if the offices of the plaintiff's attorney are situated more than 15 kilometres from the court out of which the plaintiff is issuing summons, the plaintiff's attorney invariably will appoint a *correspondent*. This is an attorney who *does* practise within 15 kilometres of the relevant court, and who will draft and issue the summons in accordance with the particulars of claim sent by the plaintiff's attorney. The

correspondent will then act as a 'post box', receiving and dispatching documents on behalf of the plaintiff's attorney.

High Court rule 17(3) and Magistrates' Courts rule 5(3) must be read in conjunction with High Court rule 18(1) and Magistrates' Courts rule 5(1), which stipulate an additional signature requirement for *all* pleadings *other than* a simple summons. For all such pleadings in the context of the High Court, the signature of an *advocate* is required *in addition* to that of an *attorney*, unless that attorney is one who has the *right of appearance in the High Court* in terms of s 4(2) of the Right of Appearance in Courts Act.[33] This Act provides, *inter alia*, that an attorney who holds an LLB degree and has been practising as such for at least three years, may apply to the registrar of the relevant division of the High Court to issue him with a certificate allowing him to appear in the High Court.

2.1.4(e) High Court rules 17(4)(a) and (b) and Magistrates' Courts rules 5(4)(a) and (b) – citations

The rules appear to require the plaintiff to be cited with slightly more detailed information to that which is required for the defendant. The summons must set out the following details *for the plaintiff*:

1. Full name;
2. Gender (if the plaintiff is a natural person);
3. Occupation;
4. Residential address or place of business; and
5. If the plaintiff is suing in a representative capacity, that capacity must be stated.

The summons sets out the following details *of the defendant*:

1. Surname and first names, or initials by which the defendant is known to the plaintiff.
2. Residential address or place of business.
3. Occupation and employment address (if known).
4. If the person being cited is acting in a representative capacity, that capacity must be stated (e.g. '… in his representative capacity as father and natural guardian of Joe Bloggs'). Rule 6(5)(*d*) of the Magistrates' Courts Rules provides as follows: 'Where the plaintiff sues in a representative capacity, state the capacity in which he sues'. This provision provides for the situation in which either the plaintiff sues, or the defendant is sued, in a representative capacity. 'Representative capacity' in this context means the relevant party is suing or being sued as the holder of some position, function or office, rather than in his personal capacity. The function or office may be any of several different capacities, including, for instance, guardian, executor of an estate, or government minister. In each case, however, it is important to aver the relevant capacity by alleging that the plaintiff is either suing or the defendant is being sued 'in his capacity as …' or words to this effect. Merely stating that the relevant party holds an office without specifically averring that he is suing or being sued in the capacity of that office, is insufficient and will merely be held to be descriptive.[34] Remember that, when a party is acting in a representative capacity, his name in the 'header' should also indicate that he is acting in a representative capacity. To do so, add the words 'N.O.'(which stands for *nominee officio*) after the party's name.

D24

2.1.5Drafting particulars of claim – High Court rule 18 and Magistrates' Courts rule 6

Rule 18 of the High Court Rules and rule 6 of the Magistrates' Courts Rules are almost identical and use the same wording for the most part. The differences are relatively minor and will be dealt with in detail under 2.1.6 below.[35] These rules are of fundamental importance as they contain various general provisions relating to the manner in which all pleadings should be prepared and presented. Therefore, the provisions of these rules must be followed carefully when drafting the first pleading, the particulars of claim.

Subsections (1)–(3) of rules 18 and 6 deal with the structure of all pleadings, indicating what they should look like. Subsection (4) of both rules deals with the substance of what all pleadings should contain, and is possibly the most important provision of rules 18 and 6. Subsection (5) in each set of rules provides for completeness of reply, largely in relation to pleas. Subsections (6)–(11) of rule 18 and (6)–(12) of rule 6 set out the precise averments that should be made in relation to certain specific causes of action. Finally, High Court rule 18(12) and Magistrates' Courts rule 6(13) provide for the consequences and procedures to be followed in the event of failure to conform to the provisions of rules 18 and 6, respectively.

2.1.5(a)Signatures – High Court rule 18(1) and Magistrates' Courts rule 6(1)

Apart from those cases in which a party is acting for himself (in which case he will sign himself), the particulars of claim portion of a combined summons must be signed by an advocate *as well as* an attorney in the High Court. If an attorney has the right of appearance in the High Court, then the attorney may draft the particulars of claim and sign them without involving an advocate.[36] The summons portion of a combined summons may be prepared and signed by the attorney alone, as may a simple summons. Magistrates' Courts rule 6(1) makes no provision for advocates to sign, referring only to attorneys and unrepresented plaintiffs signing in their own capacity.

Although a private person who is representing himself in a High Court matter is entitled to sign a pleading, a juristic person, such as a company or close corporation, is not entitled to do so through one of its officers.[37] This is not the case in the Magistrates' Courts, as local authorities, companies, or other incorporated bodies as well as partnerships may be represented by an officer or, in the latter case, a member nominated for that purpose.[38]

2.1.5 (b)Title of the action – High Court rule 18(2) and Magistrates' Courts rule 6(2)

In an action, every pleading should have a heading which looks something like this:

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 123/2010

In the matter between:

John Doe Plaintiff

and

Jane Doe Defendant

This is known as the *title of the action* and, as you can see, it provides sufficient information to enable the registrar to locate the relevant court file. Since every pleading in the action receives the same heading, should the document ever be lost it is easy for the registrar or any of the parties to trace precisely the action to which the pleading belongs. In an action, which is

commenced by a summons, the parties are known as the plaintiff and the defendant, whereas in an application, which is commenced by a notice of motion, the parties are known as the applicant and the respondent.

The title is followed by two 'tramlines' which run across the page under the title. A description of the pleading in question is inserted between the tramlines. For example:

PLAINTIFF'S PARTICULARS OF CLAIM

2.1.5(c) Paragraphs – High Court rule 18(3) and Magistrates' Courts rule 6(4)

High Court rule 18(3) and Magistrates' Courts rule 6(3) both read as follows:

> **Every pleading shall be divided into paragraphs (including sub-paragraphs) which shall be consecutively numbered and shall, as nearly as possible, each contain a distinct averment.**

This rule is helpful in two ways. Firstly, it prevents a pleader from mixing up different points in a confusing jumble of information. Secondly, since each material fact averred is separate and numbered, it is easy for the opposing party to identify and respond to each averment.

2.1.5(d) The full facts – High Court rule 18(4) and Magistrates' Courts rule 6(3)

High Court rule 18(4) and Magistrates' Courts rule 6(4) are probably the most important provisions within rules 18 and 6 as they set out a *fundamental principle* that must be followed when drafting particulars of claim or any other pleading. High Court rule 18(4) and Magistrates' Courts rule 6(4) both provide that:

> **Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.**

The only material facts you may raise at trial and on which you may rely are those which have been raised in the pleadings.[39] As pointed out previously, the *material facts* upon which a pleader relies are known as the *facta probanda*. The material facts will be those facts sufficient to show or disclose a cause of action. These material facts upon which the pleader relies must be distinguished from the evidence that the pleader will adduce in order to prove the material facts. The evidential facts adduced to prove the material facts are known as the *facta probantia*.

When drafting a pleading, you are required, in terms of these rules, to plead the *facta probanda*, but not the *facta probantia*. In other words, you are required to plead the *facts*, but *not the evidence in support of those facts*.

The words 'with sufficient particularity to enable the opposite party to reply thereto' add a further dimension. It means that the party drafting the pleading (the pleader) must not only supply sufficient facts to set out a cause of action or defence, as the case may be, but must also set out these facts in a sufficiently detailed manner to enable the other side to respond. This does not mean that evidence (*facta probantia*) must be provided. It means merely that the *facta*

probanda should go beyond telling the other side in very general terms what kind of case they have to meet, and also provide specific averments to which they may specifically reply.

The reason that it is so important to set out *all the material facts in your pleadings* is that it is no longer possible to request *further particulars* for the purposes of pleadings. In other words, if you leave out some of the material facts, your opponent is placed in an invidious position. He is unable to ask for further particulars, and he cannot respond to your pleading because he does not know all the material facts. As a result of the virtual abolition of further particulars at the pleadings stage, you have to get your pleadings right *first time*. Your opponent cannot ask you to provide the omitted facts by requesting further particulars. If you fail to furnish the material facts, the following courses of action are open to your opponent:

1. Make an application to have your pleading set aside as an *irregular step* in terms of High Court rule 30, read with rule 18(12), read with rule 18(4), or the corresponding Magistrates' Courts rule 60A, read with rule 6(13), read with rule 6(4).

or

2. *Except* to your pleading in terms of High Court rule 23 or Magistrates' Courts rule 19. Note, however, that mere failure to give sufficient particularity in order to enable the other party to plead will not, in general, entitle that party to except. The lack of particularity must be so serious as to amount to a failure to *disclose a cause of action* or, alternatively, to render the pleading *vague and embarrassing*, before an exception may be brought.

2.1.5(e) Requirements: breach of contract – High Court rule 18(6) and Magistrates' Courts rule 6(6)

High Court rule 18(6) and Magistrates' Courts rule 6(6) are almost identically worded and deal with pleadings relating to *contracts*. In terms of these rules, when you plead in relation to a contract, you must:

1. state whether the contract is written or oral;
2. state when, where and by whom it was concluded; and
3. attach a true copy of the contract to the pleading in question (unless, of course, it is an oral agreement).

2.1.5(f) Requirements: divorce – High Court rule 18(8) and (9) and Magistrates' Courts rule 6(8)

High Court rule 18(8) states as follows:

> **A party suing or bringing a claim in reconvention for divorce shall, where time, date and place or any other person or persons are relevant or involved, give details thereof in the relevant pleading.**

For example, if you are alleging that a marriage has irretrievably broken down due to a series of adulterous affairs conducted by the other marriage partner, details of the times, places and parties involved in the alleged affairs would have to be given. Similarly, incidences of assaults might be pleaded. It might be unwieldy to list every single incident or place, however, particularly if the adulterous relationship occurred over a long period, in which event a somewhat more general reference might be made to 'divers (sundry) incidences of adultery' over a certain period, which in most cases would fulfil the requirements of rule 18(4).

Since August 2010, the regional divisions of the Magistrates' Courts have jurisdiction to hear divorce matters.[40] Somewhat oddly, however, rule 18(8) has no counterpart in the Magistrates' Courts Rules. Since any particularity which might be relevant to divorce proceedings would be included under rule 18(4), this subsection may well have been considered to be superfluous, hence the possible reason for its non-inclusion in the Magistrates' Courts Rules.

High Court rule 18(9) and Magistrates' Courts rule 6(8) both read as follows:

> **A party claiming division, transfer or forfeiture of assets in divorce proceedings in respect of a marriage out of community of property, shall give details of the grounds on which he claims that he is entitled to such division, transfer or forfeiture.**

Division involves dividing property between the spouses, *transfer* refers to the passing of ownership of property from one spouse to another, and *forfeiture* means the loss of property or any share in property that one spouse might have gained as a result of the marriage.[41]

Let us take the example of a claim for the forfeiture of assets. In terms of s 2 of the Matrimonial Property Act[42], if a marriage is out of community of property, then it is subject to the accrual system, unless the accrual is expressly excluded. The result is that most out-of-community marriages these days are subject to the accrual system. Section 9 of the Matrimonial Property Act provides that (in regard to these marriages) the right to share in the accrual of a spouse may on divorce be declared *forfeit*, either wholly or in part.

For example, assume that a millionaire widow marries a penniless gigolo. They enter into an antenuptial contract subject to accrual and (stupidly) the initial values of their respective estates are set at zero. After one week of marriage the gigolo sues the widow for divorce and claims half the accrual – in effect, half the widow's estate. In this case, the widow would ask the court to order that the gigolo *forfeit* his right to accrual sharing. High Court rule 18(9) and Magistrates' Courts rule 6(8) require that the widow give details of the grounds on which she claims that she is entitled to the forfeiture. She would have to show that if the gigolo were allowed to share in the accrual, he would be gaining an undue benefit. It seems strange that there is no mention in this subsection of marriages *in* community of property with regard to the forfeiture issue. The rich widow would be in exactly the same danger in this situation, with even less protection than that afforded by an antenuptial agreement. We are unable to explain why no mention has been made in the rule of marriages in community. We would submit, however, that a plaintiff suing for forfeiture in a community of property situation needs to make exactly the same kind of averments, based on subsection (4) of rules 18 or 6, which require the pleader to include sufficient detail to enable the other side to respond.

2.1.5(g) Requirements: bodily injuries – High Court rule 18(10) and Magistrates' Courts rule 6(9)

High Court rule 18(10) and Magistrates' Courts rule 6(9) are identically worded and deal with claims for damages. In general, the rules require that if a plaintiff sues for damages, he must set his damages out in such a way that the defendant is reasonably able to assess the *quantum* (in other words the *amount*) of the damages. With regard to damages for *personal injury*, the plaintiff must specify the following:

1. *His date of birth*: A young person may, for example, have a bigger claim than an older person as he is likely to live longer.
2. *The nature and extent of his injuries*: This is needed for the parties and the court to make an assessment of a claim for pain and suffering, as well as supporting other claims for medical expenses.

3. *The nature, effects and duration of the disability*: Disability refers to the effect of the injuries on the plaintiff's life. This information is needed for the parties and the court to make an assessment of a claim for loss of the amenities of life, as well as supporting claims for loss of earnings.

Personal injuries should be separated into four heads of damages, and the plaintiff must state separately what is claimed under each heading:

1. *Medical costs and hospital and other similar expenses*, specifying how these costs and expenses are made up. These costs are proved at the trial by providing copies of the medical accounts.
2. *Pain and suffering*, specifying whether permanent or temporary and what injury caused this. The amount is proved at the trial by reference to previous court cases in order to establish what the courts have been prepared to grant for similar injuries in the past. An adjustment is then made for inflation in order to arrive at an approximate figure for this part of the claim. Eventually, the court will have to make a final decision on the particular facts before it.
3. *Disability*, which is divided into two categories:
4.
    1. *Loss of income*, which must in turn be divided into *income lost to date and estimated future loss of income*. With regard to future income, the plaintiff must give details of the work he expects to be able to perform in the future. Income lost to date is proved at trial by providing documents such as previous salary slips, profit statements, etc. Future loss of income is proved at the trial with the help of an actuary, who is able to calculate mathematically the earning capacity of people over the expected course of their lives.
    2. *Loss of enjoyment of the amenities of life*, for example, a particular plaintiff may have enjoyed playing the piano, but because of an injury to his hand, can no longer do so. The plaintiff must stipulate whether his enjoyment has been temporarily or permanently terminated. The amount is proved at the trial in the same way as pain and suffering.
5. *Disfigurement*, including a full description of the disfigurement suffered, stating whether it is temporary or permanent. (The amount is proved at the trial in the same way as pain and suffering.)

Note that medical expenses and loss of income are sometimes called *special damages*, whereas the other categories which include, for instance, 'pain and suffering' and 'loss of amenities of life', are called *general damages*. In the former case, the damages are proved by using 'hard' documentary evidence, including medical accounts and pay records. In the latter case, the damages are more difficult to determine precisely, and require the court to reach a decision it feels is just, based on similar cases which have previously come before the courts.

Note that the common law pertaining to the quantum of damages only applies to RAF claims (i.e. claims under the Road Accident Fund Act)[43] in limited circumstances.[44] The Road Accident Fund Amendment Act,[45] which came into effect on 1st August 2008, introduced far-reaching changes, a full discussion of which is beyond the scope of this book. These changes are highly controversial and too numerous to enumerate in detail here. The general effect, however, is to deprive the innocent parties in motor vehicle collisions of the *general damages* to which they were entitled at common law, unless the party suffered a 'serious injury' in terms of ss 17(1) and (1A) of the Road Accident Fund Act. Paradoxically, the limitation of R25 000 that previously applied to the claims of the passengers in the motor vehicle of which the driver was solely at fault, have been removed. In addition, a limit prescribed in regulations has been placed on claims for loss of income,[46] while compensation for medical treatment is restricted to a tariff in terms of s 17(4B) of the Act.

2.1.5(h) Requirements: death – High Court rule 18(11) and Magistrates' Courts rule 6(10)

In terms of the identically worded High Court rule 18(11) and Magistrates' Courts rule 6(10), a plaintiff suing for damages resulting from the death of another shall state the date of birth of the deceased as well as that of any person claiming damages as a result of the death. A claim for *loss of support* may be brought by any of the deceased's lawful dependants. The various dates of birth are required to enable the parties to obtain actuarial assessments as to the date on which, but for his death, the provider would have ceased providing support.

Claims for loss of support have also been affected by the Road Accident Fund Act 56 of 1996, and claims from the Road Accident Fund are limited to an amount prescribed in regulations to the Act, in respect of each deceased breadwinner.[47]

2.1.5(i) Implications of not following High Court rule 18(12) and Magistrates' Courts rule 6(13)

High Court rule 18(12) and Magistrates' Courts rule 6(13) are almost identically worded and provide as follows:

> **If a party fails to comply with any of the provisions of this rule, such pleadings shall be deemed to be an irregular step and the opposite party shall be entitled to act in accordance with [Rule 30 in the case of a High Court matter and Rule 60A in the case of the Magistrates' Courts].**

Failure to comply with the requirements of rules 18 or 6 when drafting pleadings will mean that the pleading will be deemed to be an *irregular step* and the opposing party will be entitled to bring an application to have the pleading *set aside* in terms of rule 30 in the case of a High Court matter and the almost identically worded rule 60A in the case of the Magistrates' Courts.

Furthermore, failure to follow rules 18 or 6 to the letter may, in certain circumstances, also render the pleading *excipiable*(i.e. the opposing party may have sufficient grounds on which to *note an exception* against the pleading in terms of High Court rule 23 or Magistrates' Courts rule 19).[48]

In either case, failure on the part of the pleader to rectify the pleading may eventually lead to the claim or defence being dismissed or set aside. High Court rules 23 and 30 and Magistrates' Courts rules 19 and 60A are dealt with in detail later. You should note, however, that of the two potential remedies, an application under High Court rule 30 and Magistrates' Courts rule 60A are the most important, at least in the context of failure to conform to rules 18 or 6. This is because there may be instances where a pleading may not be *excipiable*, but may still amount to an *irregular step*, since it does not conform to rules 18 or 6. For example, particulars of claim may disclose a cause of action and be sufficiently clear so as not to be vague and embarrassing (and therefore not be excipiable), but still fail to provide the particularity required by rule 18(4) or 6(4) (and therefore fall foul of rule 18(12) or 6(13)). In this case, only the remedy provided by rules 30 or 60A would apply.

2.1.5*(j)* Further averments relating to the Magistrates' Courts only

Note that rules 6(11) and 6(12), which relate to causes of action arising out of or regulated by legislation and cessions, respectively, are not common to both sets of rules and are dealt with in Section 2.1.6 below.

D23 2.1.6Provisions for summonses relating exclusively to the Magistrates' Courts

By and large, the High Court and Magistrates' Courts Rules as they relate to summonses have been standardised. Some differences remain, however. Several provisions requiring additional specific averments to be made in particular situations appear in Magistrates' Courts rule 5, such as rules 6(11) and 6(12), which relate to causes of action based on legislation and cessions, respectively.[49]

P10 *2.1.6(a)Electronic addresses*

The Magistrates' Courts Rules make provision for the use of electronic addresses. In terms of rule 5(3)(*a*)(i), the plaintiff's attorney must, where available, include his electronic and facsimile address as well his postal address in the summons. Furthermore, in terms of rule 5(3)(*b*), the plaintiff may indicate in the summons whether he is prepared to accept service of all subsequent documents and notices in the suit through any manner other than the physical address or postal address, and, if so, which manner of service would be preferred. There is also provision in rule 5(3)(*c*) for the defendant in response to the written request of the plaintiff, to deliver a consent in writing to the exchange or service by both parties of subsequent documents and notices in the suit by way of facsimile or electronic mail. Should the defendant refuse or fail to deliver the consent, the court may, on application by the plaintiff, grant such consent, on such terms as to costs and otherwise as may be just and appropriate in the circumstances. This would appear to be an attempt to encourage the use of electronic means for the exchange of documents, but must be balanced against the need for certainty as to service of the documents and fairness to both parties. Before any documents or pleadings are delivered by way of facsimile or electronic mail, a written agreement should be lodged with the registrar in which the parties agree to delivery in this manner. The agreement must also contain the facsimile number or electronic mail address where delivery must be effected.[50]

P11 *2.1.6(b)Provisions for the defendant*

Magistrates' Courts rule 5(5) stipulates that the summons must include the following information for the benefit of the defendant:

1. A form of consent to judgment;
2. A form of appearance to defend;
3. A notice drawing the defendant's attention to the provisions of s 109 of the Magistrates' Courts Act, which requires a judgment debtor to keep the court, creditor or creditor's attorney and, if applicable, an administrator informed of any change of address; and
4. A notice in which the defendant's attention is directed to the provisions of various sections of the Magistrates' Courts Act relating to debt collection, including ss 57, 58, 65A and 65D, where the action is based on a liquidated sum of money due in terms of s 55 of the Act.

Provision is made for all these requirements in Forms 2 (simple summons) and Form 3 (summons incorporating an automatic rent interdict), which provide modals for the structure and content of the summonses.

2.1.6(c) Provision for jurisdictional averments

Magistrates' Courts rule 5(6) required certain allegations to be made with regard to jurisdiction.

Rule 5(6)(*a*) provides that where the defendant is cited under the jurisdiction conferred upon the court by s 28(1)(*d*) of the Magistrates' Court Act, which relates to jurisdiction based on the cause of action, the summons must contain the averment that the whole cause of action arose within the district or region (in the case of a Regional Magistrates' Court). The rule specifically requires that the summons sets out particulars in support of this averment. This means that the usual statement to the effect that 'the cause of action arose wholly within the jurisdiction of the above honourable court' would not be valid for the purpose of a Magistrates' Court summons. The requirement applies to all summonses, including simple summonses, which is an anomaly given that a simple summons is not required to comply with the particularity stipulated in rule 6(4).

Rule 5(6)(*b*) provides that when the plaintiff relies on s 28(1)(*g*) of the Magistrates' Court Act for jurisdiction (i.e. in an action relating to immovable property where the plaintiff avers that the immovable property concerned is situated within the district of the Magistrates' Court in question), the particulars should include the averment that 'the property concerned is situated within the district or region'.

Finally, rule 5(6)(*c*) provides that the summons should show any abandonment of part of the claim under s 38 of the Magistrates' Court Act and any set-off under s 39 of the Magistrates' Court Act.

2.1.6(d) Provisions relating to legislation

Rule 5 makes provision for claims regulated by legislation. This may include the various Acts dealing with the suing of government departments, which require particular procedures, such as giving notice before service of summons[51] or claims based on credit agreements regulated by the National Credit Act.[52] Rule 5(7) provides a general direction to the effect that where the plaintiff issues a simple summons in respect of a claim regulated by legislation, the summons may merely contain a bare allegation of compliance with the legislation. If an appearance to defend is served by the defendant on receipt of the simple summons, however, and the plaintiff responds with a declaration, the declaration must allege full particulars of such compliance.

The situation is somewhat different where the original cause of action is a credit agreement under the National Credit Act[53], by which the plaintiff seeks to obtain judgment in terms of s 58 of the Act. In this instance, the summons must deal with each one of the relevant provisions of ss 129 and 130 of the National Credit Act and allege that each one has been complied with, even in the case of a simple summons.[54] It must specifically contain sufficient allegations as to the manner in which the s 129(1)(*a*) notice was delivered so as to place the court in a position to determine whether there was delivery in terms of the National Credit Act.[55] Furthermore, most of the practice directives of the various divisions have specific requirements as to what must be alleged in the summons.[56]

A similar provision features in rule 6(11) in terms of which a party, who relies on a cause of action arising out of or regulated by legislation, shall state the nature and extent of the party's compliance with the relevant provisions of such legislation. This would include agreements concluded in terms of the National Credit Act, of course.

2.1.6(e) Suing as a cessionary

Rule 5(9) provides that where the plaintiff sues as cessionary, the plaintiff must indicate the name, address and description of the cedent at the date of cession as well as the date of the cession. Without an averment making it clear that the action has been ceded, the particulars of claim would fail to show the plaintiff's interest in the matter – his *locus standi*. The necessary averment would read more or less as follows:

> **The plaintiff sues as cessionary in terms of an agreement of cession dated …, in terms of which … the cedent (including name, address and description of cedent), ceded his right, title and interest in this action to the plaintiff.**

Rule 6(12) contains a similar provision to the same effect, a requirement which is not present in the current High Court rule 18. An averment of this nature would always be necessary to support a cause of action based on a ceded right, however, and would therefore be implicit in terms of rule 18(4), or rule 6(4) of the Magistrates' Courts Rules, for that matter.

2.1.6(f) Declaration that immovable property is executable

In terms of rule 5(10), a summons in which an order is sought to declare immovable property (which is the home of the defendant) executable must also contain a notice in the following form:

> **The defendant's attention is drawn to section 26(1) of the Constitution of the Republic of South Africa which accords to everyone the right to have access to adequate housing. Should the defendant claim that the order for eviction will infringe that right it is incumbent on the defendant to place information supporting that claim before the Court.**

D25

2.1.6(g)Automatic rent interdict summons

Rule 5(8) makes provision for a summons in respect of a rent claim which includes an automatic rent interdict. In terms of s 31 of the Magistrates' Courts Act, when issuing a P12

summons for *arrear rent* in the Magistrates' Courts, it is possible to include what is called *an automatic rent interdict* in the summons. In other words, the landlord will include in his summons a notice prohibiting any person (including, obviously, the tenant), from removing from the premises any furniture or other effects, which are subject to the landlord's hypothec for rent (i.e. which belong to the person/s who owe/s the rent), until the court makes an order as to what is to become of such furniture and other effects. Anyone who has knowledge of this notice is interdicted (i.e. legally prohibited) from removing the said furniture or other effects, until the court reaches its decision.

In order to ensure that the tenant does not remove items without the landlord's knowledge, the landlord may, at his own expense, request the sheriff to make an *inventory* of the goods which will enable the landlord to check whether or not items have been removed from the premises after the inventory is made. If items *have been* removed, the person who removed them faces conviction in terms of s 106 of the Magistrates' Courts Act, which reads as follows:

> **Any person wilfully disobeying, or refusing or failing to comply with … a notice lawfully endorsed on a summons for rent prohibiting the removal of furniture or effects, shall be guilty of contempt of court and shall, upon conviction, be liable to a fine or to imprisonment for a period not exceeding six months or to such imprisonment without the option of a fine.**

This provides a remedy in theory, but is of little consolation to the landlord who wants payment of the money due in respect of the rent. A procedure is available, however, for a landlord who is not interested in having the tenant committed to prison, but would rather secure the tenant's goods as soon as possible. In this case, he would use the procedure set out in s 32 of the Magistrates' Courts Act.

In terms of s 32, a landlord who is owed rent may make an *application* to court for an order allowing for the *attachment* of movable property on the rented premises. Only such goods as are (a) subject to the landlord's hypothec for rent, and (b) sufficient to satisfy the amount of rent which is outstanding, may be attached. The application must be supported by an affidavit in which the landlord alleges, *inter alia*, that:

1. he has demanded the arrear rent in writing, and more than seven days have passed without the arrear rent being paid; *or*
2. he believes that the tenant is about to remove the movable property which is on the rented premises in order to avoid payment of the rent.

In addition, the landlord must give *security* to the satisfaction of the clerk of the court that he will pay all damages, costs and charges which the tenant, or any other person, may sustain or incur by reason of the attachment.

If the court grants the application, the landlord may, with the approval of the clerk of the court in terms of Magistrates' Courts rule 41(7)(*a)*, instruct the sheriff to attach and *immediately remove* that property to a place of security. In this way the landlord is able to secure the tenant's property before it is spirited away. Bear in mind that in Magistrates' Courts practice, the sheriff will usually attach goods without removing them.[57] The sheriff will merely make an inventory and inform the tenant that the goods are attached. This means that it is necessary to give the sheriff a further instruction should the landlord want the property to be removed. In such cases, the plaintiff will have to pay the cost of removal and storage. This presents the landlord with a dilemma since although the costs of removal and storage may theoretically be recovered when the goods are auctioned, the amounts realised at sales in execution are often low. It is wise to keep costs as low as possible if it seems likely that the tenant's goods will be worth very little.

Rule 5(8) provides that the summons must be in the form prescribed in Annexure 1, Form 3.
Finally, the defendant has to be warned to enter an appearance to defend within 10 days after the service of the summons, and the consequences of not doing so, namely that default judgment may be taken against him.[58]

2.1.7 Lapsing and superannuation of summons and judgments

(i) *Superannuation of summons*

Rule 10 of the Magistrates' Courts Rules previously provided for the lapsing of a summons in two situations. The summons would lapse if it had been issued but not served within a period of 12 months. Alternatively, the summons would lapse if no further action to prosecute the matter was taken by the plaintiff within 12 months after service. This rule was amended in its entirety and no longer contains a provision to this effect.

As regards High Court practice, however, there is some judicial authority that a High Court summons can go 'stale' inasmuch as an unreasonable delay in proceeding with an action may be regarded as an abuse of process.[59]

(ii) *Superannuation of judgments*

As regards superannuation of judgments, the first point to be aware of is that, in terms of the Prescription Act, a judgment debt does not prescribe until a period of 30 years has lapsed. Nevertheless, the process of execution against a judgment debtor's property pursuant to the judgment will not be permitted if not acted upon promptly. Section 63 of the Magistrates' Courts Act provides:

> **Execution against property may not be issued upon a judgment after three years from the day on which it was pronounced or on which the last payment in respect thereof was made, except upon an order of the court.**

A Magistrates' Court's judgment sounding in money thus 'superannuates' within three years of the judgment being granted.[60]Alternatively, and in the event that the debtor began to make payment toward the judgment debt but ceased to do so before payment was made in full, the three-year period is calculated from the date of receipt of the last payment. This being the case, execution of a judgment must take place within the three-year period, after which time it will have superannuated. If superannuation does occur, an application must be made to'revive'the superannuated judgment.

In the High Court, rule 66(1) previously provided that no writ of execution could be issued after three years. This rule, however, was eliminated in 2014. Rule 66 now provides that a writ of execution for the enforcement of a *judgment, once issued*, remains in force until the judgment debt prescribes in terms of the Prescription Act. Furthermore, in terms of this rule, the writ of execution may be executed at any time without being renewed.[61]

The recent amendments create something of an anomaly in that in the Magistrates'Court process can only go stale after judgment (section 63), whereas High Court process can only go stale prior to judgment (based on common law). Another possibility is that with the amendment of rule 10, the common-law position applies to the Magistrates' Courts as well.

2.2 Step 2: Notice of intention to defend

Once the summons has been served on the defendant, he has several choices:

1. He may decide to do nothing (which will usually result in the plaintiff obtaining a default judgment against him.[62])
2. He may contact the plaintiff's attorney and attempt to settle the matter by agreement.[63]
3. In the Magistrates' Courts he may *consent to judgment*[64] (with similar results to default judgment, albeit with a slight saving in costs). A similar procedure, called *confession to judgment*, exists in the High Court.[65]
4. He may decide to defend the matter, in which case he must enter an *appearance to defend* and the matter will proceed on a defended basis.

Let us assume that he decides to enter an appearance to defend the matter.

P12

2.2.1The notice

Notice of intention to defend is provided for in rule 19 of the High Court Rules and rule 13 of the Magistrates' Courts Rules. The rules are virtually the same.

An appearance to defend is usually entered by the defendant's attorneys,[66] who deliver a notice both to the court and the plaintiff called a *notice of intention to defend*.[67] This notice simply tells the plaintiff and the court that the defendant intends to defend the action, and appoints an address for service on the defendant of further documents in the action.

The notice has the effect of placing the defendant's attorneys *on record*. In terms of High Court rule 16(4), should the defendant's attorneys in a High Court matter wish to cease representing the defendant after placing themselves on record and before the matter has been concluded, they are required to withdraw formally by sending a notice to the defendant, the plaintiff's attorneys and the court.[68] This must be done timeously.[69] The same procedure must be followed in Magistrates' Courts matters.[70]

The service address is the address at which the defendant wishes to receive service of all future documentation in a matter, but that is not the only address which should feature in the notice. The Magistrates' Courts Rules are not identical to the High Court Rules in this regard. Nevertheless, Magistrates' Courts rule 13(3) and High Court rule 19(3) both require the defendant to provide his or her full physical residential or business address in the notice. (Note that these addresses have not always been provided in practice.) The Magistrates' Courts rule goes further, however, requiring also the defendant's postal address and, where available, a facsimile address and electronic mail address.[71]

Having provided all these addresses in the notice, the defendant should then select an address for the service of all subsequent documents in the matter. Unless the defendant is unrepresented, this address would be that of his attorney rather than one of the defendant's addresses listed immediately above.[72] Rule 4A of the High Court rules, inserted in June 2012, now provides that service of all documents apart from those initiating proceedings may be effected either at the physical address for service provided in the notice, by registered post to the postal address provided, or via facsimile or electronic mail to the respective addresses provided. The rule, however, does not appear to *require* such additional addresses to be given in the notice. In both the High Court and Magistrates' Courts Rules this service address needs to be within 15 kilometres of the court out of which the summons was issued.[73] In High Court practice, the address must be a street address and may not be a post office box address.[74]

In contrast, the Magistrates' Courts Rules do not impose any restriction on the type of address that may be used, and the implication is that the use of postal addresses, including post office boxes would still be valid.[75] The Magistrates' Courts Rules also make provision for the use of electronic addresses. Furthermore, rule 13(3)(*b*) requires the defendant to indicate in the notice of intention to defend whether the defendant is prepared to accept service of all subsequent documents and notices in the suit through any manner other than the physical address or postal address and, if so, to state such preferred manner of service. Rule 13(3)(*c*) provides that the plaintiff may, at the written request of the defendant, deliver a consent in writing to the exchange or service by both parties of subsequent documents and notices in the suit by way of facsimile or electronic mail. Finally, in terms of rule 13(3)(*d*), if the plaintiff refuses or fails to deliver the consent in writing as provided for in rule 13(3)(*c*), the court may, on application by the

defendant, grant such consent, on such terms as to costs and otherwise as may be just and appropriate in the circumstances. It would seem, however, that the initial address for service must be either physical or postal, and that the plaintiff will serve his response to a request for service by way of electronic means to the physical or postal address supplied by the defendant. This provision reflects a similar stipulation pertaining to the plaintiff and summonses in rule 5(3), and would appear to be an attempt to encourage the use of electronic means for the exchange of documents. The High Court rule also provides that if the plaintiff refuses or fails to deliver the consent in writing, the court may on application grant such consent. Furthermore, in the Regional Magistrates' Court, before any documents or pleadings is delivered by way of facsimile or electronic mail, a written agreement must be lodged with the registrar in which the parties agree to deliver in that manner.[76]
Once an address has been selected, however, service at this address will be 'valid and effectual, except where by any order or practice of the court personal service is required', which means that any document in the matter properly served at that address will be deemed to be received by the defendant and the defendant's legal representatives.

Entering an appearance to defend does not prevent a defendant from raising an exception or a special plea at a later stage in the proceedings. For example, at a later stage in the proceedings the defendant may claim that the plaintiff has sued the wrong person, or that the plaintiff's claim has prescribed, or that the court has no jurisdiction.[77] High Court rule 19(4) and Magistrates' Courts rule 13(4) both provide that the defendant will not be deemed to have waived any right he may have 'to object to the jurisdiction of the court or to any irregularity or impropriety in the proceedings.'[78]

2.2.2 Delivery of the notice

The appearance to defend is entered by *delivering* one copy of the notice to the registrar or clerk of the court, and one copy to the plaintiff or his attorney. The word 'deliver' is defined in a similar fashion in both the High Court and Magistrates' Courts Rules.[79] It involves two activities: *serving* a copy on the opposing party, and *filing* the original document at court. A notice of intention to defend need not be served by the sheriff of the court; it is usually delivered by a messenger working for the defendant's attorneys. The messenger will deliver the original and two copies of the notice to the offices of the plaintiff's attorneys. The receptionist at the office of the plaintiff's attorneys will indicate that the plaintiff's attorneys have received the notice by stamping the original as well as the two copies with the firm's name and the date of service. The receptionist will hand the original and one of the copies back to the messenger, retaining one copy to be placed on the file of the plaintiff's attorneys. Having *served* the notice, the messenger will then *file* it at court, by handing the original and remaining copy to the clerk or registrar, who will date-stamp both documents, retaining the original for the court file and returning the copy to the messenger. Once the original notice has been placed on the court file, any dispute which may arise as to whether or not there has been proper or timeous service may be resolved by referring to the date stamps. The messenger will return the remaining copy of the notice to the defendant's attorney for filing. Presumably, the introduction of electronic means of service will not modify this greatly as the documents will still need to be filed at court by the parties who served them. Proof of service by electronic mail may require novel methods to prove service, such as e-mail delivery or read receipts, confirmation from an electronic service provider that the document was delivered, or confirmation that an imbedded hyperlink in the message envelope was accessed, or verbal confirmation by the recipient.[80]

P13

2.2.3*Dies induciae*

In both the High Court and Magistrates' Courts there are *time limits*, known as *dies induciae*, within which the defendant is required to enter an appearance to defend. If the defendant fails to enter an appearance to defend within the stipulated time limit, the plaintiff may take *default judgment* against him.

In High Court matters, the time within which the defendant is allowed to enter an appearance to defend depends on whether the summons was served upon the defendant *inside or outside* the jurisdiction of the court which issued the summons.

In terms of High Court rule 19(1), if a summons is served *inside* the jurisdiction of the court which issued it, a defendant is allowed *10 court days* after service within which to deliver a notice of intention to defend. It is important to note that the days between 16 December and 15 January, both days inclusive, are *not counted* when calculating this period.[81] These days are known as *dies non* (literally, 'non-days').[82]

In terms of s 24 of the Superior Courts Act,[83] if the summons is served *outside* the jurisdiction of the court which issued it, the appearance to defend must be delivered not less than:

1. *one month* after service, if the place of service is more than 150 kilometres from the court from which it was issued;[84] and
2. *two weeks* in any other case.[85]

Virtually the same provision applies to the Magistrates' Courts in terms of rule 13(1), including provision for the *dies non*, except that there is no distinction made between a summons being served inside or outside the jurisdiction of the court. In all cases, the period allowed the defendant within which to deliver a notice of intention to defend is *10 court days* from service of summons.

In terms of High Court rule 19(2), if the action is against a *Minister; Deputy Minister; Premier of a province; officer or servant of the state in his official capacity; the state itself; or a provincial administration*, a period of *20 court days* will be allowed for the entry of appearance to defend.

Note that whereas the days referred to in High Court rules 19(1) and 19(2) are *court days* as defined in High Court rule 1, the days referred to in s 24 of the Superior Courts Act[86] are *calendar days*, since they are referred to in the Act as opposed to the rules. It is important to employ the correct calculation method when calculating the respective periods.[87]

In both the High Court and Magistrates' Courts it is possible for a notice of intention to defend to be entered after the *dies induciae* have expired. This may be done despite the fact that the plaintiff has requested default judgment, provided that default judgment has not yet been granted.[88] In such cases, the plaintiff is entitled to the costs of his application for default judgment.

D26

2.3Step 3: Plea and counterclaim

2.3.1 Plea

2.3.1(a) General overview

The plea is essentially the defendant's *reply* to the plaintiff's particulars of claim and contains the defendant's *defence* to the plaintiff's claim. There are two main kinds of plea:

1. Plea on the merits; and
2. Special plea.

A *plea on the merits* deals with the *substance* of the plaintiff's claim. It attacks the validity of the cause of action with regard to the *facts* of the case. For example, assume that a plaintiff is claiming for damages to his motor vehicle caused by a collision with the defendant's vehicle. The defendant's plea on the merits may deny that the defendant drove negligently. This plea strikes at the heart of the plaintiff's cause of action, since negligence is one of the elements which the plaintiff will have to prove in order to be successful in an action in terms of the *Lex Aquilia*.

A *special plea* is essentially a legal objection to some aspect of the plaintiff's claim. It tries to '*knock out'* the plaintiff's case *before* the merits of the plaintiff's case are even considered. In the example above, the defendant may raise a *special plea* that the plaintiff's claim has *prescribed*. In other words, even if the defendant *were to blame* for the collision, *it does not matter*. The plaintiff has no claim in law because the matter has *prescribed*.

In practice, even if a special plea is raised, it is usual to *plead over* on the merits. In other words, a plea on the merits is added as an alternative to the special plea in case the special plea does not succeed for one reason or another.

Pleas are dealt with in rule 22 of the High Court Rules and rule 17 of the Magistrates' Courts Rules. Apart from a slight change in wording and additional provisions dealing with tenders, rule 17 of the Magistrates' Courts Rules matches rule 22 of the High Court Rules.

2.3.1(b) Plea on the merits

Rule 22 of the High Court Rules and rule 17 of the Magistrates' Courts Rules set out the requirements with which the defendant's plea must comply. The provisions of rules 22 and 17 must be read with the general provisions relating to pleading contained in rule 18 of the High Court Rules and rule 6 of the Magistrates' Courts Rules, respectively.

2.3.1(b)(i) Time limits

In terms of rule 22(1) of the High Court Rules and rule 17(1) of the Magistrates' Courts Rules, the defendant must – within *20 court days* after delivering his notice of intention to defend (in the case of a combined summons), or receiving the plaintiff's declaration (in the case of a simple summons) – deliver his *plea* to the plaintiff.

The 20 court-day time limit does *not* apply if the defendant decides to except to the plaintiff's particulars of claim or declaration, or to make an *application to strike out* allegations contained therein. The exception or application to strike out will be dealt with first, *before* the defendant is required to plead.[89]

2.3.1(b)(ii)The different kinds of pleas on the merits

High Court rule 22(2) requires that:

> **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.**
> **(Rule 17(2) of the Magistrates' Courts Rules is almost identically worded.)**

The plaintiff's particulars of claim contains the *allegations of fact* made by the plaintiff, which can only be allegations at this stage, since they have not yet been tested in court. For this reason, the 'material facts' referred to in rules 22(2) and 17(2) are generally called *allegations*, and sometimes *averments*.[90]

Rules 22(2) and 17(2) must be read with rule 18(5) of the High Court Rules and 6(5) of the Magistrates' Courts Rules. Rule 18(5) of the High Court Rules reads as follows:

> **When in any pleading a party denies an *allegation of fact* in the previous pleading of the opposite party, he shall not do so evasively, but shall answer the point of substance.**
> **(Rule 6(5) of the Magistrates' Courts Rules is almost identically worded.)**

When responding to the allegations contained in the plaintiff's particulars of claim, the defendant may respond (i.e. *plead*) to each allegation of fact in one of the following four ways:[91]

1. The defendant may *admit* the allegation;

   or
2. The defendant may *deny* the allegation;

   or
3. The defendant may *confess* and *avoid* the allegation;

   or, if he is unable to admit, or deny, or confess and avoid (usually because he has no knowledge of the particular allegation), then:
4. The defendant may respond that he does *not admit* the allegation, and indicate to what extent the allegation is not admitted.

What this means is that in relation to *each of the material facts* (the *facta probanda*) in the plaintiff's particulars of claim or declaration (i.e. in response to each and every fact contained in each and every paragraph), the defendant must either:

1. *admit* such fact;

   or
2. *deny* such fact;

   or
3. *confess* such fact; but *avoid* the legal implication the plaintiff would like the court to draw from that fact;

   or, if and only if he cannot admit, or deny, or confess and avoid (usually because he has no knowledge of the particular allegation), then:
4. *make no admission*, but put the plaintiff to the *proof* of the particular fact.

In addition to the four main categories of responses listed in rules 22(2) and 17(2), there are three general responses that are worth mentioning. The first is provided for in rules 22(4) and 17(4) which deal with the situation that will occur if the defendant has no defence to the plaintiff's claim, but has a *counterclaim* which will extinguish the claim, either entirely or in part. The second general response is not specifically dealt with in the rules but is permitted as a matter of

common practice. This is to *plead in the alternative*, which occurs when there is a second possible defence to the plaintiff's claim which is inconsistent with the first defence raised. The last general response is also not dealt with in the High Court Rules,[92] namely a *plea of tender*, although the Magistrates' Courts rule 17(5) specifically provides for such a plea. It is used in both types of courts, however, and is therefore worth mentioning here as a separate kind of *plea*. We may therefore add the following three categories of pleas:

1. Plead a *counterclaim*;

   or
2. Plead an *alternative* defence;

   or
3. Plead a *tender*.

Let us deal with each of the different kinds of plea in more detail.

2.3.1(b)(ii)(a) Admission of facts

One of the main reasons for pleadings is to define the issues that are in dispute between the parties. Once the facts contained in a particular paragraph have been admitted, they become *common cause* and the plaintiff need not prove them by leading evidence at the trial.[93] Any fact that may be implied from the facts that have been admitted is also deemed to have been admitted, unless specifically denied.[94] Should the defendant fail to deal with any averment in the plaintiff's particulars of claim, it will be deemed to have been admitted.[95]

Note that once an allegation has been admitted, it is extremely difficult for the defendant to retract the admission. Should the defendant wish to do so, he will need to amend his plea.[96] If the plaintiff does not consent to the amendment, the defendant will be obliged to bring a formal application requesting the amendment. The court hearing the application is not likely to permit the amendment unless the defendant can show that there was an error, and satisfy the court that the plaintiff will not be prejudiced.[97] 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 the defendant wishes to withdraw it'.[98]

2.3.1(b)(ii)(b) Denial of facts

Facts which are denied are placed in issue, and must be proved at the trial.[99] For example, in a motor vehicle collision case, the averments in the plaintiff's particulars of claim alleging that the defendant was negligent are almost always denied. Unless the defendant is able to show that no damages were suffered by the plaintiff, failure to deny negligence would mean that the defendant has failed to 'disclose' a defence.

Note, however, that a *bare denial* is not allowed.[100] What is meant by a 'bare denial' is explained below in our discussion of the plea of confession and avoidance. At this point, note that it is necessary to be clear and definite when denying an allegation. Rule 18(5) states as follows:

> **When in any pleading a party denies an allegation of fact in the previous pleading of the opposite party, he shall not do so evasively, but shall answer the point of substance.**
> **(Rule 6(5) of the Magistrates' Courts Rules is almost identically worded.)**

An *evasion* is to half-deny, or half-admit an allegation, which renders the plea unclear. The reason that a denial of an allegation of fact should be *clear and unequivocal*, and should not be done in an *evasive* manner, is that it should not leave the plaintiff in doubt about what he needs to prove at trial.

2.3.1(b)(ii)(c) Confession and avoidance

A plea of *confession and avoidance* is one in which the defendant *admits* (i.e. *confesses*) a particular averment in the plaintiff's particulars of claim, but then sets out *new facts* which, if proved, would justify or excuse the defendant's admitted conduct (i.e. *avoids*).[101] For example, assume that a plaintiff alleges that a defendant assaulted him and broke his nose. The defendant *admits* (confesses) that he punched the plaintiff and broke his nose, but avers that he did so in *self-defence* (avoids or effectively denies liability). If the new facts raised by the defendant are correct, it means that he is not liable for the plaintiff's claim. Were the defendant simply to admit that he punched the plaintiff and broke his nose without explaining that the punch was in self-defence, his subsequent denial of liability for the plaintiff's damages would amount to a *bare denial*.[102] In other words, a plea of confession and avoidance is sometimes necessary in order to avoid a subsequent denial of liability being categorised as a bare denial. Note that with a plea of confession and avoidance, the *onus* shifts to the defendant to prove the *new facts* raised by him. Usually, the onus rests with the plaintiff to prove his case. But when the defendant admits ('confesses to') the plaintiff's case, and seeks to rely on additional facts for his defence, it is up to the defendant to *prove* these additional facts.[103]

2.3.1(b)(ii)(d) Non-admission

The fourth kind of plea is known as a plea of *non-admission*. It may only be used if, *for some good reason*, the defendant is *unable* to put forward one of the other three pleas discussed above in response to a particular allegation in the plaintiff's particulars of claim.[104] Usually, this happens when the defendant simply does not know anything about the particular allegation.

An example of the kind of averment that would usually require this category of response is the averment in a motor collision case that the plaintiff is the *owner* of the vehicle that was damaged. This averment may well be true, but unless the defendant happens to know the plaintiff personally, it is impossible for him to be sure whether or not the plaintiff is the owner. The defendant is quite entitled to plead non-admission and put the plaintiff to the proof of this particular averment, which is essential to the plaintiff's case since it serves to establish the plaintiff's *locus standi*.

A plea of non-admission has the same effect as a plea of denial. The only practical difference between the two is that a plea of denial is a little more emphatic than a plea of non-admission. Although the rule does not specifically provide for this, a reason for making a plea of non-admission must be supplied.[105] The reason in the above case would be simply that the defendant has no knowledge, and the pleading would read more or less like this:

> ***The defendant has* no knowledge *of the contents of this paragraph*, cannot admit it, and therefore puts the plaintiff to the proof *of it.***

2.3.1(b)(ii)(e) Counterclaim

When a defendant has a *counterclaim*[106] against the plaintiff, the defendant may refer to the counterclaim in his plea, and request that the court *postpone judgment* on the plaintiff's claim until the counterclaim has been adjudicated upon. It may happen that the defendant has no defence to the present claim, but a successful counterclaim, if set off[107] against the plaintiff's

claim, will extinguish it at least in part, if not entirely. If the counterclaim is for less than the plaintiff's claim and there is no other defence, the court may give judgment against the defendant for the amount by which the claim exceeds the counterclaim. This situation is provided for in rule 22(4) of the High Court Rules and rule 17(4) of the Magistrates' Courts Rules, and pleading a counterclaim is still permissible even if the counterclaim is unliquidated.[108] The rule has been held to allow only for the situation where both claim and counterclaim are heard in the same court.[109] The court is given a discretion[110]by the rule, however, and it would be unlikely to permit a postponement in situations where the plaintiff would be unfairly prejudiced, such as a defendant tenant attempting to stave off an ejectment with a totally unrelated counterclaim.[111]

2.3.1(b)(ii)(f) Alternative defence

Occasionally, the defendant has two possible defences, but is not sure which to use. In such circumstances he may use both, provided he pleads *in the alternative*. In a case claiming damages caused by negligent driving, for example, the defendant may deny that he drove his car negligently. In the alternative, the defendant may plead that even if he is found to have been negligent, the plaintiff was also negligent, and therefore a situation of contributory negligence exists. Similarly, in answer to a claim for goods sold and delivered, a defendant may deny that he has entered into a contract with the plaintiff (e.g. he may suspect that the plaintiff was only an agent for the seller). He may plead in the alternative that the purchase price was paid. All conflicting pleas such as this must be pleaded in the alternative, otherwise they are read together and considered to be *vague and embarrassing* and the plaintiff is able to take an exception. Alternative pleas are not provided for in the rule, but are permitted nonetheless, provided they are 'necessary to meet the real justice of the case'.[112] Drafting a plea in the alternative is a reasonably simple exercise. The first version will be pleaded, followed by the word 'alternatively'[113] and then the alternative version. Remember, however, that you may only plead contradictory versions of events if your client is really not sure which version is correct. If your client knows full well that one of the versions of events is not correct and instructs you to this effect, you would be acting unethically if you were to assist him to plead the incorrect version as an alternative to another version of the events. This would amount to assisting your client to lie to the court. In other words, contradicting versions may not be pleaded if your client is not *bona fide* in respect of the allegations contained in the alternative versions.[114] In the case of the two examples given above, one could only plead the contradictory versions in the alternative if the defendant was really not sure if he had been negligent or not (first example), or if he had entered into a contract with the plaintiff or not (second example).

2.3.1(b)(ii)(g) Tender

This type of plea is discussed in the section on settlement and therefore will not be discussed here.[115]

To sum up, the way in which the defendant is required to respond to each and every material fact in the plaintiff's particulars of claim is by giving one of the following answers:

1. 'Yes' (plea of admission);
2. 'No' (plea of denial);
3. 'Yes, but' (plea of confession and avoidance); or
4. 'I've got no way of knowing – you prove it' (plea of non-admission).

And in response to the particulars as a whole:

1. 'You've got a claim, but so have I' (pleading a counterclaim);

2. ‘This is my defence, alternatively, this is my defence’ (pleading in the alternative); or
3. ‘This matter has already been settled’ (pleading a tender).

2.3.1(b)(iii) Drafting a plea on the merits

We noted above that High Court rule 18(3) and Magistrates’ Courts rule 6(3) require pleadings (including, therefore, the particulars of claim and the plea) to be divided into consecutively numbered paragraphs.

These paragraphs are merely ‘containers’ for the different allegations. Therefore each paragraph will contain one or a number of *allegations of fact*. The first task of the defendant is to *isolate*[116] the separate allegations contained in each paragraph. After doing this, the next step is to decide how to respond to *each* of these allegations (i.e. ‘Yes’, or ‘No’, or ‘Yes, but …’, or ‘I have no way of knowing, you prove it.’). Note that should the defendant decide to admit *all* the allegations contained in a particular paragraph, the practice has developed merely to indicate in his plea that he admits the entire paragraph. For the sake of accuracy, however, we suggest that even in such cases defendants state that they admit ‘all the *allegations*’ contained in the paragraph.

2.3.1(b)(iii)(a) Drafting the different plea responses

When drafting a plea, you simply respond (in one of the ways discussed above) to each allegation contained in every paragraph of the plaintiff’s particulars of claim or declaration. For example, should the defendant wish to admit all the allegations contained in paragraph 1 of the plaintiff’s particulars of claim, it should be done as follows:

Ad para 1[117]
The defendant admits all the allegations contained in this paragraph.

Likewise, should the defendant wish to deny every allegation contained in a paragraph, it will be done as follows:

Ad para 2
The defendant denies all the allegations contained in this paragraph.

When drafting a denial, the practice of adding the words ‘… as if specifically traversed herein and the plaintiff is put to the proof thereof’ should be avoided. Although many attorneys and advocates draft denials in this fashion, the effect of denying an allegation is that the plaintiff then bears the onus of proving that allegation.[118] It is therefore unnecessary and cumbersome to add to a denial the obvious allegation that ‘the plaintiff is put to the proof thereof.’

The usual form of drafting a *confession and avoidance* is as follows:

Ad para 3
‘The defendant admits the allegations contained in paragraph 3 of the particulars of claim, but avers that …’ (here set out the additional facts which the plaintiff has omitted and which show the matter in a different light).

Where an allegation is *not to be admitted* by the defendant, a reason must be given. Averring lack of knowledge (the usual reason), the response should be pleaded in the following manner:

Ad para 4
'The defendant has no knowledge of the allegations contained in paragraph 4 of the particulars of claim, cannot admit or deny these allegations, and puts the plaintiff to the proof thereof.' (In this situation the 'puts the plaintiff to the proof' phrase should be used.)

Once you have finished responding in one of these ways to the allegations in the plaintiff's particulars of claim, you should end off your plea with a *prayer*. Your prayer might look like this:

'WHEREFORE[119] the defendant prays for judgment in his favour and the plaintiff's claim be dismissed with costs.'[120]

2.3.1(b)(iii)(b) Dealing with all the plaintiff's allegations

When you are drafting a plea, it is important to bear in mind the provisions of rule 22(3) of the High Court Rules and rule 17(3) of the Magistrates' Courts Rules:

> **Every allegation of fact in the combined summons or declaration which is not stated in the plea to be denied or admitted, shall be deemed to be admitted.**

In other words, if you fail to deal with *each and every fact* in the particulars of claim or declaration, you run the risk that certain facts which you ought to have *denied* will be deemed to be *admitted*.
Also bear in mind when drafting a plea, the need to avoid the so-called 'negative pregnant'. A negative pregnant is a *negative*expression which may imply or carry with it an *affirmative* proposition. A good example is the case of *Brits v Weideman*[121]referred to above. The summons in this case alleged that on a specific date on a particular farm the defendant said the following defamatory and malicious words to the plaintiff: 'Jy is 'n bleddy skelm en jy lieg.' ('You are a bloody rogue and a liar.') In his plea, the defendant denied that he had used the words at the time and place alleged. The court held that the denial was a *negative pregnant* because you could read into the plea that the defendant *had* said the words, but not at the time and place alleged. The defendant should have denied using the words at all.

2.3.1(b)(iii)(c) The consequences of not observing the rules when drafting pleas

In terms of rule 22(5) of the High Court Rules and rule 17(6) of the Magistrates' Courts Rules, failure to comply with the provisions of the rules relating to pleas is deemed to be an *irregular step*. These subsections therefore have a similar role to that of rule 18(12) of the High Court Rules or rule 6(13) of the Magistrates' Courts Rules in relation to particulars of claim. In such a case, the plaintiff is entitled to apply to court to have the plea *set aside as an irregular step* in terms of rule 30(1) or rule 60A, respectively.[122]

2.3.1(b)(iii)(d) Material facts: avoiding bare denials

Denials that do not comply with rule 22(2) of the High Court Rules, or rule 17(2) of the Magistrates' Courts Rules, are sometimes called *bare denials.*
Both rules provide that:

the defendant … shall clearly and concisely state all material facts upon which he relies.

Obviously, whatever comprises a material fact in any situation will differ from case to case. Should the defence be based on a denial, no further facts need be pleaded as the defence is based on a *negative* allegation, i.e. a denial of the material facts averred by the plaintiff. This would be the case, for instance, where the plaintiff sues for defamation and the defendant denies the plaintiff's allegation that the defamatory words were uttered. Nothing more needs to be added.

When the defendant's defence rests on a *positive* allegation, however, the material facts on which this allegation is based must be averred. This will always occur in a confession and avoidance situation.[123] To use the defamation example again, should the defendant admit having uttered the allegedly defamatory words, he must go on to indicate both the nature of his defence and the material facts on which he relies. He may be able to claim that words were uttered on a privileged occasion, for instance, in which case the circumstances giving rise to the privileged occasion should be set out. He will also be obliged to set out the material facts if he intends to rely on a *special plea*. *Erasmus* lists several defences which require the material facts to be pleaded, including the defences of fraud or mistake in a contractual claim; agency; compromise; contributory negligence; and estoppel.[124]

2.3.1(c) Special pleas

2.3.1(c)(i) General overview

A special plea is a plea which raises a special defence and is directed at an underlying legal problem in the plaintiff's case, rather than at the merits of the case. A special plea is procedural in character and either *destroys* or *postpones the operation* of the plaintiff's cause of action.[125] Those special pleas which postpone the operation of the plaintiff's cause of action are called *dilatory special pleas*. Those special pleas which destroy the plaintiff's cause of action are called *special pleas in abatement*.[126]Let us examine these two general types of special pleas.

2.3.1(c)(ii) Dilatory special pleas

2.3.1(c)(ii)(a) Special plea of arbitration

Many contracts contain a clause stating that the parties will submit any dispute arising out of the contract to *arbitration*. If one of the parties to such a contract sues the other party to the contract *without* submitting the matter to arbitration, the party who is being sued may raise a special plea of arbitration.[127] In other words, what the party raising the special plea is saying is: 'You cannot sue me yet. First, you must take the matter to arbitration in accordance with our agreement.' The requirements for the court to grant a stay in the action are, firstly, that the issue falls within the scope of issues required to be submitted to arbitration in terms of the agreement, and secondly, that the legal validity or existence of the contract is neither in issue nor the subject of the dispute.[128]

2.3.1(c)(ii)(b) Special plea of lis pendens

A special plea of *lis pendens* may be raised in order to *stay* a particular action on the grounds that another action is *already*pending between the *same parties*, based on the *same cause of action*,[129] in respect of the *same subject matter*.[130] In other words, what the party raising this special plea is saying is: 'You cannot sue me for this. You are already suing me for the same

reason regarding the same thing.' The pending action may be in the same or in a different court.[131]

Whether or not the same cause of action exists is decided by examining the pleadings as opposed to the evidence in both matters.[132] In most respects this plea is similar to the special plea of *res judicata* discussed below, except that in the case of a special plea of *lis pendens* the matter is still pending in both courts, whereas in the case of a special plea of *res judicata* the matter has already been finalised and is then brought before court again. In the case of a special plea of *lis pendens*, the court has the discretion to stay the proceedings.[133]

2.3.1(c)(ii)(c) Special plea of premature summons

When a summons is issued before the cause of action is complete, the defendant may raise a special plea objecting to the premature summons.[134] For example, a contract may stipulate that notice of breach is required before action may be instituted for breach of the contract. Should a plaintiff issue summons for breach of contract before giving notice of breach, his summons will be premature. The failure of a plaintiff to deliver a notice under s 129(1) of the National Credit Act[135] prior to issue of summons, would also be susceptible to a special plea of premature summons.[136] Another example of a premature summons would be one which is issued at the instance of a director of a company before a special resolution has been passed authorising the action.[137]

2.3.1(c)(iii) Special pleas in abatement

2.3.1(c)(iii)(a) Special plea of prescription

Every cause of action must be prosecuted within a certain period of time, failing which it will *prescribe*. Should the matter prescribe, the defendant will not be legally liable, even if all the plaintiff's allegations about the defendant's conduct are true. If the plaintiff institutes an action after his claim has *prescribed*, the defendant should raise a special plea of extinctive prescription.[138] A special plea of prescription may be raised at any time and not only before *litis contestatio*.[139] However, prescription as an issue may only be raised by the parties and not by the court *meru motu* (of its own accord).[140]

Periods of prescription vary from case to case. It is therefore crucial for any attorney or advocate dealing with litigation matters to possess a good knowledge of the different periods of prescription. Prescription is every attorney's nightmare. Claims arising out of matters which have been allowed to prescribe comprise a high percentage of claims for professional negligence against attorneys. The first question an attorney should ask himself on being consulted by a client with a new matter is precisely when his client's claim is due to prescribe. The prescription date should be written in bold red letters on the front of the file. As a professional, an attorney has no excuse if he allows his client's claim to prescribe due to ignorance of the relevant legislation.[141]

In the section of this book dealing with letters of demand, we examine sections of various statutes which limit prescription periods in relation to specific claims against certain state bodies (including national, provincial and local government bodies) and their employees.[142] While these sections are focused on specific cases, prescription in general is dealt with by the Prescription Act 68 of 1969. It is essential for every attorney and advocate to understand this Act fully. Let us examine some of the provisions of the Prescription Act.

The Act makes reference to 'debts' rather than claims. For the purposes of the Act, however, a debt comprises far more than a claim for money. In the context of the Prescription Act, it has been held that a debt 'has a wide and general meaning, and includes an obligation to do

something or refrain from doing something'.[143] Furthermore, the term 'debt' has a wider meaning than 'cause of action' in the context of pleadings.[144] However, the exact meaning of the term 'debt' has been placed in so much doubt by the recent decision in *Makata v Vodacom*[145] in which the Constitutional Court found that a claim forcing Vodacom to commence negotiations with the claimant did *not* prescribe after three years. In reaching its decision, the Constitutional Court reasoned that a failure to meet a prescription deadline has the effect of denying a litigant access to a court. As s 39(2) of the Constitution requires legislation to be construed in a manner which is least intrusive on the right, 'debt' should not be read to include every obligation to do something, or refrain from doing something apart from payment or delivery.

The periods of extinctive prescription for various debts (i.e. the periods after which the recovery of such debts can no longer be legally enforced) are set out in s 11 of the Prescription Act.

1. For most debts, the period of prescription is *three years*. Section 11(*d*) provides that, except where an Act of Parliament specifically provides otherwise, the period of prescription of any debt not specifically mentioned in s 11 is three years.
2. In terms of s 11(*c*), if the debt arises from a bill of exchange (such as a cheque) or other negotiable instrument or from a notarial contract, the period of prescription is *six years*, unless a longer period applies in respect of the debt in question in terms of paragraphs (*a*) and (*b*) of s 11 discussed below.
3. In terms of s 11(*b*) the period of prescription is *15 years* in respect of any debt owed to the state and arising out of an advance or loan of money or a sale or lease of land by the state to the debtor, unless a longer period applies in respect of the debt in question in terms of paragraph (a) of s 11 discussed below.
4. In terms of s 11(*a*), the period of prescription is *30 years* in respect of any debt secured by mortgage bond, any judgment debt,[146] any debt in respect of any taxation imposed or levied by or under any law,[147] any debt owed to the state in respect of any share of the profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substances. Note that in the case of a surety's accessory obligation, should the principal debt be kept alive by a judgment, the accessory obligation also continues to exist for the normal period provided for judgment debts.[148]

Section 12 of the Prescription Act sets out *when* the period of prescription begins to run. Usually, it will begin to run 'as soon as the debt is due'.[149]

A debt is not deemed to be *due* until the creditor has knowledge of the *identity of the debtor*, and of the *facts from which the debt arose*.[150] Note that no specialist legal knowledge is required on the part of the creditor. For example, assume that the creditor was assaulted by a policeman. As long as the creditor is aware that he was assaulted (and was not, for instance, knocked unconscious resulting in complete memory loss) and that the person who assaulted him was a particular policeman, prescription will start running. The fact that the creditor may be *unaware* that he has a *legal claim* and the *precise nature* of that legal claim, does not prevent prescription from running. Note further that the creditor will be *deemed to have knowledge* of the identity of the debtor and of the facts from which the debt arose if he could have acquired such knowledge by exercising *reasonable care*.[151] For example, assume that the creditor in the above example is unaware of the name of the policeman who punched him, but instead of making reasonable enquiries to find out the policeman's name, he simply sits back and does nothing. In relation to the creditor's potential civil action against the policeman, prescription will start to run from the time the creditor ought reasonably to have established the policeman's identity.[152]

In certain cases, the debtor may *wilfully prevent* the creditor from becoming aware of the existence of the debt. In such cases, prescription will only begin to run when the creditor becomes aware of the existence of the debt.[153] Note also that the creditor must have actual awareness of the debt or at least a justified belief in its existence which can be inferred from the surrounding circumstances. An unsupported belief or a suspicion, even if it happens to be correct, is insufficient to allow prescription to commence.[154]

In terms of s 13 of the Prescription Act, the running of prescription may be *delayed* where:

1. the creditor is a minor (now a person younger than 18), or is insane, or is a person under curatorship, or is prevented by superior force including any law or any order of court from interrupting the running of prescription by the service of process on the debtor;
2. the debtor is outside the Republic;
3. the debtor and creditor are married to each other;
4. the debtor and the creditor are partners and the debt is a debt which arose out of the partnership relationship;
5. the creditor is a juristic person and the debtor is a member of the governing body of such juristic person;
6. the debt is the object of a dispute subjected to arbitration;
7. the debt is the object of a claim filed against the estate of a debtor who is deceased or against the insolvent estate of the debtor or against a company in liquidation or against an applicant under the Agricultural Credit Act 28 of 1966; and[155]
8. The creditor or the debtor is deceased and an executor of the estate in question has not yet been appointed.

In such cases, if the period of prescription would have been completed before, or on, or within one year after the day on which the relevant impediment referred to in these cases ceased to exist, the period of prescription will be completed only one year after the day on which the impediment ceased to exist.[156]

In terms of s 14 of the Prescription Act, the running of prescription may be *interrupted* by an express or tacit *acknowledgement of liability* by the debtor.[157] The running of prescription *starts afresh* on the date of the acknowledgement.[158]For example, assume that a debt has been outstanding for two years and 364 days, and is about to prescribe. At that stage the debtor pays a small amount to the creditor and states that he will pay the rest of the debt when he can afford it. This amounts to a tacit acknowledgement of liability and the three-year period of prescription starts to run afresh from the date on which the payment was made to the creditor. Each time an instalment is paid on a debt, prescription starts to run afresh.

In terms of s 15 of the Prescription Act, the running of the period of prescription is interrupted when the *process* whereby the creditor claims payment of the debt (i.e. summons or notice of motion) is *served* on the debtor.[159] Note that a letter of demand does *not* count as 'process'. It is only by serving a *summons or notice of motion* on the debtor (thereby instituting an action or application) that the running of prescription can be interrupted. Note further that the *issuing* of a summons or notice of motion by the registrar or clerk of the court is not sufficient to interrupt prescription. The documents must actually be served on the defendant or respondent before interruption occurs. An attorney should therefore ensure that there is enough time to issue *and* serve the summons or notice of motion *before* the prescription date arrives. It is wise to remember that the sheriff of the court is often unable to secure proper service on the first attempt (because the defendant/respondent is not at home, for instance, when the sheriff arrives to serve the document). An attorney should allow for such delay, because he is ultimately responsible for making sure that the matter does not prescribe. Finally, note that unless the debtor acknowledges

liability, the interruption of prescription by the service of process shall lapse, and the running of prescription shall not be deemed to have been interrupted if the creditor does not successfully prosecute his claim under the process in question to final judgment, or if he does prosecute his claim but abandons the judgment, or the judgment is set aside.[160]

2.3.1(c)(iii)(b) Special plea of misjoinder or non-joinder

A special plea of *misjoinder* may be raised where a party who *should not* have been *joined*[161] to an action, *has* been joined.[162]For example, Mr Sipho Zulu who stays at 23 Kudu Lane, Durban, is cited as the defendant in an action for damages resulting from a motor vehicle collision, but knows absolutely nothing about the collision in question. There is another person by the name of 'Sipho Zulu' who stays at 32 Kudu Lane, Durban, and it transpires that it is *that* Mr Sipho Zulu who should have been sued. The first Mr Sipho Zulu is entitled to raise a special plea of misjoinder.

A special plea of *non-joinder* may be raised where a party who *should* have been joined in an action, *has* not been joined to the action. If a person has a direct and substantial interest in the matter,[163] or if the order the court is being asked to make is likely to prejudice somebody, then that person must be joined. Persons in this category would include co-owners, joint contractors and partners. Where such a plea is upheld, the action is not dismissed but is stayed until the proper party has been joined.[164]

2.3.1(c)(iii)(c) Special plea of res judicata

A special plea of *res judicata* may be raised if the defendant is able to show that the point in dispute has *been adjudicated upon already* between the parties.[165] In other words, the plaintiff's claim has been heard previously by a court that has given a final judgment in the matter. The previous court is *functus officio* and cannot hear the matter again. If the plaintiff is unhappy with the previous court's decision, his remedy is either to take the matter on appeal or on review, not merely to begin a fresh action in the same or in some other court. A matter is *res judicata* if a *competent court* has previously reached a *final judgment* in a matter based on the *same cause of action* and involving the *same parties*.[166] What this amounts to is that the order granted in the previous hearing must be final and definitive of the issues raised by the same parties in the current matter.[167] This is ascertained by examining the pleadings as opposed to the evidence led at the previous hearing. When considering what constitutes the same cause of action for the purpose of *res judicata*, issues that ought to have been raised in earlier proceedings, but were not raised, are also included. Parties are required to bring their full case, this requirement being known as the 'once and for all' rule.[168]

A special plea of *res judicata* in a civil case may be compared to a plea of *autrefois convict* or *autrefois acquit* (previously convicted or previously acquitted, i.e. double jeopardy) in a criminal case. Once a criminal accused has been either convicted or acquitted of a criminal offence, he may not again be tried for that same offence. Note that if the court in a civil case gives a judgment of 'absolution from the instance', the plaintiff is generally entitled to bring a fresh action based on the same facts, without having to fear that he will be met by a special plea of *res judicata*.[169]

2.3.1(c)(iii)(d) Special plea to jurisdiction

If the plaintiff brings an action in a court which lacks jurisdiction, the defendant may raise a special plea of lack of jurisdiction.[170]

2.3.1(c)(iii)(e) Special plea of non locus standi in judicio

If the plaintiff brings an action and lacks a real and substantial interest in the matter, i.e. *locus standi*, or does not establish *locus standi* under the extended grounds in s 38 of the Constitution, the defendant may raise a special plea of *non locus standi in judicio*.[171]

2.3.1(c)(iv) Drafting a special plea

A special plea is usually raised at the start of the defendant's plea in a separate section with the heading 'Defendant's Special Plea'. A simple statement follows to the effect that the defendant is raising a particular special plea. Thereafter, the facts upon which that special plea is based are set out. For example, a special plea of prescription may contain the following:

1. The date upon which the plaintiff became aware, or ought reasonably to have become aware, of the facts upon which his cause of action is based;
2. The date on which the summons was served on the defendant;
3. The period of extinctive prescription applicable to the claim in question;
4. The fact that the plaintiff's claim had prescribed by the time the summons was served on the defendant; and
5. A request for judgment against the plaintiff with costs.

In response to such a plea, the plaintiff could argue perhaps that the dates alleged by the defendant were wrong; or that the plaintiff could not reasonably have been expected to be aware of the facts upon which his cause of action was based on the date alleged by the defendant; or that the running of prescription was somehow interrupted.

There is no uniform practice with regard to the need to *plead over on the merits*, but it seems that all defences that the defendant intends to raise must be raised at the same time.[172] This means that although there is no need to plead over on the merits if the defendant intends to rely solely on a special plea, no further opportunity will be afforded to plead over should the special plea fail.[173] This applies in both the High Court and Magistrates' Courts.

2.3.1(c)(v) Separate hearings for special pleas

Whilst there is no longer provision in the Magistrates' Court Rules for a separate hearing at which the matter might be resolved without the need for an expensive and time-consuming trial on the merits, the parties may make use of a section 54 pre-trial conference in order to raise the prospect of a separate hearing at which a special plea can be adjudicated. At the pre-trial conference the magistrate may use the powers afforded by s 54(1)(*e*) or alternatively, by rule 1(3), to order such a hearing.

High Court rule 33(4) provides that '[i]f, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may be decided conveniently 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'. A party requesting such a hearing must bring a formal application[174] and show that it is convenient to dispose of the particular question of law or fact separately.[175] The question itself may not be disposed of at the hearing of the application, but at a future hearing should the application be granted. Here the court will consider whether the appropriate circumstances exist in which a separation would facilitate the convenient and expeditious disposal of litigation. The rule allows for a broad range of issues to be heard, both of fact and

law. However, a court is likely to agree only to deal with issues which, if resolved, will save costs or finally determine the matter.[176] Besides the use of the rule for special pleas, which relate to questions of law, it is frequently used to determine questions of fact in medical negligence matters, for example, where the court may order that the issues of liability and quantum are separated. If the plaintiff is ultimately unsuccessful in proving the defendant's liability, both parties would have been spared the cost of leading evidence on the issue of quantum.[177] A special plea may be brought in terms of this provision.[178] Note that it is the duty of an attorney to consider whether or not the use of this procedure may avoid unnecessary delay and costs.[179]

2.3.2 Counterclaims

2.3.2(a) Overview

A counterclaim is a claim brought by the defendant against the plaintiff. You may think of a counterclaim as a *separate action*which, for the sake of convenience, runs *together with* the existing action. The plaintiff's claim is referred to as the *claim in convention* and the defendant's counterclaim as the *claim in reconvention*. All the normal rules for drafting particulars of claim apply to counterclaims.[180] The same time limits apply to counterclaims as to particulars of claim, but there is no need for the plaintiff to enter an appearance to defend in respect of the counterclaim. Summary judgment (which is discussed in detail later in the book) cannot be obtained in respect of a counterclaim.[181]

The counterclaim may be linked to the plaintiff's claim in the sense that it arises out of a set of related facts, but this need not necessarily be the case. Assume, for example, that the plaintiff sues the defendant for the price of goods sold and delivered. The defendant counterclaims on the grounds that the goods delivered to him were defective and caused damage to the machinery in his factory. In this case, a link exists between the claim and the counterclaim. However, the counterclaim may be completely unconnected to the transaction which gave rise to the plaintiff's claim.[182] For example, the defendant may allege that he was assaulted by the plaintiff because of a personal dispute between them. In either case, it makes sense for the claim and the counterclaim to be dealt with at the same time.

Normally, the respective *parties* to the claim and the counterclaim are the *same*, but it has been held that a *defendant* sued in his personal capacity may, in a representative capacity, counterclaim against the plaintiff.[183] The converse is not true. A counterclaim cannot be brought against a *plaintiff* in a different capacity from that in which he sues.[184] If the cause of action for the counterclaim is such that the defendant has a valid cause of action against the plaintiff as well as another person or persons, High Court rule 24(2) and Magistrates' Courts rule 20(2) allow the defendant to take action against such other person or persons, as well as against the plaintiff, by means of the counterclaim. This will only be allowed with the leave of the court, in such manner and on such terms as the court may direct. In terms of High Court rule 24(3) and Magistrates' Courts rule 24(3), if the defendant has been given leave to counterclaim against the plaintiff *plus* another person or persons, then the *title* (citation) of all further pleadings must be altered so as to reflect the additional parties.

Both the claim and counterclaim should be heard at the *same hearing* unless they arise from completely different sets of facts, in which case they may be tried separately. The resulting judgments should nevertheless be given *pari passu* or simultaneously in the Magistrates' Courts.[185] This is also the approach in the High Court,[186] particularly in view of the danger of conflicting results if the matters are dealt with piecemeal. However, the superior courts have

been known to use their inherent jurisdiction to grant default judgment on a claim in reconvention.[187]

2.3.2(b) Procedure

Magistrates' Courts rule 20 is based on High Court rule 24. In terms of High Court rule 24(1) and Magistrates' Courts rule 20(1), the defendant must deliver his counterclaim to the plaintiff *together with* the plea to the plaintiff's claim in convention (i.e. the plaintiff's claim as set out in his particulars of claim or declaration). If the defendant does *not* deliver his claim in reconvention together with his plea, the rule provides that the plaintiff may consent to it being delivered at a later stage. If the plaintiff refuses to consent to late delivery of the counterclaim, the court may be requested to allow it.

The counterclaim itself should be set out in all respects like a set of particulars of claim, and must give particulars of all the material facts of the claim in compliance with the rules that pertain to particulars of claim.[188] The claim in reconvention may either be set out in a separate document, or else included in a separate section of the plea which is headed 'Claim in Reconvention'.

It is not necessary to cite the parties in full in the claim in reconvention. Instead, the first paragraph of the claim in reconvention may simply state that the plaintiff in reconvention is the defendant in convention, that the defendant in reconvention is the plaintiff in convention, and that for the sake of convenience the parties are referred to as before. In other words, the plaintiff in convention remains the 'plaintiff' and the defendant in convention remains the 'defendant', even for purposes of the claim in reconvention.

Provided that it is based on the same transaction, the defendant's claim in reconvention will often be based on many of the same averments that are set out in the plaintiff's particulars of claim or declaration. In such a case, it is not necessary to *repeat*all these allegations in the counterclaim. The allegations to be repeated may simply be *incorporated* into the counterclaim by reference to the relevant paragraphs in the particulars of claim or declaration. A clause in the counterclaim providing for such incorporation might read as follows:

> **The allegations contained in paragraphs 5, 6, and 7 of the plaintiff's particulars of claim are hereby incorporated into the defendant's claim in reconvention.**

Of course, the contents of averments that are incorporated from the particulars of claim would be common cause between the parties. Allegations contained in the defendant's plea may also be incorporated into the defendant's claim in reconvention if the claims in convention and reconvention arise out of the same set of facts. This situation aside, however, the defendant should avoid mixing the contents of the plea and the counterclaim. The two are distinct and should be kept separate to make it easy for the plaintiff to respond.[189]

High Court rule 24(5) and Magistrates' Courts rule 20(8) both provide that failure to observe the provisions of rule 24 of the High Court Rules or rule 20 in the case of the Magistrates' Courts, is deemed to be an irregular step in terms of rule 30 or rule 60A, respectively.

2.3.2(c) Counterclaims in the Magistrates' Courts

As indicated above, counterclaims in the Magistrates' Courts are dealt with by Magistrates' Courts rule 20, which is almost exactly the same as the corresponding rule 24 of the High Court

Rules, except for special provision made in rule 20(5)–(7) for a situation in which the defendant's counterclaim exceeds the jurisdiction of the Magistrates' Courts. A defendant in an action in the Magistrates' Courts who wishes to bring a counterclaim which exceeds the jurisdiction of the Magistrates' Courts should apply to the court in terms of Magistrates' Courts rule 20(5):

1. *to declare that the counterclaim exceeds its jurisdiction*; and
2. *to stay the action under s 47 of the Magistrates' Courts Act.*

Notice of the application may be delivered together with the counterclaim, or within five days after the counterclaim has been delivered.[190] If the court is satisfied *prima facie* that the defendant has a reasonable prospect of obtaining a judgment on his counterclaim in excess of its jurisdiction, it will *stay* the action in the Magistrates' Courts for a reasonable period.[191] This will enable the defendant to institute action for the amount of his counterclaim in the High Court. Once the defendant institutes action in the High Court, the plaintiff is entitled to counterclaim in the High Court for the amount of his claim in the original Magistrates' Courts action. In other words, the claim and counterclaim in the Magistrates' Courts will be dealt with in the High Court, the only difference being that the defendant will become the plaintiff, the claim will become the counterclaim, and vice versa.[192] Various mechanisms are set out to prevent defendants delaying matters by not proceeding with the High Court action.[193]

If a defendant who wishes to bring a counterclaim exceeding the jurisdiction of the Magistrates' Courts *fails* to apply for the action in the Magistrates' Courts to be stayed, the court may dismiss the counterclaim, unless the defendant abandons (in terms of s 38) sufficient of the counterclaim to bring it within the jurisdiction of the Magistrates' Courts.[194]

2.4 Step 4: Replication (and possible subsequent steps)

2.4.1 Replication

The plaintiff may respond to the defendant's plea by means of a *replication*.[195] Magistrates' Courts rule 21 is virtually the same as rule 25 of the High Court Rules and the procedure for replication in both courts is the same. Generally speaking, a replication is only necessary if the defendant has raised *new averments* in his plea, which the plaintiff cannot allow to go unchallenged. Usually, such new averments will be made by the defendant as part of a plea of *confession and avoidance*, in which the defendant admits certain of the plaintiff's averments, but makes further (new) averments which show the plaintiff's original averments in a different light. It may then be necessary for the plaintiff to counter the new averments made by the defendant with further averments of his own, which will be contained in his replication. In the majority of cases in practice, a replication is not necessary since the defendant either admits or denies the different allegations made by the plaintiff, and does not raise new averments which require a response on the part of the plaintiff.

It is important to note that the plaintiff may only plead such fresh facts in his replication as are called for by the defendant's plea. The plaintiff may not, for example, use his replication as an excuse to introduce a new cause of action or to increase the size of his claim. This kind of replication or reply is known as *departure*[196] and the defendant may bring an application to strike out the replication or except to the replication.[197]

In terms of High Court rule 25(1) and Magistrates' Courts rule 21(1), the plaintiff must deliver the replication to the defendant within 15 court days after receiving the defendant's plea. In terms of rule 26 of the High Court Rules, if he does not do so, he will be barred and may not do

so later. While previously there was no equivalent in the Magistrates' Court Rules for the automatic barring of late pleadings, new rule 21B now makes provision for a notice of bar in respect of all pleadings.[198] Rule 21B provides that:

> **Any party failing to deliver the pleading referred to in a 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.**

2.4.2 Possible steps after replication

In some cases it may be necessary for the defendant to file a *rejoinder* to the plaintiff's replication, and then for the plaintiff to file a *surrejoinder* to the defendant's rejoinder. The defendant may then file a *rebutter* to the plaintiff's surrejoinder, and the plaintiff may reply with a *surrebutter* to the defendant's rebutter.[199]

It is only when *new averments* are made in the previous pleading that it is necessary to respond by means of any of the above pleadings. In practice, therefore, it is only in exceptional cases that it is necessary to file rejoinders, surrejoinders, rebutters and surrebutters. As each pleading is filed, it becomes increasingly unlikely that *fresh issues* will emerge to which the opposite party is required to respond. The result is that while replications and replies are infrequent in practice, rejoinders, surrejoinders, rebutters and surrebutters are rare in the extreme.

2.5Step 5: Close of pleadings (*litis contestatio*)

In general terms, it may be said that the purpose of pleadings is to define the issues in dispute. Once the issues in dispute have been defined, the pleadings close. After that the preparations for the trial begin.

The exact time at which the pleadings close is important because this is the moment of *litis contestatio* – in other words, the moment when *issue is joined* between the parties. The effect of *litis contestatio* is to freeze the plaintiff's rights at that moment.[200] For example, if a plaintiff who is claiming *non-pecuniary* damages for pain and suffering, loss of amenities of life and disfigurement happens to die *before litis contestatio*, his claims die with him. If he *dies after litis contestatio*, however, these claims are transmitted to his estate.[201]

A recent judicial decision appears to have unsettled this rule. In the precedent-setting decision of *Nkala and Others v Harmony Gold Mining Company Limited and Others*,[202] the claimants sought (and were granted) certification of two classes of plaintiff to pursue a class action against certain South African mining houses. In addition to certification, the claimants sought a declaration that any claim for general damages brought by a claimant against the mining companies would be transmissible to his estate should he die *before* the litigation reaches the stage of *litis contestation*. The concern arose in as much as a number of the claimants were terminally ill and a possibility existed that they would not survive to the stage of *litis contestati*o. The Gauteng Local Division, Johannesburg, held that the law which prohibits the transmissibility of general damages pre-*litis contestatio* fails to reflect the *boni mores* of society, failed to protect the claimant's constitutional rights to bodily integrity, and required development in the light of the spirit, purport and objects of the Constitution. The court held:

> **[T]he common law has to be developed to allow for the claim for general damages to be transmissible to the estate or executor of a deceased mineworker, even though the stage of *litis contestatio* had not been reached at the time of his death. Also, the development is necessary in the light of the court's general duty to do justice by the persons affected by its orders. The development should not be restricted to the case where the plaintiff has died pre-*litis contestatio*. It should**

also apply to the case where the defendant or *potential defendant* has died pre-*litis contestatio* as the same principles as those that apply to plaintiffs apply to them.

The court accordingly held that the common law should be developed as follows:

1. A plaintiff who had commenced suing for general damages but who has died (from whatever cause) before his claim has reached the stage of *litis contestatio*, will be entitled to continue with such action notwithstanding his death;
2. Such action shall be for the benefit of the estate of the person;
3. The development is not restricted to class actions only, but all applies to claims.

It remains to be seen whether this aspect of *litis contestation* will continue to have a place in South African law after this judgment.[203]

Currently, High Court rule 29 and Magistrates' Courts rule 21A set out the following instances in which pleadings shall be considered closed:

1. If either party has joined issue without alleging any new matter, and without adding any further pleading;
2. If the last day allowed for filing a replication or subsequent pleading has elapsed and it has not been filed;
3. If the parties agree in writing that the pleadings are closed and such agreement is filed with the registrar; or
4. If the parties are unable to agree as to the close of pleadings, and the court, upon the application of a party, declares them closed.

3 Possible extra steps: further particulars and declarations

3.1 Requests for further particulars

3.1.1 General overview

Further particulars for the purpose of pleadings are no longer permitted in the High Court or Magistrates' Courts.[204] To compensate for the abolition of further particulars at the pleadings stage, the scope of High Court rule 18 (relating to pleadings generally) was expanded and Magistrates' Courts rule 6 transformed to resemble closely High Court rule 18.

Rule 18(4) provides that, from the outset, all pleadings must contain 'sufficient particularity to enable the opposite party to reply thereto'. The Magistrates' Courts rule 6(4) has exactly the same provision. In theory at least, this together with the other provisions of rules 18 and 6 discussed earlier, removes the need for further particulars at the pleadings stage.[205] Failure to observe rule 18 or rule 6 is deemed to be an irregular step in terms of rule 30 or rule 60A of the High Court and Magistrates' Courts Rules, respectively, a remedy which is explained in more detail later.[206]

Note, however, that further particulars may *still* be requested, but only *after* the close of pleadings, and *for the purposes of trial*.[207] Further particulars for purposes of trial will be discussed in detail under pre-trial procedures.

Note further that even during the pleadings phase, 'further particulars' of a limited kind may be requested by making use of High Court rules 35(12) and (14) and the almost identical Magistrates' Courts rules 23(13) and (15). These are not 'further particulars' *per se*, but these rules do provide access to certain documents, computer disks, tape recordings and so on, which are in the possession of the opposing party. These rules are discussed immediately below.

P14

3.1.2High Court rule 35(12) and Magistrates' Courts rule 23(13)

Usually, access to documents, computer disks, tape recordings and so on, that are relevant to the case and in the possession of the opposing party, may only be obtained after close of pleadings, as part of a *discovery* procedure, which is discussed later as part of the pre-trial procedures. Rule 35(12) of the High Court Rules and 23(13) of the Magistrates' Courts Rules, however, allow for the inspection and copying of documents or 'tape recordings' (which has been interpreted to include anything on which information may be recorded)[208] that have been *referred to* in the other party's *pleadings* (*or affidavits* in the case of an application). It is not necessary to wait until the *close of pleadings* to demand inspection of documents or 'tape recordings' (hereafter taken to refer to its extended meaning) which the other party has *mentioned* in his pleadings or affidavits. From the time a party receives a pleading that includes mention of a document or 'tape recording', the party is entitled to inspect that document or 'tape recording' and make a copy or transcription. He must request inspection by serving a notice drafted in accordance with High Court Form 15 or Magistrates' Courts Form 15B.[209] Note that the rule does not restrict the documents or 'tape recordings' that may be inspected to those 'upon which the action is founded' as previously was the case under the former Magistrates' Courts rule 15. Mere *mention* in the pleading is sufficient to entitle the opposing side to inspect the documents or 'tape recordings'.[210] However, only *relevant* documents or 'tape recordings' which are not subject to *privilege*may be inspected.[211] Documents or tape recordings which are not in the opposing party's possession *are* subject also to High Court rule 35(12) or Magistrates' Courts rule 23(13), but these rules will not be enforced where the opposing party is unable to obtain them.[212] The rule applies not only to pleadings, but also to affidavits used in procedures which may form part of an action, such as the summary judgment procedure discussed later.[213] The rule applies also to documents referred to in documents annexed to affidavits.[214]

Although rules 35 and 23 are applicable to applications as well as actions, the application of the rule to applications is not automatic and requires a prior direction from the court in terms of rule 35(13) of the High Court Rules and rule 23(14) of the Magistrates' Courts Rules.

P15

3.1.3High Court rule 35(14) and Magistrates' Courts rule 23(15)

Once an appearance to defend has been entered, High Court rule 35(14) and Magistrates' Courts rule 23(15) allow any party to an action to require another party to the action to make available for inspection a clearly specified document or 'tape recording' (meaning anything on which information can be recorded)[215] *for the purposes of pleading*. Although the document or 'tape recording' to be obtained in terms of rule 35(14) or 23(15) need not have been referred to in the pleadings of the opposing party (as is required by rule 35(12) and 23(13) discussed above), it must nevertheless be a specific document or 'tape recording' which the party making use of this procedure is able to identify clearly.[216] A vague request for a general class of documents is not permitted in terms of rule 35(14) or 23(15).[217] Note further that in terms of rule 35(14) or 23(15), the document or 'tape recording' must be relevant 'to a reasonably anticipated issue in the action'. The purpose of the rule is presumably to ensure that a party is in a position to reply to pleadings, which is why it does not open the door to general discovery at this stage of the proceedings. A defendant may not use rule 35(14) or 23(15) in order to gather information needed to decide whether he has a cause of action for a counterclaim or 'go on a fishing expedition', so to speak.[218] In terms of rule 35(14) or 23(15), the document or 'tape recording'

requested must be provided within five days after a notice in terms of the rule has been delivered to the other party.

3.2 Declarations

A *declaration* is only necessary in *actions* in which a *simple summons* has been used.[219]

As explained earlier in our discussion of the different types of summons, a simple summons contains only a brief summary of the particulars of claim within the body of the summons itself. This is perfectly adequate for the majority of cases in which such a summons is used. On balance, most such cases are 'open and shut' and, for this reason, are not defended. A difficulty arises, however, with those cases that *are* defended, because the simple summons is *not* governed by *rule 18* of the High Court Rules or the corresponding *rule 6* of the Magistrates' Courts Rules and therefore lacks the detail required in terms of rules 18 and 6. Although a simple summons sets out the plaintiff's *cause of action*, it does so in *concise* terms, which means that the defendant often lacks sufficient detail to formulate his plea in response to the abbreviated particulars of claim.

Rule 20 of the High Court Rules and the rule 15 of the Magistrates' Courts Rules solve this problem. It provides that once the defendant delivers a notice of intention to defend in response to a simple summons, the plaintiff must deliver a declaration to the defendant within 15 court days of receiving the defendant's notice of intention to defend.

In effect, the declaration is the plaintiff's *particulars* of claim since it is identical in substance to the particulars of claim a plaintiff would attach to a combined summons. The contents of the declaration must comply with the same requirements as the particulars of claim, particularly with regard to rules 18(4) and 6(4) of the High Court and Magistrates' Courts, respectively. When it comes to drafting the declaration, however, the plaintiff must ensure that there is no material variance between the abbreviated claim as set out in the summons itself, and the claim as set out in the declaration.[220]

In respect of form, the declaration differs only slightly from the particulars attached to a combined summons. It has its own heading and case details conforming to those used for all the other pleadings in the action. It is described as the *plaintiff's declaration* between the 'tramlines' and it starts with a full and proper *citation* of the parties. The plaintiff's *cause of action* is set out in the same way as it would be in normal particulars of claim, and ends with a *prayer* in the usual manner.

In terms of both High Court rule 20(1) and Magistrates' Courts rule 15(1), the plaintiff must deliver his declaration to the defendant *within 15 court days* after receiving the defendant's notice of intention to defend. If the plaintiff fails to file the declaration within the 15-day period, he will not be prevented from filing it at a later stage, unless the defendant has served a *notice of bar* upon him, and he has failed to respond to the notice of bar.[221] In fact, the only substantive difference between High Court rule 20 and Magistrates' Courts rule 15 is the provision made for barring in terms of sub-rules 15(4) and (5).

If the plaintiff *has* been barred from filing a declaration, the defendant may, in terms of rule 31(3) in High Court matters and rule 15(5) in the case of the Magistrates' Courts, apply for *judgment in his favour* (if he is prepared to lead evidence) or for *absolution from the instance* (if he is not prepared to lead evidence). In other words, the *defendant* may apply for *default judgment against the plaintiff*. We will be dealing with the different kinds of judgment (such as absolution from the instance) as well as with default judgment in more detail later in the book.[222]

D28

4Responses to defective pleadings and noncompliance with the rules

4.1 General overview

Having dealt with the general rules relating to pleadings, we now need to discuss the different ways in which it is possible to respond to defective pleadings and to deal with noncompliance with the rules. A thorough knowledge of the rules relating to defective pleadings is useful in that not only does one learn how to respond to such pleadings but also how to avoid the pitfalls which may lead to one's own pleadings being defective. Knowing the procedures relating to noncompliance with the rules is useful in that it encourages one to stick to the rules when pleading.

The purpose of pleadings is to define concisely and accurately the issues in a matter. Defective pleadings are those that fail to fulfil this purpose adequately or that do not comply with the relevant rules of court. It has been held that pleadings should not be approached in an overly technical and formalistic way.[223] Nevertheless, it is dangerous to take chances with poorly drafted pleadings that do not fulfil their purpose. There are different ways in which pleadings may be defective, and in which the rules of court may be broken. Although the remedies for defective pleadings or noncompliance with the rules sometimes overlap, usually they cannot be used interchangeably, and a specific procedure is prescribed for each type of defect.

The following procedures may be used *to attack* different types of *defective pleadings*:

1. Response 1 – *Exception*: This is the usual method of attacking a defective pleading. There are two main grounds for bringing an exception. The first type of defect in a pleading is that it fails to *disclose* a cause of action (when the pleading is a particulars of claim) or a defence (when the pleading is a plea). The second type of defect is that the pleading has been drafted in such a way that it is *vague and embarrassing*.
2. Response 2 – *Application to strike out*: Application may be made to strike out parts of a pleading which are offensive, in that they contain matter which is scandalous, argumentative, irrelevant, etc.[224]

The following procedures may be used to respond to *breaches of the rules of court*:

1. Response 3 – *Application to set aside an irregular step*: This procedure is intended primarily for addressing technical breaches of the rules, not for dealing with faulty pleadings although it can be used for this purpose. It provides for setting aside a procedural step taken by the opposing party which is defective in that it fails to comply with the rules. There is an occasional overlap between this procedure and the procedures for attacking defective pleadings.
2. Response 4 – *Enforcing compliance and condoning noncompliance with the rules*: Both the High Court and Magistrates' Courts Rules set out procedures for enforcing compliance and condoning noncompliance with the rules.

The following procedure may be used *to cure* certain *defective pleadings*:

1. Response 5 – *Amendment/correction of pleadings*: In certain situations, a pleader may cure defective pleadings by amending them.

4.2 Response 1: Exception

Exceptions are dealt with in terms of rule 23(1) of the High Court Rules and rule 19(1) of the Magistrates' Courts Rules, both rules being virtually identical in all material respects.

An exception is a *legal objection* to a pleading,[225] the objection being that the pleading as it stands is not legally valid for its purpose. It follows that if an exception is to be used, the defect should be apparent *ex facie* the document, i.e. obvious from reading the pleading itself without recourse to external evidence.[226] Where the fault in a pleading is apparent *ex facie* the pleading, the pleading is said to be *excipiable*. The party who brings the exception is known as the *excipient*. If an exception is brought where the defect in the pleading is not apparent *ex facie* the pleading, the exception itself will be bad. Because an exception attacks a fatal flaw in the pleading in question, it may result in the dismissal or setting aside of the claim or defence of the party whose pleading is being attacked. In other words, an exception may act as a 'knock-out punch' which is able to bring the proceedings to an early end without the need for the action to go to trial.

4.2.1 The two major grounds for taking an exception

There are two major grounds for taking an exception against a pleading:[227]

1. The pleading fails to disclose a cause of action or defence.[228]
2. The pleading is vague and embarrassing.

P16

4.2.1(a)Failure to disclose a cause of action or defence

Since the purpose of a pleading is to define the pleader's case, failure to *disclose or reveal a cause of action* (in your particulars of claim if you are the plaintiff) or *defence* (in your plea if you are the defendant) is the most serious fault which may be found in a pleading. When bringing an exception, the truth of each of the allegations contained in the pleading concerned is not questioned.[229] Even if the allegations are correct, however, the pleading may be held to be excipiable on the basis that no claim or defence exists in law. This means that even if evidence were led sufficient to prove the facts set out in the pleading, no cause of action or defence would be disclosed.[230]

The plaintiff's particulars of claim should contain averments alleging all the *material facts* necessary to give rise to an enforceable claim, failing which the summons is *excipiable*.[231] Similarly, the defendant's plea must set out all the *material facts*necessary to raise a *defence* to the plaintiff's cause of action, failing which the plea is *excipiable*. The material facts (*facta probanda*) necessary to give rise to an enforceable claim or raise a defence (as the case may be) depend upon the nature of the particular claim involved. What constitutes the *facta probanda* in a particular case is a question of substantive law.[232] For example, a claim for damages arising out of a motor vehicle collision is delictual in nature and is based on the *Lex Aquilia*. The various essential elements that need to be proven in order to sustain a claim under the *Lex Aquilia* are *conduct*; *unlawfulness*; *fault* (either in the form of *negligence*, i.e. *culpa*, or *intention*, i.e. *dolus*); *causation*; and *damages*. Failure to allege any one of these elements will render the plaintiff's particulars of claim excipiable. Occasionally, the courts have been prepared to draw an inference from the pleadings and accept that a necessary averment is implied.[233] Note, however, that there is a limit to what the courts are prepared to read into a pleading.[234]

It is also worth mentioning that failure to disclose a cause of action can occur in two ways. It can either occur as a result of the failure to aver a necessary element of a claim or defence that would otherwise exist in law, or it can relate to a claim which although fully pleaded is misconceived in that it does not exist in law. In the latter case, the potential exception overlaps with a potential special plea. This possible overlap is dealt with at paragraph 4.2.7 below.

P17

4.2.1(b)Vague and embarrassing

A pleading may disclose a cause of action or defence, but may have been drafted in such a way that the pleading is ambiguous or lacks clarity.[235] To constitute sufficient grounds for an exception, the vagueness of the pleading must be such that it will result in prejudice or 'embarrassment' to the opposing side if it is allowed to persist.[236] An exception based on the grounds that the particulars of claim in a specific case are vague and embarrassing, 'strikes at the formulation of the cause of action and not its validity'.[237] For this reason, the consequences that flow from this particular defect in pleadings are less serious than a failure to disclose a cause of action or defence, as discussed above.

Generally, pleadings are vague and embarrassing if they are unclear and ambiguous to the extent that the opposing party is uncertain of the case he is required to meet.[238] For example:

1. *Lack of clarity, or ambiguity*: A pleading is vague where a *material* allegation is *unclear*, *meaningless or ambiguous* in that it is capable of more than one meaning.[239] A pleading may be *unclear* for a number of reasons, for example, where there is more than one claim, but it is not clear what relief is requested in respect of which claim.[240] Other examples include situations in which averments are unintelligible or where the particulars of a claim are so prolix (lengthy) that it is not clear what claim or claims the defendant has to meet. An example of *ambiguity* would include those cases in which it is not clear whether the plaintiff is suing in contract or delict,[241] or where there is more than one contract and it is not clear on which contract the plaintiff is suing.[242]
2. *The omission of material facts*: Pleadings will be vague and embarrassing where material facts have been *omitted*, with the result that the claim or defence is rendered *unclear* in a *material* respect. Occasionally, this situation may *overlap* with those situations in which the omissions are not material, but merely result in a lack of sufficient particularity to enable the opposing party to reply. The two situations should not be confused. The latter situation should not be dealt with by way of exception but by bringing an application in terms of rule 30 for breach of rule 18(4) (in a High Court matter) and an application in terms of rule 60A for breach of rule 6(4) (in a Magistrates' Courts matter).[243] An exception is the proper remedy when the omission is more serious. An omission is sufficiently serious to warrant an exception when it goes to the root of the claim or the defence, notwithstanding the fact that a cause of action or defence has been disclosed.[244] The circumstances in which this kind of situation arises vary, depending on the nature of a claim. For example, failing to stipulate the date of signature of a contract,[245] or the date on which rent was due,[246] will be more material to the cause of action in a case based on breach of contract than the failure to stipulate the date of a collision in a case based on the commission of a delict. Confusion is more likely to occur in distinguishing an agreement from a series of transactions, than in identifying a particular collision.[247] In the contract example, an exception would be the correct remedy, whereas in the collision example,

an application in terms of rule 30 (High Court) or rule 60A (Magistrates' Courts) would be the proper remedy.

3. *Contradictions in the pleadings*: Contradictions may result in vagueness and embarrassment in several situations. The first situation occurs when individual allegations within a particular pleading contradict each other without being pleaded in the alternative.[248] An example is a plea in respect of a collision case in which the defendant denies being the driver of the other vehicle, but later admits colliding with the plaintiff's vehicle, claiming that he was not driving negligently. The second situation occurs when two claims or defences contradict each other without being pleaded in the alternative, such as a claim for rent and for ejectment.[249] This particular situation is an example of *approbation and reprobation*, in other words an attempt to simultaneously enforce and cancel an agreement. A third situation occurs when a pleading contradicts another document. Examples include a contradiction between a pleading and its further particulars,[250] or between a plea and a counterclaim,[251] or a simple summons and the subsequent declaration.[252]

4.2.2 The prejudice requirement

An exception may not be taken unless the excipient will be *prejudiced* if the pleading is allowed to stand. The reason for requiring prejudice is to prevent parties from taking technical objections without real substance. Since prejudice is a requirement at common law, there is no specific mention of prejudice in the rules.[253]

Essentially, prejudice constitutes the *embarrassment* element of a pleading that is vague and embarrassing.[254] For this reason it is insufficient that a pleading merely be vague; it must be vague to the extent that it is embarrassing (or prejudicial) before it is possible to raise an exception against it. Prejudice exists when the excipient is unable to meet his opponent's case properly due to the vagueness of the pleading.[255]

In the case of pleadings that fail to disclose a *cause of action* or *defence*, the requirement of prejudice is satisfied by the fact that a *vital element* is missing from the pleading.[256]

4.2.3 Procedure for lodging an exception

4.2.3(a) The procedure in general

The procedure for bringing an exception is identical in the High Court and the Magistrates' Courts. The citation is similar to other pleadings or notices. The words 'Exception to the Plaintiff's Particulars of Claim,' (or 'Defendant's Plea', as the case may be) are inserted between the 'tramlines'. The main body of the exception should clearly and concisely state the grounds upon which the exception is founded.[257] It must be signed by counsel and an attorney in the High Court, and an attorney in the Magistrates' Courts (or by the party who is excepting, in person) and it must end with a prayer for relief.

4.2.3(b) Time periods

An exception must be delivered 'within the period allowed for filing any subsequent pleading'.[258] Therefore, the defendant must except to the plaintiff's particulars of claim within the time allowed for the filing of his plea,[259] and the plaintiff must except to the defendant's plea within the time allowed for his replication to the plea.[260]

It is *not* necessary, *in addition* to delivering the exception, to deliver the normal pleading which the excipient *would* have had to deliver if he were *not* excepting.[261]

4.2.3(c) Notice

An exception based on the grounds that the pleading lacks the averments needed to sustain *a cause of action or defence* may be delivered without any preliminary steps. Where the exception is based on the grounds that the pleading is *vague and embarrassing*, however, the excipient must give the opposing party an opportunity to remove the cause of the embarrassment *before* delivering the exception. The reason for this is to avoid the taking of exceptions in purely technical situations or in respect of pleadings that merely lack clarity.[262] The opportunity to remove the defect is provided by the excipient serving a written notice on the opposing party.[263] The notice must set out clearly the cause of complaint, giving the opposing party 15 court days to remove the cause of the complaint, and informing him that an exception will be taken if he fails to do so. The opposing party may remove the cause of complaint by amending his pleading. If he fails to do so, the excipient must deliver the exception within 10 court days from the date on which the opposing party either replies to the notice, or within 10 court days from the expiry of the 15-day grace period.[264]

4.2.4 The hearing

An exception is set down for hearing as an application on the opposed roll. Within five days after delivery of the exception, the excipient should apply to the registrar for a date for the hearing.[265] A court may defer the hearing of the exception until the trial.[266]

As the fault that gives rise to the exception must be apparent *ex facie* the pleading, no evidence may be heard at such a hearing.[267] The excipient may not raise an issue that has not been set out in the particulars of the exception, or in the notice required in respect of those exceptions based on the grounds that the pleading complained of is vague and embarrassing.[268]The onus is on the excipient to show that the pleading is excipiable.[269]

4.2.5 The consequences of failing to lodge an exception

Every litigant has a duty to take the most expeditious course to bring the litigation to finality. The prime purpose of an exception is to dispose of a matter as quickly and cheaply as possible. Should a party fail to take exception to a pleading which is clearly excipiable, and the matter subsequently goes to trial, the court may hold that he is not entitled to his costs, even though he was successful at the trial.[270]

4.2.6 The consequences of a successful exception

If the exception is successful, then the pleading which was the subject of the exception is disposed of. This does not mean, however, that the action or defence of the other side is also disposed of. The court will usually grant the opposing party leave to amend the particular pleading.[271]

If that party fails to do so, then the excipient may apply to court for judgment. If, at the initial hearing of the exception, the court finds that there is no basis in law for the claim or the defence, it will not be possible to amend the pleading and the matter will end at this stage.

4.2.7 The overlap between exception and special plea

Occasionally, the circumstances that give rise to an exception overlap with those that give rise to a special plea. In these circumstances, the potential excipient may choose between raising a special plea or an exception. For example, this may occur where a plaintiff fails to establish his *locus standi* in the particulars of claim by failing to allege his interest in the matter. In a

motor vehicle collision case, for instance, the plaintiff must allege that he is the owner of the vehicle in respect of which damages are being claimed. Should he fail to make this averment, the defendant may raise either a *special plea of non locus standi in judicio* or an *exception* on the grounds of failure to disclose a cause of action.[272] Note, however, that an overlap between the two procedures will only exist where the fault is apparent from the pleading itself.[273] If the fault is not apparent *ex facie* the pleading, there is no option but to raise a special plea.

Another important distinction that arises from the need for the fault to be apparent *ex facie* the pleading is that no *extrinsic* evidence of the fault may be raised at the hearing of an exception. An exception is decided by legal argument based on the wording of the pleading in question. It is assumed for this purpose that the facts set out in the pleading in question are true.[274] If it is necessary to hear extrinsic evidence in order to reveal the defect in the plaintiff's claim, then filing a special plea is the proper procedure.[275] This will always be the case with defences such as *res judicata* since the fault will not be apparent from the pleading, making it necessary to lead evidence as to the previous action. This is also true for the defence of *lis pendens*.

4.3 Response 2: Application to strike out

The second type of procedure that may be used to attack defective pleadings is an application to strike out. This procedure provides for an offending averment to be deleted or erased from the pleading in question. Applications to strike out are dealt with in terms of rule 23(2) of the High Court Rules and rule 19(2) of the Magistrates' Courts Rules. Rule 19(2) of the Magistrates' Courts Rules is based on the corresponding rule 23(2) of the High Court Rules, both rules being virtually identical in all material respects.[276] Both rules read as follows:

> **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 …, 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.**

In other words, there are two requirements for an application to strike out:

1. The offending pleading contains statements which are *scandalous*, *vexatious*, or *irrelevant*.
2. The applicant will be *prejudiced* in the conduct of his claim or defence if the offending statements are not struck out.

As far as the first requirement is concerned, matter which may be struck out has been defined as follows:

1. *Scandalous matter*: Allegations that may or may not be relevant, but that are worded so as to be abusive or defamatory.[277]
2. *Vexatious matter*: Allegations that may or may not be relevant, but are worded so as to convey an intention to harass or annoy.[278]
3. *Irrelevant matter*: Allegations that do not apply to the matter in hand and do not contribute in any way to a decision regarding the matter.[279]

Note, however, that the meaning of 'irrelevant' in this context is limited to matter that is irrelevant *to the pleadings*, rather than matter that is irrelevant to the case as a whole. Allegations of law (as opposed to allegations of fact) are irrelevant to the pleadings, even if such allegations relate to the case. Similarly, allegations relating to evidence (as opposed to allegations relating to

the material facts) are irrelevant to pleadings in an action, even if the evidence may be relevant at the trial.[280] While statements of law (instead of fact) may be struck out, claims or defences that are bad in law are not irrelevant for the purpose of pleading and therefore may not be struck out, and the proper response is to raise an exception.[281] The *distinction between an exception and an application to strike out* may therefore be described as follows: an exception goes to the very heart of the claim or defence, but an application to strike out attacks individual allegations which do not comprise an entire claim or defence.[282]

As far as the second requirement for an application to strike out is concerned, the *prejudice* need not be so great that it will reduce the applicant's prospects of success. The fact that the applicant is diverted from pursuing the main issue by having to deal with scandalous, vexatious or irrelevant matter is probably sufficient to constitute prejudice.[283] Note, however, that the court will not allow the use of this procedure to raise technical objections that *delay* the matter without any advantage.[284]

An application to strike out must be delivered 'within the period allowed for filing any subsequent pleading'.[285] When an application to strike out is made, it is only necessary to deliver the next pleading once the application to strike out has been dealt with.

4.4 Response 3: Application to set aside an irregular step

An *irregular step* may be set aside in terms of High Court rule 30 and rule 60A of the Magistrates' Courts Rules. A '*step'* in the context of these rules is one that advances the proceedings one stage nearer to completion.[286] An irregular step is a step that is in some way defective. Examples include the failure to serve summons properly;[287] premature set down;[288] failure to give reasons for urgency in an urgent application;[289] or the use of a simple summons instead of a combined summons for a damages claim.

Failure to comply with rule 18 of the High Court Rules and rule 6 of the Magistrates' Courts Rules (which regulate pleadings generally) or with rule 22(2) or (3) of the High Court Rules and rule 17(2), (3) or (5) of the Magistrates' Courts Rules (which regulate the substantive content of pleas), is deemed to be an irregular step.[290] Rule 18(4) of the High Court Rules and 6(4) of the Magistrates' Courts Rules are general provisions that require all pleadings to contain sufficient particularity to enable the opposing party to reply. Failure to adhere to this rule may be met with an application in terms of rule 30 or 60A. Furthermore, failure to include the particular averments required in terms of rules 18(6), (8), (9), (10) and (11), and the corresponding provisions contained in rules 6(6), (8), (9), (10), (11), and (12) of the Magistrates' Courts Rules, also constitutes an irregular step. Examples of this include divorce particulars of claim that fail to set out the grounds on which forfeiture is claimed in terms of rule 18(9) and 6(8), or failure to include all the averments required in respect of a claim for damages for bodily injuries in terms of rules 18(10) and 6(9).[291] In this context, irregular step proceedings help to compensate for the fact that further particulars for the purpose of pleadings are no longer permitted. In many cases, lack of particularity may prejudice a party's ability to reply without constituting grounds for an exception, but irregular step proceedings will provide a remedy in these circumstances.

In some cases, however, a particular step taken by a party may be both excipiable (subject to exception) *and* irregular. For example, if a plaintiff's particulars of claim fails to set out all the material facts upon which his claim is based, they will contravene rule 18(4) or 6(4) and therefore constitute an *irregular step* in terms of rules 18(12) and 6(13), respectively. Quite possibly, the particulars of claim will also be open to *exception*, since the omission of material

facts may mean that no valid cause of action is disclosed in those particulars. In such a case, the opposing party may choose whichever procedure he wishes to follow. There is authority, however, to the effect that rule 30 proceedings are designed to deal with technical as opposed to substantive defects. It is therefore preferable to take an exception in such circumstances.[292]

The required procedure to set aside an irregular step in the High Court is set out in rule 30(2)–(4) of the High Court Rules and rule 60A(2)–(4) of the Magistrates' Courts Rules, respectively:

1. The applicant may not himself take a further step in the matter after becoming aware of the irregular step.
2. Instead, within 10 court days of the applicant's becoming aware of the step, he must send a written notice to the opposing party pointing out the irregularity, and giving that party 10 court days to remove the irregularity.
3. If the opposing party does not remove the irregularity within the ten-day period, the applicant must serve the application papers on the opposing side within 15 court days after the expiry of the ten-day period.
4. Once the court has heard the application, it will make an order as to what is to be done about the irregular proceedings. It has a wide discretion in terms of rule 30(3) to set the irregular proceedings aside in whole or in part, grant leave to amend, or make any other suitable order. The court will not set aside an irregularity that does not substantially prejudice the applicant.[293]
5. In terms of rule 30(4), until a party has complied with the order of the court in respect of the irregular proceeding, that party may not take any further steps in the matter.

4.5 Response 4: Enforcing compliance and condoning noncompliance

Both the High Court and Magistrates' Courts Rules contain provisions designed to enforce compliance and condone noncompliance with the rules of court.

4.5.1 In the High Court

4.5.1(a) Rule 30A – noncompliance with the rules

High Court rule 30 concerns itself only with the setting aside of an irregular step. Rule 30A differs from this in two ways. Firstly, it deals with all types of noncompliance with the rules generally, not just procedures that constitute steps. Secondly, its purpose is not to set aside a step, but to enforce compliance with a rule that has not been followed. An example of a situation in which this rule would be used is if a party *fails to take a step* he is required to take. The opposing party is able to use the procedure set out in rule 30A to compel the defaulting party to take the necessary step. Rule 30A is a catch all which deals with general noncompliance with the rules. It is not necessary to use this rule to enforce compliance with those rules which contain their own remedy for noncompliance.[294]

High Court rule 30A reads as follows:

> **(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.**

4.5.1(b) Rule 27 – extension of time, removal of bar and condonation

High Court rule 27 is intended for the use of parties who have not complied with the rules and want the court to condone (i.e. excuse) their lack of compliance.

The procedure used is an application on notice to the other parties, supported by an affidavit in which the applicant must show *good cause*. What constitutes good cause will vary according to the circumstances of each case. It seems, however, that the court will balance two factors: the merits of the applicant's case and the applicant's default.[295] The applicant must provide an explanation for his default in his supporting affidavit,[296] together with a factual outline of his case in order to show that it is not unfounded or without merit. The court has a wide discretion to grant an order under this rule and will take into account not only the reasons for default and the strength of the applicant's case on the merits, but also the prejudice likely to be suffered by all the parties. The question of prejudice is irrelevant, however, if the applicant has not shown good cause in accordance with the rule.[297]

4.5.2 In the Magistrates' Courts

4.5.2(a) Rule 60 – noncompliance with rules, including time limits and errors

Rule 60 of the Magistrates' Courts Rules deals with noncompliance with rules, including time limits and errors. It is the nearest equivalent in the Magistrates' Courts Rules to High Court rule 30A, but also deals with one aspect of condonation provided for in High Court rule 27, namely the extension of time limits.

Magistrates' Courts rule 60(2) and (3) makes provision for two different applications to the court which represent two successive steps in a process. In terms of rule 60(2), the court may be asked to order the opposing party to comply with a particular provision of the rules, or with a legitimate request made in terms of the rules. If the opposing party thereafter refuses to comply with the rules within the time period provided in the order, the original applicant may again apply to court in terms of rule 60(3) asking for judgment against the opposing party. Magistrates' Courts rule 60 may not be used to enforce a rule that contains its own internal provision for relief.[298] Rule 60 can be used to enforce discovery when there is no response or an inadequate response to a notice in terms of rule 23(1).

Rule 60(5) deals with the extension of time limits prescribed by the rules from the point of view of a party who has failed to keep to these limits. Most time limits may be extended with the written consent of the other party(ies) in the matter.[299] If such parties fail to consent to the extension, the court may on application allow such an extension. In using its discretion to allow such an extension, a court should consider the sufficiency and acceptability of the explanation given for noncompliance.[300]The general approach a court should adopt when making this assessment has been stated in the case of *Evander Caterers (Pty) Ltd v Potgieter*,[301] in the following terms:

> **Generally speaking, a time limit in the rules of court is directed at a delay in the particular procedural step. It is not concerned with the merits of the case as such, and, because of the existence of the sub-rule under consideration, it is not intended without more to deprive a litigant of his claim or defence, as the case may be. It is merely intended to prevent delay or an injustice being done, owing to delay. It would seem to follow that an extension of a time limit should not be granted as a matter of course, merely for the asking, and it should also not be lightly refused if the delay did not prejudice the other party in respect of the merits or in the conduct of his case, other than the procedural advantage gained by him owing to the existence of the time limit. Indeed everything should be done**

to secure a fair trial between the parties in the litigation so that the disputes and questions between them may be settled on their merits.

In other words, although every effort must be made to comply with the time limits and requirements set out in the rules, they are not set in stone. The whole purpose behind the rules is to ensure that the parties eventually get to court and present their respective cases. This spirit is reflected in rule 60(7), which provides that:

No process or notice shall be invalid by reason of any obvious error in spelling or in figures or of date.

Practitioners should guard against an overly mechanistic approach, in which all requests for extensions are refused, and a major issue is made out of obvious typographical errors in pleadings. Note that rule 60 has been amended, with effect from 22 May 2015, to introduce sub-rule (9) which provides that:

The court may, on good cause shown, condone non-compliance with the rules.

The phrase 'good cause' is not defined and it would seem that sub-rule (9) has afforded the Magistrates' Court a wide discretion to condone noncompliance with the rules.

4.6 Response 5: Amendment of pleadings

4.6.1 General overview

Occasionally it is necessary to amend or correct pleadings after they have been filed at court and served on the opposing party. This may occur because of an error that came to the pleader's attention only after service, or it may occur following a successful exception or motion to strike out where the court has granted the party with defective pleadings leave to amend. An amendment may be granted at any stage of the proceedings before judgment.[302]

Amendment of pleadings is dealt with by High Court rule 28 and Magistrates' Courts rule 55A which are virtually identical. The sub-rules referred to in the discussion which follows refer to the sub-rules of both High Court rule 28 and Magistrates' Courts rule 55A, which correspond exactly.
Amendment in terms of these rules may take place either with the *consent* of the opposing party, or if there is an *objection*, by order of court. It is a *three-stage process*, with the second stage becoming unnecessary should the opposing side raise no objection to the proposed amendment.

P21

4.6.2Stage one: notice of intention to amend

A party wishing to amend a pleading or document[303] that has already been filed at court and served on the other parties must *first serve a notice of intention to amend* on all the other parties.[304]

This notice must set out the precise amendments intended by stating which portions of the pleading are to be deleted, and setting out the words with which the deleted portions are to be replaced. It must also call upon the other parties to deliver written objections to the proposed

amendments within 10 court days, failing which the amendments will be effected. Should no objection be delivered within this time, the other parties are deemed to have consented to the amendment.[305]Consequently, stage two falls away and the party wishing to amend the pleadings proceeds straight to stage three.

4.6.3 Stage two: objecting to the amendment

If, after receiving the notice of intention to amend, one of the other parties wishes to *object* to the proposed amendment, the objector needs to 'clearly and concisely state the grounds upon which the objection is founded.'[306] Having received such an objection within the 10 court days referred to in sub-rule (2), the party wishing to amend must make application on notice of motion to court within 10 court days of receipt for leave to amend.[307] The matter will then be set down for hearing as would any interlocutory application.

The court will usually lean in favour of granting the proposed amendment.[308] After all, the purpose of pleadings is to allow a proper airing of the dispute between the parties, which may only be possible if the amendment is permitted.[309] The onus is on the applicant to show that the amendment should be permitted. The main consideration for the court in permitting an amendment is that the other parties *should not be prejudiced* in a manner that cannot be corrected by an *order for a postponement* of proceedings if necessary, and *costs against the applicant*. With regard to prejudice, the applicant's burden to persuade the court to allow an amendment becomes greater depending on the extent of the inconvenience and dislocation caused to the other parties.[310] A further consideration is whether the amendment introduces something worthy of consideration; a triable issue rather than a groundless issue that will merely harass the opposing party.[311] A triable issue is one which, if it can be proved by the evidence prospectively set out in the application for the amendment, will be viable or relevant, or which, as a matter of probability, will be proved by the evidence prospectively set out in the application.[312] The *bona fides*(good faith) of the applicant in requesting the amendment is also of importance.[313] With respect to *bona fides*, the reason for the amendment is considered; whether, for instance, it has been occasioned by an honest error or an attempt to secure a tactical advantage. An example of securing a tactical advantage *mala fide* would be to request an amendment to include a new cause of action, which the applicant had deliberately refrained from raising at the start because he wished to cross-examine his opponent's witnesses before including it in the particulars of claim. The criteria the court applies when deciding whether to permit an amendment have been summarised as follows:

> **… the practical rule … 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, in other words, unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleadings which it is sought to amend were filed.**[314]

Usually, the application need not be accompanied by a supporting affidavit, apart from situations in which a full explanation is required to convince the court of the applicant's *bona fides*. An amendment correcting spelling, arithmetical or clerical errors, or amendments that remove ambiguities and correct pleadings that are vague and embarrassing, usually would not involve the applicant's *bona fides* as an issue. The applicant's *bona fides* become an issue in the case of more serious forms of amendment, such as when the applicant wishes to withdraw an admission.[315] While the considerations usually applied by the court remain the same (i.e.

prejudice and its avoidance by way of a costs order and postponement, together with a consideration of *mala fide*), the courts are less likely to grant this kind of amendment. This is because the applicant's change of attitude with regard to the admission calls for an examination of his *bona fides*. His reasons for requesting the amendment are not self-evident and will need explanation. Also, the potential for prejudice is far higher in this kind of case in that if the amendment is allowed, the opposing side will be obliged to gather evidence in support of the allegation which was admitted, but then placed in dispute again by the amendment. In this kind of case the supporting affidavit needs to set out the circumstances under which the pleading was originally drafted and the reasons for which the amendment is now requested.[316] Other examples of more serious amendments would be when the proposed amendment introduces a fresh cause of action,[317] and amendments that alter the original parties to the action.[318] Note also that an amendment which renders the pleading excipiable will be refused.[319]

4.6.4 Stage three: giving effect to the amendment

In terms of sub-rule (5), if none of the other parties objects to the amendments proposed in the notice of amendment, the party proposing the amendment may *effect* (i.e. carry out) the amendment within 10 court days after the expiry of the period allowed for objection. Alternatively, the amendment may be effected within 10 court days of the court authorising it as a result of an application referred to in stage two above.[320] In terms of sub-rule (7), an amendment is *effected* by filing the *amended pages* at court, and serving them on the opposing party. The amended pages are pages that reflect the alterations indicated in the notice of amendment delivered during stage one. These amended pages replace the original pages.

Once an amendment to a particular pleading has been effected, the other parties may want to change their pleadings in response to the amendment. Sub-rule (8) provides that the opposing party may, within 15 court days after the amendment has been effected, make any consequential adjustment he wishes to his own pleadings. Should the opposing party fail to do so, rule 22(3) will apply and every allegation of fact that has not been denied will be deemed to have been admitted.[321]

He is also entitled to raise an exception to, or make an application to strike out, portions of the amended pleading or to make application to have it set aside as an irregular step in terms of High Court rule 30 or Magistrates' Courts rule 60A.

D29

5Shortcut judgments

5.1 General overview

It is not always necessary to wait until a trial has been held in order to obtain *judgment*. In the following situations, it may be possible to obtain judgment *before* the matter goes to trial:

1. *Default judgment*: The plaintiff may apply for default judgment against the defendant if the defendant fails either to enter an appearance to defend, or to plead after being warned that he may be barred if he fails to do so. Default judgment may also be taken against a party who fails to appear at the trial, as well as in certain other circumstances.
2. *Summary judgment*: If a plaintiff has a particularly clear-cut claim (one of a number specified in the rules), he may apply for summary judgment if it is clear that the defendant has no valid defence and is simply entering an appearance to defend in order to delay the matter.

3. *Confession of claim or consent to judgment*: Judgment may be taken against a defendant who has consented to judgment being taken against him.

We refer to the above as *shortcut judgments*. Let us examine each one in turn.

5.2 Shortcut judgment 1 – Default judgment

5.2.1 Overview

There are two main forms of default that may result in judgment: default of appearance and default of pleadings. Although a number of possible default situations are dealt with below, those most frequently encountered in practice are: (a) a failure on the part of the defendant to enter an appearance to defend at all, or (b) after entering an appearance to defend, a failure to plead after he is warned that he may be barred if he fails to do so. Apart from certain minor differences indicated below, the procedures involved are broadly similar in the High Court and Magistrates' Courts.[322]

5.2.2 Default of appearance

5.2.2(a) Defendant's default of appearance to defend

In terms of High Court rule 31(2)(*a*) and 31(5)(*a*) and Magistrates' Courts rule 12(1)(*a*), default judgment may be granted against a defendant if he fails to deliver a notice of intention to defend within the time set out in the summons (*dies induciae*). This is the most common situation resulting in default judgment.

Practitioners should note that where an order is sought declaring residential property specially executable, the registrar can no longer hear the matter and must refer it to the court.[323] This is in accordance with the Constitutional Court decision in *Gundwana v Steko Development and Others*[324] and *Jaftha v Schoeman and Others*; *Van Rooyen v Stoltz and Others*,[325] which found the rules and practice allowing registrars to declare mortgaged property specially executable after default judgment on money debt unconstitutional for lack of judicial oversight.

*5.2.2(b) Plaintiff's default of appearance at trial (*comparuit *default)*

High Court rule 39(3) and Magistrates' Courts rule 32(1) apply to failure on the part of the *plaintiff* to appear at trial.

In terms of Magistrates' Courts rule 32(1), if the plaintiff fails to appear at the trial, the court may dismiss the action with costs. The word 'may' indicates that the court has a discretion whether or not to dismiss the action. The words 'plaintiff' and 'defendant' include the attorneys of the respective parties. This means that the parties will not be held to be in default, provided that their attorneys are present in court.[326] 'Dismissal' in this context means absolution from the instance[327] rather than a final judgment, and cannot be pleaded as *res judicata*.[328]

High Court rule 39(3) makes provision for the termination of the plaintiff's claim in the circumstances outlined above. The rule specifically refers to *absolution from the instance* and is therefore very similar in effect to the Magistrates' Courts rule. However, it contains an added proviso to the effect that the defendant '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.' However, the court will not grant final judgment lightly.[329] There must be special circumstances, such as deliberate default on the part of the plaintiff.[330]

5.2.2(c) Defendant's default of appearance at trial

In terms of rule 32(2) of the Magistrates' Courts Rules, the plaintiff may apply for judgment with costs if the defendant fails to appear at the trial. In order to properly exercise its discretion, the court may need to hear evidence. This will be the case when determining the quantum of the claim, should the action be for an unliquidated amount of money.[331]

High Court rule 39(1) is the corresponding rule in High Court practice. It provides that if 'the defendant does not appear, the plaintiff may prove his claim so far as the burden of proof lies upon him and judgment will be given accordingly, in so far as he has discharged that burden.' It adds the proviso that 'where the claim is for a debt or liquidated demand no evidence shall be necessary unless the court otherwise orders.'

5.2.3 Default of pleadings

5.2.3(a) Default of plea

Default of plea is the most important kind of default relating to pleadings. In March 2016, rule 12 of the Magistrates' Courts Rules was amended and, in 2014, rule 21B of the Magistrates' Courts Rules was introduced, as a result of which the High Court and Magistrates' Courts Rules on this particular topic are nearly identical in effect. Nevertheless, the procedure followed in each court will be dealt with separately to avoid confusion.

5.2.3(a)(i) Default of plea: High Court

With default of plea, the defendant has given notice of his intention to defend the action, but has failed to deliver his plea within the prescribed period set out in High Court rule 21(1). The plaintiff then serves a *notice of bar* on the defendant in terms of rule 26, calling on him to deliver his plea within five days. Should the defendant fail to do so, he is in default and is *ipso facto*barred from pleading.[332]

From this point on, the procedure is almost the same as if the defendant were in default of appearance and the plaintiff may apply for default judgment in terms of rule 31(2) or (5). There is one important difference in that notice of the application for default judgment must be served on the defendant in terms of rule 31(4) and (5).[333]

Note that although rule 31(2)(*a*) does not mention that a *notice of bar* is required, the sub-rule uses the words 'in default of delivery of a plea', which has a technical meaning in this case. In terms of rule 26, a defendant will only be 'in default' of delivering his plea *once the time period stipulated in the notice of bar has expired*. It is for this reason that once a notice of intention to defend has been filed, default judgment may only be applied for after the service of a notice of bar and the expiry of the time period set out in that notice.

5.2.3(a)(ii) Default of plea: Magistrates' Courts

In terms of Magistrates' Courts rule 12(1)(*b*), if a defendant enters an appearance to defend, but fails to deliver a plea within the prescribed time limit, then the plaintiff may serve a notice of bar on the defendant. This notice of bar will call upon the defendant to deliver a plea within *five*

days from the date of receipt of the notice, failing which the defendant will be in default of the plea and *ipso facto* (i.e. automatically) barred. The plaintiff will then be entitled to apply to the clerk of the court for *default judgment* against the defendant. The effect of this rule is identical to that of High Court rule 26 as it relates to the defendant's plea. One difference in respect of the subsequent default judgment application, however, is that no further notice need be given to the defendant.[334]

5.2.3(a)(iii) Default of plaintiff's plea in reconvention

In High Court practice, the procedure in respect of the plaintiff's failure to deliver his *plea in reconvention* to the defendant's counterclaim on time is identical to the barring procedure used in respect of the defendant's plea in convention. In *High Court practice*, the barring procedure provided for in High Court rule 26 covers all pleadings, which of course includes a plea in reconvention. With the introduction of rule 21B in 2014 (and its amendment in 2016), which provides for a general barring rule covering all types of pleadings, the position is now identical in *Magistrates' Courts practice*. Accordingly, rule 21B of the Magistrates' Courts Rules eliminates a lacuna which existed as a result of the 2010 amendments to the Magistrates' Courts Rules, as discussed in the second edition of this book.[335]

5.2.3(b) Default of declaration

Default of declaration is an example of the *plaintiff* being in default of pleading, and the *defendant* being in a position to apply for default judgment. If the plaintiff's claim is for a debt or liquidated demand, he will usually issue a *simple* rather than a *combined* summons. Once the defendant has given notice of his intention to defend, the plaintiff must deliver a *declaration*within 15 days of receipt of such notice in terms of High Court rule 20(1) and Magistrates' Courts rule 15(1). If he neglects to do so, the defendant may serve a notice of bar on him in terms of High Court rule 26, demanding that the declaration be delivered within five days. Should the plaintiff still fail to do so within this period, he is automatically barred. With the plaintiff barred from any further pleading, the defendant may set the action down in terms of High Court rule 31(3) and apply for absolution from the instance or, after adducing evidence, for judgment. Provision is made in terms of Magistrates' Courts rule 15(5) for exactly the same remedy and result where a plaintiff has been barred in terms of rule 21B(3) from delivering a declaration.

5.2.4 Applying for default judgment

Where either the plaintiff or defendant fail to appear at the trial, in either the High Court or Magistrates' Courts, application for default judgment is made orally from the bar.[336] The procedures to be adopted in all other cases are dealt with below.

5.2.4(a) The procedure in the High Court

The first question the plaintiff must ask himself is whether or not his claim is for a *debt or liquidated demand*. A debt or liquidated demand is a claim for a *fixed, certain or ascertained amount or thing*.[337] For example, a claim for goods sold and delivered is a debt or liquidated demand, whereas a claim for damages arising out of a motor vehicle collision is an unliquidated claim. Where the claim is not for a debt or liquidated demand, the court itself will have to hear the application for default judgment. Where the claim is for a debt or liquidated demand, however, the application for default judgment may be considered *administratively* by the registrar of the court.[338]

This means that the application for default judgment is lodged with the registrar who deals with it in chambers, without the plaintiff or his legal representatives present. The reason for this administrative procedure is that claims involving debts or liquidated amounts are often very straightforward. By allowing applications for default judgment involving such claims to be decided by the registrar, the rules have reduced the burden of work placed on the courts. Let us examine each type of claim and the procedure required in turn.

5.2.4(a)(i) If the claim is not for a debt or liquidated demand

If the claim is *not* for a *debt or liquidated demand*, that is, an unliquidated claim, then the plaintiff must *set the matter down* for hearing by the court where the application will be moved formally by counsel.[339] The reason that such matters must be heard by the court is that the plaintiff has to satisfy the court as to the *quantum* (i.e. amount) of his damages. The court may also, in its discretion, allow the plaintiff to lead evidence by affidavit to prove his cause of action in a damages claim.[340] Although default judgment is granted in relation to an action rather than an application, the matter is always heard in motion court because the application procedure is used to obtain default judgment. In undefended matrimonial actions where the matter is set down for default judgment, however, the plaintiff must attend court and briefly give evidence to verify the facts constituting the cause of action in the summons.

If the defendant has failed to enter a notice of intention to defend, then *no notice of set-down* of the application for default judgment need be given to the defendant in terms of High Court rule 31(4). If the defendant has failed to plead and then ignored a notice of bar, however, notice of set-down must be given to the defendant at least five court days before the hearing.[341] The reason for the difference in approach is apparent. If the defendant has not bothered to enter an appearance to defend, there is no reason why the plaintiff should be put to the bother and expense of giving the defendant notice of the application for default judgment. If the defendant has at least taken the trouble to enter a notice of intention to defend, but then has failed to do anything further, he is entitled to the benefit of the doubt and must be given notice of the application for default judgment.

After hearing evidence the court will grant judgment or make an order which it considers fair.

5.2.4(a)(ii) If the claim is for a debt or liquidated demand

If the claim is for a *debt or liquidated demand*, the plaintiff must file a *written application*[342] for judgment against the defendant *with the registrar*.[343] Note that a plaintiff is *obliged* to apply for judgment to the registrar where the claim is for a debt or liquidated demand, and may not make application to the court.[344]

If the defendant has failed to enter a notice of intention to defend, then notice of the application to the registrar need not be given to the defendant.[345] If the defendant has failed to plead and has then ignored a notice of bar, however, notice of the application to the registrar must be given to the defendant at least five court days before the application is made.[346] Note that this is a notice of *intention to apply for default judgment, not* a notice of *set-down*. This is because all claims for a debt or liquidated demand are now dealt with by the registrar administratively in chambers, and therefore at his convenience, without the plaintiff or his representative present. It is therefore impossible either to set the matter down for hearing, or even to know when the matter will be 'heard' by the registrar. The notice of intention to apply for default judgment should therefore give five days' notice of the date on which the matter will be lodged with the registrar.

The registrar may grant judgment as requested; or grant judgment for part of the claim only, or on amended terms; or refuse judgment wholly or in part; or postpone the application for judgment on such terms as he may consider just; or request or receive oral or written submissions; or 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, as discussed above.[347]

The registrar will require the matter to be set down for a court hearing if he is of the opinion that evidence is required, either as to the quantum or the merits of the claim, or if he has doubts about granting judgment.[348] Although the courts have invariably granted judgment by default on a debt or liquidated demand without hearing evidence, they retain the discretion to demand evidence on any point should they deem it to be necessary.[349]

If a party is dissatisfied with the judgment or directions of the registrar, he may, within 20 days after he has acquired knowledge of the judgment or direction, set the matter down for reconsideration by the court.[350] It is not clear how an application for *reconsideration* by the court of a default judgment given by the registrar will differ from an application for *rescission* of a default judgment given by the court in terms of rule 31(2)(*b*), although it is clear the requirements are different: Rule 31(2)(*b*) is only available to a defendant (not a plaintiff); it prescribed a 20-day period after obtaining knowledge of the judgment within which to make application; and it requires that good cause be shown. The safest course of action for the defendant to adopt in the former case may be to treat an application for reconsideration in the same way as an application for rescission.[351]

As far as the costs are concerned, if the claim falls within the jurisdiction of the Magistrates' Courts, the registrar will grant a judgment for R200 costs plus sheriff's fees. If the claim is outside the jurisdiction of the Magistrates' Courts, then the registrar will grant a judgment for R650 costs plus the sheriff's fees, unless the application for default judgment specifically requires the costs to be taxed, or the registrar decides that the court should decide the issue of costs.[352]

P18

5.2.4(b)The procedure in the Magistrates' Courts

In the Magistrates' Courts, if the defendant defaults in that he fails to enter an appearance to defend, or fails to plead after being called upon to do so in a notice of bar, the plaintiff may request default judgment against him in terms of Magistrates' Courts rule 12. Ordinarily, a request for default judgment is not heard in open court unless, as indicated previously, it is made in respect of failure to appear at trial, when it is applied for orally from the bar. In all other cases the plaintiff merely lodges a written request for judgment by default with the clerk of the court. The request must be drafted to conform to Form 5 of the Magistrates' Courts Rules and must be signed in duplicate (which, strictly speaking, means two original signed drafts, and not one original plus a copy). In practice, the relevant particulars are typed onto a printed form or – more likely these days – added to a computer-generated precedent. The original summons and the sheriff's return of service should be attached to the application. These documents will still be with the plaintiff's attorney as the clerk of court no longer opens a court file when summons is issued in the Magistrates' Courts, but only when the matter proceeds further. Note that in terms of rule 12(3), default judgment may only be obtained on a summons served by way of registered

post if an acknowledgement of receipt referred to in rule 9(13)(*a*) has been filed by the sheriff with his return of service. Requests for default judgment in the Magistrates' Courts under rule 12 are all dealt with administratively *in chambers*, and because the plaintiff's attorney is not present, he will only learn of the outcome when the requests are returned, duly endorsed with the judgment, or otherwise.

In the case of liquid claims (e.g. for goods sold and delivered), the clerk of court grants judgment himself in terms of rule 12(1)(*c*), the job being delegated at bigger centres such as Durban to *judgment clerks*. They will peruse the particulars of claim to check that the cause of action for the claim which is set out in the request for default judgment, is disclosed in the particulars of claim. In the event that default judgment has been applied for after the defendant's failure to enter an appearance to defend, the judgment clerk will also check that there has been proper service of the summons on the defendant. Only if all appears to be in order will he grant judgment, and thereafter inform the plaintiff's attorney by sending back the request endorsed with a stamp indicating that judgment has been granted, together with the date. If the application is based on a liquid document, this document must be filed before judgment is entered in terms of rule 12(6).[353]

Where the claim is for an *unliquidated amount* (e.g. damages to a motor vehicle resulting from a collision), default judgment will *not* be granted by the clerk of the court. Instead, the matter will be referred to the *court*,[354] which will assess the amount recoverable by the plaintiff, and give the appropriate judgment. Although rule 12(4) refers to 'the court', the matter is not heard in open court. The clerk places it before a magistrate who deals with the matter administratively in chambers, usually without any of the parties being present. In terms of rule 12(4), the court will require some form of evidence (either written or oral) as to the nature and extent of the claim before it will grant default judgment. Although evidence may be given orally, a request for default judgment in respect of an unliquidated amount is usually supported by an affidavit in which full details are given as to the manner in which the claim was quantified. This is generally referred to as a *damages* affidavit. Note that a claim for an unliquidated amount is not restricted to a claim for damages, for example, a claim for unjust enrichment would constitute a claim for an unliquidated amount.[355] Note also that while a damages claim is the prime example of an unliquidated claim,[356] it may become liquidated by agreement.[357] Finally, note that it is important that the person who deposes to the damages affidavit is the person who actually assessed the damages. If the deponent is an expert, he must lay a basis for the averment that he is an expert (just as he would if he were giving oral evidence). It will not be adequate, for example, to attach an affidavit deposed to by the *owner* of a garage in which he states that the vehicle in question in a collision case has been repaired. A damages affidavit is required in order to place evidence concerning the nature and extent of the damages before the court, sufficient to enable the court to assess the damages.[358] An example is a damages affidavit by a panel beater, in which he sets out his qualifications and experience, and certifies that the amount of a claim for damages to a particular motor vehicle which he has examined is fair and reasonable.

In any request for judgment on a claim arising out of a credit agreement governed by the National Credit Act or the Credit Agreements Act 75 of 1980, the request must also be referred to the court in terms of rule 12(5).[359]

5.2.5 Barring

5.2.5(a) General overview

The concept of *barring* is often associated with default judgment, but is of wider application. Barring is a procedure that prevents the delivery of any further pleadings in an action by placing them under bar. In some situations barring is automatic; in others, it requires the delivery of a *notice of bar*. Barring is seldom fatal to a case if the barring is automatic, as this kind of barring effects only the non-essential – or rather optional – types of pleadings and does not lead to a default judgment situation (for example, replication). The danger of default judgment is always present, however, wherever a notice of bar is used. It is for this reason that the topic of barring has been raised at this particular point. Barring is dealt with under rule 26 of the High Court Rules, which is a general rule dealing with barring. Rule 21B is a direct equivalent in Magistrates' Courts practice.

5.2.5(b) Automatic barring

Automatic barring is provided for in High Court rule 26 and rule 21B of the Magistrates' Courts Rules. After the defendant serves his plea on the plaintiff, the plaintiff has 15 days in which to serve his replication to the plea on the defendant. If he does not do this, then in terms of rules 26 of the High Court rule and 21B of the Magistrates' Courts Rules, respectively, he will be *ipso facto* (or *automatically*) barred. What this means, in effect, is that the pleadings are deemed to be closed and the matter may be set down for trial.[360] This also applies to all the pleadings that follow the replication. For example, if the plaintiff delivers his replication within the time limit, but the defendant fails to deliver his rejoinder within the time limit, the defendant will automatically be barred from further pleading. Unless there is a specific need to file a further pleading, failure on the part of either the plaintiff or defendant to file such further pleading merely serves to close the pleadings and does not constitute an admission of the facts in the previous pleading.[361]

Rule 21 of the Magistrates' Courts Rules deals with replications and was amended in 2010 so as to duplicate almost exactly rule 25 of the High Court Rules. This means that unlike the solitary reply to a plea previously provided for in rule 21, the whole gambit of replication and rejoinder pleadings are now permissible in Magistrates' Courts practice. As noted above, rule 21B of the Magistrates' Courts Rules now provides a general rule for barring equivalent to rule 26 of the High Court Rules, which includes a method of automatic barring if these pleadings are necessary and are not served on time.

5.2.5(c) Notice of bar

In terms of High Court rule 26, there is no *automatic* barring in respect of pleadings that come *before* the replication. These pleadings are the plaintiff's *declaration*, the defendant's *plea* and the plaintiff's *plea in reconvention* to any counterclaim in High Court practice.

If any of these pleadings is not delivered on time, and a party wishes to obtain default judgment against the defaulting party, he must first serve a *notice of bar* on that party. The 'notice of bar' calls on the defaulting party to deliver the declaration or plea within five court days after receipt of the notice. If the defaulting party does not deliver the declaration or plea within the five-day period, or within a further agreed period, the defaulting party is *ipso facto* barred from doing so thereafter, and the other party may apply for default judgment against him. Notices of bar are

most commonly served by plaintiffs on defendants who have failed to deliver their pleas in time. Barring a party from pleading is a serious threat to that party's case as the *next step* is to *apply for default judgment* against the party who has been barred.

An important point to bear in mind is that, in terms of the proviso to High Court rule 26, the days between 16 December and 15 January, both inclusive (the *dies non*) shall *not* be included in the time allowed for the delivery of any pleading. For example, assume that a notice of bar is delivered to the opposing party on 15 December. The notice requires delivery of the opposing party's pleading within five court days after service of the notice of bar upon him. Because of the *dies non*, the opposing party will only have to deliver the pleading within five full court days *after* 15 January.

Magistrates' Courts previously never had a period of recess, and the *dies non* limitation of High Court practice has never applied. Nevertheless, the 2010 amendments introduced the *dies non* limitation into Magistrates' Courts practice with regard to notice of intention to defend in terms of rule 13(1) and delivery of any pleading in terms of Magistrates' Courts rule 21B(3).

5.2.5(d) Removal of bar

In the High Court, a bar may be removed in terms of High Court rule 27. Any attorney who has been careless enough to have his pleadings barred must adopt the following procedure in order to remove the bar. He may[362] first ask the other party if they will *agree* to the bar being removed. If the other party agrees, the bar is duly removed. If the other party *refuses* to agree to the removal of the bar, however, then the defaulting party may apply to court *on notice (as opposed to on notice of motion)*, in terms of rule 27(1) of the High Court Rules, for the bar to be removed. The non-defaulting party is not obliged to agree to the removal of the bar, although unreasonable opposition to the subsequent application may well attract an adverse costs order.[363]In order for the defaulting party to succeed in his application, he will have to show *good cause*.[364] Harms lists the following situations in which the court will tend to grant the application to lift the bar:

1. The applicant has given a reasonable explanation of his delay.
2. The application is *bona fide* and not made with the object of delaying the opposite party's claim.
3. There has not been a reckless or intentional disregard of the rules of court.
4. The applicant's action or defence is clearly not ill-founded.
5. Any prejudice caused to the opposite party can be compensated for by an appropriate order as to costs.[365]

In addition to the provisions set out in rule 27, the High Court have *inherent jurisdiction* to remove the bar.[366] There is no specific procedure for raising a bar placed on pleadings in the *Magistrates' Courts*, but the defendant may apply for an extension of time in terms of rule 60(5).[367]

5.3 Shortcut judgment 2 – Summary judgment

5.3.1 General overview

In the case of an application for *default judgment*, one is dealing with a situation in which the defendant (usually) *does not put up any opposition*, in that either he does not enter an appearance to defend, or fails to respond to a notice of bar. In the case of an application for *summary*

judgment, however, one is dealing with a situation in which the defendant *does* oppose the matter, but there is a suspicion that the *only reason* for the defendant's opposition is to *delay* the matter. The rules provide a mechanism whereby a plaintiff who finds himself in this situation may attempt to *shortcut* the usual procedures, and obtain judgment without having to go to trial. The very nature of the summary judgment procedure is *extraordinary*, in that it allows the court to grant a final order in a defended action without the parties going to trial. The purpose of the procedure is to prevent the defendant from delaying the proceedings when he has no real defence to the plaintiff's claim. There is an attempt to balance two conflicting interests. On the one hand, the plaintiff should not be forced, in circumstances which amount to an abuse of the process of court, to suffer the delay and expense of a trial. On the other hand, summary judgment is a severe and extraordinary procedure, which circumvents the *audi alteram partem* principle in that a defendant who wishes to defend a matter may have judgment taken against him without the benefit of a trial. Summary judgment will therefore only be granted where a court is satisfied that the plaintiff has a very clear case and the defendant fails to establish a *bona fide* defence.[368] There are several provisions in the rules which help to keep these competing interests in balance. Summary judgment is a frequently used procedure, and therefore of great importance.

The provisions regulating summary judgment are found in rule 32 of the High Court Rules and rule 14 of the Magistrates' Courts Rules. The provisions regulating summary judgment in the High Court and Magistrates' Courts have always been very similar, but the 2010 amendments to rule 14 of the Magistrates' Courts Rules have made them virtually identical.

5.3.2 Permissible claims

Because summary judgment is such a drastic remedy, only the clearest and most straightforward claims may be the subject of a summary judgment application. The types of claim permitted are all liquid in nature. Note also that not all types of liquidated claims are permitted, but only the four specifically listed in High Court rule 32(1) and Magistrates' Courts rule 14(1).

In terms of these rules, a plaintiff may only apply for summary judgment together with any claim for interest and costs if his claim is:

1. based on a liquid document;
2. for a liquidated amount in money;
3. for delivery of specified movable property; or
4. for ejectment.

Let us deal with each type of claim in turn.

5.3.2(a) On a liquid document

Examples of liquid documents include cheques, acknowledgements of debt and mortgage bonds.[369]

In the context of summary judgment, the term 'liquid document' has the same meaning as in the provisional sentence procedure, and is dealt with in detail in that section.[370]

Erasmus points out that even if a document does not fall precisely within the parameters of a liquid document, it is of little importance for the purposes of summary judgment. This is because the document is still likely to lead to a liquid claim under the next category, i.e. a liquidated amount in money.[371]

Of course, many liquid documents, such as cheques, are sued for by way of provisional sentence summons, where summary judgment does not apply. However, there is nothing to prevent a plaintiff from using a simple summons, or even a combined summons, to sue on a claim based on a liquid document in the High Court.

5.3.2(b) For a liquidated amount in money

A claim need not be evidenced by a document at all in order to be liquidated. In fact, a liquidated claim may arise out of an oral agreement, such as a claim for arrears rent arising out of an oral lease. A debt or liquidated demand, as noted in the sections dealing with simple summonses[372] and default judgment,[373] may be defined as 'a claim for a fixed or definite thing', for example; a claim for the transfer of immovable property or ejectment; for the cancellation of a contract; for the delivery of goods; or for the rendering of an account by a partner. A liquidated amount in money, however, only involves money claims, and does not include debts or liquidated demands requiring an act on the part of the defendant such as the delivery of property, transfer, or the like. Such a claim must be '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.'[374] In *Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd*,[375] it was held that a claim for 'work done and materials supplied' (a claim based on a *quantum meruit*) fell within the category of a liquidated amount in money as the reasonable remuneration for the work and the market price of the materials were known and therefore ascertainable. On this reasoning, a claim for *professional services rendered* would also pass muster. In KwaZulu-Natal, however, a stricter approach has been followed and the claim must be based on an obligation to pay an agreed sum of money, or an amount that can be ascertained merely as a matter of calculation.[376] There are Western Cape decisions that go both ways, but appear to favour *Fatti's* approach on balance.[377] At the very least, however, a liquidated amount in money would include claims for the purchase price of goods sold and delivered, moneys lent and advanced, arrear rent, a taxed bill of costs, etc. To this must be added the further proviso that these claims may only be for money and may not be coupled with claims requiring an act such as specific performance. This is apart from the two categories that follow.

5.3.2(c) For delivery of specified movable property

Delivery of specified movable property is one of the two types of liquid claims requiring an act, as opposed to the payment of money, in respect of which an application for summary judgment may be brought. Although claims for specific performance are usually heard in the High Court, this is one of the exceptions permitted in the Magistrates' Courts in terms of s 46 of the Magistrates' Courts Act. Note that it is a claim for the delivery of movable property which is permitted here, not a claim for the transfer of immovable property. The summons must describe the property with sufficient particularity to enable it to be identified.[378] Claims such as this are occasionally accompanied either by a claim for damages, or an alternative claim for the value of the property. As both these types of claims are unliquidated, a court would grant summary judgment on the claim for delivery, but refuse summary judgment on the accompanying claim.[379]

5.3.2(d) For ejectment

This is a claim requiring the removal of the defendant from premises unlawfully occupied, and is another example of a liquid claim which does not involve a demand for a liquidated amount in money. It may, however, accompany a claim for money. If the accompanying money claim is an unliquidated claim for damages, such claim will not be granted at summary judgment stage, but if it is a liquidated amount in money, summary judgment may be granted in respect of both

claims. The most common example would be a claim brought by a landlord against a tenant for arrears rent, accompanied by a claim for ejectment from the leased premises. Summary judgment may be granted for both these claims. Summary judgment would not be granted, however, in respect of a further claim brought by the landlord for the cost of repairing the damage allegedly caused to the leased premises by the tenant.

Claims for interest and costs are ancillary to the main claim. Summary judgment may be granted in respect of these claims. The normal principles governing costs and interest apply. Interest may be claimed from the date the defendant is *in mora*, i.e. the date when the debt fell due. In the case of a liquidated amount of money, this would usually be a date agreed by the parties.

If the plaintiff has a number of claims, some of which fall into the categories above and some of which do not, he may apply for summary judgment in respect of those claims that qualify, and allow the other claims to proceed to trial.[380]

P19

5.3.3The application

The procedure followed is by way of application, moved in motion court in terms of High Court rule 32(2) and Magistrates' Courts rule 14(2).

1. Should the plaintiff wish to apply for summary judgment, he must approach the court by way of notice of motion, within 15 days of receiving the notice of intention to defend. If application is not made within the 15-day period, the plaintiff loses the opportunity to apply for summary judgment.
2. The application for summary judgment must state that the application will be set down for hearing on a stated day. That day may not be less than 10 days from the date of the delivery of the application. This means that the defendant must be given at least 10 days' notice of the hearing. The plaintiff will obtain the date of the hearing from the registrar before serving the application on the defendant.
3. If the defendant responds by way of affidavit, this should be delivered by 'noon of the day but one' preceding the hearing, i.e. at least by noon two days before the hearing.
4. If the matter is not dealt with by the parties agreeing to the *usual order*, argument will be heard at the hearing.[381]

5.3.4 The supporting affidavit

The notice of application must be supported by an affidavit deposed to by the plaintiff himself, or by any other person who is able to swear positively to the facts. It is *not* sufficient, in cases where the deponent is a person other than the plaintiff, for the deponent simply to state that he is able to *swear positively to the facts*.[382] He must go further than this and state that the facts *are within his own personal knowledge*.[383] Where no single person has personal knowledge of all the facts, affidavits by more than one person are required.[384] If the affidavit is deposed to by someone acting in a representative capacity such as the managing director of a company, the affidavit should also state that he has been *duly authorised* and this authorisation needs to be obtained.[385] In *Rees and Another v Investec Bank Ltd*, the Supreme Court of Appeal explained:[386]

> **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.**

Furthermore in *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another* it was held that:[387]

> **(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.**

The affidavit is a very simple one, but must comply with the provisions of rule 32(2) of the High Court Rules and Magistrates' Courts rule 14(2).[388] In terms of these rules, the person making the affidavit must:

1. verify the *cause of action and the amount claimed* (if any amount is claimed);
2. state that in his opinion there is *no 'bona fide' defence* to the action; and
3. state that notice of intention to defend has been delivered *solely for the purpose of delay*.

From a practical point of view, the words above are literally all that the plaintiff need say in his affidavit, and it is advisable to stick very closely to the words used in the rule.[389] 'Verify' does not mean that the plaintiff should expand on and explain his cause of action in more detail, and it certainly does not mean that he should provide any evidence in support of the allegations contained in the particulars of claim.[390] If he does, such evidence will be struck out.[391] No annexures to the affidavit are permitted,[392] except that where the claim is based on a liquid document, a copy must be annexed.[393]

5.3.5 Responding to an application for summary judgment

In terms of rule 32(3) of the High Court Rules and Magistrates' Courts rule 14(3), the *defendant* has two main options open to him upon receipt of the notice of application for summary judgment:

1. Give *security* to the plaintiff to the satisfaction of the registrar for any judgment, including costs, which may be given. This response only applies to a money claim, of course, although it may also be used where the claim is supported by a money claim in the alternative. If the defendant adopts this course of action, the application for summary judgment will be defeated, and the action will proceed as normal.[394] With this response, the defendant is showing that he is at least able to make payment; that inability to pay is not the reason for his defending the matter; and that the plaintiff will not ultimately suffer from the delay. The defendant is in effect, 'putting his money where his mouth is'. Security may be given by way of a bond of security obtained from a financial institution, or else the defendant's attorneys may stand surety. The charges levied by financial institutions for bonds of security are prohibitive unless the defendant

has fairly strong financial resources. An attorney would be foolish to stand surety unless he is placed in funds, or the defendant he is representing is a solid business or public institution.

2. 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.[395]The affidavit or oral evidence may be given by the defendant himself or by any other person who is able to swear positively to the fact that he has a *bona fide* defence.[396] The affidavit or oral evidence must disclose fully the nature and grounds of the defence and the material facts relied upon for the defence.[397] In other words, the defendant cannot get away with simply claiming that he has a valid defence; he must spell out, in broad terms, what that defence is. He does not, however, have to set out his defence in the same detail or provide evidence as will be required of him at the trial. At the summary judgment stage the onus on the defendant is not to satisfy the court that his defence will probably succeed, but merely that the facts sketched by him, if proved at the trial, would constitute a possible defence to the plaintiff's claim.[398] In other words, at the summary judgment stage, the court is not interested in whether the plaintiff's or the defendant's version of events is more probable. As long as the defendant's version, if proved true, would amount to a valid defence to the claim, it qualifies as a *bona fide* defence. The affidavit, therefore, need never provide more information than a plea, and as High Court rule 18(4) will not apply, the defendant may even get away with less, provided that the nature and grounds of his defence are disclosed. In general the defence raised must go to the merits of the application. Technical defences are not permitted.[399]

This is the favourite method chosen by defendants for opposing summary judgment applications, as furnishing security will incur bank charges or require that funds be tied up until the close of trial. On the negative side, the defendant must hurriedly set out his defence in writing on oath. If he departs from the contents of the affidavit, either in the plea or later in the witness box at trial, the plaintiff's legal representatives are in possession of superb material with which to cross-examine him.

If the defendant either gives security or satisfies the court that he has a *bona fide* defence, the court will give him leave to defend, and the matter will proceed as if there had been no application for summary judgment.[400] The time within which any further pleading must be filed is deemed to run from the date on which the court grants leave to defend. If the defendant does not provide security or satisfy the court that he has a *bona fide* defence, the court has the discretion to grant summary judgment against the defendant in favour of the plaintiff.[401]

5.3.6 The court hearing

The plaintiff may adduce no evidence other than that contained in the affidavit accompanying his application. That affidavit, of course, provides no information that is not contained in the particulars of claim. Neither party is permitted to cross-examine any person who gives evidence *viva voce* (orally) or by affidavit.[402] This means that the hearing is restricted to an argument in relation to whether – having regard to the affidavits or oral evidence – the defendant has failed to disclose a *bona fide* defence.

It can be seen then, that in all the circumstances, the odds are stacked against a court granting summary judgment. This is because summary judgment should not be granted lightly, and the courts will only deprive a defendant of the opportunity to defend in clear cases.[403] The courts are cautious and conservative in this matter because the summary judgment procedure does infringe against the *audi alteram partem* rule to a certain extent.[404]

5.3.7 The usual order

When summary judgment has been applied for and the plaintiff has received an affidavit from the defendant that discloses a defence, the plaintiff's attorney is unlikely to persist in attempting to obtain summary judgment. Usually, he will telephone the defendant's attorney to ask if he will agree that the *usual order* be requested by consent at the hearing. If the defendant's attorney agrees, only the plaintiff's attorney will attend court, and will ask for the usual order by consent.

The usual order in these circumstances means:

1. summary judgment refused;
2. the defendant granted leave to defend; and
3. costs to be reserved.

5.3.8 Special orders for costs

Generally, the court may make an order for costs that seems to it to be just.[405] If an application for summary judgment is opposed and then refused, the costs order awarded will usually be 'in the cause' (although the court has discretion in the awarding of costs and may depart from 'the normal' costs).[406] If the application for summary judgment is granted, costs of the application will usually be awarded to the plaintiff. The alternative is that the parties agree to the usual order by consent which means that costs will be reserved. A further alternative exists in terms of High Court rule 32(9) and Magistrates' Courts rule 14(10), which provides specific guidelines for the ordering of attorney and client costs in certain situations pertaining to a summary judgment application.

Where the plaintiff makes an application that does not fall within the categories of claims listed in terms of rule 32(1) of the High Court Rules and Magistrates' Courts rule 14(1), or where the plaintiff, in the opinion of the court, knew that the defendant was relying on a contention which would entitle him to leave to defend, the court may order that the action be stayed until the plaintiff has paid the defendant's costs. The court may, in addition, show its displeasure by granting attorney and client costs.[407] This situation may arise if the plaintiff and his attorneys know, from correspondence with the defendant prior to the issue of summons, that the defendant is going to allege the existence of a valid defence. The plaintiff may not agree with the validity of the defence, but the plaintiff's attorneys ought to know that in the absence of evidence to the contrary, the defence as alleged is capable of overcoming a summary judgment application. In requesting attorney and client costs, and after setting out the nature and grounds of his defence in an affidavit, the defendant will usually proceed to allege that the plaintiff knew of the existence of this defence, and will annex copies of the correspondence which support this contention. The purpose of this provision is to discourage tactical applications for summary judgment where the plaintiff does not really believe the defendant's claim to be bogus, but wishes to force the defendant to set out his defence on oath, which will provide his attorney with material for cross-examination at a later stage.

Because of the need to balance the stringent nature of summary judgment against the defendant's right to a hearing, a summary judgment application is relatively easy to defeat. This is especially so if the defendant is willing to put forward a bogus defence in order to keep the plaintiff at bay. For this reason, rule 32(9)(*b*) of the High Court Rules and Magistrates' Courts rule 14(10)(*b*) deal with the situation in which summary judgment is refused, but it subsequently becomes clear at the trial that the defence put forward was bogus or unreasonable, and that summary judgment

ought to have been granted. The court may show its displeasure with the defendant by ordering him to pay attorney and client costs for the entire action.

5.4 Shortcut judgment 3: Consent and confession to judgment

5.4.1 Judgment on confession in the High Court – rule 31

In terms of High Court rule 31(1), a defendant may *at any time* confess to judgment in respect of the whole or part of the plaintiff's claim as contained in the summons. There are, however, exceptions to this principle. It is not permissible to confess to judgment in an action for relief in terms of the Divorce Act[408] or in an action claiming nullity of marriage. Due to the highly *personal* nature of such claims, as well as their *importance* to the parties involved (because they affect the status of the parties), it is not desirable that such claims be granted without at least one of the parties appearing in court.

The way in which a defendant *confesses* to the plaintiff's claim is by signing a *written confession to judgment*. Rule 31(1)(*b*) makes it clear that the confession to judgment must:

1. be signed by the defendant *personally*; *and*
2. the defendant's signature must *either*

3. a)be witnessed by *his* attorney (in other words, *not* an attorney acting for the plaintiff); *or*

b)be verified by an affidavit deposed to by the defendant himself.

P38 Once it is signed, the confession to judgment is delivered to the plaintiff. In terms of High Court rule 31(1), the plaintiff may then apply in writing through the registrar to a judge for judgment in accordance with the confession. *Notice* to the defendant is not necessary.[409] The defendant's confession to judgment and the plaintiff's written request for judgment are placed before a judge *in chambers*, who decides whether or not to grant the judgment. Once the defendant consents in writing to judgment, he *cannot withdraw* his consent.[410]

Where the plaintiff's claim is based on a *single cause of action*, and the defendant confesses to judgment in respect of a *part* of the claim only, the plaintiff may not obtain judgment in accordance with the confession and must then proceed against the defendant in a separate action for the balance of the claim.[411] The reason is that the defendant will raise a special plea of *res judicata*.

In practice, a defendant will often agree to pay a plaintiff's claim in instalments. The plaintiff will insist that the defendant signs a confession to judgment, but will agree not to take judgment *unless* the defendant defaults in any of his payments. The fact that the confession to judgment is subject to an agreement between the parties does not affect its status as a confession to judgment. Its status is also not affected by the fact that the plaintiff may be required to lead evidence as to the agreement between the parties in order to obtain judgment in terms of the confession. Harms notes as follows:

> **Where the judge who deals with the application for judgment is aware, from the terms of the consent itself, that the confession may not be utilised by the plaintiff for the purpose of obtaining judgment unless the defendant has failed to comply with its terms, he may require to be satisfied by the plaintiff by means of an**

affidavit that the defendant has in fact failed to do so, and may require notice to be given to the defendant before granting judgment in terms of the confession.[412]

5.4.2 Judgment by consent in the Magistrates' Courts – rule 11

After summons has been issued in a Magistrates' Courts matter, the defendant may consent to judgment in terms of Magistrates' Courts rule 11. In terms of rule 11(1), a defendant has three options if he wants to consent to judgment *before* he has entered an appearance to defend the matter:

1. When the sheriff serves him with his copy of the summons, and shows him the original summons, he can sign the consent to judgment which will be included in the original summons. The sheriff will then take the *original* summons back to court.
2. He may sign the consent to judgment which will be included in *his copy* of the summons, and lodge it with the clerk or registrar of the court.
3. He may draft his own consent to judgment, which is similar to the consent to judgment included in the summons. This consent to judgment must then be signed by *himself* and *two witnesses*, whose addresses must also be given.

In terms of rule 11(4), a defendant may consent to judgment *after* he has entered an appearance to defend a matter by drafting his own consent to judgment, which must be similar to the consent to judgment which appears on the summons. The consent need only be signed by himself or *his attorney*.

By consenting to judgment in terms of rule 11, the defendant is able to avoid the judgment costs which would be incurred if he allowed the plaintiff to take judgment by default. The defendant will, however, have judgment taken against him.

A defendant may not consent to judgment with regard to actions for relief in terms of the Divorce Act 70 of 1979, however, nor actions for the nullity of a marriage.[413]

Note that payment into court, a procedure which was previously available as an alternative to consenting to judgment, has now been abolished.[414] An offer to settle in terms of rule 18 may be made instead.

PART 2: ACTIONS

B: Pre-trial procedures

D30

1Introduction

Once pleadings close, the issues in dispute between the parties are clear. The matter is not, however, ready for trial. There is usually a long wait, which may last several months, before the trial takes place. Having regard to what has been admitted and what has been placed in issue, the attorney must now establish what evidence is required to prove the allegations made in the pleadings in order to support the cause of action or defence, as the case may be. Having decided what evidence is required, the next step is to obtain it. It is also necessary to subpoena witnesses

to ensure their attendance at trial, collect all the documents that will be needed in evidence, as well as any exhibits, plans, photographs and the like. Note that there are few secrets in a civil trial. The procedures are all aimed at allowing the trial to run smoothly, avoiding adjournments and delays, and encouraging settlement by allowing both sides to have insight into the case which is being prepared by their opponent.

The preparations for trial include the following procedures:

> *Step 1*:*Setting the matter down* for trial.
>
> *Step 2*:The *discovery* process (i.e. the process of revealing documents and other recorded evidence for inspection by the other side so that neither side is taken by surprise at the trial, as well as ancillary procedures such as asking the other side to specify precisely which documents and other recorded evidence they intend to use at the trial).
>
> *Step 3*:*Technical and medical examinations* (in some matters, it may be necessary to determine the state of an object, which is crucial to the outcome of a trial, by means of a technical inspection, or to have a party claiming damages for bodily injuries medically examined to determine the nature and extent of his injuries).
>
> *Step 4*:Obtaining *further particulars* for the trial.
>
> *Step 5*:Having the necessary *subpoenas* issued for the witnesses who are to give evidence at the trial or who are to bring documents in their possession to the trial.
>
> *Step 6*:Arranging *for special evidence*, such as evidence by *expert witnesses* (the other side must be given advance warning so that they may consult their own experts); evidence contained in the form of *photographs, plans, diagrams or models* (the other side may be prepared to admit that they are accurate, which will save time at the trial); evidence *on commission* (in rare cases it may be possible to obtain evidence from a person who cannot or will not come to court to testify in person); evidence by *interrogatories* (i.e. the same as evidence *on commission*, except that a predetermined list of questions is put to the witness); evidence *on affidavit* (this is allowed only in rare cases, usually if the evidence is purely formal and will not be contested).
>
> *Step 7*:Arranging and attending a *pre-trial conference* (at which a final attempt is made to settle the matter, and final arrangements for the trial are discussed by the parties). Furthermore, depending on the practice in your division and the nature and complexity of the matter, attending judicial case-flow management meetings.
>
> *Step 8*:Final preparation for trial – *advice on evidence*.

2 Step 1: Set down

Close of pleadings is provided for in terms of rule 29 of the High Court Rules, and the identically worded rule 21A of the Magistrates' Courts Rules. These rules are self-explanatory and read as follows:

Pleadings shall be considered closed –

> **(*a*)if either party has joined issue[415] without alleging any new matter, and without adding any further pleading;**
>
> **(*b*)if the last day allowed for filing a replication or subsequent pleading has elapsed and it has not been filed;**

(*c*)if the parties agree in writing that the pleadings are closed and such agreement is filed with the registrar; or
(*d*)if the parties are unable to agree as to the close of pleadings, and the court upon the application of a party declares them closed.

2.1 Set down in the High Court

As soon as the pleadings are closed, the matter must be *set down* for trial. In other words, a trial date must be obtained from the court and the opposing party informed. The plaintiff as *dominus litis* has the right to apply for set down in the first instance. If he fails to do so, then any party may place the case on the roll for hearing.

There are no provisions dealing expressly with set down. Each division of the High Court has its own rules for setting a matter down. We shall examine the practice followed in the division of the High Court situated in KwaZulu-Natal as an example. Once the pleadings close, the plaintiff (usually) drafts a notice addressed to the registrar requesting him to place the matter on the awaiting trial roll (i.e. the long list of cases waiting to be allocated a trial date). This notice includes details of the case number and the parties to the action; the names of the advocates and the firms of attorneys representing the parties; and the number of days which the plaintiff estimates that the trial of the action will last. The average number of days requested in the High Court tends to be three days. This notice is filed with the registrar and served on the opposing side. In the Durban seat of the KwaZulu-Natal Division, the practice is for the person delivering the notice to enter the information in a book at the general office. If this is not done, the notice merely languishes on the court file. It is advisable, therefore, to send a responsible person to court with the notice. Once the registrar has placed the matter on the awaiting trial roll, the parties must wait for a trial date to be allocated.
Depending on how many days have been requested, a delay of anything between six months and two years may be expected, before a date is allocated for the trial of a matter although the trial backlog has abated somewhat in certain divisions since the introduction of judicial case-flow management. If the registrar is asked to set aside two days for the trial of a particular matter, a trial date will be allocated sooner than if five days are requested for the trial. However, an attorney may not 'jump the queue' by asking the registrar to allocate two days for the trial of a matter, when he knows that the particular matter will take five days to complete. In such a case, the matter will become *part heard*, and the attorney will probably have to wait *longer* to have the matter finalised than if he had set the matter down for five days in the first place. The court may also decide to penalise him with an adverse award of costs if it is clear that the matter ought to have been set down for a longer period. Also, if it is clear that the requested time is insufficient at the outset, the court may refuse to hear the matter and require that it be set down again.

The next thing that will happen is that the registrar will send the so-called *weekly list* to the firm of the attorney who set the matter down. The weekly list is simply a list of all the matters that are to be tried in that particular division during a particular period. The list is sent to all the attorneys involved in the matters listed (and to the parties themselves if they are not represented by attorneys), and will arrive by registered post at each firm at least six weeks before the date on which the matter is to be tried.[416] It is good practice to serve a notice of set down on the other side, immediately, which will indicate the dates which have been allocated for the trial, so that there can be no question that they are aware of the dates on which the trial will be held.

P22

2.2Set down in the Magistrates' Courts

In the Magistrates' Courts, the procedure is slightly different in that only one notice of set down is delivered, both requesting a trial date, and informing the defendant that the matter has been set down for trial on a particular date. The plaintiff must deliver this notice of set down to the defendant within 15 court days after pleadings have closed.[417] Unlike the list system employed by the registrar in the High Court, the clerk of the civil section in a Magistrates' Court assigns a court day on receipt of the notice, and immediately endorses the notice with the trial date, before returning the notice to the plaintiff for service on the defendant. At least 20 court days must elapse from the date on which the notice of set down is delivered to the date on which the trial begins.[418] There is usually no danger of short service as the courts appear to be congested and attorneys report delays of between six months and a year in some of the larger Magistrates' Courts. This will vary considerably, however, depending both on the size of the court and the efficiency of the staff at each court. The notice of set down operates to set down simultaneously for trial any counterclaim brought by the defendant.[419]

If the plaintiff does not deliver the notice of set down within the required 15-day period, the defendant may set the matter down for trial by delivering the required notice.[420] The defendant will do this if he has brought a substantial counterclaim against the plaintiff and wishes to proceed to trial.

The 2010 amendments to the Magistrates' Courts Rules have made provision for magistrates to take the initiative with regard to holding a section 54 conference.[421] The sub-rule (4) provides that on receipt of application for a trial date, the registrar or clerk must draw the court file and take it to a magistrate in order for the magistrate to determine whether a pre-trial conference in terms of section 54 is necessary.

Sub-rule (5) provides special provision for the set down of divorce hearings in the Regional Magistrates' Courts. Promoted by the written request of the plaintiff, the registrar sets the matter down for hearing at the time, place and date fixed by the registrar, provided the defendant has:

1. failed to deliver notice of intention to defend; or
2. failed to deliver a plea after receiving a notice in terms of rule 21B(2); or
3. given written notice to the plaintiff and the registrar or clerk of the court that he or she does not intend defending the action.

However, no notice of such request or set down need be served on the defendant.

Sub-rule (6) provides that when an undefended divorce action is postponed, the action may be continued before another court notwithstanding that evidence has been given.

D31

3Step 2: Discovery and related procedures

3.1 What is discovery?

Usually, a portion of the evidence in legal cases consists of *information* recorded in *documents*, on *computer disks* or in *other ways*. The purpose of *discovery*, as the name indicates, is to allow each party knowledge of, and eventual access to, documents in the possession of the opposing party that might be relevant to the trial. Each party then knows which documents are in existence

that may assist his case or his opponent's. This prevents the parties from being taken by surprise, eliminates disputes about issues where the evidence is incontrovertible,[422] and secures the fair trial of the action in accordance with the due process of the court.[423] In other words, the litigation process is meant to be a *transparent* one, unlike the popular perception created in films where lawyers are forever springing unpleasant surprises on their hapless opponents. The request for such information, and the manner in which such information is to be furnished, is governed by rule 35 in the High Court and rule 23 in the Magistrates' Courts. Rule 23 was amended in 2010 so as to replicate rule 35 in its entirety, with minor differences in wording and sub-rule numbering.[424]

Note that pre-action discovery in terms of s 50 of the Promotion of Access to Information Act 2 of 2000 ('PAIA') is not available to litigants as part of the discovery process in civil cases. It 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.[425] Furthermore, due to an exclusion contained in s 7 of PAIA, requests for access to records made for the purpose of litigation, after litigation has commenced, are regulated by the Rules of Court (rule 38) and not PAIA.[426]

P23

3.2Discovery procedures

3.2.1 Notice to discover

3.2.1(a) When must discovery take place?

Discovery is usually prompted by a *notice to discover* served on a party by the opposing party. The rules require that discovery should occur on oath,[427] and so the lists or *schedules* of the documents a party discovers are annexed to a *discovery affidavit*.[428] A party's discovery affidavit must be delivered within *20 court days* of the receipt of a *notice to discover* from the opposing party.[429] Unless the leave of a judge or magistrate is first obtained, discovery may not be requested before the close of pleadings.

It is *not only* in response to a *notice to discover*, however, that a party is obliged to deliver a discovery affidavit to the opposing party. If a party *fails* to call for discovery (by serving a notice to discover), the action will reach a point at which the opposing party will be *obliged* to deliver a discovery affidavit to the other party without the prompting of a notice. In terms of rule 37(1), if a party has not yet discovered *by the time he receives notice of the trial date* (in other words, the weekly list of cases for trial sent out by the registrar), then he must deliver his discovery affidavit to the other side *within 15 court days*.

The implication of rule 37(1) is that each of the parties must discover, even if they have not *specifically been requested* to do so by the opposing party. In other words, rule 37(1) provides for *automatic discovery*. There is no corresponding Magistrates' Courts provision, however, which means that although a party may discover voluntarily, discovery in the Magistrates' Courts is only mandatory on the receipt of a notice to discover from the opposing side. The parties may be penalised by way of a costs order, however, if they fail to call for and to make discovery.[430]

3.2.1(b) What must be discovered?

A notice to discover contains a request for the opposing party to discover on oath:

1. all documents and tape recordings which relate *to any matter in question* in the action;
2. which the other side *have* in their possession or control when the notice is delivered, or which they *have at any time in the past had* in their possession or control.[431]

The term, *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.**[432]

In other words, compact disks, computer disks, computer hard drives, videotapes, and photographs would all fall within the meaning of a 'tape recording' as used in High Court rule 35, and rule 23 of the Magistrates' Courts Rules. These rules therefore give the expression, 'tape recording', an *extended meaning*.[433]

Note that it is *not only* the documents and tape recordings currently in a party's *possession or control* that must be discovered, but also those which have been under that party's control *at any time in the past*.[434] Documents and tape recordings in a party's possession or control include those that are in the possession of a party's attorney. They do *not include*documents that are in the possession or control of one of the *witnesses*, however, unless they were at one time under the control of the party. A witness who is not party to the proceedings may not be compelled to discover, but only to bring the documents to court under a subpoena *duces tecum*.[435]

Further, a party may not limit his discovery to the documents and tape recordings he intends to use in support of his case at trial, or merely to those favourable to his case. *All* documents which relate *to any matter in question in the action* must be discovered, whether they help or hinder a party's case. The purpose of this is to establish complete transparency and thereby avoid the litigation dragging on for no good reason. Whether or not a document is relevant is determined with reference to the issues in dispute, as they are disclosed in the pleadings.[436] A document will be relevant if it contains information that might directly or indirectly advance a party's case or damage that of his opponent. It will be indirectly relevant if the information may 'fairly' lead a party to a 'train of enquiry' that may advance his case or damage that of his opponent.[437] The test for relevance is accordingly generous. There is a small category of (mostly) *privileged* documents, however, which the opposing party is not entitled to *inspect*. These documents do not form part of the discovery affidavit and are omitted from the schedule.[438]

P24

3.2.1(c)The discovery affidavit

High Court Form 11 and Magistrates' Courts Form 13 prescribe what the discovery affidavit referred to in rule 35(2) and 23(2), respectively, must look like. According to Forms 11 and 13, there are two schedules to a discovery affidavit.

The First Schedule lists those documents and 'tape recordings' (extended meaning) which are *in the possession* of the deposing party at the time the discovery affidavit is deposed to. The First Schedule is divided into two parts.

The *first part* of the First Schedule contains those documents and 'tape recordings' (extended meaning) that the deposing party has no objection to being inspected by the opposing party. Each

document listed in the schedule should be identified by a description which will usually include its date. It is also customary to number each document and indicate whether or not the document is an original or a copy. For example:

1. 2/1/03 Letter of plaintiff to defendant – copy
2. 7/1/03 Letter of defendant to plaintiff – original … etc.

It appears that it is obligatory to list documents in chronological order, which prevents an attorney from 'burying' a document. It is certainly not 'sufficient for a party in custody of a large volume of documentation to point to a storeroom and give access thereto to his adversary with an injunction to inspect and copy to his heart's content'.[439] Where there is a large number of documents of the same type, such as invoices, which it would be pointless and time-consuming to itemise, they are 'deemed to be sufficiently identified' if described 'as being one of a bundle of documents of a specified nature, which have been initialled and consecutively numbered by the deponent.'[440] In this case, the bundle rather than the individual documents that constitute it would be described, for example:

> **'Bundle of plaintiff's current account bank statements from 1/2/98 to 1/2/03 – originals.'**

Documents must therefore either be described individually, initialled and consecutively numbered, or labelled as 'bundle of documents' of a special nature. In some jurisdictions the bundles must be initialled and consecutively numbered by the deponent.[441]

The *second part* of the First Schedule contains those documents and 'tape recordings' (extended meaning) which the deposing party objects to being inspected by the opposing party. There may, in theory, be other valid grounds for objection, but in practice, the reason will almost certainly be that the documents are *privileged* on the basis of the *rules of evidence*. The following list is not exhaustive, but includes examples of documents that are privileged:

1. A document implicating a party in a criminal offence, which is protected by the *privilege against self-incrimination*;[442]
2. A document written by one spouse to another spouse, which is protected by *marital privilege*;[443]
3. A written offer made *without prejudice* with the intention of settling a matter; and[444]
4. A document written by an attorney or advocate to his client, or vice versa, which is protected by *legal professional privilege*.[445]

In theory, documents for which privilege is claimed must be separately listed and identified in the schedule, and the grounds for each particular privilege specified.[446] This is not the case with the privileged documents specifically referred to in rule 35(2) or rule 23(2) of the High Court and Magistrates' Courts, respectively, namely: statements taken from witnesses for the purposes of the proceedings, and communications between attorney and client, and attorney and advocate, which, as indicated below, must be excluded from the schedules altogether. It must be said, however, that in practice this rule is observed in the breach, and it is extremely rare in both the High Court and Magistrates' Courts to see any privileged documents of whatever nature actually listed and itemised. The second part tends instead to consist of a standard generic list of the general types of documents which are privileged, without specifically referring to or identifying any document in particular.[447] Although this practice contravenes the rules, it is rarely challenged, either because of habit on the part of practitioners, or an implicit gentleman's agreement not to have to identify privileged documents. The fear here would be that the

opposing side might gain a tactical advantage from merely knowing of the existence of privileged communications at some point, even if they do not have access to the actual contents.

The Second Schedule lists those documents and 'tape recordings' (extended meaning) which were in the possession of the deposing party at one time, but are now no longer in the possession of that party. Second Schedule documents will, in theory, include the original copies of all letters dispatched by the deposing party. In practice, correspondence tends not to be separated in this manner, but is entered in the First Schedule, and is merely listed as a copy if the letter has been dispatched to someone else (unless no copy exists). Less commonplace documents that are no longer in the deposing party's possession, such as agreements, are the type of documents that tend to be listed in the Second Schedule.[448]

In terms of rule 35(2) of the High Court Rules or rule 23(2)(*c*) of the Magistrates' Courts Rules, the only documents and 'tape recordings' which need not, and indeed *must not*, be listed in the schedules attached to a discovery affidavit are the following:

1. Statements of witnesses taken for the purposes of the proceedings;
2. Communications between attorney and client and between attorney and advocate; and
3. Pleadings, affidavits and notices in the action.

P25

3.2.1(d)Remedies for failure to discover

3.2.1(d)(i) Notice to inspect undisclosed documents – rule 35(3) (High Court)/rule 23(3) (Magistrates' Courts)

Rule 35(3) of the High Court Rules and rule 23(3) of the Magistrates' Courts Rules set out the procedural steps that may be taken if the opposing party has *not* discovered certain documents or 'tape recordings' (extended meaning) that are relevant to the case. In terms of this rule, a written notice must be delivered to the opposing party in which that party is required:

either

1. to make the undiscovered documents or 'tape recordings' (or copies of them) available for inspection; *or*
2. to state on oath within 10 days that such documents are not in his possession, in which event he shall state their whereabouts if known to him.

The notice may relate to a *particular* document that the party giving notice knows to exist, or to a *category* of documents, such as the bank statements of a business, which reasonably may be presumed to exist, but of which the party giving notice has no actual knowledge.

It goes without saying that it is unethical, unlawful, and a breach of an attorney's duty as an officer of the court knowingly to assist a client to *lie under oath*. In other words, if you know that your client has a document in his possession, you would be very foolish indeed to assist him in making a statement under oath that such document is not in his possession.

3.2.1(d)(ii) Document or tape recording may not be used – rule 35(4) (High Court)/rule 23(4) (Magistrates' Courts)

The consequences to a party of failing to discover a document or 'tape recording' (extended meaning) are set out in rule 35(4) of the High Court Rules and rule 23(4) of the Magistrates' Courts Rules. That party *may not*, save with the leave of the court, use the undiscovered

document or 'tape recording' for any purpose at the trial. The opposing party, however, *is entitled* to use that document or 'tape recording' at the trial.

3.2.1(d)(iii) Application to compel discovery – rule 35(7) (High Court)/rule 23(8) (Magistrates' Courts)

Should a party fail to discover, his opponent may make an *application* to court under rule 35(7) of the High Court Rules and rule 23(8) of the Magistrates' Courts Rules to compel discovery. At the hearing of the application to compel discovery, the court will order the recalcitrant (uncooperative) party to deliver a discovery affidavit before a certain date. If the discovery affidavit is not delivered by that date, a further application may be made to court to dismiss the claim or strike out the defence of the recalcitrant party. Note that the dissatisfied party need not send a notice in terms of rule 35(3) of the High Court Rules and rule 23(3) of the Magistrates' Courts Rules before making an application to compel discovery.[449]

P26

3.2.2Notice to inspect

Having received the opposing party's discovery affidavit, a party will in all likelihood wish to inspect some of the documents which are described in it. In terms of rule 35(6) of the High Court Rules and rule 23(6) of the Magistrates' Courts Rules, one party may deliver a notice to another party, requiring that party to produce for *inspection* any of the documents or 'tape recordings' (extended meaning) which that party has *discovered* in his discovery affidavit. The notice must be in accordance with Form 13 and Form 15 of the High Court and Magistrates' Courts Rules, respectively.

P27

Rule 35(6) (High Court) and rule 23(6)(*b*) (Magistrates' Courts) provide that the party upon whom the notice to produce for inspection is served, has five court days within which to deliver a notice to inspect documents, which is essentially a *reply* to the notice to produce for inspection. The notice to inspect documents must be in accordance with Form 14 (High Court) and Form 15A (Magistrates' Courts), and must state a time, which is within five court days after the delivery of the notice, when the documents or tape recordings (extended meaning) listed in the notice to produce for inspection may be inspected. The inspection must take place at the office of the attorney representing the party sending the notice to inspect documents, or, if that party is not represented by an attorney, at a convenient place set out in the notice. Where the documents to be inspected are banker's books, or other books of account, or books in constant use for the purposes of any trade, business or undertaking, they will normally be inspected at the place at which they are usually kept.

The party receiving the notice to inspect documents will be entitled to inspect the documents and 'tape recordings' for a period of five court days from the time stipulated in the notice to inspect documents. He may inspect the documents on any one or more of such days during normal business hours, and may make copies or transcriptions of them.

In terms of rule 35(6) of the High Court Rules and rule 23(7)(*b*) of the Magistrates' Courts Rules, if a party fails to produce a particular document or 'tape recording' (extended meaning)

for inspection, then that party will *not* be permitted to use that document or 'tape recording' at the trial unless he convinces the court that there was *good cause* why the document or 'tape recording' was not produced.

The procedure provided in rule 35(7) of the High Court Rules and rule 23(8) of the Magistrates' Courts Rules may be used to compel the other party to produce a document or 'tape-recording' referred to in the discovery affidavit for inspection. The aggrieved party may apply to court, which may order compliance by the other party. Failing such compliance, the court may dismiss that party's claim or strike out that party's defence.

In practice, when there are not many documents listed in a discovery affidavit that a party wishes to see, that party's attorney may telephone or write a letter to the opposing party's attorney, requesting him to despatch photocopies of the documents. The requesting attorney will tender the reasonable cost of the copies.

P28

3.2.3Notice to specify

The rules also provide a means for ascertaining exactly which documents or 'tape recordings' the opposing party intends to *use at the trial*. In terms of rule 35(8) of the High Court Rules and rule 23(9) of the Magistrates' Courts Rules, 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 the notice to specify must, not less than 15 court days before the trial, deliver a notice to the party who sent the notice to specify, in which he:

1. Specifies the dates of, and parties to, and the general nature of, any documents or 'tape recordings' (extended meaning) which are in his possession and which he intends to use at the trial of the matter; and
2. Specifies any particulars whereby those documents or 'tape recordings' which are not in his possession and which he intends to use at the trial of the matter, may be identified, as well as the name and address of the person in whose possession such documents and 'tape recordings' are.

The *notice to discover* (rule 35(2)) results in the delivery of the discovery affidavit, which contains a comprehensive list of all the documents which the opposing party has or has had in his possession. To narrow the focus on the most important documents required for trial, the *notice to specify* is used (rule 35(8)). The response to the notice to specify will reveal the chain of documents (and 'tape recordings') upon which the opposing party's case is based, allowing the requesting party to prepare an adequate response. A point which is often missed by practitioners is that this rule requires discovery *beyond* that which is contained in the discovery affidavit of the party receiving a notice to specify: a rule 35(8) (High Court) or rule 23(9) (Magistrates' Courts) notice not only requires information about documents that are currently in the possession of the opposing party, or those which were in his possession in the past, it also requires information about documents that have *never* been in the opposing party's possession. These would include documents which are in the possession of *third parties*, but which the opposing party wishes to make use of at the trial (by means, for instance, of a subpoena *duces tecum*).[450] Also, in terms of this sub-rule, the party receiving the notice to specify should disclose in his reply any documents of the *opposing party* that he wishes to use at the trial. The party to whom notice has been given

is not obliged, however, to inform the opposing party of privileged documents, which he might use to attack the evidence of witnesses that the opposing party has called.[451] A further point is that this notice may be delivered at any time after close of pleadings, and is not contingent (i.e. dependent) on the discovery affidavit. In practice, this notice is often delivered together with all the other discovery notices and then completely ignored by both parties.

Occasionally, a response to the effect that the opposing party intends to use all the documents disclosed in his discovery affidavit is received. This would be adequate if indeed it were the case, but objection should be raised if the opposing party attempts thereafter to lead evidence of documents in the possession of third parties or of the party giving notice to specify at the trial. There is no specific sanction for the non-observance of this sub-rule, but the court may make an order to prevent any party being prejudiced thereby.[452] The prejudice, it is submitted, would include both the loss of the tactical advantage provided by the sub-rule, and the possibility of being taken by surprise. Enforcing the rule by way of rule 30A in a High Court matter, or rule 60(2) in the Magistrates' Courts, is another possibility.[453]

P30

3.2.4Notice to produce

Rule 35(10) of the High Court Rules and rule 23(11) of the Magistrates' Courts Rules set out the procedure whereby a party may oblige another party to produce the original of a discovered document at the hearing of the matter. In other words, a party will use this procedure if he wants the opposing party to bring one of that party's documents or 'tape recordings' to the trial. The reason a party would want the opposing party to do this, is because he wishes to use that document or 'tape recording' in support of *his own case*. By following this procedure, a party is entitled, at the trial, to hand in the document or 'tape recording' concerned, *without calling any witnesses*. The document or 'tape recording' will be received into evidence as if it had been produced in evidence by the person to whom the rule 35(10) or 23(11) notice was given. A notice to produce may not be used to obtain documents currently in the possession of third parties that have been discovered for the reason that they were once in the possession of the party making discovery.[454] The approach often used in practice of sending all the discovery notices together (including the notice to produce) at the start of the discovery process, preceding the opposing party's discovery affidavit as it does, usually requires the opposing party to produce *all* the originals of *all* the documents discovered. This mechanical approach is hardly what the rule envisages. Neither do the parties who use this approach employ the sub-rule in a useful fashion. There is no need to use a 'blanket' approach in order to avoid missing a document since although the notice should normally be delivered at least five days before the trial, there is provision in the sub-rule for the court to allow notice to be given at the trial itself.

P29

3.2.5Notice to admit

For a document to form part of the evidence at a trial, a witness who has knowledge of the document, and who is able to identify it for the court, must introduce the document. Rule 35(9) of the High Court Rules and rule 23(10) of the Magistrates' Courts Rules provide a method of avoiding this in certain circumstances. They provide a procedure whereby one party may call upon the other party to admit that certain documents or 'tape recordings' (extended meaning) were properly executed and are what they purport to be. A *notice to admit* is served on the opposing party, who then has 10 court days to make up his mind. Unless the party to whom the

notice was sent specifically states that the documents or 'tape recordings' are not admitted, the party who sent the notice is entitled to produce the documents or 'tape recordings' specified in the notice at the trial *without having to 'prove' them*.

For example, if one of the documents concerned is a contract between two extraneous parties, it may be submitted in evidence without having to call the parties who entered into the contract, to attest to the fact that this was the contract entered into by them. It will be assumed, in other words, that the contract is what it purports to be. This rule is especially useful when the documents are in the hands of third parties such as municipalities, where thousands of official documents are kept on file. It saves the filing clerk – who has the document in his *possession* and is able to identify it but has no direct knowledge of its contents – from making a pointless (and expensive) trip to court under a subpoena *duces tecum*, merely to confirm that the document in question comes from his files. Should a party unreasonably refuse to admit a document, the court may order that party to pay the costs of its proof. Note that a party who admits a document under this sub-rule is not precluded (prevented) from challenging the veracity (truth) or accuracy of the document, as it is the identity of the document, not its contents which is admitted.[455]

4 Step 3: Medical examinations and technical inspections

Preparation for trial also involves the examination of evidence other than documents or recordings. This evidence will vary considerably, from plans, diagrams and photographs, to other physical pieces of evidence of whatever kind. Examples could include anything from a damaged motor vehicle to defectively manufactured concrete blocks. Examining evidence of injuries is also necessary in respect of personal injury claims such as those arising out of motor vehicle collisions. The rules of court provide pre-trial procedures for examining evidence of this nature that resides in the hands of the opposing party. The relevant rules applicable in the High Court and Magistrates' Courts, respectively, are rule 36 of the High Court Rules and rule 24 of the Magistrates' Courts Rules. These two rules are virtually identical in all but minor detail, with the numbering of the sub-rules closely, if not exactly, corresponding in each case. The comments in relation to these rules set out below, apply equally to the practice in both courts, but to avoid confusion we shall concentrate on the High Court rule 36, noting any differences that exist in respect of rule 24 of the Magistrates' Courts rules as they arise.

4.1 Medical examinations – claim for bodily injuries

Rule 36 of the High Court Rules and rule 24 of the Magistrates' Courts Rules provide identical procedures for use by a defendant who is being sued for damages for personal injuries suffered by the plaintiff. The two sets of rules are almost identical on this issue and only the High Court rule will be referred to at this juncture, so as to avoid overburdening the text. The procedure involves an examination of the plaintiff by a suitable medical practitioner. The purpose of the procedure is to enable the defendant to ascertain the extent and severity of the plaintiff's injuries, mainly for the purpose of assessing whether or not the quantum (value) of the plaintiff's claim is reasonable. In certain circumstances it may be possible to deduce the manner in which the injury occurred from the nature of the injuries.

4.1.1 Arranging the examination

In terms of rule 36(1) of the High Court Rules, any party to proceedings in which damages or compensation in respect of *alleged bodily injury* is claimed has the right to require any party claiming such damage or compensation, *whose state of health is relevant* to the determination of

such damage or compensation, to submit to a medical examination. Rule 36(5A) also provides for a party claiming damages as the result of the death of another person to undergo a medical examination where his own medical condition is relevant to determining the damages. The damages in a loss of support claim such as this are determined by an actuarial assessment, based on the ability to work and the life expectancy of the claimant, hence the need for an examination. The procedure for the examination is set out in rule 36(2) which reads, *inter alia*, as follows:

P32

Any party requiring another party to submit to such examination shall deliver a notice specifying the nature of the examination required, the person or persons by whom, the place where and the date (being not less than fifteen days from the date of such notice) and time when it is desired that such examination shall take place, and requiring such other party to submit himself for examination then and there. Such notice shall state that such other party may have his own medical adviser present at such examination, and shall be accompanied by a remittance[456] in respect of the reasonable expense to be incurred by such other party in attending such examination …

The expense envisaged by the rule is based on the scale of witness fees in a civil suit and includes transport costs and loss of income. The rule makes provision for special transport costs in the case of someone who is unable to move unassisted, including the use of a motor vehicle and a person in attendance. The loss of income is restricted to an amount of R75 a day. The expenses involved in holding the examination become 'costs in the cause'[457] unless the court directs otherwise.

Although rule 36(2) is silent on the question, it seems that the *legal adviser* of the person being examined *is also entitled* to be present at the examination.[458]

The rule does not indicate at which stage of proceedings a notice under rule 36(1) should be delivered, but the usual time is after close of pleadings in preparation for trial. However, a defendant wishing to assess the quantum of a plaintiff's claim in order to make a prompt settlement offer, may well wish to have the plaintiff's injuries assessed as early as the time he receives the summons.[459] In certain cases, a *second* medical examination may be necessary, which is provided for by rule 36(5).

4.1.2 Objecting to the examination

The party who is being requested to submit to the examination may, within five[460] court days of receiving notice of the proposed examination, object to the examination on the following grounds set out in rule 36(3):

1. The nature of the proposed examination;
2. The person or persons by whom the examination is to be conducted;[461]
3. The place, date or time of the examination (in this case he must suggest an alternative date, time or place); and
4. The amount of the expenses tendered to him (in this case he must give details as to why he should be entitled to an increased amount).

Should the party fail to object within the five-day period, he is deemed to have agreed to the examination on the terms set out in the notice. Where objection is made and the party who has

delivered the notice demanding the examination regards the objection as unfounded, he may, on notice, make application to a judge to determine the conditions upon which the examination, if any, is to be conducted.

4.1.3 Report on the examination

In terms of rule 36(8)(*a*), the party calling for the examination must ensure that a full written report is compiled by the person who carries out the examination. The report must detail *the results of the examination*, as well as the *opinions formed* by the person who conducted the examination. A full copy of the report must be made available to any party to the matter who requests it.

4.1.4 Other medical reports, records, X-rays, etc.

In terms of rule 36(4), a party to proceedings in which *damages or compensation* in respect of an alleged *bodily injury* is claimed, may require the party who is claiming the damages to make available any medical reports, hospital records, X-rays, or similar documentary information, which is relevant to the assessment of such damages. The party claiming the damages may also be requested to provide copies of the said documents. The request is made by way of a notice in writing, and the documents must be delivered within 10 days of service in terms of the High Court Rule, and within 15 days in terms of the corresponding rule 24(4) of the Magistrates' Courts Rules.

4.2 Technical inspection – claim relating to object

Rule 36(6) deals with the 'inspection or examination' of any object, the 'state or condition' of which is relevant to the action. This includes both movable and immovable property, and may include anything from a motor vehicle involved in a traffic collision to an apartment in a block of flats, which is the subject of a building dispute. The rule has even been used for objects such as tape recordings that are usually thought to form the subject of discovery under rule 35.[462] The rule also provides for the examination of a 'fair sample' where the case concerns a large quantity of objects of the same kind, and it is inconvenient to examine each and every individual item, for example, a defective batch of bricks. Examination under this rule may only be required of a party that has the object in his possession or under his control, and not if the object is under the control of a third party.[463]

4.2.1 Arranging the inspection

The party requiring inspection must give written notice to the party in possession of the object, requiring him to make it available for inspection for a period of 10 days from the date of receipt of the notice. This may happen at any time during the course of proceedings, and not only in preparation for trial. In terms of the corresponding rule 24(6) of the Magistrates' Court Rules, however, the notice may not be given later than 15 days before the hearing.[464] During the examination, the object remains in the possession, and under the control, of the party to whom the notice has been sent.[465]

4.2.2 Objecting to the inspection

In terms of rule 36(7), the party who is called upon to submit the particular object for inspection or examination may ask the party requesting it to specify the nature of the inspection or examination. Rule 36(6) refers to both 'inspection and examination' which clearly implies that scrutiny of the object may be more than visual,[466] and may include testing, experimentation or

dismantling. If the inspection or examination will affect the object, however, causing material prejudice to the party who is being asked to submit it for inspection or examination, then that party may *refuse* to submit it for inspection or examination. The party possessing the object will be prejudiced if it is destroyed, damaged or its value reduced as a result of the examination. In the event of such a dispute, either party may, on notice to the other party, refer the matter to a judge,[467] who has a discretion to 'make such order as to him seems meet' and will decide whether or not the object may be inspected or examined.

4.2.3 Report on the inspection

Rule 36(8) applies in the case of the inspection or examination of objects, as well as the examination of persons. As stated earlier, the person who carries out the inspection or examination is required to complete a written report, which the party who caused the inspection or examination to be made, must furnish to all other parties on request.

4.3 Magistrates' and High Court procedures compared

Medical examinations and inspection of things in Magistrates' Courts matters are dealt with by Magistrates' Courts rule 24. As noted above, rule 24 of the Magistrates' Courts Rules corresponds very closely to rule 36 of the High Court Rules, and the few differences that exist have been discussed in comparison with the High Court situation (dealt with above). Briefly, however:

1. Magistrates' Courts rules 24(1), (2), (3), (5) and (8) relate to *examination of persons*;
2. Magistrates' Courts rule 24(4) relates to *medical reports, hospital records, X-rays*, etc, and
3. Magistrates' Courts rules 24(6), (7) and (8) relate to *inspection and examination of objects*.

5 Step 4: Request for further particulars for trial

5.1 What are further particulars for trial?

We have noted in the section on further particulars during pleadings[468] that a party may no longer request further particulars before replying to a particular pleading. This procedure was abolished as of 1 January 1988 in the High Court and 15 October 2010 in the Magistrates' Courts. Apart from the limited exceptions explained in the section on further particulars above,[469] further particulars are now permitted only for the purpose of preparing for trial, a procedure which is now available in both the High Court and Magistrates' Courts.[470] Now the only 'further particulars' that may legitimately be requested in terms of rule 21(2) of the High Court Rules or Magistrates' Courts rule 16, are those particulars which are *strictly necessary* to enable the party requesting them to *prepare for trial*.

The purposes of further particulars for trial are:

1. to prevent any surprises at the trial; and
2. to inform a party, with greater precision, what the opposing party is going to prove in order to enable him to prepare his case.

These purposes do *not* include attempting to tie the other party down, thereby unfairly limiting his case.[471]

For anyone unfamiliar with litigation involving complex matters, there are at least two considerations that would seem to render the exercise of requesting further particulars at this stage in the action procedure pointless. Firstly, in terms of rules 18(4) and 6(4) of the High Court

and Magistrates' Courts, respectively, pleadings should already contain sufficient information to enable the opposing party to reply. This means that all the *facta probanda* relating to the claim and defence should be known by this stage of the proceedings. Secondly, the discovery and examination procedures of High Court rules 35 and 36 and the corresponding Magistrates' Courts rules 23 and 24 allow the requesting party to obtain certain details about the evidence (*facta probantia*) that will be presented at the trial by the other party. Further particulars for the purpose of trial, however, may be requested from sources other than pleadings, and may ask limited questions about the opposing party's sources of evidence that go beyond discovery or examination provided for in rules 35 and 36.

Although the pleadings may be a starting point for requesting further particulars for the purposes of trial, other portions of the record – such as expert summaries and evidence from earlier hearings in the action – may also be used.[472] With regard to the kind of information that may be elicited from the opposing side, the information furnished under this heading is a little more generous than that permitted when further particulars are requested in order to enable a party to plead. The information elicited may include evidence if a party would otherwise be prejudiced in not knowing the case he had to meet.[473] This does not mean that a party is entitled to know the precise nature of the evidence the other side is going to lead at trial or the kind of information that might be elicited from cross-examination.[474] He is merely entitled to such particulars as are necessary to put him in a position to prepare for trial and to prevent his being taken by surprise due to evidence given against him which he could not reasonably have anticipated would be produced.[475] In short, the request must be in respect of information, without which the party requesting would be embarrassed at trial. An example of the kind of information that may be sought by way of further particulars for the purpose of trial is information with regard to a spouse's business interests in a divorce matter. This information is not normally necessary to enable a party to plead, but may well be necessary to enable a party to direct his discovery and prepare evidence in relation to the matter of the division of a joint estate.

5.2 The procedure

In terms of High Court rule 21(2) and Magistrates' Courts rule 16(2)(*a*), any party to an action may, *after the close of pleadings and not less than 20 court days before the trial*, deliver a notice requesting further particulars. In High Court matters, the request for further particulars must be signed by *both* an attorney *and* an advocate, unless, of course, the party is representing himself, or the attorney is entitled to appear in the High Court. In the Magistrates' Courts, only an attorney or a party who is representing himself need sign.

The party who has been asked to furnish the further particulars for trial, must furnish them *within 10 days* of receiving the request, failing which the party requesting the further particulars may make an application to court to compel their delivery.[476]In some divisions, where the order compelling the providing of further particulars is granted, it takes the form of a blanket order for compliance with the request. In other divisions, for example, in KwaZulu-Natal, the court orders compliance with only the items in the request for particulars that has properly been made.[477] If a party makes his request out of time, he may not make application to compel the opposing party to supply the further particulars requested.

A party who requests further particulars which are not *strictly necessary* to enable the party to prepare for trial, may be punished by an adverse order as to costs.[478] Rules 21(5) and 16(5) of the

High Court and Magistrates' Courts Rules, respectively, clearly seek to discourage 'fishing expeditions'.

In practice, some of the information which would usually be obtained by way of a request for particulars for the purpose of trial may be sought at a rule 37 (pre-trial) conference, for example, when admissions are sought. Nevertheless, as this information might be used to direct discovery, it is probably better to obtain this information sooner rather than later.

6 Step 5: Subpoena of witnesses

The method a party uses to obtain the attendance of a witness at court is by serving a subpoena on him. A subpoena is really just a notice, in the form of a court order, to a witness telling him that he is required to give evidence in court, under threat of penalty.[479] The rules provide regulations relating to the service of these documents together with payment for transport and witness fees.

6.1 Subpoenas in the High Court

6.1.1 Normal subpoena

Rule 38 of the High Court Rules deals with the subpoena of witnesses to give evidence at a High Court trial and should be read with s 35 of the Superior Courts Act[480] which deals with the manner of securing attendance of witnesses.[481]

Whichever party wants to subpoena a witness to give evidence on his behalf simply draws up a subpoena which must correspond to Form 16 of the First Schedule to the High Court Rules. The subpoena is then issued by the registrar and served on the witness by the deputy sheriff.

Any party in a matter which is due to be tried before the court, has a *right* (and need not first obtain the leave of the High Court) to have a subpoena issued and served on any witnesses the party believes may be in a position to give evidence on his behalf, or may possess documents or other physical pieces of evidence which a party thinks may be useful to his case. This right is somewhat limited in that the court may set aside a subpoena if it is *certain* that the witness who has been subpoenaed will be completely unable to assist the court in its determination of the issues raised at the trial.[482] Previously, the court's power to set aside a subpoena if it is satisfied, as a matter of certainty, that the subpoena is unsustainable was derived from its inherent jurisdiction to regulate its own process and avoid abuse of its process, a power which of course it still enjoys. However, the power to set aside a subpoena is now contained in s 36(5) of the Superior Courts Act.[483] A party may not use a subpoena to harass his enemies and drag them to court for no reason.[484]

A subpoena drafted in accordance with Form 16 informs the witness *when* and *where* he has to appear to give evidence, and *on whose behalf* he will be required to give evidence.

6.1.2 Subpoena *duces tecum*

In terms of rule 38(1)(*a*) a witness may be required to bring with him to court any *deed, instrument, writing* or *thing* that is stipulated in the subpoena. A subpoena that contains a direction to the witness that he must bring a stipulated deed, instrument, writing or thing with

him to court is known as a subpoena *duces tecum*. (The Latin words *duces tecum* mean 'bring with you'.)

A subpoena *duces tecum* is an important procedural tool. It is the method by which a party is able to obtain access to documents or other items of physical evidence that may be important to his case, when these items are in the possession of persons *who are not parties to the case*. A subpoena *duces tecum* thus supplements the discovery and examination procedures set out in rules 35 and 36, which are used to obtain documents and other evidence in the possession of the other parties to the action. A witness who claims that the document in question is privileged must still comply with the subpoena but must satisfy the registrar or the court that his claim of privilege is legally justified.

Rule 38(1)(*b*) of the High Court Rules provides that any witness who has been required to produce any deed, document, writing or tape recording by means of a subpoena *duces tecum*, is required to *hand over* that deed, document, writing or tape recording to the registrar *as soon as possible* after he receives the subpoena. The reason for this is to allow the parties to inspect whatever it is and make copies or transcriptions if they wish so that they are able to prepare for the trial. If the witness simply brought the items with him on the day of the trial, the parties would inevitably ask for an adjournment of the trial in order to allow them time to examine the items, and assess the impact of this new evidence on their respective cases. By providing that the items must be handed to the registrar and may be examined by the parties before the date of the trial, rule 38(1)(*b*) prevents unnecessary delays in the trial of the matter. Once the parties have had the opportunity of examining the items handed over to the registrar by the witness, the items, whatever they may be, will be returned to the witness.

6.1.3 Failure to comply with a subpoena

Form 16 of Schedule 1 to the High Court Rules (i.e. the form for a High Court subpoena) includes a warning directed at the witness, setting out the penalty for failure to obey a subpoena. This is a fine of R300, or three months' imprisonment. Section 35 of the Superior Courts Act sets out in detail the consequences if a witness fails:

1. either to come to court or to remain at court in compliance with the provisions of a valid subpoena; or
2. fails to produce any document or thing in accordance with a valid subpoena *duces tecum* (although this may be dealt with more properly under s 36 of the Superior Courts Act);[485] or
3. deliberately evades service of the subpoena.

Section 35(2) empowers the court to issue a warrant for the arrest of such a witness. Section 35(3) allows the court to order such witness to be detained 'with a view to securing his or her presence as a witness or production of any document or thing …' In terms of s 35(4), the court may conduct a summary enquiry into the failure to obey a subpoena to attend any proceedings as a witness or to produce any document or thing by such a witness. If the witness does not have a 'reasonable excuse' for his conduct, he may be sentenced to a fine or imprisonment for a period not exceeding three months.

An attorney preparing a subpoena on behalf of a party should bear the following points in mind in order to ensure that the court will be able to deal effectively with the witness if that witness fails to obey the subpoena:

1. The subpoena must be properly served by the sheriff.
2. The subpoena should not be served too close to the trial date because the witness is entitled to 'reasonable notice' that he has to appear as a witness. The circumstances of each case will determine what 'reasonable notice' is.
3. All the witness fees due to the witness should either be paid to him or offered to him in the subpoena.
4. In respect of a subpoena *duces tecum*, the document or thing must be sufficiently particularised.[486]

In practice, a paragraph is usually inserted in the subpoena offering the witness all the witness fees that may be due to him, as calculated in accordance with the tariff of fees framed under s 42(1) of the Supreme Court Act (and under s 37 of the Superior Courts Act, when this section comes into force, which will be discussed below).

It may not be enough, however, to simply offer the witness all the witness fees due to him. In certain cases a witness is entitled to certain fees to cover the cost of travelling to court. A cheque for these fees must be included with the subpoena. If the fees are not included and the witness fails to arrive at court, the court will refuse to issue a warrant for the arrest of the witness. The court will not issue a warrant if there is a possibility that the reason that the witness did not arrive is that he did not have sufficient funds to get to court.[487] Recently, the principle that a witness should not be required to incur any disbursements has been extended to the payment or tender of the costs of producing, reproducing, photocopying and collating the documents subpoenaed *duces tecum*.[488]

It is worthwhile trying to secure the cooperation of witnesses. Before the trial, their presence may be required at an attorney's office in order to give a statement, or at counsel's chambers to be precognised (prepared for delivering testimony at trial). Their attendance at these meetings cannot be enforced in terms of the rules. Also, a visit from a sheriff may be highly embarrassing, particularly if it is at the witness's place of work. For this reason, it is a useful practice to write to a witness in order to inform him that he is required as a witness before despatching the subpoena. Sending a polite note should not be done, however, if it is likely that a witness will attempt to avoid service if forewarned of the sheriff's visit.

6.1.4 Calculating witness fees

Section 42 of the Supreme Court Act provides for the fees to which a particular witness is entitled. This particular Act is unlikely to be relevant in this context much longer, however. The Supreme Court Act was repealed and replaced by the Superior Courts Act in 2013. Section 42 of the Supreme Court Act is to be replaced by s 37 of the Superior Courts Act. However, s 37 of this Act is not yet in force and will take effect on a date to be proclaimed. Until it is proclaimed, the 'old' tariff under the Supreme Court Act remains applicable. Therefore the discussion below proceeds on the basis of the Supreme Court Act, although its terms are essentially identical to its imminent replacement provision; s 37 of the Superior Courts Act.

Section 42 gives the Minister of Justice and Correctional Services, in consultation with the Minister of Finance, the power to prescribe a tariff of allowances to be paid to witnesses in civil proceedings. While a witness should not be left out of pocket for having given evidence, the guiding principle with regard to the financial compensation given to witnesses is that they should not be remunerated for evidence given in a court of law. It is easy to see that it would be

unhealthy to pay witnesses for giving evidence and a balance has to be achieved. Witnesses should not be financially prejudiced by giving evidence, but neither should they make a profit. The schedule provides for a *subsistence allowance, travelling expenses and transport, and income forfeited*, and applies to both the High Court and Magistrates' Courts.

The *subsistence allowance* provides for accommodation and meals. If it is necessary for the witness to hire a room for the night, the allowance provides for payment of the reasonable actual expenses. With regard to meals, a witness may either claim the amount of R50 a day or the reasonable actual expenses incurred for meals on submission of proof of the expenses to the satisfaction of the court manager or registrar. No distinction is drawn between expert and ordinary witnesses. The subsistence allowance is not payable if the witness' travel fare includes the cost of meals and accommodation.

In the case of *private transport*, the witness may claim 92c per kilometre in the case of a motorcycle, or R1,30 per kilometre in the case of a motor vehicle, calculated along the shortest route. In addition, and provided satisfactory proof has been produced, a witness is entitled to be reimbursed for the reasonable expenses actually incurred in respect of parking and toll fees. In the case of *public transport*, an amount equal to the fare for the least expensive transport along the shortest route is permitted. Air transport may only be used if the court manager, registrar, or taxing master of a division of the High Court is satisfied that the use thereof is warranted, and has approved that the witness may make use of air transport.

As far as the *income forfeited* is concerned, and provided that satisfactory proof is produced, a witness who has forfeited income as a result of his attendance of a civil case is entitled to an allowance equal to the actual amount of income so forfeited, subject to a maximum of R1 500 per day. In other words, if an important businessman is subpoenaed to court for two weeks, even though he may lose a few million rand a day, he is only entitled to receive R1 500 per day in compensation for his lost income.

Special allowances are also provided for in unusual situations, however. Where the court manager, registrar or taxing master of a division deems it fair, he may approve the payment of an allowance not provided for in the schedule, or an allowance under circumstances not provided for in the schedule. Furthermore, deviation from the tariff may be permitted in the case of a witness residing outside the Republic of South Africa or in any other case, provided the court manager, registrar or taxing master of a division is satisfied that the application of the provisions of the schedule may cause financial hardship.

The allowances prescribed in the schedule are also payable to a person who, of necessity, accompanies a witness on account of youth or infirmity owing to old age, or any other infirmity of the witness. However, where the expenses of a witness are provided for from any other source, no allowance that would otherwise be payable in terms of the schedule may be paid to the witness.

6.2 Subpoenas in the Magistrates' Courts

In Magistrates' Courts practice, *subpoenas* and *subpoenas duces tecum* are dealt with by s 51 of the Act and rule 26 of the Magistrates' Courts Rules.[489] The form a subpoena takes in the Magistrates' Courts is set out in Form 24 of the Magistrates' Courts Rules. A subpoena is issued in a manner very similar to that followed in the High Court, and is served in the same manner by the applicable sheriff. Rule 26(4) provides that the subpoena must be accompanied by as many copies as there are witnesses to be summoned, together with their 'conduct' money in each

case.[490] Subpoenas *duces tecum* are dealt with in terms of rule 26(3), the subpoena needing to specify the document or thing required to be produced in evidence.

In terms of rule 26(5), a magistrate may set the service of a subpoena aside if it appears that the witness was not given reasonable time to enable him to appear.

Section 51*bis* of the Magistrates' Courts Act deals with *witness fees* in the Magistrates' Courts.

7 Step 6: Special evidence

Special rules apply to the following types of evidence, which have been categorised in this book as *special evidence*:

1. Evidence by an *expert witness*;
2. Evidence in the form of *photographs, plans, models* and *diagrams*;
3. Evidence on *commission*;
4. Evidence by means of *interrogatories*; and
5. Evidence on *affidavit*.

7.1 Expert evidence

While parties are obliged to make pre-trial discovery or allow examination of physical evidence, ordinarily there is no obligation on a party to reveal the nature and content of the oral testimony that their witnesses will deliver in court. An exception to this is expert evidence. Anyone may give opinion evidence if it is relevant in that it will assist the court appreciably,[491] but the opinion evidence of an expert falls into a special category. Such evidence is necessary when a court lacks the specialist knowledge which is essential to enable it to decide certain issues in a matter.[492]

The evidence of expert witnesses is dealt with in terms of rule 36(9) of the High Court Rules, and rule 24(9) of the Magistrates' Courts Rules. These two rules are identical. In terms of these rules a party intending to call an expert must do two things:

P33

1.Not less than 15 court days before the hearing, deliver a *notice of his intention* to call an expert.

2.Not less than 10 court days before the hearing, deliver a *summary* of the expert's opinion, which must include his *reasons* for that opinion.

In practice, these two steps are often combined into one and the notice of intention to call the expert is combined with the summary of the expert's opinion.

Any party failing to comply with these requirements will not be entitled to lead the evidence of the expert witness unless the court grants leave to do so, or all the parties to the matter give their consent.

The rationale for this rule is to allow the opposing party to prepare himself to counter the expert's testimony, usually by calling an expert of his own. Without this rule, the opposing party would be taken by surprise at the trial, and would be forced to request an adjournment in order to obtain his own expert evidence. The rule also allows the experts to exchange reports and views, and possibly to eliminate unnecessary points of dispute between themselves.[493] This process is usually facilitated by a meeting of the respective experts resulting in the production of an expert minute (a written note of the conclusions of the meeting), which will be signed by both experts,

although the practice in the various divisions will differ depending on what is contained in the division's practice directive.

Although the required summary of the expert's evidence need be no more than a brief synopsis of the evidence, the summary should indicate the following:[494]

1. The expert's qualifications and experience in order to establish him as an expert;
2. The facts and data on which the opinion is based;
3. The process of reasoning (if it is not a matter of ordinary logic) used to arrive at the opinion; and
4. The expert's reasoned conclusions (i.e. opinion).

The main consideration when deciding what ought to be included in the summary is that the opposing party should not be taken by surprise. The summaries of expert opinions provided by attorneys in Magistrates' Courts matters frequently leave much to be desired. Often they provide only a vague conclusion in support of the relevant party's case with no explanation as to how the opinion was arrived at. Apart from MVA claims, where a great deal of work tends to be conducted on a case before issue of summons, it is not uncommon – particularly in the Magistrates' Courts – for experts to be consulted for the first time just before the trial. This is hopelessly too late. Expert evidence often forms a key aspect of a party's case, and in such matters a consultation with the expert should be arranged before the plaintiff issues summons or the defendant delivers his plea. Frequently, the expert opinion will determine whether or not a cause of action or adequate defence exists. Leaving this aspect until the eve of trial is most undesirable.[495]

P31

7.2Photographs, plans, models and diagrams

7.2.1 In the High Court

If a party decides that he wants to use a plan, diagram, model or photograph as evidence during the trial of an action, notice must be given to the opposing party before the trial. The applicable rules are High Court rule 36(10) and Magistrates' Courts rule 24(10). Although not identical, these rules are very similar.

Rule 36(10)(*a*) of the High Court Rules reads as follows:

> **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 he shall not less than fifteen days before the hearing have delivered a notice stating his intention to do so, offering inspection thereof and requiring the party receiving notice to admit the same within ten days after receipt of the notice.**

The purpose of this notice is twofold. First, without giving notice to the opposing side, the plan, diagram, model or photograph intended to be used in evidence may not be used. The second purpose is to obtain the consent of the opposing party to the admission of the evidence without proof. A party using such a notice to ask the opposing party to *admit* the plan, diagram, model or photograph is, in effect, asking his opponent to admit the following:

1. The plan, diagram, model or photograph is *authentic*. For example, a party may wish to tender in evidence at the trial a photograph of the Durban beachfront taken in 2009. By asking the opposing party to admit the photograph, the opposing party is being asked to admit that it is a photograph of the Durban beachfront taken in 2009, so that the party wishing to use the photograph does not need to call the person who took the photograph to give evidence of this fact.
2. The physical features shown on the plan, diagram, model or photograph, were present when it was drawn, made or taken. To use the previous example, the opposing party is asked to admit that the photograph shows the physical features of the Durban beachfront in 2009, and was not tampered with in any way.

In the case of *Shield Insurance Co Ltd v Hall*,[496] which concerned a plan drawn by a policeman of a motor vehicle accident scene, Galgut JA interpreted the implications of rule 36(10) as follows:

> **… I am of the view that, if the prerequisites are established, rule 36(10) creates an admission only (i) as to the authenticity of the document, i.e. it dispenses with the need to call the author of the plan or to provide other proof of its authorship, and (ii) as to the physical features actually found by the author. It must be borne in mind that a plan or diagram without physical features would be a virtual nullity.**[497]

A distinction was drawn in the above case between the *physical features* depicted in the plan, and written *statements* reflected in the plan which amount to an expression of opinion. For example, an indication on the plan as to where the collision took place is merely an expression of the author's opinion. The written statements were not taken to be admitted in terms of rule 36(10), and Galgut JA stated as follows:

> **It follows from what has been said above that regard can only be had to the physical features depicted in the plan, viz. the road, the earth bank, the gap, the position of the vehicles and tracks as depicted by the policeman. Physical features would, in my view, include the measurements relating to these features.**[498]

In terms of rule 36(10)(*b*), if the opposing party responds to the notice by delivering a written reply within 10 court days after receiving the notice in which he refuses to admit the plan, diagram, model or photograph, then the plan, diagram, model or photograph will have to be *proved* at the trial. In other words, the person/s who drew the plan or diagram, or made the model, or took the photograph, will have to be called to give evidence that the plan, diagram, model or photograph is accurate. If the person who drew the plan or diagram, or made the model, or took the photograph, is no longer available (e.g. the person who took a photograph of the Durban beachfront in 1970 might have died), some other person who is able to attest to the accuracy of the plan, diagram, model or photograph will have to be called (e.g. if the deceased person who took the photograph in 1970 was a newspaper photographer, the person in charge of the archives of the newspaper concerned could be called to attest that the photograph is the original photograph taken in 1970 and has not been tampered with in any way). Note that by refusing to admit the plan, diagram, model or photograph, and forcing the proof thereof, the opposing party takes the risk that the court will order him to pay the costs of this process in terms of rule 36(10)(*b*).

This rule is particularly useful when building plans need to be used in evidence. In many cases, particularly if old buildings are involved, the building plans can only be found in the records of the municipal engineers or building inspectorate. Since the clerk in charge of the filing office where the plans are kept is only able to attest that, according to his records, these are the plans of the building in question filed at the offices of the municipal engineer, the admission of these plans without proof saves the time and expense of calling the clerk as a witness.

7.2.2 In the Magistrates' Courts

The corresponding rule 24(10) of the Magistrates' Courts Rules is worded in a slightly different fashion. Rule 24(10)(*a*) and (*b*) corresponds to rule 36(10)(*a*), and rule 24(10)(*c*) and (*d*) corresponds to rule 36(10)(*b*) of the High Court Rules. These rules, although not identical, are very similar and have a similar effect. However, the time periods differ: in a Magistrates' Courts matter the notice has to be served on the opposing party no less than 10 days before trial, and the opposing party has to deliver his objection within five days of receipt of the notice.

7.3 Evidence on commission

In certain cases it may not be possible, for some reason or other (e.g. if the witness is bedridden, or is located in a foreign country), to get a witness to court to testify at the trial of a matter. One way in which this problem may be overcome is for the court to appoint a commissioner, who will then go and take the evidence of that witness in the form of a deposition. The deposition may then be handed in as evidence at the trial of the matter. The court loses the advantage of observing the demeanour of that witness, or putting questions to him in person, but this is still better than losing the evidence altogether.[499]

7.3.1 In the High Court

A party who wishes to make use of this procedure will have to apply to court in terms of rule 38(3) of the High Court Rules. Application is generally made after close of pleadings when the issues have been defined and it is clear what evidence will be required. A commission may be appointed at an earlier stage, however, when there is a danger that the evidence may be lost, for instance due to the imminent death of a witness. The party making application has to show that it is *convenient or necessary for the purposes of justice* to order the taking of evidence before a commissioner. The issues the court will examine in order to determine this include the inability of the witness to attend court,[500] the likelihood of evidence being otherwise lost,[501] together with the relevance[502] and materiality[503] of the evidence. According to Erasmus, the following information must be set out in the affidavit in support of the application:

> **(a)the reasons why it is necessary for the purposes of justice that the ordinary way of taking evidence … should be departed from. 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.**
>
> **(b)the nature of the evidence to be given and its relevance.**
>
> **(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. The courts have, however, granted leave to take the evidence of named persons on commission, as well as evidence of 'any other person whose evidence becomes relevant or appears to be so as a result of the evidence given at the commission.'**[504]

The court has a discretion as to whether or not to grant an application to hear evidence on commission. Erasmus states that:

> **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.**[505]

The procedure for the taking of evidence on commission is set out in rules 38(5), (6), (7) and (8) of the High Court Rules. The commissioner is appointed by the court and is generally a magistrate if the witness is present in the Republic, or a solicitor, attorney or barrister if he is in a foreign country. Once the commissioner is appointed, he may subpoena the witness to appear before the commission if situated in South Africa. The witness is then examined on oath in the commissioner's presence, and in the presence of the parties and their legal representatives. The witness adduces his evidence orally and the parties are entitled to cross-examine and re-examine.[506] A record is taken of the evidence given and the transcript is presented to the registrar of the trial court.[507]

7.3.2 In the Magistrates' Courts

Section 53 of the Magistrates' Courts Act deals with *commissions de bene esse* in the Magistrates' Courts. The wording of s 53 differs from that of rule 38 of the High Court Rules, but the effect and considerations involved are largely the same. Section 53(1) provides only that notice should be given to the opposing side of a request for the appointment of a commissioner, unlike the express requirement in rule 38(3) of the High Court Rules for the request to be made by application. *Jones and Buckle*, however, hold that where the request is made prior to the trial, it should be made in writing as far as possible in accordance with the provisions of rule 55 of the Magistrates' Courts Rules, which provides for applications.[508] The contents of the supporting affidavit should generally be the same as that indicated for the High Court practice above. Form 23 of annexure 1 to the Magistrates' Courts Rules is used to appoint the commissioner. Rule 26(2)(*a*) and (*b*) provide for the issue of a subpoena in respect of a witness who is required to appear before a commissioner within the Republic. The subpoena is sued out by the party desiring the attendance of the witness and issued by the commissioner.

7.4 Evidence by means of interrogatories

7.4.1 In the High Court

Examination by *interrogatories* may be thought of as a particular variant of the procedure for taking evidence *on commission*. Interrogatories are a set of questions, which are drawn up by the parties and submitted to the court for approval,[509] then sent to the commissioner who puts them to the witness. In this case, there is no representation or cross-examination by the parties. The procedure is not dealt with in the High Court Rules directly,[510] but in s 40 of the Superior Courts Act.[511]

A party to a High Court action is entitled to apply to court for leave to examine a witness who resides, or is for the time being outside, the area of jurisdiction of the court, by means of interrogatories. The applicant will annex to his application the questions which he wishes to be put to the witness, and the respondent will usually ask for leave to put *cross-interrogatories* to the witness. If the application is granted, the questions (i.e. the interrogatories and the cross-

interrogatories) will be transmitted to a commissioner of the court, who will put the questions to the witness, and record the answers of the witness.[512]The commissioner will send the answers to the registrar of the court, and they will be received as evidence at the trial of the matter.[513] This procedure is obviously cheaper than that provided for in rule 38(5) in that it does not require the presence of the parties and their legal representatives. Its usefulness is limited, however, by the inflexible nature of the questions, which are formulated in advance. The normal procedure for evidence taken on commission *de bene esse*, however, allows the parties to respond to any unexpected information that emerges, and is therefore more useful.

7.4.2 In the Magistrates' Courts

Section 52 of the Magistrates' Courts Act provides a limited procedure for *interrogatories* in the Magistrates' Courts. Although its effect is similar to the practice in the High Court set out above, there are some differences. Apart from the need to show that permitting interrogatories in a particular situation is 'consistent with the ends of justice', interrogatories under s 52 are only permitted in respect of witnesses who reside or are in a district other than that in which the case is being heard.[514] This excludes witnesses who cannot attend court due to some other reason such as illness, in which case a commissioner will have to be appointed under s 53, which deals with commissions *de bene esse*.[515]

The procedure set out in s 52 neither provides for interrogatories to be used by a commissioner appointed outside of the Republic, however, nor indeed for the appointment of a commissioner at all. Section 52(1) provides for the court on the application of one of the parties to approve interrogatories, and to frame some questions of its own.[516] In place of a commissioner, these interrogatories are sent to the court within whose jurisdiction the witness 'resides or is'.[517] The court then subpoenas the witness and puts the questions to him together with 'such other questions as may seem to be necessary to obtain full and true answers to the interrogatories'.[518] It is possibly because this procedure does not apply to witnesses who are unavailable for reasons such as illness, or located in a foreign country, that s 53(2) makes provision for a commissioner to put to a witness 'such questions as have been transmitted to him on agreement between the parties'.[519]

7.5 Evidence on affidavit

Rule 38(2) of the High Court Rules provides that in certain limited cases, the evidence of a witness in a High Court action may be given on affidavit. This procedure is suited to those situations in which strictly formal evidence is required from a witness, which will not be contested by the other side. If there is any reason to think that the other side will contest the evidence, the court will order that the evidence be given *viva voce* in court, so that it may be tested under cross-examination. In this regard, courts are more likely to grant leave to receive affidavit evidence where the evidence relates to matters that are formal in nature than where the evidence is contentious.[520] An example of formal evidence that may be given by affidavit would be the testimony of a banking official providing the exchange rate on a particular date, where a party wishes to prove the precise value of a cheque in rand terms that has been made out in a foreign currency. Other factors which may be relevant in deciding whether or not to receive affidavit evidence are, for instance, lack of means, the expense of bringing the witness from a foreign country, and the illness of a witness.[521] The production of proof by way of an affidavit in terms of rule 38(2) will be discussed in a pre-trial conference in terms of rule 37(5) (discussed at 7 below).

There is no corresponding provision in the Magistrates' Courts Rules, but s 22 of the Civil Proceedings Evidence Act[522] will apply to both courts. It provides for an affidavit to be admissible on its mere production for proving facts where skill in a listed category of topics is necessary. These topics tend to be of a technical nature, including, *inter alia*, biology, physics and pathology. The deponent must be in state or provincial service or attached to the South African Institute for Medical Research or a university. A copy of the affidavit must be served on the opposing party at least seven days prior to its production.

8 Step 7: Pre-trial conference

8.1 Pre-trial conference in the High Court

In terms of High Court rule 37, a pre-trial conference must be held between the parties no less than six weeks before the date of the trial. In general terms, the purpose of the 'rule 37 conference', as it is known in practice, is to curtail the proceedings as much as possible.[523] To achieve this, the parties should try to define the points in issue between them, reach agreement on as many issues as they can, and decide upon the most effective way of conducting the trial (for example, which party has the duty to begin leading evidence; whether or not the parties will produce a combined 'trial bundle' of documents to be used at the trial, and so on). The pre-trial conference also gives the parties a chance to curb costs[524] and possibly to settle the matter.[525]
Rule 37A, which has now been repealed,[526] was a separate rule that dealt with pre-trial conferences in the Western Cape Division.

8.1.1 Calling the conference

Rule 37(2)(*a*) requires that once the plaintiff receives notice of the trial date, he must, within five court days, deliver a notice to the defendant, specifying the date, time and place for the pre-trial conference. If the plaintiff fails to deliver this notice, and providing that 30 court days have passed since the date of the plaintiff's failure, then, in terms of rule 37(2)(*b*), the defendant may deliver a notice specifying the date, time, and place for the conference. The parties may agree to amend the date, time, and place for the conference, but it may not be held less than six weeks before the date of the trial.[527] In practice, this time limit is often not adhered to, although several courts have issued practice directives in an attempt to ensure adherence to the rule.[528]

Rule 37 conferences have frequently been held only a day or two before the trial, which diminishes their potential value.[529]This should be discouraged and practitioners should endeavor to plan their matters to ensure that the conference is held as early as is practicable, albeit after discovery and after the parties have exchanged documents and further particulars.

It has been held that although failure to comply with this time limit does not require an application for condonation, it may attract an adverse costs order if it results in a delay in the disposal of the case.[530]

8.1.2 Setting the agenda

Not less than 10 court days before the date of the conference, the parties must each deliver to the other a notice in terms of rule 37(4). This notice may be thought of as being each party's *agenda* for the conference. Rule 37(4) requires that the following be listed in the notice:

1. The admissions that are required from the opposing party;
2. The enquiries that will be directed at the opposing party, which have not been included in the request for particulars for trial; and

3. Any other matters regarding preparation for trial that the party delivering the notice intends to raise for discussion.

8.1.3 The conference

In practice, rule 37 conferences are often held between the advocates and the attorneys involved in the matter without their clients being present. Strictly speaking, the advocates' presence is not necessary either,[531] but, on the whole, attorneys appear to prefer to have the advocates present at the conference.[532] The conference usually takes place in the chambers of the most senior advocate involved in the matter.

8.1.4 The rule 37 minute

Immediately (i.e. within a day or two) after the rule 37 conference has been held, a rule 37 minute (a record of proceedings and the decisions reached) is prepared, usually by the plaintiff's attorney from notes taken by the most junior advocate at the conference. It is, however, the duty of all the parties present to prepare and sign the minute. The following points must be covered in the minute in terms of rule 37(6):

1. The place, date and duration of the conference and the names of the persons present;
2. If a party feels that he is prejudiced because another party has not complied with the rules of court, the nature of such noncompliance and prejudice must be recorded;
3. That every party claiming relief has requested his opponent to make a settlement proposal and that such opponent has reacted thereto;
4. Whether any issue has been referred by the parties for mediation, arbitration or decision by a third party and on what basis it has been so referred;
5. Whether the case should be transferred to another court;
6. Which issues should be decided separately in terms of rule 33(4);
7. The admissions made by each party;
8. Any dispute regarding the duty to begin or the onus of proof;
9. Any agreement regarding the production of proof by way of an affidavit in terms of rule 38(2);
10. Which party will be responsible for the copying and other preparation of documents; and
11. 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.

This list provides a fairly good idea of what ought to be discussed at a rule 37 conference. Furthermore, there is evidence that courts are becoming more strict about compliance with all aspects of rule 37, including the drafting of the minute, in the interest of a more efficient resolution of trials.[533]

Once the rule 37 minute has been prepared, it is circulated to all the parties and, if they agree with the contents, it is signed.[534] After it has been signed, the minute must be filed with the registrar in term of rule 37(7), not less than five weeks before the trial date.[535]

Rule 37(8) makes provision for a judge to call upon the attorneys or advocates in an action, to hold or continue with a conference before a judge in chambers.[536] The judge may also require the presence of the parties. The judge may order the conference *mero motu*, or at the request of one of the parties. Such a conference may be called at any time during the proceedings, but is most likely to be called for by one of the parties following a failed rule 37 conference, at which progress was thwarted by stubbornness or equivocation on the part of one of the parties.[537]

8.1.5 Special order as to costs

Rule 37(9)(*a*) gives rule 37 its 'bite'. The rule *directs* the court, at the hearing of the matter, to consider whether or not it is appropriate to make a special order as to costs against a party *or his attorney*, because he *or his attorney*:

1. did not attend a pre-trial conference; or
2. failed to a material degree to promote the *effective disposal* of the litigation.

The whole purpose of rule 37 is to reduce the length and complexity of litigation by eliminating certain issues and getting the parties to agree on the manner in which certain pieces of evidence will be presented. Those attorneys who do not comply fully with rule 37 and thereby prolong litigation may find themselves out of pocket if the court decides to invoke the provisions of rule 37(9)(*a*) against them.

8.2 Pre-trial conference in the Magistrates' Courts

Pre-trial conferences in the Magistrates' Courts are dealt with by s 54 of the Magistrates' Courts Act, read with Magistrates' Courts rule 25. The purpose of the conference is very similar to its High Court counterpart. In terms of s 54 of the Magistrates' Courts Act, the following issues may be dealt with at such a conference:

1. The simplification of the issues;
2. The necessity or desirability of amendments to the pleadings;
3. The possibility of obtaining admissions of fact and of documents with a view to avoiding unnecessary proof;
4. The limitation of the number of expert witnesses; and
5. Such other matters as may aid in the disposal of the action in the most expeditious and least costly manner.

An important innovation involving a new discretionary authority for magistrates, used in the context of a section 54 conference, has been introduced with the 2010 rule amendments. In terms of rule 1(3), in order to promote access to the courts or when it is in the interest of justice to do so, a court may, at a section 54 conference, dispense with any provision of the Magistrates' Courts Rules and give directions as to the procedure to be followed by the parties so as to dispose of an action in the most expeditious and least costly manner. While this innovation does not amount to the kind of inherent jurisdiction enjoyed by judges in the High Court, it certainly appears to be a shift in that direction.[538]

Unlike the rule 37 conference provided for in the High Court Rules, it is *not compulsory* in terms of s 54(1) of the Magistrates' Courts Act to hold a pre-trial conference before the trial of a Magistrates' Courts action. A pre-trial conference will only be held if the court decides *suo motu* (of its own accord) to order it, or if one of the parties to the action makes a written request to this effect.[539] The conference may be ordered or requested at any stage of proceedings, not merely in preparation for trial.

Rule 22, which provides for the set down of a matter after close of pleadings, also provides a mechanism for a magistrate to become aware of the issues in a matter and to be given the opportunity to decide *suo motu* whether a section 54 conference should be held. In terms of rule 22(4), on receipt of an application for a trial date, the registrar or clerk of court must draw the court file and take it to a magistrate to consider whether a pre-trial conference in terms of s 54 is

necessary. The procedure for one of the parties to request a conference is set out in rules 25(1) and (2). The request must be made in writing and should include an indication of the issues which the party making the request desires to be considered at the conference. The request is delivered to the registrar or clerk of court who places it before a magistrate in chambers who then decides whether or not the conference should be held.[540]

This procedure has seldom been used in practice.[541] However, the provision for set down in terms of rule 22(4), means that the possibility of holding a section 54 conference is considered by a magistrate in respect of every matter that goes to trial. This may well result in section 54 conferences being held more often in future, which is a positive development.

Note also the Civil Practice Directives for the Regional Courts in South Africa at paragraph 4.4, which gives further detail of the pre-trial conference procedure for matters in these courts.

9 Step 8: Final preparation for trial

9.1 Advice on evidence

Once all the pre-trial proceedings have been completed, final preparations must be made for the trial. In High Court practice it is quite usual for an advocate to be briefed by an attorney to draft what is known as an *advice on evidence*.[542] An advice on evidence is an advice to the attorney on all the relevant aspects of the case to make sure that the client's case will be put as persuasively and comprehensively as possible at the upcoming trial, and to make sure that nothing in the preparation has been left out. Usually, the advocate discusses the following issues in the advice on evidence:

1. The form of the pleadings (whether pleadings are properly closed; whether any pleadings are still required; whether any amendments to the pleadings are necessary; whether a request for further particulars for trial is necessary, etc.);
2. The discovery process (whether the process has been completed fully by both sides, etc.);
3. The issues and the onus of proof (a list distinguishing those matters which are in issue from those which are not in issue [i.e. those issues that are in dispute from those that are common cause]; which of the parties bears the onus of proof in relation to each issue; which party has the duty to begin presenting evidence at the trial, etc.);
4. The evidence available (what the documentary evidence is; what the oral evidence is; whether any further documentary or oral evidence is required; whether any expert witnesses are required; whether any models, plans, photographs or diagrams are necessary; how the evidence should be adduced, etc.); and
5. General observations (whether any further preparation is required; the prospects of success at the trial; the quantum involved [which may assist the client in fixing a minimum settlement amount], etc.).

Unfortunately, the advice on evidence is all too often undervalued by attorneys and it is relatively common for attorneys to do little more than wrap their case file in a brief cover and despatch it to counsel, under cover of a one-line brief. When briefing counsel, attorneys should endeavour to set out their own views about the case and, at the very least, an attorney briefing

counsel should analyse the pleadings, noting which averments have been admitted and which denied in order to establish what needs to be proven at trial, and make an assessment of what evidence will need to be presented at the trial.[543] The other documents that should be included with the brief are copies of the pleadings, discovery documents (not just standard forms, but thoughtfully completed), witness statements, medical or expert reports and any documents of an evidentiary nature such as contracts. The brief should list the documents with which counsel is briefed. Apart from setting out the analysis of the case by the attorney, the brief should raise any concerns or issues that the attorney wishes counsel to consider.

9.2 Case-flow management

Significant developments have occurred under the direction of the Chief Justice acting in terms of the Superior Courts Act to better ensure access to justice and the speedy resolution of cases in the superior courts. In 2014, the Chief Justice published the *Norms and Standards for the Performance of Judicial Functions* in terms of which judicial officers' functions are to include judicial case-flow management. The intention of judicial case-flow management is to ensure that judicial officers take control of the management of cases at the earliest possible opportunity, play an active role in and take primary responsibility for the progress of cases through the superior court.

The introduction of judicial case-flow management signals a limited departure from the traditional adversarial system where judges adopted a 'hands-off' approach to litigation to one in which they become involved from the outset, overseeing the preparation of the case for trial to ensure that cases are concluded without unnecessary delay. The same judicial officer is seized of a matter from inception[544] and gives the final 'sign off' for the matter to proceed to trial. In some divisions, certain matters, such as RAF matters, may not be enrolled for hearing unless they are certified 'trial ready' by a judicial officer.

In the Gauteng Local Division, Johannesburg, only trials involving expert evidence are subject to judicial case-flow management.[545] In each division, the case-flow management directives, practices or rules will provide which matters are subject to judicial case-flow management, as well as when and how to ensure that each matter is successfully certified 'trial ready'. Practitioners are encouraged to have regard to each division's guidance in this regard.

9.3 Preparation of trial bundles

In High Court practice, one of the final tasks to be performed in preparation for trial is the creation of *bundles* or collections of documents for use at trial. We have seen that documents relevant to the case are *discovered* by means of the rule 35 discovery process. Each party needs to decide thereafter which documents it intends to use in evidence at the trial. This information should be disclosed to the opposing party in reply to a rule 35(8) notice. Ideally, the parties should attend the rule 37 conference knowing which documents they intend to use at trial. One of the parties should then be given the task[546] of gathering together the original documents (if possible) from both parties into one *bundle* in chronological order. Each page in this bundle of documents should be consecutively numbered (paginated). Then an index listing each individual document in the bundle, together with a page reference, should be prepared and affixed to the front of the bundle. The bundle should then be photocopied in order to produce enough copies for the attorneys and advocates involved in the matter, as well as one copy for the use of persons giving evidence at the trial. The judge is provided with the bundle containing the original documents. In this way, all the parties and the judge are provided with a common set of documents, uniformly indexed and numbered, to which the parties and judge may conveniently refer at trial. The task of collating, indexing and paginating is usually that of the plaintiff

as *dominus litis* (master of the suit). Practices vary slightly from division to division and in some there are special requirements for the preparation of documents.[547]

There is no rule or convention pertaining to this practice in the Magistrates' Courts,[548] although the Civil Practice Directives for the Regional Courts in South Africa at paragraph 4.2 sets out how bundles should be collated, numbered consecutively and suitably bound.

9.4 Indexing and paginating the court file

The final task to be performed in High Court practice in preparation for trial is the indexing and pagination of the court file. This is required in terms of rule 62(4) of the High Court Rules, which provides that 'an applicant or plaintiff shall not later than five days prior to the hearing of the matter collate, and number consecutively, and suitably secure, all pages of the documents delivered and shall prepare and deliver a complete index thereof.'

This task is usually given to a responsible but junior member of the plaintiff's attorneys firm, invariably a candidate attorney. There will be a complete copy of all the pleadings in both the plaintiff's and the defendant's attorneys' files, with the original documents filed at court. Usually, the candidate attorney will start by gathering together all the pleadings from the plaintiff's attorneys' file. Next, he will place them in chronological order and number each page consecutively. He will then draft an index which lists each pleading in turn, with an indication of the page at which the pleading appears. The same procedure is followed for the notices and other processes, which are usually listed separately from the pleadings.[549] He will then visit the general office of the registrar armed with split pins, a spike or a corner punch, and the indexes. He will then request the court file and proceed to place all the pleadings and notices in chronological order and to paginate the papers by numbering each page consecutively. Finally, he will attach the index to the front of the bundle, and secure the documents together with a split pin pushed through a hole created in the top left-hand corner of each document. Of course, other methods of securing the documents such as plastic ring binders may be used, and different divisions of the High Court may well have their own practices and rules for this procedure.[550] There is no provision for a sanction within rule 62 itself, but in most divisions, failure to conform to the rule will result in the matter being struck off the roll with a suitable order as to costs, or at the very least in raising the ire of the judge hearing your matter.[551]

PART 2: ACTIONS

C: Trial

An action culminates in a trial before a judicial officer who, after hearing the evidence brought by both parties (and argument relating to the evidence and the law), delivers a judgment.[552] At the trial, the allegations in the plaintiff's particulars of claim, and the responses to these allegations by the defendant in his plea, are supported by evidence (oral evidence, documents and real evidence) adduced on behalf of each party.[553] The pleadings determine what evidence should be adduced, and no evidence may be given in relation to issues that have not been raised in the pleadings. The trial takes the form of a classic adversarial hearing, with most of the evidence being given orally. The parties determine which witnesses, documents or examples of real evidence[554] they wish to bring or place before the court, and they play the primary role in questioning the witnesses. The judicial officer, be he a judge or a magistrate (also referred to as the 'bench' or the 'court'), performs the largely passive function of umpire, ensuring that fair

play prevails and that the parties follow the rules. The trial procedure is identical to a great extent in the High Court and the Magistrates' Courts. Although the rules of court give the proceedings their structure, the nature of the evidence and the manner in which it is delivered are governed largely by the rules of evidence.

In a criminal matter, the standard of proof required to convict an accused is proof beyond a reasonable doubt, whereas in a civil matter, the case needs merely to be proven on a balance of probabilities. This means that if each party in a civil matter has given a different version of events, whichever version is the more likely is the one that will succeed. In a criminal matter, however, even if the state's version is the more likely, the accused must be acquitted if there is a reasonable doubt.

1 Trial in the High Court

1.1 Introduction

High Court rule 39 sets out the procedures to be followed during the trial of an action in the High Court. Despite the procedures laid down, the court has a discretion to vary any procedure in terms of rule 39(20). Furthermore, the High Court enjoys an inherent jurisdiction to vary its procedures in the interests of justice.

1.2 Parties not present

Failure on the part of one or other of the parties to appear at the trial may lead to default judgment being taken against them.[555]Note that in terms of rule 39(2), a defendant who has been barred from pleading and who has failed to have the bar lifted, may not, without the special permission of the court, appear at the trial in order to defend the matter.

1.3 Open court

In terms of s 32 of the Superior Courts Act, all proceedings must be carried on in open court,[556] which means that the press and public may be present, although this does not necessarily mean that the proceedings may be televised.[557] This section reflects the important principle that justice should be seen to be done.[558] In *special cases*, however, matters may be heard *in camera*with the public and press excluded. What constitutes a special case will depend on the circumstances. Embarrassment and prejudice to a witness have been held to constitute a special case.[559] The overriding criterion, however, is the proper administration of justice.[560]

1.4 Recalcitrant[561] witnesses

Section 36 of the Superior Courts Act covers the way in which witnesses may be dealt with if they refuse to give evidence or produce documents.

If a witness:

1. refuses to take the oath or make an affirmation; or
2. having taken an oath or having made an affirmation, refuses to answer such questions as are put to him; or
3. refuses or fails to produce any document or thing which he is required to produce without any just excuse for his refusal or failure, the court may adjourn the matter for up to eight days and commit the recalcitrant witness to prison for this period.[562]

The court may keep on adjourning the matter for up to eight days, recommitting the recalcitrant witness to prison for the periods of the adjournments until he agrees to do what is required of him.[563]

1.5 Duty to begin

At the start of the trial, the parties may request the court to hear argument and make an order as to which of the parties is under the obligation to adduce evidence first. In terms of rule 39(11) of the High Court Rules:

> **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.**

Usually, the plaintiff is obliged to adduce evidence first[564] because the *overall* onus[565] is on him to prove his case on a balance of probabilities. There is, however, a secondary *evidentiary burden*,[566] which must be taken into account.[567] This is a duty placed on a party to combat a *prima facie* case made by the opposing party.[568] It is necessary to examine the admissions made in the pleadings to ascertain where the evidential burden lies.[569] For example, a defendant in a defamation case may admit that a defamatory remark was uttered, but claim that this remark was 'true and in the public interest' (a classic plea of *confession and avoidance*). In this situation, the plaintiff will no longer be obliged to prove defamation, but the defendant will be obliged to prove the statement to be true and in the public interest. In other words, the defendant now bears the evidentiary burden (or onus). It may be necessary to argue the issue of evidentiary burden if the parties have not already settled it at the rule 37 conference.[570] The question of the evidentiary burden is critical: it is usually preferable for the *opposing* party to bear the evidentiary burden and therefore be given the *right* to begin.[571] This is because it is easier to sit back and defend rather than to bear the burden of proving a particular issue or material fact. In order to be successful, the party bearing the burden of proof in respect of a particular material fact or issue must take positive steps and lead evidence to prove it. For the opposing party to be successful, however, it is sufficient merely for the party that bears the burden to fail to discharge it. There is no need for the opposing party to take positive steps by leading contradictory evidence to *disprove* the case of the party bearing the burden, unless the party bearing the burden has successfully proved the issue *prima facie*,[572] thereby discharging the burden.

In certain cases there may be a number of issues involved in a matter, with the onus to adduce evidence in respect of certain of those issues being on the plaintiff, and in respect of the rest of the issues the burden being on the defendant. In such cases, the plaintiff must adduce his evidence first, but only on those issues in respect of which the burden is on him. The defendant must thereafter (unless the court grants absolution from the instance) adduce evidence on those issues in respect of which the burden is on him. The plaintiff then has the right to call rebutting evidence on those issues in respect of which the burden was on the defendant.[573] An action having commenced in one court will invariably proceed in that court until final judgment. Occasionally, however, the transfer of a part-heard matter to another court may be justified by considerations of justice and good sense.[574]

1.6 Opening address

At the start of the trial, the party upon whom the burden of proof rests, or an advocate on his behalf, may briefly outline the facts he intends to prove. This brief outline of the facts is known as the *opening address*.[575] Unlike the dramatic orations sometimes seen in television shows (which may in any event involve 'playing to a jury'), the opening address is a sober summing up for the benefit of the judicial officer of the issues to be addressed. Counsel should take the court through the pleadings, explaining what the case is about and listing the averments that must be proven, distinguishing them from those which are *common cause*.

1.7 Plaintiff's case

After the opening address, the party with the duty to begin (usually the plaintiff) will lead the witnesses who are able to give evidence in support of his case.

In terms of rule 39(8) of the High Court Rules:

> **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.**

The parties present their cases in turn, beginning with the party that bears the evidentiary burden. Generally, the nature and scope of whatever evidence is led will have been determined by the pleadings. Evidence not covered by pleadings will usually be inadmissible and may only be relied on by a court where it is not prejudicial to the other party.[576] Each witness called is 'led' in his *evidence-in-chief*,[577] where the witness sets out his version of events with the help of fairly open questions such as 'What happened next?' from the advocate who called him. The reason for such open questions is that counsel who has called the witness may not asking *leading* questions, i.e. questions that suggest an answer or assume facts that are in issue.[578]

Counsel[579] for the opposing side then has the opportunity to cross-examine the witness, in order to put the other party's version to him, probe inconsistencies and to show any weakness in the evidence that the witness has presented. While it may be useful to discredit a witness completely by catching him out in a lie, this will seldom be possible. In any event, it is not necessary to show that a witness is dishonest in order to show that his evidence is unreliable or irrelevant or should otherwise be rejected by the court in favour of the other party's version. His evidence will be discredited sufficiently if it is possible to show from surrounding circumstances that the witness is mistaken, that his memory is inaccurate, or that he has reconstructed the events incorrectly. In order to achieve this, opposing counsel may ask leading questions in cross-examination.

Counsel who originally called the witness then has the opportunity to re-examine the witness. This is used in order to 'patch up' the damage done during cross-examination, if possible, by clearing up discrepancies which have arisen. However, no fresh matter may be raised at this stage. The re-examination of the witness should be devoted to topics pertinent to issues raised during cross-examination.

This pattern is followed with all the witnesses, one after the other, until the party who began closes his case. After this, the opposing party opens his case and the same pattern is followed in respect of each witness called.[580] The opposing party thereafter closes his case.

If the court wishes to call a witness, both parties must consent to that witness being called.[581] At any time before judgment, however, the court may, of its own volition or on the application of either party, recall a witness for further examination. The court may examine every witness, no matter who called that witness, and ask questions in order to clarify obscure points. It may ask leading questions but, if possible, should avoid doing so, and should avoid descending 'into the arena'.

1.8 Application for absolution from the instance

In the majority of cases, it is the plaintiff's advocate who accepts the duty to begin and leads the witnesses in support of his client's case. After all the evidence for the plaintiff has been led, the plaintiff's case is closed. At this point the defendant's advocate may decide to apply to the court, without leading evidence, for *absolution from the instance*[582] on behalf of his client.[583] He may do this without leading evidence because it is the plaintiff who bears the overall onus of proving his case on a balance of probabilities, and there is no obligation on the defendant to adduce evidence if the plaintiff has failed to discharge the overall onus by the end of his case. If the court grants absolution from the instance, the case comes to an end. The plaintiff may still pursue the matter, but in order to do so he will have to institute a fresh action against the defendant.

If the defendant decides to apply for absolution from the instance at the close of the plaintiff's case, the defendant (or his advocate) will address the court in support of the application. The plaintiff (or his advocate) will then address the court in opposition to the application. The defendant (or his advocate) may then respond to any matter arising out of the address on behalf of the plaintiff.[584]

The test the court will apply in deciding whether or not to grant absolution from the instance at this point in the proceedings is whether or not the plaintiff has succeeded in adducing sufficient evidence upon which a reasonable person *might* find in his favour.[585] This is a much easier test to pass than that applied at the close of the case as a whole. For absolution to be granted at this early stage, the evidence that the plaintiff has adduced must be especially flimsy. For one thing, since the plaintiff's evidence has not yet been contradicted by that of the defendant, it will be accepted as being true unless it is inherently unacceptable,[586] or has been discredited by cross-examination. The court will refuse absolution if there are several reasonable inferences or possibilities arising out of the evidence, one of which favours the plaintiff's version of events.[587] At the close of the case as a whole, however, the court will ask itself whether, on a balance of probabilities, it *ought to* (rather than *might*) *find* in favour of the plaintiff or defendant. Unlike the test applied after the close of the plaintiff's case, the court will *weigh* the various reasonable inferences or possibilities disclosed by the evidence in order to decide which of them is more likely. If neither the plaintiff nor the defendant has proved his case on a balance of probabilities, the court will grant absolution from the instance.

Note that there can be no order for absolution from the instance where the burden of proving some of the issues was on the defendant, although the plaintiff has adduced evidence first, because the burden of proving the other issues was on him.[588] It will still be necessary for the defendant to lead evidence to rebut the onus on him.

1.9 Defendant's case

If the defendant's application for absolution from the instance at the end of the plaintiff's case is refused (or if he did not make such an application in the first place), he is obliged to open his case. If he is convinced that the plaintiff has not managed to adduce sufficient evidence to prove

his claim on a balance of probabilities, the defendant may *close* his case immediately *without leading any evidence* at all. In order to do this, the defendant must be confident that the plaintiff's version of events, even if uncontested, is not strong enough to prove the claim against him on a balance of probabilities.

To close the defendant's case without leading evidence clearly requires nerves of steel (as well as sound legal judgment) on the part of an advocate or attorney acting for the defendant. In almost all such cases the court will, minutes before, have turned down the defendant's application for absolution from the instance (which means that the plaintiff has adduced sufficient evidence upon which a reasonable person might find in his favour). Immediately thereafter, the court will be asked to reconsider the matter (without any additional evidence having been led) in the hope that it will find in the defendant's favour. All that changes is the test that the court applies to the evidence before it. Once the defendant closes his case, the court has to consider whether the plaintiff has proved his case on a balance of probabilities (in other words, whether the plaintiff has adduced sufficient evidence upon which the court *ought* to find in his favour).

In most cases, however, the plaintiff will have succeeded in constructing enough of a case to require an answer from the defendant. Evidence will therefore have to be led on behalf of the defendant to counter the allegations made by the plaintiff, and the defendant will not be in a position to close his case without doing so. The procedure then is as follows. First the defendant will address the court on what is intended to be proved in his defence, and thereafter he will lead witnesses in his defence. Each of these witnesses may be cross-examined by the plaintiff, and re-examined by the defendant.[589]

1.10 Closing address

Rule 39(10) of the High Court Rules deals with the closing addresses by the parties or their legal representatives:

> **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.**

In the closing address, counsel addresses the court on what has emerged from the evidence. He goes through the evidence to show what has been proven, and discusses the performance of the various witnesses; their credibility, reliability and the weight that he believes should be placed on the testimony of each witness. He may also make submissions with reference to the inherent probabilities in the case. Finally, he may be required to debate a point of law with his opponent and the court.

1.11 Reopening the case

Once a party's case has been closed, it may not be reopened without the permission of the court.[590] Although the court may permit the reopening of a case at any time before judgment, the longer the trial progresses, the more reluctant the court will be to grant such permission. The party who wishes to reopen his case must show that:

1. he used proper diligence to procure his evidence for the trial. This means he must show that evidence has emerged which was not available or could not reasonably be obtained before he closed his case, or, if the evidence was available and obtainable, he must give an acceptable explanation as to why it was not adduced before he closed his case.[591] Leave to reopen the case will not be granted if it appears to the court that the evidence was withheld intentionally; *and*
2. the evidence which is proposed to be led is material and likely to be weighty.[592] It need not, however, be so weighty that it would, if believed, be practically conclusive.[593]

1.12 Inspections *in loco*

It is often easier to understand the oral evidence being given by a witness about certain events if one has visited and inspected the area in which the events occurred. This is obvious: once someone has seen with his own eyes an area, or structure, or whatever, he is able to picture accurately in his mind what the witnesses are speaking about. For this reason, it often happens that the court, together with all the parties and their legal representatives, will take a trip to the place where the alleged cause of action in the particular matter arose, and will conduct what is called an *inspection in loco*. It may be necessary also to hold an inspection *in loco* for the purpose of viewing pieces of real evidence, such as defective concrete blocks, that cannot be transported to court. When the judge is present, this is known as a judicial inspection. Inspections may also be carried out by the parties without the judge present.

At any time during the hearing of the trial, either party may apply to the court for an inspection *in loco* to be held, and the court has a discretion to grant or refuse this application. Also, the court itself may decide that it wishes to conduct an inspection *in loco*.[594] The best time to hold an inspection *in loco* is at an early stage of the trial.[595]

Notes are taken during the inspection *in loco*, and the nature of the observations made are read into the record upon return to court.[596] For this reason, the legal representatives of the parties should ensure that features relevant to their respective party's cases are pointed out to the judicial officer during the inspection *in loco*.

1.13 Reference to a referee

In terms of s 38 of the Superior Courts Act, certain matters may be referred to a *referee* for enquiry and report. The following matters are specifically mentioned in s 38:

1. Any matter which requires extensive examination of documents or scientific, technical or local investigation which in the opinion of the court cannot be conveniently conducted by it. *or*
2. Any matter which relates wholly or in part to accounts;

or

3. Any other matter arising.

This means that if the court is confronted with a *highly technical matter*, it may call in the assistance of an expert in the relevant field. The referee then conducts an enquiry into the matter and produces a report. The court may adopt the report, either wholly or in part, and either with or without modifications. It may also send the report back to the referee for further enquiry or consideration, or make any other order in relation to the report that it feels is necessary or

desirable.[597] Once the court has adopted the report, it has the same effect as if it were the court's own finding in the matter.[598]

2 Trial in the Magistrates' Courts

There are few real differences between the trial procedure followed in the High Court and in the Magistrates' Courts, and much of what is described above in relation to High Court practice applies equally to Magistrates' Courts practice – except, of course, that a differently worded set of rules apply. The procedure relating to the way in which a trial in the Magistrates' Courts is conducted is set out in rule 29 of the Magistrates' Courts Rules.

Section 5 of the Magistrates' Courts Act provides that, apart from exceptional circumstances, the trial must take place in open court. Rule 29(1) of the Magistrates' Courts Rules provides that the trial should take place at the court house from which the summons was issued, unless the court has ordered otherwise.

Rule 29(3) deals with the *opening address* by each of the parties. Before proceeding to hear evidence, the court may require the parties to state briefly the issues of fact or questions of law that are in dispute. This opening address serves substantially the same purpose as that in the High Court. There is, possibly, even more need for an opening address in the Magistrates' Courts than in the High Court since the former courts do not have the advantage of a compulsory rule 37 procedure (and the resultant minute). In the authors' experience, however, practitioners appearing in the Magistrates' Courts frequently lead their first witness without any attempt to clarify the issues for the court.
Rule 29(4) is designed to make litigation more expeditious (speedy). In terms of this rule, the court may decide to deal *separately* with one issue in the matter, which may determine the action, and eliminate the need to deal with the other issues, which will become superfluous (unnecessary). It corresponds closely to rule 33(4) of the High Court Rules. The rule provides that a court may *mero motu* order that a question of fact or law be decided either before any evidence is led or separately from any other question should this appear to be convenient. An example of a situation in which this might occur would be the decision of a court to decide on the merits of a claim (or liability) first, before deciding on the *quantum* (the amount) of a claim.

Rule 29(5) provides that if the parties are agreed on the *facts*, and the dispute between them is essentially a question of *law*, then the facts may be admitted, and the court may give a judgment without hearing further evidence. In this situation the parties have to agree on a set of facts to be admitted.

If both *facts* and *law* are in dispute, and the court believes that it can dispose of the matter by deciding the question of law only, then it is entitled to do so in terms of rule 29(6). An example of this would be a dispute relating to a defendant's liability in terms of a liquid document. There may be two areas of dispute: firstly, one of fact relating to whether or not the defendant signed the document, and, secondly, a question of law relating to whether or not the defendant's alleged liability under the document has prescribed. The question of law would arise if there was a dispute as to whether or not the document in question was an acknowledgement of debt or a promissory note, each of which prescribes after a different period. It may be argued that the proper course would have been for the defendant to raise an exception or special plea,[599] but if this was not done, it remains true at the trial stage that the issue of prescription, if determined in

the defendant's favour, will resolve the entire issue there and then. This is a good reason for the court to order that the issue of prescription be dealt with first.

Rule 29(7) to 29(12) sets out the order in which evidence must be led. There is no substantial difference between the effect of these rules and the practice of the High Court set out above. The order in which evidence is given and the mode of questioning are the same. While the parties themselves may remain in the court throughout the proceedings, usually witnesses should sit outside court until called upon to testify. The plaintiff should give evidence before listening to that of his witnesses. This avoids the suspicion that the plaintiff has tailored his evidence to fit that of the witnesses, and increases the probative value of his evidence.[600] This applies equally to the defendant.

Rule 29(11) deals with the situation in which a party who has closed his case wishes to lead further evidence. The court will take into account the following factors in deciding whether or not to grant leave to a party to adduce further evidence:

1. The reason why it was not led timeously;
2. The degree of materiality of the evidence;
3. The balance of prejudice;
4. The general need for finality in judicial proceedings; and
5. The stage that the particular litigation has reached.[601]

Rule 29(12) deals with the recalling of a witness for further examination, and rule 29(14) deals with the closing addresses. These rules are broadly similar in effect to the practice in the High Court.

Recalcitrant witnesses in the Magistrates' Courts are dealt with in terms of s 51 of the Magistrates' Courts Act.

PART 2: ACTIONS

D: Judgment, interest and costs

1 Judgment

At the close of a trial, the court makes a decision based on the law and the evidence presented to it called a *judgment*. A judgment of the court may be distinguished from an order of the court. A judgment is the decision of the court in response to the relief claimed in an *action*. An *order* is the decision of the court in response to the relief claimed in an *application* or by some other procedure,[602] such as an interlocutory hearing in the course of a trial.

As *Jones and Buckle* indicate, judgment has

two functional components:

> **(a)It is a command to the party at which it is aimed, coupled in an appropriate case with a warrant to the sheriff to enforce the command;**
>
> **(b)It regulates the legal relationship between the parties and settles their mutual rights and obligations, to the extent necessary for its grant.[603]**

Although wilful disobedience of an order made in civil proceedings is a criminal offence, the practice in the High Court is to bring an application on notice of motion for committal for contempt of court in order to enforce obligations under an order *ad factum praestandum* or under a prohibitory interdict.[604]

1.1 Judgment in the High Court

There is no provision in the High Court Rules or the Superior Courts Act directly relating to judgment following upon a trial. The authority of the High Court to grant judgments appears to derive from common law. Judgment in the Magistrates' Courts, by contrast, is provided for in terms of s 48 of the Magistrates' Courts Act.

1.1.1 Judgment at the close of the plaintiff's case

As was discussed earlier, the defendant is entitled to apply to the court for absolution from the instance at the close of the plaintiff's case. This means that the action is dismissed, but judgment is not entered for either the plaintiff or the defendant. If the plaintiff still wishes to pursue the matter once absolution from the instance has been granted, he must institute a fresh action against the defendant.

The procedure adopted is that the defendant (or his legal representative) addresses the court; the plaintiff (or his legal representative) answers; and the defendant (or his legal representative) replies.

The court will only grant absolution from the instance if the plaintiff has *not* managed to adduce sufficient evidence upon which a reasonable person *might* find in favour of the plaintiff.[605] In making its decision the court normally will not have regard to the credibility of witnesses unless the plaintiff's witnesses are obviously lying, or have broken down to such an extent that no reasonable person would place reliance upon them.[606]

1.1.2 Judgment at the close of the defendant's case

Once the defendant has closed his case, and each party has delivered his closing address, the court will usually reserve judgment in order to give the judge time to consider the matter properly. Once the judge has considered the matter, the parties will be informed of the date on which judgment will be delivered.

The court may hand down one of three judgments:

1. Judgment for the plaintiff;
2. Judgment for the defendant; or
3. Absolution from the instance.

The judgment which the court gives after the close of the defendant's case depends on the manner in which the parties discharge the onus upon each of them. Overall, the onus rests upon the plaintiff to prove his case on a balance of probabilities. If he succeeds in doing this, the court will grant judgment in his favour. If he fails to do this, the court has a choice either to grant absolution from the instance or judgment for the defendant. If the defendant has convinced the court that the balance of probabilities favours his version of events, the court will grant judgment in his favour. Otherwise, the court will grant absolution from the instance. What a judgment of absolution from the instance essentially means, therefore, is that neither the plaintiff nor the

defendant has been successful in convincing the court that the balance of probabilities favours him. This may occur in two circumstances:

1. Where the *evidentiary burden is on the plaintiff*, and neither the plaintiff nor the defendant has been able to establish a case or defence on a balance of probabilities; or
2. The result of a case depends upon the credibility of witnesses who give contradictory evidence, and the court is unable to decide which of them is untruthful, making it impossible to decide between them.[607]

Where the *evidentiary burden is on the defendant*, however, the court will never grant absolution from the instance at the end of the whole case. In such a matter, judgment will be for the defendant if the onus is discharged, and for the plaintiff if it is not discharged.

1.1.3 Interpreting the court's judgment

The following quote sets out the well-established test on the interpretation of court orders:[608]

> **The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention.**

In *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd*[609] the Supreme Court of Appeal, in dealing with the interpretation of the order of the court *a quo* held:

> **The flaw in the argument, as I see it, is that it loses sight of the principle that a court order, as in the case of any other document, must be read in the context of the judgment as a whole and particularly in the light of the court's reasons for that order (see e g *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 304D–F). Approached in this way, it is clear to me that the court *a quo never intended* to and never did afford Newlands leave to appeal on the just and equitable issue or, for that matter, on the issue whether or not the share sale agreement could be characterised as *contra bonos mores*.**

1.2 Judgment in the Magistrates' Courts

Section 48 of the Magistrates' Courts Act sets out the various judgments that may be granted as a result of the trial of an action:

1. Judgment for the plaintiff in so far as he has proved the same;
2. Judgment for the defendant in respect of his defence in so far as he has proved the same;
3. Absolution from the instance if it appears to the court that the evidence does not justify the court in giving judgment for either party;
4. Such judgment as to costs (including costs as between attorney and client) as may be just;
5. An order, subject to such conditions as the court thinks fit, against the party in whose favour judgment has been given, suspending wholly or in part the taking of further proceedings upon the judgment for a specified period pending arrangements by the other party for the satisfaction of the judgment; and
6. An order against a party for the payment of an amount of money for which judgment has been granted, in specified instalments or otherwise, including an order contemplated by s 65J or 73.

The court will grant:

1. either (1) or (2) or (3);
2. plus, in most cases it will grant (4);
3. plus, in certain cases it may grant (5) or (6).

With regard to judgment for the defendant in terms of s 48(*b*), the subsection envisages a defence raised by the defendant in respect of which the burden of proof is on the defendant. For example, the burden of proof may be on the defendant in respect of facts which he has alleged 'by way of confession and avoidance, in respect of a special defence such as compromise or payment, or waiver, or in respect of dilatory defences and pleas in bar'.[610]

We have already dealt with absolution from the instance in the section on trials in the High Court. With regard to a judgment of absolution from the instance in terms of s 48(*c*), note that 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. Its effect is to leave the parties in the same position as if the case had never been brought. This means that the judgment of absolution from the instance does not amount to *res judicata*and the plaintiff may, if he so wishes, proceed afresh.

2 Variation and setting aside of the court's judgment

Once a court has *delivered a judgment*, the matter is *closed* in the sense that the original court may not revisit the matter.[611] In giving a judgment the court has exercised its jurisdiction in the case to the utmost extent possible, and its authority over the matter has come to an end.[612] The judge who delivered the judgment is *functus officio*, and there is also the public interest in bringing litigation to finality.[613] As a general rule, once the court is *functus officio*, it may not alter or vary its judgment in any manner. If the person who lost the case is unhappy with the result, he should take the matter on appeal or review.

There are, however, exceptional circumstances where the original court may alter its judgment. These exceptions fall broadly into two categories, the *correction of errors* in a judgment and the *rescission or cancellation* of a judgment. When correcting errors, note that the court may not amend the essential substance of a judgment.[614] Examples of errors that may be corrected by the original court are the clarification of an ambiguity in the text of a judgment, a patent (clearly apparent) error or omission such as the inadvertent (unintentional) omission of a costs order, or a typographical (typing) error in a court order. As far as the rescission of its judgments are concerned, the original court may rescind (cancel) certain orders given in error or by common mistake on the part of the parties, as well as default judgments in certain circumstances.

Note also that a court is not *functus officio* with respect to an interlocutory order, and therefore has greater latitude to vary or set such an order aside.[615]

2.1 Variation and rescission of judgment in the High Court

2.1.1 Variation of judgment in the High Court

In the High Court, judgments may be varied in two ways. The first method is provided by common law, while the second is provided for in terms of rule 42 of the High Court Rules.

2.1.1(a) Variation in terms of common law

The High Court has the authority at *common law* to 'supplement, clarify or correct' its own judgments.[616] This power would seem to overlap with the High Court's *inherent jurisdiction* to regulate its own proceedings in the interests of justice.[617] Using this power, it has varied its judgments to:

1. allow for the inclusion of accessory or consequential matters that have been inadvertently overlooked or that the court has inadvertently failed to grant;
2. clarify a judgment, the meaning of which is obscure, ambiguous or uncertain;
3. correct a clerical, arithmetic or other error; or
4. correct, alter or supplement a costs order.[618]

An application to vary a judgment in terms of common law must be brought within a reasonable time of the judgment having been granted.[619]

2.1.1(b) Variation of a judgment in terms of rule 42(1)

High Court rule 42(1) supplements common law by providing for certain instances in which the court may either *mero motu*[620]or on application by one of the parties *set aside* or *vary* one of its *judgments* or *orders*. The element that is more or less common to all the instances of variation or rescission under this particular rule is that of *error*. The court is not confined to the record of the proceedings in deciding whether a judgment was erroneously granted.[621]

The rule provides for variation in the following instances:

1. An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
2. An order or judgment in which there is an ambiguity, or a patent error or omission in the order or judgment, but only to the extent of such ambiguity, error or omission; and
3. An order or judgment granted as the result of a mistake common to the parties.

Rule 42(1)(*a*) deals specifically with those default judgments or orders which were *erroneously sought or granted in the absence of any party affected thereby*. The essential elements of this type of rescission are therefore (a) that judgment was erroneously sought or granted and (b) that this occurred in the absence of a party affected thereby. 'Erroneous' means, of course, that there must have been some error, and in this context, the error was material to the judgment being granted.[622] Erasmus lists two general situations in which a judgment might have been granted in error: (a) an irregularity in the proceedings; (b) when it is not legally competent for a court to make an order.[623]

The absence of the party affected would mean that usually the judgment would be given on a default basis. For this reason, while it is possible theoretically to *vary* a judgment under this sub-rule, it is more likely to be used for the purposes of *rescission*. It is possible, however, that when a judgment is granted by consent in the absence of one of the parties, some portion of the consent order on which the judgment is based might be incorrectly communicated to the court. The resultant error in the judgment may call for variation rather than for rescission.

Rule 42(1)(*b*) allows the court to correct obvious mistakes it has made in its judgment or order. It covers the following exceptions to the *functus officio* rule, all of which have been recognised by the Appellate Division, and are conveniently listed by Erasmus in his comment on the rule:[624]

(1)The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment debt, which the court overlooked or inadvertently omitted to grant.
(2)The court may clarify its judgment or order if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter 'the sense and substance' of the judgment or order.
(3)The court may correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention. This exception is confined to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense or substance.
(4)Where counsel has argued the merits and not the costs of a case, but the court has made an order regarding the costs, it may thereafter correct, alter or supplement that order.

The rule covers much the same ground as the common-law remedy discussed above.[625] This sub-rule is more likely to be used for variation of a judgment than for rescission.

With regard to rule 42(1)(*c*), two broad requirements must be met before the rule may be relied on to rescind a judgment. Firstly, there must have been a *common mistake* between the parties, which means that both parties must have made the mistake.[626] Secondly, there must be a *causative link* between the mistake and the eventual order.[627] A common example would be where the parties had agreed upon a statement of facts which was found later to be incorrect. Another type of common mistake is where a judgment is entered by consent, but where the parties consented in *justus error*. It is not sufficient, however, if the error is that of one of the parties only, or of the court, or of a legal representative.[628]

2.1.2 Rescission of judgment in the High Court

In the High Court, a default judgment may be rescinded in the following ways:

1. In terms of rule 42(1) of the High Court Rules;
2. In terms of rule 31(2)(*b*) and 31(5)(*d*) of the High Court Rules; and
3. Under the common law.

2.1.2(a) Rescission in terms of rule 42(1)

As indicated above, rescission under this rule requires the judgment to have been granted because of an error of some kind.[629]Rescission may also be granted under rule 31(2)(*b*) or rule 31(5)(*d*)[630] or in terms of the common law, but if an error can be shown, it is *not necessary* for the party seeking the rescission under rule 42 to show *good cause* as is required with the other two types of application for the rescission of a default judgment.[631]

The circumstances under which a judgment may be rescinded under this rule are the same as those under which it may be varied, and are set out above.[632] Having said this, it will not often occur that anyone will ask for *rescission* as much as for *variation* under rule 42(1)(*b*), as the tendency is to use this sub-rule to correct patent mistakes in judgments such as those discussed in Section 2.1.1(*b*) above. There is more scope for rescission under rule 42(1)(*a*) and (*c*), however, particularly under sub-rule (*a*), which will therefore be dealt with in more detail here.

Rule 42(1)(*a*) provides for the rescission of an order or judgment 'erroneously sought or erroneously granted in the absence of any party affected thereby'. The two necessary elements

are therefore an *error* made that affected the judgment and the *absence of a party affected thereby*. As noted in the section on variation under 2.1.1(*b*) above, the absence of the party will mean that many of the applications made under this sub-rule will be in connection with a judgment granted by default. Other such applications will concern consent orders which have been granted on some mistaken premise in the absence of one of the parties.

Examples of situations in which rescission may be claimed under this sub-rule are quite varied, including errors connected to procedural issues as well as those relating more closely to the substance of the claim. An example of the first situation is where the court grants judgment against a defendant, mistakenly believing that he knows that the matter has been set down for hearing.[633] An example of the second is where the capital amount of the claim has already been paid by the defendant.[634]

There is authority to the effect that the error must be apparent from the record,[635] which would not be the case necessarily in respect of the two examples mentioned above. Erasmus submits that in deciding whether a judgment has been granted erroneously, a court is not confined to the record of the proceedings, and the error must appear *ex facie* in respect of the record only where the court acts *mero motu* on the basis of an application made from the bar.[636]

For the circumstances under which one can claim rescission under rule 42(1)(*c*), see the section on variation under 2.1.1(*b*) above.

Unlike the practice that has prevailed in the Magistrates' Courts, it is not possible in the High Court to have a matter set aside merely because both parties consent to it.[637]

2.1.2(b) Rescission in terms of rule 31(2)(b) and reconsideration in terms of rule 31(5)(d)

Rescission in terms of rule 31(2)(*b*) may only take place in respect of *default judgments* granted in terms of rule 31(2)(*a*). These are default judgments granted in respect of claims that are 'not for a debt or liquidated demand' (in other words an *unliquidated claim*),[638] and where default judgment was granted because the defendant failed to deliver an appearance to defend or enter a plea.[639] There is no explicit provision for rescission in the case of a *debt or liquidated demand* where judgment has been granted by the registrar in terms of rule 31(5). If a party is dissatisfied with the judgment or directions of the registrar, however, he may, within 20 days after he has acquired knowledge of the judgment or direction, set the matter down for reconsideration by the court in terms of rule 31(5)(*d*). It is not clear how an application for *reconsideration* by the court of a default judgment given by the registrar will differ from an application for rescission of a default judgment given by the court. The safest course of action for the defendant to adopt in the former case is to treat an application for reconsideration in the same way as an application for rescission.

Let us now discuss applications for rescission in terms of rule 31(2)(*b*), which reads as follows:

> **A defendant may within 20 days after he has knowledge of such judgment [i.e. a default judgment taken against him] 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 to it seems meet.**

There are two things to note about the 20-day limit within which to bring the application for rescission in terms of this rule. Firstly, the rule states that the application must be brought within 20 days after the defendant has gained *knowledge* of the default judgment, *not* within 20 days of the judgment itself. The 20 days are therefore counted from the day after the defendant first heard about the judgment, not from the date the judgment was granted. Secondly, there are differing opinions over what is meant by the requirement that the application *be brought within 20 court days* after the defendant has knowledge of the judgment. Some cases have held that the application must be *before the court* within that period.[640] On this interpretation of the rule, the application must be drafted, lodged at court, served on the plaintiff with sufficient notice and heard, all within the 20-day limit.[641] The better interpretation, however, is that the application *need only be filed with the registrar and served* within the 20-day limit, and not be heard in addition.[642]

Under rule 31(2)(*b*), the court has the *discretion* to set aside the judgment if the defendant shows *good cause* for the rescission.[643] This has never been precisely defined, but showing *good cause*, involves three elements,[644] namely the applicant must give a reasonable *explanation for his default*; his application must be brought *bona fide*; and he must show the existence of a *bona fide defence*.[645]

2.1.2(b)(i) A reasonable explanation for default

In giving a reasonable explanation for his default, the appellant must show that his default was not wilful.[646] *Wilful default*exists where:

1. the defendant has knowledge that the action is being brought against him;
2. the defendant deliberately refrains from entering an appearance to defend, though free to do so; and
3. the defendant has a certain mental attitude to the consequences of default.[647]

Let us discuss each of these requirements in turn:

1. Firstly, to be in wilful default, the defendant must have knowledge that an action is being brought against him. If he is able to show that he failed to enter an appearance to defend because he had no knowledge of the action, he has shown that his default was not wilful. Since personal service of the summons is only required in the case of a divorce action, a summons served in some other way may never reach the defendant. He may only come to hear of the action after default judgment has been taken against him.[648]
2. Secondly, there may be circumstances in which a defendant was aware that an action had been brought against him, but was unable to enter an appearance to defend prior to default judgment being taken against him. He may be in hospital or abroad when he hears that summons has been served, and be unable to return or make arrangements for a notice of appearance to defend to be delivered before default judgment is taken. Once again, the defendant's default in these circumstances is clearly not wilful, even though he knew summons had been issued.
3. Thirdly, there are situations in which a defendant (a) knows an action has been brought against him and (b) has the opportunity to enter an appearance to defend, but (c) deliberately fails to do so. This need not amount to a situation of wilful default, however, as a further enquiry is made. This enquiry relates to the mental attitude of the defendant to the action, that is, did he fail to act as a result of indifference to the consequences?[649] In other words, did he adopt a 'don't care' attitude? Mere inadvertence or forgetfulness will not amount to wilful default. Neither will error. If he failed to understand the legal consequences of not entering an appearance to defend, the default will not be wilful. Negligence on his part or on the part of his attorney also will not amount to indifference or wilful default. Of course, the defendant's *bona fides* may well come

under examination if the error is unreasonable, which may lead to the court using its discretion to reject the application for rescission.

2.1.2(b)(ii) The existence of a bona fide *defence*

Even if the defendant is not in wilful default, the court will not use its discretion to grant rescission unless the defendant is able to show a substantial defence to the claim that is good in law. He may not merely claim to have a defence, but must set out its nature and salient (pertinent) details. The defendant 'need not deal fully with the merits of the case nor produce evidence that the probabilities are actually in his favour.'[650] What he needs to show is that a *prima facie* case exists (i.e. on the face of it) or an issue fit for trial.[651]

2.1.2(b)(iii) The application must be brought bona fide

The fact that the defendant has a *bona fide* defence is not sufficient. It must also be clear that he intends to use his defence.[652]In other words, it must be clear that the defendant's intention in bringing the application for rescission is to enable him to have his day in court. For the application to be *bona fide*, the defendant must not have some other motive for rescission, such as simply delaying execution of the judgment.[653]

The court has a *wide discretion* in deciding whether or not the defendant has shown good cause,[654] but where the applicant was in wilful default, the application for rescission will normally fail.[655]

In light of the above requirements, the affidavit supporting the application for rescission must set out the reasons for the defendant's default as well as his defence in sufficient detail for the court to be assured that the defence is *bona fide*.

2.1.2(c) Rescission in terms of the common law

Judgments may also be *set aside* at *common law* in the following circumstances:

1. Fraud;
2. *Justus error* (on rare occasions);
3. In certain exceptional circumstances when new documents have been discovered;
4. Where judgment has been granted by default; and
5. In other circumstances based on justice and fairness.[656]

In relation to fraud, to have a judgment set aside a party must prove that (a) the successful party (or someone to his knowledge) gave incorrect evidence; (b) that the evidence was given fraudulently and with the intent to mislead the court, and (c) that the false evidence was the cause of the unfavourable judgment.[657]

At common law, a court has power to rescind a judgment obtained on default of appearance, provided that *sufficient cause*for rescission has been shown. This means (a) that the party seeking relief must present a reasonable and acceptable explanation for his failure to appear and (b) that he has a *bona fide* defence which, *prima facie*, carries some prospect of success.[658] Even where wilful default may be found to exist, the mental element is just one of those used to assess sufficient cause and a court's discretion should not be unduly restricted. The defence raised should still be examined to determine whether there is an issue fit for trial, and all the circumstances should be considered as a whole in assessing whether there is sufficient cause for

rescission. These are the same requirements as those comprising good cause under rule 31(2)(*b*).[659]

The High Court also has an inherent jurisdiction to rescind default judgments.[660]

2.1.3 Void judgments

In certain *very limited cases*, an order of court may be disregarded without the necessity of having to set it aside. These are cases in which the order of the court is regarded as *void* for one of the following three reasons:

1. Where the order was obtained against a party who had not been legally cited before the court;
2. Where the case was conducted on behalf of a party without a proper mandate; or
3. Where the court lacked jurisdiction.[661]

As a general rule, even if an order of court has been granted incorrectly, it must be obeyed until it has been properly set aside.[662]

2.1.4 Abandonment of a judgment

In terms of High Court rule 41(2):

> **Any party in whose favour any decision or judgment is 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.**

2.2 Rescission and variation of judgments in the Magistrates' Courts

2.2.1 Variation and rescission in general

Section 36 of the Magistrates' Courts Act deals with rescission of judgments in the Magistrates' Courts:

The court may, upon application by any person affected thereby, or, in cases falling under paragraph (c), *suo motu*:

> **(*a*)rescind or vary any judgment granted by it in the absence of the person against whom that judgment was granted;**
>
> **(*b*)rescind or vary any judgment granted by it which was *void ab initio* or was obtained by fraud or by mistake common to the parties;**
>
> **(*c*)correct patent errors in any judgment in respect of which no appeal is pending; and**
>
> **(*d*)rescind or vary any judgment in respect of which no appeal lies.**

Apart from applications for the rescission of default judgments (referred to in paragraph (*a*) above), the procedure by means of which a party will make an application for the *rescission or variation* of a judgment in the Magistrates' Courts is set out in rule 49(7), which requires that such applications must be:

1. brought on notice to all parties; *and*
2. supported by affidavit/s setting out the grounds on which the applicant seeks rescission/variation.

The most common type of application for rescission, however, is an application for rescission of a default judgment which is referred to in paragraph (*a*) above. Let us look at this application in more detail.

2.2.2 Rescission of default judgments in particular

In terms of rule 49(1), a party who is seeking to rescind[663] a *default* judgment has *20 court days* from the date on which the judgment came to his knowledge to *serve and file* the application for rescission.[664] *Notice of* the application must be given to *all parties* to the proceedings. He is required to show *good cause* why the judgment should be rescinded or, alternatively, the court must be satisfied that there is good reason to do so.

2.2.2(a) Good reason

The court may rescind the judgment 'if it is satisfied that there is *good reason* to do so'. Although this provision appears to set a lower standard than the requirements of *good cause* as explained in the discussion of High Court rule 32(2)(*b*) above, it has been held that it does not so much lower the requirements for the applicant, as much as it extends the discretion of the magistrate. Where the applicant fails to show good cause, the magistrate may nevertheless grant rescission *mero motu* in the interests of justice if exceptional circumstances warrant it.[665]

2.2.2(b) Good cause shown

This is the same requirement as that dealt with in detail under High Court rule 31(2)(*b*), and the comments made there are pertinent to rescission of default judgments in the Magistrates' Courts.[666] 'Good cause' has never been properly defined, but it incorporates both an investigation into the existence of a *prima facie* defence, and whether or not the defendant was in wilful default. Generally therefore, rescission cannot be granted if the defendant is in *wilful default* and cannot show a *prima facie*defence. This means that to show good cause, the defendant in his affidavit must explain the reasons for his default and show the existence of a *prima facie* defence as well as satisfy the court that his default was not wilful.[667]

A magistrate has a discretion in the case of rescission, and is not obliged to grant it. The defendant's *bona fides*, whether or not the default was wilful, and the existence of a *prima facie* defence are all taken into account in exercising that discretion, the most important aspect being that of the existence of a *prima facie* defence.
Four different situations may arise:

1.The defendant is bringing the application to rescind the default judgment and wants to defend the matter (rule 49(3)).

2.This is the most common situation. It may occur, for instance, that for some reason, the defendant did not receive the summons and the next thing he knew the sheriff was at his door telling him that judgment had been taken against him. He consults an attorney, telling him that he has a good defence to the matter and would definitely have entered an appearance to defend if he had known about the summons.[668]

3.*Contents of defendant's affidavit*: In this case the application must be supported by affidavit/s. The applicant is required to set out the following details in his affidavit:

4. a) *The reasons for the defendant's absence or default*: This is where the defendant deals with the aspect of wilful default. The defendant sets out facts to show why he is in default, and must show that the default was not

wilful. If any of the three elements discussed previously are absent, the defendant cannot be held to be in wilful default.

and

b) *The grounds of the defendant's defence to the claim*: This is perhaps the most important part of the affidavit. The defendant must set forth allegations of fact which give rise to a defence. He need not deal fully with the merits, but sufficient facts must be alleged to show a *prima facie* case exists.

The onus of proving wilfulness is on the respondent in the application.

5.The defendant is bringing the application to rescind the default judgment, but he does not wish to defend the proceedings (rule 49(4)).

This happens where the defendant would have been happy to pay if he had known about the summons. As soon as he finds out about the judgment he makes arrangements to pay, but by that time he already has a judgment against his name. He now wants to remove the judgment. There is no need to show good cause in this situation, but the defendant must satisfy the court:

a)he was not in wilful default;[669]

and

b)the judgment was satisfied or arrangements were made to satisfy the judgment within a reasonable time after it came to his knowledge.

6.The plaintiff agrees in writing that the default judgment be rescinded or varied (rule 49(5)).

7.This will usually be the case where the defendant has paid off the judgment debt and now wants the judgment rescinded so that he can take his name off the list of judgment debtors that credit bureaus might have. As long as a debtor's name appears on the list, he may find it difficult to obtain credit.

a)Either the plaintiff, the defendant or any other person affected by such judgment may make the request for rescission or variation. Note that until a 2010 amendment to rule 49(5), this was not an official application to court, but a request which would have been dealt with administratively by the court. The rule has now been amended to align with s 36(2) of the Magistrates' Courts Act, with the result that the word 'request' has been replaced with the word 'apply'. It would therefore seem that the correct procedure is by way of application, rather than a notice dealt with in chambers. In terms of rule 49(5)(*b*), an application of this nature may be made at any time after the plaintiff has agreed in writing to the rescission or variation of the judgment.

b)Notice of the application must be given to all parties.

c)Written proof of the plaintiff's consent to the rescission must accompany the application.

8.The application for rescission of the default judgment is being made by a person other than those referred to in 1, 2 or 3 above (rule 49(6)).

This is a 'catch-all' clause for rescission of default judgments. The application must:

a)be supported by affidavit/s;

and

b)set out the reasons why the applicant seeks rescission of the default judgment.

3 Interest

3.1 General overview

Most claims *sounding in money* attract *interest*. Interest is an amount of money calculated as a percentage of the original debt. The sum of money comprising the original debt is known as the *capital* portion of the debt for the purposes of interest. The percentage at which interest accrues (accumulates) on the capital amount and the period over which it is calculated vary. These two aspects together comprise what is called the *rate of interest*. Interest is payable from the time the debt becomes due for payment to the time that the debtor eventually pays the debt in full. If the debtor makes periodic payments in order to reduce the amount of the debt, interest continues to be calculated on the reducing balance of the capital amount still outstanding until payment of the debt and interest is complete. Any interest that has accrued is first deducted from the payment a debtor makes, however, before the payment is used to reduce the capital amount.

Although interest is closely connected to the capital amount that forms the subject of the claim, it constitutes a separate claim.[670] Since interest does not flow automatically from the main portion of the claim, a claim for interest must be pleaded specifically in the particulars of claim, and a specific request for interest made in the prayer.[671] Without making a specific claim, the plaintiff will usually not be awarded interest.[672] There are two major questions that need to be addressed in respect of every claim for interest, namely the rate of interest and the date from which interest is calculated.

3.2 The rate of interest

The percentage used to calculate the rate of interest may differ from case to case. The period of time used in order to calculate this percentage may also differ. Interest may therefore be charged at a certain percentage, calculated over the period of a day, week, month, or year. In practice, the period over which interest is calculated is invariably per year (per annum). An example of the way in which this is expressed, using an arbitrary rate of 18%, would be ‘interest at the rate of 18% per annum’. If the claim is contractual, it will often transpire that the parties have *agreed* to a *rate* of interest in respect of the debt that comprises the claim at the same time that they agreed all the other terms and conditions of the agreement. In these circumstances, subject to the limitations set in terms of the National Credit Act (as discussed below), the agreed rate may be claimed. The plaintiff must specifically *plead* this rate, however, making out a case for it in the particulars of claim.

3.2.1 Simple and compound interest

In the absence of an agreement to the contrary, the only kind of interest that may be charged at common law is known as *simple interest*. This means that for the purposes of calculating interest, the capital amount is kept separate from the interest that has accrued thus far, and any further interest is calculated merely on the capital amount. This factor should be borne in mind by attorneys who calculate interest on the reducing balance of the capital amount as debtors make periodic payments to reduce their indebtedness. Occasionally, however, an agreement will make provision for the payment of *compound interest*, which may be the case with debts owed to

commercial financial institutions such as banks. Compound interest is usually described as *interest upon interest*. What this means is that the amount of interest that has accrued at a given point is added to the capital amount before a new interest calculation is made. Although the interest rate is usually set at a certain percentage per annum, an agreement for compound interest usually includes the stipulation that the interest will be calculated and compounded monthly (usually in arrears, i.e. the end of each month). Using an arbitrary percentage of 18%, this would be expressed in the following manner: 'interest at the rate of 18% per annum, calculated and compounded monthly in arrears'.

If there is *no agreement* as to the rate at which interest should be charged, then the plaintiff will be entitled to charge the rate as stipulated in terms of the Prescribed Rate of Interest Act.[673] The rate stipulated in terms of the Act changes every few years, and the plaintiff will be entitled to charge the rate which was in force on the date from which the plaintiff was entitled to start charging interest. The rate is fixed on that date, and does not change in respect of that debt, even though the rate of interest prescribed in terms of the Prescribed Rate of Interest Act changes. The current rate is 15,5% per annum. The interest rate provided for in the Prescribed Rate of Interest Act is sometimes referred to as the *mora* rate of interest.

3.2.2 National Credit Act 34 of 2005

Although the parties to an agreement may agree that a debt will attract interest at a rate of their choice, this choice is not completely unfettered. The National Credit Act[674] sets limits on the rate of interest charged in respect of certain types of credit agreements to which it applies. Parties need to ensure that they do not exceed the limits provided in the Act when stipulating a rate of interest in a credit agreement, otherwise that interest rate will not be enforceable.[675]

3.3 The date from which interest runs

3.3.1 Unliquidated vs liquidated debts

The date from which interest begins to run in the case of unliquidated debts is determined by statute. We propose, therefore, to deal with the case of unliquidated debts separately from that of liquidated debts.

3.3.2 Liquidated debts

There is a close relationship between the concept of *mora*[676] and the payment of interest. The date from which a debtor is placed in *mora* is the date from which interest on the capital amount of the claim begins to run. With a liquid claim, there are two aspects of *mora* that are important, namely *mora ex re* and *mora ex persona*.[677]

3.3.2(a) *The* mora ex re *situation*

Mora ex re occurs where a date for the performance of a contractual obligation (including the payment of a money debt) is set in terms of an agreement. In this situation, the claim will be due and payable from the agreed date. When this date is reached, the debtor will be in *mora* automatically, and no further demand need be made. Interest will become due and payable on the capital amount of the debt simultaneously with the capital amount becoming due and payable, and will begin to run from that date, even where interest is not expressly mentioned in the agreement. If interest is mentioned in the agreement, it will begin to run from whatever date is agreed, even if this is later than the date that the principal debt becomes due. This is rare,

however, and interest will generally run from the due date of the principal debt. The rate of interest will be that which was payable at that time in terms of the Prescribed Rate of Interest Act, unless another rate has been agreed.[678]

When drafting particulars of claim in such cases, practitioners should be careful *not* to claim interest *from date of demand*or *from date of service of summons*. Clearly, by drafting the claim for interest in this way, the plaintiff will be deprived of the interest that is due to him from a much earlier date in terms of the contract. Claiming interest *a tempore morae* (from the date of *mora*) should also be avoided, unless the date on which *mora* occurred is clear from the particulars of claim.

3.3.2(b) *The* mora ex persona *situation*

If the contract does not stipulate a date on which an amount is due and payable, and such date is not clear from the general nature of the contract, then interest will only begin to run from the date the debtor has been placed *in mora*. This situation is called *mora ex persona*. The debtor is placed *in mora* by means of a demand (an *interpellatio*) made by the creditor or his attorney, requiring payment by a certain date. This date must allow the debtor a reasonable period in which to pay. If the debtor does not make payment by the stipulated date, interest begins to run from that date. The demand may take several forms (a correctly worded invoice, for instance) but usually takes the form of a letter of demand.

3.3.3 Unliquidated debts

Until an amendment to the Prescribed Rate of Interest Act, the situation of interest as it pertained to unliquidated claims was most unsatisfactory. Until this amendment, an unliquidated claim (the most common generally being a claim for damages) only began to attract interest from the time that it became liquid. An unliquidated claim becomes liquid in two situations: when the judge or magistrate, having heard evidence on the *quantum* of the claim, comes to a decision about what the *quantum* of the damages ought to be and gives judgment; or alternatively, when the parties reach an agreement on *quantum*. In the past it was always held that the damages became due and payable when they had been *liquidated*, and therefore interest only became payable from that date onwards, i.e. the date of judgment or agreement, as the case may be.

This led to a considerable amount of unfairness. For instance, someone would have their motor vehicle damaged in a collision and pay a panel beater to fix it. The matter would only come to trial many months or years later. Even if the plaintiff recovered the amount that he paid the panel beater, inflation would have reduced the value of the claim, and he would not receive proper compensation.

Fortunately, however, an amendment of the Prescribed Rate of Interest Act solved this problem. The current position in respect of an *unliquidated debt*, such as a delictual claim for damages, is set out in s 2A of the Prescribed Rate of Interest Act, which states, *inter alia*, as follows:

> **(1)Subject to the provisions of this section the amount of every unliquidated debt as determined by a court of law, or an arbitrator or an arbitration tribunal or by agreement between the creditor and the debtor, shall bear interest as contemplated in s 1. [i.e. the prescribed rate of interest.]**
>
> **(2) (*a*)Subject to any other agreement between the parties the interest and the provisions of the National Credit Act, 2005 (Act 34 of 2005) contemplated in subsection (1) [i.e. the prescribed rate of interest] shall run from the**

date on which payment of the debt is claimed by the service on the debtor of a demand or summons, whichever date is earlier.

(*b*)In the case of arbitration proceedings and subject to any other agreement between the parties, interest shall run from the date on which the creditor takes steps to commence arbitration proceedings, or any of the dates contemplated in paragraph *(a)*, whichever date is earlier.

(3)The interest on that part of a debt which consists of the present value of a loss which will occur in the future shall not commence to run until the date upon which the quantum of that part is determined by judgment, arbitration or agreement and any such part determined by arbitration or agreement shall for the purposes of this Act be deemed to be a judgment debt.

(4)Where a debtor offers to settle a debt by making a payment into court or a tender and the creditor accepts the payment or tender, or a court of law awards an amount not exceeding such payment or tender, the running of interest shall be interrupted from the date of the payment into court or the tender until the date of the said acceptance or award.

(5)Notwithstanding the provisions of this Act but subject to any other law or an agreement between the parties, a court of law, or an arbitrator or an arbitration tribunal may make such order as appears just in respect of the payment of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which interest shall run …

It is clear from s 2(*a*) above that in the case of an unliquidated debt, interest will usually begin to run from the date on which payment of the debt is claimed by the service on the debtor of a demand or summons, whichever date is earlier. This means that interest runs from the date that payment is demanded, and not from the date of judgment, which would, of course, be much later. Now, the situation in respect of unliquidated claims has become similar to a *mora ex persona* situation. There is one important difference, however, in that no allowance is made for payment to occur within a reasonable period of demand, with interest to run from the *mora* date. Interest is due, instead, from the date of '*service* of a demand or summons', in other words, from the date of receipt. Since it may take a long time to prepare, issue and serve a summons, it makes sense in the case of an unliquidated debt (such as a delictual claim for damages) to send a letter of demand in order to start interest running before setting about preparing the summons.

It may also be worth mentioning a misconception that occasionally arises with regard to the more complex delictual claims, such as MVA claims for personal injury. Parts of this kind of claim may seem to be liquid (e.g. the so-called special damages such as medical expenses, claims for loss of past income, etc.), whereas other parts may seem to be unliquidated (e.g. the so-called *general damages* such as claims for pain and suffering, loss of amenities of life, disfigurement, etc.). It is important to remember, however, that all these *claims* are part of a single unliquidated delictual claim. Occasionally an attorney may try to *split* a single claim such as this into a number of liquid and unliquidated claims in order to enable him to claim interest on the liquidated parts of the claim from the date the delict was committed, which will be prior to the date of service of demand or summons. This is not permissible. The entire delictual claim is a single unliquidated claim and interest may only be claimed on the amount of the whole claim from the date of service of demand or summons, as set out in the Act discussed above.

3.4 The *in duplum* rule

In terms of the common law, interest may not exceed the capital amount. In other words, once the interest due has reached the amount of the claim, it stops running.[679] This is known as the *in duplum* rule. Where a partial payment is made, however, which reduces the interest owed to an amount less than the capital amount, interest starts to run again.[680] Interest only stops running when it reaches the amount of capital outstanding, or when the whole amount outstanding (capital plus interest) is paid in full. A statutory form of the *in duplum* rule is created by s 103(5) read with s 101(1)(*d*) of the National Credit Act 34 of 2005 and applies to credit agreements that fall under the Act. In this case, unpaid interest, fees and charges will stop accumulating when it equals the unpaid balance of the principal debt.[681]

3.5 Drafting a claim for interest

In practice, many attorneys and advocates simply 'kick for touch' when drafting a claim for interest. The most common way of doing this is to make use of the phrase, 'interest at the prescribed legal rate *a tempore morae*', in the prayer. Often, a rate higher than the prescribed legal rate has been agreed between the parties. By asking only for the *prescribed legal rate*, the practitioner is preventing his client from recovering the full amount due to him.

Furthermore, a practitioner should attempt to claim interest for his client from the earliest possible date, i.e. the date when performance became due – the date of *mora*. In a *mora ex re* situation, there is no need mindlessly to claim interest from the date of service of summons, or even from the date of the letter of demand (if one has been sent). Neither of these processes has any influence on *mora* in a *mora ex re* situation. In the particulars of claim, one should plead or make a case for interest from an earlier date than that of service of summons, and then request interest from this earlier date in the prayer. Furthermore, the expression *a tempore morae* is a very general term, which indicates that the claim for interest is to be calculated from the date on which payment is due. In certain cases, however, the date on which payment is due may not be clear from the papers before the court. Where this is the case, the court will be obliged to grant interest from the date of the service of summons only. Accordingly, we submit that it is much better for a practitioner to set out in detail the date from which interest is to be calculated, rather than relying on a general term such as *a tempore morae*.

If a letter of demand is to be drafted for a *mora ex persona* situation, there is a method of doing so that helps to make the drafting of the summons a little easier. We have already indicated that in a *mora ex persona* situation, interest may be claimed from the date that a debtor was placed in *mora*. This date will not actually be the *date of demand* as is so often stated, but the date from which performance became due after reasonable notice was given. Drafting the letter of demand in precise terms may facilitate establishing this date for the purpose of drafting the summons. So, for example, instead of demanding performance 'within 14 days of *receipt* of this letter' (which is difficult to ascertain), or even 'within 14 days of the *date* of this letter', payment should be demanded by a *particular* date. That will enable the plaintiff's attorney to plead the date without difficulty in the particulars of claim. Finally, having properly pleaded a claim for interest in the particulars of claim, the prayer should include a claim for interest, drafted more or less along the lines of: '*Interest on the amount of (amount) at (rate) per annum, calculated from (date) to date of payment*.' In the case of a claim for compound interest, the prayer would be drafted more or less in these terms: '*Interest on the amount of (amount) at (rate) per annum, calculated and capitalised monthly in advance from (date) to date of payment*,' in the latter case, the terms of the interest being dependent on the agreement pleaded, of course.

The rate of interest claimed will depend on what has been agreed in terms of any contract upon which the claim is based. In the absence of agreement on the interest rate or in the case of an unliquidated claim such as damages for which no interest rate would otherwise exist, the rate prescribed by the Prescribed Rate of Interest Act will be applicable. In terms of a recent amendment to the Prescribed Rate of Interest Act, the rate of interest per annum is to be calculated by having regard to the repurchase rate (as determined from time to time by the South African Reserve Bank) plus 3,5 per cent.

4 Costs

4.1 Introduction

In litigation there are winners and losers. When a court awards costs to a successful litigant, it does so to *indemnify* him for the expense to which he has been put in having either to initiate or defend litigation.[682] The High Court Rules and Superior Courts Act do not make provision for the ordering of costs in a general way.[683] Common-law principles apply to costs in the High Court. In Magistrates' Courts practice, however, s 80 and rule 33 of the Magistrates' Courts Act and rules make provision for the ordering of costs. These provisions are necessary as the Magistrates' Courts are 'creatures of statute'. However, the principles in respect of granting costs are identical in both courts, and are determined in terms of common law.

4.2 General rules relating to an award of costs

The basic rule is that all costs are in the court's discretion.[684] This discretion must be exercised judicially after considering the facts of each case.[685] It must be exercised upon grounds which a reasonable man would apply in order to reach a just conclusion.

The following general rules have been laid down for the guidance of the courts:

1. Generally, the successful party is entitled to his costs.

   When it comes to awarding costs, the *general rule* is that costs follow the event; in other words, the successful party should be awarded costs.[686]

   In determining who the successful party is, the court should look to the substance of the judgment and not merely its form. For example, with a judgment of absolution from the instance, although strictly speaking neither party has won, the defendant has been successful in warding off the plaintiff's claim, while the plaintiff has failed to achieve anything. Therefore, the defendant will usually be awarded costs in his favour. The court considers who is substantially successful, having regard to the substance of the judgment and not merely to its form.
2. The court may for good reason deprive a successful party of his costs, in whole or in part, with the result that the successful party will have to pay his own costs.

   When exercising his discretion to deprive the successful party of his costs, the judge will consider the following factors in connection with the successful party's conduct: whether the successful party has made excessive demands; the conduct of the litigation; the taking of unnecessary steps or following a wrong procedure; and misconduct.[687]
3. The court may for good reason order a successful party to pay the whole or a portion of the costs of the other party.

   The same reasons mentioned under (2) above apply in respect of the exercise of the court's decision to make a successful party pay the costs, although it is rare for a successful party to be required to pay all the costs.

Requiring a successful party to pay a portion of the costs is more common. A portion of the costs will usually be payable by the successful party in a situation where that party required an adjournment or in some other way involved the parties in unnecessary costs. In such a case, the successful party will be granted costs except for that portion of the costs incurred in respect of the unnecessary procedure, the costs of which will be granted against the successful party as 'wasted' costs.

4. The court may, in special cases, make an order that the unsuccessful party is to pay the costs of the successful party on an attorney-and-client basis, i.e. on a more punitive scale than normal – attorney and client costs are discussed in detail below.[688]
   Usually, this will occur in two situations. Firstly, such costs will be awarded when the parties have been litigating in terms of an agreement which contains a clause providing that in the event that a dispute arises between the parties in connection with the agreement, costs will be awarded on the attorney-and-client scale. Secondly, attorney-and-client costs may be awarded when the court wishes to express its displeasure at the manner in which a party has conducted the matter, the circumstances being the same as those recounted under (2) above.[689]

As was pointed out in *Nel v Waterberg Landbouwers Ko-Operatieve Vereeniging*,[690] the purpose of attorney-and-client costs is not merely to punish the losing party, but to ensure that the successful party will not be out of pocket in respect of the expenses caused to him by the litigation. In other words, one purpose of this kind of costs award is to indemnify the successful party in respect of expenses he would normally not be able to recover. However, even costs on the attorney-and-client scale will not cover all the legal expenses of the successful party.

Sometimes, for some or other good reason (e.g. the losing party has acted in a fraudulent or dishonest manner), the court does not think it just for the winning party to be left out of pocket at all. In such a case, the court may decide to award costs to the successful party on the *attorney-and-own-client scale* (attorney-and-own-client costs are discussed in detail below). By doing this, the court ensures that all the expenses of the successful party are paid by the unsuccessful party. In other words, by awarding costs on the attorney-and-own-client scale, the court is ensuring that the loser must pay the winner what he (the winner) had to pay to his attorney to act on his behalf in the matter. Such costs are awarded only in exceptional circumstances where the court wishes to show its extreme displeasure (*opprobrium*) at the actions of the party who has costs awarded against him.[691] The level of bad conduct and the level of the court's displeasure would be greater than that which is present when the court awards attorney-and-client costs. While punitive costs may be awarded by a court *mero motu*, or after argument between the parties' representatives, a party to be penalised with such a costs order ordinarily should have knowledge that such an order is to be sought.[692]

4.3 The tariffs of costs and the costs charged by an attorney

It is important to distinguish between the *tariffs* of costs provided for in the rules of court and the costs charged by an *attorney to his client*.

4.3.1 The tariff

A tariff of costs exists in both the Magistrates' Courts[693] and the High Court.[694] These tariffs contain lists of the many different tasks which are performed before and during litigation, together with the amounts that may be claimed for each task. The party who has costs awarded in his favour draws a *bill of costs* based on the work done, as provided for in the tariff. The

Magistrates' Courts tariff provides for a lower charge in respect of the various items than the High Court tariff, and is not identical in respect of the various items for which a charge may be made, but the process of drawing the bill is largely the same. The costs in a bill of costs are divided into *fees* and *disbursements*. The fees are the amounts stipulated in the tariff for the work done by the attorney, while the disbursements are amounts that the attorney has been obliged to pay out (or disburse) on his client's behalf during the course of proceedings. The disbursements include payments to the sheriff for the service of documents; the cost of transport, postage or telephone charges; payments to witnesses in respect of transport or 'qualifying' fees to experts; and, last but by no means least, fees paid to counsel. As for the attorney's fees, each consultation, conference, court appearance and telephone call is charged for, in addition to charges made for the drafting, receipt and perusal of each document and the drafting and perusal of each letter delivered. In fact, in a High Court bill of costs, each letter and telephone call must be separately identified and listed, which makes such a bill of costs a long and tedious document to draft or to read.[695] The primary principle applicable to a taxation of a bill of costs is that a successful party gets costs as an indemnification for its expense in having been forced to litigate;[696] but that a moderating balance must be struck to afford the innocent party adequate indemnification only within reasonable bounds. In assessing what is reasonable, all circumstances must be taken into account.[697]

In March 2010, an amendment to rule 70 of the High Court Rules led to a slight difference between the High Court and Magistrates' Courts in the procedure for the taxation of bills, which previously was virtually the same.[698] The Magistrates' Courts practice still follows the original procedure which is as follows.[699] Once drafted, the bill of costs is sent to the opposing party. If agreement on the items charged for cannot be reached, it is sent to the clerk of court to be set down for taxation.[700]Both parties appear at the taxation to argue for or against the various items charged, and the registrar or clerk of court acting as the 'taxing master' makes a ruling on each item in contention. The bill is then added up and the taxing master affixes his stamp, showing that the bill has been taxed. Once the bill has been agreed or taxed, it becomes liquid and payable forthwith.

The High Court amendment created a sub-rule (3B) to rule 70, which has the following effect. Before enrolling a matter for taxation, the party to whom costs have been awarded is obliged to send a notice to the party against whom costs have been awarded.[701] This notice advises the party liable to pay the costs that between certain hours (which must be office hours) and for ten days after the date of receipt of the notice, he may inspect any documents or notes pertaining to the bill of costs. It further advises that this party may file a notice to oppose the taxation within 20 days of receipt of the notice. This notice to oppose should contain a list of all the items in the bill of costs to which there is an objection, together with a brief summary of the reasons for the objection. Should no notice of opposition be forthcoming within the stipulated period, the party who has drafted the bill of costs may set it down for taxation without further notice to the other party, who will effectively be excluded from the taxation. Sub-rule 4, also a 2010 addition to rule 70 of the High Court rules, instructs the taxing master that the taxation may not proceed unless the taxing master is satisfied that the party against whom costs have been awarded has received due notice of the bill in terms of sub-rule 3B and that this party has received notice of the time and place of the taxation and his right to present at it. The latter notice is not necessary, however, if (1) the party liable to pay costs has consented in writing for the taxation to occur in his absence; (2) if the party liable to pay costs failed to give notice to oppose the taxation, or (3) the taxation concerns writ and post-writ bills. Finally, if the party liable to pay the costs has filed a notice of opposition but fails to appear at the taxation, the taxation may proceed in his absence.

The taxing master's award may be reviewed by a dissatisfied party in terms of rule 48.[702] However, a court will not lightly interfere with it and will do so only when the taxing master's view is so materially different to that of the court reviewing the decision as to vitiate the decision.[703]

4.3.2 The costs charged by an attorney to his client

The fees set out in the tariff should not be confused with the fees which an attorney will demand from his client for the professional services performed by him in accordance with the agreement reached between him and his client when the latter hired him. The costs that an attorney charges his client for his *professional services*, as well as for his disbursements must be paid, regardless of whether the client has won or lost the case.[704]

The fee for professional services is the fee which is negotiated between the attorney and the client. When the client first consults with the attorney, the attorney will (or should) explain to his client the basis on which he charges for his services. There is nothing stopping an attorney from charging his client on the basis of the tariff provided for in the rules of court.[705]Occasionally this occurs, usually with a few extras thrown in. This is because the tariff does not provide for every eventuality, and there is invariably some work that an attorney needs to perform for which there is no provision in the tariff. In addition to this problem, the tariff rarely keeps up with inflation. Just as many doctors charge more than medical aid rates, most attorneys charge their clients more than the amounts set out in the court tariffs.

Many attorneys charge on the basis of a simplified court tariff, substituting the rates permitted in the tariff with higher amounts.[706] Others charge on the basis of *time* only, no matter what kind of activity the work involves. This is a departure from the court tariff model which, for instance, provides that drafting and perusing (reading) documents is charged per page, rather than the time spent performing the work. If he wishes to bill for his time, the attorney will explain to his client that his professional fee is charged at a certain rate per hour. He will send the client a bill at the end of each month, setting out how many hours he has spent working on the matter, as well as outlining the nature of the work performed. The client agrees to pay the attorney's bill at the end of each month, and agrees that he (the client) is responsible for paying the attorney's bills, whatever the outcome of the case. Alternatively, an attorney can provide a quote or estimate for a particular instruction, although costs in litigious (as opposed to non-litigious) matters are notoriously difficult to predict. Note that the hourly rate will vary from attorney to attorney, and that the client is welcome to 'shop around' for another competent attorney who may offer a cheaper rate. Generally speaking, the market dictates the amount that a particular attorney is able to charge his client, whatever method of assessment he uses. Note, however, that if an attorney attempts to charge his client an amount which the particular Law Society concerned regards as 'unconscionable' (i.e. completely unreasonable in the circumstances), that attorney may be guilty of 'overreaching'. If such an attorney refuses to reduce the fee, a court order may be sought compelling the attorney to do so. When deciding whether the charges are reasonable or amount to overreaching, the Law Society concerned will take into account certain factors, such as the experience of the attorney, the urgency and complexity of the matter, and its importance to the client.

A fairly recent development is for attorneys to charge on a *contingency* basis. The attorney agrees with his client that he will charge his client on a contingency basis in terms of the Contingency Fees Act.[707] In this case, the attorney agrees to charge his client only if he wins the case (i.e. no win, no charge). Because the attorney takes the risk of being paid nothing at all if he

loses the case, the above-mentioned Act allows him (if he wins the case) to charge more than the amount he would charge if the matter were not being conducted on a contingency basis. An attorney may not, however, charge more than double the amount he would usually charge if the matter were not being conducted on a contingency basis. Furthermore, in the case of money claims conducted on a contingency basis, an attorney's charge may not exceed 25% of the amount awarded in favour of his client.

In 2004, the Supreme Court of Appeal in *PriceWaterhouseCoopers Inc and Others v National Potato Co-operative Ltd*[708]considered the lawfulness of champertous agreements in the light of changed circumstances and, in particular, in the light of the Constitution. Having considered the developments in English law, which increasingly recognised the important role played by champertous agreements, the Supreme Court of Appeal concluded that a clear departure from the past was required in order to promote access to justice and held that champerty was no longer to be proscribed.[709]

The issue of legal fees is one of considerable importance and has sought to be addressed by the Legal Practice Act 28 of 2014 which was enacted in September 2014.[710]

The fee for professional services charged by an attorney to his client is sometimes referred to as attorney-and-own-client costs, but this term and its meaning have become controversial, as is pointed out in the discussion below.

4.4 Types of cost awards

Our brief examination of the court tariffs and the manner in which attorneys generally charge shows how little the two sometimes have in common. With this in mind, let us now consider the different awards that a court may make with regard to costs.

4.4.1 Award of costs on the party-and-party scale

Party-and-party costs are the costs which are incurred by a party in a case and which the unsuccessful party is ordered to pay him.[711] They do not include all costs which a party may have incurred, but only those costs which, according to the taxing master, appear to have been necessary or proper for the attainment of justice or for defending the rights of any party.[712] In addition, these costs are based on the *tariff* stipulated in the rules of court, which was discussed above. Once the bill has been taxed or agreed, it is liquidated and becomes part of the judgment debt. Clients who have won their case often expect the party-and-party costs to compensate them fully for all the legal costs they have incurred during the course of the matter. Because party-and-party costs are strictly limited by the tariffs, however, in the vast majority of cases such costs will only cover a portion of the winner's total legal bill.[713]

When the court awards *costs* to the winner of a case, it is taken to mean *party-and-party costs*. These are the costs a court awards to the successful party in the vast majority of cases. Quite separate from the payment of these party-and-party costs, it is up to each of the parties to pay the fees for professional services rendered by their respective attorneys. Therefore, the loser of the case must not only pay the party-and-party costs to the winner, but must also pay the fees of the attorney who unsuccessfully represented him in the matter (unless, of course, his attorney had agreed to conduct the matter on a contingency basis). The winner of the case receives the party-and-party costs from the loser of the case, but this does not absolve him from having to pay the professional fees of the attorney who successfully represented him in the matter. This leaves the

winner out of pocket to a certain extent (although far less than the loser) because the party-and-party costs are invariably less than the professional fees, sometimes referred to as attorney-and-own-client costs, which are discussed below.

4.4.2 Award of costs on the attorney-and-client scale

An award of costs on the attorney-and-client scale may be seen as a 'half-way-house' between an award of costs on the party-and-party scale and an award of costs on the attorney-and-own-client scale (discussed below).[714] There is some difference of opinion, however, with regard to precisely what these costs comprise. Traditionally, the tariffs of costs have provided a starting point in calculating attorney-and-client costs.[715] Some authorities would have it that attorney-and-client costs give 'little more than a taxation between party and party, except that any necessary letters to and attendance on the client are allowed.'[716] On this formulation, extra correspondence or consultations with a client that are not provided for in the tariff would be permitted on an attorney and client bill, and charged at the normal tariff rate. Extra consultations or attendances might become necessary in circumstances where only one consultation is allowed in terms of the tariff, for instance, or in a High Court matter, spending longer explaining something to one's client by telephone, than the taxing master believes was absolutely necessary. Sending a copy of the pleadings to one's client for their perusal is another example of a useful and arguably necessary step, which nevertheless is not provided for in the tariff.

However, this formulation has been criticised,[717] most recently in *Aircraft Completions Centre (Pty) Ltd v Rossouw and Others*[718] on the basis that the purpose of the attorney-and-client order is to 'give the costs creditor the full indemnity in respect of all reasonable costs that a court order for costs taxed as between attorney and client intended him to have.' *Aircraft Completions* therefore envisages a situation in which unreasonable fees, such as 'exceptionally high fees to counsel' or 'arbitrary and unnecessary consultations', are taxed off the bill, but otherwise a generous approach is adopted.[719] It would still appear, however, that in terms of *Aircraft Completions*, the tariff remains the basis for the taxation, even if generously applied:

> **Within the bounds of reasonableness in the circumstances of the case, the taxing master is expected to tax such a bill generously. He should allow rates that may exceed the tariff if the work was of some complexity and was made unduly burdensome by whatever conduct on the part of the costs debtor caused the court to make an order for attorney and client costs. On the same basis, the taxing master should allow periods of time for consultations, and for other work ordinarily charged on a time basis, that may reasonably exceed the time that he would allow if taxing strictly as between party and party.**

Therefore, although extra items might be permissible, any departure from the rates provided in the tariff will only be permitted in restricted circumstances.[720] Furthermore, when considering a punitive costs order, a court should warn itself against using hindsight in assessing the conduct of a party.[721]

Although costs awarded on the attorney-and-client scale are exceptional and punitive in nature, they are not nearly as punitive or exceptional as an award of costs on the attorney-and-own-client scale.

4.4.3 Award of costs on the attorney-and-own-client scale

Attorney-and-own client costs are costs which are payable by a client to his attorney for professional services rendered (as explained at 4.3.2 above). If there is a disagreement between the attorney and his client over the fees, the attorney's bill may be taxed by the taxing master, who must then apply whatever method of fee calculation has been agreed between the attorney and the client.[722] This may occur whether or not a matter has proceeded to trial. Attorney-and-own-client costs may not only be charged in a different manner to the tariff, but may also include certain 'luxury' services a client has agreed to pay for.

Whether it is possible to have costs awarded on the *attorney-and-own-client scale* against the *opposing party* has become a debatable point. Such orders have been awarded by our courts for some time.[723] In addition, there are a number of Appellate Division decisions which recognise this type of order[724] 'in principle, but without pertinent consideration'.[725] Nienaber JA in *Thoroughbred Breeder's Association v Price Waterhouse* has indicated, however, that the matter is an issue for further consideration by the Supreme Court of Appeal.[726] Therefore, it is not beyond the realms of possibility that these cases may be challenged in due course. Some cases have already questioned certain aspects of this kind of costs order. The case of Law Society of the Cape of Good Hope v Windvogel,[727] for instance, has thrown doubt on whether there is any distinction at all between attorney-and-client and attorney-and-own-client costs orders. The point has been made that such an order might have consequences that are unjust, in that it is difficult for an opposing party to challenge any part of an attorney-and-own-client fee when he has no knowledge of what transpired between the attorney and the client. It is also possible for a client to agree to 'luxury' services between himself and the attorney which are not strictly necessary, and that in fairness, the opposing party should not be required to pay.[728] The 'unexpected or unforeseeable consequences' of this kind of order were alluded to by the SCA in *AA Alloy Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd* and the court took a doubtful attitude to attorney-and-own-client orders, without making a final decision on the issue.[729] In *MEC for Public Works, Roads and Transport, Free State v Esterhuizen and Others*, however, the court declined to grant an order for costs on the attorney-and-own-client scale on the basis that the circumstances were not so extraordinary as to warrant it, and not because such an order could not be made.[730]

Like attorney-and-client costs, attorney-and-own-client costs are awarded against the opposing party in two circumstances: when the parties have agreed to this, as may occur when parties are in dispute over a contract that has an attorney-and-own-client costs clause; or when the court awards these costs as a sign of disfavour. In the latter situation, the behaviour of the party against whom attorney-and-own-client costs have been awarded would have had to be worse than that which would earn that party an adverse costs order on the attorney-and-client scale.[731]

4.4.4 Award of costs *de bonis propriis*

Another option open to the court is to award costs *de bonis propriis*. What this means is that a portion or the whole of the costs of either or both the parties must be paid by one or more of the representatives in the matter. For example, if an attorney representing a client conducts his client's case in a negligent manner, that attorney may be ordered to pay the costs of the client *de bonis propriis*. This rule applies not only to attorneys, but to all persons who act on behalf of others in litigation (e.g. the guardian of a child, the trustee of an estate, and so on).[732]

If an attorney tells his opponent that he is going to ask the court to award costs *de bonis propriis*, it usually means that he considers the way in which his opponent is conducting himself in the matter to be highly improper.[733]

4.4.5 Interim costs orders

Costs are not only granted at the close of a trial, but also after interlocutory proceedings, for example, after an application to compel the production of further particulars; or after an unsuccessful summary judgment application; or after an adjournment necessitated by the unpreparedness of one of the parties. In the Magistrates' Courts, interim costs orders may be granted but may not be taxed until the end of the case overall, whereas an interim costs order may be taxed and enforced immediately in the High Court.[734]

4.4.5(a) Costs

This is a straightforward order of costs against one of the parties for the interlocutory procedure or adjournment in question. Such costs may be granted either on the party-and-party scale, or the attorney-and-client scale, or the attorney-and-own-client scale, according to the principles discussed above. These costs will be payable by the party against whom they are granted, even should this party be successful at the trial and have costs awarded in their favour overall.

4.4.5(b) Costs in the cause

This order makes the costs in the interlocutory procedure dependent on the eventual outcome of the case, and subject to the costs order given at the conclusion of the case.

4.4.5(c) No order as to costs

This order results in no costs being awarded to either side for the procedure in question. Each party then bears his own costs.

4.4.5(d) Costs to be reserved

This order results in no costs being granted for the time being. The question is held over until the end of the case when it may be argued in light of all that has transpired during the course of proceedings. Typically, this order is made by consent to conclude a summary judgment application, following the receipt of a defendant's affidavit in a summary judgment application, and forms part of the usual order. Having regard to what transpired at the trial, the court would be in a position to reflect on the summary judgment application and consider the cost award that is appropriate for that part of the proceedings.[735] Such a costs order may also be granted in respect of various interlocutory orders made in proceedings.

1The correct title of the rules used in High Court practice is 'The Uniform Rules of Court'. This title reflects their history in that before the introduction of the Uniform Rules, each provincial division of the Supreme Court of South Africa (as the High Court was then known) had its own set of rules. In this chapter, however, the Uniform Rules will be referred to as the 'High Court Rules' to avoid confusion.

2In terms of *GG* 3362, GN 888 of 8 October 2010.

3In terms of the Jurisdiction of Regional Courts Amendment Act 31 of 2008, which came into effect on 9 August 2010 (*GG* 33448, Notice No 41, 2010–08–06), a regional division level of Magistrates' Courts has been created, with greater jurisdiction than the District Magistrates' Courts. No distinction will be made between regional divisions and District Magistrates' Courts in this chapter unless relevant, although their differing jurisdiction must be kept in mind.

4The difference between a summons and an edict is that the summons is directed at the sheriff, while an edict is directed at the defendant. An edict is used when it is necessary to serve outside the Republic by edictal citation.

5See rule 17 of the High Court Rules for the general provisions in this regard. See also: High Court rules 17, 18, and 20 and Magistrates' Courts rules 5 and 6; also Chapter 15 of Cilliers, AC, Loots, C and Nel, HC (2009*) Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (fifth edition) 10. Finally, see Forms 9 and 10 High Court Rules and Form 2 Magistrates' Courts Rules.

6See Annexure E, 'Citations', p631.

7Rule 5(6). This is so where jurisdiction is conferred upon the court by ss 28(1)(*d*) and 28(1)(*g*) of the Magistrates' Courts Act.

8Note that summons for certain causes of action have additional requirements. For example, where the cause of action is based on a credit agreement under the National Credit Act 34 of 2005, the summons must also allege that each of the requirements contained in ss 129 and 130 of the National Credit Act have been complied with. Furthermore, where an order is sought to declare executable immovable property which is the home of the defendant, the summons must contain the prescribed notice drawing the defendant's attention to s 26(1) of the Constitution.

9A deficiency with regard to *locus standi* or jurisdiction may give rise to an exception (i.e. a legal objection by the defendant) that the particulars fail to disclose a cause of action in just the same manner as a deficiency in respect of the merits themselves.

10*Palmer v President Insurance Co Ltd* 1967 (1) SA 673 (O) at 679A.

11Rules 5 and 6 of the Magistrates' Courts Rules previously dealt with various aspects of summonses, and still do so now, but have been thoroughly amended so as to conform with the uniform approach that has now been adopted, based on High Court practice.

12See pp427 and 432.

13In terms of rules 17(3) and 18(1). An attorney with the right of appearance in the High Court in terms of the Right of Appearance in Courts Act 62 of 1995, may sign pleadings instead of an advocate. See High Court rule 18(1) as amended from 1 July 1996. If unrepresented, the plaintiff may sign these documents himself. Of course, an attorney may always sign both summons and particulars of claim in the Magistrates' Courts, unless the plaintiff is unrepresented, in which case the plaintiff must sign the summons and particulars of claim himself; see rules 5(3)(*a*) and 6(1).

14Note that Magistrates' Courts rule 5(2)(*b*) providing for the use of a simple summons is not couched in mandatory terms, and therefore its use in the case of a debt or liquidated demand is not compulsory. The corresponding High Court rule 17(2)(*b*) however, uses the word 'shall' instead of 'may' and the use of a simple summons where the claim is for a debt or liquidated demand is therefore mandatory in the High Court. For a fuller discussion see p184 below. An explanatory notice issued by the Department of Justice during 2010 in relation to the Magistrates' Court Rules makes the point that many attorneys prefer to use a combined summons when they might have used a simple summons. If this was the motivation for the difference, one might expect the High Court Rules to be amended in order to conform to the Magistrates' Courts Rules in due course.

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

16The phrase 'debt or liquidated demand' is not defined in either set of rules. It was defined in the old Transvaal and Orange Free State rules of court, however, and in terms of these rules the term meant more than merely a claim consisting of an amount of money. A 'debt or liquidated demand' was defined as 'a claim for a fixed or 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'. This can be contrasted with the phrase 'a liquidated amount of money' which is used elsewhere in the rules, such as summary judgment under rule 32 of the High Court Rules, or rule 14 of the Magistrates' Courts Rules. 'A liquidated amount of money' only involves money claims, of course, whereas the phrase 'debt or liquidated demand' also covers claims requiring an act on the part of the defendant, delivery of property, transfer or the like. In other words, 'debt or liquidated demand' includes every kind of liquid claim. With regard to a claim for an amount of money, sometimes referred to as a 'claim sounding in money', an agreed amount will always constitute a 'debt or liquidated demand', whether, for instance, it is for rent, or the purchase price of goods sold and delivered. The ambit of what constitutes a 'debt or liquidated demand' in respect of a claim for money has been extended, however. In *Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd* 1962 (1) SA 736 (T) at 739A–G, it was held by the full bench of the TPD that a claim could be regarded as a debt or liquidated demand if it is capable of prompt and speedy ascertainment although not by mathematical calculation alone. In this particular case, the claim was in respect of reasonable remuneration for services rendered, the court finding that in the absence of any features precluding this, the reasonable charges for such services could be readily ascertained. A note of warning was sounded in *Neves Builders & Decorators v De la Cour* 1985 (1) SA 540 (C) at 543A–D and 544H–545C, however, where it was held that a claim for the reasonable value of

work done and materials supplied, although usually considered to be liquidated, may not always constitute a debt or liquidated demand. A court has discretion to determine whether a claim is liquidated and to decide whether, with reference to the available facts, the amount can be readily ascertained.

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

18*Welcome Estate Ltd v Muller* (1911) 28 (4) *SALJ* 521.

19*Rhodes Fruit Farms Ltd v Williams and Others* 1939 CPD 50.

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

21*Volkskas Bank Ltd v Wilkinson & Three Similar Cases* 1992 (2) SA 388 (C).

22In the event that the fair and reasonable cost of repair exceeds the market value of the vehicle, the market value less salvage value would become the amount (*quantum*) of damages claimable.

23A simple summons is not a pleading, and therefore an exception cannot be taken on the basis that a simple summons fails to disclose a cause of action. See *Susan v Kikillus* 1955 (2) SA 137 (W) and *Icebreakers No 83 (Pty) Ltd v Medicross Health Care Group (Pty) Ltd* 2011 (5) SA 130 (KZD) at para [12]. However, if a simple summons fails to disclose a cause of action, it becomes impossible to obtain a summary or default judgment, which is the main purpose of a simple summons, considering that a declaration has to be drafted and served if the summons is defended. In many cases, this problem may be cured by giving a little thought to the standard 'shorthand' forms of particulars and including fairly simple averments in relation to all elements of the cause of action from the outset. In *Landman Implemente (Edms) Bpk v Leliehoek Motors (Edms) Bpk*1975 (3) SA 347 (O), for example, the missing element to the cause of action was an averment to the effect that the debt was due and payable. In *Globe Engineering Works Ltd v Ornelas Fishing Co (Pty) Ltd* 1983 (2) SA 95 (C) at 97C-102F, it was suggested that in certain cases this averment may be implied, but it would be better to remove the need for argument over whether such an implication can be sustained. See also *Buchner and Another v Johannesburg Consolidated Investment Co Ltd* 1995 (1) SA 215 (T).

24*Emdon and Another v Margau* 1926 WLD 159; *Trans-African Insurance Co Limited v Maluleka* 1956 (2) SA 273 (A) and *Standard Bank of SA Limited v Oneanate Investments (Pty) Limited* (in liquidation) (205/96) [1997] ZASCA 94; 1998 (1) SA 811 (SCA); [1998] 1 All SA 413 (A); (14 November 1997) at 825 D–E.

25For examples, see Annexure F on p636.

26In terms of High Court and Magistrates' Courts rules 17(2)(*b*) and 5(2)(*b*), respectively. The reason given in a guide issued by the Department of Justice for the more permissive approach taken in the Magistrates' Courts rule is that many attorneys prefer to use a combined summons and, indeed, there are situations where this approach is justified, as is indicated in the main text. However, since this particular preference can only have been perceived in relation to High Court practice, one would expect that the High Court Rules will be amended to conform with the Magistrates' Courts Rules. It seems that many judges have a somewhat relaxed approach to the use of combined summonses in situations where strictly speaking, a simple summons ought to be used, although practitioners can hardly risk relying on the attitudes of individual judges for guidance on this particular head. It is submitted that the approach taken in the Magistrates' Courts Rules is an improvement on the official position mandated in rule 17(2)(*b*) of the High Court Rules, but the somewhat haphazard introduction of the recent amendments to the various Acts and Rules pertaining to civil procedure has left a number of anomalies, and one cannot be certain whether and to what extent the High Court Rules will be amended to conform with some of the changes that have been introduced to the Magistrates' Courts Rules.

27The opposing side would not be able to except on the basis that the contradiction renders the pleadings vague and embarrassing, as a simple summons is not a pleading, but any discrepancy of this nature provides potential cross-examination material and could be prejudicial to the plaintiff's case.

28An attorney with the right of appearance in the High Court in terms of The Right of Appearance in Courts Act 62 of 1995 may sign pleadings instead of an advocate. See rule 18(1).

29Note, however, that when the plaintiff is unrepresented, the simple or combined summons (as the case may be) need only be signed by the plaintiff himself.

30See Stage Four B 'Provisional sentence', p424 below.

31The form can be found in Annexure 1 to the Magistrates' Courts Rules.

32See Precedent 8 at p576.

33Act 62 of 1995.

34*London & SA Exploration Co Ltd v McLelland and Another* (1898) 8 HCG 205.

35Apart from slight differences, such as provision for advocates to sign pleadings in terms of rule 18(1), the Magistrates' Courts rule 6 differs materially from High Court rule 18 by excluding rule 18(8) relating to certain averments to be made in divorce matters, and adding further provisions relating to claims founded on any cause of action arising out of or regulated by legislation in terms of rule 6(11) and suing as a cessionary in terms of rule 6(12).

36A combined summons will constitute an irregular step if the attorney who signed the particulars of claim was not admitted to practice in the division of the High Court in which the summons was issued. Attorneys who hold a certificate in terms of s 4(2) of the Right of Appearance in Courts Act 62 of 1995, are entitled to carry out the functions of advocates only within the area of jurisdiction of the registrar by whom that certificate was issued. See *Zeda Car Leasing (Pty) Ltd t/a Avis Fleet Services v Pillay and Others* 2007 (3) SA 89 (D). A certificate issued in terms of s 4(2) of the Right of Appearance in Courts Act 62 of 1995, confers on that attorney the right to appear before, and carry out the functions of an advocate in the High Court. The certificate also entitles the attorney to sign pleadings, qua advocate, in all divisions. Note, however, that an attorney's right to sign pleadings qua attorney appears to be limited to the division in which he or she was admitted or enrolled. See *Liberty Group Ltd v Singh and Another* 2012 (5) SA 526 (KZD) at para [17] and *Absa Bank v Barinor New Business Venture (Pty) Ltd* 2011 (6) 225 (WCC) at para [10].

37*Arma Carpet House (Johannesburg) (Pty) Ltd v Domestic and Commercial Carpet Fittings (Pty) Ltd and Another* 1977 (3) SA 448 (W). See also, however, *Manong & Associates (Pty) Ltd v Minister of Public Works and Another* 2010 (2) SA 167 (SCA) at 172G–H, where it was held that in special circumstances, non-professional representation of such a body may be permitted, but only by leave of the court sought by way of a formal application. See also *Mittal Steel SA Ltd t/a Vereeniging Steel v Pipechem CC* 2008 (1) SA 640 (C) at para [26] where it was held that the rule that a juristic person has to be represented in the High Court by an attorney is not inflexible and a court is entitled, in an appropriate case and to avoid injustice, to allow at least a one-person company to be represented at a court hearing by its 'alter ego'.

38Rule 52(1)(*b*) of the Magistrates' Courts Rules.

39*Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107G–H.

40Section 29(1B) of the Magistrates' Courts Act 32 of 1944, as amended by the Jurisdiction of Regional Courts Amendment Act 31 of 2008, the amendment having come into force on 9 August 2010.

41See s 7(3)–(6) and s 9 of the Divorce Act 70 of 1979, together with s 9 of the Matrimonial Property Act 88 of 1984.

4288 of 1984.

4356 of 1996.

44Act 56 of 1996.

4519 of 2005.

46In terms of s 17(4)(*c*)(i). The maximum amount is subject to quarterly inflationary adjustment in terms of s 17(4A)(*a*), the amount current at time of publication is R244 405.

47Section 17(4)(*c*)(ii) of the Road Accident Fund Act 56 of 1996. This amount is subject to quarterly adjustment in terms of s 17(4A)(*a*).

48The Magistrates' Courts rule 19 dealing with exceptions is based on High Court rule 23 and is virtually identical.

49The reason for this difference is that these additional averments featured in rule 6 of the previous Magistrates' Courts Rules. It would seem that the provisions contained in rule 5, which require additional averments to be made in particular cases, are there to ensure that these averments are made in simple summonses. Many of the additional rule 5 averments would be necessary in the context of a declaration or combined summons in terms of rule 6(4) anyway, or in terms of legislation such as the National Credit Act, specifically s 130.

50Civil Practice Directives for the Regional Courts in South Africa adopted by resolution of the Regional Court Presidents' Forum on 28 May 2013, which is effective from 1 August 2013. See Erasmus, HJ and van Loggerenberg, DF (1997) *Jones and Buckle: The Civil Practice of the Magistrates' Courts in South Africa, Vol II, The Rules* RS 12, 2016 App G-p1.

51See for instance, s 3 of The Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002.

5234 of 2005.

5334 of 2005.

54Section 129 of the National Credit Act 34 of 2005 provides for certain procedures to be followed before debt enforcement may occur. They include the obligation to give notice to the debtor, informing the debtor of the default in payment and suggesting certain alternatives for the resolution of the matter, before legal proceedings may commence. Section 130 of the National Credit Act provides for 'debt procedures in court'. More particularly, it requires that the debtor (referred to as a 'consumer') has been in default for at least 20 days and that at least 10 days have elapsed since delivery of the notice referred to in s 129, with the further requirement that it has been ignored or the creditor's suggestions rejected, or in the case of an instalment agreement, secured loan, or lease, the consumer has not surrendered the relevant property to the credit provider as contemplated in s 127. There are a number of other provisions aside, which are dealt with in 'Debt collection procedures' below at Stage Three, Part 2A p380 and p402: the National Credit Act.

55*Rossouw and Another v FirstRand Bank Ltd* 2010 (6) SA 439 (SCA) at 455C–G.

56For example, in KwaZulu-Natal, in any action brought in terms of the National Credit Act 34 of 2005, the summons must allege that there has been compliance with s 129 of the Act and a certificate to this effect must be attached to the summons indicating compliance.

57Unlike the practice in the High Court; rule 45(6), see also 'Debt collection procedures'at p392.

58Rule 5(1) of the Magistrates' Courts Rules does not reflect the time period within which to enter an appearance to defend. This can be found in rule 13(1), concerning notices of intention to defend, and is 10 days.

59*Molala v Minister of Law and Order and Another* 1993 (1) SA 673 (W).

60*Absa Bank Ltd v Snyman* 2015 (4) SA 329 (SCA).

61See also rule 64 of the High Court Rules, which authorises the registrar to destroy documents relating to a matter which has not been adjudicated upon, after the lapsing of three years from the filing of the last document.

62See 'Default judgment', p243.

63See 'Settlement', p411.

64Rule 11 of the Magistrates' Courts Rules. Note that this procedure does not apply to actions for relief in terms of the Divorce Act; rule 11(4), amended in order to provide for jurisdiction in divorce matters now enjoyed by the Regional Magistrates' Courts. See p261.

65Rule 31(1) of the High Court Rules. Note that this procedure does not apply to actions for relief in terms of the Divorce Act 70 of 1979 or for nullity of marriage; rule 31(1)(*a*). See p260.

66If the defendant is not represented, he must draft and deliver the notice himself. The Magistrates' Courts rule 13 is based on High Court rule 19, with the result that there is no longer provision for the clerk of the court to enter an appearance to defend for an illiterate defendant. In addition, rule 5(5)(*b*) of the Magistrates' Courts Rules provides for a form of appearance to defend to be included in every summons.

67See High Court rule 19 and Magistrates' Courts rule 13.

68The same rule applies to the plaintiff's attorneys should they cease to act for the plaintiff, and the notice to the erstwhile client may be sent by registered post.

69*MacDonald t/a Happy Days Café v Neethling* 1990 (4) SA 30 (N).

70Not in terms of the Magistrates' Courts Rules, which do not contain the equivalent of High Court rule 16(4), but in terms of the decision in *Brümmer v Brümmer* 1962 (3) SA 101 (O). A practice directive has also been issued on this topic.

71See in this regard, *Makuwa v Poslson* [2007] 4 All SA 1260 (T) at 1261 paras [2] and [3]; 2007 (3) SA 84 (T) at 86E–F. Since the requirement that the defendant's full residential or business address be set forth in a notice of intention to defend is 'of a highly technical nature,' the omission of the address is 'not necessarily fatal'. See also: Dendy, M '*Civil Procedure'* (2008) 4 *Sibergramme* 7, Siber Ink CC. These addresses could be of practical value; however, were the defendant's attorney to withdraw as attorney of record, particularly in the context of the Magistrates' Courts, there is no comparative procedure to that provided in terms of rule 16(4) of the High Court Rules.

72A defendant need not sign the notice of intention to defend personally. The defendant's attorney is entitled to enter the appearance to defend on behalf of the defendant in terms of rule 19(1) of the High Court Rules and rule 13(1) of the Magistrates' Courts Rules. Furthermore, in terms of rule 2(1) of the Magistrates' Courts Rules, the term 'defendant' includes an attorney or counsel appearing for such party.

73High Court rule 19(3) and Magistrates' Courts rule 13(3).

74Also, it may not be a *poste restante* address. Rule 19(3) of the High Court Rules.

75Magistrates' Courts rules 9(3)(*f*), 9(9)(*c*) and 9(13) all envisage service by registered post.

76Civil Practice Directives for the Regional Courts in South Africa adopted by resolution of the Regional Court Presidents' Forum on 28 May 2013, which is effective from 1 August 2013. See Erasmus, HJ and van Loggerenberg, DF (1997) *Jones and Buckle: The Civil Practice of the Magistrates' Courts in South Africa, Vol II, The Rules* RS 12, 2016 App G-p1.

77*Malcomess & Co Ltd v Allkin & Co Ltd* 1914 CPD 519.

78Consequently, there is no purpose to the custom of certain attorneys who endorse notices of appearance to defend with the words, 'without prejudice', more particularly as the purpose of this phrase on a document is to prevent its disclosure in evidence at a trial. In the case of an appearance to defend, disclosure hardly seems to be something which a defendant would ever wish to prevent.

79Rule 1 of the High Court Rule and rule 2(1) of the Magistrates' Courts Rules.

80In theory, proof of 'fax' or facsimile transmissions should be reasonably easy to show as a date is indicated on both the received document and despatching note. Covering e-mails may be printed out, and these may

show the required details also. However, the use of electronic means of communication is not completely reliable. A fax machine, for instance, will not print a transmission without paper, and if sufficient time transpires before paper is placed in the tray, its memory might not have retained all the messages it has received and of which it has acknowledged receipt. E-mail is subject to even more vagaries and inefficient or dishonest practitioners may well employ the use of electronic delivery as a rich source of excuses for failure to respond to pleadings or notices. Nothing is quite as certain as having a receptionist compare a copy of a document with its original and then stamp the proof of service together with the date.

81 Rule 19(1) of the High Court Rules.

82 Note also that the *dies non* are not counted when calculating the time limits allowed for pleadings for purposes of barring. In terms of rule 26 of the High Court Rules: '… 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.' See also new rule 21B of the Magistrates' Courts Rules.

83 10 of 2013.

84 Section 24(*a*) of the Superior Courts Act 10 of 2013, which replaces s 27(*a*) of the Supreme Court Act 59 of 1959.

85 Section 24(*b*) of the Superior Courts Act 10 of 2013, which replaced s 27(*b*) of the Supreme Court Act 59 of 1959, '14 days' has been replaced by 'two weeks'.

86 10 of 2013.

87 *Rosslee v Rosslee* 1971 (4) SA 48 (O). See also the 'Calculation of time limits' at p129.

88 Rule 19(5) of the High Court Rules and 13(5) of the Magistrates' Courts Rules.

89 Exceptions and applications to strike out are discussed later in the book.

90 See High Court rule 18(3) and Magistrates' Courts rule 6(3), which require pleadings to be divided into consecutively numbered paragraphs, each containing distinct averments. See also p146 above for the meaning of 'averment'.

91 High Court rule 22(2).

92 Except in an indirect manner in rule 34.

93 *Gordon v Tarnow* 1947 (3) SA 525 (A) at 531 and s 15 of the Civil Proceedings Evidence Act 25 of 1965.

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

95 Rule 22(3). The practice has arisen to preface every plea with a general denial more or less in the following terms; 'save for the admissions hereinafter made, each allegation in the particulars of claim is denied as if specifically set out and denied.' The object is presumably to avoid the effect of rule 22(3).

96 *Gordon v Tarnow* 1947 (3) SA 525 (A) at 531–532. See also *Mamojee v Pillay* 1948 (1) SA 212 (N).

97 What is meant by 'prejudice' in this context is procedural rather than substantive prejudice. Obviously, anything that assists the defendant's case will prejudice the plaintiff, including the legitimate and competent conduct of the defence case. But if the prejudice is merely procedural – for instance, the need for the plaintiff to obtain witnesses that might have been dispensed with as a result of the admission – the court will generally allow the amendment if the prejudice can be cured by an order for costs against the defendant and an adjournment if necessary.

98 *Amod v SA Mutual Fire and General Insurance Co Ltd* 1971 (2) SA 611 (N) at 614–615.

99 *Builders Ltd v Union Government (Minister of Finance)* 1928 AD 46 at 53.

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

101 Note that the fact that a denial is accompanied by an explanation does not mean that it amounts to a plea of confession and avoidance. See *Sager Motors (Pty) Ltd v Patel* 1968 (4) SA 98 (RA). With confession and avoidance, the plaintiff's allegation is *admitted* but the legal consequences are avoided by a further allegation that *justifies* the defendant's actions legally, and does not merely explain them. A bare denial is, in any event, usually insufficient and an explanation would usually be required. The distinction is important given the effect that a plea of confession and avoidance has on the evidentiary burden. See *Van Wyk en 'n Ander v Boedel Louw en 'n Ander* 1957 (3) SA 481 (C) at 482H–483C.

102 A bare denial of liability is not permitted as the defendant must set out all the material facts on which he relies for his defence in terms of rule 22(2). Therefore, a bare denial in the High Court would not only contravene rule 18(5) but also rule 22(2). It may accordingly be deemed to be an irregular step in terms of rule 30. The same applies to the Magistrates' Courts, having regard to the corresponding rules 17(2) and 6(5), with the result that a bare denial is an irregular step in terms of rule 60A.

103 *Van Wyk en 'n Ander v Boedel Louw en 'n Ander* 1957 (3) SA 481 (C) at 482H–483C.

104 The following was stated in the case of *Wilson v South African Railways and Harbours* 1981 (3) SA 1016 (C) at 1018: 'Normally a defendant must obey the basic rule of pleading and admit, deny or confess and avoid.

However, he may plead a non-admission if it is clear from the plea that he has a good reason for not complying with the basic rule, viz to admit, deny or confess and avoid. One such reason is no knowledge.'

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

106See 'Counterclaims', p219.

107Set off is not the reason for allowing the postponement in terms of rules 22(4) or 17(4), however, but rather the need to avoid a multiplicity of actions and to dispose of all issues between the same litigants in a single trial. *Consol Ltd t/a Consol Glass v Twee Jongegezellen (Pty) Ltd and Another* 2002 (2) SA 580 (C) at 584I-I/J and 587A/B–C.

108*Marshall Timbers Ltd v Hauser and Battaglia (Pty) Ltd and Another* 1976 (3) SA 437 (D).

109*Parekh v Shah Jehan Cinemas (Pty) Ltd and Others* 1980 (1) SA 301 (D) at 307H–308E.

110*Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd and Another* 2002 (2) SA 580 (C) at 584J–585C/D.

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

112*Whitehead's Trustee v Van Eyk* 1884 (4) EDC 4 at 8.

113A more verbose version along the lines of 'should the above honourable court find that the defendant was negligent, then and in that event only, the defendant pleads in the alternative as follows' is sometimes used.

114*Whitehead's Trustee v Van Eyk* 1884 (4) EDC 4 at 8.

115See p415.

116In a similar process described in the section 'Small Claims Court – steps in drafting pleadings'.

117*Ad* is Latin for 'towards', and merely means 'in response to'. 'Para' is short for 'paragraph'.

118*'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.'* This formulation may be valid in some circumstances, but should be avoided where it leads to ambiguity, and in any event cannot be used to replace an explanation of the denial when such an explanation is required. See in this regard Erasmus et al. (1994) *Superior Court Practice*, Revision Service OS, 2015, D1–262; *Nyandeni v Natal Motor Industries Ltd* 1974 (2) SA 274 (D) at 278A–F.

119'Wherefore' means, in effect, 'As all the required legal requirements have been met'.

120Marnewick, CG (2012) *Litigation Skills for South African Lawyers* (third edition) at 134 – Marnewick argues, correctly with respect, that the frequently used wording, 'WHEREFORE the defendant prays that the plaintiff's claim be dismissed with costs', is technically defective. He points out that an order that the plaintiff's claim be dismissed allows the plaintiff to reinstate the action because such an order merely amounts to absolution from the instance. However, an order that the judgment is given in the defendant's favour makes the claim *res judicata*. A corresponding danger in using the 'dismissed' wording in the prayer is that if the court is merely requested to dismiss the claim, the court may not grant an order in the defendant's favour as it would be required to grant more than what was asked for in the plea. See *Double v Delport* 1949 (2) SA 621 (N) at 626, which Marnewick considers to be binding, at least in KwaZulu-Natal.

1211946 OPD 144.

122See 'Irregular step' proceedings at 4.4 below.

123See 2.3.1(b)(ii)(c) above.

124Erasmus, HJ and Van Loggerenberg, DE (1994) *Erasmus Superior Court Practice, Vol II, The Rules* RS 1, 2016, D1–267.

125*Per* Innes CJ in *Brown v Vlok* 1925 AD 56 at 58. Note that since a special plea is targeted at an underlying problem in the plaintiff's case, that problem is often not apparent from a reading of the particulars of claim, in other words on the face of (*ex facie*) the particulars of claim. Should the problem be apparent, the defendant will often make use of an alternative remedy known as an exception, which is discussed in detail later in this book. Another difference between a special plea and an exception is that although an exception may be raised by either plaintiff or defendant, only a defendant may raise a special plea.

126Special pleas in abatement are also sometimes called *special pleas in bar*.

127If the innocent party elects to enforce the arbitration agreement, this must be done either by application in terms of s 6(1) of the Arbitration Act 42 of 1965 for a stay of the proceedings before the delivery of any pleadings, or the taking of any further step in the proceedings, or the filing of a special plea for the stay of proceedings pending the finalisation of the dispute by arbitration (*Foize Africa (Pty) Ltd v Foize Beheer BV and Others*2013 (3) SA 91 (SCA) at 99F–H).

128See *Jones and Buckle, Vol II, The Rules*, op. cit., and the authorities quoted there at rules 17–24.

129*Marks and Kantor v Van Diggelen* 1935 TPD 29 at 37. See also *Nestlé (South Africa) (Pty) Ltd v Mars Inc* 2001 (4) SA 542 (SCA) at 549B–G.

130*Kerbel v Kerbel* 1987 (1) SA 562 (W).

131Provided both courts have equal authority to end the dispute authoritatively. See *Nestlé (South Africa) (Pty) Ltd v Mars Inc* 2001 (4) SA 542 (SCA) at 549B–G. See also *George and Others v Minister of Environmental Affairs and Tourism* 2005 (6) SA 297 (EqC). As the applicants relied only on equality-related causes of action in the Equality Court and on non-equality-related causes of action in the High Court, and given that the applications were launched in different fora, each having different powers and functions, it was held that there was no room for a special plea of *lis alibi pendens*. With regard to a suit commenced by a plaintiff in a South African court, which is still pending in the court of a foreign state against the same defendant for the same thing and arising out of the same cause, there would be *prima facie* grounds for a plea of *lis pendens* in the absence of proof that justice would not be done without the double remedy. See *Berrange NO v Hassan* 2009 (2) SA 339 (N) at 357 G–H. For the factors that need to be taken into account when considering whether a stay should be granted in a local court where a suit involving the same parties, subject matter and cause of action has been brought in the court of a foreign state, see *Nestle (South Africa) (Pty) Ltd v Mars Inc*2001 (4) SA 542 (SCA) at 5481–J–549A–J.

132*Marks and Kantor v Van Diggelen* 1935 TPD 29 at 33.

133*Van As v Appollus en Andere* 1993 (1) SA 606 (C) at 610D–F and *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC and Others*2013 (6) SA 499 (SCA) at 513F–G.

134*Von Gent v Venter* 1946 TPD 506.

135National Credit Act 34 of 2005.

136*Standard Bank of South Africa Ltd v Van Vuuren* 2009 (5) SA 557 (T). In this matter, the defence was raised in the context of a summary judgment application, but would equally apply at the stage of a special plea.

137See *Transkeian Territories General Council v Mngqibisa* 1928 EDL 256 at 258–259 and other examples cited in Van Winsen, LDV et al. (1997) *Herbstein and Van Winsen: The Civil Practice of the Supreme Court of South Africa* (fourth edition), 473–474. This example is not repeated in the 2009 fifth edition of this work by *Herbstein and Van Winsen* (2009), op. cit., vol. 1, p607, which appears to confine its treatment of premature summons to the similar plea of arbitration.

138*Union & SWA Insurance Co Ltd v Hoosein* 1982 (2) SA 481 (W). Prescription must be raised by way of a special plea and not exception (*Living Hands (Pty) Ltd and Another v Ditz and Others* 2013 (2) SA 368 (GSJ) at 391C–393E, but see *Sanan v Eskom Holdings Ltd* 2010 (6) SA 638 (GSJ) where the opposite was held).

139Section 17(2) of the Prescription Act 68 of 1969.

140Section 17(1) of the Prescription Act 68 of 1969; *Ntame v MEC, Dept of Social Development, Eastern Cape; Mnyaka v MEC, Dept of Social Development, Eastern Cape; Mnyaka v MEC, Dept of Social Development, Eastern Cape* [2005] 2 All SA 535 (SE).

141In order to reduce the chance of matters prescribing, commercial services such as 'Prescription Alert', which provide an alert when prescription on a file is approaching, are available to practitioners.

142See p123. There is other legislation which also deals with prescription, of course, such as s 23 of the Road Accident Fund Act 56 of 1996. Section 23(1) provides that … 'the right to claim compensation under section 17 from the Fund or an agent in respect of loss or damage … shall become prescribed upon the expiry of a period of three years from the date upon which the cause of action arose.' However, s 23(2) provides that prescription in terms of s 23(1) shall not apply to certain categories of persons, including minors.

143*Desai NO v Desai NNO and Others* (718/93) [1995] ZASCA 113; 1996 (1) SA 141 (SCA); (22 September 1995) at 1421.

144'The term "debt" for the purposes of s 15(1) bears a wide and general meaning and does not have the technical meaning given to the phrase "cause of action" in the context of pleadings. Hence, even a summons that discloses a different cause of action to that ultimately relied upon will interrupt the running of prescription if the general nature of the debt sought to be enforced is recognisable from the allegations made in the summons.' Sharrock, R: 'Contract' (2007) October to December (4) *Juta's Quarterly Review of South African Law* commenting on *BMW Financial Services (SA) (Pty) Ltd v Harding* [2007] 4 All SA 716 (C) at 117.

145*Makate v Vodacom (Pty) Ltd* (CCT52/15) [2016] ZACC 13; 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC) (26 April 2016).

146The fact that the period of prescription for a judgment debt is 30 years illustrates the desirability of obtaining judgment on behalf of a client for a debt due to him. Once judgment has been obtained, there is no longer any worry that the debt will prescribe after only three years, and your client has 30 years to recover the amount owed in terms of the judgment. See, however, 2.1.7 below where superannuation of judgments is discussed.

147The debts referred to include not only tax due to the South African Revenue Services, but also municipal rates which are due to a local authority. In other words, both SARS and local authorities have 30 years within which to bring action for the recovery of rates and taxes.

148*Eley (Formerly Memmel) v Lynn and Main Inc* 2008 (2) SA 151 (SCA), [2008] 1 All SA 315 (SCA).

149Section 12(1) of the Prescription Act 68 of 1969. See also *Truter and Another v Deysel* 2006 (4) SA 168 (SCA) at 174B–D '… for the purposes of the Act, the term "debt due" means a debt, including a delictual debt, which is owing and payable. A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.' A claim for the repayment of monies held in an attorney's trust account becomes due as soon as it is demanded by the client. See *Ramdin v Pillay and Others* 2008 (3) SA 19 (D). In the case of interest, the due date and period of prescription would appear to depend on the date and prescription period of the principal debt, unless varied by agreement. See *Absa Bank Ltd v Erasmus*2007 (2) SA 545 (C) at 553A–D. For a consideration of the state's moral duty when deciding whether or not to raise the defence of prescription against a plaintiff to whom it owes social security, see *Njongi v MEC, Department of Welfare , Eastern Cape* 2008 (6) BCLR 571 (CC), and discussed by Danie Brand in 'Administrative Law' (2008) January to March (1) *Juta's Quarterly Review of South African Law* (Online). Also discussed is the time from which prescription begins to run for debts owed by the state in the case of an underlying debt which can only be claimed once an administrative decision has been set aside by a court.

150Section 12(3) of the Prescription Act 68 of 1969.

151Proviso to s 12(3) of the Prescription Act 68 of 1969.

152A creditor may not postpone the commencement of prescription through his own inaction; *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd and Another* [2005] 4 All SA 517 (C).

153Section 12(2) of the Prescription Act 68 of 1969.

154See *Minister of Finance and Others v Gore NO* 2007 (1) SA 111 (SCA) at 120A–F.

155In the case of a money debt owed by a company in liquidation where the running of prescription has been delayed by a claim filed in terms of s 13(1)(*g*), prescription begins to run again on the Master's confirmation of the final liquidation and distribution account; *Nedcor Bank Ltd v Rundle* 2008 (1) SA 415 (SCA).

156Section 13(1) of the Prescription Act 68 of 1969.

157Section 14(1) of the Prescription Act 68 of 1969.

158Section 14(2) of the Prescription Act 68 of 1969.

159Section 15(1) of the Prescription Act 68 of 1969. *Embling and Another v Two Oceans Aquarium CC* 2000 (3) SA 691 (C) at 697.

160Section 15(2) of the Prescription Act 68 of 1969.

161'Joined' or 'to join' are the verbs expressing the noun 'joinder'. Joinder is the means by which persons are made party to litigation.

162*Anderson v Gordik Organisation* 1960 (4) SA 244 (N).

163*Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) at 168–70.

164*Peacock v Marley* 1934 AD 1.

165*Lowrey v Steedman* 1914 AD 532; *S v McCarthy* 1995 (3) SA 731 (A).

166See *Jones and Buckle, Vol II, The Rules* RS 12, 2016 Rule-p17–33 for a full discussion of the topic. For a restatement of the principles, see *Yellow Star Properties 1020 (Pty) Ltd v MEC, Department of Development Planning and Local Government, Gauteng* 2009 (3) SA 577 (SCA) at 586 paragraphs [21–22]; and *Al-Kharafi & Sons v Pema and Others NNO* 2010 (2) SA 360 (W) at [40]–[41].

167*Rail Commuters' Action Group and Others v Transnet Ltd and Others* 2006 (6) SA 68 (C) at 74E–H and 82E–83A.

168*Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd and Another* (2) 2005 (6) SA 23(C) at 45C–48I. The 'once and for all' rule requires that all claims generated by *the same cause of action* are instituted in one action. Where the cause of action is different, however, the rule does not apply. For example, where a plaintiff relies on different sections of the same statute in consecutive proceedings (*Janse Van Rensburg And Others NNO v Steenkamp and Another*; *Janse Van Rensburg and Others NNO v Myburgh and Others* 2010 (1) SA 649 (SCA)) and where a plaintiff claims restitution and damages in two separate actions, the rule does not apply (*National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA)).

169*Thwaites v Van der Westhuizen* (1888–1889) 6 SC 259. See, however, *De Wet and Another v Paynter* 1921 CPD 576. Dismissal of actions due to the failure of the plaintiff to appear at trial leads to a situation similar to absolution, and a defence of *res judicata* cannot be raised if the plaintiff proceeds again in terms of rule 32(1) and (3) of the Magistrates' Courts Rules. A default judgment taken against a defendant, however, can be pleadable as *res judicata*, see *Jacobson v Havinga t/a Havingas* 2001 (2) SA 177 (T) at 179I/J–180C.

170*Dusheiko v Milburn* 1964 (4) SA 648 (A) at 655A–B. Note that such a matter may be dealt with by way of exception where the lack of jurisdiction is apparent *ex facie* the pleadings (see *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O) at 759H–760E). In such a case, the ground for exception will be failure to disclose a cause of action.

171Lack of *locus standi* will generally be apparent *ex facie* the pleadings, in which case the plaintiff may take exception rather than file a special plea. See *Ahmadiyya Anjuman Ishaati-Islamlahore (SA) and Another v Muslim Judicial Council (Cape)* 1983 (4) SA 855 (C).

172*Thyssen v Cape St Francis Township (Pty) Ltd* 1966 (2) SA 115 (E) at 116D–E and 116H.

173*David Beckett Construction (Pty) Ltd v Bristow* 1987 (3) SA 275 (W) at 279G–282B.

174Alternatively, an application may be made orally at the commencement of the trial or any time before judgment.

175*Sibeka and Another v Minister of Police and Others* 1984 (1) SA 792 (W) at 795H; *Internatio (Pty) Ltd v Lovemore Brothers Transport CC* 2000 (2) SA 408 (SE) at 411B.

176*Groenewald v Minister van Justisie* 1972 (4) SA 223 (O) at 225E.

177In terms of paragraph 22 of the KwaZulu-Natal Practice Manual Incorporating Practice Directive and Guidelines (Dec 2014), where a judge has given a ruling on an issue separated in terms of rule 33(4) (for example, liability in a damages action) the matter will be regarded as partly heard before that judge (colloquially known as a 'part-heard' matter). The effect is that the remaining issue(s), for example, the issue of quantum, should be heard before the same judge.

178*Improfed (Pty) Ltd v National Transport Commission* 1990 (3) SA 324 (T) at 325F–G.

179*Rauff v Standard Bank Properties (A division of Standard Bank of SA Ltd) and Another* 2002 (6) SA 693 (W) at 703I–J.

180Rule 20(1) of the Magistrates' Courts Rules and rule 24(1) of the High Court Rules.

181Erasmus et al. (1994) *Superior Court Practice*, op. cit., OS, 2015, D1–312 and *Jones and Buckle, Vol II, The Rules* RS 12, 2016 Rule-p20–4.

182*Brunette and Others v Stanford* (1859) 3 Searle 221 at 225–226. See also rule 20(3) of the Magistrates' Courts Rules which specifically provides for the defendant to set up any claim '… whether liquid or illiquid, whether liquidated or unliquidated, whether or not it arises out of or is connected with the subject matter of the claim in convention …'

183*Cauvin v Landsberg* (1851) 1 Searle 86.

184*Lock v Keers* 1945 TPD 113.

185*Robot Paints, Hardware & Timber Co (Pty) Ltd v South African Industrial Equipment (Pty) Ltd* 1975 (4) SA 829 (T).

186*Mauritz Marais Bouers (Pty) Ltd v Carizette (Pty) Ltd* 1986 (4) SA 439 (O).

187See the authorities set out in *Mauritz Marais Bouers (Pty) Ltd v Carizette (Pty) Ltd*, supra.

188Rules 18 and 20 in the case of the High Court and rules 6 and 15 in the case of the Magistrates' Courts.

189*Fielding v Sociedade Industrial de Oleos Limitada* 1935 NPD 540 at 548.

190Rule 20(4).

191Section 47(1) of the Magistrates' Courts Act.

192Section 47(1) of the Magistrates' Courts Act.

193Sections 47(2) and (3) of the Magistrates' Courts Act.

194Rule 20(7).

195Rule 25 of the High Court Rules and rule 21 of the Magistrates' Courts Rules.

196*Broad v Bloom* 1903 TH 427.

197*Butler v Swain* 1960 (1) SA 527 (N).

198Magistrates' Courts rules 21B deals with barring and rule 12(1)(*b*) concerns the plaintiff's application for default judgment when the defendant has been barred in terms of rule 21B(3) from delivering a plea.

199These pleadings are referred to abstractly in High Court rule 25(5) which provides: 'Further pleadings may, subject to the provisions *mutatis mutandis* of sub-rule (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.' Apart from slightly different subparagraph division, rule 21(5) of the Magistrates' Courts Rules is almost identically worded.

200This is subject to the parties' entitlement to amend the pleadings in terms of rule 28 – see *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at 601F–G. Where amendments to the pleadings raise new issues, pleadings are re-opened and the initial situation of *litis contestatio* falls away and is only restored once the issues have once more been defined in the pleadings. See also *KS v MS* 2016 (1)

SA 64 (KZN), where it was held that minor or immaterial amendments would not result in fresh *litis contestatio*.

201See, generally, Neethling, J, Potgieter, JM and Visser, PJ (2015) *Law of Delict* (seventh edition) 267.

202(48226/12, 31324/12, 31326/12, 31327/12, 48226/12, 08108/13) [2016] ZAGPJHC 97; [2016] 3 All SA 233 (GJ); 2016 (7) BCLR 881 (GJ); 2016 (5) SA 240 (GJ) (13 May 2016).

203There are instances in which the application of *litus contestatio* might operate fairly, however, and a danger exists with regard to the decision in *Nkala and Others v Harmony Gold Mining Company Limited and Others* that 'hard cases make bad law'. However, further discussion of this is beyond the scope of this book.

204As of 15 October 2010, see GN 888, *GG* 33620 of 8 October 2010.

205See 'Particulars of claim', p186.

206See 'Irregular proceedings', p236.

207In terms of rule 21(2) of the High Court Rules and rule 16(2) of the Magistrates' Courts Rules.

208Rule 35(15) of the High Court Rules.

209Contained in the First Schedules to the High Court Rules.

210With regard to the manner in which the phrase 'referred to' may be interpreted, it has been held that while it may include an indirect reference to a document, it does not include a reference that can only be deduced or inferred. See *Penta Communication Services (Pty) Ltd v King and Another* 2007 (3) SA 471 (C) at 475F–476 J. An example of inference or deduction dealt with in this particular case related to a bank account to which a direct reference had been made in a party's papers. The opposing party then required production in terms of rules 35(12) or 23(13) of the documents, which in the normal course must exist in relation to these accounts.

211*Gorfinkel v Gross, Hendler & Frank* 1987 (3) SA 766 (C) at 773F; *Unilever plc and Another v Polagric (Pty) Ltd* 2001 (2) SA 329 (C); *Penta Communication Services (Pty) Ltd v King and Another* 2007 (3) SA 471 (C) at 479D–480 I.

212*Moulded Components and Rotomoulding SA (Pty) Ltd v Coucourakis and Another* 1979 (2) SA 457 (W) at 461B–E. *Penta Communication Services (Pty) Ltd v King and Another* 2007 (3) SA 471 (C) at 479G–480 I.

213Including the defendant's answering affidavit in a summary judgment matter. See *Gehle v McLoughlin* 1986 (4) SA 543 (W).

214*Universal City Studios v Movie Time* 1983 (4) SA 736 (D) at 750D. See also *Plastic Manufacturers Association of SA v Montecatini Edison* 1972 BP 233.

215Rule 35(15) of the High Court Rules.

216*MV Urgup Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd and Others* 1999 (3) SA 500 (C) at 515C–I.

217*Quayside Fish Suppliers CC v Irvin & Johnson Ltd* 2000 (2) SA 529 (C) at 534E–G.

218*Quayside Fish Suppliers CC v Irvin & Johnson Ltd*, supra at 534G–H and *MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd and Others* 1999 (3) SA 500 (C) at 515C–H.

219See pp182 and 185 above.

220*Trustee Insolvent Estate Beckett v Nicolson* (1904) 25 NLR 238.

221In terms of High Court rule 26, in the case of High Court matters. Barring is discussed in detail later as part of the section dealing with default judgment at p250.

222See 'Judgment' at pp243 and 307.

223*Klokow v Sullivan* 2006 (1) SA 259 (SCA). See also in this regard, *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) at 465H.

224The precise grounds differ slightly from the High Court to the Magistrates' Courts and are discussed in detail below.

225*Jones and Buckle, Vol II, The Rules*, op. cit., RS 12, 2016 Rule-p19–1and Erasmus et al. (1994) *Superior Court Practice*, op. cit., RS 1, 2016, D1–293.

226At the stage of an exception the court is not concerned with the merits of the case and the pleadings have to be considered as they stand. No facts can be brought into issue other than those disclosed in the pleadings and no reference to any other document is permitted. The onus is on the excipient to persuade a court that upon every interpretation which can reasonably be placed on a pleading, no cause of action or defence can be disclosed. See *Shell Auto Care (Pty) Ltd v Laggar and Others* 2005 (1) SA 162 (D).

227These two grounds are applicable in both the High Court and Magistrates' Courts.

228Failure to disclose a cause of action is usually raised by the defendant as an exception to the plaintiff's particulars of claim, whereas failure to disclose a defence is usually raised by the plaintiff as an exception to the defendant's plea.

229Unless they are manifestly false, all the allegations contained in particulars of claim are taken to be admitted for the purpose of bringing an exception. See *TWK Agriculture Ltd v NCT Forestry Co-operative Ltd and Others* 2006 (6) SA 20 (N) at 23B–C.

230*McKelvey v Cowan NO* 1980 (4) SA 525 (Z) at 526; *Amalgamated Footwear and Leather Industries v Jordan & Co Ltd* 1948 (2) SA 891 (C); *Kotsopoulos v Bilardi* 1970 (2) SA 391 (C); *Callender-Easby and Another v Grahamstown Municipality and Others* 1981 (2) SA 810 (E).

231The material facts giving rise to an enforceable claim are those facts which will have to be proved at trial and are called the *facta probanda*. They need to be distinguished from the *facta probantia* which are the evidential facts used at trial to prove the *facta probanda*. The *facta probantia* need not be set out in pleadings. See *Koth Property Consultants CC v Lepelle-Nkumpi Local Municipality Ltd* 2006 (2) SA 25 (T).

232*Alphedie Investments (Pty) Ltd v Greentops (Pty) Ltd* 1975 (1) SA 161 (T).

233*Walbrugh v Newmark* 1912 CPD 725; *Tuckers Land and Development Corporation (Pty) Ltd v Loots* 1981 (4) SA 260 (T) at 263. Note that the courts are more inclined to draw the necessary inference in the case of an exception based on failure to disclose a cause of action or defence, than in the case of an exception based on the pleading being vague and embarrassing. See *First National Bank of Southern Africa Ltd v Perry NO and Others* 2001 (3) SA 960 (SCA) at 972I–J.

234*General Commercial and Industrial Finance Corporation Ltd v Pretoria Portland Cement Co Ltd* 1944 AD 444 at 453.

235*Liquidators, Wapejo Shipping Co Ltd v Lurie Bros* 1924 AD 69 at 74 and *Trope and Others v South African Reserve Bank* 1993 (3) SA 264 (A) at 268F.

236*Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C) at 298A and *Gallagher Group Ltd and Another v IO Tech Manufacturing (Pty) Ltd and Others* 2014 (2) SA 157 (GNP) at para 54–56.

237*Jones and Buckle, Vol II, The Rules*, op. cit., RS 12, 2016 Rule-p19–5 and *Trope v South African Reserve Bank* 1993 (3) SA 264 (A) at 269I; *Nel and Others NNO v McArthur and Others* 2003 (4) SA 142 (T) at 148D–E.

238*Liquidators Wapejo Shipping Co Ltd v Lurie Bros* 1924 AD 69 at 74; *Dusheiko v Milburn* 1964 (4) SA 648 (A) at 655; *Tuckers Land and Development Corporation (Pty) Ltd v Loots* 1981 (4) SA 260 (T) at 263–264. Particulars of claim are not vague and embarrassing if the defendant is fairly able to plead to them. Exception is not the stage at which the defendant may claim sufficient information to prepare for trial. See *Venter and Others NNO v Barritt; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd* 2008 (4) SA 639 (C) at 644G–645B.

239*Nasionale Aartappel Koöperasie Bpk v Price Waterhouse Coopers Ing en Andere* 2001 (2) SA 790 (T) at 797I; *Nel and Others NNO v McArthur and Others* 2003 (4) SA 142 (T) at 148F–G.

240*Greyvenstein v Hattingh* 1925 EDL 308.

241*Pockets Holdings (Pvt) Ltd v Lobel's Holdings (Pvt) Ltd* 1966 (4) SA 238 (R); *Gerber v Naude* 1971 (3) SA 55 (T).

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

243See 'Irregular proceedings', p236.

244*Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 902F–G.

245*Horwitz v Hendricks* 1928 AD 391; *Gruhn v M Pupkewitz & Sons (Pty) Ltd* 1973 (3) SA 49 (A) at 57.

246*Liquidators Wapejo Shipping Co Ltd v Lurie Bros* 1924 AD 69.

247*Jones and Buckle, Vol II, The Rules*, op. cit., RS 12, 2016 Rule-p20–1 footnote 65.

248*Trope v South African Reserve Bank and Another and Two Other Cases* 1992 (3) SA 208 (A) at 211E.

249*Greenhalgh v Rowley* 1925 SR 30. However, this would not apply where the claim for rent arose before the claim for ejectment.

250*Gerber v Naude* 1971 (3) SA 55 (T).

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

252*MM O' Reilly v Estate Martens* (1907) 28 NLR 158.

253Prejudice is a requirement for exceptions at common law. While not expressly mentioned in rule 19, given the common-law position, it is clear that prejudice is a requirement under rule 19. See *Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C) at 298A.

254*Kennedy v Steenkamp* 1936 CPD 113 at 115; *Nxumalo v First Link Insurance Brokers (Pty) Ltd* 2003 (2) SA 620 (T) at 623F–G.

255*Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C) at 298A–D and I–J.

256*Tuckers Land and Development Corporation (Pty) Ltd v Loots* 1981 (4) SA 260 (T) at 264.

257Rule 23(3) of the High Court Rules and rule 19(3) of the Magistrates' Courts Rules.

258In terms of rule 23(1) of the High Court Rules and rule 19(1) of the Magistrates' Courts Rules.

259Within 20 days of the delivery of an appearance to defend with a combined summons, or the receipt of a declaration in the case of a simple summons; rule 22(1) of the High Court Rules and 17(1) of the Magistrates' Court Rules.

260Within 15 days of the service of the plea; rule 25(1) of the High Court Rules and rule 21(1) of the Magistrates' Courts Rules.

261In terms of rule 23(4) of the High Court Rules and rule 19(4) of the Magistrates' Courts Rules.

262For the same reason it is an informal courtesy at many bars for an advocate to draw to the attention of his opponent the basis for the exception and permit his opponent time, if required, to remedy the defect.

263In terms of rule 23(1) of the High Court Rules and rule 19(1) of the Magistrates' Courts Rules.

264*Trope and Others v South African Reserve Bank* 1993 (3) SA 264 (A).

265In terms of rule 23(1) read with rule 6(5)(*f*) of the High Court Rules and rule 19(1) read with rule 55(1)(*j*) of the Magistrates' Courts Rules.

266*Hudson v Hudson and Another* 1927 AD 259 at 269.

267*Muller v Cook and Others* 1973 (2) SA 247 (N).

268*Beaufort Furniture and Joiner Manufacturing Co (Pty) Ltd v De Vos* 1950 (1) SA 112 (C) at 116.

269*Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A) at 183D–F; *Pete's Warehousing and Sales CC v Bowsink Investments CC* 2000 (3) SA 833 (E) at 839F–I; *South African National Parks v Ras* 2002 (2) SA 537 (C) at 542B–E.

270*Algoa Milling Co Ltd v Arkell and Douglas* 1918 AD 145.

271*Rowe v Rowe* 1997 (4) SA 160 (SCA). See also *Pitsiladi and Others v ABSA Bank and Others* 2007 (4) SA 478 (E) at 483C; *Erf 1026 Tygerberg CC t/a Aspen Promotions SA v Pick 'n Pay Retailers (Pty) Ltd* 2005 (6) SA 527 (C) and *Constantaras v BCE Foodservice Equipment (Pty) Ltd* 2007 (6) SA 338 (SCA) at 348H–349B.

272*Edwards v Woodnutt NO* 1968 (4) SA 184 (R) at 186D-H; *Anirudh v Samdei and Others* 1975 (2) SA 706 (N); and *Ahmadiyya Anjuman Ishaati-Islamlahore (SA) and Another v Muslim Judicial Council (Cape) and Others* 1983 (4) SA 855 (C) at 860E–H.

273*Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O) at 759E–760E; *Marney v Watson and Another* 1978 (4) SA 140 (C) at 146D–E; *Smith v Conelect*1987 (3) SA 689 (W) at 691H–693H.

274*Marney v Watson and Another* 1978 (4) SA 140 (C) at 144F–G. See also *TWK Agriculture Ltd v NCT Forestry Co-operative Ltd and Others* 2006 (6) SA 20 (N) at 23B–C.

275*Hatfield Town Management Board v Mynfred Poultry Farm (Pvt) Ltd* 1963 (1) SA 737 (SR); *Muller v Cook and Others* 1973 (2) SA 247 (N).

276The additional grounds for an application to strike out that were previously provided for in Magistrates' Courts rules 17(6)(*a*) and 19(17)(*a*), namely 'Argumentative' 'superfluous' and 'contradictory' matters, vanish from the current version of the rules and such grounds are now obsolete.

277*Vaatz v Law Society of Namibia* 1991 (3) SA 563 (Nm) at 566C-E. It is submitted, however, that relevance will often play an overriding role. An averment, for instance, that the defendant is involved in an adulterous affair is *prima facie* defamatory, but is also highly relevant to divorce particulars of claim and could not be struck out as being scandalous. See also *Living Hands (Pty) Ltd and Another v Ditz and Others* 2013 (2) SA 368 (GSJ) at paras [75]–[77].

278*Vaatz v Law Society of Namibia*, supra at 566C–E. See also *Bisset and Others v Boland Bank Ltd and Others* 1991 (4) SA 603 (D) at 608D–E.

279*Vaatz v Law Society of Namibia*, supra at 566D–E.

280*Ahlers NO v Snoeck* 1946 TPD 590 at 594. See, generally, *Herbstein and Van Winsen* (2009), op. cit., 653–655 for a discussion of the effect of the decisions in *Stephens v De Wet* 1920 AD 279 and other cases on this question, and the views expressed in *Botha v Botha* 1921 TPD 387. See also *Rail Commuters' Action Group and Others v Transnet Ltd and Others* 2006 (6) SA 68 (C) at 83–84, cited there. Note that applications to strike out in action proceedings differ from applications to strike out in application proceedings since allegations relating to evidence are required (and are thus not irrelevant) in the affidavits used in support of an application.

281*Stephens v De Wet* 1920 AD 279 at 282; *Deeley-Barnard and Another v Thambi and Another* 1992 (4) SA 404 (D) at 405G–406B. Similarly, a court dealing with an application to strike out will not concern itself with the validity or otherwise of the claim, or whether it raises a cause of action, as these are issues which should be dealt with by way of exception. See *Rail Commuters' Action Group and Others v Transnet Ltd and Others* 2006 (6) SA 68 (C) at 83B–84B.

282*Salzmann v Holmes* 1914 AD 152 at 156; *Stephens v De Wet* 1920 AD 279.

283*Vaatz v Law Society of Namibia* 1991 (3) SA 563 (Nm) at 566J–567B.

284*Anderson and Another v Port Elizabeth Municipality* 1954 (2) SA 299 (E) at 309B–C; *Msunduzi Municipality v Natal Joint Municipal Pension / Provident Fund and Others* 2007 (1) SA 142 (N) at 150A–C.

285In terms of High Court rule 23(2) and Magistrates' Courts rule 19(2).

286*Market Dynamics (Pty) Ltd t/a Brian Ferris v Grögor* 1984 (1) SA 152 (W) at 153C.

287*SA Instrumentation (Pty) Ltd v Smithchem (Pty) Ltd* 1977 (3) SA 703 (D).

288*Santam Versekeringsmaatskappy Bpk v Leibrandt* 1969 (1) SA 604 (C).

289*Eniram (Pty) Ltd v New Woodholme Hotel (Pty) Ltd* 1967 (2) SA 491 (E).

290In terms of rules 18(12) and 22(5) of the High Court Rules and rules 6(13) and 17(6) of the Magistrates' Courts Rules, respectively.

291*Minister of Law and Order v Taylor NO* 1990 (1) SA 165 (E) at 165E.

292See *Herbstein and Van Winsen* (2009), op. cit., Vol 1, 740, for the arguments and authorities listed there.

293*Soundprops 1160 CC and Another v Karlshavn Farm Partnership and Others* 1996 (3) SA 1026 (N) at 1034A–D; *Gardiner v Survey Engineering (Pty) Ltd* 1993 (3) SA 549 (SE) at 551C.

294*ABSA Bank Ltd v The Farm Klippan* 490 CC 2000 (2) SA 211 (W); *Eikenhof Plastics Bottling Co (Pty) Ltd and Others v BOE Bank Ltd (Formerly known as NBS Boland Bank Ltd)* 2000 (2) SA 211 (W) at 215A–B. High Court rule 35(7), for example, provides a specific remedy which may be used if the other side fails to discover as required in terms of rule 35(2).

295*Du Plooy v Anwes Motors (Edms) Bpk* 1983 (4) SA 212 (O) at 217C-D and *Venmop 275 (Pty) Ltd and Another V Cleverlad Projects (Pty) Ltd and Another* 2016 (1) SA 78 (GJ).

296*Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353A.

297*Standard General Insurance Co Ltd v Eversafe (Pty) Ltd and Others* 2000 (3) SA 87 (W) at 95E–F.

298Unlike High Court rule 30A. See *Van der Schyff v Taylor* 1984 (2) SA 688 (C) at 692D, but see footnote 294.

299Except the period prescribed in rule 51(3) and (6).

300*Phillips t/a Southern Cross Optical v SA Vision Care (Pty) Ltd* 2000 (2) SA 1007 (C) at 1011B–C.

3011970 (3) SA 312 (T) at 315–316.

302Sub-rule (10).

303Sub-rule (1) does not apply to affidavits which constitute evidence taken under oath and can only be amended by way of a further statement made under oath. See *Brummund v Brummund's Estate* 1993 (2) SA 494 (Nm) at 498E.

304In terms of sub-rule (1). Note that amendments may also be requested orally in court – see *Marais v Smith en 'n Ander* 2000 (2) SA 924 (W). Where it is intended to substitute (or 'join') a party, such substitution (or 'joinder') is only effective if the notice is served on the entity which is to be substituted. See *Holdenstedt Farming v Cederberg Organic Buchu Growers (Pty) Ltd* 2008 (2) SA 177 (C) at 180D–181D.

305Sub-rule (5).

306Sub-rule (3).

307Sub-rule (4).

308*Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another* 1990 (3) SA 547 (A) at 565. Also see *Luxavia (Pty) Ltd v Gray Security Services (Pty) Ltd* 2001 (4) SA 211 (W), which deals with the substitution of parties by amendment.

309*Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 279C.

310*Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd en 'n Ander* 2002 (2) SA 447 (SCA) at 463E.

311*Trans-Drakensberg Bank Ltd (Under judicial management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 641A; *Benjamin v Sobac South African Building and Construction (Pty) Ltd* 1989 (4) SA 940 (C) at 958D; *Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another* 1990 (3) SA 547 (A) at 565 G–I; *Sebenza Forwarding & Shipping Consultancy (Pty) Ltd v Petroleum Oil and Gas Corporation of SA (Pty) Ltd t/a Petro SA and Another* 2006 (2) SA 52 (C) at 57G–F; *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd en 'n Ander* 2002 (2) SA 447 (SCA) at 462 G–463 B.

312*Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd en 'n Ander* 2002 (2) SA 447 (SCA) at 462 G–463 B; *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd and Another (2)* 2005 (6) SA 23 (C) at 36 E–J.

313*Nonxago v Multilateral Motor Vehicle Accidents Fund* [2005] 4 All SA 567 (SE) at 569 para [5], 573 para [15] and 574 para [16]; *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at 261 B–F.

314*Moolman v Estate Moolman and Another* 1927 CPD 27 at 29. This has been reconfirmed in *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at 261 B–F. Also

see *Embling and Another v Two Oceans Aquarium CC* 2000 (3) SA 691 (C), on the issue of whether or not amending the description of a defendant amounts to the introduction of a new legal entity.

315*Swartz v Van der Walt t/a Sentraten* 1998 (1) SA 53 (W) at 57C.

316Ibid.

317*Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 643C. Note that the introduction of new categories of damages to an existing cause of action does not create a new cause of action, provided that the right of action sought to be enforced in the summons subsequent to its amendment is recognisable as the same or substantially the same right of action as that disclosed in the original summons. See *Duduzile v Road Accident Fund* [2007] 4 All SA 1241 (W) at paras [12]–[17].

318*Luxavia (Pty) Ltd v Gray Security Services (Pty) Ltd* 2001 (4) SA 211 (W) at 219B–D and *Golden Harvest (Pty) Ltd v Zen-Don CC* 2002 (2) SA 653 (O).

319*Cross v Ferreira* 1951 (2) SA 435 (C) at 442G.

320Sub-rule (6).

321*Wendy Machanik Property Holdings CC v Guiltwood Properties (Pty) Ltd* 2007 (5) SA 90 (W) at 93I–94IE.

322The rules that relate to default judgment in one way or another are High Court rules 31, 32, 39, 26 and (to some extent) 27, together with Magistrates' Courts rules 12, 32 and 60.

323See High Court rule 31(5)(*a*).

3242011 (3) SA 608 (CC).

325(CCT 74/03) [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) (8 October 2004).

326*Labuschagne v Van Schalkwyk* 1949 (1) PH F34 (O).

327See 'Judgments, interest and costs' at p307.

328*Broughton v Manicaland Air Services (Pvt) Ltd* 1972 (4) SA 458 (R) at 460. See also rule 32 (3) of the Magistrates' Courts Rules.

329*Verkouteren v Savage* 1918 AD 143; *Bosman v Du Toit's Executors* 1937 CPD 209; *Sayed v Editor, Cape Times, and Another* 2004 (1) SA 58 (C) at 66–67.

330*Collins v Van der Merwe* 1908 TS 1086 and *O'Brien v Nurick* 1930 WLD 322.

331See *Jones and Buckle, Vol II, The Rules*, op. cit., RS 12, 2016 Rule-p32–3.

332Barring is dealt with in detail below at p250.

333This is not the case in Magistrates' Courts practice, and no further notice need be given. See rule 12(1)(*b*) of the Magistrates' Courts Rules. Note, however the dicta in *Minister of Police v Nongwejane* (CA&R63/2015) [2015] ZAECMHC 80 (20 November 2015) at para 12 where it was stated: 'Whilst it is not a requirement of the Magistrates' Court Rules of Court that a request for default judgment or a notice of set down in respect thereof be served upon a defendant who has failed to file a plea, which is a requirement of the Uniform Rules of Court, service of such documentation in [some] circumstances would have been a salutary exercise.'

334Rule 12(1)(*b*) of the Magistrates' Courts Rules provides that '[w]hen the defendant has been barred in terms of rule 21B(3) from delivering a plea, the plaintiff may lodge with the registrar or clerk of the court a request in writing for judgment in the same manner as when the defendant has failed to deliver the notice of intention to defend.' Rule 20(1)(*a*) provides: 'The provisions of these rules shall apply equally to claims in reconvention except that it shall not be necessary to deliver a notice of intention to defend and that all times which, in the case of a claim in convention, run from the date of delivery of a notice of intention to defend, shall, in the case of a claim in reconvention, run from the date of delivery of such claim in reconvention.'

335Before the 2010 amendments to the Magistrates' Courts Rules, all the provisions relating to the defendant's plea contained in Magistrates' Courts rules 12 and 19 applied *mutatis mutandis* to pleas in reconvention in terms of the previous Magistrates' Courts rule 20(1). This meant that it was possible to serve notice of bar when there was a failure to serve a plea to a counterclaim. After the 2010 amendment of rules 17, 19 and 20, however, that was no longer the case. These rules had been amended to bring them into line with the High Court Rules, but lacking a general rule for barring such as High Court rule 26, the removal of certain provisions from the former rules created a lacuna in this particular instance. Rule 21B of the Magistrates' Courts Rules has eliminated this lacuna.

336It has been held that as the procedure only involves a formal evaluation of whether the summons discloses a cause of action, and as it involves neither judicial discretion nor the mechanical granting of an order, provided there is no constitutional challenge to an order of execution, there is no constitutional bar to a registrar entering judgment in terms of rule 31(5). See *Standard Bank of South Africa Ltd v Saunderson and Others*2006 (2) SA 264 (SCA). However, as discussed above, the registrar may not authorise the issue of

execution orders in respect of residential immovable property when granting default judgment – see *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC) and *Jaftha v Schoeman and Others*; *Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC).

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

338In terms of rule 31(5) of the High Court Rules.

339High Court rule 31(2)(*a*).

340*Credit Corporation of SA Ltd v Bosman* 1958 (3) SA 845 (T) at 847A.

341Ibid. The defendant having been given notice, the plaintiff must take steps to place the matter on the court roll by setting the proceedings down for hearing before noon on the day but one preceding the day the matter is to be heard. Rules 6(4)(*a*) and 6(5)(*c*).

342There is no prescribed form, but there is a form which resembles Form 5 of the Magistrates' Courts Rules which may be useful. This is to be found in para 28 of the Consolidated Practice Notes of the Western Cape Division. It does not make provision for a notice of bar situation, however, and would need to be adapted for that purpose.

343Rule 31(5).

344See *Entabeni Hospital Ltd v Van der Linde; First National Bank of SA Ltd v Puckriah* 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).

345Rule 31(5)(*a*).

346Rule 31(5)(*a*) proviso.

347Rule 31(5)(*b*).

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

349*Mashifane v Suliman and Another* 1931 TPD 328 at 331.

350Rule 31(5)(*d*).

351Discussed below at p313.

352Rule 31(5)(*e*).

353Or an affidavit setting out reasons to the satisfaction of the court or the registrar or clerk of the court, as the case may be, why such original cannot or should not be filed.

354Rule 12(4) of the Magistrates' Courts Rules.

355See *Jones and Buckle, Vol II, The Rules*, op. cit., RS 13, 2016 Rule-p12–10.

356*SA Fire and Accident Insurance Co Ltd v Hickman* 1955 (2) SA 131 (C).

357*Pick 'n Pay Retailers (Pty) Ltd h/a Hypermarkets v Dednam* 1984 (4) SA 673 (O).

358*Minister of Police v Nongwejane* (CA&R63/2015) [2015] ZAECMHC 80 (20 November 2015) at para 14. Where an application for default judgment serves before a court, it has a clear and unfettered discretion in terms of the relevant rule of court to decide whether or not to hear oral evidence on any of the issues which may require to be decided in order to determine whether or not to grant the relief claimed – see *Abraham v City of Cape Town* 1995 (2) SA 319 (C) at 324.

359The reference to the Credit Agreements Act remains in the rules, despite the repeal of this statute.

360See *Moghambaram v Travagaimmal* 1963 (3) SA 61 (D).

361Rule 25(2) of the High Court Rules, read with rule 29(*b*), and rule 21, read with 21A(*b*) of the Magistrates' Courts Rules.

362Rule 27(1) uses the phrase 'in the absence of agreement between the parties' before prescribing the procedure for an interlocutory application. It is not clear that this implies that an attempt to obtain agreement must first be made, although the rule appears to envision that this would normally be the case. It would certainly be the most sensible course of action to take before wasting time and costs on an application.

363*Gool v Policansky* 1939 CPD 386 at 390 and *Sampson v Union & Rhodesia Wholesale Ltd (in liquidation)* 1929 AD 468 at 484.

364See discussion of 'Rule 27 – Extension of time, removal of bar and condonation' above at p238.

365Harms (2002) *Superior Courts*, op. cit., B27.5.

366*Nathan (Pty) Ltd v All Metals (Pty) Ltd* 1961 (1) SA 297 (N) at 300B–D.

367See, for example, *Tiashi SA (Pty) Ltd v Molemela* (A465/2007) [2008] ZAFSHC 142 (30 October 2008) at paras [6] and [7].

368*Nair v Chandler* 2007 (1) SA 44 (T), 46H–47B.

369Where a claim for payment of the capital sum is founded on a mortgage bond, an order declaring the mortgaged property executable is relief ancillary to the main claim, and must have been intended to be covered by rule 32(1). See *FirstRand Bank Ltd v Lenea and Another* 2008 (3) SA 491 (E) at 493B–D.

370*Credcor Bank Ltd v Thomson* 1975 (3) SA 916 (D). See also 'Provisional sentence' at p424.

371Erasmus et al. (1994) *Superior Court Practice*, op. cit., OS, 2015, D1–386.

372See pp182–183.

373See p245.

374*Botha v W Swanson & Company (Pty) Ltd* 1968 (2) PH F85 (CPD).

3751962 (1) SA 736 (T) at 738–739.

376*Leymac Distributors Ltd v Hoosen and Another* 1974 (4) SA 524 (D).

377See Erasmus et al. (1994) *Superior Court Practice*, op. cit., OS, 2015, D1–388 for a full discussion and the authorities listed there.

378*All Purpose Space Heating Co of SA (Pty) Ltd v Schweltzer* 1970 (3) SA 560 (D) at 564–565.

379*Werdmuller v Joubert* (1900) 14 EDC 164.

380*Spilhaus & Co Ltd v Coreejees* 1966 (1) SA 525 (C); *Leymac Distributors Ltd v Hoosen and Another* 1974 (4) SA 524 (D).

381The usual order for summary judgment applications is discussed below at 5.3.7.

382Unless such direct knowledge appears from the facts stated in the affidavit.

383*Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A); *Fischereigesellschaft F Busse & Co Kommanditgesellschaft v African Frozen Products (Pty) Ltd* 1967 (4) SA 105 (C).

384*International Shipping Co (Pty) Ltd v FC Bonnet (Pty) Ltd* 1975 (1) SA 853 (D).

385Through a resolution of the company. Where a managing director deposes to a verifying affidavit without formal authorisation, condonation may be granted where it is clear that the deponent is the ideal person to depose to the affidavit. *Technological Pump Developments CC t/a TPD Water Services v Irving 630 CC t/a B & M Pumps and Another* 2007 (3) SA 370 (T) at 371C–372 I.

3862014 (4) SA 220 (SCA) at 224E–H.

3872010 (5) SA 112 (KZP) at 122F–I at para [13].

388*Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A).

389This is reflected in the framing of Form 8 of the Magistrates' Courts Rules. It is permissible, although unnecessary and a waste of time to repeat the particulars of claim. See *Strydom v Kruger* 1968 (2) SA 226 (GW).

390The reason for the limitation on the contents of the plaintiff's summary judgment affidavit is the need to balance the interests of the plaintiff and the defendant. Summary judgment is so drastic a remedy, with the defendant being denied a trial, that it should not be granted unless it is very clear that the plaintiff's claim is completely unimpeachable, and that the defendant has no real defence. Evidence may not be adduced at the summary judgment hearing so the plaintiff stands or falls by the contents of his particulars of claim. It is consequently a good idea from the plaintiff's point of view – particularly in the Magistrates' Courts – to make the particulars of claim as complete as possible without becoming prolix (long-winded) if the plaintiff believes that the defendant is likely to raise a bogus defence.

391*Kosak & Co (Pty) Ltd v Keller and Another* 1962 (1) SA 441 (W).

392*Trust Bank of Africa Ltd v Hansa and Another* 1988 (4) SA 102 (W).

393In terms of rule 32(2) of the High Court Rules and rule 14(2) of the Magistrates' Courts Rules. Failure to attach the document has been condoned in circumstances where the applicant verified the cause of action and the failure caused no prejudice to the respondent. See *Nedcor Bank Ltd v Lisinfo 61 Trading (Pty) Ltd* 2005 (2) SA 432 (C) at 434C–E.

394*Cinemark (Pty) Ltd v Alfetta Tune-Up Centre* 1979 (4) SA 802 (W).

395Note that a new defence based on failure by the plaintiff to deliver a notice under s 129(1) of the National Credit Act 34 of 2005 prior to issue of summons is now available. See *Standard Bank of South Africa Ltd v Van Vuuren* 2009 (5) SA 557 (T). An important area in which summary judgment is used in the enforcement of credit agreements under the National Credit Act 34 of 2005. Summary judgment is frequently sought in National Credit Act matters, usually on the basis of a credit agreement, an acknowledgement of debt entered into pursuant to a credit agreement or a mortgage bond securing indebtedness under a credit agreement. Where enforcement of a credit agreement is sought, practitioners should be familiar with ss 129 and 130 of the National Credit Act, as well as the debt counselling provisions in terms of s 86(7) of the National Credit Act 34 of 2005. See Annexure B hereto, which deals with specific provisions of the National Credit Act 34 of 2005 and its impact on civil procedure.

396*International Shipping Co (Pty) Ltd v FC Bonnet (Pty) Ltd* 1975 (1) SA 853 (D).

397Failure to disclose all the relevant facts of the defence may only be condoned in special circumstances. 'Summary judgment is a drastic remedy granted only where the defendant has no *bona fide* defence. 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 High Court subsequently held by this Court to be incorrect.' See *SA Bank of Athens Ltd v Van Zyl* 2005 (5) SA 93 (SCA) at 102D–F.

398*Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T); *Gilinsky and Another v Superb Launderers and Dry Cleaners (Pty) Ltd* 1978 (3) SA 807 (C); *District Bank Ltd v Hoosain and Others* 1984 (4) SA 544 (C); *Nair v Chandler* 2007 (1) SA 44 (T) at 47B–C. See in particular *Tesven CC and Another v South African Bank of Athens* 2000 (1) SA 268 (SCA).

399Erasmus et al. (1994) *Superior Court Practice*, OS 2015, D1–413 and *Liberty Group Ltd v Singh and Another* 2012 (5) SA 526 (KZD) at 537G–538.

400Rule 32(7) of the High Court Rules and Magistrates' Courts rule 14(7).

401Rule 32(5) of the High Court Rules and Magistrates' Courts rule 14(5).

402Rule 32(4) of the High Court Rules and rule 14(4) of the Magistrates' Courts Rules.

403*Maisel v Strul and Others* 1937 CPD 128.

404*Terry's Motors Ltd v Seeck* 1962 (2) SA 262 (SWA), and *Venter v Kruger* 1971 (3) SA 848 (N). The comment of Beck J in *Chrismar (PVT) Ltd v Stutchbury and Another* 1973 (4) SA 123 (R) at 125 is pertinent: 'So extraordinary an invasion of a basic tenet of natural justice will not lightly be resorted to, and it is well established that it is only when all the proposed defences to the plaintiff's claim are clearly unarguable both in fact and in law, that this drastic relief will be afforded to the plaintiff.' See also *First National Bank of SA Ltd v Myburgh and Another* 2002 (4) SA 176 (C).

405Rule 32(9) of the High Court Rules and Magistrates' Courts rule 14(10).

406OS, 2015, D1–420; *Thembani Wholesalers (Pty) Ltd v September* 2014 (5) SA 51 (ECG) at para [17]. See 'Costs' at p336 for an explanation of the phrase 'costs in the cause'.

407Rule 32(9)(*a*) of the High Court Rules and Magistrates' Courts rule 14(10)(*a*). See *South African Bureau of Standards v GGS/AU (Pty) Ltd* 2003 (6) SA 588 (T).

408Act 70 of 1979.

409*Sunset Investments (Pty) Ltd v Bramdaw and Others* 1973 (2) SA 415 (D).

410*Moshal Gevisser (Trademarket) Ltd v Midlands Paraffin Co* 1977 (1) SA 64 (N).

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

412Harms (2003) *Civil Procedure in the Superior Courts*, B31.4.

413Rule 11, sub-rules (1) and (4). This restriction was introduced in 2010 to allow for the jurisdiction of Regional Magistrates' Courts, which may hear divorce matters.

414Rule 18, which previously provided for payment into court, has been amended so as to align with rule 34 of the High Court Rules. It now provides for an offer to settle. See the section on 'Settlement' below.

415'Join issue' can be taken essentially to mean a denial. See also rule 25(2) of the High Court Rules where the term is also used.

416However, there is some anecdotal evidence that despite long delays between the closure of pleadings and the trial, the registrars of some courts allocate trial dates on very little notice before trial, occasionally as little as three weeks. This creates major difficulties, not least of which is the briefing of counsel as the advocate who drafted the pleadings and who is familiar with the matter may not be available on such short notice.

417Magistrates' Court rule 22(1).

418Rule 22(3).

419Rule 22(2).

420Rule 22(1).

421This deals with a lacuna in that although magistrates have always had the authority to call for a pre-trial conference *suo motu*, (s 54(1)), there was no method available for a matter to come to the attention of a magistrate before the hearing other than for one of the parties to request a conference. See 'Pre-trial conferences' below at p290.

422*Durbach v Fairway Hotel Ltd* 1949 (3) SA 1081 (SR) at 1083.

423*Bridon International GmbH v International Trade Administration Commission and Others* 2013 (3) SA 197 (SCA) at 209I–210E and *MV Banglar Mookh Owners of MV Banglar Mookh v Transnet Ltd* 2012 (4) SA 300 (SCA) at para [58].

424Discovery in the High Court and Magistrates' Courts is almost identical. While discovery procedures have always been similar in both courts, rule 23 extends the ambit of discovery in Magistrates' Courts practice by adding procedures which previously existed only in High Court practice, such as notice to admit in terms of rule 23(10). Other additions include the ambit of discovery itself, which was previously restricted to the *books and documents* which were *currently* in a party's possession or under his control. The ambit of discovery was therefore much narrower than in the High Court, which require discovery of *documents and tape recordings* (meaning any form of recorded information at all) *which are or have at any time been in the possession or control* of the party receiving the notice.

The category of documents to be discovered was also more limited. In terms of rule 35(1) of the High Court Rules and rule 23(1) of the Magistrates' Courts Rules, *all* documents which relate *to any matter in question in the action* must be discovered; in other words, any document which is broadly relevant and which may (directly or indirectly) 'fairly' lead a party to a 'train of enquiry' that may advance his case or damage that of his opponent. In terms of the former rule 23(1) of the Magistrates' Courts Rules, however, discovery need only have been made of documents which related to the action and which the party who was making the discovery intended to use in the action or which tended to *prove or disprove either party's case*. The one remaining difference is that lacking a corresponding provision to rule 37(1) of the High Court Rules, discovery in the Magistrates' Courts continues to be dependent on the delivery of a notice to discover from the opposing party.

425*Unitas Hospital v Van Wyk and Another* 2006 (4) SA 436 (SCA) at 445I–446 D.

426*PFE International and Others v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 (CC).

427Rule 35(1) of the High Court Rules and rule 23(1) of the Magistrates' Courts Rules.

428Rule 35(2) of the High Court Rules.

429In terms of High Court rule 35(1) and (2) or rule 23(1) and (2) of the Magistrates' Courts Rules.

430See Erasmus et al. (1994) *Superior Court Practice, Vol II, The Rules*, OS, 2015, D1–460 note 20, *Pelidis v Ndhlamuti* 1969 (3) SA 563 (R).

431In terms of rule 35(1) of the High Court Rules or rule 23(1) of the Magistrates' Courts Rules.

432In terms of rule 35(15) of the High Court Rules or rule 23(16) of the Magistrates' Courts Rules.

433In *Makate v Vodacom (Pty) Ltd* 2014 (1) SA 191 (GSJ) at 202I–204B the High Court 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 utilise the provisions of rule 35(7) in order to ensure that 'the discovery process achieves its objective in the electronic age'. This decision was overturned on appeal by the Constitutional Court in *Makate v Vodacom (Pty) Ltd*2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC), although *not* on this particular point.

434This differs from the position that previously prevailed in the Magistrates' Courts where only the books and documents currently under a party's control needed to be discovered.

435*Erasmus* et al. (1994) *Superior Court Practice*, OS, 2015, D1–461. The only provision for a third party to discover is contained in rule 35(5) of the High Court Rules, or 23(5) of the Magistrates' Courts Rules, which relates to discovery in MVA (motor vehicle accident) cases.

436*Swissborough Diamond Mines (Pty) Ltd and Others v Government of the RSA and Others* 1999 (2) SA 279 (T) at 311A.

437*Rellams (Pty) Ltd v James Brown and Hamer Ltd* 1983 (1) SA 556 (N) at 564A. However, see *Copalcor Manufacturing (Pty) Ltd and Another v GDC Hauliers (Pty) Ltd (formerly GDC Hauliers CC)* 2000 (3) SA 181 (W), which provides that documents which tend to advance only the case of the party making the discovery need not be disclosed, provided such party does not intend using such documentation at the trial. This is supported too by *MV Alina II, Transnet Ltd v MV Alina II* 2013 (6) SA 556 (WCC) and *Makate v Vodacom (Pty) Ltd* 2014 (1) SA 191 (GSJ).

438In terms of rule 35(2)(*c*) of the High Court Rules or rule 23(2)(*c*) of the Magistrates' Courts Rules.

439*Copalcor Manufacturing (Pty) Ltd and Another v GDC Hauliers (Pty) Ltd (formerly GDC Hauliers CC)* 2000 (3) SA 181 (W) at 194B–195C.

440In terms of rule 35(2)(*c*) of the High Court Rules or rule 23(2)(*b*) of the Magistrates' Courts Rules.

441*Copalcor Manufacturing (Pty) Ltd and Another v GDC Hauliers (Pty) Ltd (formerly GDC Hauliers CC)* 2000 (3) SA 181 (W) at 195C–D.

442Section 14 of the Civil Proceedings Evidence Act 25 of 1965.

443Ibid.

444*Naidoo v Marine & Trade Insurance Co Ltd* 1978 (3) SA 666 (A).

445Zeffertt, DT and Paizes, AP (2009) *The South African Law of Evidence: formerly Hoffmann and Zeffertt* (second edition), 625. See also *Centre for Child Law v Hoërskool Fochville and Another* 2016 (2) SA 121 (SCA) at [17] where the Supreme Court of Appeal confirmed that a privileged document, if referred to in a pleading or affidavit, cannot be subjected to compulsory disclosure in terms of rule 35(12). The Supreme Court of Appeal also considered whether the best interest of the child standard in s 28 of the Constitution could override the application of the rule in the circumstances of the case.

446*Carpede v Choene NO and Another* 1986 (3) SA 445 (O).

447It should also be said that the manner in which the Form 11 (High Court) or Form 13 (Magistrates' Courts) affidavit is framed lends itself to a general generic explanation of any objection, rather than specific explanation, as it is apparently here that the reasons for objection should be given rather than in the schedules themselves. Unless the schedule lists several documents to which the same objection is raised, explaining the objection in detail in the affidavit would seem to render the schedule superfluous. Nevertheless, Form 11 clearly does not merely envisage a formal general objection of the kind customarily given in that it makes provision for the factual verification of the grounds on which the objection is based.

448Again, the framing of the Form 11 (High Court) or Form 13 (Magistrates' Courts) affidavit requires the documents' current whereabouts to be indicated in the affidavit itself, rather than in the schedules to the affidavit where it might be expected to be disclosed, particularly if there are several documents. This would seem to render the Second Schedule superfluous unless there are several documents that have all gone to the same destination. It might be preferable merely to indicate in the affidavit that the current whereabouts of each document will be disclosed where it is listed in the schedule.

449*Tractor & Excavator Spares (Pty) Ltd v Groenedijk* 1976 (4) SA 359 (W) at 363.

450This kind of subpoena requires a witness who is in possession of a document to produce that document in court. The subpoena will be discussed at p280.

451*Mazele v Minister of Law and Order* 1994 (3) SA 380 (E) at 389C. It may be recalled that a person who has a privilege may waive the privilege if it suits his purpose.

452*Bank of Lisbon and South Africa Ltd v Tandrien Beleggings (Pty) Ltd and Others* (1) 1983 (2) SA 621 (W).

453*Venter v Du Plessis* 1980 (3) SA 151 (T) at 153D–G.

454Erasmus et al. (1994) *Superior Court Practice*, op. cit., RS 2, 2016, D1–477.

455*Selero (Pty) Ltd and Another v Chauvier and Another* 1982 (2) SA 208 (T) at 216.

456Meaning payment or allowance.

457See 'Costs' at p336.

458*Goldberg v Union and SWA Insurance Co Ltd* 1980 (1) SA 160 (E).

459Ibid.

460The corresponding rule 24(3)(*a*) of the Magistrates' Courts Rules differs only in respect of the time period, which in the case of the Magistrates' Courts is 10 days.

461The rule does not give the claimant the right to select the person he would like to examine him. The objection is limited to the medical qualifications of the proposed practitioner in relation to the injuries, and/or an aversion based on past personal differences. See *Durban City Council v Mndovu* 1966 (2) SA 319 (D) at 325D–H.

462*Da Mata v Menfred Properties (Pty) Ltd* 1969 (3) SA 332 (W).

463Which would include possession by an attorney or an agent.

464There is no corresponding limitation in rule 36(6) of the High Court Rules.

465*Wellcome Foundation Ltd v Cape Industries (SA) (Pty) Ltd* 1976 BP 505 at 509E–G.

466*Caltex Oil Rhodesia (Pvt) Ltd v Perfecto Dry Cleaners (Pvt) Ltd* 1970 (2) SA 44 (R).

467In terms of rule 1 of the High Court Rules, this means 'a judge sitting otherwise than in open court', in other words a judge in chambers. The corresponding rule 24(7)(*b*) of the Magistrates' Courts Rules provides that either party may bring an application to the court and the court may make such order as it may deem fit. This implies a formal application on notice of motion, but the other provisions are substantially the same in both courts.

468See 'Possible extra steps' at p225.

469See the section on rules 35(12) and 35(14) of the High Court Rules, and the corresponding rules 23(13) and 23(15) of the Magistrates' Courts Rules under 'Possible extra steps' at p225–226.

470In the case of the Magistrates' Courts, the procedure was introduced as at 15 October 2010 for the first time, with the replacement of Magistrates' Courts rule 16 in its entirety with the content of rule 21 of the High Court Rules.

471*Thompson v Barclays Bank DCO* 1965 (1) SA 365 (W); *Lotzoff v Connel and Another* 1968 (2) SA 127 (W); *Schmidt Plant Hire (Pty) Ltd v Pedrelli*1990 (1) SA 398 (D).

472*Schmidt Plant Hire (Pty) Ltd v Pedrelli* 1990 (1) SA 398 (D) at 402–403.

473*Annandale v Bates* 1956 (3) SA 549 (W) at 551.

474*Von Gordon v Von Gordon* 1961 (4) SA 211 (T) at 213.

475*Silver v Silver* 1934 NPD 396 at 402.

476In terms of rule 21(2) read with rule 21(4) of the High Court Rules, or the corresponding rule 16(2) read with rule 16(4) of the Magistrates' Courts Rules, as the case may be. The court retains a discretion to grant or refuse an order for the delivery of further particulars in terms of rule 21(4). See *Szedlacsek v Szedlacsek*; *Van der Walt v Van der Walt*; *Warner v Warner* 2000 (4) SA 147 (E).

477The KwaZulu-Natal Practice Directive at para 19 provides: 'Only those particulars will be ordered which the court is satisfied are justified in terms of the Rules. It will no longer be permissible to avoid the question as to whether each request is so justified by arguing that all that is required is that the respondent "respond" to the request. If an order is granted for the furnishing of further particulars, the form of the order will still be that the respondent "respond" to the request (or, if only some of the particulars are justifiably sought, that the respondent respond to the questions asked in certain specified paragraphs). This form is considered correct since the defendant may, in some cases, conceivably turn out to be unable to furnish such particulars. The court must, however, be satisfied that each question is justified in terms of the Rules before ordering that the respondent respond to such question.'

478In terms of High Court rule 21(5) and the corresponding Magistrates' Courts rule 16(5).

479*Minister of Police and Others v Premier of the Western Cape and Others* 2014 (1) SA 1 (CC) at para [1].

48010 of 2013.

481Note that s 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.

482*S v Matisonn* 1981 (3) SA 302 (A) at 313. Where the applicant is not the witness who has been subpoenaed, a party to the action only has *locus standi* to challenge the validity of a subpoena *duces tecum* on the ground that it constitutes an abuse of the court process. Any objection in respect of a witness who is not a party should normally emanate from the witness himself. See *South African Coaters (Pty) Ltd v St Paul Insurance Co (SA) Ltd and Others* 2007 (6) SA 628 (D) at 633F.

48310 of 2013.

484To do so may be an abuse of process.

485This section sets out the manner in which a witness may be dealt with on refusal to give evidence or produce documents.

486A subpoena *duces tecum* must specify the document which the witness is required to produce. 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.*

487*Swart en 'n Ander v Cronje en 'n Ander NNO* 1991 (4) SA 296 (E).

488*Laskarides and Another v German Tyre Centre (Pty) Ltd (in liquidation) and Others NNO* 2010 (1) SA 390 (W).

489Rule 26 was amended in 2010 to align more closely with rule 38 of the High Court Rules, although rule 26 merely overlaps with rule 38 in certain respects, rather than replicating it. The contents of rule 38(1)(*a*) is all that has been replicated in rule 26, in fact, the balance of the rule remaining the same.

490'Conduct money' is the allowance laid down under s 51*bis* of the Magistrates' Court Act 32 of 1944.

491Zeffertt and Paizes (2009), op. cit., 322.

492'The opinion of expert witnesses is admissible whenever, by reason of their special knowledge and skill, they are better qualified to draw inferences than the judicial officer. There are some subjects upon which the court is usually quite incapable of forming an opinion unassisted, and others upon which it could come to some sort of independent conclusion, but the help of an expert would be useful.' Zeffertt, DT, Paizes, AP and Skeen, ASt Q (2003) *The South African Law of Evidence*: formerly Hoffmann and Zeffertt, 299. See also *Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MBH* 1976 (3) SA 352 (A) at 370; *Visagie v Gerryts en 'n Ander* 2000 (3) SA 670 (C) at 681A–B; and Zeffertt and Paizes (2009), op. cit., 321–322. It follows that expert evidence ought not to be used when a court should be able to draw the correct inferences and form opinions unassisted. See, for instance, the warning of the Supreme Court of Appeal in *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA) at para [40]. In that case, the Supreme Court of Appeal strongly disapproved of the fact that the High Court had allowed an expert witness to testify as to the meaning of a contract. Such evidence is irrelevant.

493*Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MBH* 1976 (3) SA 352 (A) at 371F.

494Supra at 371–372.

495There have been efforts to rationalise the production of expert reports for a more efficient resolution of trials in line with the 'Woolf' reforms in England and Wales. These form part of the case-flow management process (discussed below at 9.2) which is sometimes included as part of the pre-trial procedure. For instance, the Practice Manual of South Gauteng High Court Johannesburg (January 2010) at 6.5 states: 'In all trials in which the parties have opposing expert witnesses, such opposing expert witnesses must meet and reduce their agreements and disagreements to writing in joint expert minutes, signed by them. This minute must be filed in the court file not less than five days prior to the date allocated for the hearing of the trial.' With regard to RAF matters, the Practice Directive issued in the KwaZulu-Natal Division para 31 emphasises the enforcement of time limits for expert notices and summaries in terms of the rules and then adds the following requirement at (31(2)(e)(ii): *'The parties will thereafter deliver a further summary clearly and concisely setting out areas in which their respective experts agree as well as areas in which they disagree. Such a summary shall be delivered not later than two days prior to the date.'* See also Section 8.1.4 below.

4961976 (4) SA 431 (A).

497At 438 of the judgment.

498At 439.

499See, generally, Zeffertt and Paizes (2009), op. cit., 887–889.

500*Federated Insurance Co Ltd v Britz and Another* 1981 (4) SA 74 (T).

501*Shield Insurance Co Ltd v Deysel and Another* 1978 (2) SA 164 (SE).

502*Grant v Grant* 1949 (1) SA 22 (C) at 26.

503*Meyerson v Health Beverages (Pty) Ltd* 1989 (4) SA 667 (C) at 678A.

504Erasmus et al. OS, 2015, D1–511.

505Erasmus, op. cit., OS, 2015, D1–511.

506Rule 38(5) of the High Court Rules.

507Rule 38(7) and (8) of the High Court Rules.

508*Jones and Buckle, Vol I, The Act*, RS 10, 2016 Act-p356.

509Zeffertt and Paizes (2009), op. cit., 889.

510It is mentioned as an alternative to the normal procedure for evidence taken on commission in rule 38(5) of the High Court Rules.

51110 of 2013.

512See ss 32(2) and (3).

513See ss 32(3) and (6).

514Section 52(1).

515Erasmus, HJ and Van Loggerenberg, DE (1996) *Jones and Buckle: The Civil Practice of the Magistrates' Courts in South Africa, Vol I, The Act*, RS 10, 2016 Act-p350.

516Rule 29(15) provides for the filing of interrogatories and cross-interrogatories once interrogatories have been authorised by the court.

517Section 52(1).

518Section 52(2).

519*Jones and Buckle, Vol I, The Act*, op. cit., RS 10, 2016 Act-p352.

520See *Ex Parte Atkinson* 1918 CPD 127.

521*Knight v Knight* (1900) 14 EDC 162.

522Act 25 of 1965.

523*Bosman v AA Mutual Insurance Association Ltd* 1977 (2) SA 407 (C); *Rauff v Standard Bank Properties (A division of Standard Bank of SA Ltd) and Another* 2002 (6) SA 693 (W).

524See *Lekota v Editor, 'Tribute' Magazine and Another* 1995 (2) SA 706 (W).

525See rule 37(6)(*c*) and (8).

526GN No R. 373, *GG* 22265 of 30 April 2001. Consolidated Practice Notes of the Western Cape Division at 41 deals with pre-trial procedure and case management. See also the discussion on case-flow management below at 9.2.

527Rule 37(3)(*a*).

528See *Kemp v Randfontein Estates Gold Company* 1996 (1) SA 373 (W) at 374A–D. A number of courts have issued practice directives regarding the timeous holding of rule 37 conferences. See, for instance, the Consolidated Practice Notes of the Western Cape Division at 41 and 6.13 of the Amended Practice Manual of

the North Gauteng High Court both of which provide that '[i]n order to ensure that it is effective, a pre-trial conference should be held after discovery and after the parties have exchanged documents and further particulars'. The KwaZulu-Natal Practice Manual provides at para 31(1) that 'Uniform Rule 37(7), requiring minutes of the rule 37 conference to be filed with the registrar not later than five weeks prior to the trial date, shall be strictly enforced and noncompliance shall automatically result in the matter being struck off the trial roll.'

529The provision contained in rule 37(9)(*b*) to the effect that no advocate's fees may be allowed on a party-and-party basis for attendance at a pre-trial conference held more than 10 days prior to the hearing, coupled with the fact that attorneys tend to prefer the advocates to be present, must surely be one of the reasons for the lateness of the conferences. Another reason is that ideally, for all the rule 37 conference functions to be fulfilled, discovery by both parties should be complete by the time the conference is held. This very point is made in the practice directives discussed above, which both indicate that to ensure its effectiveness, a pre-trial conference must be held after discovery and after the parties have exchanged documents as contemplated in rule 35. However, despite the long delays between close of pleadings and trial, inertia often sets in as an attorney's attention is directed to more pressing matters and discovery is often completed relatively close to trial. Furthermore, the time limits in the rules are somewhat out of kilter. For instance, rule 35(8) only requires a response to a notice to specify 15 days before trial, although a rule 37 conference must be held at least six weeks prior to the trial. There is also some anecdotal evidence that despite long delays between the closure of pleadings and the trial, the registrars of some courts allocate trial dates on very little notice before trial, occasionally as little as three weeks. This may also create difficulties for the timeous holding of conferences, although apart from the aforementioned inertia, there is technically nothing stopping parties from proceeding with the conference before the allocation of a trial date.

530See *Kemp v Randfontein Estates Gold Company*, supra at 374H–I. See footnote 529 above.

531*Lekota v Editor, 'Tribute' Magazine and Another* 1995 (2) SA 706 (W) at 709A–C.

532Part of the reason might be to avoid making tactical errors in the absence of an important member of the legal team, the 'expert' on evidence, as it were. The situation does point to a certain insecurity felt by attorneys in High Court practice, however, another sign of which, for instance, is the frequent involvement of advocates in drafting affidavits, supposedly an attorney's task. The habit of briefing counsel on evidence with the entire court file is another practice of some attorneys which indicates an abdication of the responsibility for running the trial. This insecurity is understandable to some degree, based as it is on a lack of specialisation of many attorneys in courtroom appearances generally, let alone at High Court level. It is also one of the advantages of the divided profession, that an inexperienced attorney is able to brief an experienced advocate. The abdication of responsibility is unproductive, however, in that the attorney needs to be more than a mere administrative factotum whose sole function is to deliver notices. The situation also renders incomprehensible, incidentally, the call for the abolition of the division in the profession by some members of the side-bar.

533For instance, the Consolidated Practice Notes of the Western Cape Division at para 27.2 makes the following point: 'At a pre-trial conference the parties must genuinely endeavour to achieve the objects of rule 37 (by defining triable issues and curtailing proceedings) and the minute must show this'. The Joint Rules of Practice for the Eastern Cape Division of the High Court contains the following requirements at 1: '(a) The conference in terms of Uniform Rule 37 should be regarded as an ongoing procedure which, having been convened, does not end but will stand adjourned until the commencement of the trial, with either party being free to reconvene it from time to time on reasonable notice; (b) The minute of the conference is to contain a full record of the matters discussed at every stage, and must include not only those matters on which agreement has been reached but also the requests of one party and the replies of the other relating to matters where there is no agreement. However, as a general rule, the minute should not include requests for particulars or replies to interrogatories.' The KwaZulu-Natal Practice Directive at para 31(1) requires, as stipulated in rule 37(7), that the minutes of rule 37 conferences be filed with the registrar not later than five weeks prior to the trial date, and stipulates that noncompliance with this shall automatically result in the matter being struck off the trial roll.

534This is mandatory – see rule 37(6).

535Divisions may have their own practice rules, such as 28 of the Consolidated Practice Notes of the Western Cape Division, which provides that if the signed minute has not been filed, the Judge President may refuse to allocate the matter.

536In terms of Practice Directive 31, rule 37(8) conferences before a judge in chambers have been made mandatory in the case of all Road Accident Fund matters held in the KwaZulu-Natal Division.

537Erasmus et al. OS, 2015, D1–501.

538Paragraph 4.4.4 of the Civil Practice Directives for the Regional Courts in South Africa provides: 'In accordance with the spirit of Magistrates' Court Rule 1(3), directives may be given to the parties to hold a party and party pre-trial conference, in particular where a settlement may be possible, in which case the parties

must inform the registrar no later than ten court days before the trial date, if already allocated, whether the matter will proceed or be settled.'

539Section 54(1).

540In terms of rule 25(3), the process for requiring the attendance of parties or their legal representatives at a pre-trial conference is by letter signed by the registrar or clerk of the court, together with a copy of the request, if any.

541See footnote 540 above. Many matters in the Magistrates' Courts are simple enough not to require the added expense of this procedure, which is possibly the reason that it is voluntary. However, the procedure tends to be ignored even in situations where it is warranted. This is possibly due to the reluctance of many attorneys to add to their already considerable workload.

542*Oshry and Lazar v Taxing Master and Another* 1947 (1) SA 657 (T) at 662.

543Using an 'evidence chart' to analyse the pleadings is particularly useful. This is, in any event, what an attorney ought to be doing when operating without counsel's assistance in the Magistrates' Courts. If followed by all attorneys, this practice would improve the standards in the Magistrates' Courts and prevent attorneys from becoming mere passengers in the High Court.

544Discussed in *Ebotswana (Pty) Ltd v Sentech (Pty) Ltd and Others* 2013 (6) SA 327 (GSJ) at para [70].

545See Case Management Directive Effective from First Term of 2015 Gauteng Local Division.

546In terms of rule 37(6)(*j*) of the High Court Rules.

547See, for instance, 11–13 of the Consolidated Practices Notes of the Western Cape Division.

548Note, however, a recent introduction to rule 1(4)(*c*) of the Magistrates' Courts Rules which provides that: 'All process of the court for service or execution and all documents or copies to be filed of record other than documents or copies filed of record as documentary proof shall be on paper known as A4 standard paper of a size of approximately 210 mm by 297 mm.'

549Some attorneys do not bother with the notices at all, but rule 62(4) clearly refers to 'all pages of the documents delivered'. In any event, it is not unlikely that reference will have to be made to some or other notice at trial if a dispute arises as to whether or not there was an adequate or timeous response. Separating notices from pleadings is, however, a useful practice, leaving the pleadings uncluttered and easy to read. While it is an informal but invariable practice in some divisions, it is specifically provided for in others; see, for instance, para 6.2 of the Consolidated Rules of Practice of the Northern Cape Division of the High Court.

550For instance, para 3 of the Eastern Cape Practice Directions deals with pagination and indexes.

551See *Makuwa v Poslson* 2007 (3) SA 84 (T), where failing to index and paginate were one of several instances of disregard for the Rules and Practice of Court, resulting in an order of costs *de bonis propriis* against the practitioners.

552With an application, by contrast, the evidence is set out in the affidavits from the start, and the hearing proceeds directly to legal argument.

553'Adduce' means to deliver or present, and is generally used in the context of presenting or giving evidence.

554'Real' evidence means evidence in the form of physical objects as opposed to oral testimony from witnesses.

555See the section dealing with 'Default of appearance' at p243.

556'… except in so far as any such court may in special cases otherwise direct.' Section 32 of the Superior Courts Act 10 of 2013. See *Prinsloo v RCP Media Ltd t/a Rapport* 2003 (4) SA 456 (T) (decided under the now repealed Supreme Court Act 59 of 1959).

557The media has, however, requested and obtained access to the criminal court hearings – for example, that of the Oscar Pistorius trial (*Multichoice (Pty) Ltd and Others v National Prosecuting Authority and Another, In Re; S v Pistorius and Another Related Matter* [2014] 2 All SA 446 (GP)) – as well as access to televise hearings in the Constitutional Court frequently occurs with the permission of the judges.

558See, generally, *Financial Mail (Pty) Ltd v Registrar of Insurance and Others* 1966 (2) SA 219 (W). See also *Phillips and Another v National Director of Public Prosecutions and Others* 2001 (4) SA 849 (W) at 851F–852H.

559For example, evidence of a sex change operation in divorce proceedings *W v W* 1976 (2) SA 308 (W) at 310.

560*Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd and Another* 1984 (4) SA 149 (T) at 158H.

561Behaviour that is obstinate, unmanageable, noncompliant and disobedient.

562Section 36(1).

563Section 36(2).

564*Topaz Kitchens (Pty) Ltd v Naboom Spa (Edms) Bpk* 1976 (3) SA 470 (A) at 473.

565See *Pillay v Krishna and Another* 1946 AD 946 at 952–953 '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.' See also *Tregea and Another v Godart and Another*1939 AD 16 at 32.

566*South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 548A. This evidentiary burden is referred to in rule 39(11), (12) and (13) as 'the onus of adducing evidence'. Erasmus et al. (1994) *Superior Court Practice*, op. cit., OS, 2015, D1–528.

567See Zeffertt and Paizes (2009) op. cit., 127–130.

568See, generally, Erasmus et al. (1994) *Superior Court Practice*, op. cit., OS, 2015, D1–528.

569*Mobil Oil Southern Africa (Pty) Ltd v Mechin* 1965 (2) SA 706 (A) at 710F.

570In terms of rule 37(5), this is one of the issues that must be discussed.

571Leading evidence, that is.

572Meaning 'on the face of it'. A material fact proven *prima facie* requires contradictory proof from the opposing party, failing which it is conclusively proven.

573Rule 39(13), (14) and (15) of the High Court Rules.

574*Nongovu NO v Road Accident Fund* 2007 (1) SA 59 (T). In this particular case, the issues relating to the merits and quantum of damages had been separated (as is usual) before the merits were adjudicated.

575Rule 39(5) and (9) of the High Court Rules.

576*Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 at 198: 'The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the court has a wide discretion. For pleadings are made for the court not the court for the pleadings.' In *E C Chenia and Sons CC v Lamé & Van Blerk* 2006 (4) SA 574 (SCA) at 579 A–580 H, it was held that certain evidence which departed from the pleadings had not been prejudicial in that the evidence did not deal with the real issue between the parties, did not depart from the pleadings in any material respect, and no objection had been raised by opposing counsel.

577Otherwise called 'examination-in-chief' from the perspective of the lawyer conducting the examination.

578However, where facts are common cause, closed questions may also be asked in examination-in-chief.

579The word 'counsel' is used here to refer to *all* trial lawyers, not advocates only.

580Rules 39(7) and (8) of the High Court Rules.

581See *Rowe v Assistant Magistrate Pretoria, and Another* 1925 TPD 361.

582This is a judgment given when neither party has managed to prove his case on a balance of probabilities. The defendant is substantially the 'winner' from a costs point of view, but the plaintiff may bring the action again (provided that it has not prescribed in the meantime).

583See rule 39(6) of the High Court Rules.

584See rule 39(6) of the High Court Rules.

585*Gascoyne v Paul & Hunter* 1917 TPD 170; *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A).

586*Atlantic Continental Assurance Co of SA v Vermaak* 1973 (2) SA 525 (E) at 527C–D.

587*Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 38H.

588*Arter v Burt* 1922 AD 303; *Schoeman v Moller* 1949 (3) SA 949 (O).

589Rule 39(8) of the High Court Rules.

590*Schapiro v Schapiro* 1904 TS 673 678; *Jardim v Jardim* 1972 (1) SA 142 (C).

591*Mkwanazi v Van der Merwe and Another* 1970 (1) SA 609 (A).

592*Oosthuizen v Stanley* 1938 AD 322.

593*Bellstedt v SAR & Harbours* 1936 CPD 397; *Gijzen v Verrinder* 1965 (1) SA 806 (D).

594*Goldstuck v Mappin & Webb Ltd* 1927 TPD 723.

595*Goldstuck v Mappin & Webb Ltd*, supra at 733–734.

596High Court rule 39(16)(*d*) and Magistrates' Court rule 30(1)(*d*).

597Section 38 of the Superior Courts Act 10 of 2013.

598Section 38 of the Superior Courts Act 10 of 2013.

599See, for instance, *Allen and Others NNO v Gibbs and Others* 1977 (3) SA 212 (SE).

600Paterson, TJM (2005) *Eckard's Principles of Civil Procedure in the Magistrates' Courts* (fifth edition), 220–221. See also *Phuthi v Minister of Police*(8540/2012) [2015] ZAGPPHC 159 (5 March 2015) at para [28] where the court expressly draws this inference: 'Plaintiff seemed to tailor his evidence to the defendant's witnesses' evidence particularly since he was present in court during the defence case'.

601*Jones and Buckle, Vol II, The Rules*, op. cit., RS 12, 2016 Rule-p29–11.

602See, generally, *Dickinson and Another v Fisher's Executors* 1914 AD 424; *Constantia Insurance Co Ltd v Nohamba* 1986 (3) SA 27 (A) 43.

603*Jones and Buckle, Vol I, The Act*, op. cit., RS 10, 2016 Act-p320.

604*Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at 332 A. See 344 G-345 A for the requisites and evidential burden.

605See *Gascoyne v Paul and Hunter* 1917 TPD 170; *Supreme Service Station (1969) (PVT) Ltd v Fox & Goodridge (Pvt) Ltd* 1971 (4) SA 90 (RA); *Standard Trading Co (Knitting Mills Ltd) v Lacey Knitting Mills* 1972 (3) SA 392 (A).

606See, generally, *Gafoor v Unie Versekeringsadviseurs (Edms) Bpk* 1961 (1) SA 335 (A) at 340D–E.

607*Forbes v Golach & Cohen* 1917 AD 559; *Hairman v Wessels* 1949 (1) SA 431 (O).

608*Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* (363/2011) [2012] ZASCA 49; 2013 (2) SA 204 (SCA) (30 March 2012) at para 13 and *Eke v Parsons* 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC). See also *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A).

6092015 (4) SA 34 (SCA).

610*Jones and Buckle, Vol 1, The Act*, op. cit., RS 10, 2016 Act-p324.

611The rule that a court may not alter or vary its own judgment does not apply to interlocutory orders. See *Zondi v MEC, Traditional and Local Government Affairs, and Others* 2006 (3) SA 1 (CC) at 13 A–E; *Brown and Others v Yebba CC t/a REMAX Tricolor* 2009 (1) SA 519 (D) at 524J and 525B–C.

612*Estate Garlick v Commissioner for Inland Revenue* 1934 AD 499 at 502.

613*Zondi v MEC, Traditional and Local Government Affairs, and Others* 2006 (3) SA 1 (CC) at 12 E–G.

614*S v Wells* 1990 (1) SA 816 (A) at 820B–C.

615*Sayprint Textiles (Pvt) Ltd and Another v Girdlestone* 1984 (2) SA 572 (ZH). See also Erasmus et al. *Superior Court Practice*, op. cit., OS, 2015, D1–561 and the authorities cited there. As regards divorce matters, see *PL v YL* 2013 (6) SA 28 (ECG) at 53–55.

616Zeffertt and Paizes (2009), op. cit., 926; *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 6B–E.

617In *Zondi v MEC, Traditional and Local Government Affairs, and Others* 2006 (3) SA 1 (CC) at 13 E–14 H, Ngcobo J indicated that pre-constitutional exceptions to the general rule that a judge has no authority to amend his or her own final order appeared to be grounded on at least two interrelated considerations, namely justice and the need to adapt the common law. 'What emerges from our pre-constitutional era jurisprudence is that the general rule that an order once made is unalterable was departed from when it was in the interests of justice to do so and where there was a need to adapt the common law to changing circumstances and to meet modern exigencies. It is equally clear from the case law that in departing from the general rule, the Court invoked its inherent power to regulate its own process. … This approach to the general rule by the Appellant Division is consistent with the Constitution. It is now entrenched in s 173 of the Constitution …' It is not always clear, with regard to the variation of a judgment, where inherent jurisdiction ends and common law begins. Indeed, s 173 of the Constitution appears to have institutionalised a common-law role for inherent jurisdiction and Ngcobo J's judgment reflects this. In fact, many older authorities made no attempt to distinguish between the two although the distinction periodically becomes relevant. See, for instance, the issues arising in *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173. The nature of this book, however, does not warrant a detailed discussion on the topic.

618See, generally, Zeffertt and Paizes (2009), op. cit., 926–927, and the authorities cited there. This list is by no means exhaustive and may be extended to meet the exigencies of modern times. See *Zondi v MEC, Traditional and Local Government Affairs, and Others* 2006 (3) SA 1 (CC) at 12 H–13 A.

619*West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 at 193–194.

620Meaning 'of its own accord or on its own initiative'.

621*President of the Republic of South Africa v Eisenberg & Associates (Minister of Home Affairs Intervening)* 2005 (1) SA 247 (C) at 264 F–J.

622Lack of awareness about facts that have not been revealed to the judge does not in itself amount to an error. 'A judgment to which a party is procedurally entitled cannot be considered to have been granted erroneously by reason of facts of which the Judge who granted the judgment, as he was entitled to do, was unaware.' 'Similarly, in a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant, the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence.' See *Lodhi 2 Properties Investments CC and Another v Bondev Developments(Pty) Ltd* 2007 (6) SA 87 (SCA) at 94E and 95E.

623See Erasmus et al. (1994) *Superior Court Practice*, op. cit., OS, 2015, D1–562, and *Colyn v Tiger Food Industries Ltd* op. cit. at 8A-9B. Also see *President of the Republic of South Africa v Eisenberg & Associates (Minister of Home Affairs Intervening)* 2005 (1) SA 247 (C).

624Erasmus et al. (1994) *Superior Court Practice*, op. cit., OS, 2015, D1–564, and the authorities cited there.

625*Seatle v Protea Assurance Co Ltd* 1984 (2) SA 537 (C) at 541H.

626*Tshivhase Royal Council and Another v Tshivhase and Another, Tshivhase and Another v Tshivhase and Another* 1992 (4) SA 852 (A) at 863A.

627*Tshivhase Royal Council and Another v Tshivhase and Another*, supra at 863B.

628Erasmus et al. (1994) *Superior Court Practice*, op. cit., RS 2, 2016, D1–576.

629*De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1039H–1043B.

630In terms of this rule the judgment may be 'reconsidered' by the court.

631*Topol and Others v LS Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W) at 650D–J; *Mutebwa v Mutebwa and Another* 2001 (2) SA 193 (TkH) at 199E–H.

632See 2.1.1(b) above.

633*De Sousa v Kerr* 1978 (3) SA 635 (W).

634*Frenkel, Wise & Co (Africa) (Pty) Ltd v Consolidated Press of SA (Pty) Ltd* 1947 (4) SA 234 (C).

635*Bakoven Ltd v GJ Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 471F. See, generally, *Herbstein and Van Winsen* (1997), op. cit., 697, and the authorities cited there.

636Erasmus et al. (1994) *Superior Court Practice*, RS 2, 2016, D1–569. See also *Mutebwa v Mutebwa and Another* 2001 (2) SA 193 (TkH) at 201A–C and *Colyn v Tiger Food Industries Ltd* op. cit. at 8H–9B.

637*Ex Parte Naudé* 1964 (1) SA 763 (D) at 764.

638See the section on 'Default judgment' at p243.

639Rule 31(2)(*a*) of the High Court Rules.

640*Kunene v Union National South British Insurance Co Ltd and Others* 1976 (4) SA 782 (D).

641The application for rescission is one which is 'on notice' (as opposed to 'on notice of motion') to the plaintiff although some divisions of the High Court have requirements for the form it must take. Although the 10-day notice period set out in rule 6(5)(*b*) of the High Court Rules is only applicable to applications on notice of motion, and not to applications which are simply on notice (i.e. interlocutory applications), the plaintiff must still be given reasonable notice of the date of the hearing of the application for rescission. Of course, if the defendant is unable to draft and serve the papers in time to meet the 20-day deadline, he could ask the plaintiff to agree to an extension of the time limit and, if he refuses, make application to court for an extension of the time limit in terms of rule 27(1).

642*Government of the Islamic Republic of Iran v Berends* 1998 (4) SA 107 (NmH) at 120C–E. In fact, the corresponding rule 49(1) of the Magistrates' Courts Rules specifically provides that the defendant need merely 'file and serve' the application within the 20-day period.

643In addition to good cause, *Herbstein and Van Winsen* add the requirements that the applicant prove that he at no time renounced his defence and that he has a serious intention of proceeding with the case. See *Herbstein and Van Winsen* (2009), op. cit., Vol 1, 715 and *Van Aswegen v MacDonald Forman & Co Ltd* 1963 (3) SA 197 (O).

644*Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476–477; *Colyn v Tiger Food Industries Ltd* op. cit. at 9B–F.

645Sometimes this element is described as a substantial defence. See *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352.

646*Maujean t/a Audio Video Agencies v Standard Bank of SA Ltd* 1994 (3) SA 801 (C) at 803J.

647Erasmus et al. (1994) *Superior Court Practice*, OS, 2015, D1–367.

648This is even more likely in the Magistrates' Courts than the High Court. In terms of rule 9(5) of the Magistrates' Courts Rules, if the sheriff is unable to find the defendant or a person in charge of the defendant's residence apparently over the age of 16, because the person to be served keeps his or her residence or place of business closed and thus prevents the sheriff from serving the process, he may affix a copy of the summons to the principal outer door. The chances are reasonably high that the summons will blow away or in some other way disappear before the defendant sees it, particularly if the defendant is away on a long trip.

649*Chedburn v Barkett* 1931 CPD 421 at 423. Other cases have held that the defendant's actions should have been deliberate in full knowledge of the consequences. See *Morkel v Absa Bank Bpk en 'n Ander* 1996 (1) SA 899 (C) at 905C–D.

650*Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 477.

651*PLJ van Rensburg en Vennote v Den Dulk* 1971 (1) SA 112 (W).

652*Kritzinger v Northern Natal Implement Co (Pty) Ltd* 1973 (4) SA 542 (N) at 546.

653*Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352.

654*Wahl v Prinswil Beleggings (Edms) Bpk* 1984 (1) SA 457 (T).

655*Kouligas & Spanoudis Prop (Pty) Ltd v Boland Bank Bpk* 1987 (2) SA 414 (O).

656Erasmus et al. (1994) *Superior Court Practice*, op. cit., OS, 2015, D1–563. See also *De Wet and Others v Western Bank Ltd* 1979 (2) SA at 1042H; *KR Sibanyoni Transport Services CC and Others v Sheriff, Transvaal High Court, and Another* 2006 (4) SA 429 (T) at 431F–432A.

657*Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O); *Smit v Van Tonder* 1957 (1) SA 421 (T).

658*De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A). See also *Harris v Absa Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T) at 528H–531A and 532G–I.

659*Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352H–353A.

660*Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 764I–J.

661In *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others* 2012 (3) SA 325 (SCA) the Supreme Court of Appeal confirmed that 'judicial decisions issued without jurisdiction or without the citation of a necessary party are nullities that a later court may refuse to enforce (without the need for a formal setting-aside by a court of equal standing). This seems paradoxical but is not. The court, as the fount of legality, has the means itself to assert the dividing line between what is lawful and not lawful. For the court itself to disclaim a preceding court order that is a nullity therefore does not risk disorder or self-help.' See *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC) at 512, footnote 78 and *Premier Foods v Manoim NO* (20147/2014) [2015] ZASCA 159; 2016 (1) SA 445 (SCA); [2016] 1 All SA 40 (SCA) (4 November 2015) at paras [35]–[39].

662*Culverwell v Beira* 1992 (4) SA 490 (W) at 494.

663Or to vary.

664In terms of rule 49(2), unless the applicant proves the contrary, it is presumed that he had knowledge of the default judgment *10 court days* after the date on which it was granted.

665*Wright v Westelike Provinsie Kelders Bpk* 2001 (4) SA 1165 (C) at 1181H–1182A. A somewhat different conclusion was arrived at in *Phillips t/a Southern Cross Optical v SA Vision Care (Pty) Ltd* 2000 (2) SA 1007 (C) at 1013A–H, where Van Reenen J indicated that the criterion was now 'less stringent', but these remarks were *obiter*.

666See 2.1.2(*b*) at p314. See also *Maujean t/a Audio Video Agencies v Standard Bank of SA Ltd* 1994 (3) SA 801 (C) at 803J; and *Harris v ABSA Bank Ltd t/a Volkskas* [2002] 3 All SA 215 (T) at 218 *b-c; De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd* 1994 (4) SA 705 (E) at 708G. Note that the claim by *Jones and Buckle, Vol II, The Rules*, op. cit., RS 12, 2016 Rule-p49–11 that Van Reenen J and Ngwenya AJ in *Phillips t/a Southern Cross Optical v SA Vision Care (Pty) Ltd* 2000 (2) SA 1007 (C) at 1013I–1014A held that the words 'a certain mental attitude towards the consequences of the default' no longer form part of the definition of 'wilful default' is, in our view, not necessarily supported by a reading of the case. The learned author correctly points out, however, that the courts have struggled to define this element.

667Erasmus points out that while the lack of wilful default is not an element in the enquiry in its own right, it is one of the considerations to take into account when the court considers the existence of good cause. See Erasmus et al. (1994) *Superior Court Practice, Vol II, The Rules*, op. cit., OS, 2015, D1–366.

668Other grounds for rescission may also be brought in terms of rule 49(3) of the Magistrates' Courts Rules, of course, such as the judgment being void *ab origine*, in which case the applicant must still comply with the provisions of rule 49(3) by presenting proof of the existence of a valid and *bona fide* defence to the claim. See *Leo Manufacturing CC v Robor Industrial (Pty) Ltd t/a Robor Stewarts & Lloyds* 2007 (2) SA 1 (SCA) at 4E.

669In this case, the absence of wilful default is a specific requirement.

670'Interest is a legal corollary to the principal indebtedness forming a separate and distinct indebtedness of its own'. See *Wedge Steel (Pty) Ltd v Wepener* 1991 (3) SA 444 (W) at 444F.

671*Queensland Insurance Co Ltd v Banque Commerciale Africaine* 1946 AD 272 at 286.

672An exception to the need to plead specifically occurs if, although interest is not pleaded in the particulars of claim, a request for interest is made in the prayer *a tempore morae*, meaning from the date of *mora*. Here, however, interest will merely be awarded from the date of the service of the summons (in the case of a liquidated claim), as lacking any specific allegation in the particulars of claim, no other date will be apparent unless evidence is led.

673Act 55 of 1975.

674Section 105 of the National Credit Act 34 of 2005 replaces the Usury Act 73 of 1968 and Credit Agreements Act and came into effect fully on 1 June 2007.

675The permissible interest rate that may be levied on a credit agreement depends on the type of credit agreement in question. For example, a different fee may be levied in respect of a mortgage agreement and a credit facility, both of which are determined with reference to the repo rate. The interest rate 'caps' are set out in Regulation 42 of the regulations to the National Credit Act (*National Credit Regulations, 2006* published in *GG* 28864, Notice No 489, of 31 May 2006). These interest rate 'caps' are amended from time to time.

676See the section on 'Demand' at p125.

677Christie applies the term '*mora ex lege*', *inter alia*, to unliquidated claims. See Christie, RH (2006) *The Law of Contract in South Africa* (fifth edition), 498. This term is seldom encountered, but it is a useful characterisation of what happens when noncontractual obligations become due for performance.

678*Davehill (Pty) Ltd and Others v Community Development Board* 1988 (1) SA 290 (A) and *Crookes Brothers Ltd v Regional Land Claims Commission for the Province of Mpumalanga and Others* [2013] 2 All SA 1 (SCA).

679*LTA Construction Bpk v Administrateur, Transvaal* 1992 (1) SA 473 (A); *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation)* 1998 (1) SA 811 (SCA) at 827H.

680*Van Coppenhagen v Van Coppenhagen* 1947 (1) SA 576 (T).

681See *Paulsen and Another v Slip Knot Investments 777 (Pty) Limited* 2015 (3) SA 479 (CC) where the court considered the common-law *in duplum*rule. In this matter a R12 million loan agreement had been entered into and sureties to that agreement were being held liable for R72 million, made up of the capital sum of R12 million and accrued interest – a R60 million difference between capital and interest. The court confirmed that, far from being an anachronism, the *in duplum* rule is a part of everyday commerce. It also clarified that the *in duplum* rule is not suspended *pendente lite* but continues to protect debtors while litigation proceeds.

682*Die Meester v Joubert en 'n Ander* 1981 (4) SA 211 (A) at 218.

683Apart, that is, from rule 70 of the High Court Rules which provides a tariff and rules for taxation.

684*Graham v Odendaal* 1972 (2) SA 611 (A) at 616; *Naylor and Another v Jansen* 2007 (1) SA 16 (SCA) at 23F–29D. This discretion can result in some unusual costs orders. See, for instance, *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 (4) SA 97 (CC) at 123E–125D. Here the Minister was required to pay the costs of all the parties in a matter where the constitutional validity of a statutory provision was under consideration by a court and the state official under whose administration the statutory provision rested, ought to have taken more substantive action, as he or she would be called upon to deal with the formulation of an appropriate remedy in the event that the provision was held to be unconstitutional.

685*Gelb v Hawkins* 1960 (3) SA 687 (A) at 694.

686*Skotnes v SA Library* 1997 (2) SA 770 (SCA); *Wildlife and Environment Society of SA v MEC for Economic Affairs, Environment and Tourism, EC Provincial Government and Others* [2005] 3 All SA 389 (EC) at 395; *Minister of Defence and Others v South African National Defence Union; Minister of Defence and Others v South African National Defence Union and Another* 2007 (1) SA 422 (SCA) at 433E.

687*Mahomed v Nagdee* 1952 (1) SA 410 (A).

688This is expressly provided for in s 80(2) of the Magistrates' Courts Act.

689*Reid NO v Royal Insurance Co Ltd* 1951 (1) SA 713 (T). Conducting proceedings in a manner which is sufficiently offensive for a court to indicate its disapproval by awarding an order for attorney-and-client costs, includes the following examples: (1) making irrelevant, serious and knowingly unfounded accusations in an affidavit and bringing to court an application which was strictly not necessary; *Hawkins v Gelb and Another* 1959 (1) SA 703 (W) 705 at 708G–H; (2) tardy conduct resulting in a postponement; *Ketwa v Agricultural Bank of Transkei* [2006] 4 All SA 262 (Tk); (3) opposing an appeal where the judgment of the court *a quo* is clearly wrong; *Madzunye and Another v Road Accident Fund* 2007 (1) SA 165 (SCA) at 170I–171G; and (4) making groundless allegations of impropriety against a judge, withdrawn without explanation or apology, while bringing an appeal without merit; *MEC for Public Works, Roads and Transport, Free State v Esterhuizen and Others* 2007 (1) SA 201 (SCA) at 205E–F.

6901946 (AD) 597 at 607.

691*Cambridge Plan AG v Cambridge Diet (Pty) Ltd and Others* 1990 (2) SA 574 (T) at 589D.

692See *Makuwa v Poslson* 2007 (3) SA 84 (T) where the court gave a punitive order for costs against both legal representatives *mero motu*. In *Sheriff Pretoria North-East v Flink and Another* [2005] 3 All SA 492 (T) at 495–497, it was held that a costs order on a punitive scale should not be obtained without prior notification to the defendant. In this case, however, there was no indication in the papers that any costs order was sought against the first respondent, and the order was obtained in his absence. See also footnote 732.

693Annexure 2 to the Magistrates' Courts Rules, Scale of Costs and Fees.

694Rule 70 of the High Court Rules.

695The drafting of these documents is so burdensome, despite the provision of a fee for drafting and a separate fee for attending taxation, that a sizeable industry has grown up around the drafting of bills of costs, fashioned cost consultants, and many attorneys farm this work out rather than spend time on it themselves.

696*Rabinowitz v Van Graan and Others* 2013 (5) SA 315 (GSJ) at 324E.

697*Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2012 (11) BCLR 1143 (CC) at para 4.

698GN R90 in *GG* 32941/12–02–2010, which came into effect on 12 March 2010.

699Note that Rule 33(5)(*c*) was amended in 2013 and now provides for scale D of Table A of Annexure 2 to apply in all civil matters (including divorce matters) in the Regional Magistrates' Courts.

700Rule 33(17)(*b*) penalises with the loss of the costs of taxation, the failure of an attorney to accept a written offer for payment of the costs, when the amount taxed is smaller than that offered.

701This notice must be drafted to conform with Form 26 as closely as possible; a form set out in the First Schedule to the High Court Rules.

702See *Society of Advocates of KwaZulu-Natal v Levin* (4564/13) [2015] ZAKZPHC 35; 2015 (6) SA 50 (KZP); [2015] 4 All SA 213 (KZP) (6 July 2015) at paras [13]–[15] where the court sets out how the taxing master should exercise his discretion and the material that the taxing master may be provided in order to do so. See also *Hennie de Beer Game Lodge CC v Waterbok Bosveld Plaas CC and Another* 2010 (5) SA 124 (CC) para [9] (concerning counsels' fees for appeals) in which a 'time-based' approach to calculating fees was eschewed: 'The Supreme Court of Appeal has taken note of 'the almost invariable practice throughout the country nowadays for legal practitioners to make their charges time-related'. The principle flowing from this is that time charged is not decisive. An objective assessment of the features of the case in primary, and time actually spent in preparing an appeal cannot be decisive in determining the reasonableness, between party and party, of a fee for that work. The reason is that time alone would put a premium on slow and inefficient work and would conduce to the charging of fees wholly out of proportion to the value of the services rendered.'

703*Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2012 (11) BCLR 1143 (CC) at para 4.

704See Carnelley, M (2006) 'Costs' in Joubert, WA et al. (eds) *The Law of South Africa (LAWSA)*, Vol 3, part 2, para 316.

705In fact, departure from the tariff is not permissible in the absence of an agreement to charge on a different basis. See *Aircraft Completions Centre (Pty) Ltd v Rossouw and Others* [2003] 3 All SA 617 (W) at 657. See also Paterson (2005) *Eckard's*, op. cit., 234. 'Any party, even if not ordered to pay costs, can require an attorney's bill to be taxed as between attorney and own client. In this instance there is no scale which is provided in the Act. The clerk has to determine what a reasonable fee for the services rendered is bearing in mind the scales as between party-and-party. Such a bill can be taxed even though no action is pending and before judgment, provided the attorney's mandate had been terminated. Such taxation would be useful to a client only where there was no agreement between client and attorney as to fees to be charged, and where, as a result, the contract would contain an implied term that the amount allowed on taxation would be charged.'

706Sometimes local groupings of attorneys agree on the 'going rate' for a particular service. See, for instance, *Loots v Loots* 1974 (1) SA 431 (E). This practice will probably fall foul of the competition legislation. See *Venter v Law Society of the Cape of Good Hope and Others* (014688) [2013] ZACT 103 (14 October 2013) which involved the question of whether a rule of a professional association, the Law Society of the Cape of Good Hope, contravened s 4(1) of the Competition Act 89 of 1998, which prohibits horizontal agreements.

707Act 66 of 1997.

7082004 (6) SA 66 (SCA).

709See also *Gold Fields Limited and Others v Motley Rice LLC* 2015 (4) SA 299 (GJ).

710See s 35 of the Legal Practice Act which governs fees in respect to legal services. See also Rogers, 'High fees and questionable practices' (April 2012) Vol 25 (1) *Advocate* at 40–2.

711See *Mouton and Another v Martine* 1968 (4) SA 738 (T).

712See Carnelley (2006), para 316.

713See *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 at 488.

714*Nel v Waterberg Landbouwers Ko-operatieve Vereeniging* 1946 AD 597 at 607.

715*Malan v Meyer* 1974 (1) SA 476 (T). See also *Hawkins v Gelb and Another* 1959 (1) SA 703 (W) at 705D–H. Here the court used the tariff as the norm but made allowance for additional items and for larger amounts to be charged for the same items.

716Roos, FJ (1947) *Taxation of Bills of Costs in the Superior Courts of South Africa*, referred to and quoted in *Aircraft Completions Centre (Pty) Ltd v Rossouw and Others* [2003] 3 All SA 617 (W) at 641.

717Correctly, with respect. The court explained how Roos' formulation, though widely accepted, is based on a faulty premise. See *Aircraft Completions Centre (Pty) Ltd v Rossouw and Others*, supra at 641–643.

718*Aircraft Completions Centre (Pty) Ltd v Rossouw and Others*, supra at 641.

719*Aircraft Completions Centre (Pty) Ltd v Rossouw and Others*, supra at 641–642.

720The court expanded on this point at 649–650 by holding that a departure from the rate or scale of fees provided in the tariff may only take place in circumstances that are 'extraordinary' or 'exceptional' as

provided in rule 70(5)(*a*) of the High Court Rules, which gives the taxing master a discretion where strict adherence to the tariff would be inequitable. If this is the case, departure from the tariff rates on an attorney-and-client costs bill in the Magistrates' Courts would never have been possible in the past as there was no equivalent provision until the 2010 amendment to include rule 33(8)(*d*). The nature of this book prevents a thorough discussion of the topic, but we submit that rule 70(5)(*a*) provides the taxing master with a discretion to go beyond the tariff in an attorney-and-client situation (notwithstanding decisions to the contrary, see *Loots v Loots*1974 (1) SA 431 (E) at 434C.) If this is not the case, it would seem to take attorney-and-client costs very little further than the 'Roos' formulation, and provide little scope for the 'full indemnity' that attorney-and-client costs are designed to bring according to the *Aircraft Completions Centre*case quoted above. With regard to the exceptional circumstances in which a punitive order for costs may be brought, see also *Herold v Sinclair and Others* 1954 (2) SA 531 (A) at 537C–538A.

721*AA Alloy Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd* 2000 (1) SA 639 (SCA) at 648E.

722Paterson (2005) *Eckard's*, op. cit., 233–234.

723See also 4.2(4) above and *Cambridge Plan AG v Cambridge Diet (Pty) Ltd and Others* 1990 (2) SA 574 (T).

724*Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A) at 807B-E; *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at 22A–E. See also *Nel v Waterberg Landbouwers Ko-Operatieve Vereeniging* 1946 AD 597 at 607.

725*Thoroughbred Breeder's Association v Price Waterhouse* 2001 (4) SA 551 (SCA) at 596C–I.

726Supra at 596H.

7271996 (1) SA 1171 (C). See also *Aircraft Completions Centre (Pty) Ltd v Rossouw and Others* [2003] 3 All SA 617 (W) at 675.

728*Aircraft Completions Centre (Pty) Ltd v Rossouw and Others*, supra at 657.

7292000 (1) SA 639 (SCA) at 648F–I.

7302007 (1) SA 201 (SCA) at 205F–G.

731*Cambridge Plan AG v Cambridge Diet (Pty) Ltd and Others* 1990 (2) SA 574 (T) at 589D. See also *Audio Vehicle Systems v Whitfield and Another*2007 (1) SA 434 (C). In this matter – non-disclosure of a highly material fact in an *ex parte* application for an Anton Piller order in which draconian relief was sought – abuse of process in the manner in which the application was brought and executed and the unapologetic attitude of the applicant resulted in an award of costs on the attorney-and-own-client scale.

732Fiduciary appointees (for example, a curator or trustee) may have costs awarded against them in their personal capacity, if they act in an improper or unreasonable manner or with a lack of *bona fides*. However, in the case of a curator appointed in terms of the Prevention of Organised Crime Act 121 of 1998 to control and administer property in terms of that Act, personal liability is excluded unless there is an absence of good faith. See *Phillips and Others v Van den Heever NO and Another* 2007 (4) SA 511 (W) at 522H–523A, 533E–G. Although a minor is usually liable for the costs of an unsuccessful action in which he is assisted by his guardian, the guardian may become liable for costs *de bonis propriis*where the action or application was instituted frivolously or recklessly or where the guardian acted *mala fide*, unreasonably or negligently. See *Tshona v Principal, Victoria Girls High School and Others* 2007 (5) SA 66 (E). The fact that a practitioner is acting in accordance with specific instructions when drafting an affidavit that includes irrelevant, scandalous, vexatious and defamatory matter, will not be a defence to the award of an order of costs *de bonis propiis.* See *Masema (Pty) Ltd and Others v PP Mkhari and 4 Others (TPD)* (unreported case 29781/07, 6–8-2007); Kanyane, M: 'Beware the power of the mighty pen' (2008) 3 March *De Rebus* 22.

In *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 (4) SA 97 (CC) at 123C-E, the court refused an application for costs *de bonis propriis* to be awarded against one of the parties. The court held that it was neither just nor equitable for a person to be burdened with a costs order *de bonis propriis*, only upon the basis of a request made during argument and without prior notice nor the notice of motion in the application proceedings having been amended to make provision for a prayer for costs *de bonis propriis*. It is submitted that this ruling must be considered in the context of the facts of the case, and that there are appropriate situations in which an order for costs *de bonis propriis* will be given by a court without notice, particularly if it is given *mero motu*.

733In *Makuwa v Poslson* 2007 (3) SA 84 (T), failing to index and paginate was one of several instances of disregard for the rules and practice of court, resulting in an order of costs *de bonis propriis* against the practitioners.

734Rule 33(3) of the Magistrates' Courts Rules.

735See p252

STAGE THREE:

AFTER LITIGATION

PART 1: APPEALS AND REVIEWS

Introduction

A: Appeals

B: Reviews

PART 2: DEBT COLLECTION PROCEDURES

Introduction

A: Writs and warrants of execution

B: Section 65 procedure

C: Administration orders

PART 1: APPEALS AND REVIEWS

Introduction

Introduction

After litigation has been finalised (that is, after the trial or application has been completed and judgment has been given), a party who is unhappy with the outcome of the litigation, or with the procedure used by the court in arriving at the outcome, has certain further options available. If the party is dissatisfied with the judgment of the court because he thinks the court got the law or the facts wrong when coming to its decision, then that party may *appeal* against that judgment to a higher court. Where a party is dissatisfied with the method or procedure used by the court in arriving at its judgment, then that party may take the case on *review*. In both situations, the reason for bringing the proceedings under review or appeal is normally the same, namely, to have the judgment of the court set aside. But in the case of an appeal, the dissatisfied party thinks the court came to a wrong decision on the facts or the law, and therefore attacks the *result* of the trial or application, whereas in the case of a review, the party wants the judgment set aside because of the *process* used by the court in coming to its decision.

Having set out this basic distinction between appeals and reviews, we can now go on to look at these two procedures in more detail.

A: Appeals

1 General overview

Whereas reviews focus on the *procedure* whereby the judgment of the court (or tribunal or board, etc.) was reached, appeals focus on the *merits* of the judgment itself. In other words, when you appeal against a judgment, you are not telling the judge or magistrate (or whoever made the decision) that he was dishonest or biased or grossly negligent[1] when he formulated his judgment. However, although he might have reached his judgment in good faith, you still disagree with the judgment, either on the *law*, or on the *facts*, or on *both the law and the facts*. As such, the procedure available to you is to appeal against the judgment to a higher court which has appeal jurisdiction. The aim of your appeal is to have the judgment of the court *a quo*(the court of first instance) set aside, or at least that portion of the judgment with which you are dissatisfied.

2 Preliminary issues relating to appeal

2.1 What may be appealed – judgments, orders and rulings

2.1.1 High Court matters

In *High Court* matters, the general rule under the now repealed Supreme Court Act[2] was that you were entitled to appeal against a *judgment* or an *order*, but not entitled to appeal against a *ruling*.[3] The Superior Courts Act,[4] which repealed and replaced the old Supreme Court Act, now refers only to an appeal against a '*decision*'. In our view, this change in terminology does not affect the existing principles and case law set out below.

A judgment or order (or decision, to use the terminology of the Superior Courts Act[5]) is a determination which has the following three attributes:

1. It must be final in effect and not susceptible to alteration by the court of first instance.
2. It must be definitive of the rights of the parties in the sense that it must grant definitive and distinct relief.
3. It must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.[6]

While previously – under the test laid down in *Zweni v Minister of Law and Order*[7] – if a decision did not have all three of the above attributes, it would be considered a ruling, which was not appealable, the Supreme Court of Appeal and Constitutional Court have recently softened this approach. The requirements stated in the *Zweni* case are no longer cast in stone or exhaustive.[8] The position now is that a decision may be appealable even if it does not possess all three attributes. However, in general terms, a non-appealable decision is one which is not final because the court of first instance remains entitled to alter it, or because it is not definitive of the rights of the parties, or because it does not have the effect of disposing of at least a substantive portion of the relief claimed in the main proceedings.[9]

Even if a decision takes the form of an order, it may, on consideration of its effect, be deemed to be a ruling and therefore not subject to appeal.[10] The following are examples of rulings:[11]

1. A ruling on a point of evidence;
2. A ruling on a preliminary point of law;
3. An order referring a matter to oral evidence (see *Man Truck & Bus (SA) (Pty) Ltd v Dorbyl Ltd* 2004 (5) SA 226 (SCA));
4. The ordering of further particulars;
5. An order in terms of rule 33 of the High Court Rules (which concerns special cases and adjudication upon points of law);
6. An *Anton Piller* order;[12]
7. An order for security for costs;
8. A discovery order;
9. An order granting or refusing a postponement;
10. An order that a matter be heard as a matter of urgency; and
11. An order upholding or dismissing an exception, save for exceptions which go to jurisdiction.

Our courts have therefore stressed that in determining whether an order is final in effect, what matters is not only the form of the order, but also, and predominantly, its effect.[13] A good example is that of an interim interdict which disposes of any issue or portion of an issue in the main application. In such a case, the interim interdict has a final effect and is appealable. For example, in *Maccs and CC v Macassar Land Claims Committee and Others* [2005] 2 All SA 469 (SCA), the court dealt with an interim interdict restraining the mining of land pending finalisation of the claim. The Supreme Court of Appeal held that the order was appealable since the effect of the interdict was final as mining rights were likely to expire before finalisation of the action. The order was thus appealable.

In *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*,[14] which also concerned interim interdicts, the Constitutional Court held that, while courts should be reluctant to hear appeals against interim orders, it is not an inflexible rule and, in each case, what best serves the interests of justice dictates whether an appeal against an interim order should be entertained. In assessing the interests of justice in this case, the Constitutional Court stated:

> **Whether an interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review is a relevant and important consideration. Yet, it is not the only or always decisive consideration. It is just as important to assess whether the temporary restraining order has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable.**

The Court went on to state:

> **A court must also be alive to and carefully consider whether the temporary restraining order would unduly trespass upon the sole terrain of other branches of Government even before the final determination of the review grounds. A court must be astute not to stop dead the exercise of executive or legislative power before the exercise has been successfully and finally impugned on review.**

Other examples of judgments and orders include the following:

1. A dismissal of a special plea (but see the decision of the Supreme Court of Appeal in *Steenkamp v SABC* 2002 (1) SA 625 (SCA) regarding special pleas as to jurisdiction);
2. A finding that the defendant is not liable to the plaintiff;

3. A declaratory order that the plaintiff's claim for damages is limited;
4. A finding that the defendant is liable to the plaintiff although the extent of the liability has not yet been established;
5. An application for adequate reasons;[15] and
6. An order granting or refusing review, example, of a registrar's decision on the amount of security for costs, is appealable.

In addition to the general principles relating to judgments, orders and rulings, the provisions of s 16(3) of the Superior Courts Act[16] set out various judgments and orders against which *no appeal lies* in a High Court matter:

Notwithstanding any other law, no appeal lies from a judgment or order in proceedings in connection with an application−

> **(*a*)by one spouse against the other for maintenance *pendente lite*;**
> **(*b*)for contribution towards the costs of a pending matrimonial action;**
> **(*c*)for the interim custody of a child when a matrimonial action between his or her parents is pending or is about to be instituted; or**
> **(*d*)by one parent against the other for interim access to a child when a matrimonial action between the parents is pending or about to be instituted.**

2.1.2 Magistrates' Courts matters

The position in the Magistrates' Courts is regulated entirely by statute. In terms of s 83 of the Magistrates' Courts Act,[17] any party to a civil suit or proceeding may appeal to the division of the High Court having jurisdiction against the following judgments, rules, orders and decisions of a Magistrates' Court:[18]

1. Any judgment of the nature described in s 48 of the Magistrates' Courts Act. These are (a) judgment for the plaintiff; (b) judgment for the defendant; (c) absolution from the instance; (d) judgment as to costs; and (e) order suspending the taking of further proceedings upon a judgment.
2. Any rule or order having the effect of a *final judgment*, including any order under Chapter IX (i.e. relating to execution and debt-collecting procedures) and any order as to costs.

The rationale for prohibiting or limiting appeals against judgments which are not final in effect is to discourage piecemeal appeals.[19] As to the meaning of 'having the effect of a final judgment', previously, this was determined by asking whether the rule or order sought to be appealed from was 'interlocutory'. *Jones and Buckle* states as follows:[20]

In *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* [1977 (3) SA 534 (A) at 549] Corbett JA refers to the fact that the tests to be applied in determining whether or not an order is interlocutory, 'emerge with a reasonable degree of certainty' from a series of decisions of the Appellate Division ranging from 1911 to 1977. The general effect of this series of decisions, 'together with consistent judgments of other courts', is summarised [at 549F–551A] in the following terms:

> **(a)The term 'interlocutory' refers to all orders pronounced by the court upon matters incidental to the main dispute, preparatory to, or during the process of, the litigation.**

Orders of this kind are of two classes: (i) those which have a final and definitive effect on the main action; and (ii) those which do not (known as 'simple (or purely) interlocutory orders' or 'interlocutory orders proper').

> **(b)Statutes relating to the appealability of judgments or orders which use the word 'interlocutory' or other words of similar import, are taken to refer to simple interlocutory orders. In other words, it is only in the case of simple interlocutory orders that the statute is read as prohibiting an appeal or making it subject to the limitation of requiring leave, as the case may be. Final orders, including interlocutory orders having a final and definitive effect, are regarded as falling outsider the purview of the prohibition or limitation.**
>
> **(c)The test as to whether or not an order is a simple interlocutory one is the well-known one stated by Schreiner JA in *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd*:**

'… [A] preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to 'dispose of any issue or any portion of the issue in the main action or suit' or … unless it 'irreparably anticipates or precludes some of the relief which would or might be given at the hearing'.

While the classification of the order as interlocutory might at one time have been considered to be determinative of whether it was susceptible to an appeal, the approach that has been taken by the courts in more recent times has been increasingly flexible and pragmatic.[21] The enquiry has been directed more to doing what is appropriate in the particular circumstances than to elevating the distinction between orders that are appealable and those that are not to one of principle. If an order irreparably anticipates or precludes some of the relief which would or might be given at the hearing, it will generally be appealable. However, ultimately, what is of paramount importance in deciding whether a judgment is appealable is the interests of justice.[22]

1. Any decision overruling an exception when the parties concerned consent to such an appeal before proceeding further in an action, or when it is appealed from in conjunction with the principal case, or when it includes an order as to costs.

Because s 83 of the Magistrates' Courts Act[23] gives you a right to appeal, *no leave to appeal is required* before you prosecute the appeal. Although you have an *automatic* right to appeal (in other words, you do not need to ask the court which gave judgment for leave to appeal against the judgment), you may *lose* this right in certain circumstances. One example of this is where, in terms of s 82 of the Magistrates' Courts Act,[24] the parties lodge an agreement in writing with the court that the decision shall be final. Another example is the common-law rule of peremption of an appeal, where, after judgment, a party unequivocally conveys an intention to be bound by the judgment. In such instances any right of appeal is abandoned. The test for determining whether there has been peremption of an appeal was laid down by the Appellate Division in *Dabner v SA Railways and Harbours* where Innes CJ said:

> **The rule with regard to peremption is well settled, and has been enunciated on several occasions by this Court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the *onus* of establishing that position is upon the party alleging it. In doubtful cases acquiescence, like waiver, must be held non-proven.**[25]

2.2 Appeal on the facts versus appeal on the law

In an appeal a party's dissatisfaction with the judgment of the court *a quo* may arise either because that party is unhappy with a *finding of fact* made by the court (for example, the party is of the view that the court incorrectly believed or disbelieved a witness whose evidence was material to the case) or because the party is unhappy with a *ruling of law* made by the court (for example, the party is of the view that the court misunderstood the law on a certain point). It often happens that a party feels that the court got both the law and the facts wrong, and an appeal will then be lodged on both grounds.

Certain principles governing appeals *on facts* have arisen in our case law, and are set out in the leading case of *R v Dhlumayo and Another*[26] as follows:

> **1.An appellant is entitled as of right to a re-hearing, subject to the stipulated principles.**
>
> **2.The principles are, in the main, matters of common sense, and are flexible and should not hamper the court of appeal in doing justice in the case before it.**
>
> **3.The trial judge has the advantage – which the court of appeal cannot have – of seeing and hearing the witnesses and of being steeped in the atmosphere of the trial. He has the opportunity of observing not only their demeanour, but also their appearance and whole personality.**
>
> **4.In consequence the court of appeal is very reluctant to upset the findings of the trial judge.**
>
> **5.The mere fact that the trial judge has not commented on the demeanour of a witness can hardly ever place the appeal court in as good a position as he was.**
>
> **6.Even in drawing inferences, the trial judge may be in a better position than the court of appeal in that he may be more able to estimate what is probable or improbable in relation to the particular people whom he has observed at the trial.**
>
> **7.Sometimes, however, the court of appeal may be in as good a position as the trial judge to draw inferences, where they are drawn either from admitted facts or from the facts found by the trial judge.**[27]
>
> **8.Where there has been no misdirection on fact by the trial judge, the presumption is that his conclusion is correct; the court of appeal will only reverse it where it is convinced that it is wrong.**
>
> **9.In such a case, if the court of appeal is merely left in doubt as to the correctness of the conclusion, it will uphold the decision.**
>
> **10.There may be a misdirection on fact by the trial judge where the reasons are either on their face unsatisfactory or where the record shows them to be such; there may be such a misdirection also where, though the reasons as far as they go are satisfactory, he is shown to have overlooked other facts or probabilities. The court of appeal will then be able to disregard his findings on fact, even though based on credibility, in whole or in part, according to the nature of the misdirection and the circumstances of the particular case, and so come to its own conclusion on the matter.**
>
> **11.A court of appeal should not seek anxiously to discover reasons adverse to the conclusions of the trial judge. No judgment can ever be perfect and all-embracing, and it does not necessarily follow that because something has not been mentioned it has not been considered.**
>
> **12.Where the court of appeal is constrained to decide the case purely on the record the question of onus is all-important.**

13.In order to succeed, the appellant has got to satisfy a court of appeal that there has been 'some miscarriage of justice or violation of some principle of law or procedure.'[28]

Harms usefully sums up the *further principles applicable to appeals on facts* which were added in subsequent cases as follows:

14.Where the trial court has made no finding on the credibility of witnesses, the court of appeal has to do its best on such material as it has before it to decide the credibility issue. Only after the relevant evidence has been examined and only if the probabilities are balanced is the onus decisive.

15.If the trial court committed an irregularity (for example, by excluding admissible evidence), the proceedings will be set aside unless the respondent can convince the court that the appellant did not suffer any prejudice as a result of that irregularity.

16.An award of compensation will only be set aside if the court of appeal is satisfied that the award was incorrect. The fact that an unsatisfactory method or an arbitrary figure was used does not mean that the conclusion was incorrect.

17.Where the trial court did not assess the amount of damages suffered because it was not necessary for its judgment, the Appeal Court may fix damages rather than remit the matter to the court below if there are 'good reasons' for doing so.[29]

2.3 Principles governing appeals in discretionary matters

In addition to appeals against the decision of a court *a quo* on the facts or the law, a party may be faced with a situation where he wishes to appeal against the exercise of discretion *by a court*. As a general rule, a court of appeal is not entitled to interfere with the exercise by the lower court of its discretion.[30] Generally, an appeal court may interfere with a lower court's exercise of discretionary power only if that power was not properly exercised.[31] Discretionary power is regarded as having not been exercised judicially if:

- it is applied capriciously;
- the court was moved by a wrong principle of law or an incorrect appreciation of the facts;
- it did not bring its unbiased judgment to bear on the issues; or
- it did not act for substantial reasons.[32]

A good example of the reluctance of an appeal court to interfere with the decision of a lower court in the exercise of its discretion is provided by the Constitutional Court's decision in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs and Others*.[33] In that case, the applicants had brought an application in the High Court for an order declaring a certain statute to be unconstitutional. At the High Court, the respondents had failed to file answering affidavits despite a lapse of seven months. A day before the hearing, the respondents asked the High Court for a postponement in order to file these affidavits. The High Court, in the exercise of its discretion, refused the postponement. When the matter eventually went on appeal to the Constitutional Court, one of the arguments on appeal by the Minister of Home Affairs was that the High Court had erred in exercising its discretion to refuse the postponement. The Constitutional Court held, however, that a court of appeal is not entitled to set aside the decision of a lower court granting or refusing a postponement in the exercise of its discretion merely because the court of appeal, on the facts of the matter before the lower court, would have come to a different conclusion. According to the Constitutional Court, a court of

appeal can only interfere when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which could not reasonably have been made by a court properly directing itself to all the relevant facts and principles. On the facts before it, the Constitutional Court was satisfied that the High Court was correct not to grant the Minister of Home Affairs a postponement to file answering affidavits when the government had already had a period of seven months in which to do so.[34]

2.4 The effect of a pending appeal on the judgment of the lower court

In terms of s 18(1) of the Superior Courts Act,[35] the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal is suspended pending the decision of the application or appeal.

What this means is that the execution of a judgment (i.e. its coming into effect) is suspended when an appeal is noted by one party. The effect of this suspension is that pending the appeal, the judgment cannot be carried out and no effect can be given to it, unless the court which granted it gives permission. To obtain such permission, the party in whose favour the judgment was given must make a special application in terms of section 18.

Prior to the enactment of s 18 of the Superior Courts Act, applications of this nature were governed by the provisions of the now repealed rule 49(11) of the High Court Rules which provided that any of the parties may apply to the court to direct that its order *will not be suspended* pending the decision of the appeal or application.[36]

Previously, the court to which application for leave to execute was made had a wide general discretion to grant or refuse leave and, if it was granted, to determine the conditions according to which the right to execute would be exercised. In exercising this discretion, the court could determine what was just and equitable in all the circumstances and, in so doing, would normally have regard, *inter alia*, to the following factors:

1. The potentiality of irreparable harm or prejudice to the appellant on appeal (respondent in the application) if leave to execute were to be granted;
2. The potentiality of irreparable harm or prejudice to the respondent on appeal (applicant in the application) if leave to execute were to be refused;
3. The prospects of success on appeal, including more particularly the question whether the appeal is frivolous or vexatious or has been noted not with the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose, for example to gain time or harass the other party; and
4. Where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be.[37]

The position is now regulated by s 18(3) of the Superior Courts Act, which has radically altered the position under rule 49(11). In terms of s 18, a court may only make an order allowing execution if the party who applied to the court for the order proves two things:

1. There exist ‘exceptional circumstances’ warranting the operation and execution of the judgment pending the outcome of the appeal; and
2. On a balance of probabilities, the party who applied to the court for the order will suffer irreparable harm if the court does not so order and the other party will not suffer irreparable harm if the court so orders.

This makes it clear that the wide discretion previously enjoyed by courts when determining whether to grant an order allowing execution pending the outcome of an appeal has been curtailed. Subsections 18(4) and (5) of the Superior Courts Act are also novel. These subsections require the court hearing the matter to immediately record its reasons if it grants an order allowing execution pending the outcome of an appeal. Furthermore, these subsections afford the other party a right to an automatic appeal to the next highest court, which has to be treated *as a matter of extreme urgency*. The Gauteng Local Division, Johannesburg, in *Mokgatla and Others v South African Municipal Workers Union and Others*[38] explained the significance of these subsections as follows:

> **Previously, an order made in terms of Rule 49(11) was purely interlocutory and, therefore, not appealable. The court granting the order always had the power to vary it on application, should it be appraised of changed circumstances. This can no longer occur as the losing party is now afforded an appeal, and once the appellate court upholds the order it becomes an order of that court. It is no longer an order of the court *a quo* that initially granted it. The court *a quo* cannot vary a judgment or order of an appeal court.**

Note that in terms of s 18(2), where a court has granted an *interlocutory order not having the effect of a final judgment* and this is the subject of an application for leave to appeal or of an appeal, the rule set out above does *not* apply. The operation and execution of an interlocutory decision is therefore not suspended pending the decision of the application or appeal.

In terms of rule 49(12),[39] if the order is *not* suspended, any party who wishes to execute in terms of the order must, before execution, provide *security* for the *restitution* of any sum obtained upon execution. The parties may agree or the registrar may decide on the amount of the security required. Neither the government nor any provincial administration need file security for the restitution of any sum obtained upon execution.

2.5 Disputing the validity of law in the Magistrates' Courts

In practice, parties to litigation in the Magistrates' Courts may from time to time wish to dispute the validity of a law (either statute law or common law) *on constitutional grounds*.

The Magistrates' Courts are not entitled to declare either statute law or common law to be invalid on constitutional (or any other) grounds. The remedy for a litigant in this situation, as discussed in more detail below, is to take the matter on appeal to the High Court, which is empowered to pronounce upon the validity of existing law.

Section 170 of the Constitution provides that 'a court of a status lower than the High Court may not enquire into or rule on the constitutionality of any legislation or any conduct of the President'. In terms of s 110(1) of the Magistrates' Courts Act, a Magistrates' Court is 'not … competent to pronounce on the validity of any law or the conduct of the President'.[40] The meaning of 'law' in s 110 of the Magistrates' Courts Act[41] is broad enough to encompass both statutory law and common law. Despite the absence of any reference to common law in either s 170 of the 1996 Constitution or in s 110 of the Magistrates' Courts Act,[42]Magistrates' Courts do *not* have the power to rule on the constitutionality of any rule embodied in common law. The Magistrates' Court is a creature of statute and has no jurisdiction beyond that granted by the

statute creating it. No statutory jurisdiction has been accorded to the Magistrates' Court to enquire into, or rule on, the validity of rules of common law.[43]

Accordingly, if in any proceedings before a Magistrates' Court it is alleged that any law (statutory or common law) or conduct of the President is invalid because of inconsistency with the Constitution, the Magistrates' Court shall decide the matter on the assumption that such law or conduct is valid.[44] If a litigant in a Magistrates' Court matter raises the point that an Act of Parliament is unconstitutional, the magistrate will hear evidence regarding the invalidity, but will proceed as if the Act were constitutionally valid.[45] The purpose of hearing the evidence is to facilitate a litigant who may wish to take the point on appeal to the High Court once the matter has been finalised in the Magistrates' Court.[46]

3 The different routes an appeal may follow

In simple terms, the route followed by a civil appeal will depend upon whether the court of first instance is a Magistrates' Court or the High Court. In other words, did the case start in a Magistrates' Court, or did it start in the High Court? We will deal with each in turn.

D32

3.1Appeals from the Magistrates' Courts

3.1.1 The usual route

A Magistrates' Court, sitting as a court of first instance,[47] gives a judgment. In your opinion the magistrate was wrong in his understanding of the *law*, or the *facts*, or *both*. You therefore wish to appeal against the judgment.

No leave to appeal is required. You have the right to appeal to the High Court.[48]

The appeal will be heard by *two* judges of *either a main or local seat* of the High Court.[49] (i.e. both main and local seats have jurisdiction to hear Magistrates' Courts' appeals).[50] Once the two High Court judges have delivered their judgment on appeal, you may still not be satisfied with the decision. You will then have to appeal against that decision to the Supreme Court of Appeal in Bloemfontein.[51]

Before you are entitled to appeal, however, you must obtain leave to appeal from the Supreme Court of Appeal.[52]

If you are granted leave to appeal and follow the proper procedure, the matter will eventually be heard by three or five judges of the Supreme Court of Appeal.[53] This was previously the final court of appeal for all the non-constitutional issues in a matter. However, an amendment to the Constitution has brought about a change in the jurisdiction of the Constitutional Court, making it the apex court with final appeal jurisdiction in respect of both constitutional and non-constitutional matters. Accordingly, a decision of the Supreme Court of Appeal may be taken on appeal to the Constitutional Court.

In terms of the Constitutional Court Rules of 1 December 2003,[54] Rule 19 requires that before you are entitled to appeal, leave to appeal will have to be obtained by way of an application to

the Constitutional Court. The application for leave to appeal must be lodged with the registrar of the Constitutional Court within 15 court days after the order you are appealing against has been handed down. Notice of the application must be given to the other party or parties.[55] The application, signed by the appellant, must set out the decision against which the appeal is brought and the grounds on which that decision is disputed; must contain a statement setting out clearly and succinctly the constitutional matter raised in the decision; and any other issues including issues that are alleged to be connected with a decision on the constitutional matter and such supplementary information or argument as the applicant considers necessary to bring to the attention of the Court; and, finally, it must include a statement indicating whether the applicant has applied or intends to apply for leave or special leave to appeal to any other court.[56]

The Constitutional Court Rules were drafted prior to the Constitution Seventeenth Amendment Act of 2012 which expanded the Constitutional Court's jurisdiction, from matters which were exclusively constitutional to now include matters that raise an arguable point of law of general public importance which ought to be considered by the Court. Despite this amendment, Rule 19 of the Constitutional Court Rules has not yet been updated to cater for appeals in respect of 'non-constitutional' matters. Rule 19 must therefore be read in the light of the constitutional amendment to regulate appeals in respect of both constitutional and non-constitutional matters.[57]

A litigant seeking leave to appeal to the Constitutional Court need not first approach the court whose decision and order is sought to be overturned and may apply directly to the Constitutional Court.

Within 10 days of the application for special leave to appeal having been lodged, the respondent or respondents may respond thereto in writing, indicating whether or not the application is opposed and the grounds for such opposition.[58] If leave to appeal is granted by the Court (after the Court has made its decision in terms of Rule 19(6)), then the appellant must note and prosecute his appeal in accordance with the provisions of Rule 20 of the Constitutional Court Rules, although frequently the matter is simply set down and leave to appeal is only granted in the ultimate judgment handed down by the Constitutional Court after the hearing.

In *Nkabinde and Another v Judicial Service Commission and Others*,[59] the Constitutional Court sets out how it deals with applications for leave to appeal. The Court explained:

> **The practice of this Court in dealing with applications for leave to appeal is that, as a norm, they are deliberated upon at Conference or a meeting of the Justices. An overwhelming majority of them are dismissed summarily at Conference without any written or oral argument. A few of them are set down for hearing. Those that are set down are those that appear to have reasonable prospects of success and raise important constitutional issues or arguable points of law of general public importance that deserve consideration by this Court. They are then heard in open court where the litigants have a right to attend. Those applications that do not get set down are dealt with and finalised at Conference and are summarily dismissed without a judgment. Occasionally, a short judgment is written without oral or additional written submission but sometimes with additional written argument. Litigants have no right to attend Conference or to be represented there when the Court considers applications for leave to appeal. This procedure is consistent with both section 173 of the Constitution and Rule 19 of the Rules of this Court.**

3.1.2 Shortcut appeals directly to the Constitutional Court

In three instances, it may be possible to take a shortcut to the Constitutional Court.

3.1.2(a) Direct access cases

The first instance in which a shortcut to the Constitutional Court is possible is in those exceptional cases where *direct access* is permitted to the Constitutional Court in the interests of justice. Such matters will go directly to the Constitutional Court without first being heard by another court.

Direct access to the Constitutional Court is provided for in s 167(6)(*a*) of the Constitution, read with Constitutional Court Rule 18 of the Constitutional Court Rules.[60] The Constitutional Court will sit as a *court of first instance* in these cases because the matter is of sufficient public importance or urgency to necessitate direct access.[61] (Note that it is not only in these direct access cases that the Constitutional Court will be sitting as a court of first instance. It will also sit as a court of first instance in those cases over which it has exclusive jurisdiction. Matters in which the Constitutional Court has exclusive jurisdiction are limited to a few specific constitutional issues set out in s 167(4), such as matters relating to the constitutionality of parliamentary or provincial Bills or certification of provincial constitutions.[62] In the case of direct access in terms of s 167(6)(*a*) of the Constitution, however, any kind of case may qualify, as long as it involves a constitutional issue or a matter that raises an arguable point of law of general public importance which ought to be considered by the Constitutional Court, and it is in the interests of justice that direct access to the Constitutional Court is granted.)

In order to be allowed direct access to the Constitutional Court, you will have to make an application to the Court by way of a notice of motion supported by an affidavit.[63]

The affidavit in support of the application for direct access must set out:

1. the grounds on which it is contended that it is in the interests of justice that direct access to the Constitutional Court be granted;
2. the nature of the relief sought and the grounds upon which such relief is based;
3. whether the matter can be dealt with by the Constitutional Court without hearing oral evidence; and
4. if oral evidence needs to be heard, how such evidence should be adduced and conflicts of fact resolved.[64]

3.1.2(b) Declarations of invalidity in constitutional cases

A second instance in which a shortcut to the Constitutional Court is possible (and, in this case, *required*) is when the Supreme Court of Appeal or High Court declares an Act of Parliament, or a provincial Act, or any conduct of the President to be *constitutionally invalid*. (Remember that the Magistrates' Courts are not empowered to do this due to the provisions of s 170 of the Constitution and s 110 of the Magistrates' Courts Act.)[65]

In terms of s 172(2)(*a*) of the Constitution, however, the Supreme Court of Appeal and the High Court *do* have the power to declare an Act of Parliament, or a provincial Act, or any conduct of the President to be constitutionally invalid.

It should be noted though that the declaration of invalidity will be of no force unless it is confirmed by the Constitutional Court.[66] The court making the order of invalidity may, however, grant a temporary interdict or other temporary relief to a party, pending the decision of the Constitutional Court. This protects the interests of the party whose interests are being threatened by the legislation or conduct which has been declared, but not yet confirmed to be, invalid.[67]

There are two ways in which a declaration of invalidity will come before the Constitutional Court:

1. Firstly, regardless of whether any party wishes to appeal against or apply to confirm the declaration of invalidity, the registrar of the court which issued the declaration of invalidity must refer the order to the registrar of the Constitutional Court within 15 days of the order. If no notice of appeal or notice of application for confirmation is lodged by any party within this time, the matter of the confirmation of the order of invalidity shall be disposed of in accordance with directions given by the Chief Justice.[68]
2. Secondly, it is open to either of the parties to *appeal against*, or to apply for the *confirmation of*, the declaration of invalidity.[69]

3.1.2(c) The leapfrog to the Constitutional Court

A third instance in which a shortcut to the Constitutional Court is possible is where the High Court has made a decision on a constitutional matter (other than a declaration of invalidity) or a matter that raises an arguable point of law of general public importance that ought to be heard by the Constitutional Court, and you are able to show that it is in the interests of justice to appeal directly to the Constitutional Court.[70]

The Constitutional Court has only pronounced on the question of what constitutes a matter of 'general public importance' in one previous judgment to date.[71] In *Paulson* the Court had regard to comparative law in developing its jurisprudence in relation to what would constitute a matter of general public importance. In summary, the Court held, with reference particularly to United Kingdom (UK) and Kenyan authorities, that '*for a matter to be of general public importance, it must transcend the narrow interests of the litigants and implicate the interest of a significant part of the general public*.'[72] The Court also referred to what was held by the House of Lords in *R v Secretary of State for Trade and Industry, ex parte Eastaway* [2000] 1 WLR 2222 at 2228, in relation to its similar jurisdiction (more recently endorsed by the UK Supreme Court):[73]

> ***In its role as a supreme court the House must necessarily concentrate its attention on a relatively small number of cases recognised as raising legal questions of general public importance. It cannot seek to correct errors in the application of settled law, even where such are shown to exist.*** **(Our emphasis).**

Before you will be allowed to leapfrog to the Constitutional Court, however, you will have to apply to the Constitutional Court for leave to appeal.[74]

3.2 Appeals from the High Court

3.2.1 The usual route

A division of the High Court, sitting as a court of first instance,[75] gives a judgment. In your opinion the judge was wrong in his understanding of the *law*, or the *facts*, or *both*. You therefore wish to appeal against the judgment.

You need to apply to the same judge who gave the judgment for *leave to appeal* against his judgment.[76] If the judge refuses your request, you may petition the President of the Supreme Court of Appeal to grant you leave to appeal. Note that the Supreme Court of Appeal may grant you leave to appeal either to a full bench of the High Court or to the Supreme Court of Appeal.[77]

The appeal will be heard by a full court of the division of the High Court within whose jurisdiction the matter falls.[78] A full court of the division consists of three High Court judges.[79] As a general rule, local seats of divisions of the High Court (such as the KwaZulu-Natal Local Division, Durban) do not have jurisdiction to hear full court appeals. An exception to this general rule is the Gauteng Local Division, Johannesburg, which does possess such jurisdiction.[80]

If your appeal is turned down by the full court, you will then require *special leave to appeal* to the Supreme Court of Appeal.[81] The way in which you obtain special leave to appeal is by means of an application to the Supreme Court of Appeal. This application is made to the President of the Supreme Court of Appeal, who is in charge of the Supreme Court of Appeal.[82]

As a general rule, your appeal will be heard by five judges of the Supreme Court of Appeal in Bloemfontein, although the President of the Supreme Court of Appeal may allow the appeal to be heard by three judges.[83]

D33 Before you are entitled to appeal, leave to appeal against the judgment of the Supreme Court of Appeal will have to be obtained by way of an application to the Constitutional Court.[84]

3.2.2 Shortcut appeals directly to the Supreme Court of Appeal or Constitutional Court

In four instances, it may be possible to take a shortcut directly to the Constitutional Court or to the Supreme Court of Appeal.

3.2.2(a) Direct access in constitutional cases

Precisely the same principles apply as were discussed in 3.1.2(a) above dealing with jurisdiction in Magistrates' Courts appeals.

3.2.2(b) Declarations of invalidity in constitutional cases

Precisely the same principles apply as were discussed in 3.1.2(b) above dealing with Magistrates' Courts appeals.

3.2.2(c) The leapfrog to the Constitutional Court

Precisely the same principles apply as were discussed in 3.1.2(c) above dealing with Magistrates' Courts appeals.

3.2.2(d) The leapfrog to the Supreme Court of Appeal

In terms of s 16(1)(*a*)(i) of the Superior Courts Act,[85] if an appeal is being launched against the judgment of a *single judge*, then the appeal may be by way of a full court appeal to the relevant main seat of the division *(or Witwatersrand Local Division*, now the Gauteng Local Division, Johannesburg*), or* by way of an appeal to the Supreme Court of Appeal. The court granting leave to appeal may order an appeal to the Supreme Court of Appeal as opposed to a full court appeal

if the court is of the view that the decision to be appealed involves a question of law of importance, whether because of its general application or otherwise or in respect of which a decision of the Supreme Court of Appeal is required to resolve differences of opinion. It may also do so if the administration of justice, either generally or in the particular case, requires consideration by the Supreme Court of Appeal of the decision.[86] Notwithstanding what a party or the parties may prefer, it remains the duty of the judge to consider which court is the more appropriate in the circumstances.[87] This provision is aimed at ensuring that parties do not unnecessarily increase costs by being inappropriately allowed to appeal to the Supreme Court of Appeal.

It also ensures that cases involving greater difficulty and which are truly deserving of the attention of the Supreme Court of Appeal do not end up competing for a place on the court's roll with a case which is not. When the court granting leave to appeal orders that an appeal must be by way of a full court appeal as opposed to an appeal to the Supreme Court of Appeal, or vice versa, any interested party may, in terms of s 17(6)(*b*) of the Superior Courts Act,[88] apply to the Supreme Court of Appeal to set that order aside. Such an application to the Supreme Court of Appeal will take the form of an application to the President of the Supreme Court of Appeal. It may also be set aside by the Supreme Court of Appeal acting of its own accord.

4 Leave to appeal

4.1 Overview

In High Court appeals, the appellant will need to obtain leave (i.e. permission) to appeal or special leave to appeal, before actually launching an appeal. This is a procedure which a litigant must follow if he wishes to appeal against a decision of the High Court, or if he wishes to appeal against a decision of the Supreme Court of Appeal to the Constitutional Court. (Note again that the *leave to appeal* procedure is not a feature of appeals against decisions of the Magistrates' Courts. As we pointed out above (para 3.1), you have an automatic right by law to appeal against the decision handed down in a Magistrates' Court and do not have to seek permission to appeal first.)

The requirements for leave to appeal and special leave to appeal are set out in s 17 of the Superior Courts Act:

1. In terms of s 16(1)(*b*) of the Superior Courts Act, if a judgment has already been appealed against by means of a full court appeal, and you now want to launch a *further appeal* against the judgment of the full bench, then you need the *special leave*of the Supreme Court of Appeal. Section 17(3) of the Superior Courts Act sets out the procedure to be followed. The Appellate Division in *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) held that the meaning of the phrase 'special leave' is as follows:

> **[T]he general principle is that an applicant for 'special leave' to appeal must show, in addition to the ordinary requirement of a reasonable prospect of success, that there are special circumstances which merit a further appeal to the Appellate Division [now the Supreme Court of Appeal]. Examples of such special circumstances would be (a) where the appeal raises a substantial point of law; (b) where the matter is of very great importance to the parties or of great public importance; or (c) where the prospects of success are so strong that the refusal of leave to appeal would probably result in a manifest denial of justice.**

2. Furthermore, in terms of s 16(1)(*b*) of the Superior Courts Act, the special leave of the Supreme Court of Appeal is now also required where leave to appeal is sought in respect of a decision of two judges on appeal to it from a Magistrates' Court.[89]

4.2 Grounds for granting leave to appeal and special leave to appeal

Historically, the court, in evaluating an application for leave to appeal, was guided by whether the applicant had satisfied the court that there is a reasonable prospect of the appeal succeeding, and whether the matter was of substantial importance for the appellant or for the appellant as well as the respondent.[90] These principles are now codified in s 17(1) of the Superior Courts Act, which prescribes that leave to appeal may only be given where the judge or judges concerned are of the opinion that:

(*a*) (i)the appeal would have a reasonable prospect of success; or
(ii)there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
(*b*)the decision sought on appeal will have some practical effect or result; and
(*c*)if the decision sought to be appealed does not dispose of all the issues in the case, the appeal would nonetheless lead to a just and prompt resolution of the real issues between the parties.

If you are applying to the Supreme Court of Appeal for *special leave* to appeal, you need to show that there are *special circumstances* which merit a further appeal, *over and above* the requirements of reasonable prospects of success and substantial importance. As stated above, in *Westinghouse Brake*, special circumstances may include a matter (a) in which the appeal raises a substantial point of law; (b) that is of great importance to the parties involved or the general public; and (c) in which the prospect of success is strong and the refusal of leave to appeal would probably result in a manifest denial of justice.[91]The power is likely to be exercised only when the President of the Supreme Court of Appeal believes that some matter of importance has possibly been overlooked or grave injustice will otherwise result.[92]

4.3 Application to the High Court for leave to appeal

The procedure which you must use in asking the High Court from a court constituted before a single judge for leave to appeal is set out in High Court rule 49(1):

1. In terms of rule 49(1)(*a*), you may request leave to appeal *at the time the judgment or order is made*. In other words, at the time the judge gives his judgment, you may inform the judge that you want to appeal, and *state verbally* the grounds on which you want to appeal.
2. If you did *not* verbally request leave to appeal at the time the judgment or order was made, and you still wish to appeal, then, in terms of rule 49(1)(*b*), you must make an *application* for leave to appeal within 15 days of the date of the judgment or order appealed against. This procedure is more frequently followed than that of requesting leave at the time of the judgment in terms of subrule (a). In the application you must set out succinctly and clearly the *grounds* upon which you believe that the court should grant you leave to appeal. In *Xayimpi v Chairman Judge White Commission* [2006] 2 All SA 442 (E) the court went so far as to dismiss an application for leave to appeal for noncompliance with rule 49(1)(*b*) where the applicants simply attached an affidavit of some 45 pages instead of setting out the grounds of appeal clearly and succinctly as required by the rule.

Once you have lodged your application for leave to appeal with the registrar, you will wait for the registrar to arrange a date on which the application will be heard.[93] Once the registrar has

arranged a date, he will inform all the parties thereof. On that date, the application will be heard *by the judge who presided at the trial* of the matter being appealed against. If that particular judge is not available, then another judge of the division in which the judgment was handed down will hear the application.[94]Usually, the court will decide *ex tempore* whether to grant or refuse leave. If the court reserves its judgment, and then fails to give its judgment for an unreasonable period of time, such failure may be regarded as frustrating the litigant's right to a fair hearing and his right to apply to a court for leave to appeal.[95]

4.4 Petition to the Supreme Court of Appeal for special leave to appeal

If your application for leave to appeal has been *refused* by the *the High Court*, but you still believe that you have good grounds for an appeal, you may then address a petition[96] to the President of the Supreme Court of Appeal for special leave to appeal against the decision of the High Court.[97] Similarly, you must address a petition to the President of the Supreme Court of Appeal for special leave to appeal when you are appealing against the decision of a *full court (meaning three judges;* or the Gauteng Local Division, Johannesburg) which has been given following a full court appeal.[98]

In terms of s 17(2)(*b*) of the Superior Courts Act, the petition must be made *within one month of* the refusal of the application of leave to appeal or the judgment of the full bench has been given.

The following requirements must be met:

1. The petition must be addressed to the *President of the Supreme Court of Appeal*.
2. It must be lodged with the *registrar of the Supreme Court of Appeal*.
3. It must be lodged together with *two copies* of the petition (i.e. in triplicate).
4. A copy of the petition must also be served on the *respondent or his attorney*.

If the respondent wishes to *respond* to the allegations made in the petition, he must lodge his written response with the registrar of the Supreme Court of Appeal within one month after the petition was served on him.[99] His written response must be in the form of an affidavit and two copies thereof must be lodged with the registrar.

The petition is then considered in chambers by two judges of the Supreme Court of Appeal designated by the President of the Supreme Court of Appeal.[100] If these two judges cannot agree, then the President himself, or else a third judge designated by the President, will also consider the petition.[101] The judges who are considering the petition may:[102]

1. *grant* or *refuse* the petition; or
2. order that the petition be *argued before them* on a set date; or
3. refer the petition to the court (i.e. the *Supreme Court of Appeal)* for consideration.

The decision of the majority of the judges considering the petition (or the decision of the Supreme Court of Appeal if it is referred to the Supreme Court of Appeal) to either grant or refuse the petition is *final*.[103] This is subject to only one *proviso*: the President of the Supreme Court of Appeal may in exceptional circumstances, whether of his own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.

5 The procedure leading up to the appeal hearing

What follows is a brief discussion of the procedure you will follow leading up to the actual hearing of the appeal. Whichever appeal procedure one is dealing with, be it from the Magistrates' Court to the High Court, the High Court to the Supreme Court of Appeal or the Constitutional Court, or the Supreme Court of Appeal to the Constitutional Court, it is important that the rules relating to the particular appeal being pursued are carefully scrutinised by practitioners to ensure full and proper compliance. Litigants are constantly warned that those who fail, for instance, to prepare a proper index of the record, or to heed the rules against duplication of documents, or to ensure that the record is properly prepared, risk adverse costs orders.[104] In *Ensign-Bickford (South Africa) (Pty) Ltd and Others v AECI Explosives and Chemicals Ltd*,[105] the Supreme Court of Appeal went so far as to warn that:

> **[l]itigants who do not in future follow the rules fully and intelligently will run the risk of being debarred from proceeding with their appeals.**

5.1 Appeals to the High Court: the procedure

5.1.1 Overview

The rules regarding appeals from the Magistrates' Court to the High Court are set out in the Magistrates' Courts Rules (rule 51) and in the Rules of the Court of Appeal (mainly High Court rule 50, but also, among others, rule 7). If you are appealing to the Gauteng Division, Pretoria, or the Gauteng Local Division, Johannesburg, the rules of those divisions, usually contained in practice directives for the division, must be consulted as they contain particularities relating to the appeal procedure before them.

5.1.2 The noting of an appeal

5.1.2(a) Request for written judgment (rules 51(1) and (2) of the Magistrates' Courts Rules)

Within 10 days after judgment, the prospective appellant must deliver to the magistrate, who presided, a written request for a written judgment showing:

1. the facts which the magistrate found to be proved; and
2. his reasons for judgment.

The magistrate must deliver the written judgment to the clerk of the Magistrates' Court within 15 days.[106] The clerk of the court delivers the written judgment forthwith to the prospective appellant.[107]

5.1.2(b) Procedure on noting an appeal (rules 51(3), (4), (7) and (8) of the Magistrates' Courts Rules*)*

Within 20 days after receiving the written judgment, the appellant must *note* the appeal.[108] The appeal is *noted* by delivering a *notice of appeal* to the respondent and filing a copy of the notice of appeal with the clerk of the court. Together with the notice of appeal, the appellant must provide *security* for the respondent's costs, up to the amount of R1 000 (unless the court of appeal orders otherwise). The state and persons using legal aid need not provide security.[109] The notice of appeal must state:

1. whether the whole or part only of the judgment is being appealed against, and if part only, then which part; and
2. the grounds of appeal, specifying the findings of fact or rulings of law appealed against.[110]

Within 10 days after the notice of appeal is delivered to him, the respondent must note any *cross-appeal* he may want to prosecute. This is achieved by delivering a *notice of cross-appeal* to the appellant. The notice of cross-appeal must contain the same details as a notice of appeal.[111]

Within 15 days after the appeal has been noted, the magistrate must hand the clerk of the court a written statement showing:

1. the facts he found to be proved;
2. the grounds upon which he arrived at any finding of fact specified in the notice of appeal as appealed against; and
3. his reasons for any ruling of law or for the admission of any evidence so specified as appealed against.[112]

5.1.3 The prosecution of an appeal

Either the appellant or the respondent must *prosecute*[113] the appeal within 60 days after the appeal was noted, otherwise the appeal *lapses*.[114]

The prosecution of the appeal operates as the prosecution of any cross-appeal which has been noted.[115]

The appeal is taken to have been prosecuted on the date on which the *registrar of the division of the High Court* receives a written application from either the appellant or the respondent for the assignment of a date for the hearing of the appeal.[116]There are different time periods within which the appellant and the respondent may apply for such a date:

> **Either the appellant may apply for a date at any time within 40 days after the appeal was noted; or if the appellant does not apply for a date within the 40-day period, then the respondent may apply for a date at any time until 60 days have elapsed after the appeal was noted.[117] (*Note: In respect of the Gauteng Division, Pretoria, and the Gauteng Local Division, Johannesburg, the period of 40 days is extended to 12 weeks and the period of 60 days is extended to 14 weeks*.)**

At the same time that he applies for a date for hearing from the registrar, the appellant must lodge with the registrar two copies of the record (i.e. one for each of the two judges who will hear the appeal). If more than two judges are going to hear the appeal, the registrar may request extra copies of the record.[118]

5.1.4 Preparing the court record and subsequent procedures

The record must be typed on A4-sized paper in double spacing, and every tenth line on each page must be numbered. The record must contain a correct and complete copy of the pleadings, evidence and all documents necessary for the hearing of the appeal. The record must be indexed,

and the copies of the record supplied to the registrar must be certified as correct by the attorney lodging them or by the person who prepared the record.[119]

Formal documents such as subpoenas and notices of trial may be omitted from the record.[120] Immaterial portions of lengthy documents may also be omitted from the record if the parties consent in writing to this.[121]

As soon as the registrar receives a request for a date for the hearing of the appeal, he will assign a date. Unless all the parties consent to an earlier date, the date for the hearing must be at least 40 days after the application for the date was made.[122]

The registrar will immediately give the appellant written notice of the date of the hearing.[123]

The appellant must then immediately deliver a notice of set down to the respondent, and give written notice of the date of hearing to the clerk of the Magistrates' Court.[124]

Not less than *15 days* before the date of hearing, the appellant must furnish the respondent (or if there is more than one respondent, each of the respondents) with two copies of the record.[125]

Not less than *15 days* before the date of the hearing, the appellant must deliver a concise and succinct statement of the main points which he intends to argue on appeal, as well as a list of authorities to be tendered in support of each point. The common name for this document containing the main points of argument is *heads of argument*. One copy of the heads of argument must be delivered to the respondent, and three copies must be filed with the registrar.[126]

Not less than *10 days* before the date of the hearing, the respondent must deliver his heads of argument.[127]

In terms of s 14(3) of the Superior Courts Act,[128] the division of the High Court which is hearing the appeal will consist of at least *two judges*.[129]

The court of appeal is empowered to make a wide range of orders. The various orders which may be made by the court of appeal are set out in s 87 of the Magistrates' Courts Act and s 19 of the Superior Courts Act (the two sections to some extent overlap), and include confirming, varying or reversing the judgment appealed against.

5.2 Appeals to the full court of the High Court: the procedure

The procedure to be followed in order to prosecute a *full court appeal* – i.e. an appeal from a court constituted before a single judge of a division of the High Court, sitting as a court of first instance, to a full court of that division or the Gauteng Local Division, Johannesburg (previously known as the Witwatersrand Local Division) – is set out in High Court rule 49:

> *Step 1:*The first step in prosecuting a full court appeal is to obtain *leave to appeal* from the judge who gave the judgment which is being appealed against.

Step 2:Once leave to appeal to the full court has been granted, a *notice of appeal* must be delivered to all the parties *within 20 days*. This period of 20 days may be extended if you are able to show good cause to the court.[130] You must state in your notice of appeal whether you are appealing *against the whole or a part of the judgment or order* concerned. If you are only appealing against a part of the judgment or order, then you must state which part. You must also specify the finding of fact and/or ruling of law which you are appealing against, and the grounds upon which your appeal is founded.[131]

P34

Step 3:The respondent must deliver *notice of any cross-appeal* he wishes to bring within 10 days after he receives the notice of appeal. This period of 10 days may be extended on good cause being shown.[132]

Step 4:Within *60 days* after delivering the notice of appeal, the appellant must apply in writing to the registrar of the court for a *date for the hearing* of the appeal.[133]

Step 5:If the *appellant fails to apply for a date for the hearing* of the appeal within the 60-day period referred to above, then within 10 days after the 60-day period has expired, the *respondent may apply for such date*. If neither the appellant nor the respondent applies for a date, the appeal (together with any cross-appeal which has been noted) will lapse.[134]

Step 6:In terms of High Court rule 7(2), a *power of attorney* authorising the attorney to prosecute the appeal must be filed with the registrar together with the application for a date for hearing.

Step 7:In terms of rule 49(13), unless the respondent waives his right to security, the appellant must, before lodging copies of the record with the registrar (see next paragraph), enter into good and sufficient *security* for the respondent's costs of appeal. If the parties fail to agree on the amount of security to be lodged, the registrar shall fix an amount. The decision of the registrar is final. Neither the government nor any provincial administration need file security for the costs of appeal.

Step 8:At the same time that the appellant applies for a date for the hearing of the appeal, he must file *three*copies of the record with the registrar, and deliver *two* copies to the respondent. The appellant must also provide the registrar with copies of all papers, documents and exhibits in the case, except formal and immaterial documents. A comprehensive index must be provided with the documents, and any documents which have been omitted must be referred to in the index.[135]

Step 9:The record must be typed on A4 paper in double spacing. It must be paginated and bound, and every tenth line on every page must be numbered.[136] If all the parties consent in writing, any exhibit or annexure or other portion of the record which has no bearing on the point which is in issue in the appeal, as well as immaterial portions of immaterial documents, may be omitted from the record. The written consent must set out which documents or parts thereof have been omitted, must be signed by the parties, and must be filed with the record.[137]

Step 10:When an appeal is to be decided exclusively on a point of law, the parties may agree to submit the appeal to the court in the form of a special case in terms of High Court rule 33. In such a case, only those

portions of the record which the parties believe are necessary for the proper decision of the appeal need be submitted to the court.[138]

Step 11:If the appellant *fails* to deliver the required copies of the record *within 40 days* after the registrar has accepted his application for a date for the hearing of the appeal, the respondent may approach the court for an order that the appeal has *lapsed*.[139]

Step 12:Once the registrar receives the record, he will assign a date for the hearing of the appeal and will set the matter down for hearing on that day. The registrar will give the parties 20 days' written notice of the date of the hearing.[140]

Step 13:In terms of rule 49(15), not later than 15 days before the appeal is heard, the appellant must deliver a concise and succinct statement of the main points which he intends to argue on appeal, as well as a list of the authorities to be tendered in support of each point. In other words, not less than *15 days* before the hearing, the appellant must deliver his *heads of argument*. The respondent is in turn required to deliver heads of argument no later than *10 days* before the hearing. Three extra copies of the heads must also be filed with the registrar.

5.3Appeals to the Supreme Court of Appeal (SCA): the procedure

Appeals to the Supreme Court of Appeal (the SCA) are dealt with by ss 16 and 17 of the Superior Courts Act, as read with the Rules Regulating the Conduct of Proceedings of the Supreme Court of Appeal of South Africa (the SCA Rules).

Step 1:The first step is for the appealing party to obtain leave to appeal from the High Court against whose judgment the appeal is being brought, or if such leave to appeal is refused by the High Court, to obtain leave to appeal by petitioning the President of the Supreme Court of Appeal. While the SCA Rules requires a certified copy of the order, the registrar of the Supreme Court of Appeal will accept applications for leave to appeal or notices of appeal without a certified copy of the order because of problems experienced in obtaining orders from registrars in various divisions. Instead, a letter from the registrar of the division certifying the date of the order will be sufficient.[141]

Step 2:Every appellant to whom leave to appeal has been granted must, within one month, deliver a *notice of appeal* to all the parties.[142] This period of one month may be extended by the written agreement of all the parties to the appeal.[143]You must state in your notice of appeal what part of the judgment or order is appealed against.[144] The respondent must deliver *notice of any cross-appeal* he wishes to bring within one month after he receives the notice of appeal.[145]

Step 3:After an appeal has been noted, the appellant must lodge with the registrar of the Supreme Court of Appeal *six copies of the record of the proceedings in the court appealed from*.[146] The appellant must also deliver the number of copies of the record to the respondent as is necessary. If the decision of a matter on appeal is likely to turn exclusively on a question of law, the parties may, by mutual consent, submit the question of law to the Supreme Court of Appeal in the form of a *special case*.[147]

Step 4:The copies of the record (or special case) must be typed on A4 paper in double spacing. It must be paginated and bound, and every tenth line on every page must be numbered.[148] If the appellant fails to lodge the record within the prescribed period of time and has not within that period applied to the respondent or his attorney for

consent to an extension of time to lodge and has given notice to the registrar of the Supreme Court of Appeal that he has applied for an extension, then in terms of SCA rule 8(3) his appeal shall lapse.

Step 5:The appellant must lodge his heads of argument with the registrar of the Supreme Court of Appeal (six copies of his main heads of argument, together with a list of authorities to be quoted in support of the argument), and must do so within six weeks of lodging the record.[149]

Step 6:The respondent must then, within one month from the receipt of the appellant's heads of argument, lodge with the registrar six copies of the respondent's heads of argument, together with a list of authorities to be quoted in support of each head.[150]

Step 7:The parties must in respect of their heads of argument have regard to the Supreme Court of Appeal Practice Directions dated 15 November 2014. In the Practice Directions the parties are required to attach to their heads of argument a brief note indicating, *inter alia*, the nature of the appeal, an estimate of the duration of the appeal, and a summary of the argument. Various other points of procedure are also dealt with.[151] See *Van Aardt v Galway* where it was stated:[152]

> **The practice note requires a statement of counsel's view, in the form of a list, of those parts of the record that need to be considered in order to decide the case. The fact that his or her opponent may disagree is neither here nor there. That will emerge from the opponent's practice note. In addition the list is to be confined to those parts of the record that are 'necessary' for that purpose. Documents and evidence are not to be included in the list on the off chance that someone might wish to refer to them. The list should include only those parts of the record that counsel is likely to refer to either in support of the argument, or for rebuttal, or to highlight flaws in the judgment appealed against. It is inappropriate to include material on the basis that if a particular question is asked, or explanation is sought, it may be necessary to refer to it. What is required is a list setting out the portions of the pleadings, the documents and the particular passages in the record of evidence that counsel believes are necessary to determine the case. The list must identify by reference to volumes and pages where those parts of the record are to be found. Lastly, it would be a salutary practice for counsel to prepare the list in positive terms, identifying the parts of the record necessary for the determination of the appeal, rather than, as seems frequently to be the case, identifying portions that need not be read. The list is supposed to assist the judges in identifying what needs to be read. It should not be treated as the commencement of a process of elimination of unnecessary material.**

After the provisions of the rules have been complied with, the registrar of the Supreme Court of Appeal must notify the parties or their attorneys of the date of the hearing (SCA rule 13(1)).

5.4 Appeals to the Constitutional Court: the procedure

The Constitutional Court, as the highest court in all matters, sits also as a court of appeal. Appeals lie to it under the following circumstances:

1. In the case of a declaration of constitutional invalidity of an Act of Parliament, a provincial Act or any conduct of the President, by either a division of the High Court (or a court of similar status) or the Supreme Court of Appeal, with no requirement of leave to appeal;[153]
2. From a judgment or order of the Supreme Court of Appeal, subject to leave having been granted by the Constitutional Court;[154] or

3. Decisions on a constitutional matter or point of law of importance by any other court, subject to leave having been granted by the Constitutional Court.[155]

These types of appeals require an in-depth knowledge of the Rules of the Constitutional Court. What follows is a brief summary of the key procedural steps.[156]

The procedure for bringing an appeal to the Constitutional Court is set out in Rules 19 and 20 of the Constitutional Court Rules:

> *Step 1*:In terms of Rule 19, a litigant who is aggrieved by the decision of a court (any court, including the Supreme Court of Appeal)[157] and who wishes to appeal against it directly to the Constitutional Court on a constitutional matter shall, within 15 days of the order against which the appeal is sought to be brought and after giving notice to the other party or parties concerned, lodge with the registrar of the Constitutional Court an application for leave to appeal.[158] The application must be signed by the applicant or his legal representative and shall contain:
>
> > a)the decision against which the appeal is brought and the grounds upon which such decision is disputed;
> > b)a statement setting out clearly and succinctly the constitutional matter or arguable point of law of importance to the general public raised in the decision, and any other issues, including issues that are alleged to be connected with a decision on the constitutional matter;
> > c)such supplementary information or argument as the applicant considers necessary to bring to the attention of the Court; and
> > d)a statement indicating whether the applicant has applied or intends to apply for leave or special leave to appeal to any other court, and if so, which court, whether such application is conditional upon the application to the Constitutional Court being refused, and the outcome of such application if known at the time of the application to the Court.[159]
>
> *Step 2*:Within 10 days from the date upon which the application for leave to appeal is lodged with the Constitutional Court, the respondent or respondents may respond thereto in writing, indicating whether or not the application for leave to appeal is being opposed, and if so, the grounds for such opposition.[160]
>
> *Step 3*:The Court shall then decide whether or not to grant the appellant leave to appeal.[161] Applications may be dealt with summarily, without receiving oral or written argument other than that contained in the application itself,[162] or the Court may order that the application for leave to appeal be set down for argument and direct that the written argument of the parties deal not only with the question whether the application for leave to appeal should be granted, but also with the merits of the dispute.[163]

Rule 20 governs the procedure on appeal. In terms of this rule, if leave to appeal is granted under Rule 19, the appellant shall note and prosecute the appeal as follows:[164]

> *Step 1*:The appellant shall prepare and lodge the appeal record with the registrar within such time as may be fixed by the Chief Justice in the directions. Subject to the provisions of Rule 20(1)(*c*) (set out in Step 2–4 below), the appeal record shall

consist of a transcript of the judgment of the court from which the appeal is noted, together with all the documentation lodged by the parties in that court and a transcript of all the evidence which may have been led in the proceedings and which may be relevant to the issues that are to be determined.[165]

Step 2:The parties shall endeavour to reach agreement on what should be included in the record and, in the absence of such agreement, the appellant shall apply to the Chief Justice for directions to be given in regard to the compilation of the record.

Such application shall be made in writing and shall set out the nature of the dispute between the parties in regard to the compilation of the record and the reasons for the appellant's contentions.

Step 3:The respondent may respond to the application within 10 days of being served with the application and shall set out the reasons for the respondent's contentions.

Step 4:The Chief Justice may assign the application to one or more judges, who may deal with the matter on the papers or require the parties to appear before him or her or them on a specified day and at a specified time to debate the compilation of the record.

The judge or judges concerned shall give directions in regard to the compilation of the record, the time within which the record is to be lodged with the registrar and any other matters which may be deemed by him or her or them to be necessary for the purpose of enabling the court to deal with the appeal, which directions may include that the matter be referred back to the court *a quo* for the hearing of additional evidence specified in the directions, or that additional evidence be put before the court by way of affidavit or otherwise for the purpose of the appeal.

Step 5:Once the record has been correctly lodged,[166] the registrar shall cause a notice to be given to the parties to the appeal requiring the appellant to lodge with the registrar written argument[167] in support of the appeal within a period determined by the Chief Justice and specified in such notice,[168] and the respondent to lodge with the registrar the written argument in reply to the appellant's argument by a specified date determined by the Chief Justice, which shall be subsequent to the date on which the appellant's argument was served on the respondent.[169]

Step 6:The appellant is given further opportunity to lodge written argument with the registrar in answer to the respondent's argument.[170] Such written argument must be lodged within 10 days from the date on which the respondent's argument was served on the appellant.[171]

Step 7:The Chief Justice may thereafter decide whether the appeal shall be dealt with on the basis of written arguments only,[172] but if the Chief Justice decides that oral argument is to be heard, the Chief Justice shall determine the date on which the oral argument is to be heard and the registrar shall within five days of such determination notify all parties to the appeal of the date of the hearing by registered post or facsimile.[173]

6 The appeal hearing

6.1 Further evidence on appeal and the raising of new points

In terms of s 19(*b*) of the Superior Courts Act,[174] the Supreme Court of Appeal or a division exercising appeal jurisdiction, has the power to receive further evidence on appeal, or to remit the case to the court of first instance, or the court whose judgment is the subject of the appeal, for further hearing. However, since a court of appeal has to consider the correctness of the decision

of the court *a quo*, it will, as a general rule, not allow evidence of events subsequent to the judgment under appeal. As Cloete J remarked in the case of *Fedsure Life Assurance Co Ltd v Worldwide African Investment Holdings (Pty) Ltd and Others*,[175] a court deciding an appeal decides whether the judgment appealed from was right or wrong according to the facts in existence at the time it was given, and not according to new circumstances which came into existence afterwards. Accordingly, further evidence can only be admitted in exceptional circumstances and caution should be exercised when admitting this type of evidence lest the floodgates be opened for such a procedure to be followed in almost every case; it is in the public interest to attain finality in litigation.[176] Therefore the appeal court will use this power reluctantly and in accordance with the following principles set out in the case of *Colman v Dunbar* 1933 AD 141:

> **1.It is essential that there should be finality to proceedings and a litigant should not, exception in exceptional circumstances, be allowed to adduce further evidence.**
>
> **2.The applicant must show that the failure to adduce the evidence was not due to his negligence and must satisfy the court that he could not have obtained the evidence if he had used reasonable diligence …**
>
> **3.The evidence tendered must be admissible, weighty and material and, presumably, to be believed, and must be such, that if adduced, it would be practically conclusive …**
>
> **4.If conditions have so changed that the fresh evidence will prejudice the opposite party, for example, if the witnesses of the opposite party cannot be brought back to refute the fresh evidence, or to explain their own evidence in the light of the fresh evidence, the court will not lightly grant the application.**[177]

A more general, but related, principle is that a party who takes a matter on appeal is bound by the record of the case in the court *a quo* and cannot raise a new point by relying on a circumstance which does not appear from, or which cannot be deduced from, the record. Put differently, a party whose case has unravelled before the trial court is not allowed to stitch together a new one on appeal if it was not properly covered in evidence. A party is not entitled to advance on appeal a case different from the one he presented on paper in the court below – be it in the affidavits on notice of motion or in the pleadings on trial.[178] If an appellant is not satisfied with the record he must apply for leave to amend it.[179] As a good example of the rule that a court will not allow a point to be raised on appeal unless it was covered by the pleadings, consider the case of *Road Accident Fund v Mothupi*.[180] In this case, the Supreme Court of Appeal dealt with the question of whether a new point that the appellant wished to take (regarding estoppel) could be raised on appeal.

According to the court, it would be unfair to the other party if the new point had not been fully canvassed or investigated at the trial. In this case, the Supreme Court of Appeal was not certain that the issue of estoppel in all its ramifications had been properly and fully investigated by the High Court. It appeared to the court that the proposed amendment 'opened entirely new fields of enquiry' which had not been properly explored at trial. The application for amendment was accordingly refused, and estoppel fell by the wayside.[181]

The Constitutional Court has similarly explained the principles that guide the admission of further evidence on appeal before that Court. There are two ways in which evidence not adduced before a court of first instance may be admitted in the Constitutional Court. In *Prophet v*

National Director of Public Prosecutions 2007 (6) SA 169 (CC), the court explained (at para [33]) that the test for admission was a strict one:

> **Before turning to deal with the documents sought to be introduced on appeal, it will be useful to indicate that there are two routes for the admission of late evidence on appeal in this Court. The first is Rule 31 of the Rules of this Court which permits parties to adduce relevant material that is common cause or otherwise incontrovertible or is of an official, scientific, technical or statistical nature and capable of easy verification. The second is in terms of s 22 of the [now repealed] Supreme Court Act, which is incorporated into the Rules of [the Constitutional Court] by Rule 30. This Court has considered the circumstances in which evidence may be tendered in terms of s 22 on several occasions and concluded that it may only be done in exceptional circumstances where the evidence sought to be submitted is 'weighty, material and to be believed' and there is a reasonable explanation for the late filing of the evidence.**

The Court in giving further consideration to Rule 31 continued at para [38]:

> **It is true that Rule 31 does not expressly require an explanation for lateness. However, our courts have always required an explanation for the late tender of evidence. There are important reasons of fairness in an adversarial system why this is so. The late filing of an application in terms of Rule 31 would also require an explanation for the late filing. The applicant clearly made a deliberate choice not to adduce Mr Smith's evidence earlier and take the Court into his confidence. His counsel correctly conceded in oral argument that the information contained in the affidavit is 'objectively ascertainable' and could have been obtained at any stage. The applicant, insofar as Mr Smith's affidavit is concerned, has clearly been remiss. It would be a travesty of justice and a precedent which could lend itself to abuse were this Court, on account of the reason that Rule 31 does not require an explanation, to exercise its discretion in favour of the applicant where there has been remissness and recantation. The application falls to be determined on this ground alone. It is, however, also clear that Mr Smith's affidavit does not fall within the terms of Rule 31. Although it is scientific evidence, it is disputed by the respondent and is not capable of easy verification. That ground of admissibility is therefore not open to the applicant.**

The Constitutional Court in *Mail and Guardian Media Ltd and Others v Chipu N.O. and Others*[182] and *Lee v Minister of Correctional Services*[183] refused applications to introduce further evidence.

6.2 No appeal or order granted without a practical effect or result

Another point relating to the hearing of appeals is that in terms of s 16(2)(*a*)(i) of the Superior Courts Act,[184] an appeal court will not grant any appeal or order requested if such appeal or order will have no practical effect or result.[185] A good example of the application of this rule is provided by the Supreme Court of Appeal's decision in *Coin Security Group (Pty) Ltd v SA National Union for Security Officers and Others*.[186] In this case, the appellant (a private security company) had been involved in a labour dispute with some of its employees arising out of a strike action and sought an interdict from the High Court. When the matter came to the High Court, the court upheld an argument by the employees that the High Court had no jurisdiction since the Labour Court exercised exclusive jurisdiction in matters of this nature. The appellant

appealed this decision to the Supreme Court of Appeal, asking that the employees' point concerning jurisdiction be dismissed and that the matter be sent back to the High Court for determination. By the time the case came on appeal to the Supreme Court of Appeal in 2001, however, the employees had been fairly dismissed from their jobs in 1997.[187] The Supreme Court of Appeal found, therefore, that it was unnecessary to decide the question of whether the High Court really had jurisdiction in respect of the interdict sought by the appellants as against the striking employees. The order sought would have no practical effect or result, as the court was asked to confirm an interdict, for the future, in respect of acts committed in the course of an industrial dispute which had been finally resolved between the parties by the dismissals in 1997. The court therefore dismissed the appeal and ordered the appellant to pay the costs of the appeal.[188]

6.3 Condonation of noncompliance with rules

A court of appeal is empowered to condone noncompliance with any of its rules, if *good cause* is shown.[189] Precisely what constitutes good cause in a particular case lies within the discretion of the court of appeal considering the matter.[190]

The Constitutional Court has held that the standard for considering an application for condonation is the interests of justice. The concept 'interests of justice' is elastic and may include the following: 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.[191]

A party who wishes his breach of the rules to be condoned must apply for condonation as soon as he becomes aware that he has breached the rules.[192] In situations where a party is aware that he will not be in a position to meet a particular time limit, and his opponent refuses to consent to the time limit being extended, he must make an immediate application for condonation, even though the rules have not yet been breached.[193] The Constitutional Court has stressed that an application for condonation must set out a full explanation for the delay and the explanation must be reasonable.[194]

An application for condonation in the Supreme Court of Appeal is made by means of a petition.[195]

In appeals before the Constitutional Court, Constitutional Court Rule 32 allows the Constitutional Court to condone noncompliance with the Constitutional Court Rules.[196] That power of condonation appears to be limited to proceedings that take place in the Constitutional Court. In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*,[197] the Constitutional Court held that on appeal it has no power to make condonation orders on behalf of other courts, short of setting aside an order on appeal and substituting it with another order. *In casu*, the applicants had brought an application in the High Court for an order declaring a certain statute to be unconstitutional.

In the High Court the respondent (the Minister of Home Affairs) had failed to file answering affidavits despite a lapse of seven months. A day before the hearing, the respondent asked the High Court for a postponement in order to file such affidavits. The High Court, in the exercise of its discretion, refused the postponement. When the matter came on appeal to the Constitutional Court, the respondent launched an application in the Constitutional Court seeking, *inter alia*,

condonation of their failure to file their answering affidavits in the High Court and an order granting them leave to file affidavits, and, alternatively, referring the matter back to the High Court. In addition, the respondents argued, as one of their arguments on appeal, that the High Court had erred in exercising its discretion to refuse the postponement.[198] The Constitutional Court held that the application for condonation was wholly misconceived,[199] and that in any event a court of appeal is not entitled to set aside the decision of a lower court granting or refusing a postponement in the exercise of its discretion merely because the court of appeal, on the facts of the matter before the lower court, would have come to a different conclusion.[200] According to the Constitutional Court, a court of appeal may only interfere when it appears that the lower 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.[201] On the facts before it, the Constitutional Court was satisfied that the High Court was correct not to grant the Minister of Home Affairs a postponement to file answering affidavits when the government had already had a period of seven months in which to do so.[202]

The Constitutional Court has issued many warnings to litigants about the consequences of failing to observe court rules. In *eThekwini Municipality v Ingonyama Trust*[203] it stated:

> **The Court cannot continue issuing warnings that are disregarded by litigants. It must find a way of bringing this unacceptable behaviour to a stop. One way that readily presents itself is for the Court to require proper compliance with the rules and refuse condonation where these requirements are not met. Compliance must be demanded even in relation to rules regulating applications for condonation.**

6.4 The judgment

The judgment of the majority of the judges on appeal is taken to be the judgment of the court. If the judges differ in their judgments to the extent that there cannot be said to be a majority judgment, then the matter must be heard *de novo* (i.e. from the beginning) before a freshly constituted court.[204] If one of the judges is absent or unable to perform his functions, or if a vacancy among the members of the court arises (i.e. a judge dies or cannot continue sitting in an appeal for some or other reason), the hearing will continue before the remaining judges, provided that those remaining judges constitute a majority of the judges who started hearing the appeal. The judgment of the majority of the remaining judges is taken to be the judgment of the court, provided that those judges also constitute a majority of the number of judges who started hearing the appeal.[205]

A judge may not form part of a court which is hearing an appeal against one of his own judgments.[206]

PART 1: APPEALS AND REVIEWS

B: Reviews

1 General overview

The usual meaning of the term 'review' is the process whereby the proceedings of *lower courts*, both *civil and criminal*, are brought before the *High Court* in respect of *irregularities* occurring during the course of such proceedings.[207]

The term 'review' may also be used in other contexts, such as:

1. the review of the proceedings of administrative authorities and domestic tribunals; *and*
2. judicial review in constitutional matters.

2 Review jurisdiction

Magistrates' Courts do *not* have review jurisdiction. In other words, Magistrates' Courts do not have the power to review the proceedings of, for example, the Small Claims Court. This would have to be done by the High Court.

In terms of s 21(1)(*b*) of the Superior Courts Act,[208] a division of the High Court has the power to review the proceedings of all Magistrates' Courts within its area of jurisdiction. Previously, *local divisions* of the High Court, apart from the Witwatersrand Local Division (now the Gauteng Local Division, Johannesburg), did not have review jurisdiction unless such jurisdiction was conferred by a particular statute, whereas *provincial divisions* of the High Court (as they were then called), *did*have review jurisdiction. While it appears that, subsequent to the enactment of the Superior Courts Act, this continues to be the practice, the recent case of *Nedbank Limited v Norris and Others*[209] has held that local divisions do have review jurisdiction:

> **In s 22 [of the Superior Courts Act], which deals with the grounds of review of proceedings of Magistrates' Courts, the introductory portion of sub-section (1) indicates that review proceedings may be brought 'before a court of the Division'. The equivalent provision of the now repealed Supreme Court Act indicated that the power to review a decision of a lower court was confined to provincial divisions and 'a local division having review jurisdiction'. In terms of s 19(2)(*b*) of the repealed Act only the Witwatersrand Local Division was vested with both appeal and review jurisdiction. The Superior Courts Act does not in terms address this. There is no express provision which indicates that the Witwatersrand Local Division, now a local seat of the Gauteng Division, no longer enjoys such jurisdiction. No doubt if it had been intended to do so the new Act would have had to specifically so provide. The absence of an express provision**

saving the appeal and review jurisdiction of the local seat of that Division points, in my view, to the clear intention of the legislature to confer the power to hear and determine appeals and reviews upon courts of a Division whether sitting at the main seat or a local seat of the Division.

There is no provision for the proceedings of the High Court to be reviewed by another higher court. If grave irregularities or illegalities occur in proceedings before a High Court, your remedy is to include these issues in an appeal.[210]

3 Grounds for review

Section 22 of the Superior Courts Act sets out the various *grounds* upon which the proceedings of any Magistrates' Court may be reviewed. A Magistrates' Court is defined in s 1 of the Superior Courts Act to mean any court established in terms of s 2 of the Magistrates' Courts Act.[211]

The grounds of review set out in s 22 are:

1. *absence of jurisdiction* on the part of the court to hear the matter;
2. interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;
3. gross irregularity in the proceedings; and
4. the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence by the inferior court.

An example of *gross irregularity* as grounds for review would be for the *audi alteram partem* rule to be disregarded. Because this rule is one of the cornerstones of our law, if a court makes an order against a party without affording the party an opportunity to present his case, the disregard of the rule will be a good cause for review.

D34

4The procedure to bring a matter under review

You use the *application procedure* to bring a matter under review. In the *High Court* you may either use the normal application procedure set out in High Court rule 6, or else you may use the specialised review application procedure set out in High Court rule 53. The procedure set out in rule 53 is simply the normal application procedure which has been modified to make it particularly suitable for bringing an application for review.[212] Although the review procedure may also be used to review the proceedings of administrative authorities and domestic tribunals – this may well change in the near future[213] – we shall examine the *rule 53 procedure* from the perspective of an application for the review of proceedings in a Magistrates' Court.

In terms of rule 53(1), the proceedings of a Magistrates' Court may be brought under review by way of a *notice of motion*directed and delivered to the *magistrate who presided* over the proceedings in the Magistrates' Court, as well as to *all other parties affected*. In other words, the respondents in the application for review will include the relevant magistrate, as well as the opposing party or parties in the Magistrates' Court matter. The notice of motion will:

1. call upon the respondents (i.e. the magistrate and the opposing party or parties) to show cause why such decision or proceedings should not be reviewed and corrected or set aside; and

2. call upon the magistrate, within 15 days after he receives the notice of motion, to dispatch to the registrar:

    3. a)the record of the proceedings; together with

    b)any reasons that he may be required by law or desires to give, and to notify the applicant that he has done so.

Note that the proceedings of a tribunal, or board, or officer performing judicial, quasi-judicial or administrative functions are brought under review in the same way.

In terms of rule 53(2):

> **The notice of motion shall set out the decision or proceedings sought to be reviewed and shall be supported by affidavit setting out the grounds and the facts and circumstances upon which applicant relies to have the decision or proceedings set aside or corrected.**

Paterson[214] gives the following useful example of a notice of motion for review:

NOTICE OF REVIEW

TAKE NOTICE that the Applicant (the Defendant in the above-mentioned case) hereby calls upon Honourable Magistrate ……. to show cause why the proceedings in the matter between ……. (Plaintiff) and ……. (Defendant) heard under case number ……. of ……. should not be reviewed and corrected.

TAKE NOTICE FURTHER that Honourable Magistrate ……. is called upon to dispatch, within 15 days after receipt of this notice, to the registrar of the above-mentioned Honourable Court the record of the proceedings in the above-mentioned case together with such reasons as he is by law required or desires to give or make, and to notify the Applicant that he has done so.

TAKE NOTICE FURTHER that the Applicant applies for review on the basis that during the trial of the above-mentioned matter and before the Applicant had called all of his witnesses and closed his case, the Honourable Magistrate indicated to ……. that he would grant judgment against the Applicant and that the said conduct of the Honourable Magistrate constitutes a gross irregularity.

TAKE NOTICE FURTHER that the affidavit of ……. attached hereto will be used in support of the application.

In terms of rule 53(3), once the registrar receives the record of the proceedings under review from the magistrate (or other official) who presided at those proceedings, the registrar will make the record available to the applicant on such terms as the registrar thinks appropriate to ensure its safety. The applicant will then make *several copies* of those portions of the record which are necessary for the review proceedings. The registrar must receive two of these copies, and the other parties must receive one copy each. The copies must be certified by the applicant as true copies. The costs of transcription shall be borne by the applicant and shall be costs in the cause.

In terms of rule 53(4), the applicant is entitled, within 10 days after the registrar has made the record available to him, to *amend*, *add to* or *vary* the terms of his notice of motion and

supplement his supporting affidavit. This is achieved by delivering a notice in terms of rule 53(4), together with an affidavit setting out the changes. Consent from the opposing party to the amendment is not required. Rule 53(4) therefore modifies the normal application procedure to make this specialised procedure particularly suitable for the bringing of an application for review. In a matter of this nature, it makes sense to allow the applicant to amend, add to, or vary his notice of motion and supplement his supporting affidavit after receiving the record of the matter. The record may contain all sorts of details of which the applicant was unaware when he launched his application for review.

5Opposing the application for review

If the magistrate (or other official) who presided at the proceedings under review wants to oppose the application for review, he must follow the procedure set out in rule 53(5):

1. Within 15 days after receiving the notice of motion, the magistrate (or other official) must deliver a *notice of opposition* to the applicant. The notice of opposition must include a service address within 15 kilometres of the office of the registrar.
2. Within 30 days after the expiry of the ten-day period within which the applicant may alter his application papers in terms of rule 53(4), the magistrate (or other official) must deliver his *answering affidavits* to the applicant.

In terms of rule 53(6), the applicant is entitled to deliver *replying affidavits* in response to the answering affidavits as if the matter were a normal application matter.

Note that depending on the circumstances, the respondent is not prevented from placing the record, or the relevant parts thereof, before the review court simply because the applicant has chosen not to do so. While it is clear that, in terms of rule 53, the right to require the record of the proceedings of a body whose decision is taken on review is primarily intended to operate for the benefit of the applicant, the respondent may, in appropriate circumstances, oppose the application for review by placing the record or relevant parts thereof before the court even though the applicant has failed to do so.[215]

6Time limits

An applicant is required to institute review proceedings within a reasonable period of time.[216] Where an applicant has failed to institute proceedings within a reasonable period of time, the review court has to decide (a) whether the proceedings were in fact instituted after the passing of a reasonable period; and (b) if so, whether the unreasonable delay ought to be condoned. The court exercises a judicial discretion, having regard to all the relevant circumstances, in deciding whether the delay ought to be condoned.[217]

7Urgent reviews

You should be aware that applications to review decisions of Magistrates' Courts may require urgent handling and, in proper circumstances, a review application might justify the granting of interim relief. Sometimes, therefore, you will have to consider bringing an application for urgent review of an inferior court's decision.

8Powers of the court on review

If the application for review is successful, the court will usually set aside the proceedings reviewed, and refer the matter back to the court (or person or body) which made the decision, for reconsideration. This is not always the case, however. In certain cases, the review court may decide to impose its own decision in place of that of the inferior court.[218] In determining whether there are exceptional circumstances justifying the review court to substitute its own decision for that of the body being reviewed, a number of guidelines have crystallised in South African law, and have been summarised by Hlophe J (as he then was) in *University of the Western Cape and Others v Members of the Executive Committee for Health and Social Services and Others*:

> **Where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter, the courts have not hesitated to substitute their own decision for that of the functionary. The courts have also not hesitated to substitute their own decision for that of the functionary where further delay would cause unjustifiable prejudice to the applicant. Our courts have further recognised that they will substitute a decision of a functionary where the functionary or tribunal has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again. It would also seem that our courts are willing to interfere, thereby substituting their own decision for that of the functionary, where the court is in as good a position to make the decision itself.**[219]

9Court record required

Unlike the situation that pertains to appeal, the review court is not bound to the record of proceedings in the court *a quo*. This is because the irregularity may not be apparent from the record. This means that extrinsic evidence of a bribe given to a magistrate, for example, would be admissable in review proceedings.

1See the grounds of review in s 22 of the Superior Courts Act 10 of 2013.

2 59 of 1959.

3 *Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration* 1987 (4) SA 569 (A) at 587.

4 10 of 2013

5 10 of 2013.

6 *Marsay v Dilley* 1992 (3) SA 944 (A) at 962; *Jones v Krok* 1995 (1) SA 677 (A).

7 1993 (1) SA 523 (A) at 532I–533B.

8 *Absa Bank Ltd v Mkhize and Two Similar Cases* 2014 (5) SA 16 (SCA) in para 17 (minority judgment). That is not to say, however, that the *Zweni*case has lost its relevance; rather, the correct test now is an augmented Zweni test which involves a consideration of the interests of justice – see *Baluso v FirstRand Bank Limited t/a Wesbank* [2016] ZACC 23 at para 20.

9 *SA Motor Industry Employers' Association v SA Bank of Athens Ltd* 1980 (3) SA 91 (A) at 96.

10 See Harms, LTC (2002) *Civil Procedure in the Supreme Court* SI 54, Oct 2015, C1.17. See further Cilliers, AC, Loots, C and Nel, HC (2009) *Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (fifth edition), vol. 2, 1204–1212.

11 Ibid.

12 See Stage Four, p409.

13 See *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC) at 307A; and see *Metlika Trading Ltd and Others v Commissioner, South African Revenue Service* 2005 (3) SA 1 (SCA) at para [23].

14 (CCT 38/2) [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) (20 September 2012).

15*Commissioner, South African Revenue Service v Sprigg Investment 117 CC T/A Global Investment 2011 (4) SA 551 (SCA) at 23.*

16Act 10 of 2013.

17Act 32 of 1944.

18In terms of s 21(1)(*a*) of the Superior Courts Act 10 of 2013, a division of the High Court has the power to hear and determine appeals from all Magistrates' Courts within its area of jurisdiction.

19Health *Professions Council of South Africa and Another v Emergency Medical Supplies and Training CC t/a EMS* 2010 (6) SA 469 (SCA) at para 16; *Guardian National Insurance Co Ltd v Searle* NO 1999 (3) SA 296 (SCA) at 301B–C and *Van Niekerk and Another v Van Niekerk and Another* 2008 (1) SA 76 (SCA) paras 3–7.

20Erasmus, HJ and van Loggerenberg, DE (1996) *Jones and Buckle: The Civil Practice of the Magistrates' Courts in South Africa, Vol I, The Act* (ninth edition) RS 11, 2016, Act–p587.

21*National Director of Public Prosecutions v King* 2010 (2) SACR 146 (SCA) at para 42.

22*Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC) (2002 (8) BCLR 771) at para 8. The facts of the case Philani-*Ma-Afrika And Others v Mailula and Others* 2010 (2) SA 573 (SCA) provides a striking illustration of the need for orders of the nature of the execution order to be regarded as appealable in the interests of justice.

2332 of 1944.

2432 of 1944.

251920 AD 583 at 594. There are, however, limits to the doctrine of peremption. In *Government of The Republic of South Africa and Others v Von Abo* 2011 (5) SA 262 (SCA), the Supreme Court of Appeal held that an appeal cannot be perempted where it will mean that a court is bound, as a result of a mistake of law by a party, to what is legally untenable. In such an instance, a court will not be precluded from investigating the legal soundness of a judgment. See also *Yannakou v Apollo Club* 1974 (1) SA 614 (A) at 623G-H; *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd* 2015 (4) SA 34 (SCA) at paras 11–12 (regarding the limits of reliance on the legality principle on appeal).

261948 (2) SA 677 (A).

27See further in this regard *Union Spinning Mills (Pty) Ltd v Paltex Dye House (Pty) Ltd and Another* 2002 (4) SA 408 (SCA), para [24] at 416F–G/H.

28Harms, LTC (2002) *Civil Procedure in the Supreme Court*, op. cit., SI 54, C1.38.

29Harms, op. cit., SI 54, C1.38.

30See *Kekana v Society of Advocates of SA* [1998] 3 All SA 577 (A).

31*Ferris and Another v FirstRand Bank and Another* (CCT 52/13) [2013] ZACC 46; 2014 (3) SA 39 (CC) (12 December 2013); 2014 (3) BCLR 321 (CC) at para 28.

32*Florence v Government of the Republic of South Africa* 2014 (6) SA 456 (CC); 2014 (10) BCLR 1137 (CC); *Mphela and Others v Haakdoornbult Boerdery CC and Others* 2008 (4) SA 488 (CC); 2008 (4) BCLR 675 (CC). *Naylor and Another v Jansen* 2007 (1) SA 16 (SCA) at para 14 and authorities collected in fns 16–23; *Malan and Another v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA) at para 13; *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council and Another* 1999 (4) SA 799 (W) at 807fin, approved by the Constitutional Court in *Giddey NO v JC Barnard* 2007 (5) SA 525 (CC) at para 21. See most recently *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC) at paras 82–92.

332000 (2) SA 1 (CC).

34Supra, para [11] at 14A/B–C/D.

3510 of 2013.

36See, for example, the decision in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) and *N and Others v Government of the Republic of South Africa and Others (No 2)* 2006 (6) SA 568 (D).

37Harms, LTC (2002) *Civil Procedure in the Superior Courts*, SI 54, October 2015, B49.24 .

38(21815/2014) [2014] ZAGPJHC 322 (12 November 2014) at para 5.

39High Court Rules.

40Section 110(1) of the Magistrates' Courts Act 32 of 1944. See too Snyckers, F: 'Civil and constitutional jurisdiction and procedure' (1997) *Annual Survey of South African Law*, 657 at 658–659.

4132 of 1944.

4232 of 1944.

43*Jones and Buckle, Vol I, The Act*, op. cit., Act 403. Note, however, that s 39(2) of the Constitution requires all courts (including Magistrates' Courts) indirectly to apply the Bill of Rights when interpreting any

legislation and when developing the common law so as to promote the 'spirit, purport and object of the Bill of Rights'. As such, while Magistrates' Courts may not enquire into or rule on the validity of any law (statute or common law), there is nothing to prevent a magistrate from indirectly applying the Bill of Rights to a matter before it in the process of interpreting a statute or developing common law. See in this regard Du Plessis, M, Penfold, G and Brickhill, J (2013) *Constitutional Litigation* (first edition) at 36.

44Section 110(2), Magistrates' Courts Act 32 of 1944.

45Section 110(2)*(a)* of the Magistrates' Courts Act 32 of 1944. See also Du Plessis, M, Penfold, G and Brickhill, J (2013) *Constitutional Litigation*(first edition) at 37.

46Ibid.

47See Stage One, Part 1C above on jurisdiction in respect of the Magistrates' Courts jurisdiction.

48Section 83 of the Magistrates' Courts Act 32 of 1944.

49Section 14(3) of the Superior Courts Act 10 of 2013. Note that, despite this general rule, the Judge President or, in the absence of both the Judge President and the Deputy Judge President, the senior available judge may in the event of the judges hearing such appeal not being in agreement, at any time before a judgment is handed down in such appeal, direct that a third judge be added to hear that appeal.

50Section 6(4) of the Superior Courts Act 10 of 2013.

51Note that if the decision involves a constitutional issue, you may wish to leapfrog directly to the Constitutional Court, a procedure which we discuss under 3.1.2(*c*).

52In *Lewis and Another v Vexma Properties 329 CC, In Re: Vexma Properties 329 CC v Lewis and Another* [2015] ZAGPPHC 325 (8 May 2015), referring to the cases of *Van Wyk v The State* (20273/2014) and *Galela v The State* (20448/2014) [2014] ZASCA 152 (22 September 2014) at paras 19 and 22 and *Potgieter v S* [2015] ZASCA 15, it was held that s 16(1)(*b*) of the Superior Courts Act 10 of 2013 relates to an appeal from a decision of a division of the High Court where it sits as a court of appeal from a decision of a single judge or of a Magistrates' Court.

53Section 13(1)(*a*), read with (*b*), of the Superior Courts Act 10 of 2013.

54The Constitutional Court's rules were amended by Government Notice No 1603, Regulation No 7808 *Government Gazette* No. 25643, 31 October 2003. The new rules became operative on 1 December 2003. But see *Government Gazette* No 25726, Notice No 1675, Regulation No 7827, 31 October 2003.

55Constitutional Court rule 19(2).

56Constitutional Court rule 19(3)(*a*)–(*d*).

57Practice Direction dated 17 March 2015: Interim Reading of Rule 19 Pending Revision of Court's Rules.

58Constitutional Court rule 19(4)(*a*). If an appellant fails to comply with these time limits, an application for condonation (i.e. condoning the late filing) must be made (see discussion at 6.3 below).

59*Nkabinde and Another v Judicial Service Commission and Others* (CCT 122/16) [2016] ZACC 25 (24 August 2016) at para 4–6.

60Rules of the Constitutional Court operative from 1 December 2003, contained in *Government Gazette* No. 25726, 31 October 2003 No. R1675.

61See Du Plessis, M, Penfold, G and Brickhill, J (2013) *Constitutional Litigation* (first edition) at 82–90 for further discussion.

62See Part VII of the Constitutional Court Rules.

63Constitutional Court rule 18(1).

64Constitutional Court rule 18(2).

65Act 32 of 1944. See the discussion above under Section 2.5, p349.

66Section 172(2)(*a*) of the Constitution read with s 15 of the Superior Courts Act 10 of 2013.

67Section 172(2)(*b*) of the Constitution.

68Constitutional Court rule 16(5).

69Section 172(2)(*d*) of the Constitution, read with Constitutional Court Rules 16(2) and (4).

70Section 167(6)(*b*) of the Constitution, read with Rule 19 of the Constitutional Court Rules.

71*Paulsen and Another v Slip Knot Investments* 777 (Pty) Ltd 2015 (3) SA 479 (CC) at para 25.

72*Paulson* (supra) at para 26D–E.

73*Uprichard v Scottish Ministers and Another* [2013] UKSC 21 at para 60.

74Rule 19(1) of the Constitutional Court Rules. Note that in terms of the rules of the Constitutional Court, it is not necessary to apply for leave to appeal and a judge's certificate from the High Court (as had been required by Rule 18 of the rules which preceded the current version). The procedure is to apply directly to the Constitutional Court for leave to appeal in terms of Rule 19(1) of the Constitutional Court Rules.

75See Stage One, Part 1C above on jurisdiction in respect of the High Court's jurisdiction.

76Section 17(2)(*a*) of the Superior Courts Act 10 of 2013. This is essentially an application for permission to appeal.

77Section 16(1)(*a*)(i) and 17(2)(*a*) and (*b*) of the Superior Courts Act 10 of 2013. This application will be considered by two judges of the Supreme Court of Appeal designated by the President of the Supreme Court of Appeal and, in the case of a difference of opinion, also by the President of the Supreme Court of Appeal or any other judge of the Supreme Court of Appeal so designated.

78Section 16(1)(*a*)(i) of the Superior Courts Act 10 of 2013.

79Section 1 of the Superior Courts Act 10 of 2013.

80Rule 49(5) of the Uniform Rules of Court and the commentary in Erasmus et al. (1994) *Superior Court Practice* vol. 2, OS, 2015, D1–668. See also s 21(1) and 50(1) of the Superior Courts Act 10 of 2013 and *Thembani Wholesalers (Pty) Ltd v September and Another* 2014 (5) SA 51 (ECG) at paras 8–11.

81Section 17(2)(*b*) and 16(1)(*a*)(ii) of the Superior Courts Act 10 of 2013.

82Rule 6 of the Supreme Court of Appeal Rules.

83Section 13(1)(*a*) and (*b*) of the Superior Courts Act 10 of 2013.

84Rule 19 of the Constitutional Court Rules.

85Act 10 of 2013.

86Section 17(6)(*a*) of the Superior Courts Act 10 of 2013.

87Note in this regard the decision of the Supreme Court of Appeal in *Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC and Others* 2003 (5) SA 354 (SCA) and its critical approach to the High Court's granting of leave to appeal to the Supreme Court of Appeal when the issue was purely one of fact, in which no controversial legal principle was involved, and where the sums of money involved in the matter were not so great as to justify a leapfrog to the Supreme Court of Appeal.

8810 of 2013.

89*Van Wyk v S, Galela v S* (20273/2014, 20448/2014) [2014] ZASCA 152; [2014] 4 All SA 708 (SCA); 2015 (1) SACR 584 (SCA) (29 September 2014); *Potgieter v S* (20109/2014) [2015] ZASCA 15 (17 March 2015); *Lewis and Another v Vexma Properties 329 CC, In Re: Vexma Properties 329 CC v Lewis and Another* [2015] ZAGPPHC 325.

90*United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A). In that case the Appellate Division stated that '[t]hese factors are not individually decisive but are interrelated and must be weighed one against the other' (at 720F–G). See too *Rutherford v Ferguson en Andere (Standard Bank van Suid-Afrika Bpk toetredend)* 1998 (4) SA 90 (O).

91*Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) 564H–565E.

92*Avnit v FirstRand Bank Ltd* [2014] ZASCA 132 at para 7.

93See rule 49(1)(*d*).

94See rule 49(1)(*e*).

95See *Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang and Another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health and Another* 2005 (3) SA 238 (SCA); *Strategic Liquor Services v Mvumbi T NO and Others* 2010 (2) SA 92 (CC) (2009 (10) BCLR 1046) (CC) para 15; and *Commissioner, South African Revenue Service v Sprigg Investment 117 CC T/A Global Investment* 2011 (4) SA 551 (SCA) at 29.

96In terms of the Petition Proceedings Replacement Act 35 of 1976, the term 'petition' must be understood as referring to the institution of such proceedings by notice of motion. (As to the rules regarding the Supreme Court of Appeal, see rule 6 of the SCA Rules).

97Section 17(2)(*b*) of the Superior Courts Act 10 of 2013.

98Section 16(1) of the Superior Courts Act 10 of 2013.

99Supreme Court of Appeal rule 6(3).

100Section 17(2)(*c*) of the Superior Courts Act 10 of 2013.

101Ibid.

102Section 17(2)(*d*) of the Superior Courts Act 10 of 2013.

103Section 17(2)(*f*) of the Superior Courts Act 10 of 2013.

104See, for example, *Plaaslike Oorgangsraad, Bronkhorstspruit v Senekal* 2001 (3) SA 9 (SCA) at 26G–27F; *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd en 'n Ander* 2002 (2) SA 447 (SCA).

1051998 (2) SA 1085 (SCA) at para [16] 1091D–E.

106See Magistrates' Courts rule 51(1)(*a*) and (*b*): The judgment must show the facts the magistrate found to be proved and his reasons for judgment.

107Magistrates' Courts rule 51(2).

108Magistrates' Courts rule 51(3).
109Magistrates' Courts rule 51(4).
110Magistrates' Courts rule 51(7).
111Magistrates' Courts rules 51(6) and (7).
112Magistrates' Courts rule 51(8).
113'Prosecution' means applying to the registrar, on notice to all other parties, for a date of hearing in the prescribed manner.
114High Court rule 50(1).
115High Court rule 50(2).
116High Court rule 50(4)(*c*).
117High Court rule 50(4).
118High Court rule 50(7)(*a*).
119High Court rule 50(7)(*b*) and (*c*).
120High Court rule 50(8)(*a*).
121High Court rule 50(8)(*b*).
122High Court rule 50(5)(*a*).
123High Court rule 50(5)(*b*).
124High Court rule 50(6).
125High Court rule 50(7)(*d*).
126High Court rule 50(9).
127Ibid.
12810 of 2013.
129The Judge President or Deputy Judge President or, in the absence of both of them, the senior available judge may in the event of the judges hearing such appeal not being in agreement, at any time before a judgment is handed down in such appeal, direct that a third judge be added to hear the appeal.
130High Court rule 49(2).
131High Court rule 49(3).
132High Court rule 49(4).
133High Court rule 49(6)(*a*).
134Ibid.
135High Court rule 49(7)(*a*).
136High Court rule 49(8)(*a*).
137High Court rules 49(8)(*b*) and 49(9).
138High Court rule 49(10).
139High Court rule 49(7)(*d*).
140High Court rule 49(7)(*c*).
141Supreme Court of Appeal Practice Directions dated 15 November 2014.
142SCA rule 7(1).
143SCA rule 7(4).
144SCA rule 7(3)(*a*).
145SCA rule 7(2).
146SCA rule 8(1). In addition to the record, SCA rule 8(7) requires that a core bundle should be prepared as an adjunct to the appeal record.
147See SCA rule 8(8).
148SCA rule 8(6).
149SCA rule 10(1)(*a*) and 10(3)(*e*)(i).
150SCA rule 10(1)(*b*) and 10(3)(*e*)(i).
151Rule 10A, titled 'Practice Notice', has been incorporated into the SCA Rules: Heads of Argument must be accompanied by a brief typed note containing:a concise statement of the basis for jurisdiction in this Court, including the statutory provisions and time factors on which jurisdiction rests; if that party wishes to raise a constitutional question relating to the constitutional validity or the constitutional applicability of any law or the constitutional validity or applicability or extension of a common law rule, a concise definition of the question; the issues on appeal succinctly stated (for example, 'negligence in MVA case', 'admissibility of a confession', 'interpretation of …'); an estimate of the duration of the argument; if more than one day is required for argument, the reasons for the request; which portions or pages of the record are in a language

other than English; a list reflecting those parts of the record that, in the opinion of counsel, are necessary for the determination of the appeal; a summary of the argument, not exceeding 100 words; if a core bundle is not appropriate for the appeal, the reasons for the conclusion; that there was due and timeous compliance with rule 8(8) and (9) [of the SCA Rules], and if not, why not; and a certificate signed by the legal practitioner responsible for the heads of argument that rules 10 and 10A(a) have been complied with.

152*Van Aardt v Galway* (923/10) [2011] *ZASCA* 201; 2012 (2) SA 312 (SCA); [2012] 2 All SA 78 (SCA) (24 November 2011) at para 36.

153Section 172(2)(2) of the Constitution of the Republic of South Africa Act 108 of 1996. See also Rule 16(2) of the Constitutional Court Rules and s 15 of the Superior Courts Act 10 of 2013.

154Rule 19 of the Constitutional Court Rules.

155Rule 19 of the Constitutional Court Rules. The requirement (laid down by the previous rules in Rule 18) that the litigant obtain a judge's certificate in appeals from a division of the High Court or other superior court (such as the Land Claims Court or the Labour Court) has been done away with by the Constitutional Court Rules.

156Consult the Rules of the Constitutional Court, *Government Gazette* No 25726, Notice No 1675, Reg. No 7827, 31 October 2003. Readers are further advised to consult the latest practice directions issued by the Chief Justice in terms of Rule 32(2) of the Constitutional Court's Rules on 17 March 2015.

157See Rule 19(1) which prescribes that the procedure set out in Rule 19 for an application for leave to appeal to the Constitutional Court applies in respect of a decision on a constitutional matter, other than an order of constitutional invalidity under s 172(2)(*a*) of the Constitution, which has been given 'by any court including the Supreme Court of Appeal'.

158Rule 19(2): provided that if the President of the Supreme Court of Appeal has refused leave to appeal the period prescribed in the rule shall run from the date of the order refusing leave.

159Rule 19(3)(*a*)–(*d*). Rule 21 further provides that where an application for leave to appeal is lodged in terms of Rule 19, the applicant or appellant shall at the same time provide the registrar with a note – (a) setting out the length of the record, or if the record consists of evidence that has not been transcribed, an estimate of the length of the record and the time required for transcription, and (b) whether there are any special circumstances that may require a hearing of more than one day or which might otherwise be relevant to the directions to be given by the Chief Justice.

160Rule 19(4)(*a*). This response must be signed by the respondent or respondents or his or her legal representative (Rule 19(4)(*b*)). Rule 19(5) sets out the procedure to be followed if the respondent or respondents wish to cross-appeal.

161Rule 19(6)(*a*). The Court's jurisdiction is governed by s 167(3) to (7) of the Constitution. Whereas previously s 167(3) conferred jurisdiction on the Court to 'decide only constitutional matters and issues connected with decisions on constitutional matters', the section has been amended by the Constitution Seventeenth Amendment Act to make the Constitutional Court the highest court in all matters (see *Paulsen and Another v Slip Knot Investments 777 (Pty) Limited* (CCT 61/14) [2015] ZACC 5); 2015(3) SA 479 (CC) (24 March 2015). Previously, the test applied by the Constitutional Court was whether an applicant had satisfied the following two requirements: 1. The application must raise a constitutional matter or issues connected therewith; 2. It must be in the interests of justice to grant leave. In *Paulsen*, the Court held that some of the factors that are of relevance to the interests of justice factor in the context of jurisdiction based on constitutional matters may also find application in respect of non-constitutional matters.

162Rule 19(6)(*b*).

163Rule 19(6)(*c*): the provisions of Rule 20 on the procedure for hearing of appeals shall, with necessary modifications, apply to the procedure to be followed when the Court orders the parties to deal not only with the question whether the application for leave to appeal should be granted, but also with the merits of the dispute.

164Rule 20(1)(*a*)–(*c*).

165As to the preparation of the record, see the provisions of rule 20(2)(*a*)–(*i*).

166In compliance with the provisions of rule 20(1)(*b*) and (*c*), and read with rule 20(2).

167Or heads of argument.

168Rule 20(3)(*a*).

169Rule 20(3)(*b*).

170Rule 20(4).

171Ibid.

172Rule 20(5).

173Rule 20(6).

174 10 of 2013.

175 2003 (3) SA 268 (W).

176 Supra para [12] at 275A–B/C. In *Masetlha v The President of the Republic of South Africa and Another* 2008 (1) BCLR 1 (CC) the Constitutional Court explained that a request by the applicant in appeal proceedings before the Constitutional Court to refer certain issues to the High Court for the hearing of oral evidence was turned down where the evidence in question related to a 'marginal dispute' which did not weigh more heavily than the need for finality in the matter.

177 Harms (2002) *Civil Procedure in the Superior Court*, SI 54, Oct 2015, C1.34.

178 *Cooper and Others NNO v Syfrets Trust Ltd* 2001 (1) SA 122 (SCA), para [21] at 133A/B–E.

179 *S v Siwela* 1981 (2) SA 56 (T).

180 2000 (4) SA 38 (SCA).

181 At 54C–F.

182 (CCT 136/12) [2013] ZACC 32; 2013 (11) BCLR 1259 (CC); 2013 (6) SA 367 (CC) (27 September 2013) at paras 6–20.

183 *Lee v Minister of Correctional Services* (CCT 20/12) [2012] ZACC 30; 2013 (2) BCLR 129 (CC); 2013 (2) SA 144 (CC); 2013 (1) SACR 213 (CC) (11 December 2012) at paras 32–34.

184 10 of 2013.

185 *Port Elizabeth Municipality v Smit* 2002 (4) SA 241 (SCA). See also *Department of Public Works v MS Moos Construction CC* [2006] 4 All SA 535 (SCA). It seems the courts have a discretion to allow an appeal where its decision or order would have a practical effect, not between the parties but in other respects (for example where important questions of law which were likely to arise frequently were at issue and their determination could benefit others). However, under the provisions of the Superior Courts Act 10 of 2013, the position may have changed. While s 16(2)(*a*) of the Superior Courts Act provides that the appeal *may* be dismissed on this ground, which would suggest a discretion, s 17(1) of the Act dictates that leave to appeal *may only* be given where the judge or judges concerned are of the opinion that, *inter alia*, the ground in s 16(2)(*a*) is not present. This latter provision of the Superior Courts Act 10 of 2013 would appear to restrict the discretion of the court. In *Legal-Aid South Africa v Magidiwana and Others* (1055/13) [2014] ZASCA 141; 2015 (2) SA 568 (SCA) [2014] 4 All SA 570 (SCA) (26 September 2014), the Supreme Court of Appeal held that, where the parties have by agreement settled all disputes between them, as a matter of principle there is no discretion for this court to exercise under s 16(2)(*a*)(i) of the Superior Courts Act.

186 2001 (2) SA 872 (SCA).

187 The fairness of the dismissals had been challenged by the employees but upheld as fair and therefore legal by the Labour Appeal Court.

188 *Coin Security Group*, supra, 876I-J and 877A–B. See also *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others* (No 2) 2008 (3) SA 129 (E) where the Court held that it was consistent with the purpose of (the now repealed) s 21A of the Supreme Court Act and with the common law that the *court of first instance* may also refuse leave to appeal because the judgment or order on appeal will have no practical effect (see para [8] at 132A–B). In that matter, a settlement agreement between the parties providing that the appellant 'waives its right to enforce the outcome of the appeal against the affected employees should it succeed on appeal' (see para [6] at 131C–D) had the effect of rendering any appeal ineffective. Because the outcome of the appeal could have no effect whatsoever on the position of the parties between themselves, the High Court chose to refuse leave to appeal.

189 See rule 27(3) of the High Court Rules and *Cairns' Executors v Gaarn* 1912 AD 181.

190 *Cairns' Executors v Gaarn* 1912 AD 181.

191 *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC) at para 22.

192 *Ferreira v Ntshingila* 1990 (4) SA 271 (A) at 281.

193 *De Beer en 'n Ander v Western Bank Ltd* 1981 (4) SA 255 (A).

194 See *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) at para 22 and *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC) at para 23.

195 *Administrateur, Transvaal v Van der Merwe* 1994 (4) SA 347 (A).

196 As to the factors to be considered in granting or refusing condonation, see *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (2) SA 837 (CC) at para [3].

197 2000 (2) SA 1 (CC).

198 2000 (2) SA 1 (CC) at para [9].

199 Supra at para [10].

200Supra at para [11].

201*Florence v Government of the Republic of South Africa* 2014 (6) SA 456 (CC); 2014 (10) BCLR 1137 (CC); *Mphela and Others v Haakdoornbult Boerdery CC and Others* 2008 (4) SA 488 (CC); 2008 (7) BCLR 675 (CC). *Naylor and Another v Jansen* 2007 (1) SA 16 (SCA) at para 14 and authorities collected in fns 16–23; *Malan and Another v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA) at para 13; *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council and Another* 1999 (4) SA 799 (W) at 807fin, approved by the Constitutional Court in *Giddey NO v JC Barnard and Partners* 2007 (5) SA 525 (CC) at para 21. See, most recently, *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited* 2015 (5) SA 245 (CC) at paras 82–92.

202Ibid.

203(CCT 80/12) [2013] ZACC 7; 2013 (5) BCLR 497 (CC); 2014 (3) SA 240 (CC) (28 March 2013) at para 26.

204Section 13(2)(*b*) and 14(4)(*b*) of the Superior Courts Act 10 of 2013.

205Section 13(3)(*a*) and 14(5)(*a*) of the Superior Courts Act 10 of 2013.

206Section 12(3), 13(5) and 14(8) of the Superior Courts Act 10 of 2013.

207Harms, LTC (2002) *Civil Procedure in the Superior Courts*, SI 54, A9.3.1. See also *Herbstein and Van Winsen* (2009), op. cit., vol. 2, 1264–1310.

20810 of 2013.

209(2978/2015) [2016] ZAECPEHC 5; 2016 (3) SA 568 (ECP) (1 March 2016) at paras 17 and 18.

210See *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 601D–F. See also *Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others* 2003 (2) SA 385 (SCA).

21132 of 1944.

212A party is not compelled to use rule 53 when taking a matter on review and the failure to utilise rule 53 is not necessarily irregular. See *South African Football Association v Stanton Woodrush (Pty) Ltd t/a Stan Smidt & Sons and Another* 2003 (3) SA 313 (SCA); and *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) at 661E-663D.

213See the Rules of Procedure for Judicial Review of Administrative Action, published in Government Notice 966; Regulation No 9165 of 9 October 2009 (*Government Gazette* No 32622). These rules have not yet come into effect. Note, further, that these rules have been declared to be inconsistent with the Constitution, unlawful and invalid to the extent that they fail to provide for a mechanism whereby a private respondent in an application for judicial review can obtain access to the record and reasons for a decision which is sought to be reviewed and set aside (*Lawyers for Human Rights v Rules Board for Courts of Law and Another* (78163/2009) [2012] ZAGPPHC 54; 2012 (7) BCLR 754 (GNP) (11 April 2012); [2012] 3 All SA 153 (GNP); [2012] JOL 28787 (GNP) at [102]).

214Paterson, TJM (2001) *Eckard's Principles of Civil Procedure in the Magistrates' Courts* (fourth edition), 299.

215See *SACCAWU and Others v President, Industrial Tribunal, and Another* 2001 (2) SA 277 (SCA) at 282B/C–E.

216*Lion Match Co Ltd v Paper Printing Wood and Allied Workers Union and Others* 2001 (4) SA 149 (SCA).

217Harms (2002) *Civil Procedure in the Superior Courts*, SI 54, B53.21.

218See *Ruyobeza and Another v The Minister of Home Affairs and Others* 2003 (8) BCLR 920 (C). See also *Masamba v Chairperson, Western Cape Regional Committee, Immigrants Selection Board and Others* 2001 (12) BCLR 1239 (C).

219*University of the Western Cape and Others v Members of the Executive Committee for Health and Social Services and Others* 1998 (3) SA 124 (C) at 131D–J.

Introduction

In this chapter we consider the procedures used to enforce the judgment in favour of your client against the losing party.

In order to enforce a money judgment, one may issue a *writ or a warrant of execution*. When you are enforcing a judgment in the High Court, you issue a *writ of execution* on behalf of your client. If the judgment emanates from the Magistrates' Courts, then you issue a *warrant of execution* to enforce the provisions of that judgment. Note that special rules apply under the National Credit Act 34 of 2005 to credit providers who attempt to enforce *credit agreements* as defined in the Act.

Another method used to enforce judgments, as an alternative to issuing a writ or warrant of execution, is the *section 65 procedure*. In terms of s 65 of the Magistrates' Courts Act,[1] a judgment debtor may be brought to court in order that the court may conduct an enquiry into his financial affairs. If the court reaches the conclusion that the debtor can afford to pay the judgment debt in instalments, the court will make an order to this effect. If the judgment debtor persists in not paying, he is liable to be arrested and imprisoned for disobeying an order of court.

Aside from writs and warrants of execution, and the s 65 procedure, we also consider *administration orders*. These are orders which arise from a type of insolvency proceeding in which the estate of the debtor is not sequestrated, but an administrator is appointed to take charge of the debtor's affairs and to satisfy the claims due to his creditors.

Other procedures that, by their nature, must also be regarded as debt collection procedures, but have already been dealt with in other parts of the book, include: consent and confession to judgment (see shortcut judgments in the pleadings section of Actions, at p243) and ss 57 and 58 of the Magistrates' Courts Act (see Settlement, p411).

PART 2: DEBT COLLECTION PROCEDURES

A: Writs and warrants of execution

1 General overview and effect of the National Credit Act

In order to enforce a judgment debt, one may issue a writ of execution (in the High Court) or a warrant of execution (in a Magistrates' Court). In both these scenarios, the effect of the writ or the warrant is to instruct the sheriff of the court to attach the property of the judgment debtor so that if the judgment debt remains unpaid after the attachment, the attached property can be sold at a public auction and the proceeds used to pay the money owed to the judgment creditor. In relation to writs and warrants of execution, note that both *corporeal* as well as *incorporeal* property may be attached.

Corporeal property includes either *movable* or *immovable* property.

In respect of *incorporeal* property we shall discuss specialised orders known as *garnishee orders* and *emoluments attachment orders*.

Once a litigant has obtained judgment in his favour in respect of a money claim, he is referred to as the *judgment creditor*. The party against whom judgment has been awarded in such a case is referred to as the *judgment debtor*.

When considering the enforcement of judgments, you should distinguish between *judgments sounding in money* (*ad pecuniam solvendam*), and *judgments not sounding in money* (*ad factum praestandum*). A judgment sounding in money is one in which the judgment debtor is ordered to pay a specific amount of money to the judgment creditor (e.g. an order to pay a sum of money by way of damages for breach of contract or delict, or an order for the payment of maintenance, or an order for the payment of the purchase price of property bought).[2] It does not matter whether the claim arose as the result of a delict, or a contract, or unjust enrichment – if the judgment contains an order in money terms, then it is a judgment sounding in money. A judgment sounding in money may be enforced by attaching the debtor's *property*, but *not* the debtor's person.[3]

A judgment not sounding in money will contain an order *to do* something (other than pay over an amount of money), or *not to do* something (e.g. transfer or take transfer of immovable property; deliver movable property; vacate property; allow a right of way, etc.). If the judgment debtor does not comply with a judgment not sounding in money, the judgment creditor may apply to court to have the debtor committed for contempt of court.

In this section, when referring to *execution*, we mean the process by means of which a judgment debtor's property is attached by the sheriff in terms of a writ or warrant of execution so that it may be sold in order to satisfy a judgment sounding in money, i.e. a judgment debt. Note, however, that it is not only in order to satisfy a judgment debt that property (or, indeed, a person) may be attached. Other reasons include the following:

1. The property of a debtor may be attached in order to found or confirm jurisdiction.

2. An interim attachment of property may be granted in order to protect a real or personal right which is claimed over the property by an applicant. It is also possible to attach property in order to preserve it as evidence by means of an *Anton Piller*order.[4]
3. In certain cases, the person of a debtor (i.e. the debtor himself) may be attached (i.e. arrested) where he is in contempt of an order of the court.[5]

Note that under the National Credit Act[6] certain constraints are placed upon a 'credit provider' for the enforcement of a credit agreement. If a credit provider (e.g. a bank) attempts to enforce a credit agreement (i.e. an agreement in terms of which it lent money to a client), it may not commence legal proceedings to enforce the agreement before certain steps have been followed. A credit provider must deliver a notice in terms of s 129 of the National Credit Act before it is entitled to take legal steps to enforce a credit agreement to which the Act applies or repossess the goods sold thereunder, advising the consumer of his right to refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court, or ombud to resolve any dispute under the agreement. Only when a credit provider has sent the s 129 notice, and the consumer has not responded or has responded by rejecting the proposal contained in the notice, a period of ten business days has elapsed since the credit provider delivered the notice to the consumer and the consumer has been in default of the credit agreement for a period of at least 20 business days, may the credit provider approach a court for relief.[7] Readers are cautioned to consult a specialist text on the National Credit Act to ensure that the detailed procedures laid down therein are followed prior to the enforcement of a credit agreement as defined in the Act. For further discussion on this, see Annexure B: 'Impact of the National Credit Act and the Consumer Protection Act on Civil Procedure'.

D35

2Attachment and sale of corporeals

2.1 Writ of execution in the High Court

2.1.1 Overview

Execution of judgments in the High Court is dealt with by High Court rules 45 and 46, read with ss 42 and 45 of the Superior Courts Act:[8]

1. Rule 45 deals with execution *in general*, and with execution against *movables* in particular.
2. Rule 46 deals with execution against *immovables*.

Generally speaking, the registrar will not issue a writ of execution against a judgment debtor's immovable property until he is certain that the judgment debtor does not possess sufficient movable property to satisfy the amount of the judgment debt.[9] In other words, *before* you may issue a writ of execution against a judgment debtor's immovable property, you must *first* issue a writ against his movable property. It is only if the sheriff finds that the judgment debtor *does not have sufficient movable property to satisfy the judgment debt*, and provides you with what is called a *nulla bona* return, that you are able to proceed to have a writ of execution issued against the judgment debtor's *immovable* property. There are, however, *exceptions* to this general rule.

In certain cases, the judgment debtor's immovable property may be 'specially declared executable'. In other words, you may issue a writ of execution against the judgment debtor's immovable property without first having to issue a writ against his movable property. This is confirmed by High Court rule 46(1)(*a*)(ii). Note that a warrant of execution may be rescinded

after it has been issued. As a general rule, a warrant of execution will be rescinded if it is not supported, or no longer supported, by its *causa*.[10] The *causa* is the debt and the judgment based on such debt, and the *causa* for a warrant falls away if the debt and the judgment are extinguished because the debt has been paid or come to an end through novation, compromise, delegation or cession.[11]

Section 39 of the old Supreme Court Act stated (prior to its repeal) that the following categories of movable property could not be seized in execution of any process:

1. The necessary beds and bedding and wearing apparel of the person against whom execution is levied, or any member of his family;
2. The necessary *furniture*, other than beds, and household utensils in so far as they do not exceed R2 000 in value;
3. *Stock, tools and agricultural implements of a farmer* in so far as they do not exceed R2 000 in value;
4. Any *food or drink* sufficient to meet the needs of such person and the members of his family for one month;
5. *Tools and implements of trade* in so far as they do not exceed R2 000 in value;
6. *Professional books, documents or instruments* necessarily used by the debtor in his profession in so far as they do not exceed R2 000 in value; and
7. Such *arms and ammunition* as the debtor is, in terms of any law, regulation or disciplinary order, required to have in his possession as part of his equipment.

Section 45 of the Superior Courts Act,[12] which replaces the Supreme Court Act,[13] contains a similar provision to the effect that certain belongings of the debtor may not be seized by the sheriff in execution of process, unless the court in exceptional circumstances permits this to be done. However, s 45 does not identify which belongings of the debtor the sheriff may not seize; rather, this must be prescribed by the Minister of Justice and Correctional Services ('Minister') in regulations, which, at the time of writing the third edition of the book, has not yet been done. More fundamentally, however, s 45 is not yet effective and will enter into force on a date to be published by the Minister. Given this, at the time of writing the third edition of this book, the position appears to be that such items are not protected from attachment by the sheriff. This uncertainty is unfortunate, and can and should be remedied by the relevant regulations being drafted and the section being made operative.

Annuity and benefits payable under a pension law may not be attached or subjected to any form of execution.[14]

P36

2.1.2Attachment and sale of movables

In terms of High Court rule 45(1), the format to be adopted for a High Court writ of execution against movables is set out in High Court Form 18 (contained in the First Schedule to the High Court rules). Once the writ has been issued by the registrar, it must be delivered to the sheriff of the High Court who is responsible for making the attachment. A judgment creditor who sues on a writ of execution does so 'at his own risk'.[15]

In terms of High Court rule 45(3), the sheriff or his assistant will proceed to the residence or place of employment or business of the judgment debtor,[16] unless you have given specific instructions that he must proceed to another place where you believe that assets of the judgment

debtor are situated. Once the sheriff or his assistant arrives at the judgment debtor's residence or place of employment, or wherever, he must follow this procedure:

1. He must first demand satisfaction of the writ. If the judgment debtor (or anyone else) responds by paying the full amount set out in the writ, then that, of course, is the end of the matter.
2. If the judgment debtor fails to satisfy the writ, the sheriff must demand that the judgment debtor point out as much of his movable and disposable property as is sufficient to satisfy the writ. In other words, the judgment debtor (if he is present, alternatively one of his family members or colleagues) has the opportunity to say which of his possessions should be attached and which should not. Of course, it is the sheriff who has the discretion to decide whether or not sufficient objects have been pointed out so as to satisfy the writ. In other words, the sheriff must be satisfied that the value which will be realised at a sale in execution of the objects will cover the amount of the judgment debt, plus costs.
3. If no movable property belonging to the judgment debtor is pointed out to the sheriff, he must search for such property.

In terms of High Court rule 45(3)(*c*), once the sheriff has located attachable movable property, he must:

1. make an inventory of the property; *and*
2. take the property into his custody.

The sheriff *must* take the goods into his custody in order to effect a valid attachment, but he will *not* take the property into his custody if:

1. the judgment creditor directs the sheriff *not* to take the goods into custody;
2. the judgment debtor undertakes in writing that if the attachment has *not* been legally lifted by the day of the sale, he will produce the goods attached on that day so that they may be sold in execution. A person of 'sufficient means' must stand surety for the due fulfillment of this undertaking by the judgment debtor. Both the judgment debtor and the person standing surety for him must sign a deed of suretyship in accordance with High Court Form 19;[17]
3. another person makes a claim to the property, and the judgment creditor fails to give the sheriff an indemnity holding him harmless from any loss or damage which results from the seizure.[18]

If the satisfaction of the writ was not demanded from the judgment debtor personally, the sheriff must give the judgment debtor written notice of the attachment and a copy of the inventory made by him.[19]

Once the sheriff has taken the attached goods into his custody, he must either 'remove the said goods to some convenient place of security', or 'keep possession thereof on the premises where they were seized'.[20] If he chooses the latter course of action, he must leave an officer permanently in possession of the goods. It is not good enough for him to occasionally send one of his officers to check up on the goods.

After the sheriff has made the attachment, he will leave a copy of the writ of execution with the judgment debtor, and file the original, together with his return of service, at the office of the registrar of the division. He will also furnish you, as the attorney for the judgment creditor, with copies of the writ of execution, his return of service, and the inventory of the goods attached.[21]

If the property which has been attached is perishable (for example, a truckload of tomatoes), then the sale in execution may take place immediately, provided that:

1. the execution debtor consents to the sale; or
2. the execution creditor indemnifies the sheriff against any claim for damages which may arise as a result of the sale.

If the property which has been attached is not perishable, the sale in execution may only take place once *15 court days* have elapsed from the date of the attachment.[22]

The goods must be sold by *public auction*.[23] The sheriff must *advertise* details of the auction beforehand in two suitable newspapers circulating in the district in which the property has been attached.[24]

Where property subject to a real right of any third person is sold in execution, such sale shall be subject to the rights of such third person unless he agrees otherwise.[25]

Note that special rules apply in respect of execution against the state. Section 3 of the State Liability Act 20 of 1957 previously provided as follows:

> **No execution, attachment or like process shall be issued against the defendant or respondent in any such action or proceedings against any property of the State, but the amount, if any, which may be required to satisfy any judgment or order given or made against the nominal defendant or respondent in any such action or proceeding may be paid out of the National Revenue Fund or a Provincial Revenue Fund, as the case may be.**

In *Nyathi v MEC for Department of Health, Gauteng and Another*,[26] the Constitutional Court found that the section was unconstitutional, *inter alia*, because it failed the test of public accountability. Parliament has since passed the corrective legislation, and the following procedure is now to be followed in respect of execution against the state:

1. If a final order against a national or provincial department for the payment of money is not satisfied within thirty (30) days of the date of judgment or within the time period agreed upon by the judgment creditor and the accounting officer of the department concerned, the judgment creditor may serve the court order in terms of the applicable rules of court on the executive authority and accounting officer of the department concerned, the State Attorney or attorney of record appearing on behalf of the department concerned and the relevant treasury;
2. The relevant treasury shall within fourteen (14) days of service of the order, cause the judgment debt to be settled or acceptable arrangements to be made with the judgment creditor for the satisfaction of the judgment debt should there be inadequate funds available to the department concerned;
3. Should the relevant treasury fail to cause the judgment debt to be satisfied or acceptable arrangements be made with the judgment creditor for the satisfaction of the judgment debt, the judgment creditor may apply for a writ of execution in terms of rule 45 of the High Court Rules or a warrant of execution in terms of rule 36 of the Magistrates' Courts Rules, whichever is applicable, against movable property owned by the state and used by the relevant department;
4. The sheriff of the relevant court shall, pursuant to the writ of execution or warrant of execution, attach but not remove the identified movable property;
5. In the absence of any application to stay the execution, the sheriff of the relevant court may after the expiration of thirty (30) days from the date of attachment, remove and sell the attached movable property in execution of the judgment debt; and

6. A party having a direct and material interest may, before the attached movable property is sold in execution, apply to the court which granted the order, for a stay on grounds that the execution of the attached movable property would severely disrupt service delivery, threaten life or put the security of the public at risk or is not in the interests of justice.

2.1.3 Attachment and sale of immovables

High Court rule 46 deals with the attachment and sale of immovable property in the High Court. In order to execute against immovable property, the debtor's movable property must have been excussed in terms of rule 45 or the immovable property must have been declared 'specially executable'. This means that, despite the debtor's movable property not having been excussed, the immovable property may nonetheless be executed against. This may occur, for example, where immovable property has been hypothecated as security (e.g. in favour of the bank which granted the debtor a home loan).

In terms of High Court rule 31(5)(b), when a debtor has failed to deliver a notice of intention to defend or a plea, and the claim is for a debt or liquidated demand, the registrar of the division may grant judgment for the creditor, including an order declaring immovable property specially executable. The registrar may, however, not do so if the property in question is *residential* property. In such instances, the matter must be referred to court. This is so even if the immovable property is, for example, a holiday home.[27]

Where the residential property is the debtor's *primary* residence, additional safeguards apply. In such instances, not only must the application be referred to open court but the court considering the application must consider all 'relevant circumstances' before making the order.[28]

These requirements were introduced to rules 31(5) and 46 as a result of the decision of the Constitutional Court in *Gundwana v Steko Development and Others*.[29] In this case, the constitutionality of the practice of registrars granting orders declaring property constituting a person's home specially executable was considered. The Constitutional Court, having regard to the constitutionally entrenched right of access to housing, and in the light of its earlier decision in *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*,[30] held that the practice was unconstitutional.

The precise content of 'relevant circumstances' was deliberately not defined by the Court. However, generally this would include any evidence showing an infringement of constitutional rights or an abuse of process, as well as evidence offered to support any contention by the creditor that an infringement is justifiable.[31] The Constitutional Court stated in *Jaftha*:

> **[F]actors that a court might consider, but to which a court is not limited, are: The circumstances in which the debt was incurred; any attempts made by the debtor to pay off the debt; the financial situation of the parties; the amount of the debt; whether the debtor is employed or has a source of income to pay off the debt and any other factor relevant to the particular facts of the case before the court.**

Note, further, that the summons initiating action in which an order declaring immovable property executable is sought must contain a prescribed paragraph drawing the debtor's attention to s 26(1) of the Constitution (the right of access to adequate housing) and indicating that, should the

defendant claim that the order for execution will infringe s 26(1), that it is incumbent on the defendant to place information supporting that claim before the court.[32]

A High Court writ of execution against immovable property must take the format of High Court Form 20. It must set out what was contained in the sheriff's return in respect of the debtor's movable property (i.e. to verify that the debtor does not have sufficient movable assets to satisfy the judgment debt). It must also contain a full title deed description (which may be obtained from the Registrar of Deeds), as well as the street address of the property to be attached.

Rule 46(3) provides that immovable property is attached by means of a written notice sent by the sheriff, by prepaid registered post, to the following people:

1. The owner;
2. The Registrar of Deeds; and
3. The occupier of the property (unless the occupier is also the owner).

Details of the names and addresses of the owner and occupier of the immovable property, as well as details of the Registrar of Deeds in whose office the title deeds relating to the property are lodged, must thus accompany the writ of execution.[33]

Once the immovable property has been attached, the execution creditor must instruct the sheriff *in writing* to proceed with the sale.[34]

The sheriff must then find out and record which *bonds or other encumbrances* are registered against the property, together with the names and addresses of the persons in whose favour such bonds and other encumbrances are registered. The sheriff must provide the execution creditor with this information.[35]

Thereafter the execution creditor must send a written notice by prepaid registered post to the following persons:

1. All *preferent creditors*: For example, a preferent creditor might be a bank in whose favour a mortgage bond has been registered over the property.
2. The *local authority*: This is only necessary if the property is rateable. The local authority will be a preferent creditor in respect of any claim for arrears rates.

In his written notice to the preferent creditors and the local authority, the execution debtor must call upon these persons to *stipulate, within 10 court days, a reasonable reserve* price at which the property may be sold, or to agree to a sale without reserve. Obviously, if the property is to be sold in execution, then the preferent creditors will want to recover at least the outstanding amounts of the debts owing to them by the execution debtor, and will take this into account when they set the reserve price.[36]

The execution creditor must provide the sheriff with proof that the preferent creditors and the local authority have set a particular reserve price, or have agreed to a sale without reserve.

If the sheriff is satisfied that it is impossible to notify a preferent creditor of the sale, or that a preferent creditor has been notified of the sale but has not responded, the sale may nevertheless go ahead.[37]

The sheriff will then *appoint a date* for the sale of the property. This date must be not less than one month after service of the notice of attachment.[38] The execution creditor must then prepare the *notice of sale*, which must contain:

1. A short description of the property;
2. The situation and street number, if any, of the property;
3. The time at which and place where the sale will be held; and
4. An invitation to inspect the conditions of sale at the office of the sheriff.

The execution creditor must publish the notice of sale in one newspaper that circulates in the district in which the property is situated, as well as in the *Government Gazette*, not less than five court days and not more than 15 court days before the date of the sale. The sheriff must be provided with a photocopy or a telefax of the notices once they have been published. Instead of providing the sheriff with a copy or fax of the notice in the *Government Gazette*, the execution creditor is entitled simply to provide the number of the *Government Gazette* in which the notice was published.[39]

Not less than 20 days before the date of the sale, the execution creditor must prepare conditions of sale in accordance with High Court Form 21. The conditions of sale must be submitted to the sheriff for approval. Thereafter, the execution creditor must supply the sheriff with two copies of the *conditions of sale*, one of which must lie for inspection by any interested party at the sheriff's office.[40] Not less than 10 days before the date of the sale, the sheriff must:

1. send a copy of the notice of sale to every judgment creditor who has attached the property, as well as to every mortgagee of the property;[41] and
2. affix one copy of the notice on the notice board of the Magistrates' Court of the district in which the property is situated, and one copy as near as possible to the place where the sale is to take place.[42]

Not later than the day before the sale, the execution creditor must provide the sheriff with a *copy* of each of the newspapers, and the number of the *Government Gazette*, in which the notice of sale was published.[43]

On the date of the sale, the property will be sold by public auction.[44]

As soon as possible after the sale, the sheriff must prepare a plan of distribution of the proceeds of the sale. A copy of the plan must be forwarded to the registrar, and it must lie for inspection at both the office of the registrar and the office of the sheriff for a period of 15 court days. Written notice must be given, by registered post, to all parties who have lodged writs, as well as to the execution debtor, that the plan of distribution is lying for inspection.[45]

Any interested party may object to the plan of distribution, in which case he shall give notice in writing to the sheriff and all other interested parties of the particulars of his objection, and shall bring such objection before a judge for review, on 10 court days' notice to the sheriff and the said persons.

2.2 Warrant of execution in the Magistrates' Courts

2.2.1 Overview

In the Magistrates' Courts one speaks of a *warrant* as opposed to a *writ* of execution. Note that there are three types of warrants in the Magistrates' Courts:

- *Warrant of ejectment*: Here one is dealing with a claim for ejectment of a person from your property – the sheriff removes the person from the property. Use Magistrates' Courts Form 30 (contained in the annexure to the Magistrates' Courts Rules).
- *Warrant for delivery of goods*: The claim is for the delivery of certain property – the sheriff removes the property from the defendant and gives it to you. Use Magistrates' Courts Form 31.
- *Warrant of execution against property*: This is a normal money claim – the sheriff attaches property which is then sold in execution and proceeds of the sale are given to you. Use Magistrates' Courts Form 32.

Execution by warrant in the Magistrates' Courts is dealt with by Magistrates' Courts rules 36 to 43. Rule 41, in particular, deals with execution against *movable property*, while rule 43 deals with execution against *immovable property*. Rule 42 deals, *inter alia*, with execution against *incorporeal property* such as a lease, a bill of exchange, a promissory note, a bond, or another form of security for the payment of money.[46] It also deals with execution against the interest of the execution debtor in property pledged, leased or sold under suspensive condition to or by a third person, and with execution against movable property which is under the supervision or control of a third person.[47]

Here, we focus on the *warrant of execution against property*, and particularly those cases where a Magistrates' Court has given judgment for the payment of money and that judgment has not been complied with. The execution procedure consists, first, of the attachment of the judgment debtor's assets and, second, of the sale in execution of those assets. In terms of s 63 of the Magistrates' Courts Act, the judgment must be executed within three years of the date on which it was granted (superannuation is dealt with at 5 below).

2.2.2 The warrant of execution

In practice, the judgment debtor is usually given some time to satisfy the judgment. At this stage, the judgment debtor often makes arrangements with the attorney representing the judgment creditor for the payment of the judgment debt, plus costs. In such a case, a warrant of execution is usually not issued. Obviously, if no acceptable arrangement can be made to satisfy the judgment, the plaintiff will arrange for a warrant of execution to be issued against the property belonging to the judgment debtor. Before applying for a warrant of execution, it is recommended that a judgment creditor first issue a notice in terms of s 65A(1) of the Magistrates' Court Act (discussed at 3 below), unless the judgment debtor is already aware of the existence of attachable assets. Where the judgment creditor has issued a warrant of execution *before* the hearing of proceedings in terms of a notice under s 65A(1) and a *nulla bona* return is made, the judgment creditor shall generally not be entitled to the costs of the warrant.[48]

The warrant is issued and signed by the clerk of the court and addressed to the sheriff for the purpose of attachment.[49]

The *sheriff of the court* may be regarded as its executive officer. His duty is to execute orders and carry out the instructions of the court, for example by attaching goods. The sheriff's return, i.e. the declaration made by the sheriff concerning the execution of the court's instructions to him, is considered *prima facie* evidence of the matters stated in the return.[50]

2.2.3 Attachment – what can and cannot be attached

Before we go on to a detailed examination of writs of execution against movables and immovables, note that certain property is not liable to be seized in execution by the Magistrates' Courts. Section 67 of the Magistrates' Courts Act provides that the following categories of property may not be seized in execution of any process:

1. The necessary *beds and bedding and wearing apparel* of the person against whom execution is levied, or any member of his family;
2. The necessary *furniture*, other than beds, and household utensils in so far as they do not exceed R2 000 in value;
3. *Stock, tools and agricultural implements of a farmer* in so far as they do not exceed R2 000 in value;
4. Any *food or drink* sufficient to meet the needs of such person and the members of his family for one month;
5. *Tools and implements of trade* in so far as they do not exceed R2 000 in value;
6. *Professional books, documents or instruments* used by the debtor in his profession in so far as they do not exceed R2 000 in value; and
7. Such *arms and ammunition* as the debtor is, in terms of any law, regulation or disciplinary order, required to have in his possession as part of his equipment.

Note that the court has a discretion in exceptional circumstances to increase the sums referred to above.[51]

Section 68 of the Magistrates' Courts Act stipulates which property may be attached and sold in execution. The list is extensive and includes, for example:

1. movable property generally;
2. money; cheques; bonds; promissory notes, etc.; and
3. the interest of the execution debtor in any movable property belonging to him or her.

You are advised to consult the full list in s 68 to check whether the property you are trying to execute against is, in fact, executable.

2.2.4 The attachment

Once the warrant has been issued and handed to the sheriff of the court for execution, the sheriff will proceed to the residence or place of employment or business of the judgment debtor, unless you have given specific instructions that he must proceed to another place where you believe that assets of the judgment debtor are situated.[52] Once the sheriff or his assistant arrives at the judgment debtor's residence or place of employment or wherever, he must follow this procedure:

1. He must first demand satisfaction of the writ by exhibiting the original warrant of execution. He must hand a copy thereof to the execution debtor or leave it on the premises.[53] If the judgment debtor (or anyone else) responds by paying the full amount set out in the writ, that is the end of the matter.

2. If the judgment debtor fails to satisfy the writ, the sheriff must demand that the judgment debtor point out as much of his movable and disposable property as is sufficient to satisfy the writ.[54] In other words, the judgment debtor (if he is present, alternatively one of his family members or colleagues) has the opportunity to say which of his possessions should be attached and which should not. Of course, it is the sheriff who has the discretion to decide whether or not sufficient objects have been pointed out so as to satisfy the writ. In other words, the sheriff must be satisfied that the value which will be realised at a sale in execution of the objects will cover the amount of the judgment debt, plus costs.
3.
4. If no movable property belonging to the judgment debtor is pointed out to the sheriff, he must search for such property. So far as may be necessary to the execution of the warrant, the sheriff may open any door on any premises or of any piece of furniture. If opening is refused and, if it is necessary, the sheriff may use force to open any door.[55]

Once the sheriff has located attachable movable property, he must draw up an inventory of the property and make a valuation.[56]

If the debtor declares that he has no, or insufficient, movable property and the sheriff is unable to find sufficient movable property to satisfy the warrant, the sheriff must request the execution debtor to declare whether he has immovable property which is executable and enter the reply on his return of service, endorsed on the warrant.[57]

Note that if the sheriff has issued a *nulla bona* return indicating that insufficient movables exist to discharge the debt, the sheriff is not allowed simply to attach immovable property (such as a debtor's house) for execution. According to the Constitutional Court decision in *Jaftha v Schoeman and Others* and *Van Rooyen v Stoltz and Others* 2003 (10) BCLR 1149 (C), the creditor will first need to approach a court to seek an order allowing execution against the immovable property of the judgment debtor (see paras [62] to [64] of the judgment).[58]

As soon as the requirements of rule 41 have been complied with, the property specified in it is deemed to be judicially attached.[59]

Note, however, that unlike High Court attachments of movable property where the sheriff *must* either 'remove the said goods to some convenient place of security', or 'keep possession thereof on the premises where they were seized',[60] with attachments in the Magistrates' Courts the execution creditor or his attorney must advise the sheriff, after receiving notification of the attachment, whether the property is to be removed to a place of security or left on the premises in the charge of the judgment debtor or of some other person.[61] This is subject to the *proviso* that the execution creditor or his attorney may instruct the sheriff in writing to immediately remove all articles reasonably believed to be in the execution debtor's possession, provided the judgment creditor has first satisfied the registrar or clerk as to the desirability of immediate removal and the registrar or clerk has endorsed his approval on the document containing the instructions. This instruction to the sheriff by the judgment creditor or his attorney may be of vital importance to ensure that property the sheriff has attached does not disappear from the premises of the execution debtor, and is not damaged to such an extent that there is nothing of value left to sell in order to satisfy the judgment.[62]

2.2.5 Execution

After attachment, the property is sold in execution on a date, appointed by the sheriff, which is not less than 15 days after the attachment.[63] The sheriff will appoint a day for the sale and a notice of sale will be advertised (at the court and the place where the sale is to be held). If the sheriff is of the opinion that the value of the goods exceeds R5 000, then the notice must also be published in a newspaper circulating in the district at least 10 days before the sale.[64] Notice of attachment should be given to interested parties.[65] Where a motor vehicle is to be sold in execution, notice must be given to both the title holder and owner of the vehicle.[66]
On the date of the sale, the property will be sold by public auction.[67]

D36

3Attachment and sale of incorporeals

3.1 Attachment of incorporeals in the High Court

3.1.1 Attaching a debt owed to the judgment debtor by a third party

High Court rule 45(12) provides a procedure whereby the judgment creditor may attach debts owing or accruing to the judgment debtor by a *third party*. Such debts may include salary or wages *as are now* and *will in the future* be owed to the judgment debtor by his employer (i.e. the rule covers debts which are both owing now and accruing in the future),[68] as well as any other kind of debt owed to the judgment debtor (e.g. money loaned to the third party by the judgment debtor). There is no distinction in the High Court (as there is in the Magistrates' Courts practice discussed below) between so-called *emoluments attachment orders* (which relate to the attachment of the salary or wages of the judgment debtor) and *garnishee orders* (which relate to the attachment of other kinds of debts owed to the judgment debtor).

In the High Court, if any debt is owing to the judgment debtor (including salary and wages), such debt may be attached by the sheriff if he is requested to do so by the judgment creditor.[69] The person who owes the debt to the judgment debtor is known, for the purposes of attachment, as a *garnishee*. The sheriff must serve a notice on the garnishee, ordering him to pay the debt directly to the sheriff, instead of to the judgment debtor. If the amount of the debt owed by the garnishee to the judgment debtor is more than the amount of the judgment debt, the sheriff may not demand that more than the amount of the judgment debt be paid to him. Once the garnishee has paid the sheriff, the sheriff will issue a receipt to the garnishee to the effect that the amount of the debt paid to the sheriff has been discharged.[70]

If the garnishee refuses or neglects to comply with the notice calling on him to pay the debt directly to the sheriff, the sheriff must immediately notify the judgment creditor. The judgment creditor may then deliver a notice to the garnishee, calling upon him to appear before the court *to show cause* why he should *not* pay the debt to the sheriff. If the garnishee does not dispute the debt due by him to the judgment debtor, or does not appear in court to answer the judgment creditor's notice, the court may order that a writ of execution be issued against the garnishee's property for the amount of the debt.[71]

3.1.2 The procedure for attaching incorporeal property

Rule 45(12) should be read together with rule 45(8), which governs the attachment of incorporeal property in the High Court. All debts owed or accruing to the judgment debtor by a

third party (which are recoverable by means of the procedure set out in rule 45(12) discussed above), may be classified as *incorporeal property* in terms of rule 45(8). Rule 45(8) sets out the procedure which must be followed when attaching incorporeal property (including debts owed to the judgment debtor by a third party). It is important to follow closely the process set out in rule 45(8); this provision is mandatory to the extent that, insofar as any of its provisions have not been complied with, the attempted attachment is void.[72] The rule divides incorporeal property into three categories for the purposes of attachment:

1. Lease (i.e. the judgment debtor is owed rent by a third party, who leases property from the judgment debtor), bill of exchange (e.g. the judgment debtor is in possession of a cheque made out to him by a third party), promissory note (e.g. the judgment debtor is in possession of an IOU in respect of money lent by the judgment debtor to a third party), bond (e.g. the judgment debtor is in possession of a mortgage bond over the property of a third party, to whom he loaned money), or other security for the payment of money;
2. The interest of the execution debtor in property pledged, leased or sold under a suspensive condition, to or by a third person; and
3. Other incorporeal property.

In order to complete the attachment of incorporeal property falling into the *first category*, the following conditions have to be met:

1. The sheriff must give *notice* to the lessor and lessee, mortgagor and mortgagee, or person liable on the bill of exchange, or promissory note, or security.
2. The sheriff must take *possession* of the written lease agreement (if there is one), or the bill of exchange, or the promissory note, or the mortgage bond, or the security.
3. If the lease or right concerned has been *registered*, then *notice* must be given to the Registrar of Deeds.[73]

In order to complete the attachment of incorporeal property falling into the *second category*, the sheriff must serve the notice of attachment, together with a copy of the writ of execution, on the execution debtor as well as on the third person.[74]Attachment of property subject to a lien is also effected in this way.[75]

In order to complete the attachment of incorporeal property falling into the *third category*, the following conditions have to be met:

1. The sheriff must give *written notice* of the attachment to all the interested parties.[76] Where the asset consists of incorporeal immovable property or an incorporeal right in immovable property, the sheriff must also give written notice to the Registrar of Deeds in whose registry the property or right is situated.
2. The sheriff must *take possession of the document which evidences ownership* of the property or the right. For example, in *Badenhorst v Balju, Pretoria Sentraal, en Andere*,[77] the court held that a member's interest in a close corporation is an incorporeal moveable.[78] In respect of such an asset, attachment should take place, where possible, of the document or similar item establishing the right. In the case of a company it would be a share certificate; in the case of a close corporation it would be a certificate issued in terms of the mandatory provisions of s 31 of the Close Corporations Act 69 of 1984.[79]Attachment is then effected by a caveat, interdict or order of attachment being noted against the relevant title deeds in the Deeds Office.[80]

If the sheriff cannot locate such a document, he must certify that, despite a diligent search, he has been unable to obtain possession of the document.[81]

3.2 Attachment of incorporeals in the Magistrates' Courts

3.2.1 Emoluments attachment orders versus garnishee orders

In terms of the procedure adopted in the Magistrates' Courts, there is a distinction between *emoluments attachment orders*(which relate to the attachment of the salary or wages owing or accruing to the judgment debtor by a third party), and *garnishee orders* (which relate to the attachment of all the other kinds of debts which may be owed to the judgment debtor by a third party). There have recently been significant developments concerning emolument attachment orders, which have significantly changed how such orders may be obtained. These are considered below.

3.2.2 Emoluments attachment orders

3.2.2(a) What is an emoluments attachment order?

Emoluments attachment orders are dealt with in s 65J of the Magistrates' Courts Act. According to s 65J, an emoluments attachment order is an order whereby the judgment creditor is able to attach part of the salary or wages of the judgment debtor. In other words, once an emoluments attachment order has been granted, the employer of the judgment debtor (who is referred to as the *garnishee*) is obliged (on a continuing basis and until such time as the judgment debt has been paid in full) to pay a certain portion of the judgment debtor's salary or wages to the judgment creditor.[82] This is a good way of proceeding against a judgment debtor who does not possess sufficient attachable assets to pay off a significant portion of the debt. Because the money goes directly from the employer to the judgment creditor, the latter's attorney does not have to worry about the judgment debtor spending it before it can be attached. The judgment debtor also has an interest in retaining his job, and, as long as jugdment debtor does so, the debt will continue to be paid.

3.2.2(b) How is such an order obtained?

An emoluments attachment order may be obtained in the following ways:

1. By obtaining the *written consent* of the judgment debtor.[83]

   or

2. By obtaining the *authorisation of the court*.

   or

3. By the judgment creditor or his attorney:

   - sending a *registered letter* to the judgment debtor at his last known address, advising the judgment debtor of the amount of the judgment debt and costs as yet unpaid and warning him that an emoluments attachment order will be issued if the amount is not paid within 10 court days from the date on which the registered letter was posted;[84]

   and

   - filing, with the clerk of the court, an *affidavit or an affirmation* by the judgment creditor, or a *certificate* by his attorney, setting forth the amount of the judgment

debt at the date of the order, laying down the specific instalments, the costs (if any) which have accumulated since that date, the payments received since that date and the balance owing, and declaring that the provisions of the paragraph above have been complied with on the date specified therein.[85]

Since the recent judgment of the Constitutional Court in *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others (South African Human Rights Commission as amicus curiae)*,[86] there are only two methods by which to secure an emolument attachment order – both involving the intervention of the court. With effect from 13 September 2016, section 65J(2) provides that an emolument attachment order shall not be issued:

> **(*a*)unless the judgment debtor has consented to it in writing and the court has so authorised it;**
>
> **(*b*)unless the judgment creditor or his or her attorney has first—**
>
> **(i)sent a registered letter to the judgment debtor at his or her last known address advising him or her of the amount of the judgment debt and costs as yet unpaid and warning him or her that an emoluments attachment order may be issued if the said amount is not paid within ten days of the date on which that registered letter was posted; and**
>
> **(ii)filed with the clerk of the court an affidavit or an affirmation by the judgment creditor or a certificate by his or her attorney setting forth the amount of the judgment debt at the date of the order; and**
>
> **(iii)been granted an order of court authorising that an emoluments attachment order be issued."**

Furthermore, before a court may grant an order authorising an emolument attachment order, it must be satisfied both that it is just and equitable that an emoluments attachment order be issued and that the amount is appropriate. While there is no clear guidance on what constitutes just and equitable circumstances, the Court did some guidance where it held:

> **An emoluments attachment order is clearly burdensome. It severely constricts the autonomy of the debtor to decide how she will pay off the debt. It is also inflexible as it does not adapt to the debtor's changing circumstances from week to week. It goes directly off a debtor's wages – and these wages will often form the means for the debtor's day-to-day survival. These are all important considerations to be borne in mind when deciding whether an emoluments attachment order should be granted. What is more, a debtor's personal circumstances may well have changed in the interim between when a judgment debt is entered and ordered to be paid in instalments and when an emoluments attachment order is sought. It is, therefore, crucial that these considerations are taken into account at the time the emoluments attachment order is sought.**

3.2.2(c) Out of which court must the emoluments attachment order be issued?

An emoluments attachment order must be issued from the court of the district in which the *employer* of the judgment debtor resides, carries on business or is employed.[87] If the judgment debtor is a *state official*, the emoluments attachment order must be issued from the court of the district in which the *judgment debtor* resides.[88]

3.2.2(d) What is the effect of the order?

The effect of an emoluments attachment order is that it obliges the garnishee (i.e. the employer) to pay the judgment creditor or his attorney, from time to time, specific amounts (as laid down by the court) out of the emoluments of the judgment debtor, until the judgment debt and costs have been paid in full.[89]

3.2.2(e) What if the judgment debtor leaves his employment?

Section 65J(8) reads as follows:

> **(*a*)Whenever any judgment debtor to whom an emoluments attachment order relates leaves the service of a garnishee before the judgment debt has been paid in full, such judgment debtor shall forthwith advise the judgment creditor in writing of the name and address of his or her new employer, and the judgment creditor may cause a certified copy of such emoluments attachment order to be served on the said new employer, together with an affidavit or affirmation by him or a certificate by his attorney specifying the payments received by him since such order was issued, the costs, if any, incurred since the date on which that order was issued and the balance outstanding.**
>
> **(*b*)An employer on whom a certified copy referred to in paragraph (a) has been so served, shall thereupon be bound thereby and shall then be deemed to have been substituted for the original garnishee, subject to the right of the judgment debtor, the garnishee or any other interested party to dispute the existence or validity of the order and the correctness of the balance claimed.**

3.2.3 Garnishee orders

Section 72(1) of the Magistrates' Courts Act reads, *inter alia*, as follows:

> **The court may, on *ex parte* application by the judgment creditor … order the attachment of any debt at present or in future owing or accruing to a judgment debtor by or from any other person (excluding the state), residing, carrying on business or employed in the district, to an amount sufficient to satisfy the judgment and the costs of the proceedings for attachment, whether such judgment has been obtained in such court or in any other Magistrate's Court, and make an order (hereinafter called a garnishee order) against such person (hereinafter called the garnishee) to pay to the judgment creditor or his attorney … so much of the debt as may be sufficient to satisfy the judgment and costs, and may enforce such garnishee order as if it were a judgment of the court.**

Note that the garnishee order effectively pulls the garnishee into the matter between the judgment creditor and judgment debtor. If the garnishee refuses to pay in terms of the garnishee order, the judgment creditor is entitled to attach his property or proceed against him in terms of s 65A. In other words, even though the garnishee might not know the judgment creditor from a bar of soap, if he (the garnishee) for some reason or other refuses to obey the terms of the garnishee order, he may find himself at the receiving end of various debt collection procedures instituted by the judgment creditor.

Magistrates' Courts rule 47 (read with s 72 of the Magistrates' Courts Act) sets out the procedure in terms of which an application for a garnishee order must be made. In terms of rule 47(1), the application must be supported by an affidavit or affirmation by the judgment creditor or a

certificate by his attorney. The following details must be included in the affidavit, affirmation or certificate:

1. A court (*a*) has granted judgment to the judgment creditor; or (ii) has ordered the payment of a debt referred to in s 55 and costs in specific instalments.
2. Such judgment or order referred to in rule (1)(*a*) is still unsatisfied, stating the amounts still payable thereunder.
3. The garnishee resides, carries on business or is employed within the district, with mention of the address of the garnishee.
4. That a debt is at present or in future owing or accruing by or from the garnishee to the judgment debtor and the amount thereof.

In terms of rule 47(2):

> **Unless the application for a garnishee order is directed to the court which granted the judgment or order referred to in rule (1)(*a*), a certified copy of the judgment or order against the judgment debtor shall accompany the affidavit or affirmation or certificate referred to in sub-rule (1).**

Rule 47(3) requires the following:

> **Sufficient information including the identity number or work number or date of birth of the judgment debtor shall be furnished in a garnishee order to enable the garnishee to identify the judgment debtor.**

The application is made *ex parte*. In other words, when the application is made, only the judgment creditor (the applicant) will be in court. In terms of rule 47(5), if the application papers are in order, the court will order the garnishee:

1. to pay to the judgment creditor or his attorney so much of the debt at present or in future owing or accruing by or from him to the judgment debtor as may be sufficient to satisfy the judgment, together with the costs of the garnishee proceedings (including the costs of service); or
2. if he does not pay to appear before the court on a certain date (the 'return date') in order to show cause why he should not be required to pay the debt.

In terms of rule 47(7), once the initial order of court has been served on the garnishee and the judgment debtor, it operates as an attachment of the debt in the hands of the garnishee. In other words, the garnishee may not go ahead and pay the debt to the judgment debtor.

The main *defences* open to the garnishee on the return date are to:

1. dispute that he is liable to pay the debt to the judgment debtor;
2. allege that he has a set-off against the judgment debtor;
3. allege that he has a valid counterclaim against the judgment debtor; or
4. allege that the debt belongs to or is subject to a claim by some other person.

In terms of rule 47(9), if the garnishee does not appear in court on the return date, or appears but fails to convince the court that he should not be required to pay the debt, the court may order the garnishee to pay the debt (or such portion of it as the court may determine) to the judgment creditor or his attorney on the dates set out in the order. If the garnishee fails to pay as ordered, execution may be issued against the garnishee by the judgment creditor.

4 Interpleader proceedings

4.1 General overview

The interpleader procedure enables a party who is, or may be, the subject of adverse claims by two or more parties to have the competing claims decided between the claimants. By doing so, the party who is the subject of these adverse claims can ensure that he is protected against costs. Although interpleader proceedings are not a type of debt collection procedure, we deal with them here because, in practice, the need for such proceedings often arises following the attachment of goods in terms of a writ or warrant of execution. In other words, after attachment of goods, the sheriff may receive a claim to the property from a third party (i.e. someone other than the judgment debtor).

4.2 Interpleader proceedings in the High Court – rule 58

Interpleader proceedings in the High Court are dealt with by High Court rule 58. There are two basic types of interpleaders:

1. Two or more persons make adverse claims to property which is in the custody of a third party, known as the *stakeholder*. For example, a lecturer finds an expensive watch which is claimed by two students. The lecturer is unable to keep the watch, for fear of being sued by either or both of the students. The lecturer is also unable to hand the watch to one of the two students, for fear of being sued by the other student.
2. The sheriff of the court attaches property which ostensibly belongs to the judgment debtor in a particular case. Another person then claims that the property that has been attached does not belong to the judgment debtor but to him. The judgment creditor insists that the property belongs to the judgment debtor. The sheriff is now in the position of a stakeholder, uncertain whether to continue with the sale of the property, or to release the property from attachment.

If you are acting for a stakeholder who is faced with competing claims in respect of certain money or property he is holding, you should deliver an interpleader notice to the competing claimants on your client's behalf in terms of rule 58(1). Once the *interpleader notice* has been issued, any proceedings instituted against your client by either of the two claimants will be stayed.[90]

In terms of High Court rule 58(2):

1. If the stake being held by your client consists of *money*, it must be paid to the registrar at the same time as you deliver the interpleader notice to the claimants.
2. If the stake being held by your client consists of a *movable item*, you must offer to deliver that item to the registrar at the same time as you deliver the interpleader notice to the claimants.
3. If the stake being held by your client consists of *immovable property*, you must give the title deeds relating to that property to the registrar at the same time as you deliver the interpleader notice to the claimants. You must also give the registrar an undertaking that your client will sign all documents necessary to effect transfer of the property in accordance with any order the court may make or any agreement of the claimants.

Rule 58(3) sets out the details which must be included in an interpleader notice. Basically, the interpleader notice:

1. tells the claimants what the stake is;
2. requires each of the claimants to deliver his particulars of claim to the stake; and

3. notifies the claimants that the stakeholder is going to apply to court to decide on his (the stakeholder's) liability or the validity of the respective claims.

The stakeholder is required to attach an affidavit to the notice. In terms of rule 58(4) the stakeholder is required, in his affidavit, to state the following:

1. He claims no interest in the subject matter in dispute, other than for charges and costs.
2. He does not collude with any of the claimants.
3. He is willing to deal with, or act in regard to, the subject matter of the dispute as the court may direct.

In terms of rule 58(5), if a claimant fails to deliver particulars in support of his claim, or fails to appear in court when the interpleader application is heard, the court may make an order barring that claimant, as against the stakeholder, from making any claim in relation to the 'stake' being held by the stakeholder. The claimant must specify an address for service within 15 kilometres of the office of the registrar.[91]

Rule 58(6) sets out the various orders which a court may make in relation to an interpleader matter:

1. Then and there adjudicate upon such claim after hearing such evidence as it deems fit.
2. Order that any claimant be made a defendant in any action already commenced in respect of the subject matter in dispute in lieu of, or in addition to, the applicant.
3. Order that any issue between the claimants be stated by way of a special case or otherwise and tried, and for that purpose order which claimant shall be plaintiff and which shall be defendant.
4. Dismiss the application if it considers that the matter is not a proper matter for relief by way of interpleader notice.
5. Make such order as to costs, and the expenses (if any) incurred by the applicant … as to it may seem meet.

With regard to the type of interpleader matter in which the sheriff of the court is involved, rule 58(1) states as follows:

> **In regard to conflicting claims with respect to property attached in execution, the sheriff shall have the rights of an applicant and an execution creditor shall have the rights of a claimant.**

In other words, the procedure discussed above applies in the same way when the sheriff is the stakeholder, as it does when someone else is the stakeholder.

The court adjudicating the matter may:

1. order any claimant to state orally or in writing under oath or otherwise the nature and particulars of his or her claim;
2. order that the matters in issue are to be tried on a day appointed for that purpose, and order which of the claimants is to be the plaintiff and which is to be the defendant for the purpose of the trial; or
3. try the matters in dispute in a summary manner.[92]

4.3 Interpleader claims in the Magistrates' Courts – rule 44

Interpleader claims in the Magistrates' Courts are dealt with by Magistrates' Courts rule 44 and s 69 of the Magistrates' Courts Act.

Magistrates' Courts rule 44(1) deals with the situation where a stakeholder has in his possession money or property to which two or more persons make adverse claims. This rule must be read together with Magistrates' Courts Form 35.

Magistrates' Courts rule 44(2) deals with the situation in which the *sheriff* is the stakeholder. In these cases, a claim is made on property attached by the sheriff, by a person other than the execution debtor, and the execution creditor does not, after notice of the claim, admit the said claim. This rule must be read together with Magistrates' Courts Form 36. In such a case where a stakeholder (or claimant, as he is referred to in rule 44(2)) makes any claim to or in respect of property attached by the sheriff in execution of any process of the court or where any such claimant makes any claim to the proceeds of property so attached and sold in execution, the sheriff shall require from such claimant to lodge an affidavit in triplicate with the sheriff within 10 days from the date on which such claim is made, setting out certain details which are to be forwarded to the judgment creditor. Those details include the nature and grounds of his claim substantiated by evidence rule 45(2)(*a*) (iii). These details allow the judgment creditor to make an informed decision as to whether to accept or reject such claim. Only once the judgment creditor rejects such a claim will the sheriff then prepare and issue an interpleader summons, calling upon the rival claimants to appear in court and have their claims adjudicated upon. The summons takes the form set out in Form 36 of the Magistrates' Courts forms. In addition to the summons, the applicant must annex an affidavit in which he states that:

1. he claims no interest in the subject matter in dispute other than for charges or costs;
2. he is not in collusion with any of the claimants; and
3. in the case of property other than money paid into court, he is willing to deal with the property as the court may direct.[93]

5 Superannuation of judgments

A party who has secured a judgment debt has a certain period of time within which he must take steps to execute against the assets of the judgment debtor. If he does not do so in time, the judgment is said to superannuate, and certain consequences result for the judgment creditor who wishes to proceed with execution.

5.1 Superannuation of judgments in the High Court

In terms of the Prescription Act, a judgment debt (the debt a party owes to the creditor on account of a judgment awarded against him) only prescribes once a period of 30 years has passed from the date on which the judgment was granted. One of the two main ways in which the judgment creditor may seek to recover a judgment debt is by issuing a writ of execution against the assets of the judgment debtor.[94] Previously, in terms of High Court rule 66(1), you could *not* issue a writ of execution to enforce a judgment if *more than three years* have passed since the date on which the judgment was granted *unless* the debtor consented to the issue of the writ *or* the judgment was revived by the court on notice to the debtor.

This rule was amended in 2014, and now provides as follows:

> **Writs of execution of a judgment once issued remain in force, and may, subject to [the Prescription Act], at any time be executed without being renewed until judgment has been satisfied in full.**

5.2 Superannuation of judgments in the Magistrates' Courts

Superannuation of Magistrates' Courts judgments is dealt with by s 63 of the Magistrates' Courts Act, which reads as follows:

> **… execution against property may not be issued upon a judgment after three years from the day on which it was pronounced or on which the last payment in respect thereof was made, except upon an order of the court in which judgment was pronounced or of any court having jurisdiction, in respect of the judgment debtor, on the application and at the expense of the judgment creditor, after due notice to the judgment debtor to show cause why execution should not be issued.**

For further discussion see the decision in *Absa Bank Ltd v Snyman*.[95] See Stage 2 for a comprehensive discussion of superannuation of judgments and summons.

PART 2: DEBT COLLECTION PROCEDURES

B: Section 65 procedure

1 General overview

If used correctly, the so-called section 65 procedure, which is set out in the Magistrates' Courts Act,[96] can be a very effective procedure for the *collection of judgment debts*.[97] The main thrust of s 65A (which is the heart of s 65) is to set up an enquiry at which the financial position of the judgment debtor can be properly assessed. Once it is clear how much the judgment debtor can afford to pay (usually on an instalment basis), the court can make an order to this effect.[98]

The s 65 procedure need not be restricted to the recovery of money judgments in the Magistrates' Courts, which are smaller, in comparison, than the money judgments in the High Court. It can also be used in the recovery of large High Court money judgments.

2 Section 65M

The first thing to note about s 65 is that, although it is a Magistrates' Courts debt collection procedure, it may also be used for judgments taken in the *High Court*, provided that the provisions of s 65M are complied with:

> **If a judgment for the payment of any amount of money has been given by a division of the Supreme Court of South Africa, the judgment creditor may file with the clerk of the court from which the judgment creditor is required to issue a notice in terms of s 65A(1), a certified copy of such judgment and an affidavit or affirmation by the judgment creditor or a certificate by his attorney specifying the amount still owing under the judgment and how such amount is arrived at, and thereupon such judgment, whether or not the amount of such judgment would otherwise have exceeded the jurisdiction of the court, shall have all the effects of a judgment of such court and any proceedings may be taken thereon as**

if it were a judgment lawfully given in such court in favour of the judgment creditor for the amount mentioned in the affidavit or affirmation or the certificate as still owing under such judgment, subject however to the right of the judgment debtor to dispute the correctness of the amount specified in the said affidavit or affirmation or certificate.

3 The section 65A procedure

The s 65 procedure can only be brought in the court in the district in which the debtor works and/or resides.

The *procedure* is as follows:

1. Judgment is handed down by the court.
2. In most cases, the judgment will have been by default. In other words, neither the judgment debtor nor his representative (attorney) would have been present when judgment was handed down. If this was the case, the judgment creditor has to send a registered letter to the judgment debtor, in which the judgment debtor is informed about the terms of the judgment. (This is not necessary, however, if the judgment creditor served a warrant of execution on the judgment debtor personally – i.e. opted for the warrant of execution route before trying s 65.)[99] In the letter the judgment creditor should request payment within 10 days.
3. Ten days must elapse from the date on which the letter was posted.[100]

P35

A notice may then be issued[101] calling on the judgment debtor to come to court to attend an enquiry into his financial position. The notice must be supported by an affidavit by the judgment creditor or a certificate by his attorney, in which the information prescribed by rule 45(1)(*a*)–(*d*)[102] is clearly set out (for example, stating in what respect the judgment debtor has failed to comply with the judgment or order referred to in s 65A(1) of the Act, the amount in arrears and outstanding balances on the date upon which the notice is issued). The financial enquiry is then held in the magistrate's chambers. The court must be situated in the district where the debtor stays, is employed or carries on business. If the judgment debtor is a juristic person, e.g. a company, then the notice may be served on a director or officer of the company.[103]

1. The notice must be served on the judgment debtor:
   by the sheriff
   or
   by the attorney or candidate attorney representing the judgment creditor
   and
   at least 10 court days before the date on which the judgment debtor is to appear in court for the financial enquiry.[104]
2. If the judgment debtor ignores the notice to attend the financial enquiry and fails to appear at court on the day set out in the notice, the judgment creditor or his attorney may request the court to authorise the issue of a warrant directing the sheriff to arrest the judgment debtor.[105]

3. If the court authorises the warrant, the judgment creditor or his attorney may prepare a warrant, have it signed by the clerk of the court, and then deliver it to the sheriff who will go out and arrest the judgment debtor.[106]
4. Once the sheriff has arrested the judgment debtor, he must be brought before a competent court as soon as possible.[107]
5. By ignoring the notice to attend the financial enquiry, the judgment debtor may be guilty of an offence and be liable on conviction to a fine or to imprisonment for up to three months.[108]
6. The court before which the judgment debtor is brought after arrest will conduct a summary enquiry into whether or not the judgment debtor is guilty of such an offence.[109]
7. Before conducting the summary enquiry, the court will explain to the judgment debtor what is going on (i.e. that a summary trial is going to be held and that he may be convicted of the offence referred to and fined or sent to prison), and will tell the judgment debtor that he has the right to choose, and be represented by, a legal practitioner.[110]
8. The court will have regard to the following rights of the judgment debtor during the summary enquiry:
    1. The right to remain silent and to be presumed innocent.
    2. The right to adduce and to challenge evidence.
    3. The right not to be compelled to give incriminating evidence.[111]
9. After the summary enquiry has been held, the court will proceed with the enquiry into the judgment debtor's financial affairs.[112]
10. If the court establishes that the debtor can afford to pay off a certain amount per month, it will probably order him to do so.[113]
11. If the debtor disobeys the court's order by refusing to pay the instalments, he will contravene s 106 of the Magistrates' Courts Act.
12. In terms of s 106 of the Magistrates' Courts Act, any person who wilfully disobeys, or refuses, or fails to comply with any judgment or order of a court, shall be guilty of contempt of court and shall, upon conviction, be liable to a fine or to imprisonment for a period not exceeding six months.

4 Juristic persons and the state

As mentioned above, the s 65 procedure can be used not only against natural persons who are judgment debtors, but also against juristic persons. Section 65A(1)(*a*) explains that the judgment creditor 'may issue, from the court of the district in which the judgment debtor resides, carries on business or is employed, or if the judgment debtor is a juristic person, from the court of the district in which the registered office or main place of business of the juristic person is situated, a notice calling upon the judgment debtor, or if the judgment debtor is a juristic person a director or officer of the juristic person as representative of the juristic person and in his or her personal capacity', a notice to appear before court for a s 65 enquiry.

According to the High Court in *Lombard v Minister van Verdediging*,[114] the provisions of s 65A(1) are *not applicable* in circumstances where the state is the judgment debtor. In the quoted case, the judgment debt arose from damages flowing from a collision between the plaintiff's motor vehicle and a motor vehicle driven by an employee of the Minister of Defence. Judgment in the amount of R6 400 had been given in 1999 and the defendant – the Minister of Defence – did not ensure that the judgment debt was paid, with the result that the plaintiff served a s 65A(2) notice on the defendant, calling on the defendant to make payment within ten days. When the defendant defaulted, the plaintiff issued a notice in terms of s 65A(1) requiring the defendant to appear in court for a financial enquiry into the defendant's department, the Department of

Defence. The matter eventually came on appeal to the High Court. According to the court, the proceedings in terms of s 65A were irregular for two reasons: s 65A(1) refers to natural persons and legal persons, but not the state, and s 3 of the State Liability Act 20 of 1957 prohibits the issuing of a warrant of execution or attachment or similar process against the state. According to the court, the plaintiff's correct remedy would have been to attempt a prosecution of the state for contempt of court.

PART 2: DEBT COLLECTION PROCEDURES

C: Administration orders

1 General overview

Administration orders are dealt with in terms of s 74 of the Magistrates' Courts Act. In terms of the section, a debtor who is unable to pay his debts may apply for an administration order, provided that his debts do not exceed an amount of R50 000.[115]Where such an application is granted, the administration order then obliges the debtor to make regular payments to an administrator. The administrator is obliged to draw up a list of creditors and must pay them from the amounts received from the debtor. It is in this regard that the administration order might be considered part of the 'debt-collection procedures'. While an administration order is a debt relief measure available to debtors who find themselves in financial trouble (in as much as it provides them with an opportunity to obtain a statutory rescheduling of debt, sanctioned by a court order), the order operates as something of a debt collection mechanism for creditors who are entitled to a *pro rata* distribution of the payments that the debtor has, in terms of the administration order, been obliged to make to the administrator. The administration procedure is therefore a modified form of insolvency, well-suited to deal with relatively small estates where the costs of sequestration would exhaust the estate.[116] The procedure should not be confused with debt review proceedings under the National Credit Act.[117]

2 The procedure

The procedure for obtaining an administration order is described below.

2.1 The application for an administration order

First, the debtor who is in financial trouble drafts a document in which he makes application for an administration order.[118]Administration is only available to natural person debtors and not to juristic persons. Attached to the application document must be a full statement of the debtor's financial affairs,[119] including a list of all the debtor's creditors and the amounts owed by him to each of them severally.[120] Upon completing the application, the debtor lodges the application with the clerk of the court and delivers personally or by registered post to each of his creditors, at least three days before the date appointed for the hearing, a copy of the application and the statement of his affairs, containing the case number under which the original application was filed.[121]

2.2 The hearing

The application is heard by a magistrate with the debtor appearing in person or with his legal representative before the court. Creditors, whether or not they have received notice in terms of s 74A(5), may attend the hearing.[122]

The debtor is then questioned, either by the court or by the creditors,[123] in respect of the circumstances having a bearing upon the envisaged administration order. During this examination, the debtor may be examined only in regard to the following:

1. His assets and liabilities;
2. His present and future income and that of his spouse living with him;
3. His standard of living and the possibility of economising, and
4. Any other matter that the court may deem relevant.[124]

The debts that the debtor listed in his statement to the court are deemed to be proved, unless any creditor raises an objection to a particular debt or the court rejects it or requires it to be substantiated.[125] Any creditor to whose claim an objection is raised by the debtor or by any other creditor, or who is required by the court to substantiate the debt, must provide proof of the debt allegedly due to him.[126]

2.3 The administration order

If the court grants the administration order, the order must take the prescribed form, the content and form of which is regulated by s 74C and Annexure 1 Form 51, respectively. The salient parts of the order are as follows:

1. An order that the debtor's estate be placed under administration;
2. That the administrator is nominated and appointed; and
3. The amount that the debtor is obliged to pay weekly or monthly to the administrator.

As part of the administration order the court may authorise that an emoluments order or a garnishee order is issued.[127]

2.4 The appointment of an administrator and his tasks

After issuing its order, the court nominates and appoints a person as administrator. The administrator, after appointment, forwards a copy of the administration order by registered post to every creditor whose name is mentioned by the debtor in his statement of affairs, or who has given proof of a debt.[128]

The administrator then draws up a complete list of the names of creditors and the amounts owing to them individually, as at the date on which the administration order was granted, and lodges the list with the clerk of the court.[129] This list of creditors lies for inspection by the creditors or their attorneys at the office of the clerk of the court and the office of the administrator at any time during office hours.[130] The rule provides that creditors may object to any debt included in the list of creditors, or may provide proof of a debt owing before the making of the administration order and not listed in that order.[131]

2.5 Payment to the administrator and to the creditors

The debtor is then obliged to pay the administrator the amounts of the weekly or monthly or other payments stipulated in the administration order.[132] If he fails to do so, the court may

undertake an investigation into the debtor's failure to make the payments due by him at a hearing to which the debtor will have been summoned. The s 65 procedure is utilised in this regard.[133]

Where the debtor pays in terms of the administration order, the administrator collects the payments and keeps an up-to-date list of all payments and other funds received by him from or on behalf of the debtor. He then distributes these amounts *pro rata* among the creditors, at least once every three months, unless the creditors agree otherwise or the court orders otherwise in a particular case.[134] He must undertake such distribution in accordance with the laws relating to insolvency, so that claims that would enjoy preference under those laws are paid out in the correct order.[135]

1Act 32 of 1944.

2*De Crespigny v De Crespigny* 1959 (1) SA 149 (N). See *Herbstein and Van Winsen* (2009), op. cit., at 1022.

3*Metropolitan Industrial Corporation (Pty) Ltd v Hughes* 1969 (1) SA 224 (T) at 227. There are two exceptions to this general rule: the first is when there has been a failure to comply with an order for the payment of maintenance or a contribution towards costs in a matrimonial matter (see *Dezius v Dezius* 2006 (6) SA 395 (T) at 402–403; and the second is possibly when there is a failure to a pay an order of costs *de bonis propriis* (see *Hofmeyer v Fourie; BJBS Contractors (Pty) Ltd v Lategan* 1975 (2) SA 590 (C) at 597). See also *SH v GF* 2013 (6) SA 621 (SCA) and *JC v DC* 2014 (2) SA 138 (WCC) at paras[35]–[37].

4See the section dealing with *Anton Piller* orders above in Section G: Drastic procedures.

5Note that the common law and s 30 of the Magistrates' Courts Act, which allowed for arrest *tanquam suspectus de fuga*, were declared unconstitutional in *Malachi v Cape Dance Academy International (Pty) Ltd and Others* 2010 (7) BCLR 678 (WCC). The declaration in respect of s 30 of the Magistrates' Courts Act was confirmed by the Constitutional Court in *Malachi v Cape Dance Academy International (Pty) Ltd and Others* 2010 (6) SA 1 (CC)). See further Stage Four.

634 of 2005.

7Section 129, read with 130(1) of the National Credit Act 34 of 2005.

8Act 10 of 2013.

9High Court rule 45(1).

10See *Le Roux v Yskor Landgoed (Edms) Bpk en Andere* 1984 (4) SA 252 (T) at 257. See also *Wichmann v Standard Bank van Suid-Africa Bpk en Andere* [2002] 1 All SA 558 (T).

11Ibid.

1210 of 2013.

1359 of 1959.

14Section 2(1) of the General Pensions Act 29 of 1979.

15Rule 45(1), amended by GN R981 of 19 November 2010. This was already the position at common law. See *McNutt v Mostert* 1949 (3) SA 253 (T).

16Rule 45(3) does not require that the debtor must be at his home or his place of employment or business in order for the service to be proper. It was held in *Wilken and Others NNO v Reichenberg* 1999 (1) SA 852 (W) at 858–859 that 'the Rule allows … service at such places in the absence of the debtor'.

17See rule 45(5).

18Rule 45(3)(*c*)(i).

19Rule 45(3)(*c*)(ii).

20Rule 45(6).

21Rule 45(4).

22Rule 45(7).

23Ibid.

24Ibid. Bear in mind that the Consumer Protection Act 68 of 2008 would apply to such auctions – see ss 18 to 33.

25Rule 45(10).

262008 (5) SA 94 (CC).

27*Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC), which followed from the line of authority in *Jaftha v Schoeman and Others*; *Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC).

28Rule 46(1)(*a*)(ii).

292011 (3) SA 608 (CC).

302005 (2) SA 140 (CC) (2005 (1) BCLR 78) (CC).
31*Standard Bank of South Africa Ltd v Bekker and Another and Four Similar Cases* 2011 (6) SA 111 (WCC).
32*FirstRand Bank Ltd v Folscher and Another, and Similar Matters* 2011 (4) SA 314 (GNP) and *Nedbank Ltd v Jessa and Another* 2012 (6) SA 166 (WCC). See also, for example, para 26 of the KwaZulu-Natal Division of the High Court Practice Manual.
33Rule 46(1).
34Rule 46(4).
35Ibid.
36Rule 46(5)(*a*).
37Rule 46(5)(*b*).
38Rule 46(7)(*a*).
39Rule 46(7)(*c*).
40Rule 46(8)(*a*).
41Rule 46(7)(*d*).
42See *Todd v FirstRand Bank Ltd and Others* [2013] 3 All SA 500 (SCA) as to the effect of noncompliance with this rule.
43Rule 46(7)(*c*).
44Rule 46(10).
45Rule 46(14)(*b*).
46Rule 42(1).
47Rule 42(2).
48Section 65E(4) of the Magistrates' Court Act 32 of 1944.
49Rule 36(1).
50Section 17 of the Magistrates' Courts Act.
51Section 67.
52Rule 41(1)(*a*).
53Rule 41(3).
54Rule 41(1)(*a*).
55Rule 41(*2*).
56Rule 41(1)(*a*).
57Section 66(8) of the Magistrates' Courts Act 32 of 1944.
58Note too the SCA's decision in *Menqa and Another v Markom and Others* 2008 (2) SA 120 (SCA), where the Court clarified that sales in execution of immovable property (and subsequent sales) were invalid if the warrant of execution pursuant to which the sales had taken place had been issued by the clerk of the Magistrates' Court without judicial supervision (as indicated in *Jaftha v Schoeman and Others*; *Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC)), and the absence of this procedural safeguard imperilled a party's s 26(1) constitutional rights, even if they occurred prior to the *Jaftha* case (supra). See in particular paras [21]–[22] at 128H–129D.
59Rule 41(4).
60Rule 45(6) of the High Court Rules.
61Rule 41(7)(*a*). Note that for the attachment of goods in security of rent, see the decision in *Timmerman v Le Roux* 2000 (4) SA 59 (W).
62Paterson (2005), op. cit., 260.
63Rule 41(9).
64Rule 41(8)(*c*).
65*Stratgro Capital (SA) Ltd v Theodorus NO and Others* [2009] JOL 24610 (SCA) paras [16]–[17].
66*Absa Bank Ltd v Van Eeden and Others* 2011 (4) SA 430 (GSJ).
67Rule 41(8)(*a*).
68*Foley v Taylor and Another* 1971 (4) SA 515 (D) 519. However, the decision in *Foley* was not followed in *Gouws v Theologo and Another* 1980 (2) SA 304 (W). See too the decision in *Pienaar v Pienaar en Andere* 2000 (1) SA 231 (O).
69Rule 45(12)(*a*).
70Ibid.
71Rule 45(12)(*b*).

72See *Iscor Pension Fund v Jerling and Others* 1978 (3) SA 858 (T) at 863B–864C. In the *Iscor Pension Fund* case Margo J pointed out that the sub-rule concerned is mandatory and that the sheriff has to take possession of the document evidencing the ownership of such property or right, or has to certify that despite diligent search, the document could not be found. See also *Badenhorst v Balju, Pretoria Sentraal, en Andere* 1998 (4) SA 132 (T) at 140B–C.

73Rule 45(8)(*a*).

74Rule 45(8)(*b*).

75Rule 45(9).

76See *South African Congo Oil Co (Pty) Ltd v Identiguard International (Pty) Ltd* 2012 (5) SA 125 (SCA) at para 23, read with *Stratgro Capital (SA) Ltd v Lombard NO and Others* 2010 (2) SA 530 (SCA)at paras [15]–[17].

771998 (4) SA 132 (T).

78The case dealt with an application for the rescission of an attachment and sale in execution of the interest of members in a close corporation. See, however, the decision in *Carlzeil Properties (Pty) Ltd v Goncalves and Others* 2000 (3) SA 739 (T) where the High Court, without referring to the *Badenhorst* decision, found (on account of the provisions of s 34A of the Close Corporations Act 69 of 1984) that a member's interest in a close corporation is now regarded as movable property, capable of attachment and sale in execution in a Magistrates' Court. It seems, therefore, that a litigant may approach the court for attachment of such interest either as an incorporeal (in terms of the *Badenhorst* case) or as a corporeal (in the light of the *Carlzeil* case).

79In *Badenhorst*, supra, the court held that if such a certificate cannot be found or has been lost or was never issued, it will be sufficient for the sheriff to attach the founding statement of the close corporation which has to be filed with the Registrar of Companies and that such document, *inter alia*, represents and is proof of the incorporeal right it represents (139E–F).

80*Badenhorst*, supra, 139F.

81Rule 45(8)(*c*).

82Section 65J(1)(*b*)(i).

83Section 65J(2)(*a*).

84Section 65J(2)(*b*)(i), prior to the order of the Constitutional Court in University of Stellenbosch Legal Aid Clinic.

85Section 65J(2)(*b*)(ii) See further *Minter NO v Baker and Another* 2001 (3) SA 175 (W) at 181B–182E/F.

86*University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others*; *Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others*; *Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others* (CCT 127/15) [2016] ZACC 32.

87Section 65J(1)(*a*).

88Ibid.

89Section 65J(1)(*b*)(ii).

90The Hire Purchase Act 36 of 1942 has been repealed and replaced by the Credit Agreements Act 75 of 1980.

91Rule 58(5A). This rule refers to High Court rule 6(5)(*b*), which in turn makes reference to a distance of eight kilometres, is out of kilter with other provisions of the rules (which were updated to require an address within 15 kilometres). The reference to eight kilometres was likely an oversight by the Rules Board and we anticipate that it will be corrected in due course.

92Rule 58(6)(*a*)–(*e*).

93Rule 44(1)(*c*)(i)–(iii).

94The other way being a s 65 procedure.

952015 (4) SA 329 (SCA); [2015] 3 All SA 1 (SCA).

96Act 32 of 1944.

97However, see the criticisms directed against the s 65 procedure by Yssel, R: 'The resurrection of the long dead: the "new" s 65 procedure' (1998) May *De Rebus* 69 and Yssel, R: 'Alice in the debtor's court' (1999) February *De Rebus* 21.

98In what follows we discuss the s 65 procedure as amended by the Constitutional Court's decision in *Coetzee v Government of the Republic of South Africa*; *Matiso and Others v Commanding Officer, Port Elizabeth Prison and Others* 1995 (10) BCLR 1382 (CC). Prior to the decision in *Coetzee*, s 65 provided that a judgment debtor who had failed to satisfy a judgment debt could be required to attend a hearing at which a magistrate was entitled to issue an order to commit him to prison for contempt of court for failure to pay the debt (s 65F). The provision for imprisonment of judgment debtors was declared to be unconstitutional in *Coetzee*.

Subsequent to this judgment, s 65 was amended by the Magistrates' Courts Amendment Act 81 of 1997, and the 'new' provisions became law on 10 December 1997. The effect of this amendment is that imprisonment remains an option in terms of the revised s 65.

99 Section 65A(2).

100 Ibid.

101 This notice is in accordance with Form 40.

102 See rule 45 of the Magistrates' Courts Rules.

103 Section 65A(1)(*a*).

104 Ibid.

105 Section 65A(6).

106 Section 65A(7).

107 Section 65A(8).

108 Section 65A(9). In practice, it may be particularly difficult, however, to obtain a conviction in respect of the debtor's failure to appear, since such failure must be shown to have been 'wilful' (s 65A(9)) and the offence must be proved 'beyond reasonable doubt' – s 65A(10)(*a*)(i).

109 Section 65A(10)(*a*).

110 Section 65A(10)(*b*).

111 Section 65A(10)(*c*)(i).

112 Section 65A(11).

113 Section 65D, as amended by s 172(2) of the National Credit Act 34 of 2005, deals with the financial enquiry.

114 2002 (3) SA 242 (T).

115 See s 74(1)(*b*) and GN 217 of 27 March 2014 in *Government Gazette* No. 37477.

116 Boraine, A: 'Some thoughts on the reform of administration orders and related issues', (2003) 36 *De Jure* 217 at 225. See also *Fortuin and Others v Various Creditors* 2004 (2) SA 570 (C).

117 34 of 2005.

118 The document must be in the manner prescribed in Annexure 1, Form 44 of the Magistrates' Courts Act Forms.

119 Section 74A(1).

120 In this respect, Form 45 of the Magistrates' Courts Act Forms may be used for the sake of convenience.

121 Section 74A(5). Creditors may provide proof of the claim due to them and may object to any debt listed by the debtor in his statement of affairs.

122 Section 74B(1)(*a*).

123 Section 74B(1)(*e*).

124 Section 74B(1)(*e*) and *Els v Els* 1967 (3) SA 207 (T).

125 Section 74B(1)(*b*).

126 Section 74B(1)(*c*).

127 Section 74D.

128 Section 74F(2).

129 Section 74G(1).

130 Section 74G(10)(*a*).

131 See s 74G(10)(*b*) and s 74G(2) and (3).

132 Section 74I(1).

133 Section 74I(2).

134 Section 74J(1).

135 Section 74J(3).

STAGE FOUR:

ADDITIONAL PROCEDURES

A: Settlement

B: Provisional sentence

C: Interim relief pending judgment

D: Arrest *tanquam suspectus de fuga*

E: Multiple parties and actions

F: Interdicts

G: Drastic procedures

H: Declarations of rights and stated cases

I: Small Claims Court procedures

J: Other civil courts

ADDITIONAL PROCEDURES

A: Settlement

1 General overview

A dispute in a civil matter may be settled at any time prior to the institution of legal proceedings, usually after demand has been made,[1] and thereafter at any time right up to the time of judgment.

Many matters are settled before the institution of legal proceedings, and many others are settled before the matter goes to court.[2] This is to be expected for if the dispute is left in the hands of the court, the parties to the dispute lose control over the matter, and are reliant on an 'unpredictable' third party (i.e. the judge) to decide their fate.

The process of reaching a settlement requires many and varied skills, such as negotiation and mediation techniques, coupled with some knowledge of behavioural psychology and an insight into human nature. A discussion of these skills is beyond the scope of this book – we focus only on the making and acceptance of settlement offers in law, and the legal aspects incidental to these settlement procedures.

Settlement procedures are essentially based on common law (especially the law of contract), with a settlement agreement being an offer which is made by an offeror (who is usually the defendant) and then accepted by an offeree (who is usually the plaintiff).[3] These common law contractual principles are supplemented by reliance on the Rules of Court, specifically High Court rule 34 and Magistrates' Court rule 18.[4]

The most important common-law principle relevant to reaching a settlement is the distinction between unconditional offers to settle, and offers of compromise. These types of settlement may be used in High Court and Regional and District Magistrates' Courts matters.

2 Offers at common law: unconditional offer versus offer of compromise

Assume that you are an attorney attempting to negotiate a settlement on behalf of a client. One of the most important points that you must bear in mind is the common-law distinction between an *unconditional offer* and an *offer of compromise*.

Different consequences are attached to the acceptance of each of these types of offers. If you are making an offer of settlement on behalf of your client, it is very important that you make it absolutely clear to your opponent which type of offer you are making. Likewise, if you are considering whether or not to *accept* an offer on behalf of your client, you must make sure which type of offer is being put to you for acceptance.

Let us consider each type of offer in turn.

2.1 The unconditional offer

An unconditional offer is an admission of liability to the whole or part of the offeree's claim.

By making such an offer, the offeror is *acknowledging debt* in respect of the part or the whole of the claim to which it refers.[5]

If the unconditional offer relates to *part* of the offeree's claim only, the offeree is entitled to accept the unconditional offer in respect of that part of the claim only, and commence legal proceedings against the offeror for the balance of the claim to which the unconditional offer did not relate. In other words, by making the offer, the offeror is effectively saying the following to the offeree:

> **I admit that I owe you that particular part of your claim and I'm prepared to pay it. I deny that I owe you the rest of your claim and you're welcome to take the risk of suing me for it if you want to.**

In order to qualify as an unconditional offer, it must be made *animo solvendi*. This means that it must be clear that the intention of the offeror was to admit liability for the whole or part of the offeree's claim. The intention must be made clear: debtors who express themselves inadequately in their intentions to achieve a compromise run the risk of having their words interpreted against them[6] and offers of compromise will be strictly interpreted.[7]

2.2 The offer of compromise

2.2.1 Introduction

An offer of compromise (also known as a *without prejudice* offer, or *tender with admission of liability*)[8] is an offer made under denial of liability.[9] In other words, the offeror denies that he is liable for part or the whole of the offeree's claim, but is nevertheless prepared to make an offer

in order to settle the matter for an amount less than the original claim. The essence of an offer of compromise is that the defendant is asking the plaintiff to accept less than he is asking for in order to settle the whole claim without the need for litigation. What the offeror is usually saying to the offeree is something along these lines:

> **As far as I'm concerned, I don't think your claim is valid and I don't owe you anything. I'm a busy person, however, and I don't want to be tied up in expensive and time-consuming litigation in relation to this matter. Why don't you accept the following partial payment in full and final settlement of your whole claim and we can call it quits.**

When the offeror makes an offer of compromise, he does so *animo contrahendi*. This means that the offer is made with the intention of entering into an agreement – that is a compromise agreement. This intention must be clear from the wording of the offer. If it appears from the offer's wording that the intention of the offeror was to make an *unconditional offer* rather than an offer of compromise, adding the words 'without prejudice' to the document containing the offer will *not* convert it into an offer of compromise. (The pitfalls involved in wording an offer of compromise are considered below.)

A consequence of the offeree's accepting an offer of compromise is that *transactio* takes place (i.e. a compromise is effected), and the entire original claim is extinguished. This means that a novation occurs and the original cause of action is ended and replaced with a new cause of action, which is the agreement to pay in terms of the offer of compromise. In the case of *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd and Others*,[10] *transactio* was described as an agreement between two or more persons, either to end litigation, or to prevent litigation. Each party recedes from his previously held position and concedes something.[11]

By accepting the compromise offer, the offeree gives up his right to sue for any balance outstanding. The offeree may, however, reserve his right to revert to his original cause of action (which will allow him to sue for the whole of his original claim) if the offeror does not perform in terms of the offer of compromise, by including a term to this effect in the compromise agreement.
If, however, the offeror does perform as agreed, the offeree is legally precluded from recovering the balance of his claim.

2.2.2 Making an offer of compromise: possible pitfalls

When drafting an offer of compromise on behalf of the offeror, the first and most important point to clarify is that the offer is an *offer of compromise*, and not an *unconditional offer*.

The wording of the offer must be unambiguous, and the context in which the words are used must not give rise to any doubts as to the nature and precise scope of the offer. In the case of *Mulla v Rajkumar*,[12] the court stated that 'what is clear and unambiguous must prevail,' and in *Karson v Minister of Public Works*,[13] the court ruled that an ambiguous offer will be construed *contra proferentem* (i.e. given the interpretation most favourable to the party that did not draft the initial offer).
Stating that an offer is made 'without prejudice' and that the lesser amount is being offered 'in full and final settlement' of the claim are strong indications that an *offer of compromise*, as

opposed to an *unconditional offer*, is being made. There is no magic to these words, however, and the context in which they are used will establish if the intention of the offeror was to make an offer of compromise or an unconditional offer.[14]

Let us assume that Abel is claiming an amount of R100 000 from Ben. Ben now makes a settlement offer to Abel as follows:

> **I offer R20 000 in full and final settlement of my debt.**

The words 'my debt' imply that the offeror is only admitting liability for the amount which he considers he owes to Abel. In other words, this could be interpreted as an *unconditional offer*. If so, the offeror is entitled to accept the offer and sue for the outstanding balance of R80 000.
Assume, however, that Ben's offer had read as follows:

> **I offer you R20 000 in full and final settlement of your claim.**

This wording indicates that this is an *offer of compromise* as Ben is offering a lesser amount in settlement of the *whole* claim. If Abel accepts this offer, he will *not* be entitled to sue for the outstanding balance of R80 000.

Apart from making it absolutely clear that the offer is an offer of compromise as opposed to an unconditional offer, the precise *extent* of the offer must also be specified. For example, it must be stipulated whether the offer is being made in relation to the offeree's principal claim alone, or whether it is being made in relation to the principal claim, plus any claim for interest and costs.
Here is an example of a cautiously worded offer of compromise:

> **For the sole purpose of settling this matter, and without admitting my liability for any part of your claim, I hereby offer, without prejudice, the amount of R50 000 in full and final settlement of your present claim, and any future claims you may seek to bring against me, including all related claims for interest and costs, arising out of the motor vehicle collision which took place on 1 January 2016, at the corner of Jan Smuts Drive and Lanchester Road, Johannesburg, between motor vehicles GP 7007 and BDH 069 GP.**

2.2.3 Accepting an offer of compromise: possible pitfalls

There are several important points to remember when deciding whether or not to accept an offer of compromise on behalf of a client.

When you accept an offer of compromise on behalf of your client, you are effectively giving up your client's right to claim the full amount outstanding in terms of his claim, and restricting his claim to the amount of the compromise offer. Therefore, before you do anything which may be construed as an acceptance of the offer, you must explain the full legal consequences to your client, and ascertain his wishes in the matter. If you are unsure of your client's wishes, beware of accepting any money offered, unless you are absolutely certain that the offer is unconditional as opposed to an offer of compromise. The courts have held that the retention of a payment may be construed as acceptance of an offer of compromise even if the offeree contends that he was under the mistaken belief that the offer was unconditional.[15]

If you accept the offer unconditionally, your client's original cause of action falls away, and is replaced by a cause of action based on the offer of compromise.[16] If the offeror fails to make good on the offer, your client is restricted to claiming no more than the amount of the offer. Your client may not revert to his original cause of action and claim the full amount originally demanded from the offeror. In order to avoid this, it is wise to accept an offer of compromise on condition that if payment is not made in full and on the due date in terms of the offer, the offeree is entitled to revert to his original cause of action and to sue for the original amount demanded.[17]

If the offeror offers to pay the amount offered in instalments, it is important to remember that a separate cause of action will arise each time an instalment is not paid, and will relate only to the amount of the instalment not paid. It is not prudent to accept an offer of payment in instalments unless an *acceleration clause* is included in the document containing the offer. Such a clause permits the offeree to sue for the full balance outstanding if any single instalment is not made in full on due date.

2.2.4 Proving an offer of compromise: responding to a claim

Assume that you act for a client who made an offer of compromise which was accepted by the claimant. He made good on the offer and expected the matter to be at an end. He then received a summons claiming the balance of the original demand. In this case, you will defend the matter and plead in your client's defence that the plaintiff accepted an offer of compromise made by your client. In general terms, your client will have to satisfy the court of the following:

1. He intended to make, and did make, an offer of compromise which was accepted by the plaintiff. Of course, if the offer was unconditional (as opposed to an offer of compromise), the plaintiff is *entitled* to sue for the balance outstanding, and your client's plea will not be successful. As for the acceptance of the offer by the plaintiff, this acceptance is often indicated by the fact that an amount of money equal to the amount of money offered and paid to the plaintiff, was deposited by the plaintiff into his bank account.
2. He *made good* on the offer (for example, if the offer was for the payment of money, that he paid the amount offered in full on the stipulated date). Alternatively, if the date for payment has not yet fallen due, he will make good on the offer.
3. His offer of compromise related to the *whole of the plaintiff's claim, plus interest and costs*. In other words, the offer disposed of the whole of the plaintiff's claim, including interest and costs, and there was no valid reason for the issue of summons.

3 Offers to settle during litigation

3.1 Introduction: offer to settle as a defensive weapon

Sometimes, all attempts to settle a matter without litigation fail. An aggrieved party may, for example, refuse to accept an offer of compromise and proceed to issue summons or, having accepted an offer of compromise, may decide to sue your client for the outstanding balance of his original claim, despite the settlement agreement. In the sections that follow, we deal with the specific procedures provided for in both the High Court and Magistrates' Courts Rules for making and accepting offers of settlement during litigation.[18]

The procedures for making and accepting offers during litigation are designed to encourage and support defendants who are prepared to make an offer of compromise to settle matters without further litigation. A well-calculated offer made in terms of these rules can take the wind out of

the sails of the plaintiff's case, and effectively place the plaintiff on the defensive from the time the offer is made.

3.2 Settlement procedures during litigation in the High Court

3.2.1 Written offers and tenders

Offers of settlement in the High Court are covered by High Court rule 34.[19]

Rule 34 distinguishes between two types of claim:

1. *Money claims*: Actions in which a *sum of money* is claimed, either with or without a claim for additional or alternative relief.
2. *Performance claims*: Actions in which the plaintiff claims the *performance of some act* by the defendant, for example ejectment, the passing of transfer of property, or the delivery of specified movable property.

The way in which you offer to settle the first type of claim is set out in High Court rule 34(1).

The defendant must provide a *written offer* to settle the plaintiff's claim, which must be signed either by the defendant himself, or by his attorney if the latter has been authorised thereto in writing. The way you offer to settle the second type of claim is set out in High Court rule 34(2). The defendant must provide a *tender*,[20] stating in unambiguous terms that he will perform the act demanded in the plaintiff's claim. (If the act is one which can be performed by someone other than the defendant, then the defendant must also provide an *irrevocable power of attorney* authorising someone else to perform the act.)

Note that although rule 34 distinguishes between an 'offer' and a 'tender', in other contexts the word 'tender' is often used to mean 'offer' (for example, in some cases dealing with common-law settlement procedures).[21] For present purposes the difference can be understood as follows: offers concern money and are made in terms of rule 34(1) whereas tenders concern performance and are made in terms of rule 34(2).

Note that settlements are used extensively in divorce proceedings and usually deal with matters such as the division of the assets of the parties, the payment of maintenance, custody of, and contact with, the children and the payment of the costs of the proceedings.[22]

3.2.2 The consequences of a 'without prejudice' offer or tender

Rule 34 makes the important distinction between *unconditional* and *without prejudice* offers and tenders. In our earlier discussion of the general contractual principles applicable, we referred to this fundamental distinction as that between 'unconditional offers' and 'offers of compromise'.[23]

An important difference between an offer or tender that is unconditional, and one that is made without prejudice, is that the existence of a without prejudice offer or tender may *not* be revealed to the court at any stage before judgment has been given in the matter, whereas the existence of an unconditional offer *may* be disclosed to the court before judgment. No reference to the fact that a without prejudice tender or offer has been made may appear on the court file. If a party discloses that such an offer or tender was made, he or she will be liable for an adverse costs order, even if successful in the matter.[24]

As far as the plaintiff is concerned, the real sting in the tail of the rule 34 procedure relates to *costs*. Once the defendant makes a without prejudice offer in terms of rule 34, the plaintiff is potentially at risk of forfeiting the costs he may normally recover from the defendant at the conclusion of the matter. Assume, for example, that the plaintiff refuses the defendant's without prejudice offer or tender in terms of rule 34, and the matter proceeds to trial. If the court then gives judgment in favour of the plaintiff, but for an amount less than that offered by the defendant, the court may decide to penalise the plaintiff for not accepting the defendant's offer when he had the chance. It usually does this by refusing to award the plaintiff any of the legal costs which he incurred *after* the offer was made (based on the obvious logic that *had* the plaintiff accepted the offer then, these additional costs would not have been incurred).

As a without prejudice offer will not be before the court when it makes its decision, High Court rule 34(12) provides as follows: '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 …' Note that the court has a wide discretion in the awarding of costs and nothing in rule 34 fetters the court's discretion.

Costs incurred after the date of settlement (and hence not covered by the settlement) may be dealt with in the court's discretion.[25]

What this means if you are the attorney acting for the plaintiff, is that you have to give very careful consideration to any without prejudice offer made to your client in terms of rule 34. Unless you are confident that, at the end of the case, the court is bound to award your client more than the amount of the offer, you should seriously consider recommending to your client that he accept the offer.

3.2.3 The contents of a written offer or tender

High Court rule 34(5) sets out the requirements in respect of the written notice of offer or tender. The notice must be given to *all* the parties to the action and must state:

1. whether it is unconditional or without prejudice;
2. whether or not it includes an offer to pay all or part of the other party's costs;
3. whether the offer or tender was meant to be in settlement of both the claim *and* the costs, or of the claim only; and
4. whether or not the defendant denies liability for the plaintiff's costs, in which case the *reason* for this denial shall be given, and the action may be set down on the question of costs alone.

3.2.4 Accepting an offer or tender

In terms of High Court rule 34(6), the plaintiff has 15 court days from the date on which he received the written notice of offer or tender within which to accept the offer or tender. During this 15-day period, the defendant *may not withdraw* the offer or tender.

In terms of rule 34(8), the manner in which an offer or tender must be accepted is by *notice of acceptance*. If more than 15 court days have elapsed since the plaintiff received the notice of offer or tender, the plaintiff may ask the defendant to consent to his late acceptance of the offer.

If the defendant refuses to consent to the plaintiff's accepting the offer or tender, the plaintiff may apply to court to be allowed to accept the offer.[26]

3.2.5 Performance in terms of an offer or tender

In terms of rule 34(7), once the plaintiff has accepted the defendant's offer or tender (by delivery of the notice of acceptance), the defendant has 10 court days within which to pay the amount offered, or to perform the act as tendered.[27]

If the defendant fails to pay or perform as offered or tendered, the plaintiff may apply for judgment to be granted in his favour against the defendant. The application for judgment is made through the registrar to a judge in chambers. The defendant must be given five days' written notice that this application is going to be made.

3.2.6 Rule 41: settlement procedure

In terms of rule 41(3) of the High Court Rules, if a settlement has been reached in any High Court proceedings, the attorney acting for the plaintiff or applicant has a duty to inform the registrar immediately by way of a Notice of Settlement. In terms of rule 41(4), any party to a settlement which has been reduced to writing, and signed by the parties or their legal representatives, may apply for judgment in terms of the settlement on at least five days' notice to all interested parties. Note that this procedure may only be used if the terms of the settlement agreement have not yet been carried out, and where the proceedings have not been withdrawn.

3.3 Settlement procedures during litigation in the Regional and District Magistrates' Courts

Rules 18 of the Magistrates' Courts Rules essentially replicate rules 34 of the High Court Rules. All existing case law applicable to High Court rules 34 will now, *mutatis mutandis*, be applicable when interpreting the rules 18 when applied in the Regional or District Magistrates' Courts. In addition, rule 17 of the Magistrates' Courts Rules replicates High Court rule 22, which means that pleading a tender in the Regional or Magistrates' Court will henceforth require compliance with the District Magistrates' Courts rule 17(5). This rule allows a tender to be pleaded in the defendant's plea and, unlike Magistrates' Courts rule 18, may be disclosed before judgment.

4 Methods of recording agreements to settle

There are a number of ways to record a settlement agreement, and the choice of settlement method will be determined largely by the ease with which the offeree is able to recover the debt if the offeror fails to perform. A number of settlement options are available, which include:

1. a general settlement agreement or an acknowledgement of debt;[28]
2. confession to judgment in the High Court;[29]
3. sections 57 and 58 procedures for liquid amounts due in the Magistrates' Courts;[30] and
4. recording a settlement in terms of Magistrates' Courts rule 27(6) to (10).[31]

4.1 General settlement agreements and acknowledgements of debt

The general settlement agreement, or alternatively, the acknowledgement of debt, is the usual way of recording the terms of an agreement to settle entered into before the start of the trial. The

settlement agreement or acknowledgement of debt may, where appropriate, be used in High Court, Regional and District Magistrates' Courts proceedings.

The agreement may take the form of a *bilateral contract* entered into between the parties and signed by both sides (called a settlement agreement), or the form of a *unilateral undertaking* in writing by one party to repay his opponent on certain terms (called an acknowledgement of debt).

The salient features of settlement agreements and acknowledgements of debt are the following:

1. *Ordinary rules of contract apply*: Whether the settlement agreement is made prior or subsequent to the issue of summons, the agreement remains an ordinary common-law contract. There are no specific provisions in the High Court or Magistrates' Courts Rules of Court that provide for acknowledgements of debt in settlement of civil disputes.
2. *Order of court*: The settlement agreement may contain a provision requesting a court to make the agreement an order of court. This provision obviously ensures that the agreement is easier to enforce.[32]
3. *Full amount payable*: The agreement should deal separately with the capital amount owing, interest outstanding, and costs payable. Separate amounts as at the date of the agreement should be allocated to each of these three headings, followed by the total amount owing in terms of the agreement of settlement.
4. *Instalments*: Agreements should specify whether the total amount owing is to be paid in one lump sum or in instalments. Should the parties agree that the total amount owing be paid in instalments, they must stipulate in detail exactly how these instalments are to be paid. This detail shall include the amount of each instalment; the commencement date for payment of these instalments; and the payment date and amount of the final instalment.
5. *Acceleration clause*: A settlement agreement should always contain an acceleration clause in order to ensure that the plaintiff can sue for the *total amount owing* in terms of the settlement agreement should the defendant breach his undertaking to pay any one of the instalments. If the agreement does not contain an acceleration clause, the plaintiff will only be able to sue for each instalment as it becomes due.
6. *Payment details*: The agreement should specify to *whom* the payments must be made (usually the plaintiff's attorneys); *how*the payments must be made (cash, bank cheque, debit order, stop order, direct transfer, etc.); and *where* the payments must be made (i.e. physical address or plaintiff's bank account details). The agreement also usually specifies how payments made will be allocated, for example, first to legal costs, then to outstanding interest, and finally to capital.
7. *Signatures*: The settlement agreement must be signed by the parties[33] (i.e. the plaintiff and the defendant(s)), and if the settlement agreement is entered into after the issue of summons (or the institution of application proceedings), the legal representatives of the litigants usually sign the agreement in their representative capacities.[34] The confirmatory signatures of the representatives do not make them parties to the agreement, and they cannot therefore be sued in terms of the agreement.

4.2 Making settlement agreements orders of court

1. Settlement agreements may be made orders of court. This may be done either by cutting and pasting the relevant terms of the settlement agreement into an order or by making an order which, by reference, incorporates the provisions of the settlement agreement. The method of wholesale incorporation of the settlement agreement has, however, not been the practice in certain divisions of the High Court, such as in the KwaZulu-Natal Division.[35] In its recent

decision in *Eke v Parsons*, which concerned the enforceability of settlement agreements which are made into orders of court, the Constitutional Court expressed its misgivings (albeit *obiter*) about this formalistic approach. It concluded that:[36]

> **[t]he … approach is formalistic and takes a narrow view of the efficacy and value of court orders granted as a result of settlement agreements. In certain instances, agreement – or lack of it – on certain terms may mean the difference between an end to litigation and a protracted trial. Negotiations with a view to settlement may be so wide-ranging as to deal with issues that, although not strictly at issue in the suit, are related to it – whether directly or indirectly – and are of importance to the litigants and require resolution. Short of mere formalism, it does not seem to serve any practical purpose to suggest that these issues should be excised from an agreement that a court sanctions as an order of court.**

Based on this authority, it would seem that the practice of wholesale incorporation will become uniform in the various divisions. This, however, does not mean that anything and everything agreed to by parties will be made an order of court. The agreement (or the provisions that parties intend incorporating into the order of court) must meet the following requirements:[37]

1. The provision must relate, directly or indirectly, to an issue or *lis* between the parties. It cannot be a matter unrelated to the dispute.
2. The agreement must be capable, both from a legal and a practical point of view, of being included in the order. This means, amongst other things, that its terms must accord with the Constitution and must not be at odds with public policy.
3. Finally, the agreement must hold some practical and legitimate advantage to the parties.

Once a settlement agreement has been made an order of court, it is an order like any other and will be interpreted as such. It has the effect of changing the status of the rights and obligations between the parties and bringing finality to the *lis* between the parties. Once a settlement agreement has been made an order of court, the dispute between the parties becomes *res judicata*.

4.3 Confession to judgment in the High Court[38]

High Court rule 31 contains a quick and simple procedure to obtain a judgment against a defendant in High Court matters. This method of recording a settlement allows for immediate enforcement through warrant of execution or s 65 proceedings as the judgment obtained in this way has the same status and effect as any other court judgment (the written acknowledgment of the debt or claim is called the *confession*, but does not establish a contract between the plaintiff and the defendant).[39] Note that rule 31 may be used in conjunction with a settlement agreement, as a way of ensuring speedy and efficient enforcement of the agreement, and is particularly handy where the defendant does not want to have a judgment in his name, if possible. In this case, a confession to judgment may be signed when the settlement agreement is entered into on the condition that it will not be relied on unless there is a default in the settlement agreement.

Note that the rule 31 procedure is only available to parties in pending *action proceedings*; it is not available to parties in pending *motion proceedings*.[40] (Parties to motion proceedings may use the procedure provided for in rule 41(4) to obtain a judgment on a settlement agreement.)

P37

4.4Admission of liability and consent to judgment in the Regional and District Magistrates' Courts

The procedures contained in ss 57 and 58 of the Magistrates' Courts Act[41] are essentially codified alternatives to the common-law settlement procedures. The main differences between s 57 and s 58 procedures are as follows:

1. Section 57 provides for a written admission of liability by the defendant, combined with an undertaking to pay in a single sum or instalments, and further combined with the undertaking that, should he breach the agreement, the plaintiff may obtain judgment against him.
2. Section 58 provides for the defendant to consent immediately, in writing, to judgment in favour of the plaintiff, after which the matter is directly referred to the clerk of the court for the obtaining of judgment against the defendant. (This is the Magistrates' Court equivalent of the High Court *confession to judgment* procedure.)

The procedures in these sections, in essence, provide the claimant or plaintiff with a quick way to obtain judgment. A written consent to judgment in terms of s 58 permits the court to order[42] the defendant to pay the plaintiff's claim, with costs, in a single payment or in instalments. Sections 57 and 58 are both applicable where the demand is in the form of a *letter of demand*or in the form of a *summons*.

The procedures to be followed to obtain judgment in terms of ss 57 or 58 are set out in detail below.

4.4.1 Section 57: admission of liability procedure

1. The debtor (i.e. the future defendant) receives a letter of demand or is served with a summons demanding the payment of a debt.[43]
2. In terms of s 57(1) the defendant then does the following:
    1. He admits liability for the amount of the debt, (or any another amount) and costs;
    2. He offers to pay the amount admitted and costs (in full or in instalments);
    3. He undertakes to pay any collection fees applicable; and
    4. He agrees that, should he fail to pay, the plaintiff may obtain judgment against him.
3. Section 57(2) sets out the steps the registrar of the Regional Magistrates' Courts, or the clerk of the Magistrates' Court must take in order to enter judgment against the defendant.

The procedure in s 57 is quick and simple. If your client, the plaintiff, *accepts* the debtor's written offer, by means of a *registered letter* to the debtor, and he at any stage thereafter fails to pay, you can simply apply to the registrar or clerk of the court for judgment. There is no need for a summons and trial at which you have to prove your client's claim. The judgment is granted administratively, and has the same effect as a default judgment. The application to the registrar or clerk of the court for judgment under this section will follow Magistrates' Court Form 5A.

Note that once the registrar or clerk of the court has entered judgment against the debtor, s 57(3) requires that the plaintiff or his attorney inform the debtor by registered letter of the judgment.

4.4.2 Section 58: consent to judgment procedure

Section 58 is similar to s 57 and provides that a person may, upon receipt of a letter of demand or service upon him of a summons demanding payment of a debt, *consent in writing to judgment* for the amount of the debt and costs claimed. The plaintiff will then be able to request, in writing, judgment against the defendant for the amount of the debt and costs. As is the case with the s 57 procedure, the judgment is entered administratively by the clerk of the court (or the registrar of the Regional Court).

4.5 Recording settlements during litigation in the Regional and District Magistrates' Courts – rule 27

If the parties reach a settlement during litigation (i.e. after the entry of an appearance to defend, but before judgment),[44] an application, on notice or orally, during a hearing at which the other party is represented (or when the other party's written waiver of notice is produced), may be made to the court hearing the matter to have the terms of the agreement of settlement *recorded* by the court. The court does not enter a judgment at this stage, although, if the terms of settlement so provide, the court may make the settlement an order of court.

At the hearing of an application, the applicant lodges with the court a statement of the terms of settlement (which must be signed by all the parties to the proceeding) and, if there are no objections, the court will note that the action has been settled on the terms set out in the statement, and further proceedings in the matter will be stayed.[45]

The applicant's remedy is contained in rule 27(9), which reads as follows:

> **(a)When the terms of the settlement agreement which was recorded in terms of subrule (6) provide for the future fulfilment by any party of stated conditions and such conditions have not been complied with by the party concerned, the other party may at any time on notice to all interested parties apply for the entry of judgment in terms of the settlement.**
>
> **(b)An application referred to in this subrule shall be on notice to the party alleged to be in default, setting forth particulars of the breach by the respondent on the terms of settlement.**

B: Provisional sentence

1 Introduction

Provisional sentence is an extraordinary procedure which is available to a creditor (the plaintiff) who has liquid documentary proof of his claim against the debtor (the defendant).[46]

The purpose of the provisional sentence procedure is to provide a plaintiff – who, on the face of it, has a cast-iron case in that his claim is based on a liquid document – with a *shortcut* to a kind of provisional or temporary judgment, called *provisional sentence*. This provisional sentence becomes final if the defendant fails to do anything about it for two months. It is a speedy procedure, which allows plaintiffs whose claims are based on liquid documents to avoid the more lengthy and expensive mechanics of an ordinary trial action. Provisional sentence is also extraordinary in that it is actually a hybrid procedure: it starts by way of a summons (as in an action), but then proceeds by way of affidavits (as in an application) and becomes an action again (if the 'principal' i.e. main case is entered into). Note, however, that notwithstanding its hybrid nature, provisional sentence is termed an action and the parties are called the plaintiff and the defendant, respectively. A plaintiff uses a *provisional sentence summons* in order to initiate the provisional sentence procedure. A provisional sentence summons is a special type of summons which is used in the High Court, and the Regional and District Magistrates' Courts.[47]

2 Requisites for provisional sentence

The court will grant provisional sentence if:

1.the plaintiff's claim is based on a liquid document; *and*

2. a)where the *onus* is on the *plaintiff*, he can satisfy the court that the probabilities of success in the principal case[48] are *in his favour*;

or

3. b)where the onus is on the defendant, he is unable to produce sufficient proof to satisfy the court that the probabilities of success in the principal case are against the plaintiff.

The basic principles applicable to provisional sentence procedure were reiterated in the case of *Joob Joob Investments* (*Pty*) *Ltd v Stocks Mavundla Zek Joint Venture*,[49] where the court held that provisional sentence:

> **… is granted on the presumption of the genuineness and the legal validity of the documents produced to the Court. The Court is provisionally satisfied that the creditor will succeed in the principal suit. The debt disclosed in the documents must therefore be unconditional and liquid ('zuiwer en klaar').**

The constitutionality of the provisional sentence procedure was considered by the Constitutional Court in the case of *Twee Jonge Gezellen (Pty) Ltd and Another v The Land and Agricultural Development Bank of South Africa t/a The Land Bank* and is discussed in Section 4.4 below.

3 What is a liquid document?

A *liquid document* has been defined in the case of *Rich and Others v Lagerwey*[50] as a document which evidences by its own terms, without the need for extrinsic evidence, an unconditional acknowledgement of indebtedness in an ascertained sum of money, the payment of which is due.[51]

We provide a list of examples below, but for now note that typical examples of a liquid document are cheques, acknowledgements of debt or even deeds of sale.[52]

Harms explains the concept of a liquid document by dividing it into five basic elements and providing a useful five-point checklist in the process. According to him, a liquid document is defined as:[53]

1. a written instrument;
2. signed by the defendant or his agent;
3. evidencing an acknowledgement of indebtedness;
4. which is unconditional; and
5. of a fixed amount in money.

1. *Written instrument*: Provisional sentence may only be claimed in respect of a liquid claim which is contained in a written instrument (document).[54] The fact that the claim is contained in a document that has been signed by the defendant is what gives the claim its cast-iron or water-tight nature, deserving of this specialised form of procedure.[55]

   However, the *reason* for the indebtedness, the so-called *causa debiti*, does *not* have to be stated in the liquid document.[56]This is invariably the case, of course, with a liquid document such as a cheque, although the reason for the indebtedness might occasionally appear, for instance in an acknowledgement of debt. It should be remembered that the crux of the provisional sentence procedure is that the defendant has unconditionally admitted, in writing, that he owes a specified amount to the plaintiff. The reason for the indebtedness is irrelevant for provisional sentence purposes. The point is that the defendant has signed a document in which he has acknowledged his unconditional indebtedness to the plaintiff.

   Harms points out that a document will still be liquid, even if it does not comply with the formal requirements for documents of its ostensible nature. He gives the example of a mortgage bond which has not been registered. Such a mortgage bond will still be a liquid document, despite the fact that it is not registered.[57]

2. *Signed by the defendant or his agent*: Provisional sentence summons calls upon the defendant to admit or deny his signature or that of his agent on the liquid document in question. It is a fundamental aspect of the provisional sentence procedure that the liquid document in question should be signed by the defendant. As we noted above, the defendant's signature on a document acknowledging his indebtedness is strong proof that he is liable, which is one of the reasons for providing the extraordinary procedure of provisional sentence.[58] Without the signature of the defendant (or his agent), there is no readily apparent proof of an acknowledgement by him that he is indebted to the plaintiff.

3. *Evidencing an acknowledgement of indebtedness*: The document must contain an acknowledgement of indebtedness on the part of the defendant.[59] This means that the defendant should clearly admit that he owes the debt. Although the document should refer specifically to the defendant (the debtor), it need not refer specifically to the plaintiff (the creditor). This is because the plaintiff may have become entitled to claim as the creditor because the right to

payment in terms of the document was ceded to him, or, in the case of a cheque, that the cheque was negotiated to him. Note that it is sufficient if the acknowledgement of debt is given in respect of an undertaking by the creditor to advance an amount of money in the future, *provided* the undertaking to *advance the money is binding and unconditional* in an amount confirmed by the document. This is because the debt comes into existence at once, and is not suspended by the fact that the promise is only to advance the money in the future. This extension of the definition (of a liquid document) appears to be motivated by commercial necessity, for example to allow for provisional sentence in the case of mortgage bonds.[60]

4. *Which is unconditional*: The definition of a liquid document includes the phrase '… *one which evidences by its own terms, without the need for extrinsic evidence*, …' This means that the defendant's acknowledgement of indebtedness should be apparent merely from reading the document, i.e. *ex facie* the document (meaning 'on the face' of the document). No further evidence should be required to prove this from sources external or *extrinsic* to the document. As soon as any *conditions* are attached to the obligation to make payment in terms of a document, however, then the document will no longer *evidence*the defendant's indebtedness 'by its own terms' because *extrinsic evidence* will be required to prove that the conditions have been fulfilled. For this reason, the document will not be a liquid document. The *exception* to this rule is where the condition only relates to *when* the debt is to be *paid* (as opposed to the defendant's *liability to pay*). Such a condition is a *simple condition*, and in such a case additional evidence *will* be allowed to prove that the condition has been met. Erasmus points out that:

> **If a document expresses payment of a debt to be subject to a simple event or condition, extrinsic proof of the happening of the event or compliance with the condition is permitted, provided the act or event is indeed simple in the sense that it is inherently capable of speedy proof by means of affidavit evidence.[61]**

An example of a simple condition would be where payment, in terms of an acknowledgement of debt, is conditional on the creditor's giving a set period of notice that the money is due to the person who owes him money.[62] In such a case it can speedily be proved by affidavit that the period of notice has been given by the creditor and that the simple condition has therefore been complied with.

An important distinction must be kept in mind here. It is only where *payment* is subject to the fulfilment of a simple condition that the document's liquidity is not destroyed. Where the actual *indebtedness* is subject to the fulfilment of a condition, no matter how simple, the document is not liquid.[63]

5. *Of a fixed amount in money*: The claim referred to in the liquid document must be for an amount of money,[64] and this amount must be fixed or certain.[65] If a liquid document refers to a certain amount of money which is fixed and certain and another amount which is not, then the document will only be liquid in respect of the amount which is fixed and certain.[66]

Examples of *liquid documents* are:

- a cheque;
- an acknowledgement of debt;
- a promissory note (e.g. an IOU, although these tend to have been replaced in modern usage by post-dated cheques);

- a mortgage bond (this is really just an acknowledgement of debt where property has been put up as security for the repayment of the debt);
- a bill of exchange;
- a guarantee, provided that the amount of the indebtedness is clear from the guarantee; and
- an architect's certificate certifying that a builder has performed work in terms of a building contract, provided that the architect acted as the duly authorised agent of the defendant.

4 Provisional sentence in the High Court

Provisional sentence is provided for in terms of rule 8 of the High Court Rules, which sets out the procedure to be followed. The circumstances in which provisional sentence may be brought, however, are not dealt with in the rule and must be read with the common law, as set out above.

P7

4.1 Provisional sentence summons

Should an attorney be instructed to sue, on the basis of a liquid document, for an amount in excess of R400 000,[67] he should issue a provisional sentence summons in the High Court as it provides a speedy way for an attorney to obtain judgment. A plaintiff is not prevented from issuing another type of summons, of course, but the advantages given to a plaintiff in provisional sentence proceedings make the choice of conventional proceedings inadvisable in these circumstances. A provisional sentence summons must be framed in accordance with High Court Form 3.[68]

The provisional sentence summons informs the defendant of what the plaintiff's claim comprises, and attaches a true copy of the liquid document on which the claim is based.[69] The summons then gives the defendant the following options:

1. He can either give up immediately and *pay* the claim plus interest;

or

2. He can decide to *oppose* the matter.

If he decides to oppose the matter, the summons tells him that he must do two things:

1. First, the defendant must *come to court* on a certain date in order to deny his liability in most cases, although he is also entitled to come to court to admit his liability. (Presumably he will only come to court to admit his liability if he does not have sufficient money to pay the plaintiff's claim.)
2. Second, if the defendant intends to come to court to deny his liability, then he must *file an affidavit*, by not later than 12 noon, two days before the matter is to be heard.

The defendant's affidavit must meet two basic requirements:

1. It must set out his *defence*; and
2. He must state whether he admits or denies his *signature* on the liquid document; or, in cases where the liquid document was signed by his agent, whether he admits or denies either the signature or the authority of his agent to sign.[70]

The summons then warns the defendant that if he fails to pay the plaintiff's claim, and fails to file an opposing affidavit and come to court, *provisional sentence* may be granted against him.

The summons finally informs the defendant that once provisional sentence has been granted, he has the *right to security*from the plaintiff if he (the defendant) pays the amount for which provisional sentence was granted, but still wishes to defend the matter.

4.2 Opposing and replying affidavits

Once the provisional sentence summons has been served on the defendant he can either pay the amount claimed, or file an opposing affidavit containing the allegations set out in 4.1 above. If an opposing affidavit is filed by the defendant, the plaintiff is entitled to a reasonable period to file a *replying affidavit* if he wishes.[71]

In order to get the matter to court, the plaintiff has to set the matter down by delivering a notice of set-down to the defendant and the registrar in terms of rule 8(4) of the High Court Rules.

When the matter comes before the court, the court will have before it:

1. the provisional sentence summons and annexures describing the plaintiff's claim;
2. the defendant's opposing affidavit (if he decided to file one);
3. the plaintiff's replying affidavit (if he decided to file one); and
4. in exceptional circumstances, a further set of affidavits allowed by the court.[72]

The court may also allow oral evidence to be led at the hearing with regard to the authenticity of the defendant's signature or that of his agent, or his agent's authority to act on his behalf (if this has been placed in dispute by the defendant).[73]

4.3 The evidentiary burden[74]

There is an evidentiary burden on the plaintiff to establish certain issues, while there is a burden on the defendant to establish others. Broadly speaking, the burden of proof will be on the plaintiff because the purpose of provisional sentence is the enforcement of liquid documents. If the defendant denies liability on the basis of issues that are external to the document or its liquidity, however, he will bear the burden of proving them. Issues relating to the document or its liquidity will include a denial that the signature is that of the defendant or his agent, or that the document does not contain an unconditional acknowledgement of debt, etc.

Issues external to the document, however, will usually involve the merits of the *causa debiti* or reason for the indebtedness, in other words, the underlying transaction in respect of which the liquid document was signed. A cheque might be issued by a defendant, for instance, as payment for the purchase of a motor vehicle. In this case, the purchase and sale of the motor vehicle will be the underlying transaction. If the defendant wishes to challenge the sale (and therefore the payment of the cheque) on the basis that the motor vehicle was defective and not worth what he agreed to pay, the burden would be on him to prove that the probabilities are against the plaintiff in the principal case.

The burden borne by the defendant to prove that the probabilities are against the plaintiff in the principal case[75] is quite a heavy one. It is much harder to discharge, for instance, than the burden placed on a defendant to ward off summary judgment. With summary judgment, the defendant has merely to show that he has a *prima facie* defence. In order to ward off provisional sentence,

however, the defendant must show that the *probabilities* are that his defence will be successful. This means, of course, that this particular burden is discharged on the normal civil burden of a preponderance of probabilities.[76] The defendant needs to show in his opposing affidavit and documentary evidence that the probabilities favour his defence.

The case of *Lesotho Diamond Works v Lurie*[77] illustrates how a defendant can discharge the burden. In this case, the plaintiff received a cheque from the defendant and the defendant then stopped payment. The plaintiff issued a provisional sentence summons. In his opposing affidavit the defendant admitted that the signature on the cheque was his, but stated that he had stopped payment because it was a material term of the agreement that he would receive flawless diamonds from the plaintiff in return for the payment. He provided proof that the stones were flawed. The court held that the probabilities were that the defendant's defence would be successful, and provisional sentence was refused.

The plaintiff bears the burden to prove the following issues[78] (which, it can be seen, all relate to the document itself in some way):

1. The authenticity of the defendant's signature;[79]
2. The authenticity of the defendant's agent's signature;[80]
3. The authority of the defendant's agent;[81]
4. Fulfilment of any relevant simple condition;[82] and
5. The entitlement of the plaintiff to the claim evidenced by the liquid document[83] – that he is the party identified as creditor in the document, that he has obtained the right (by a negotiation or cession or whatever) to payment – facts that are necessary for the completion of his cause of action.

4.4 The consequences of provisional sentence

Should the defendant:

1. come to court and the plaintiff fail to satisfy the court in respect of any of the issues in respect of which he bears the burden; or
2. satisfy the court that he has a defence on a balance of probabilities;
3. then the court will *refuse* provisional sentence and the defendant may be ordered to file a plea, whereafter the matter will continue just as if it were a normal action.[84]

Should the defendant:

1. fail to pay the amount demanded in the provisional sentence summons and fail to file an affidavit; or
2. fail to come to court on the day stipulated in the summons; or
3. come to court but fail to meet whatever burden he bears;
4. then the court will *grant* provisional sentence against the defendant, provided that the provisional sentence summons itself was in order.

What are the consequences of a provisional sentence to the defendant?

As its name suggests, a provisional sentence is *not* a final judgment. If the defendant does *nothing* about it, however, the provisional sentence *will* become a final judgment *two* months after the date on which it was granted. The defendant therefore has two months from the date on which provisional sentence is granted against him to decide whether or not he still wishes to fight the case.

If he wishes to fight the case (or 'enter into the principal case' as it is phrased), he must pay the *full amount* of the provisional sentence judgment *plus taxed costs* to the plaintiff.[85] If he does not do this, he may not be allowed to continue to fight the case. When he pays the plaintiff, however, he is entitled to demand that the plaintiff furnish him with *security de restituendo*[86] (which means security for the repayment to the defendant of the amount paid to the plaintiff if the defendant is successful in his defence of the matter). The defendant's right to security helps to balance, at least to some extent, the advantages enjoyed by a plaintiff in provisional sentence proceedings, and the prejudice suffered by the defendant.

What about when a defendant has a solid defence but is unable to establish his defence without recourse to oral evidence or cross-examination of the plaintiff's witnesses, but his prospects of success are evenly balanced with the plaintiff? Applying the principles set out above, provisional sentence would be granted and the defendant would be obliged to pay the full judgment debt if he wished to enter into the principal case. Where the defendant is unable to pay, however, he cannot enter into the principal case and the judgment will become final. The result is that, even though the defendant had an equal chance of winning, the provisional sentence procedure would have deprived him of his chance to successfully defend his case. The Constitutional Court held in *Twee Jonge Gezellen (Pty) Ltd and Another v Land and Agricultural Development Bank of South Africa t/a The Land Bank and Another* [87] that in these *narrowly described circumstances* the provisional sentence procedure constitutes a limitation of the defendant's right to a fair hearing and the Constitutional Court developed the common law so that courts will have a discretion to refuse provisional sentence where the defendant can demonstrate the following:

1. An inability to satisfy the judgment debt;
2. An even balance of prospects of success in the main case on the papers; and
3. A reasonable prospect that oral evidence may tip the balance of prospective success in his favour.

A point to remember is that during the two-month period that the defendant is deciding whether or not to continue fighting the case, the plaintiff need not sit back and do nothing. He is entitled to issue a warrant of execution against the defendant's property, and the defendant may be forced to pay the amount of the provisional sentence judgment to the sheriff. The plaintiff will *only* be entitled to be paid out by the sheriff, however, if he provides *security de restituendo*.[88] If the plaintiff refuses to provide security, he will not get paid, and the defendant will still be entitled to fight the case.

The way in which the defendant lets the plaintiff know that he wishes to continue fighting the case, despite the fact that provisional sentence has been granted against him, is to send a notice to that effect to the plaintiff within the two-month period after provisional sentence was granted.[89] The provisional sentence summons is then deemed to be a combined summons, and the defendant must deliver his plea within 10 court days of giving notice of his intention to enter into the principal case.[90] If he does not deliver his plea within the ten-day period, the provisional sentence judgment will become a final judgment.

4.5 Possible outcomes in provisional sentence matters

Here is a list of various outcomes in a provisional sentence matter:

1. If the defendant admits that he or she owes the debt, the court will grant *final judgment* to the plaintiff.
2. If the plaintiff does not discharge the burden on him, for example, he fails to show that the document on which he is relying is a liquid document, the provisional sentence proceedings will

be dismissed with costs, and the plaintiff will have to start afresh by issuing a normal summons.[91]

3. If the defendant does not oppose the provisional sentence proceedings in that he does not file an opposing affidavit or appear at court, the court will grant provisional sentence against him.
4. If the defendant does oppose the granting of provisional sentence, and the plaintiff discharged the onus on him, but the defendant does not manage to discharge the burden upon him, then the court will grant provisional sentence against the defendant. (It is in these circumstances that the *Twee JongeGezellen* situation might arise, i.e. if the defendant is unable to satisfy the judgment debt; there are an even balance of prospects of success in the main case on the papers; and a reasonable prospect that oral evidence may tip the balance of prospective success in the defendant's favour).
5. If both the plaintiff and the defendant discharge the burden upon them, the court will refuse provisional sentence. The provisional sentence summons will stand as the summons in the action, and the defendant will be entitled to enter into the principal case, and will be required to file his plea within a period stipulated by the court.

5 Provisional sentence in the Regional and District Magistrates' Courts

The provisional sentence procedure in the Regional and District Magistrates' Courts is provided for in rule 14A of the Magistrates' Court Rules. Rule 14A of the Magistrates' Court Rules is very similar to rule 8 of the High Court Rules, being almost a direct copy of the High Court rule, with minor adaptations to allow it to correspond with other Magistrates' Courts Rules. Apart from further subdivisions in the sub-rules, the numbering and substantive contents of the sub-rules are also almost identical. Our discussion with regard to provisional sentence in the High Court is therefore directly applicable to Regional and District Magistrates' Courts practice and procedure.

The form which the provisional sentence summons takes in the Regional and District Magistrates' Courts is set out in Form 2A of the Magistrates' Courts forms. Just as is the case with the corresponding High Court Rules, Magistrates' Courts Form 2A is very similar to High Court Form 3, which sets out the form of the provisional sentence summons in the High Court. Having said this, however, the Magistrates' Courts Form 2A provides for certain requirements common to all Magistrates' Courts summonses in terms of rule 6 of the Magistrates' Courts Rules and, unlike the High Court summons, is addressed to the defendant directly.

ADDITIONAL PROCEDURES

C: Interim relief pending judgment

1 The two types of interim relief pending judgment

Litigation is often a painfully slow process. The plaintiff may well have a good case, but by the time judgment is granted in his favour, he may be in dire financial straits. In two special instances, however, it may be possible to obtain an *advance payment*from the defendant *before* the judgment is finalised: the procedures are contained in rule 34A and rule 43 of the High Court Rules.

1.1 Interim relief: actions for bodily injuries – rule 34A of the High Court Rules and rule 18A of the Magistrates' Courts Rules

Interim payments for damages claims resulting from bodily injuries or death are dealt with in terms of rule 34A of the High Court Rules. Note that the provisions of rule 34A have been replicated in the Magistrates' Courts Rules. Thus, in terms of rule 18A in the Magistrates' Courts Rules, a plaintiff in an action for damages for personal injury or the death of a person may apply to the Magistrates' Court for an order requiring the defendant to make interim payments in respect of a claim for medical costs or loss of income. In what follows we discuss the procedure in rule 34A but *mutatis mutandis* the same procedure applies in the Magistrates' Courts under rule 18A.

The procedure set out in rule 34A, which provides for interim payments by the defendant in a matter, permits the plaintiff to obtain payment from the defendant *before* the case has been finalised. The reason for the existence of this procedure is to reduce the hardship which may be suffered by a plaintiff who, due to his injury, is unable to work and is confronted with large medical bills, or whose only breadwinner has been killed, and faces the prospect of a lengthy and expensive trial, normally on the quantum, before he can expect to receive any compensation. The defendant may have admitted causing the injury or death, but the process of determining the quantum (value) of the damages may drag on for months. This is where the rule 34A procedure is useful.

A number of important features to note are as follows:

1. A person who has suffered bodily injuries or whose breadwinner has been killed may apply to court for an *interim payment*.[92]
2. This procedure only applies to claims for certain *special damages*, namely *medical costs* and *loss of income* arising from the *death* of a person or from *personal injuries*.[93] This includes a claim for loss of support,[94] but will not include any claim in respect of *general damages*, such as pain and suffering, and loss of the amenities of life.[95] It is not possible to claim *future* medical expenses and loss of support as interim payments under rule 34A.[96]
3. The application may be made at any time after the expiry of the period for the delivery of the notice of intention to defend.[97]
4. The application may only be brought if:
    1. the defendant has admitted in writing that he was responsible for the plaintiff's injuries;[98]
    or
    2. judgment has been given against the defendant, but the quantum of damages has not yet been determined.[99]
5. The application is brought in the normal manner prescribed by High Court rule 6, and the affidavit must contain the amount of the damages claimed, the grounds for the application, giving particulars of the medical costs, loss of earnings, or loss of support. Documentary proof or certified copies thereof should be attached to the affidavit, which will include, for instance, medical accounts, pay slips or other evidence relating to the interim payment.[100]
6. The court will not make the order unless the defendant has the financial means to make the interim payment.[101] This means that the court must be satisfied that the defendant is insured in respect of the damages, or that he has enough money of his own to pay for the damages.
7. The court may, if it thinks fit, 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.[102]

8. The fact that an interim order has been made may not be pleaded and no disclosure of that fact may 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.[103]
9. In an action where an interim payment or an order for an interim payment has been made, the main action may not be discontinued or the claim withdrawn without the consent of the court. This is to prevent obvious abuse of the rule. If leave to withdraw is granted, and interim payment has been made, the court may make an order that the plaintiff repay all or part of the interim payment, or that 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.[104]

1.2 Interim relief: actions for divorce – rule 43 of the High Court Rules and rule 58 of the Magistrates' Courts Rules

It often happens in divorce cases that the spouse seeking the divorce does not control the marital finances. The spouse will often lack the funds to bring the divorce action, or to maintain herself and her children while the divorce action is pending.[105]For this reason, rule 43 of the High Court Rules provides a *quick and inexpensive procedure* whereby that spouse can obtain certain funds from the other spouse *while the divorce action is still pending*. Note that a similar rule (rule 58) exists in the Magistrates' Courts Rules. Thus, in terms of rule 58 in the Magistrates' Courts Rules, a Magistrates' Court is empowered to grant interim relief pending the outcome of a divorce action. In what follows we discuss the procedure in rule 43 but *mutatis mutandis* the same procedure applies in the Magistrates' Courts under rule 58.[106]

Because (a) rule 43 deals with most important aspects of divorce (barring the division of the estates); and (b) the normal principles governing aspects such as 'care' of children (previously custody) and maintenance are followed; and (c) the parties are obliged to air these issues prior to and during the hearing, it often happens that the divorce as a whole is settled during rule 43 proceedings. It must be emphasised, however, that the divorce summons must nevertheless be served, and rule 43 only affords a temporary regulation of various issues until the resolution of the divorce action (a decree of divorce must be granted by a court and cannot be agreed by settlement).

In terms of rule 43(1) in the High Court, or rule 58(1) in the Magistrates' Court, the spouse seeking relief may apply for the following:

1. *Maintenance* pendente lite:[107] Maintenance may be obtained by a spouse in respect of that spouse personally, and any children in that spouse's care.[108] The normal criteria such as the respondent's ability to pay and the parties' standard of living would apply in ascertaining the amount of the maintenance.[109]
2. *A contribution towards the costs of a pending matrimonial action*: The respondent may, at a rule 43 hearing, be ordered to assist with the payment of the applicant's legal costs for the divorce, if needed. These costs are limited in that they do not include attorney-and-client costs,[110] and are generally awarded only up to the first day of trial as many matters settle at that stage.[111] A further application may be made if the matter does not settle on the first day.
3. *Interim care of any child*: The applicant may apply for care of any children pending the finalisation of the divorce. The usual legal criteria apply for the granting of care, primarily the best interests of the children, but including, *inter alia*, reluctance to upset the *status*

quo;[112] reluctance to separate siblings;[113] the sex and age of the children;[114] and the relative competence of the parties as parents.

4. *Interim access (or what is now called 'contact') to (or with) any child*: The party who does not have contact will usually be awarded access, unless the parent is abusive or some other reason exists for refusing access. The frequency and length of contact periods may also be ordered at a rule 43 hearing.

As far as the *jurisdiction* of a court to hear a rule 43 application is concerned, the application must be brought in the court where the action is pending, and not in another court which by chance may have jurisdiction to hear a divorce action between the parties.[115]

In terms of rule 43(2), the spouse seeking the relief must deliver to the other spouse:

1. *a notice* in accordance with Form 17;[116]

plus

2. *a sworn statement*, in the nature of a *declaration*, setting out:

3. a) *the relief* being claimed;

and

4. b) *the grounds* upon which she is claiming the relief.

While the procedure is by way of application, some of the terminology used is borrowed from actions. A case in point is the sworn statement 'in the nature of a declaration'. This is, in fact, an affidavit, but apparently it is called a declaration because it is meant to be brief. In fact, brevity in the document and modesty in the claim, which is only supposed to be of an interim nature, are encouraged both by the rules and the authorities.[117] Brevity is a tall order, however, seeing that, *inter alia*, the respondent's ability to pay maintenance must be detailed and proven, and the applicant's need to receive it must be established. Also, the fear must always exist that the amount requested at this point of the proceedings will influence the final award.

The rule 43 notice and declaration must be delivered by the *sheriff of the court*, except in circumstances of urgency where rule 6(12) applies and some other form of delivery is warranted.

In terms of rule 43(3), the spouse receiving the rule 43 notice and declaration has *10 days* within which to deliver his *written reply*. The reply must be *on oath*, and takes the form of a *plea*, although it is also an affidavit, the title of 'plea' like that of 'declaration' showing that the document should be brief. If the respondent spouse does not deliver his reply within the ten-day period, he will be *automatically barred* from doing so.

The applicant spouse has no right to replicate to the respondent spouse's reply.

In terms of rule 43(4), as soon as possible after the reply has been delivered (or the period within which it ought to have been delivered expires), the registrar must bring the matter before the court for summary hearing. The registrar must give both spouses 10 days' notice of the date of the hearing, but no notice need be given if the respondent spouse is in default.

In terms of rule 43(5), the court may hear *viva voce* evidence at the summary hearing, and may make any order it deems fit. Usually, the procedure is that the court will hear argument based on the application before it, and rarely does it hear oral evidence.[118] Because of the nature of the application (being an application for interim relief) where there are generally only two affidavits

before the court, it is seldom possible for the court to arrive at a comprehensive view of the relative merits and demerits of the parties' cases. As a result, the court usually takes a robust approach and does its best to arrive at an order it thinks fit to ensure a just and expeditious decision. As Erasmus puts it:

> **Maintenance pendente lite is intended to be interim and temporary and cannot be determined with the same degree of precision as would be possible in a trial where detailed evidence is adduced.**[119]

In practice where the interim custody care of children is in issue, courts usually refer an application to the family advocate in terms of s 4 of the Mediation in Certain Divorce Matters Act 24 of 1987. Erasmus explains:

> **The function of the family advocate, in a matter in which the custody of minor children is in issue, is to assist the court by placing facts and a balanced recommendation before the court; the family advocate should not take sides in the dispute, nor create the impression that he has taken a decision and wishes to prescribe to the court.**[120]

Where the circumstances of the parties have changed, the order may be amended. In terms of rule 43(6):

> **The court may, on the same procedure, vary its decision in the event of a material change taking place in the circumstances of either party or a child, or the contribution towards costs proving inadequate.**

This would occur, for example, where the supporting spouse has lost his job or is earning significantly less than he was when the original order was made.

Attorneys and advocates are *restricted* by rules 43(7) and 43(8) to charging what amounts to symbolic fees only in order to facilitate the moving of a rule 43 application:

> **43(7)No advocate or attorney appearing in a case under this rule shall charge a fee of more than R426.00 if the claim is undefended or R1 066.00 if it is defended, unless the court in an exceptional case otherwise directs.**
>
> **43(8)No instructing attorney in cases under this rule shall charge a fee of more than R1491.00 if the claim is undefended or R2130.00 if it is defended, unless the court in an exceptional case otherwise directs.**[121]

In terms of s 16(3) of the Superior Courts Act,[122] a decision of a court in a rule 43 matter is *not appealable*.

D: Arrest *tanquam suspectus de fuga*

1 The *Malachi* case: *tanquam suspectus de fuga* unconstitutional

Under our law for many years it had been the position that where a debtor owes money to a creditor who holds no security for the payment of the debt, and there are reasonable grounds for believing that the debtor is about to leave the country in order to avoid paying creditors, the creditor could make use of a procedure known as arrest *tanquam suspectus de fuga*.[123] This literally translated meant 'an arrest as if being suspected of being a fugitive'. The *purpose of the procedure* was to prevent a person against whom a creditor intends to institute, or has already instituted, an action, from fleeing from the jurisdiction of the court with the purpose of avoiding or delaying payment of the claim.[124] The object of the arrest was not to force the debtor to pay the claim but to ensure that he remained within the jurisdiction of the court until the court had given judgment in the matter.

The common law and s 30 of the Magistrates' Courts Act (which allowed for arrest *tanquam suspectus de fuga*) were declared unconstitutional in the case of *Malachi v Cape Dance Academy International (Pty) Ltd and Others* 2010 (7) BCLR 678 (WCC) and the finding of constitutional invalidity of s 30 of the Magistrates' Courts Act was confirmed by the Constitutional Court in *Malachi v Cape Dance Academy International (Pty) Ltd and Others*[125] in 2010.[126]

Following the judgment, the Magistrates' Courts Act and Supreme Court Act (which has since been repealed and replaced by the Superior Courts Act), as well as the High Court Rules and Magistrates' Courts Rules have been amended and no longer authorise arrest *tanquam suspectus de fuga*.[127]

2 Going forward: the possibility of arrest *tanquam suspectus de fuga?*

It is not certain what alternative remedies will remain open to creditors who face the prospect of a fugitive debtor.[128] However, the Rules Board has published a 'Proposed New Rule 56' (of the Magistrates' Courts Rules) which includes an amended procedure for arrest *tanquam suspectus de fuga* provision. This rule, if adopted, would provide:

1. Application may be made to the court for an order of arrest *tanquam suspectus de fuga*.
2. Every such application shall be upon affidavit stating the facts upon which the application is made and the nature of the order applied for.
3. The court may, before granting an order upon such an application, require the applicant to give security for any damages which may be caused by such order and may require such additional evidence as it may think fit.
4. An order made *ex parte* for the arrest of a person shall call upon the respondent to show cause against it at a time stated in the order, which shall be the first court day after service.
5. The return day of an order made *ex parte* for arrest may be anticipated by the respondent upon 12 hours' notice to the applicant.
6. An order for the arrest of a person or the attachment of goods made *ex parte* shall *ipso facto* be discharged upon security being given by the respondent for the amount to which the order relates, together with costs.

It is, however, not clear when (or whether) this rule will be adopted by the Rules Board and, in the meanwhile, no provision is made for such arrest.

ADDITIONAL PROCEDURES

E: Multiple parties and actions

1 General overview

Legal proceedings are not necessarily a *one-on-one* affair. Frequently, a matter will involve several plaintiffs and defendants in an action (or several applicants and respondents in an application), and more than a single cause of action. This section of the book deals with the *joinder* of parties and causes of action, the consolidation of actions and applications, the intervention of persons as plaintiffs or applicants and defendants or respondents, and the so-called *third party* procedure in the High Court and its equivalent in the Magistrates' Courts.

The main point to recognise under this head is that *several plaintiffs* (*or applicants*) may sue *several defendants* (*or respondents*) in one action (or in one application). This is why when one reads law reports, one notices occasionally that the name of only one party is referred to, followed by the words 'and another' or 'and others'. In our discussion below we will focus on joinder, consolidation, intervention and the third party procedure in the context of an action. However, you should note that the applicable rules (High Court rules 10, 11, 12 and 13), while only referring to actions, are made applicable to applications by virtue of High Court rule 6(14). Rule 6(14) provides that the rules on joinder, consolidation, intervention and the third party procedure shall *mutatis mutandis* (with the necessary changes) apply also to applications. There is no rule that directly corresponds to rule 6(14) in the Magistrates' Courts Act or rules, but joinder and intervention by third parties apply to both actions and applications in the Magistrates' Courts because of the wording of rule 28 of the Magistrates' Courts Rules. Rule 28 applies to 'any proceedings' and makes specific reference in rule 28(2) to both plaintiffs or applicants and defendants or respondents.

2 Joinder of parties and causes of action

2.1 Introduction

Joinder is a term which refers to the joining of more than one party, or more than one cause, in a single action. The reason for joining parties or causes of action is most often one of convenience: time, costs and effort are saved by joining parties or causes in one action instead of instituting separate actions. Note, however, that while joinder is usually a matter of convenience, in certain situations it may become essential that a party is joined in a matter because of the interest he or she has in the case. In such situations, the court will demand that the party is joined and will not allow the matter to proceed without joinder being applied for, or until the court is satisfied that the third parties have consented to be bound by the judgment or have waived their right to be joined.[129]

As discussed below, the High Court Rules of Court and the Magistrates' Courts Act have made it possible for a number of plaintiffs with separate causes of action to join in one action against the same defendant – this is called joinder. The High Court Rules and the Magistrates' Courts Act

have made it possible also for a plaintiff in the High Court or a Magistrates' Court, with separate causes of action against two or more defendants, to sue them in one summons – that is, to *consolidate* the action. These developments are significant because under common law it was not possible generally to effect a joinder of plaintiffs[130]or a consolidation of actions.[131]

2.2 Joinder in the High Court

2.2.1 Joinder of several causes of action

Rule 10(2) of the High Court Rules allows a plaintiff to join several causes of action in the same action. This means that several claims, each supported by a separate cause of action, may be set out in the particulars of claim attached to a single summons. These claims will be listed in the particulars of claim as 'claim 1', 'claim 2', etc.

2.2.2 Joinder of more than one plaintiff or defendant

Rules 10(1) and 10(3) of the High Court Rules allow for the joinder of more than one plaintiff and defendant in a single action. The general effect of these rules is that if two or more matters, arising between two or more plaintiffs or defendants, *involve substantially the same question of law or fact*, then such plaintiffs or defendants may be joined together in one action. These are useful provisions since it is a waste of time to institute separate actions when, by joining the plaintiffs and/or the defendants in one action, it is possible to kill two birds with one stone.

Rule 10 does not deal with, nor do its provisions alter, the common-law rules relating to the *compulsory joinder of parties*. Note that whenever a party has a *direct and substantial interest* in any order which a court may make in a matter, *or* if any such order cannot be put into effect without prejudicing that party, then that party *must be joined* to the action, unless the party specifically waives his or her right to be joined.[132] For example, a co-owner of property would be an interested party in respect of any litigation concerning that property.[133]

The effect of the above is that when a practitioner is contemplating instituting legal proceedings, he must *always* consider who is likely to be affected by the order or relief which the court is being asked to grant. Once this question is answered, each of the persons likely to be affected by the outcome of the proceedings must be joined. If this is not done, the court will not deal with the matter.[134] The opposing party may also raise a special plea of non-joinder. Note also that the High Court has inherent jurisdiction to order that necessary parties be joined to an action or application, or even an appeal.[135]

2.2.3 Joinder of state authorities

Note that in terms of High Court rule 10A:

> **[i]f in any proceedings before the court, the validity of a law is challenged, whether in whole or in part and whether on constitutional grounds or otherwise, the party challenging the validity of the law must join the provincial or national executive authorities responsible for the administration of the law in the proceedings.**

2.2.4 Separation of trials

In terms of rule 10(5) of the High Court Rules, where there has been a joinder of causes of action or of parties, the court may, on the application of any party at any time, order that separate trials be held either in respect of some or all of the causes of action, or some or all of the parties.

2.3 Joinder in the Magistrates' Courts

2.3.1 Joinder of several causes of action

There are no specific sections dealing with the joinder of several causes of action in the Magistrates' Courts, but s 43 of the Magistrates' Courts Act makes reference to the 'combination' of claims when providing for cumulative jurisdiction in certain cases. Section 43(1) allows the Magistrates' Courts to hear multiple claims in one summons, provided that these claims do not *individually* exceed its jurisdiction. Thus, even though the total amount claimed on the basis of the different causes of action may exceed the jurisdiction of the Magistrates' Court,[136] as long as the individual claims do not exceed the Magistrates' Courts jurisdiction, the court will still have jurisdiction to try each of the claims in that summons. Put differently, the amounts sued for in each individual claim are not added together for jurisdictional purposes.[137] In terms of Magistrates' Courts rule 28(3), '[a] plaintiff may join several causes of action in the same action and the court may at the conclusion of the proceedings make such order as to costs as it deems fit.'

2.3.2 Joinder of more than one plaintiff or defendant

In the Magistrates' Courts, *joinder of plaintiffs* is dealt with in s 41 of the Magistrates' Courts Act, and *joinder of defendants* is dealt with in s 42 of the Act. Section 41 deals with cases in which:

1. there are a *number* of plaintiffs who each have a separate claim against the *same* defendant; and
2. each of these separate claims relies upon a *common* question of law or fact – in other words, if the claims were instituted separately, the same question of law or fact would arise in each case.

In such cases, the plaintiffs may join together in a single action against the same defendant.

Section 42 deals with cases in which a plaintiff has suffered damages, but is uncertain which of a number of defendants are responsible for those damages. In such cases, the plaintiff may sue all the defendants in one action. The plaintiff may either sue the defendants *in the alternative*, or *both in the alternative and jointly*.[138]

2.3.3 Separation of trials

While s 41 provides that any number of plaintiffs may join together in a single action against the same defendant, and s 42 provides that several defendants may be sued by the plaintiff when the plaintiff is uncertain which of the defendants are responsible for his damages, both s 41(1) and s 42(1) add a proviso which allows for a *separation of trials after joinder*. The proviso to s 41(1) provides that if a joint action has been instituted by a number of plaintiffs against a single defendant, that defendant may apply to court for an order directing that separate trials be held. The proviso to s 42(1) provides that any of the defendants whom the plaintiff has decided to sue may make an application to court for an order that separate trials be held. Rule 28(4) of the Magistrates' Courts Rules provides that '[w]here there has been a joinder of causes of action or

of parties, the court may on the application of any party at any time order that separate trials be held either in respect of some or all of the causes of action or some or all of the parties; and the court may on such application make such order as it deems fit'.

3 Consolidation of actions

3.1 Consolidation of actions in the High Court

Consolidation of actions is covered by rule 11 of the High Court Rules and caters for the situation where separate actions have already been instituted by different parties, and one of the parties to one of the actions believes that it would make sense for the actions to be consolidated as one action. That party may apply to court for an order of consolidation, and if the order is granted, the actions proceed as one action. The test the court follows is whether the balance of convenience favours the consolidation.[139] One of the factors in this context is whether consolidation will cause substantial prejudice to other parties – in exercising its discretion whether or not to order consolidation the:

> **Court will not order a consolidation of trials unless satisfied that such a course is favoured by the balance of convenience and that there is no possibility of prejudice being suffered by any party.[140]**

Generally, the court will order consolidation if by doing so a multiplicity of proceedings and attendant costs can be avoided.[141]

3.2 Consolidation of actions in the Magistrates' Courts

Rule 28(5) of the Magistrates' Courts Rules provides that:

[w]here separate actions have been instituted and it appears to the court convenient to do so, it may upon the application of any party thereto and after notice to all interested parties, make an order consolidating such actions, whereupon –

> **(a)the said actions shall proceed as one action;**
>
> **(b)the provision of this rule shall *mutatis mutandis* apply with regard to the action so consolidated; and**
>
> **(c)the court may make any order which it deems fit with regard to the further procedure, and may give one judgment disposing of all matters in dispute in the said actions.**

4 Voluntary intervention in a matter

4.1 Intervening in a High Court matter

Voluntary intervention as a plaintiff or defendant is covered by High Court rule 12, although the rule does not displace the common law. It may seem odd that anyone would *voluntarily* intervene in legal proceedings, but it will be appreciated that doing so makes sense if a matter is likely to affect a party's interests. The excluded party can best protect his or her interests by becoming party to the proceedings, instead of remaining on the outside.

The test to determine whether or not a party is entitled to intervene in terms of High Court rule 12 is set out in the case of *Minister of Local Government and Land Tenure and Another v Sizwe Development and Others*: *In re Sizwe Development v Flagstaff Municipality*:

The undermentioned principles apply to an application in terms of rule 12, or the common law, for leave to intervene.

(a)The applicant must satisfy the Court that:

(i)he has a direct and substantial interest in the subject-matter of the litigation, which could be prejudiced by the judgment of the Court (*Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) at 167; *United Watch and Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C) at 415–16; *Aquatur (Pty) Ltd v Sacks and Others* 1989 (1) SA 56 (A) at 62C);

(ii)the application is made seriously and is not frivolous, and that the allegations made by the applicant constitute a *prima facie* case or defence – it is not necessary for the applicant to satisfy the Court that he will succeed in his case or defence (*Mgobozi and Others v The Administrator of Natal* 1963 (3) SA 757 (D) at 760G; *Ex parte Moosa: In re Hassim v Harrop Allin* 1974 (4) SA 412 (T) at 414B).

(b)A 'direct and substantial interest' means '… an interest in the right which is the subject-matter of the litigation and … not merely a financial interest which is only an indirect interest in such litigation' (the *Henri Viljoen (Pty) Ltd case supra* at 169H; *United Watch and Diamond Co case supra; Aquatur (Pty) Ltd case supra*).

(c)The fact that a judgment or final order has already been issued is not a bar to leave to intervene being granted (*United Watch* and *Diamond Co case supra*) if the intervention is sought for some legitimate process which can be instituted subsequent to the issue of the judgment or final order (*Baard v Estate Baard* 1928 CPD 505, in which the applicant was granted leave to intervene for purposes of noting an appeal against the judgment).[142]

Although an applicant may show that he has a *prima facie* interest in the case, a court may allow other considerations to weigh more heavily with it and refuse the application to intervene. For instance, in *National Director of Public Prosecutions v Zuma*2009 (2) SA 277 (SCA), Mr Mbeki and other members of government sought leave to intervene in the Supreme Court of Appeal because the reasons in the judgment in the High Court cast serious aspersions on them. While Harms DP held that the parties applying for intervention had ample reason to be upset by the High Court's judgment, which made the applicants' desire to intervene at the appeal stage understandable, nevertheless the application to intervene was refused. The Supreme Court of Appeal held that to be able to intervene in proceedings, a party must have a direct and substantial interest *in the outcome of the litigation*, and concluded that the applicants had no interest in the order but only in its reasoning. The court concluded that the applicants were in a position analogous to a witness whose evidence has been rejected or on whose demeanour an unfavourable finding has been expressed. Such a person has no ready remedy, especially not by means of intervention.[143] So, too, in constitutional litigation, the Constitutional Court held in *Gory v Kolver NO and Others (Starke and Others Intervening)*[144] that the Court always has an overriding power to grant or to refuse intervention in the interests of justice, and that other considerations that could weigh with the Court in exercising its discretion include:

> **the stage of the proceedings at which the application for leave to intervene is brought; the attitude to such application of the parties to the main proceedings; and the question, whether the submissions which the applicant for intervention seeks to advance raise substantially new contentions that may assist the Court.**

4.2 Intervening in a Magistrates' Court matter

Magistrates' Courts rule 28(1) deals with the situation in which a person wishes to intervene in proceedings. In terms of the rule, such person must make application to court to intervene. Only a person having an interest in the proceedings may make application to intervene. Having an interest in the proceedings means having a *direct and substantial interest* in the proceedings.[145]

5 Forced intervention in a matter

5.1 The need for forced intervention

It often occurs in practice that one of the parties to an action will wish to draw an outside party into a matter.

Example 1

A motor vehicle driven by A collides with a motor vehicle driven by B. The motor vehicle driven by A is damaged. The motor vehicle driven by A is owned by C. C institutes action against B to recover the cost of repairing his vehicle. B believes that A was at least partly to blame for the collision and wants to pull A into the action so that the court may allocate a share of the blame for the collision to A.

Example 2

A and B enter into a contract. B obtains an indemnity from C, which indemnifies B in the event that he is sued for breach of contract by A. A sues B for breach of contract. B now wants to pull C into the action between A and B so that the court may determine C's liability in terms of the indemnity provided to B.

In both examples, one would make use of either the *joinder procedure* in terms of Magistrates' Courts rule 28A, or the *third party procedure* in terms of High Court rule 13 (previously third party notices were dealt with in terms of Magistrates' Court rule 28(2)). We shall deal with each of these procedures in due course. Before we do so, however, it is necessary to discuss a procedural step which, in delictual matters, should *always* be taken *before* drawing an outside party into a matter in terms of Magistrates' Courts rule 28(2) or High Court rule 13. This procedural step is taken in terms of the Apportionment of Damages Act,[146] and essentially involves inviting the outside party to intervene voluntarily in the matter, even though Magistrates' Courts rule 28(2) and High Court rule 13 allow for that person to be drawn into the matter against his will. The reason one should not simply rely on either Magistrates' Courts rule 28(2) or High Court rule 13 will become apparent from the discussion which follows.

5.2 Inviting intervention in terms of the Apportionment of Damages Act 34 of 1956

The purpose of the Apportionment of Damages Act is to avoid a multiplicity of actions arising from a single loss-causing event – the scheme of the Act contemplates a single determination of liability by multiple wrongdoers and the apportionment of liability amongst them in single proceedings.[147] Section 2 of the Apportionment of Damages Act[148] deals with situations in which

two or more people are jointly or severally liable in delict to a third person (the plaintiff) for the same damage. The persons liable for the plaintiff's damage are referred to as *joint wrongdoers*.

If the plaintiff decides to sue only *certain* of the joint wrongdoers and *not others*, then in terms of s 2(2) of the Act:

1. at any stage before the close of pleadings;
2. either the plaintiff or any of the joint wrongdoers who are part of the action;
3. may give a notice to any or all of the joint wrongdoers who were not sued;
4. informing them of the action and inviting them to intervene in the action.

If either the plaintiff or the joint wrongdoers sued by the plaintiff (i.e. who *are* part of the action) *fail* to send the above notice, they could forfeit their right to take action *at a later stage*, against any of the joint wrongdoers who were *not* sued by the plaintiff (i.e. who are not part of the action). Sections 2(4)(*a*) and (*b*) of the Apportionment of Damages Act state as follows:

2(4)(*a*) If a joint wrongdoer is not sued in an action instituted against another joint wrongdoer and no notice is given to him in terms of paragraph (*a*) of subsection (2), the plaintiff shall not thereafter sue him except with the leave of the court on good cause shown as to why notice was not given as aforesaid.

2(4)(*b*) If no notice is under paragraph (*a*) or (*b*) of subsection (2) given to a joint wrongdoer who is not sued by the plaintiff, no proceedings for a contribution shall be instituted against him under subsection (6) or (7) by any joint wrongdoer except with the leave of the court on good cause shown as to why notice was not given to him under paragraph (*b*) of subsection (2).

Therefore, whenever a case involves joint wrongdoers, it is necessary to ensure that the required notice in terms of s 2(2) of the Act is sent to those joint wrongdoers who have not been sued. Even though these persons may be joined to the action as third parties (rule 13 of the High Court Rules) or as defendants (rule 28(2) of the Magistrates' Courts Rules), they still need to be sent the required apportionment of damages notice. As will become apparent in the discussion which follows, the *only* benefit of a joinder is to get a declarator (in the High Court) or a *finding* (in the Magistrates' Court) as to the relative liability of the persons joined. It may *still* be necessary to institute a separate action against those persons to actually *recover* the amount which corresponds to their degree of liability in terms of the declarator or finding. This will be difficult if the apportionment of damages notice in terms of s 2(2) of the Act has not been sent.

5.3 Magistrates' Courts – joinder in terms of rule 28(2)

5.3.1 The grounds for joinder

In the case of an application for *joinder* in terms of rule 28(2), it is *not* necessary to show that the person to be joined has a direct and substantial interest in the matter. Where one of the parties to a Magistrates' Courts action/application makes an application to *join* an outsider to that action or application, all that party needs to show is that it would be *convenient* and *in accordance with the interests of justice* to join the outsider.

The above principle was set out in the important case of *Khumalo v Wilkins*.[149] The case involved a collision between two motor vehicles. The plaintiff was the owner of one of the two motor

vehicles, and the husband of the driver of that vehicle. The driver of the other vehicle (the defendant) wanted to join the plaintiff's wife as a defendant to the action in terms of Magistrates' Courts rule 28(2). Milne J stated as follows:

> **I do consider, therefore, that the court has a discretion to permit the joinder of a defendant in circumstances such as the present, notwithstanding that the person sought to be joined does not have a direct and substantial interest in the proceedings and notwithstanding that his rights would not be affected by the judgment of the court if he were not joined.**[150]

The court held that it would be 'eminently convenient, and in accordance with the interests of justice' if the wife were indeed joined as the second defendant in the action by her husband against the defendant.[151]

5.3.2 The procedure for effecting joinder

The procedure for effecting a joinder is simply to make an application to court to have the outsider joined as a plaintiff or defendant.

5.3.3 The effect of joinder

Usually, it is the defendant in an action who seeks to join an outside party because he (the defendant) feels that the outside party was partly to blame for the damage suffered by the plaintiff, and wants the court to allocate a share of the blame to the outside party.

The effect of successfully joining an outsider to an action in terms of Magistrates' Courts rule 28(2) is *not* to obtain an order that the person joined must pay part of the plaintiff's damages. The defendant who was originally sued by the plaintiff is still liable to pay *all* the plaintiff's damages. Although this may seem a bit unfair, it must be remembered that the plaintiff chose to sue that defendant. If the court were to order the second defendant to pay a portion of the plaintiff's damages, it would amount to forcing the plaintiff to sue someone he did not wish to sue. In the *Khumalo v Wilkins* case, for example, the person joined to the action was the wife of the plaintiff. Obviously, the plaintiff did not want to claim against his own wife.

The following question may be asked: 'If the original defendant is still liable to pay 100% of the plaintiff's claim, even though he (the original defendant) has successfully joined the outside party to the action, what is the use of having joined the outside party?' The answer is that the original defendant may ask the court to make a finding as to the respective degrees in which he (the original defendant) and the outside party, who has been joined as a co-defendant, are responsible for the plaintiff's claim. In other words, the magistrate may be requested to state the respective degrees of blame carried by the original defendant and the outside party who has been joined as a defendant. Although the original defendant will have to pay the plaintiff's claim *in full*, the finding will be very useful to the original defendant in helping him to recover from the party who was joined to the action a portion of what he (the original defendant) paid to the plaintiff. Of course, this portion will be calculated according to the degree of fault attributed by the magistrate to the party who was joined to the action. In practice, it will usually not be necessary for the original defendant to institute a separate action against the party who was joined to the action for the said portion. Once the magistrate has made the finding, the writing is on the wall so to speak, and the party who was joined to the action will usually settle out of court.

Milne J states as follows in *Khumalo v Wilkins*:

> **I think it is clear that the power of the court to order the joinder of a defendant cannot and does not encompass a power to compel a plaintiff to claim relief against a defendant whom he has not sued and does not wish to sue. That being so, the joinder sought by the appellant cannot have the effect of compelling the plaintiff to make a claim against the second respondent (in spite of the fact that the magistrate apparently thought that this is the effect that a joinder would necessarily have). If the joinder is allowed therefore it will only be upon the basis that the plaintiff's claim continues to be one against the appellant only … It is quite clear that one of the grounds upon which the appellant sought the joinder was to enable a finding to be made which would be binding on the second respondent on the question as to whether it was the appellant's negligence or the second respondent's negligence that caused the collision or, if it was the negligence of both of them, to what extent each was at fault. Admittedly, as Mr Findlay pointed out, it seems that the appellant contemplates a further action for his own damages and Mr Donnellan conceded that the joinder could not give him the right to claim such damages in this action from the second respondent. Theoretically, therefore, there will, in any event, have to be a further action and this somewhat weakens the appellant's claim to a joinder on the grounds of avoiding multiplicity of actions. On the other hand, it is clear that in egard to the alternative plea of the appellant to the effect that the accident was caused by the negligence of both himself and the second respondent, a finding by the magistrate as to the respective degrees of fault of the appellant and the second respondent would make a successful claim for a contribution in terms of sec. 2(6) (*a*) of the Apportionment of Damages Act by the appellant against the second respondent, virtually a foregone conclusion. Similarly such a finding would confine the issue in any action by the appellant for his own damages against the second respondent, to the quantum of the appellant's damages. This would have the desirable effect of, in all probability, reducing the costs of any such action if, in fact, any further action were to be brought and the matter were not to be settled out of court as it probably would be.**[152]

In practice, if an attorney is acting for one of two wrongdoers, and the other wrongdoer has not been sued by the plaintiff, the safest route to follow is to join the 'co-wrongdoer' in terms of rule 28(2).

5.4 High Court and Magistrates' Court – third party procedure in terms of rule 13 of the High Court and rule 28A of the Magistrates' Courts Rules

5.4.1 Introduction

Assuming the existence of three parties – party A who has instituted action against party B for damages, and party C who is an outsider to the action – the effect of rule 13 may be described as follows:[153] Rule 13 provides a procedure whereby an unnecessary multiplicity of separate actions can be avoided by:

1. securing that a person who is not a party to the action (the proposed third party – party C), against whom a party to the action (party B) claims a contribution or an indemnity, can be

brought before the court so as to have his obligation (if any) determined at the same time with those of the other defendants who are being sued by the plaintiff or applicant (party A); or

2. providing for the determination, as between a litigant (party B) and a non-litigant (party C), of any question or issue in an action, if substantially the same question or issue will arise or has arisen between them.

Third party joinder was not previously provided for in the rules of the Magistrates' Courts (although it was held that the provisions of rule 28(2) are wide enough to allow such a joinder). Because it is important that this type of joinder and its consequences are expressly regulated, rule 28A of the Magistrates' Courts Rules was introduced to deal with the third party process in the Magistrates' Courts. Accordingly, in the discussion that follows, the same procedure as that which applies in the High Court for joinder of a third party is now applicable in the Magistrates' Court.[154]

5.4.2 The grounds for joinder of a third party

The procedure applies in two situations which are set out in rules 13(1)(*a*) and 13(1)(*b*) of the High Court Rules. We describe each of these situations as they usually occur in practice below:

Situation 1: The defendant in an action examines the claim which the plaintiff is making against him. He concludes that an *outsider* to the action is liable to *contribute* towards settling the plaintiff's claim. Usually, this involves cases in which the defendant and the outsider have *both* contributed towards damage suffered by the plaintiff, but the plaintiff has elected to sue the defendant alone. The defendant will want to bring the outsider into the action to take his share of the blame for causing the plaintiff's damages. Alternatively, the defendant may conclude that an outsider to the action is liable to *indemnify* the defendant from having to satisfy the plaintiff's claim. Usually, this situation arises when, previous to the plaintiff's claim, the *defendant* and the *outsider* have entered into a *contract*, in terms of which the outsider agreed to *indemnify* the defendant for any claims brought against him in relation to specific actions carried out by the defendant.[155] For example, the defendant, a teacher, agrees to take a group of school children on an outing, provided that the school indemnifies him in respect of any claims which might be brought against him as a result of any of the children being injured during the outing. If one of the children is injured during the outing, and the parent of the injured child sues the teacher, the teacher will want to join the school as a third party on the basis that the school must indemnify him from liability for the parent's claim – in other words, the school should pay and not him.

Situation 2: One of the parties to an action (it could be *either* the plaintiff or the defendant, although it is *usually* the defendant) claims that:

1. a question or issue in the action before the court;
2. is *substantially the same*;
3. as a question or issue which has arisen or will arise between *that party* and an *outsider* to the action; and
4. the question or issue should properly be determined with the outsider as part of the action.

P20

5.4.3The procedure for effecting joinder of a third party

The third party procedure is relatively straightforward. As long as either situation set out in High Court rules 13(1)(*a*) or (*b*) (or Magistrates' Courts rules 28A(1)(*a*) or (*b*)) is applicable, the party

wanting to bring another party into the matter as a third party must issue a *third party notice* which is in accordance with High Court Form 7[156] (or in the Magistrates' Court, in accordance with Form 43 of Annexure 1) and have it served on the third party by the sheriff of the court. No application to court is necessary, provided that the third party notice is served before the close of pleadings. If the pleadings are closed, then the leave of the court is required to serve a third party notice.

Note that a copy of the summons is attached to the third party notice.[157] In terms of rule 13(3)(*c*) (and in the Magistrates' Court, rule 28A(3)(*a*)), copies of any other pleadings which may have been filed in the matter must also be attached to the third party notice. Note, from Form 7 (or Form 43 in the Magistrates' Court), that an annexure is attached to the third party notice, setting out the grounds on which the person sending the third party notice claims a contribution or indemnification from the third party. In terms of rule 13(2) in the High Court (and rule 28A(2)(*b*) in the Magistrates' Court), these grounds must be set out in the same way that a claim would be set out in the particulars of claim to a summons.

5.4.4 Opposition by the third party

The third party notice further indicates that the third party is put on terms to give a notice of intention to defend, if he either:

1. disputes the claim of the plaintiff against the defendant; and/or
2. disputes the claim of the defendant for a contribution or indemnification from him.

In other words, the third party can oppose the matter on either or both of the following grounds:

1. He can say that the defendant who sent him the third party notice does not have good grounds for claiming a contribution or indemnification from him; or
2. He can say that the plaintiff does not have a good claim against the defendant who sent the third party notice to him, and for that reason he will not be liable to the defendant for a contribution or indemnification.

The ending to the third party notice tells the third party that he has 20 days from the date on which he gives notice of his intention to defend, to file a plea to the plaintiff's claim against the defendant, or a plea to the defendant's claim against him, or both such pleas. In other words, what happens is that the third party is drawn into the action and he must plead as a defendant would plead.

Depending on the way he pleads, the third party will be regarded, *for the purpose of further pleadings*, as a defendant in relation to the plaintiff, *or* as a defendant in relation to the person who sent him the third party notice, or both.[158]

5.4.5 The effect of a third party notice

Remember that although in certain cases (*for the purposes of further pleadings*) the third party may be regarded as a defendant in relation to the plaintiff, this does *not* mean that the third party *becomes a defendant* in relation to the *plaintiff*. Harms points out that the third party 'does not … become a defendant *vis-à-vis* the plaintiff since there is no *lis* between the plaintiff and the third party and the court cannot therefore give judgment against him in favour of the plaintiff; the court's judgment is more in the nature of a declarator'.[159] This point was confirmed in the case of *Geduld Lands Ltd v Uys and Others*, in which the following is stated:

> **The indemnity claimed by the defendant from the third parties does not create a *lis* between the plaintiff and the third parties. The plaintiff does not claim any relief from the third parties. See Shield Insurance Co Ltd v Zervoudakis 1967 (4) SA 735 (E) from which I quote the relevant passage at 739A of the report of the judgment by Munnik J which reads as follows: '… A study of the provisions of Rule 13 satisfies me that the trial Court could not, in a case like the present, give a judgment against the third party in favour of the plaintiff. *Vis-à-vis* each other they are not plaintiff and defendant. All the trial Court could do is to apportion the degree of fault between the defendant and the third party in the form of a declaratory order …'**[160]

If a defendant in an action joins an outsider to that action as a third party, that defendant cannot in most cases expect the court to order the third party to *pay* anything or *do* anything.[161] Usually, the only way that the court may help the defendant is to *declare* that a certain percentage of liability for the plaintiff's claim lies at the door of the defendant. Despite this *declarator*, however, the defendant is *still* liable to pay *100%* of the plaintiff's claim. *After* he has paid the plaintiff's claim, the defendant may *then* proceed to claim a share of the amount paid from the third party in a *separate* action against the third party (as long as the defendant has complied with the requirements of the Apportionment of Damages Act, which we introduced above, and which is discussed further below). Of course in practice, having seen the declarator, the third party will often agree to settle the case out of court. The following extracts confirm these points:

> **Under Rule 13 all that can be sought by one alleged wrongdoer against another is an apportionment of fault in the form of a declaratory order (*Shield Insurance Co Ltd v Zervoudakis*, 1967 (4) SA 735 (E) at p. 739C). The Rule makes no provision for a Court granting a judgment sounding in money in favour of one alleged wrongdoer against another.**[162]

> **If prayer 2 is construed as seeking only a declaratory order it aims at no more than the determination of the quantum of the contribution payable by the third party … Further, if defendant obtains his declaratory order, he cannot execute upon it. He will, if the third party is recalcitrant, have to sue the latter specifically in terms of the Act and only then will the question of defendant's full discharge of the judgment debt become relevant.**[163]

ADDITIONAL PROCEDURES

F: Interdicts

D37 1General overview

An *interdict* is a court order which either orders a person to *refrain* from performing some act, or orders a person *to perform* a particular act.[164] It is a swift and unusual remedy that is not granted unless certain prerequisites have been met.

Interdicts are almost always obtained by way of application procedure, although it is possible to approach the court by way of action. Keep in mind, however, that the term 'interdict' refers to

the *type of order* you seek (i.e. to *stop* someone from doing something, or to *force* someone to do something), and is *not* a reference to a type of *court procedure*. As mentioned above, all interdicts have to be brought by way of *application* or (sometimes) *action*.

Interdicts may be obtained in both High Court and Magistrates' Courts.[165]

2 The two types of interdicts: prohibitory and mandatory interdicts

Essentially, there are only *two types* of court orders obtainable in the form of an interdict:

1. An order to *stop* or *prevent* someone from doing something: called a *prohibitory* interdict; and
2. An order to *force* someone to do something, called a *mandatory* interdict.[166]

Note that a mandatory interdict against a public official, usually an order that a public official must perform a certain duty, is known as a *mandamus*.[167] An example would be where the Registrar of Deeds is ordered to transfer a piece of land into the name of the applicant.[168]

3 Final and interim interdicts

The purpose of an interdict is to enforce a right. As indicated above, the enforcement of a right may involve either stopping someone from doing something which infringes your right (a prohibitory interdict), or forcing someone to do something which you have a right to have done (a mandatory interdict).

If, when you approach the court to enforce your right, you are able to establish clearly your right (i.e. the court is prepared to hold that you have a *clear right*), then the court may be prepared to grant you a *final interdict* (i.e. a final order enforcing your right). If, however, when you approach the court you are only able to advance *prima facie* proof of your right (i.e. you are able only to satisfy the court that you have a right *on the face of it*), then the court will only be prepared to grant you an *interim interdict*.[169] An interim interdict (also called a temporary interdict or an interlocutory interdict)[170] will serve to enforce your right for a limited period until it can be established whether or not your *prima facie* right is, in fact, a clear right (i.e. until you have clearly established your right).[171] You will then be entitled to apply to court for a final interdict.

In order to illustrate the difference between final interdicts and interim interdicts, let us examine a practical example which often arises in practice. Let us assume that your neighbour is digging a large hole next to your boundary wall, which is causing the wall to collapse. You tell him to stop, but he keeps digging. You have a right to lateral support of your property. You need an urgent prohibitory interdict to enforce this right. Because the matter is so urgent, you may be forced to launch an urgent *ex parte* application asking the court for this interdict. If the application is *ex parte*, your neighbour's side of the story will not be before the court when it first considers the matter. This means that, no matter how well drafted your papers are, the court will only be prepared to hold that your right has been established *prima facie* (because they have not heard your neighbour's side of the story).

This means, in turn, that when the matter is first in court, the court will at most be prepared to grant you an interim interdict, which will operate until such time as your neighbour has had the

opportunity to put his side of the story to the court (on the return date of the rule *nisi* which the court will issue).

There is a further very important point to note in relation to the distinction between final interdicts and interim interdicts. For the granting of either of these types of interdict, it is not sufficient for you simply to establish a right (either clearly or *prima facie*).[172] There are certain additional requirements you need to establish in order to be granted the interdict.

These additional requirements will be discussed in detail in due course. The point you should note at this stage is that the additional requirements which you must establish in order to be granted an interim interdict are more stringent than those required in order to be granted a final interdict. This makes sense, since a temporary interdict is granted on the strength of a right which has been established *prima facie* whereas a final interdict is granted once the right has been clearly established.

4 Jurisdiction to grant interdicts

The High Court, the Magistrates' Courts and the Regional Courts all have jurisdiction to grant interdicts.

The High Court has inherent power to grant interdicts. Section 30(1) of the Magistrates' Courts Act gives the Magistrates' Courts the jurisdiction to grant interdicts.

5 Purposes for which an interdict may be granted

An interdict may be granted for a wide range of purposes, for example:

1. to compel the respondent to perform his obligations in terms of a contract:
    1. A sells, but does not deliver, an article to B. A then 'sells' the same article to C. B may apply for an interdict to prevent A from transferring the article to C.
    2. A grants an option to B to purchase certain property. A then threatens to sell the property to C without giving B the opportunity to exercise his option. B may apply for an interdict to prevent A from selling the property to C.
2. to prohibit the commission of a crime;
3. to prohibit the commission of a delict;
4. to restrain infringements of an owner's rights of enjoyment of his property;
5. to prevent a breach of a statutory provision;
6. to restrain an employee from passing his employer's trade secrets to a business rival; and
7. to restrain a person from *passing off* his business as that of another.

What all interdicts have in common, however, is that the person seeking the remedy must have a *right that is under some kind of threat*. As you can see from the examples listed above, this right may be derived from any legal source, be it the common law, the Constitution, a statute or a right created by a legal transaction such as a contract or will.

6 Final interdicts

The requirements for a final interdict are:[173]

- a *clear right* on the part of the applicant;
- an *injury* actually committed or reasonably apprehended; and
- here is *no other satisfactory remedy* available to the applicant.

Let us deal with each of these requirements in turn. Bear in mind that where a final interdict is sought, any factual disputes must be resolved, if the parties do not request such issues to be referred for trial or evidence, by applying the test enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*:[174] that the interdict sought can be granted only if the facts as stated by the respondents, together with the admitted facts in the applicant's affidavits, justify the grant of the order.

6.1 What is a clear right?

Interdicts involve the enforcement and protection of rights. It follows that the first prerequisite for the granting of an interdict is the existence of a right accruing to the person who seeks to enforce the interdict. For a court to grant a final interdict, it must be satisfied that the right to be protected is a clear right. To establish that the right in question is a clear right, as opposed to a *prima facie* right, involves two steps:

1. Confirming that the right *exists in law*;
   and
2. *Proving* that the right exists in *fact*.

1. *Confirming that the right exists in law*: The first step to take when considering an interdict is to identify the right to be protected or enforced. Rights are many and varied, and although it has become popular to think immediately of constitutional or human rights when rights are under discussion, both common and statute law provide many more. These vary from a right to have one's reputation protected by the law of delict, to rights of ownership or lateral support in property law. Rights are also created by contract, for instance a tenant's right of occupation created under a contract of lease.

   Whether or not the applicant has a right is therefore a matter of *substantive law*, meaning that the right must be one that is recognised by the law. A practitioner must examine the facts of the matter and identify the right on which the applicant relies as a ground for the interdict, and specifically refer to this right in the application papers.

2. *Proving that the right exists in fact*: Merely identifying the right is not sufficient to make it a clear right. Having decided which right possessed by the applicant is under threat, the next step is to prove its existence in *fact*. A mere allegation that it exists is insufficient. *Evidence* must be provided to *prove* its existence. For instance, a right of occupation enjoyed by a tenant would be proved by the existence of an agreement of lease. To establish a clear right, the applicant must prove the existence of the right *on a balance of probabilities*.

To sum up, it may be said that a *clear right* is one that is possessed by the applicant as a matter of substantive law, the existence of which may be proven on a balance of probabilities.

Be careful: Many persist in confusing a *clear* right with a *real* right (as in a real right of ownership). A clear right may be either a real or a personal right, in other words, a right *in rem* or a right *in personam*. The kind of right involved does not matter, provided that the right is *clearly established*, i.e. it exists as a matter of law, and the applicant has proved the right on a balance of probabilities.

6.2 What is an injury actually committed or reasonably apprehended?

The second requirement for a final interdict is an *injury actually committed or reasonably apprehended*. An injury in this context does not necessarily mean physical harm either to the applicant's person or belongings, or harm that results in financial loss.[175] Interference with the right to use a public park, for instance, does not involve any physical injury or financial loss. Having been denied the right of access to the park, however, the applicant suffers injury in the sense that he is denied the enjoyment of using the park's facilities.[176] As Erasmus explains, the authorities use the word 'injury' to mean 'an act of interference with, or an invasion of, the applicant's right and resultant prejudice'.[177]

Note that if the interdict is required in order to prevent or stop the commission of a delict, facts must also be alleged and proved to show that the conduct of the respondent is wrongful.[178]

The injury must either be continuing or about to occur. An interdict will not be granted in respect of an injury already committed.[179] Injury or prejudice does not necessarily mean *actual* prejudice, but also includes *potential* prejudice, which is why the injury may also be *reasonably apprehended*. This means that the injury might not yet have occurred, but can reasonably be expected to happen. As far as the reasonable apprehension of injury is concerned, this does not mean that the applicant must establish a set of undisputed facts, and then prove on a balance of probabilities that the injury *will* result. All the applicant has to show is that a *reasonable person*, when confronted with the facts, would expect that injury would result.[180]It is not enough for a timid applicant to come to court and say that he subjectively fears that injury will result. He must set out the facts on which his fears are based, and they must be well grounded and be shared by the proverbial *reasonable man*.[181]

In other words, the judge must agree with you that your client is right to fear the injury. While it is not sufficient for the applicant merely to assert that he fears injury, however, the apprehension need only be reasonable on a balance of probabilities, and need not be indisputable.[182]

It is also worth noting that the injury need not be irreparable (which, you will see, is the requirement for an *interim interdict*). This makes sense if you consider that your client has a *clear right*: if he has a clear right, then why should the harm that occurs as a result of interference with the right have to be *irreparable* before he is entitled to an interdict? His right is clear, therefore he is legally entitled to be protected from any harm at all.

6.3 What does the absence of any other satisfactory remedy mean?

The last requirement for a final interdict is that the applicant must have *no ordinary or satisfactory remedy*, other than the interdict for which he is asking. Because an interdict is a drastic remedy, the court will not grant an interdict when some other form of redress would be adequate or would provide similar protection.[183] This *other form of redress* may take a variety of forms, provided it is both legal and provides relief as effectively as would an interdict. For example, interdicts have been refused because the court considered that sequestrating the

respondent's estate gave the applicant adequate relief,[184] or that the applicant's own powers were sufficient to provide a remedy without resort to an interdict.[185]

Obtaining police protection or a binding-over order has also been considered to be an adequate alternative.[186]

In other words, an alternative remedy can be almost any legal remedy available. In practice, however, the alternative remedy would usually be a claim for damages. Damages would be a viable alternative remedy where the infringement of the right is capable of being assessed in monetary terms, and the payment of damages would provide adequate compensation. In general then, the court will not grant an interdict where the applicant would be able to obtain suitable compensation for whatever injury he fears by way of an award of *damages*. This rule, however, is subject to certain exceptions:

1. If the respondent is a *man of straw* (in other words, someone who has no assets or money), then the court may consider granting an interdict, even if an award of damages would, in theory, compensate the applicant for any injury suffered.[187]Clearly, an award of damages that cannot be paid is useless.

2. The court may grant an interdict where 'the injury is a *continuing violation of the applicant's rights*', even though it may be possible technically to compensate the applicant by an award of damages.[188] This is closely related to the principle that no one should ever have to abandon his or her rights and accept damages instead.[189]

3. The court may grant an interdict if, although technically possible, it would be very *difficult to assess the damages* caused by the injury.[190]

4. In respect of a *vindicatory application* (an interdict for the return of property to someone with a right to own it), a court will not regard damages as adequate compensation. The reason is that an owner who has been deprived of his property should not be forced to accept damages instead of the return of the property.

You will note that these exceptions all have in common the fact that although they relate to circumstances in which damages might theoretically be granted, damages will not compensate the applicant in practice.

7 Interim interdicts

The requirements for an *interim interdict* are:

1. a *prima facie* right on the part of the applicant;[191]
2. a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is granted;
3. a balance of convenience in favour of the granting of the interim relief; and
4. the absence of any other satisfactory remedy available to the applicant.

Note that in the case of an application for a final interdict, a court is obliged to grant the interdict once the applicant has proved all the requisites.[192] In the case of an application for an interim interdict, however, the court *has a discretion*, and is *not obliged*to grant such an interdict, even if all the requisites are shown.[193] The court must exercise the discretion judicially[194] and will grant

or refuse the interdict depending on a consideration of all pertinent issues, including the prospects of success, the potential injury, the balance of convenience and the availability of alternative remedies. These issues should all be considered together and not separately.

7.1 What is a *prima facie* right?

Because the relief requested from the court is *temporary relief*, the requirement of proving a right which has been infringed, or in respect of which reasonable apprehension of future infringement exists, is less stringent. Temporary interdicts are usually needed in a hurry, and are always brought by way of application. As it may be impossible to prove the right on a balance of probabilities, especially if there is a dispute of fact, only a *prima facie* right need be shown in the case of interim interdicts. But what exactly is a *prima facie* right? The Latin words literally mean 'at first sight', and can also correspond to the English phrase 'on the face of it'.

In practice, a *prima facie right* is established as follows:

1. *Identifying an applicable right that exists as a matter of law*: This is identical to the situation that exists with a clear right. It is necessary to identify a right that exists as a matter of law, from whatever source. A mere interest, for example, will not suffice. It just means that the degree of proof required showing its existence as a matter of fact is less stringent than if you were claiming a final interdict.
2. *Supporting this right with allegations and supporting evidence based on your version of the dispute*: In an application for a temporary interdict, the applicant's right need not be shown by a balance of probabilities; it is sufficient if such right is *prima facie* established, though open to some doubt. In the case of *Webster v Mitchell*,[195] the court held that:

> **The proper manner of approach is to take the facts as set out by the applicant together with any facts set out by the respondent which applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by the respondent should then be considered, and if serious doubt is thrown upon the case of the applicant he could not succeed in obtaining temporary relief …**

What this means is that the allegations made by the applicant must be sufficient to show that a right exists, even though the right's existence is open to some doubt because of denials by the respondent.[196] If, on the probabilities, there is not only some doubt of the existence of a right, but great doubt, then the interdict will not be granted, even on a temporary basis.

Where the interlocutory interdict is bought by way of application, the applicable test for determining whether the requisites have been established are as set out in *Webster v Mitchell* in the following terms:[197]

> **The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown upon the case of the applicant he could not succeed in obtaining temporary relief, for his right, prima facie established, may only be open to "some doubt". But if there is mere contradiction, or unconvincing**

> **explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief.**

In *Gool v Minister of Justice and Another* 1955 (2) SA 682 (C) at 688C–E, Ogilvie Thompson J clarified the test with the following passage:

> **With the greatest respect, I am of opinion that the criterion prescribed in this statement for the first branch of the inquiry thus outlined is somewhat too favourably expressed towards the applicant for an interdict. In my view the criterion on an applicant's own averred or admitted facts is: should (not could) the applicant on those facts obtain final relief at the trial. Subject to that qualification, I respectfully agree that the approach outlined in *Webster v Mitchell* … is the correct approach for ordinary interdict applications.**

This becomes very important to consider when an urgent interim interdict is sought, as such an application will typically be brought by way of application. Where the applicant and respondent's version are mutually destructive, the application of the rules in *Webster and Gool* will be key to determining whether you will be successful in your application.

7.2 What is a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is granted?

In the case of an application for a final interdict, if an applicant can show a clear right, he is entitled to protection for that right from any kind of injury, even if that injury is relatively minor. Matters are different, however, in the case of an application for a temporary interdict.

If an applicant is only able to show a *prima facie* right, the court will only grant an interim interdict if the harm to the applicant is likely to be irreparable. The reason for this is obvious. Where an applicant's right is open to doubt (i.e. it is only *prima facie* right), and the harm is likely to be relatively minor, the court will be less inclined to interfere with the respondent's rights by granting an interdict.

What does 'irreparable harm' mean, precisely? The term is rather elastic in that it does not mean that the harm must be absolutely irreparable, or unfixable, but rather difficult and almost impossible to restore, with emphasis placed on the word 'difficult' rather than 'impossible'. If restoring the *status quo* at a later stage will be costly and difficult, for instance, the applicant will probably have met this requirement.[198]

Any interference with a right that prevents the applicant from exercising the right is considered to be irreparable harm, regardless of whether there is financial loss.[199] However, irreparable harm can also include the loss of money, or any property, corporeal or incorporeal, in circumstances where recovery is unlikely; or alternatively, if the applicant is forced to spend money he is unlikely ever to get back.[200]

Irreparable loss will also occur when a person who has a right to property is obliged merely to accept its value instead of the property itself.[201] In fact, there is a rebuttable presumption that in a vindicatory matter for the recovery of property allegedly owned by the applicant, the injury will be irreparable.[202]

7.3 What is a balance of convenience in favour of the granting of the interim relief?

With a final interdict you must have a clear right to protection so it does not matter if it will be very inconvenient *or* expensive for the other party if the interdict is granted. To obtain a temporary interdict, however, you need only have a *prima facie* right. It may be that your client has a clear right that just has to be proved, *or* it may be that your client is unable to prove a clear right. When the court decides whether or not to grant the temporary interdict, however, it does not know whether your client will be able to prove a clear right in the long run. Given this uncertainty, it is important that the respondent should not be unfairly prejudiced by the granting of the interdict. To avoid this, where the right is not clear, but has only been established *prima facie*, the applicant must show a *balance of convenience* in favour of the granting of the interim relief. This means that the court weighs the prejudice that is likely to be suffered by the applicant if the interdict is not granted now but at a later stage, against the prejudice that will be suffered by the respondent if it is.

Also taken into account are the applicant's prospects of success. If they can be shown to be strong, the balance of convenience need not be too strongly in his favour, whereas if they are weak, the balance of convenience must be highly in his favour, and the potential injury great, before an interdict will be granted.

Occasionally, the court will also take into account potential prejudice against third parties,[203] and it is also possible that the court will make provision for the protection of the respondent in any order in favour of the applicant by ordering that the applicant provide security for the respondent's potential damages.[204]

7.4 What does the absence of any other satisfactory remedy mean?

This aspect is identical to that dealt with in respect of final interdicts in Section 6.3 above.

7.5 Treatment of interim interdicts pending an appeal or application for leave to appeal

As discussed elsewhere in this book, interim interdicts may be appealable. Whether or not an interim order is appealable may depend on whether it is final in effect, whether it disposes of a substantial portion of the relief sought, and whether the interests of justice require that the appeal be entertained. Assuming it to be appealable, we consider below how an interim interdict would be treated pending the appeal (or application for leave to appeal).

In terms of s 18(2) of the Superior Courts Act,[205] the general principle is that interim orders *which do not have the effect of final judgments* are not suspended when an application for leave to appeal is lodged against those judgments.[206] In terms of s 18(3), read with s 18(2), however, the court may order that the operation of the interim order *is* suspended, if certain circumstances are met.[207]

Section 18 introduces a standard for the suspension of an interim order different from that which existed under the old Supreme Court Act.[208] Now, under the Superior Courts Act, the applicant must, firstly, demonstrate that *exceptional circumstances* exist to justify the order sought; that irreparable harm will be suffered by the applicant if the interim order is not suspended; and, finally, that the respondent will not suffer irreparable harm if the interim order is suspended.[209]

The meaning of the phrase '*exceptional circumstances*' has been considered by the courts in various legislative contexts, and the following provides a guideline as to its likely meaning in s 18(2) of the Superior Courts Act:

1. There is no general rule and each case must be considered upon its own facts to establish whether 'exceptional circumstances' exist.[210]
2. When a statute directs that a fixed rule shall only be departed from under exceptional circumstances, the court should take a strict, rather than a liberal, view of applications for exemption.
3. The court should carefully scrutinise any special circumstances relied on.[211]
4. The term 'exceptional circumstances' ordinarily means something out of the ordinary and of an unusual nature.[212]
5. To be exceptional, the circumstances concerned must arise out of, or be incidental to, the particular case.[213]

With regard to the '*irreparable harm'* leg of the test, the Act requires that the applicant shows two things: firstly, that the unsuccessful party who seeks to appeal would suffer irreparable harm if the suspension were not to be ordered and, secondly, that the successful party would *not* suffer irreparable harm if the suspension were to be ordered.[214] This would seem to suggest that, if *both parties* would suffer irreparable harm, even slight harm, the court may not grant the order in terms of s 18(3). Both of these requisites must be established *on a balance of probabilities* in order to be successful under s 18(3).

7.6 The granting of interim interdicts and separation of powers[215]

In a case where granting an interim interdict is against a government department and has certain budgetary implications, regard must be had to further considerations. Assume, for example, that you apply for an interim interdict restraining the South African Revenue Service from collecting taxpayers' money pending a challenge to the tax statutes.[216] Such an order would have a severe impact on tax revenue and the national fiscus. In *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* (*OUTA*),[217] the Constitutional Court clarified the correct approach to granting interim relief in such circumstances:

1. The existing test for interim interdicts as set out in *Setlogelo v Setlogelo*[218] remains applicable;
2. In applying the *Setlogelo* test, however, judges must be cognisant of the normative scheme and democratic principles that underpin the Constitution, particularly the impact of the interdict on the separation of powers;
3. Separation of powers 'harm' must be considered within the rubric of the balance of convenience inquiry;[219]

A temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm.[220]

The *OUTA* approach requires that, when a court is seized with an application of this nature, it must assess carefully how and to what extent its interdict will disrupt executive or legislative functions conferred by the law and, accordingly, whether the order will implicate the tenet of separation of powers. While a court has the power to grant a restraining order of that kind, it does not readily do so, except when a proper and strong case has been made out for the relief and, even so, only in the clearest of cases.[221]

The Constitutional Court decision of *City of Tshwane Metropolitan Municipality v AfriForum and Another* [2016] ZACC 19 provides an interesting example of how the OUTA test may be applied. The case concerned a restraining order granted in favour of AfriForum against the City of Tshwane Metropolitan Municipality in which the municipality was ordered to stop removing the old street names in the Pretoria area and to bring back those that had been removed already. The majority of the Constitutional Court held that AfriForum had failed to satisfy the requirements for the interim interdict because the interdict impeded the municipality's ability to transform society and its related right to govern. The minority judgment, on the other hand, held that the High Court's interim order had merely restored the *status quo ante* – and as such, the mandatory interdict did not meddle in the domain of the Executive but showed deference. The judgment shows that ascertaining what constitutes separation of powers 'harm' is anything but clear.

8 How to decide whether to apply for an interim or a final interdict in practice

The crucial feature distinguishing situations in which you will apply for a temporary interdict from those where you will apply for a final interdict is whether your client is able to *demonstrate a clear right*. If so, then you will apply for a final interdict. If not, you will apply for a temporary interdict (also called an *interim* interdict). If an action is already pending in relation to the matter, then it is obvious that your client will not be able to allege a clear right. In such a situation, you will apply for a temporary interdict in order to protect your client's rights until the action has been finalised. Once the action has been finalised, the problem will usually resolve itself, and it will not be necessary to apply for a final interdict at that stage. For example, two farmers are engaged in a dispute as to the location of the common boundary between their farms. Legal action has either been threatened or commenced in order to resolve the issue of the location of the boundary. Before this legal action has been finalised, one of the farmers threatens to bulldoze a shed which was built by the other farmer near the common boundary, on the grounds that it is situated on his (the first farmer's) land. In this situation, the farmer who owns the shed would apply for a temporary interdict to stop the other farmer from bulldozing the shed. He cannot apply for a final interdict (i.e. to prevent permanently the other farmer from bulldozing his shed) because it may, in fact, turn out that the shed is situated on the other farmer's land. Once the boundary dispute has been settled, the problem surrounding the shed will probably resolve itself since it will be clear on whose land the shed is situated (i.e. a *clear right* has been established).

If no legal action is pending, it will often be the case in practice that your client will allege a clear right to the interdict. For example, your client's house is situated on a slope. Your client's neighbour, who lives further down the slope, starts to excavate land near the boundary with your client's house. The removal of lateral support from your client's house causes cracks to start appearing in the walls of the house. Your client has a clear right to lateral support and will apply for a final interdict against his neighbour.

In the scenario sketched above, the application for a final interdict will have to be brought on an urgent basis because cracks are already beginning to appear in the walls of the house. Because the matter is so urgent, the application will probably be made *ex parte*, and you will ask the court to issue a rule *nisi*. The rule *nisi* will order the respondent to come before court on the return date *to show cause* why the final interdict should not be granted.

Together with the rule *nisi*, you will ask the court to allow the order you are asking for to operate with *interim effect*. In other words, you will ask that the respondent be interdicted from continuing with his excavations until the return date, when your application for a final interdict will be heard. In effect, you will be asking for a *temporary interdict* until the return date, at which time you will be asking for a *final interdict*. Thus your application papers will have to allege the requirements for both a temporary *and* a final interdict. Three of the requirements overlap, but one does not:

1. By alleging a clear right (for the final interdict), you will automatically also be alleging a *prima facie* right (which you need for the temporary interdict).
2. By alleging that your client will suffer irreparable harm if the temporary interdict is not granted but the final interdict is granted (which you need to do for the temporary interdict), you will in effect be alleging that your client has suffered or reasonably apprehends an injury (which you need to do for the final interdict).
3. You will allege that your client has no alternative remedy (since this allegation has to be made for both the temporary and the final interdicts).
4. The only requirement that does not overlap is the allegation that the balance of convenience favours the granting of the interim interdict (this allegation is not required for a final interdict, but you will nevertheless make the allegation since you are asking for a temporary interdict followed by a final interdict.)

9 Applying for an interdict: the usual procedural steps in practice

In practice, both final interdicts and temporary interdicts are usually sought by way of application. The reason for this is that the types of situations which require relief in the form of an interdict usually involve some sort of urgency. Often, the urgency will be such that the application will be brought *ex parte*, without notice to the respondent, although interim interdicts are frequently brought on notice to the other party. In some divisions, a rule *nisi* must be sought and obtained, together with temporary relief in the form of an interlocutory interdict (e.g. in the KwaZulu-Natal Division this is the practice).[222] The practice in some other divisions is to seek an interim interdict to operate with immediate effect and a final interdict thereafter (with no rule *nisi*).

Assuming a rule *nisi* is sought, the usual steps are as follows:

1. An application for a temporary interdict is brought on notice of motion with founding affidavit.
2. If extremely urgent, it may be brought *ex parte*.
3. A rule *nisi* is granted calling on the respondent to show cause on the return day why the relief set out in the rule should not be granted and a final interdict granted. Typically, the rule *nisi* (or 'rule' as it is sometimes referred to informally) will have a paragraph in terms of which it is to operate with immediate effect (i.e. giving temporary, immediate relief in the form of an interim interdict).
4. The rule *nisi* has the effect of an order of court and the applicant will usually ensure that a copy of the rule is served on the respondent.
5. Together with the rule *nisi*, the applicant will usually ask for temporary relief (usually a request that the final relief sought operates with temporary effect) which will operate until the return day.
6. On the return day, the rule *nisi* is either confirmed or discharged. If it is confirmed, the interdict is made final (if the matter is relatively open and shut and the applicant is able to meet the requirements for a final interdict) or discharged (if the plaintiff fails to satisfy the requirements

for a final interdict). Note the different requirements for final and interim relief in application proceedings as set out in *Plascon Evans and Webster v Mitchell* – discussed above.

7. The rule *nisi* may also be extended if further temporary relief is required (if the matter is more complex and the applicant is still only able to meet the requirements for a temporary interdict – in such a case the matter may have to be finally dealt with by means of an action and the temporary interdict will remain in place until such action is finalised).

10 Remedies for breach of interdict

An interdict (whether it is temporary or final) comes into operation at the moment it is granted by the court. The order of court granting the interdict does *not* have to be served on the person who is subject to the interdict in order to make the interdict effective (although it is good practice to ensure that the respondent is served with a copy so that he or she knows about it and can comply with it).[223] A party who ignores the provisions of an interdict may be committed to prison for contempt of court. Erasmus states that:

> **Any person bound to observe the prohibition contained in the order will be guilty of contempt if he flouts the order while he has information, which he has no reason to disbelieve, to the effect that an order of court has been granted against him. The principle is that when a person receives information, which he has no reasonable ground for disbelieving, that an order of court has been issued against him, he is bound to act as if that order had actually been served upon him, and if he fails to do so, he acts contrary to its tenor at his peril.[224]**

The Constitutional Court in *Pheko and Others v Ekurhuleni City* reiterated the importance of compliance with court orders as integral to the rule of law in the following terms:[225]

> **[D]isobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.**
>
> **Courts have the power to ensure that their decisions or orders are complied with by all and sundry, including organs of state. In doing so, courts are not only giving effect to the rights of the successful litigant but also and more importantly, by acting as guardians of the Constitution, asserting their authority in the public interest. It is thus unsurprising that courts may, as is the position in this case, raise the issue of civil contempt of their own accord.**

Wilful disobedience of an order made in civil proceedings is not only contemptuous but is also a criminal offence. The object of contempt proceedings is to impose a penalty that will vindicate the court's honour following the disregard of a previous order and to compel performance of the previous order. Civil contempt is a form of contempt by disobeying a court order and it is a crime. If all of the elements of criminal contempt are satisfied, civil contempt can be prosecuted in criminal proceedings.[226]

11 Structural interdicts[227]

The so-called *structural interdict* is an innovation that developed as a result of the inadequate enforcement mechanisms available to the courts to ensure that organs of the state comply with

their constitutional obligations.[228] In essence, the remedy here is a *mandamus* that incorporates a specific order of court directed at a government department, giving detailed directions to the department concerned to report back to the court, within a given time frame, on its implementation of the court's order in a matter.[229]

Rycroft and Bellengère[230] comment as follows on the court in *Zuba's* justification for the use of the structural interdict:

> **In justifying the structural interdict, Plasket J took as his starting point the positive obligations that the Constitution places on the state to 'protect, promote and fulfil' fundamental rights. He took this to imply that in proper cases, new approaches to remedies are called for because the usual remedies [such as the declarator, the prohibitory interdict, the mandamus and awards of damages] 'may not be capable of remedying, or be appropriate to remedy, systemic failures or the inadequate compliance with constitutional obligations, particularly if one is dealing with the protection, promotion or fulfilment of rights of a programmatic nature'. Underpinning this conclusion is the Constitutional imperative on courts to grant appropriate, just and equitable relief when a right in the Bill of Rights has been infringed or threatened. The court concluded that 'judicial innovation may be necessary to properly and effectively remedy constitutional infractions by fashioning new remedies' [footnotes removed].**

The ultimate aim of the structural interdict is, therefore, to ensure compliance with the court order by state departments to the public by establishing a fixed reporting pattern. This interdict requires the relevant state or other authority to report the implementation of the court order to the court in a structured and detailed manner so that the court may be satisfied that its order has been effectively implemented.[231]

In *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another*,[232] the Constitutional Court crafted an order that required the parties to report back on its attempts to negotiate in good faith. In *Port Elizabeth Municipality v Various Occupiers*[233] the Constitutional Court considered the importance of such orders:

> **In seeking to resolve the above contradictions, the procedural and substantive aspects of justice and equity cannot always be separated. The managerial role of the courts may need to find expression in innovative ways. Thus, one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a pro-active and honest endeavour to find mutually acceptable solutions.**

G: Drastic procedures

1 *Anton Piller* orders

1.1 What is an *Anton Piller* order?[234]

The purpose of the *Anton Piller* order is to ensure that vital evidence is preserved[235] for use in a subsequent trial. It is a drastic remedy because the order may be obtained *ex parte* (without notice to any potential respondents), and the application may be heard *in camera* to ensure maximum confidentiality. The application is usually brought on an urgent basis as it is done in anticipation of the other party destroying or hiding vital evidence.[236] It is also drastic because the *Anton Piller* order has the potential to create serious inroads into a person's right to privacy.

1.2 Applying for an *Anton Piller* order

The *Anton Piller* order is obtained by way of an *ex parte* application. The order requested is of limited scope as its sole aim is the preservation of vital evidence, and it can be made against any private person, company, entity, or any government department. As the order does not normally operate as an interdict, the provisions of s 3 of the General Law Amendment Act 62 of 1952, requiring notice of 72 hours in applications served on government departments, does not apply to *Anton Piller*orders.[237] The order gives immediate relief (i.e. to search premises and seize evidence), but remains an interim order that is aimed solely at preserving evidence for trial.

1.3 Procedural requirements[238]

It was held, in the *Universal City Studios* case,[239] that the applicant for the order must, *prima facie*, establish the following on his founding papers:

1. That he has a *valid cause of action* against the respondent(s), and that he has a serious intention of pursuing the cause of action;
2. That the respondent has *specific*[240]*objects or documents* in his possession, and that these objects or documents constitute *vital evidence*[241] for his proposed civil action; and
3. That he has a *real and well-founded apprehension*[242] that the specified evidence will be destroyed, hidden or otherwise removed before the discovery stage of civil proceedings, or by the time the matter is set down for trial.

1.4 Procedural safeguards

A number of procedural safeguards have been developed by our courts when granting *Anton Piller* orders:

1. The court order may be very detailed to ensure that the search and seizure power it affords is not open to abuse.[243]
2. If the application is opposed on the return day, the court will decide the matter on the ordinary test of a *balance of probabilities*. The court retains the discretion whether to grant the order or not, and will not make the order more onerous than is strictly necessary to protect the applicant's interests.
3. The court may order that an *explanatory notice* be given to the respondent. This notice is served by the sheriff, and sets out the nature and effect of the *Anton Piller* order for the respondent. It

may also contain other information, such as his right to contact a legal representative and the measures to be taken for the protection of the property seized.[244]

4. The court may order that a *supervising attorney* be appointed to ensure that the order is implemented strictly in accordance with the court's directions. This attorney may not be a member or employee of the firm acting for the applicant. The order may also specify the role the sheriff of the court must play in implementing the order.[245]
5. If the order was granted in the respondent's absence (which, of course, will almost always be the case), the respondent is entitled to set the matter down for reconsideration on notice.[246] However, in granting this relief (to set the matter down for reconsideration) the court must be cognisant of the applicant's need to ensure that opportunities to dispose of evidence are minimised.
6. Although the Constitutional Court has held that *Anton Piller*-type orders are, in principle, neither contrary to public policy nor unconstitutional, the courts nevertheless have to be vigilant in ensuring that the fundamental rights of respondents are not unduly infringed.[247]

1.5 The form of the order contained in the notice of motion

As is apparent from the above, the form of the order is key to ensuring that the power of search and seizure is not abused and that such power is exercised constitutionally. Harms[248] suggests that the notice of motion (drafted by the applicant seeking the order and presented to the court, which will form the basis of the order if the application is granted) would do well to provide for the following:

1. Declaring that the applicant is entitled to have the application heard *in camera*;
2. Dispensing with the forms and service provided for in the rules (if the matter is heard as one of urgency);
3. Ordering the registrar to retain the court file (so that the respondent(s) or the legal representatives of the respondent(s) cannot get wind of the matter before the execution of the order);
4. Prohibiting anyone, pending the execution of the order, from disclosing any facts relating to the application without the leave of the court;
5. Stipulating that any acts which have to be performed to implement the order must be performed by or in the presence of the sheriff, the applicant's attorney and a supervisory attorney;
6. Requiring the respondent(s) to point out and to disclose to the sheriff specified objects and documents;
7. Enabling the sheriff to enter and search the premises of the respondent(s), and to seize, attach and remove specified objects and documents; and
8. Ordering the sheriff to keep in his possession[249] the objects and documents, pending the directions of the court.

Various divisions of the High Court have their own procedures and specimen orders of which practitioners must take account.

2 *Knox D'Arcy* interdicts

2.1 What is a *Knox D'Arcy* interdict?

A *Knox D'Arcy*[250] interdict is a special kind of interdict which is sought to prevent a defendant or respondent from dissipating or concealing his assets at any stage before judgment has been taken against him, or even after judgment.

Given its unique features, the Appellate Division in the *Knox D'Arcy* case held that this type of interdict is *sui generis*.[251]

This type of interdict has also been called a 'Mareva-type' interdict, an interdict *in securitatem debiti*, and an *anti-dissipatory interdict*.[252]

2.2 General principles and procedural requirements

The general approach to, and procedural requirements for, obtaining this kind of interdict are set out in the case of *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A), an appeal from the decision in the case of *Knox D'Arcy Ltd and Others v Jamieson and Others* 1994 (3) SA 700 (W).

2.2.1 The purpose of the interdict

In *Knox D'Arcy*[253] the court emphasised that:

> **the only claim which the petitioners had was the claim for damages, and the purpose of the interdict sought was not to substitute it for the claim for damages but to reinforce it; to render the claim more effective.**

2.2.2 The justification for the interdict

The justification for the interdict is based on the court's desire to prevent an unsuccessful defendant from concealing or getting rid of funds or assets with the intention of not paying the successful plaintiff.[254]

2.2.3 What the applicant must show

The applicant must show either that the defendant was:

1. *busy* dissipating[255] or concealing assets; or
2. that the defendant was *likely to* dissipate or conceal assets;
3. with the *intention of defeating the claim of the applicant*.[256]

2.2.4 The applicant's onus of proof

The court held as follows on the issue of whether the requirements in paragraph 2.2.3 above must be proved on a balance of probabilities, or merely *prima facie*:[257]

The basis of the petitioners' claim, as set out in the petition for leave to appeal and the heads of argument, is that they have proved prima facie that the respondents had an intention to defeat the petitioners' claims, or to render them hollow, by secreting their assets. It was common cause that if these facts could be proved, together with the other requirements for an interim interdict, their petitions would have a good case, and for the reasons given above I agree with this approach.

There was some argument on whether the fact that assets were secreted with intent to thwart the petitioners' claim, had to be proved on a balance of probabilities or merely prima facie. However, it seems to me that here also the relevant strength or weakness of the petitioners' proof would be a factor to be taken into account and weighed against other features in deciding whether an interim interdict should be granted.

It appears from the above that the court reiterated the usual test for obtaining an interim interdict, and that *prima facie* proof will be sufficient to obtain an interim interdict in this type of case.

The second paragraph in the extract above (which appears to be obiter) seems, however, to suggest that, in some circumstances, proof on a balance of probabilities may be required.

Unfortunately, the wording of this second paragraph leaves matters somewhat unclear.

The court *did* hold, however, that the *balance of convenience test* may, in suitable circumstances, be applied in this type of application.[258]

2.2.5 Notice to the respondent

The general rule is that the respondent must be given notice. In the *Knox D'Arcy*[259] case, the Appellate Division endorsed this dictum of Stegmann J in the court *a quo*:

> **The making of an order which affects an intended defendant's rights, in secret, in haste, and without the intended defendant … being heard, is grossly undesirable and contrary to fundamental principles of justice (at 379G).**

The court went on to hold that this type of application should only be heard *in camera* in exceptional circumstances; that is, where justice could not be served otherwise than by depriving the respondent of the right to be heard.[260]

2.2.6 Noncompliance with court orders

The refusal to comply with an order of court (whatever the legal remedy used) amounts to contempt of court, which may result in the court ordering specific compliance, combined, at its discretion, with an appropriate penalty.[261]

3 The civil recovery of property: the Prevention of Organised Crime Act 121 of 1988

3.1 Introduction

The Prevention of Organised Crime Act 121 of 1998 (hereafter abbreviated as POCA) in chapter 6 provides for the civil recovery of property, and is dealt with in two parts: the first part of the chapter deals with the *preservation* of property seized in terms of the Act, and the second part deals with the *forfeiture* of property seized.

Chapter 6 of the Act is introduced by s 37, which reads as follows:

> **37Proceedings are civil, not criminal**[262]
>
> **(1)For the purposes of this Chapter all proceedings under this Chapter are civil proceedings, and are not criminal proceedings.**
>
> **(2)The rules of evidence applicable in civil proceedings apply to proceedings under this Chapter.**
>
> **(3)No rule of evidence applicable only in criminal proceedings shall apply to proceedings under this Chapter.**
>
> **(4)No rule of construction applicable only in criminal proceedings shall apply to proceedings under this Chapter.**

3.2 Preservation of property in terms of POCA

Preservation of property orders made in terms of ss 38 to 47 of POCA are similar in nature to *Anton Piller* orders. In terms of s 38 of POCA, the National Director of Public Prosecutions (NDPP) may make an *ex parte* application to the High Court for the following:

1. Prohibiting any person from dealing in any manner, as specified in the draft order, with any property;
2. For an order authorising the seizure of specified property by a police official, and ancillary orders for the fair and effective execution of this order; and
3. Directions for the preservation of the seized property, pending further court proceedings.

In terms of s 38(2), the applicant has to show that there are reasonable grounds to believe that the property specified was *instrumental to an offence* referred to in Schedule 1 to POCA, or that the property concerned was obtained from the *proceeds of unlawful activities*. As to the meaning of the term 'proceeds of unlawful activity', which has been interpreted very broadly, see *National Director of Public Prosecutions v Abrina 6822 Ltd and Others*.[263]

Part 2 of Chapter 6 also provides for *notice to be given* to all persons who have an interest in the property subject to the preservation order, and for notice of the order to be published in the *Government Gazette*.[264]

3.3 Forfeiture of property[265] in terms of POCA

Once a preservation of property order is in force, the NDPP may apply to the High Court for an order forfeiting all or part of that property to the state.[266] The NDPP is obliged to give 14 days' notice of this forfeiture application to all interested parties, and this notice must be served by the sheriff in the same way as a High Court summons. The interested party may then oppose the making of the order, or apply for a variation of the order (for example, excluding his share of the property from the operation of the order). The interested party responding is also entitled to give and lead evidence at the hearing of the application.[267] In terms of s 56, the High Court may appoint a *curator bonis* to supervise the implementation of the forfeiture order.

4 Protection orders in terms of the Domestic Violence Act 116 of 1998[268]

4.1 What is a domestic violence protection order?

In terms of s 7 of the Domestic Violence Act 116 of 1998, a special type of interdict called a *protection order* may be issued by the court in domestic violence cases. The provisions of the Act may be utilised against any person who is or has been in a *domestic relationship* with a complainant and who has committed or allegedly committed an act of *domestic violence* against the complainant. Both 'domestic relationship' and 'domestic violence' are defined in the widest possible terms, making the Act very broad in its scope.

4.2 Defining a domestic relationship

The term 'domestic relationship' is defined as a relationship between a complainant and a respondent in any of the following ways:

1. They are or were married to each other, including marriage according to any law, custom or religion.
2. They (whether of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other.

3. They are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time).
4. They are family members related by consanguinity, affinity or adoption.
5. They are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration.
6. They share or recently shared the same residence.

4.3 The definition of domestic violence

The definition of *domestic violence* includes the following:

1. Physical abuse (which means any act or threatened act of physical violence towards a complainant);
2. Sexual abuse (which means any conduct that abuses, humiliates, degrades or otherwise violates the sexual integrity of the complainant);
3. Emotional, verbal and psychological abuse (which means a pattern of degrading or humiliating conduct towards a complainant, including repeated insults, ridicule or name calling; repeated threats to cause emotional pain; or the repeated exhibition of obsessive possessiveness or jealousy, which is such as to constitute a serious invasion of the complainant's privacy, liberty, integrity or security);
4. Economic abuse (which includes the unreasonable deprivation of economic or financial resources to which a complainant is entitled under law or which the complainant requires out of necessity, including household necessities for the complainant, and mortgage bond repayments or payment of rent in respect of the shared residence; and the unreasonable disposal of household effects or other property in which the complainant has an interest);
5. Intimidation (which means uttering or conveying a threat, or causing a complainant to receive a threat, which induces fear);
6. Harassment (which means engaging in a pattern of conduct that induces the fear of harm to a complainant including (i) repeatedly watching or loitering outside of or near the building or place where the complainant resides, works, carries on business, studies or happens to be; (ii) repeatedly making telephone calls or inducing another person to make telephone calls to the complainant, whether or not a conversation ensues; (iii) repeatedly sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant);
7. Stalking (which means repeatedly following, pursuing, or accosting the complainant);
8. Damage to property (which means the wilful damaging or destruction of property belonging to a complainant or in which the complainant has a vested interest);
9. Entry into the complainant's residence without consent (where the parties do not share the same residence); or
10. Any other controlling or abusive behaviour towards a complainant.

4.4 *Locus standi* to apply for a protection order

In keeping with the wide scope of the Act, *locus standi* to make application for a protection order is extended well beyond the complainant. In terms of s 4(3) of the Act, such application may also be made on behalf of the complainant by any other person, including a counsellor, health service provider, member of the South African Police Service, social worker or teacher, who has a material interest in the well-being of the complainant. The application must, however, be brought with the written consent of the complainant, except in circumstances where the complainant is (a) a child (younger than 18); (b) mentally retarded; (c) unconscious; or (d) a person whom the

court is satisfied is unable to provide the required consent. In terms of s 4(4), any minor (now a child younger than 18), or any person on behalf of a child, may apply to court for a protection order without the assistance of a parent, guardian or any other person.

4.5 Applying for a protection order: the procedure

In terms of s 4(7) of the Act, the procedure involved in making application for a protection order is simply to lodge such application, together with any supporting affidavits by persons who have knowledge of the matter, with the clerk of the Magistrates' Court. The clerk will then submit the application and affidavits to the court.

As soon as is reasonably possible, the court will consider the application. In terms of s 5(2), if the court is satisfied that there is *prima facie* evidence that the respondent is committing, or has committed, an act of domestic violence, and that undue hardship may be suffered by the complainant as a result of such domestic violence if a protection order is not issued immediately, it will issue an interim protection order against the respondent. The interim protection order will be issued despite the fact that the respondent has not been given notice of the application.

4.6 Serving the order on the respondent

In terms of s 5(3), the interim protection order must be served on the respondent and it will call upon him to show cause on a return date specified in the order why a protection order should not be granted. A copy of the application as well as a copy of the record of any evidence considered by the court must be served on the respondent together with the interim protection order.

In terms of s 5(4), if an interim protection order is not issued, the court will direct the clerk of the court to make sure that certified copies of the application together with the supporting affidavits are served on the respondent, together with a notice calling on the respondent to show cause on the return date specified in the notice why a protection order should not be issued.

4.7 The orders the court may make

On the return date the court will decide, after hearing witnesses, if necessary, whether or not to issue a permanent protection order. The powers of the court are very wide. In terms of s 7(1), it may prohibit the respondent from:

1. committing any act of domestic violence;
2. enlisting the help of another person to commit any such act;
3. entering a residence shared by the complainant and the respondent; provided that the court may impose this prohibition only if it appears to be in the best interests of the complainant;
4. entering a specified part of such a shared residence;
5. entering the complainant's residence;
6. entering the complainant's place of employment;
7. preventing the complainant who ordinarily lives or lived in a shared residence as contemplated in subparagraph (3) from entering or remaining in the shared residence or a specified part of the shared residence; or
8. committing any other act as specified in the protection order.

In terms of s 8(1), whenever a court issues a protection order, it must make an order authorising the issue of a warrant for the arrest of the respondent, and suspending the execution of the warrant subject to compliance with the terms of the prohibition order. In other words, there is a sword of Damocles hanging over the respondent's head, making noncompliance with the protection order an unattractive prospect.

4.8 The Older Persons' Act 13 of 2006

The Older Persons' Act 13 of 2006 came into force on 1 April 2010.[269] Chapter 5 of the Act deals with the protection of older persons, and s 24 provides that the Older Persons' Act '… must not be construed as limiting, amending, repealing or otherwise altering any provision of the Domestic Violence Act 116 of 1998, or as exempting any person from any duty or obligation imposed by that Act or prohibiting any person from complying with any provision of that Act.'

In addition, s 26 of the Older Persons' Act provides for procedures for notification of the suspected abuse of older persons as defined in the Act;[270] s 27 provides for procedures for the delivery of written notices to suspected offenders; and s 28 provides for the procedure for bringing alleged abusers before a magistrate for a hearing.

5 Spoliation orders

5.1 What is a spoliation order?

> **It is a fundamental principle that no man is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property whether movable or immovable. If he does so, the court will summarily restore the *status quo ante*, and will do that as a preliminary to any inquiry or investigation into the merits of the dispute.**[271]

The kind of remedy envisaged by the court in the *Nino Bonino* case quoted above is a *spoliation order* (also known as a *mandament van spolie*). What you are asking for with this procedure is that a person who *unlawfully deprives you of possession*of something, give that thing back to you while the lawfulness or unlawfulness of your possession is investigated. This is a *summary remedy* and the person who deprived you of possession cannot argue that you were not entitled to be in possession of the thing. Your *possession* of the thing must first be *restored* to you before the court will consider who is entitled to possession of the thing. The procedure is thus designed to stop people taking the law into their own hands by taking things to which they think they are entitled.[272] In *Tswelopele* the Supreme Court of Appeal explained the remedy's effect:[273]

> **Under it, anyone illicitly deprived of property is entitled to be restored to possession before anything else is debated or decided (*spoliatus ante omnia restituendus est*). Even an unlawful possessor — a fraud, a thief or a robber — is entitled to the mandament's protection. The principle is that illicit deprivation must be remedied before the Courts will decide competing claims to the object or property.**

5.2 The *mandament van spolie* distinguished from the *reivindicatio*

A person's ownership of property has nothing to do with a *mandament van spolie* as this is purely a *possessory remedy* brought to restore possession to a party who has been unlawfully deprived of it. For example, the remedy may be used by a tenant unlawfully ejected from leased premises by a landlord. It is an extremely robust remedy and could even be used by the tenant in

the example just cited if his lease had already ended, where the landlord acted forcibly without the authority of a court order. Even a thief in certain circumstances may obtain spoliation from an owner (if the possession was peaceful and undisturbed).[274] The court does not examine the rights of ownership: the remedy merely restores the *status quo ante* (the situation that existed before).

It should therefore not be confused with a *vindicatory remedy*, such as the *reivindicatio*, in terms of which an *owner* has his property restored to him. The spoliation order merely ensures that the thing *spoliated* (i.e. taken from possession) is restored to the person from whom it was taken, without going into the question of who is *entitled in law* to be in possession of the property.[275] Under the common law there are only a limited number of defences available to a spoliation claim; impossibility is one such defence.The *mandament van spolie* cannot be relied on when the property that was spoliated is destroyed or demolished.[276]

5.3 The procedure for obtaining a spoliation order

One usually applies for a *mandament van spolie* by means of an *ex parte* application. The remedy is similar to an interdict, but the requisites are not the same. All the applicant has to prove in order to be granted a spoliation order is the following:

1. That he was in *peaceful and undisturbed possession* of the thing;[277] and
2. That he was *forcibly dispossessed* [278] of the thing.

The order made is a *final order*, having the effect of a final judgment, at least in respect of the immediate entitlement to possession. Therefore, it can never be an interlocutory remedy, neither need it be made *pendente lite* (pending an action). The result is that the applicant must prove the requisites set out above on a balance of probabilities.

5.4 An example of application papers for a *mandament van spolie* order

[Citation]

APPLICATION FOR *MANDAMENT VAN SPOLIE*

TAKE NOTICE that application will be made to the above Honourable Court for an order directing the Respondent to restore possession of a Mercedes ND 12345 to the Applicant.

TAKE NOTICE FURTHER that the affidavit of Jack Jones attached hereto will be used in support of this application.

[Usual ending]

[Citation]

APPLICANT'S FOUNDING AFFIDAVIT

I the undersigned Jack Jones do hereby make oath and say that:

1. I am the Applicant in this matter …… etc.
2. The Respondent is …… etc.
3. On 3 April 2010 and at Durban I entered into a written agreement of sale with the Respondent in terms of which I purchased a Mercedes ND 12345 from the Respondent.

The purchase price was R80 000 and was payable as follows: a deposit of R20 000 followed by one instalment of R60 000 payable on 5 May 2010.

4. I paid the deposit of R20 000 to the Respondent on 3 April 2010 and the Respondent thereupon placed me in possession of the vehicle.
5. On 20 April 2010, before the instalment of R60 000 became payable, the Respondent arrived at my place of business and without my consent and without having good reason to do so removed the said vehicle.
6. Through the aforesaid conduct the Respondent has deprived me of the lawful possession and use of the said vehicle.

WHEREFORE I pray that the above Honourable Court will grant an order in terms of the notice of application.

[Usual ending]

ADDITIONAL PROCEDURES

H: Declarations of rights and stated cases

1 General overview

In an application for a *declaration of rights* (also called a *declarator*), the applicant wants the court to *declare what the law is* on a specific issue (and consequently, what the rights are of parties or persons affected by the issue). It is usually applied for on notice of motion,[279] but there is authority for a declarator to be brought by way of action proceedings where there is an unresolved dispute of fact.[280]

The *special cases* procedure (also called stated cases procedure) contained in rule 33 of the High Court Rules must be used where decisions on questions of law are sought *pending* the institution of action proceedings, *during* trial proceedings, and in some cases, even after the trial or after the institution of motion proceedings.[281] (The *stated case* is a written statement of facts agreed upon by the parties to an action or application, and the court then declares what the law applicable to these facts is.)

Rule 33 is aimed at facilitating the expeditious disposal of litigation and makes provision for the following distinct procedures:

1. 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));
2. 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));

3. The disposal ofa question of law without hearing any evidence where the facts are, by agreement between the parties, admitted and recorded at the trial (subrule (6)).

In the Magistrates' Courts, rule 29(5) provides that if the parties are agreed on the facts, they may prepare a written statement of the agreed facts on which the court will give judgment.

2 Declarations of rights: general principles

2.1 Circumstances in which a declarator may be granted

Any interested person[282] may apply to the High Court[283] for a declaration of rights. Earlier cases appeared to limit such applications to situations where an actual dispute was already in existence, but since the decision in *Ex Parte Nell* [284] in 1963, the majority of cases have held that a prior existing dispute is not required before an interested party can apply for a declarator.[285] It is, however, a requirement that, firstly, there must be interested parties upon whom the declaratory order would be binding, and, secondly, that the case is a proper one for the court to exercise its discretion to grant declaratory relief.[286]

Such orders may, in certain circumstances, give rise to concerns about mootness. In *Buthelezi v Minister of Home Affairs and Others* [287] the Supreme Court of Appeal was required to decide whether the Minister of Home Affairs' unreasonable delay in deciding whether to grant the Dalai Lama a visa more than a year after the event was moot. The Supreme Court of Appeal held that the issue whether 'the authorities had acted lawfully was and remains a live issue'.[288] The only substantive relief granted in the order was a declarator to the effect that the conduct of the Minister was unlawful.

2.2 Existing, future or contingent right or obligation

The applicant's interest must be in an existing right or obligation (i.e. existing at the time of the application); or a future right (i.e. a right the applicant will become entitled to in the future); or a contingent right (i.e. a right that is dependent on, or conditional upon, the happening of some other event or decision).[289]

2.3 The court's decision

The court is not obliged to make a declaration of rights, even if the circumstances justify the making of a declarator.[290] If the court *does* grant a declarator, it will usually not suggest the legal remedy appropriate to enforce the declarator.[291] The declarator has the effect of a final order and is binding on all interested parties.[292] It will not normally be granted where there are appropriate alternative remedies available.[293]

3 Special cases[294] and points of law – rule 33

3.1 Special cases – rule 33(1) to (3)

High Court rules 33(1) to (3) deal with the situation where the parties are agreed on the facts, but disagree on questions of law, i.e. they simply want the court to adjudicate on the question of law.

In terms of High Court rule 33(1), the parties to a dispute may, after the institution of proceedings,[295] agree upon a *written statement of facts*[296] in the form of a *special case*[297] for the adjudication of the court.

In terms of rule 33(2)(*a*), the statement must set out the *facts* which the parties agree upon, the *questions of law in dispute*[298]between them, and their contentions on these questions. All relevant documents must be attached to the written statement. A special case must set out agreed facts, not assumptions.[299] A judge faced with a request to determine a special case where the facts are inadequately stated should decline the request. As stated in *Absa Bank Ltd v Bernert*:[300]

> **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. Where issues are to be separated rule 33(4) requires the court to make an order to that effect. If for no reason but to clarify matters for itself a court that is asked to separate issues must necessarily apply its mind to whether it is indeed convenient that they be separated, and if so, the questions to be determined must be expressed in its order with clarity and precision.**

The statement of facts prepared by the parties must set out the facts upon which the proposed legal argument was to rest and define the question of law that the court was being asked to determine, or set out the parties' contentions in relation to that question.[301]

The matter is set down for hearing in the normal way.[302] Since the evidence in the matter consists of the written statement of facts plus the documents annexed to it, there is no need to call witnesses to give evidence. The parties simply present their respective arguments to the court, based on the agreed facts contained in the written statement and attached documents.[303]

3.2 Separating issues in pending actions – rule 33(4)[304]

In terms of High Court rule 33(4), in any pending action,[305] the court may order that a question of law or fact be decided *separately* from the rest of the case. The court may make the decision to separate *mero motu* (in other words, of its own accord),[306] or on application by any party to a matter. The rule *obliges* the court, in response to an application by any party to a matter, to order that a question of law or fact be decided separately, unless it appears that the question cannot *conveniently*[307]be decided separately. The application for separation, if made prior to the trial, is on notice of motion, setting out the grounds therefor.

It may be made at the beginning of the hearing or during the course thereof.[308]

This subsection caters for those situations in which it is possible that, once a particular question of law or fact has been decided *separately* from the rest of the case, the need to hear evidence on the remaining issues in the case falls away. For example, assume that a defendant in a particular matter has raised a special plea of prescription. If the special plea succeeds, the matter is effectively at an end, making it unnecessary to hear evidence as to the merits of the matter.[309]

3.3 Deciding the case on a point of law – rule 33(6)

High Court rule 33(6) deals with the adjudication by a court on a question of *law*, where the parties at a trial agree on the *facts*, and reads as follows:

> **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.**

In this situation, the entire case is disposed of solely on a question of law as the facts are not in dispute. In contrast to rule 33(1), the statement of facts here can only be agreed upon during the trial proceedings, and it is differentiated from the proceedings in rule 33(4) by the fact that the *entire case* is disposed of once the point of law has been decided.

4 Stated cases on appeal, in the Constitution, and other statutes

The parties to an appeal may agree on a statement of facts to replace the trial record, and the decision of the appeal court will be based on only this statement of facts. This makes the appeal court's task much easier, and speeds up the appeal process.[310]

In terms of s 38 of the Constitution, anyone defined in subsections 38(*a*), (*b*), (*c*), (*d*) or (*e*), has the right to approach a competent court to grant relief, *inter alia*, by way of a declaration of rights.[311] Where the matter does not pertain to the Bill of Rights, courts nonetheless has the power to grant declaratory orders in terms of their remedial discretion under s 172(1)(*b*) of the Constitution.[312]

The Constitutional Court has recognised that declaratory relief is a flexible remedy that can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of constitutional values. Declaratory orders are of particular value in a constitutional democracy because courts are thereby enabled to declare the law, which in turn means the other arms of government can decide how best the law should be observed.[313] Declaratory orders may be accompanied by other forms of relief, such as mandatory or prohibitory orders, or as self-standing relief.[314]

A number of statutes also make special provision for stated cases – see, for example, s 96(3) of the Administration of Estates Act 66 of 1965; s 32(1) of the National Environmental Management Act 107 of 1998 ('NEMA'); s 82 of the Promotion of Access to Information Act 2 of 2000; s 8 of the Promotion of Administrative Justice Act 3 of 2000, and s 21 of the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000.

ADDITIONAL PROCEDURES

I: Small Claims Court procedures

1 General overview

Small Claims Courts were established in terms of the Small Claims Court Act 61 of 1984, which came into force on 24 August 1985. The aim of the Small Claims Courts is to provide for the cheap and speedy resolution of low-value civil disputes. The presiding officer of a Small Claims Court is called a *commissioner for small claims*, and is appointed in terms of the provisions of s 9 of the Small Claims Court Act. An official in employ of the Magistrates' Court in the district where a Small Claims Court is situated, is appointed as the clerk of the Small Claims Court concerned, and the sheriff serves all Small Claims Court process.[315]

2 *Locus standi*

In terms of s 7 of the Act, only a *natural person* may institute an action in the Small Claims Court – a *juristic person* (i.e. companies and close corporations)[316] may only become party to a Small Claims Court action as a defendant. The plaintiff must appear in person before the court, and may not be represented by any person during the proceedings.[317]

3 Jurisdiction of the Small Claims Court

3.1 Area of jurisdiction

Each Small Claims Court's area of jurisdiction is gazetted in terms of s 2, read with s 12 of the Small Claims Court Act.[318]Virtually every magisterial district of the Republic currently has one or more Small Claims Courts.

3.2 Jurisdiction in respect of persons

In terms of s 14 of the Act, Small Claims Courts shall have jurisdiction over all persons, natural or legal, within its area of jurisdiction.[319] Section 14(2), however, provides that no action may be instituted against the state in a Small Claims Court.

3.3 Jurisdiction in respect of causes of action

The Small Claims Court has jurisdiction in the following causes of action:[320]

1. Actions for the *delivery or transfer of any property, movable or immovable*, not exceeding R15 000 in value;[321]
2. Actions *for ejectment* where the value of the property does not exceed R15 000;
3. Actions based on a *liquid document or a mortgage bond* where the claim does not exceed R15 000;
4. Actions arising out of a *credit agreement* (as defined in s 1 of the National Credit Act, 2005, where the claim or the value of the property forming the subject matter of the credit agreement does not exceed R15 000; and
5. Actions for *counterclaims*, not exceeding R15 000, only in respect of the causes of action mentioned in s 15 of the Small Claims Court Act; and
6. *All other actions* (not mentioned in s 15 of the Small Claims Court Act), where the claim or value of the matter in dispute does not exceed R15 000.

3.4 Matters beyond the jurisdiction of the Small Claims Court

The Small Claims Court *does not have jurisdiction* in the following:[322]

1. To deal with *dissolution of marriages* or *customary unions*;
2. To decide on the *validity or interpretation of a will*;
3. To decide on the status of a person's *mental capacity*;
4. To grant *specific performance* without an alternative claim for damages (except for a claim for the rendering of an account in an amount of R15 000 or less; and for claims for the delivery or transfer of any movable or immovable property not exceeding the value of R15 000);
5. To grant a decree of *perpetual silence*;[323] and
6. Actions for damages in respect of *defamation*; *malicious prosecution*; *wrongful arrest*; and *wrongful imprisonment*; *seduction*; *breach of promise to marry*; and *interdicts*.

3.5 Abandonment

In terms of s 18 of the Small Claims Court Act, a party may *abandon* a portion of their claim or counterclaim to bring the claim within the R15 000 limit. This abandonment must be stated in the summons (or statement of defence, as the case may be), but need *not* be indicated in the letter of demand which has to precede the issuing of summons.[324]

3.6 Concurrent jurisdiction with the District Magistrates' Courts

A party whose claim falls *within* the jurisdiction of the Small Claims Court is not obliged to proceed in the Small Claims Court, but may choose to proceed in the District Magistrates' Court instead. Given the low monetary limit currently applicable to Small Claims Court matters, however, it would not make economic sense to proceed in the District Magistrates' Court.

4 Instituting legal action

4.1 The letter of demand

Before the clerk of the Small Claims Court will issue a summons, the plaintiff is obliged to deliver a *letter of demand* [325] to the defendant. The letter of demand must be delivered *by hand* or *by registered post*, and the defendant must be given *at least 14 days*, calculated from the date of *receipt of the demand* by the defendant, to satisfy the plaintiff's claim.[326]

Note that *only* these two requirements have to be complied with for a valid letter of demand in the Small Claims Court: the letter of demand need *not* indicate that it is done in compliance with the provisions of the Small Claims Court Act, nor need any intention to abandon part of the claim be indicated in the demand.[327] The clerk of the Small Claims Court will *not* issue summons unless he is presented with a letter of demand which complies with the above requirements.

4.2 The summons and particulars of claim

The summons and particulars of claim may be prepared by the plaintiff (with the assistance of a legal adviser, or the clerk of the Small Claims Court), and will be issued by the clerk on receipt of a valid letter of demand, and after expiry of the prescribed 14-day period. The summons and particulars of claim will then be served personally by the plaintiff on the defendant, or it will be served by the sheriff of the court.[328]

4.3 The defendant's response: statement of defence

The defendant need not reply to the plaintiff's summons, and is merely obliged to arrive, prepared for trial, on the date stated on the summons. Note, however, that the defendant is entitled to deliver a written statement setting out the *nature of his defence*, and the *grounds* on which this defence is based, to the clerk of the Small Claims Court.[329] This can be done at any time before the start of the hearing, and a copy of the statement of defence must be given to the plaintiff by the defendant.[330]

5 Procedure at court

1. *Legal representation*:[331] As Small Claims Court procedure is designed to be quick, efficient and inexpensive; the parties are not permitted to be legally represented. A juristic person who is a

defendant may be represented by the director of the company, a member of the close corporation or any other *officer*.[332] A business may be sued in its own name, even if the sole proprietor or group of persons is merely trading in that name.[333]

2. *The pleadings and decision of the court*: The only pleadings required prior to the day of the hearing are the summons (usually supported by attached particulars of claim), preceded by a letter of demand.[334] The defendant has the option, which is not compulsory, to prepare a statement of defence which must be handed in to the court and to the plaintiff no later than the start of the trial.[335] The court only records its decision as it is not a court of record.[336] The court's judgments have the effect of a Magistrates' Court civil judgment, and post-judgment collection procedures have to be done in terms of the Magistrates' Courts Act and Rules.[337]

3. *Court procedure*: The procedure at court is inquisitorial and informal. Usually the presiding officer (i.e. the Commissioner) will begin by asking the plaintiff to outline his case, based on his particulars of claim. After the plaintiff has outlined his case, the Commissioner will give the defendant an opportunity to question the plaintiff, and may ask further questions of his own as well. The plaintiff will then have the opportunity to call witnesses in support of his claim, and will thereafter close his case. The defendant will then have an opportunity to respond to the plaintiff's case, based on the content of his statement of defence if he has prepared one. The plaintiff will be given an opportunity to question the defendant, and the defendant will also have the opportunity to call witnesses if he chooses. As the rules are informal, it is the decision of the Commissioner as to whether the litigants may pose questions directly to each other, or whether questions must be addressed to the Commissioner who will, in turn, put the question to the opposing litigant. The rules of evidence are not strictly applied, and the Commissioner may admit any evidence he deems relevant for a just decision in the case. At the conclusion of the evidence, the Commissioner will usually allow brief arguments to be presented, after which he will make a decision on the law.[338] The Commissioner has the option to end the proceedings if complex questions of law or fact arise. The matter will then have to be started afresh in another court – usually the Magistrates' Court.[339]

4. *Review proceedings*: There is no right of appeal against the decision of the Small Claims Court.[340] In cases of gross irregularity in the proceedings, however, the decision of the Commissioner may be taken on review to the High Court.[341] The grounds for review are: absence of jurisdiction; or where there is, on the part of the Commissioner, interest in the cause; bias; malice; and/or corruption.

5. *Judgment and rescission of judgment*: Section 46[342] provides that default judgment may be obtained for non-appearance, and that judgments obtained by fraud or common mistake may be rescinded. An application for the rescission of a default judgment must be made within six weeks, and an application for a rescission on any other ground must be made within one year from the date the applicant had knowledge of the relevant judgment.

6 A Small Claims Court case study: *Abel Achebe v Ben Baxter*[343]

6.1 The facts

Abel Achebe is a 21-year-old university student who has been renting a house, situated at 1 Oxford Road in Johannesburg for two years. One of his neighbours is Ben Baxter, who lives at 3 Oxford Road. Ben is a 30-year-old car salesman.

Abel had a habit of parking his car, a 2012 Nissan Micra, in his yard, under the branches of a tree growing in Ben's yard. These branches jutted into Abel's yard and provided welcome shade for Abel's car.

On 4 September 2016, Ben decided to trim this tree. In the course of trimming the tree, he cut a branch that fell onto Abel's car. The branch smashed the windscreen, dented the bonnet and cracked the dashboard. Abel and a water-meter inspector (who happened to be on Abel's property at that time) also saw Ben cut the branch, and saw the branch fall onto Abel's car. Up to that stage, Abel and Ben had been on good terms.

Abel's car was not insured, and he obtained three quotations for the repair of the damage to his car. These were the quotations he received:

1. Ace Panelbeaters: R5 600
2. Blake Panelbeaters: R6 000
3. Chariot Panelbeaters: R5 850.

On 10 September 2016, he went to Ben's house with the quotations to discuss the damage to his car. Ben received him in a friendly fashion, and told Abel to leave the quotes with him as he wanted to think about the matter.

After two weeks, Abel had still not heard from Ben, and decided to approach his friend, Cathy Chetty, a law student, for advice on what to do next.

6.2 The legal opinion[344]

The first question is whether Abel is likely to win if he takes Ben to court for refusing to pay for the damage to Abel's car.

Cathy may give Abel her oral or written opinion about the prospects of success if legal action is taken against Ben. Her opinion will follow this logical sequence:[345]

Step 1:*The facts*

Cathy will carefully interview Abel to ensure that she has all the necessary information (i.e., facts) on which to base her legal opinion.

Step 2:*The issue*

Cathy will then decide what the central issue is. In other words, she must ask what it is the client (Abel) wants.

Step 3:*The applicable legal principles*

The next step is to research and state rules of law applicable to the issue – in other words, the legal tests that have to be applied to decide the issue.

Step 4:*Apply the rules of law to the facts*

At this stage, the rules of law are applied to the facts of the case.

Step 5:*Conclusion*

Cathy now reaches a conclusion based on the preceding four stages: is the legal action against Ben likely to be successful?

Now, apply these five steps to the information given in 6.1 above:

Step 1:*Facts*

All the necessary information has been obtained from Ben.

Step 2:*Issue*

On the given facts, is Ben liable to compensate Abel for the loss Abel suffered?

Step 3:*Rules of law*

The wrong done to Abel by Ben is a civil wrong called a *delict*. The legal remedy for this kind of delict is the *Aquilian action*. To succeed in this action, Abel will have to prove four separate things (or elements):

1. Wongfulness of conduct;
2. Fault (in the form of intention or negligence);
3. Causation; and
4. Monetary loss.

Step 4:*Apply the rules of law to the facts*

1.*Wrongfulness of conduct*

That Ben's action (cutting the branch and letting it fall onto Abel's car) was wrongful (i.e. wrong in the eyes of the community as a whole, or contrary to the *legal convictions of the community*) will be easily proved on the facts (two eyewitnesses).

2.*Fault*

That Ben was at fault (i.e. he acted intentionally or negligently; either he cut the branch to let it fall on Abel's car on purpose [intentionally] or a reasonable person in Ben's position would not have cut the branch in similar circumstances [negligence]) can be inferred from the facts. At the very least, one can infer negligence by Ben, in the absence of a reasonable explanation from him.

3.*Causation*

The falling branch caused the damage to Abel's car. The fact that the branch fell onto Abel's car will also be easy to prove (two eyewitnesses: Abel and the water-meter inspector).

4.*Monetary loss*

Abel will have to prove the amount of the monetary loss he suffered as a result of the damage caused. In addition to the repair quotations obtained, Abel may have to get an independent expert (mechanical engineer or professional vehicle assessor) to inspect his damaged car. This inspection will confirm which one of the three quotations is reasonable and should be accepted.

Step 5:*Conclusion*

Abel's prospects of succeeding in obtaining compensation from Ben are very good.

After receiving Cathy's legal opinion, Abel knows that, should he be forced to take Ben to court, he would probably win the case. However, the taking of legal action should always be a last resort as it is expensive, time-consuming and damaging to personal relationships.

Abel therefore decides that his next step will be to write a friendly note to Ben requesting that Ben pay the R2 600 required to fix his car. If Ben ignores this letter, Abel's next option will be to send a formal letter of demand as required by s 29 of the Small Claims Court Act.

As the amount of Abel's loss is less than R15 000, his claim falls within the jurisdiction of the Small Claims Court.[346] Also, in terms of s 29 of the Act, Abel is not permitted to serve a Small Claims Court summons on Ben until he has first sent Ben a letter of demand. This letter of demand has to be delivered to Ben by hand, or sent to him by registered post. In addition, the letter should indicate that the recipient (Ben) has a period of 14 days, calculated from the day he receives the letter, in which to settle the claim.[347]

6.3 The section 29 letter of demand

(a) Planning the letter of demand

Step 1:*Objectives*

1.To issue a formal demand for payment in the amount of R5 600 in order to repair Abel's car.

2.To attempt to persuade Ben to pay this amount; and

3.To ensure that the letter of demand complies with the Small Claims Court Act. (Note that maintaining a good relationship with Ben is no longer an objective.)

Step 2:*Strategy and tactics*

1.Ensure that all the elements of the delict committed by Ben are covered in the letter of demand.

2.Use a formal tone – ensure that the salutation, body of the letter and its ending are consistent in tone.

3.Give Ben sufficient information to enable him to make a settlement offer. Note that the letter of demand may become an item of evidence at the Small Claims Court hearing. Ensure, therefore, that not too much information is divulged in the letter (for example, the letter may mention that an independent eyewitness saw the incident, but the name of the witness should not be disclosed – this would be tactically unwise as Ben may approach this witness prior to the day of the hearing). Also, do not indicate anywhere on the letter of demand that you intend to proceed in the Small Claims Court[348] – the fear of incurring legal costs in the Magistrates' Court may be sufficient to persuade Ben to pay the R5 600 claimed by Abel.

Step 3:*Read from recipient's point of view*

1.Read your draft from Ben's point of view to ensure your three objectives have been met. Then make the necessary alterations.

(b) The final letter of demand

BY HAND

Oxford Road
Rosebank
Johannesburg
4001

Mr B Baxter
3 Oxford Road
Rosebank
Johannesburg
2096

22 December 2016

Dear Sir

DEMAND FOR PAYMENT: R5 600 LOSS INCURRED DUE TO DAMAGE CAUSED TO MOTOR VEHICLE GP113 189

I refer to the incident that occurred on 4 September 2016, when the branch of a tree you cut fell on my car, GP113 189, causing extensive damage to it.

The damage caused to my car was entirely your fault as you were negligent in not taking proper care when cutting the branch.

The branch you cut badly damaged the front of my car, also smashing its windscreen and cracking its dashboard.

On 9 September 2016, I obtained three quotations for the repair of the damage caused by the branch to my car. These quotations are attached to this letter. As you can see, the lowest quotation is for an amount of R5 600 (five thousand six hundred rand). I have also attached to this letter an affidavit from an expert motor assessor, Mr Sello Mothibe, in which he assessed the pre-collision market value of my car to be R18 000.

It is clear that the market value of the car far exceeds the reasonable cost of repair of R5 600.

I, therefore, demand that you pay me the amount of R5 600 (five thousand six hundred rand) within 14 days of receipt of this letter. Should you fail to do so, I shall proceed, without further notice to you, with legal action against you to recover this money.

Yours faithfully,

(Signed)
ABEL ACHEBE

Should Ben *still* refuse to pay, Abel will have to convert the contents of the letter of demand into particulars of claim. The particulars of claim is a new document in which the details of his legal

claim are set out in a specific format. The pages containing the particulars of claim will then be attached to the summons form (which contains Ben's address, at which the summons will be served, and the time and date of the hearing), and this document will then be served on Ben (i.e. delivered to Ben in terms of s 29(2) of the Small Claims Court Act).

This is how Abel's *particulars of claim* will look when drafted.

6.4 Abel's particulars of claim

PARTICULARS OF CLAIM

1.

The plaintiff is Abel Achebe, an adult male student, who resides at 1 Oxford Road, Rosebank, Johannesburg.

2.

The defendant is Ben Baxter, an adult male salesman, who resides at 3 Oxford Road, Rosebank, Johannesburg.

3.

The whole cause of action arose within the area of jurisdiction of this court.

4.

On 4 September 2016, at or near 1 Oxford Road, Rosebank, Johannesburg, the defendant wrongfully caused damage to the plaintiff's motor vehicle, registration number GP113 189, by cutting a branch which then fell onto this motor vehicle.

5.

The damage to this motor vehicle was due to the fault of the defendant, who was negligent in one or more of the following respects:

5.1 He cut the branch off a tree without keeping a proper lookout as to where the branch would fall;

5.2 He cut the branch off without taking reasonable precautions to ensure it would not cause damage to the plaintiff's property;

5.3 He failed to prevent the branch from falling on the plaintiff's motor vehicle in circumstances where he could and should have prevented it from falling on the motor vehicle.

6.

As a result of the damage caused by this branch to the plaintiff's motor vehicle, the plaintiff suffered a loss of R2 600, being the reasonable costs of repair of the plaintiff's motor vehicle. This cost of repair is lower than the reasonable pre-collision market value, less the reasonable post-collision market value, of the vehicle.

Despite demand, the defendant has refused or omitted to compensate the plaintiff for this loss.
WHEREFORE the plaintiff claims:

7.1 Payment in the amount of R5 600;
7.2 Interest at the prescribed rate[349] from the date of demand to the date of payment;
7.3 Costs in terms of s 37 of the Small Claims Court Act, 1984.[350]

(Signed)
ABEL ACHEBE
Plaintiff

6.5 Preparing Ben's statement of defence

After the summons, to which the particulars of claim will be attached, has been delivered to Ben, Ben has the option of preparing a *statement of defence*. The purpose of the statement of defence is to set out Ben's responses to Abel's particulars of claim in writing. If Ben intends to use his statement at trial, he has to supply Abel with a copy of the statement on or before the day of the hearing.

The statement of defence may be very informal (virtually a written statement of Ben's version), or fairly formal, similar to a plea in court proceedings. The suggested method for preparing a statement of defence is as follows:

> *Step 1*:Number the allegations contained in each paragraph of the particulars of claim, and list these allegations. For example, paragraph 1 of the particulars of claim contains five separate allegations, namely:
>
> 1.that the plaintiff is Abel Achebe;
> 2.that the plaintiff is an adult;
> 3.that the plaintiff is a male;
> 4.that the plaintiff is a student; and
> 5.that the plaintiff resides at 1 Oxford Road, Rosebank, Johannesburg.
>
> *Step 2*:Repeat the process in Step 1 for each paragraph of Abel's particulars of claim.
> *Step 3*:Now, starting with paragraph 1 of the particulars of claim, read each allegation listed, and decide whether you *agree*(*admit*) or *disagree* (*deny*) the allegation concerned. (Note that none of the allegations that you *admit* will have to be proved at court – they become *common cause*. On the other hand, each allegation that you *deny*, or deny knowledge of, will have to be proved by the plaintiff, Abel. This means that Abel will have to call witnesses, or hand in evidence at court to try to prove the allegations that Ben has denied.)
> *Step 4*:When you have replied to every allegation contained in the paragraphs of the particulars of claim, you should, in your last paragraph, state which order you want from the court. (For example, that the plaintiff's claim be dismissed with costs; or that you want judgment in your favour, with or without costs and interest.)
> *Step 5*:The last step is then to *write out* the statement of defence, responding in turn to each of the allegations contained in the seven paragraphs that constitute Abel's particulars of claim, and ending with the order you want the court to make. Finally,

the statement of defence must be signed by the defendant, but should not be made under oath.

Ben's statement of defence in this matter should look something like this:

6.6 Ben's statement of defence

STATEMENT OF DEFENCE

1. *Re paragraph 1 of the particulars of claim:*
   I admit the allegations in this paragraph.
2. *Re paragraph 2:*
   I admit the allegations in this paragraph.
3. *Re paragraph 3:*
   I admit the allegations in this paragraph.
4. *Re paragraph 4:*
   4.1I admit that on 4 September 2016 I cut a branch that fell onto motor vehicle GP113 189;
   4.2I admit this branch caused damage to the vehicle;
   4.3I deny that I acted wrongfully;
   4.4I state that it was Abel who voluntarily assumed the risk of damage to his vehicle because he drove motor vehicle GP113 189 underneath the tree while I was cutting the branch, without giving me any warning.
5. *Re paragraph 5:*
   I deny all the allegations in this paragraph, and state that the plaintiff was negligent because he drove underneath the tree while I was cutting a branch without giving me any warning.
6. *Re paragraph 6:*
   I deny the allegations in this paragraph.
7. *Re paragraph 7:*
   I admit that I have refused to compensate the plaintiff for his loss.

WHEREFORE I ask that the plaintiff's claim be dismissed with costs.

(Signed)
BEN BAXTER
Defendant
Date: ……

J: Other civil courts

1 General overview

It is beyond the scope of this book to deal in detail with all the types of courts available to civil litigants. What follows below, therefore, are brief comments on the purpose and scope of a selection of civil courts, namely Admiralty Courts, Tax Courts, the Competition Tribunal and Appeal Court, Labour Courts, Land Claims Court, SIU Courts, Equality Courts, Children's Courts, Maintenance Courts and Courts of Chiefs and Headmen.

2 Admiralty Courts

In terms of the Admiralty Jurisdiction Regulation Act 105 of 1983, every High Court has the jurisdiction to hear any maritime claim. Once a maritime claim, as defined in this Act,[351] has occurred, the High Court concerned exercises its admiralty jurisdiction and it effectively sits as an Admiralty Court.

3 Tax Courts

In terms of the Tax Administration Act 72 of 2011, Tax Courts are established to hear tax appeals.[352]

Tax courts established under this Act consists of a judge or an acting judge of the High Court, who is the president of the tax court; an accountant selected from the panel of members; and a representative of the commercial community selected from the panel of members.[353]

4 Competition Appeal Court

In terms of the Competition Act 89 of 1998, a Competition Commission has been established to investigate and regulate anti-competitive commercial behaviour, and a Competition Tribunal has been established to adjudicate objections to the decisions of the Competition Commission. The Competition Appeal Court hears appeals against decisions of the Competition Tribunal, and also reviews the decisions of the Tribunal.[354] The Competition Appeal Court consists of a Judge President, sitting with at least two other High Court judges.

5 Labour Courts

Currently, Labour Courts are superior courts that decide labour disputes. They differ from ordinary High Court in that they can decide matters on the grounds of both law *and* equity.

6 The Land Claims Court

The Land Claims Court is a court that has been established under the Restitution of Land Rights Act 22 of 1994, to hear and decide disputes over land claims. The court has jurisdiction throughout South Africa, and consists of a President, other judges as required by the claim

concerned, and at least one assessor in each case. Decisions of this court may be appealed to the Supreme Court of Appeal. The Land Claims Court is seated in Randburg and held around the country.

7 Special Investigating Units (SIUs) and Tribunals

In terms of the Special Investigating Units and Special Tribunals Act 74 of 1996, the President may, by proclamation in the *Government Gazette*, establish special tribunals to adjudicate upon civil disputes that arise from an investigation of a Special Investigative Unit (SIU). SIUs are established to investigate public corruption in all its forms. A special tribunal is presided over by a judge or a retired judge of the High Court, with additional members of the tribunal being drawn from the ranks of other judges, magistrates, advocates, or attorneys.[355]

8 Equality Courts

These courts have been established in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Every division of the High Court is an equality court for its jurisdiction, and in addition, one or more Magistrates' Courts in each administrative region must be designated Equality Courts for that region. Presiding officers for the court have to complete a prescribed training course. The purpose of the Equality Court is to enquire into allegations of unfair discrimination, hate speech, or harassment. An order of the Equality Court has the effect of a civil judgment, and its decisions are appealable.

9 Children's Courts

In terms of the Children's Act 38 of 2005, s 42, every Magistrates' Court is a Children's Court for its area of jurisdiction, and every magistrate is a commissioner of child welfare. The purpose of a Children's Court is to determine whether a child is 'in need of care'. Decisions of the Children's Court may be appealed to a division of the High Court having jurisdiction.[356]

10 Maintenance Courts

In terms of the Maintenance Act 99 of 1998, every Magistrates' Court is also a Maintenance Court within its area of jurisdiction. In terms of s 4 of the Act, every public prosecutor is also deemed to be a Maintenance Officer for the Magistrates' Court concerned. At maintenance enquiries, a civil hearing is held to determine various matters incidental to maintenance, and the order of the court has the effect of a civil judgment appealable to the High Court having jurisdiction.

11 Summary: miscellaneous other civil courts[357]

In terms of s 12 of the Black Administration Act 38 of 1927, chiefs or headmen may be given the power to decide civil claims that arise out of indigenous law and custom. Legal representation is not permitted in these courts, and the procedure to be followed must be in accordance with the customs of the tribe concerned.

These courts were still in existence despite the enactment of the Repeal of the Black Administration Act and Amendment of Certain Laws Amendment Act 20 of 2009, as the

effective date of this Act has been extended. It is envisaged that these chiefs or headmen courts will, in due course, be replaced by traditional courts in terms of the Traditional Courts Bill (which is not yet enacted).

In addition, there are special courts for Income Tax Appeals, Water Tribunals, the Court of the Commissioner of Patents, and the Consumer Courts introduced by the Consumer Protection Act 68 of 2008 (see Annexure B).

1See Stage One, Part 2A 1.

2Hence the well-known saying that the parties settled 'at the doors of the court'. An offer to settle (or tender to perform) made before the start of the trial will usually protect the party making the offer from incurring further legal costs. See *Unit Inspection Company of SA (Pty) Ltd v Hall, Longmore & Co (Pty) Ltd* 1995 (2) SA 795 (A).

3The *offeror* is the person who makes the offer, and the *offeree* is the person who receives the offer.

4Certain settlement agreements in the form of acknowledgement of debt may constitute credit agreements for purposes of the National Credit Act 34 of 2005 (*Friend v Sendal* (A973/2010, 24425/2009) [2012] ZAGPPHC 162; 2015 (1) SA 395 (GP) (3 August 2012). See Annexure B which considers the impact of the National Credit Act 34 of 2005 and the Consumer Protection Act 68 of 2008 on various aspects of civil procedure.

5In *Visser v Visser* 2012 (4) SA 74 (KZD) an offer had been rejected and the matter proceeded to trial. The question that arose was whether the unconditional offer amounted to a binding acknowledgment of liability. The court held that it did not and the plaintiff, having rejected the offer, could not then fall back on it. In reaching this conclusion, the High Court found that the offer neither created a cause of action nor fixed minimum liability in the amount offered. The court held that to allow the plaintiff to enforce the offer, where he was unable to prove liability in excess of the sum offered, would defeat the entire purpose of the rule (paras [31]-[32]).

6See *ABSA Bank Ltd v Van de Vyver NO* 2002 (4) SA 397 (SCA) at para [19].

7*Hubbard v Mostert* 2010 (2) SA 391 (WCC) at para [11].

8Ibid. at 397C–398A.

9Note, however, that in *ABSA Bank Ltd v Van de Vyver NO* 2002 (4) SA 397 (SCA) at para 18 the Supreme Court of Appeal held that 'there may be an offer of compromise if there is simply no admission of liability accompanying the payment. And one may have to do with an offer of compromise even if there is an admission of liability. In the latter instance, the line between an offer of compromise and payment of an admitted liability would naturally be finer than in the other two cases.'

101978 (1) SA 914 (A).

11*Karson v Minister of Public Works* 1996(1) SA 887 (E) at 893F.

121982 (1) SA 246 (D).

131996 (1) SA 887 (E).

14*Jili v South African Eagle Insurance Co Ltd* 1995 (3) SA 269 (N); *Andy's Electrical v Laurie Sykes (Pty) Ltd* 1979 (3) SA 341 (N).

15*Cecil Jacobs (Pty) Ltd v Macleod & Sons* 1966 (4) SA 41 (N).

16*Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd and Others* 1978 (1) SA 914 (A).

17*Road Accident Fund v Ngubane* [2007] SCA 114 (RSA) at para 13. Absent such a clause, the original cause of action is extinguished and cannot be reverted to. See, as an example, *Nagar v Nagar* 1982 (2) SA 263 (ZH). In this matter, the parties entered into an agreement of compromise in terms of which the plaintiff waived and abandoned all rights of action which he had against the defendant. The compromise agreement contained no express reservation of the plaintiff's right, on breach, to revert to the old cause of action and the compromise agreement contained no resolutive condition to this effect. When the compromise agreement was breached, the plaintiff attempted to proceed on the original cause of action. The Zimbabwe High Court held that the plaintiff had abandoned his rights under the original cause of action in favour of his rights under the compromise agreement and, accordingly, upheld the defendant's special plea, disallowing the plaintiff from proceeding on the original cause of action.

18Rule 34 of the High Court Rules; rule 18 of the Magistrates' Courts Rules.

19See, in general, *Naylor and Another v Jansen* 2007 (1) SA16 (SCA).

20Unlike High Court rule 34(1), rule 34(2) does not expressly provide that the tender has to be in writing. However, it is clear from rule 34, when read as a whole, particularly rule 34(4), that a written tender is envisaged.

21See the discussion on High Court rule 34 in Harms, LTC (2002) *Civil Procedure in the Superior Courts*, at B34.1.

22For a detailed discussion regarding settlement agreements in the context of divorce proceedings, see the full bench decision of *Ex parte Le Grange and Another; Le Grange v Le Grange* (984/2011) [2013] ZAECGHC 75; [2013] 4 All SA 41 (ECG); 2013 (6) SA 28 (ECG) (1 August 2013).

23There are certain differences between common-law settlement and settlement in terms of High Court rule 34 (or Magistrates' Court rule 18). For example, a common-law offer may be withdrawn at any time before acceptance, whereas an offer made in terms of the rules must stay open for 15 days.

24Rule 34(13).

25*Winlite Aluminium Windows & Doors (Pty) Ltd v Pyramid Freight (Pty) Ltd* t/a UTI 2011 (1) SA 571 (SCA).

26High Court rule 34(6).

27Rule 34(8) deals with the place at which notice of acceptance should be delivered and rule 34(9) provides that if the settlement does not deal with costs the plaintiff may apply to the court for a costs order.

28A written agreement in which the debtor admits his indebtedness in a specified amount, which sets out a debt repayment schedule and the legal consequences of noncompliance with the terms of the agreement. (Also see Annexure B.)

29High Court rule 31(1).

30Sections 57 and 58 of the Magistrates' Courts Act 32 of 1944.

31In *Eke v Parsons* 2016 (3) SA 37 (CC), the Constitutional Court stated at para 14: 'There is nothing wrong with taking the terms of a settlement agreement and casting them in the form of an order. Questions arise though. Must a court be this formalistic; why must it cut the terms out of the agreement and paste them onto its order? Why can't it simply say the agreement, or those of its terms that do lend themselves to being part of a court order, are made an order of court? Insofar as one is aware, the less formalistic option is the usual practice in most divisions of the High Court of South Africa. Of course, if a court sanctions only some of the terms of a settlement agreement, it would have to identify them clearly.' Note that rule 27(5) requires the attorney for the plaintiff to notify the registrar of the Regional Magistrates' Courts or the clerk of the Magistrates' Court if a settlement or agreement to postpone is reached.

32In terms of rule 41(4) of the High Court Rules, and rule 27(9) of the Magistrates' Courts Rules.

33Acknowledgements of debt are usually signed only by the debtor (i.e. a unilateral undertaking to pay the creditor).

34For example, the agreement may indicate below the signature of the party that the party is represented by 'Mr X of Firm Y' (i.e. the plaintiff's signature, represented by [name and signature of plaintiff's attorney and firm]).

35The practice in the KwaZulu-Natal Division, for example, was captured in the case of *Mansell v Mansell* 1953 (3) SA 716 (N) where the High Court held at 721B–E:

> For many years this Court has set its face against the making of agreements orders of Court merely on consent. We have frequently pointed out that the Court is not a registry of obligations. Where persons enter into an agreement, the obligee's remedy is to sue on it, obtain judgment and execute. If the agreement is made an order of Court, the obligee's remedy is to execute merely. The only merit in making such an agreement an order of Court is to cut out the necessity for instituting action and to enable the obligee to proceed direct to execution. When, therefore, the Court is asked to make an agreement an order of Court it must … look at the agreement and ask itself the question: 'Is this the sort of agreement upon which the obligee (normally the plaintiff) can proceed direct to execution?' If it is, it may well be proper for the Court to make it an order. If it is not, the Court would be stultifying itself in doing so. It is surely an elementary principle that every Court should refrain from making orders which cannot be enforced. If the plaintiff asks the Court for an order which cannot be enforced, that is a very good reason for refusing to grant his prayer. This principle appears … to be so obvious that it is unnecessary to cite authority for it or to give examples of its operation.

36At para 19.

37These were set out by the Constitutional Court in *Eke v Parsons* 2016 (3) SA 37 (CC).

38See Stage Two, Part 2A 5: Shortcut judgments, p243.

39High Court rule 31(*b*). The rule requires that the confession is signed by the defendant personally and either his signature is witnessed by an attorney acting for him or verified by affidavit. See *Estate Breet v Peri-Urban Areas Health Board* 1955 (3) SA 523 (A).

40Due to the wording of rule 31(1), which limits the rule's applicability to 'the claim contained in the summons'.

4132 of 1944.

42In terms of s 58(1)(*b*)(ii), this order shall be deemed to be a s 65A(1) order.
43Section 57(1) of the Magistrates' Courts Act 32 of 1944.
44Magistrates' Courts rule 27(6).
45Magistrates' Courts rule 27(8), as amended by GN R5 of 9 January 2015, with effect from 13 February 2015.
46Erasmus, HJ et al. (1994) *Supreme Court Practice*, OS, 2015, D1–97. See also *Barclays National Bank Ltd v Serfontein*1981 (3) SA 244 (W) at 249H.
47Magistrates' Courts rule 14A is identical to High Court rule 8.
48The 'principal case' is a phrase used to refer to the underlying transaction between the parties as a result of which a negotiable instrument has been issued, with the merits of the underlying transaction now being in dispute.
492009 (5) SA 1 (SCA) at 10C.
501974 (4) SA 748 (A) at 754H.
51See also *Jones v Krok* 1995 (1) SA 677 (A) at 685J–686A and *Integritas Ouditeure Ingelyf v Crous* [2002] 1 All SA 583 (T) at 586.
52*Da Costa and Another v Da Silva and Another* 1958 (1) SA 662 (T).
53Harms (2002) *Civil Procedure in the Superior Courts*, B8.3.
54*Rich and Others v Lagerwey* 1974 (4) SA 748 (A) at 754H.
55*Barclays National Bank Ltd v Serfontein* 1981 (3) SA 244 (W) at 249H.
56*Jenkins v De Jager* 1993 (4) SA 534 (N) at 538D–H, 539F.
57Harms (2002) *Civil Procedure in the Superior Courts*, B8.25.
58*Barclays National Bank Ltd v Serfontein* 1981 (3) SA 244 (W) at 249H.
59*Harrowsmith v Ceres Flats (Pty) Ltd* 1979 (2) SA 722 (T) at 743G.
60See also *Wollach v Barclays National Bank Ltd* 1983 (2) SA 543 (A) at 555A–556D.
61Erasmus (1994) *Superior Court Practice*, op. cit., OS, 2015, D1–101. See also the examples cited there.
62See *Pepler v Hirschberg* 1920 CPD 438 at 443; *Rich and Others v Lagerwey* 1974 (4) SA 748 (A) at 755D; *Wedge Steel (Pty) Ltd v Wepener*1991 (3) SA 444 (W) at 447B–C.
63Gautschi and Guidozzi, (1999), op. cit., 67.
64*Van Wyngaardt NO v Knox* 1977 (2) SA 636 (T) at 638G.
65*Volkskas Bpk v Scott* 1981 (2) SA 471 (E).
66*Wedge Steel (Pty) Ltd v Wepener* 1991 (3) SA 444 (W) at 446H–447A.
67Section 29(1)*(d)* of the Magistrates' Courts Act 32 of 1944. The Magistrates' Court would not be precluded from entertaining actions on documents where the sum reflected upon the liquid document exceeded this amount because what must be ascertained is the value of the *claim*.
68Form 3 of the First Schedule of the High Court Rules.This is in terms of rule 8(1) of the High Court Rules.
69The copies of the documents annexed to the summons must be true copies and correspond with the originals in all material respects. The general practice is to hand the original documents up from the bar when the plaintiff moves for provisional sentence – see Erasmus *Superior Court Practice*, RS2, 2016 at D1–113.
70Form 3 of the First Schedule of the High Court Rules.
71Rule 8(5) of the High Court Rules.
72*Navidas (Pty) Ltd v Essop; Metha v Essop* 1994 (4) SA 141 (A) at 154I–J; *First National Bank v Avtjoglou* 2000 (1) SA 989 (C) at 993D–G.
73Rule 8(7) of the High Court Rules.
74Many commentators, and indeed the courts, tend to use the term 'onus' in this context. Strictly speaking, however, it is the evidentiary burden which is at issue here: a 'shifting onus' rather than the overall onus.
75*Froman v Robertson* 1971 (1) SA 115 (A) at 120B–C.
76*Dickinson v South African General Electric Co (Pty) Ltd* 1973 (2) SA 620 (A) at 630F.
771975 (2) SA 142 (O).
78Erasmus et al. (1994) *Superior Court Practice*, op. cit., OS, 2015, D1-11–D1-117.
79*Sonfred (Pty) Ltd v Papert* 1962 (2) SA 140 (W) at 143C.
80*Inglestone v Pereira* 1939 WLD 55 at 71.
81Ibid.
82*Union Share Agency & Investment Ltd v Spain* 1928 AD 74 at 78–79.
83*Millman NO v Goosen*1975 (3) SA 141 (O) at 143B.
84Rule 8(8) of the High Court Rules.

85Rule 8(10) of the High Court Rules.
86Rule 8(9) of the High Court Rules.
872011 (3) SA 1 (CC).
88Rule 8(10) of the High Court Rules. The duty in each case is simultaneous. See *Van der Merwe v Bonaero Park (Edms) Bpk* 2000 (4) SA 329 (SCA).
89Rule 8(11) of the High Court Rules.
90Rule 8(11) of the High Court Rules, and see rule 14A(2) of the Magistrates' Courts Rules.
91Note that Erasmus op cit., at OS, 2015, D1–118 takes the view that '[w]here he sues for provisional sentence upon an illiquid document and his action is dismissed, it is finally dismissed'.
92High Court Rule 34A(1).
93Ibid.
94*Nel v Federated Versekeringsmaatskappy Bpk* 1991 (2) SA 422 (T).
95*Karpakis v Mutual & Federal Insurance Co Ltd* 1991 (3) SA 489 (O) at 499C–D.
96*Fair v SA Eagle Insurance Co Ltd* 1995 (4) SA 96 (E) at 100D–I.
97High Court Rule 34A(1).
98High Court Rule 34A(4)(*a*).
99High Court Rule 34A(4)(*b*).
100High Court Rule 34A(2).
101Rule 34A(5).
102Rule34A(4).
103Rule 34A(8).
104Rule34A(10).
105Relief under this rule is available to same-sex partners (i.e. partners to either a same-sex marriage or civil partnership) (see *AS v CS* 2011 (2) SA 360 (WCC) at para [32]) or in terms of the rule by virtue of her Muslim marriage, irrespective of whether the husband had pronounced a *talaq* or not (see *TM v ZJ* 2016 (1) SA 71 (KZD) at para [17] and *AM v RM* 2010 (2) SA 223 (ECP) at para [10]).
106Under s 29(1B)(*a*) of the Magistrates' Courts Act 32 of 1944, a court for a regional division has jurisdiction to decide upon any question arising from a divorce suit. In this regard the court for a regional division has the same jurisdiction as any division of the High Court in relation to such matter.
107In other words, pending the future divorce action.
108This may include a dependent major child. See *JG v CG* 2012 (3) SA 103 (GSJ) at para [54] and [55].
109*Taute v Taute*1974 (2) SA 675 (E) at 676E.
110*Nicholson v Nicholson* 1998 (1) SA 48 (W) at 51H–J. As to the extent of costs to be awarded, see *Greenspan v Greenspan* 2000 (2) SA 283 (C) at paras [17] and [18].
111*Service v Service* 1968 (3) SA 526 (D) at 528G.
112*Whitehead v Whitehead* 1993 (3) SA 72 (SE) at 75C–D.
113*Madden v Madden* 1962 (4) SA 654 (T) at 658D.
114*Madden v Madden*, supra, at 657C and 658C.
115*Green v Green* 1987 (3) SA 131 (SE).
116First Schedule of the High Court Rules. Under rule 58 in the Magistrates' Court, the notice must correspond with Form 42 of Annexure 1 to the Magistrates' Courts Rules.
117*Taute v Taute* 1974 (2) SA 675 (E) at 676H. See *Du Preez v Du Preez* 2009 (6) SA 28 (T) at 33B where Murphy J berated the practice of producing prolix papers. In *Patmore v Patmore* 1997 (4) SA 785 (W) at 788D, the application was struck from the roll because the applicant's papers ran to 47 pages.
118In practice, if evidence in addition to what is contained in the parties' affidavits needs to be placed before the court, a supplementary affidavit is delivered. The court must first grant leave before any further evidence (be it oral or written) is delivered. See *Verster v Verster*1975 (3) SA 493 (W).
119Erasmus *Superior Court Practice*, RS 1, 2016, D1–580.
120Erasmus *Superior Court Practice*, OS, 2015, D1–581.
121In the Magistrates' Courts Rules under rule 58(7) and (8) '[n]o attorney or advocate appearing in a case under this rule shall charge a fee of more than R404,00 if the claim is undefended or R929,00 if it is defended, unless the court in an exceptional case otherwise directs', and '[n]o instructing attorney in cases under this rule shall charge a fee of more than R1 414,00 if the claim is undefended or R2 020,00 if it is defended, unless the court in an exceptional case otherwise directs.'
12210 of 2013.
123*Getaz v Stephen* 1956 (4) SA 751 (N) at 755C–F.

124*Segal v Diners Club SA (Pty) Ltd* 1974 (1) SA 273 (T); *Gouveia v Da Silva* 1988 (4) SA 55 (W).

125The Court's order was as follows (at para [54]): The order of constitutional invalidity made by the Western Cape High Court, Cape Town, is confirmed to the following extent: (i) The words 'arrest *tanquam suspectus de fuga*' as contained in s 30(1) of the Magistrates' Courts Act 32 of 1944 are declared unconstitutional and invalid. (ii) The whole of s 30(3) of the Magistrates' Courts Act 32 of 1944 is declared to be inconsistent with the Constitution and invalid.

1262010 (6) SA 1 (CC). In reaching its decision, the Constitutional Court had regard to the views expressed in the 2005 version of this textbook when considering the meaning of arrest *tanquam suspectus de fuga* (see para [21] of the judgment).

127The words 'arrest *tanquam suspectus de fuga*' in s 30(1) and the whole of s 30(3) of the Magistrates' Court Act 32 of 1944 were deleted (see s 2(*a*) and s 2(*b*) of the Judicial Matters Amendment Act 42 of 2013), with effect from 22 January 2014 and rule 56 of the Magistrates' Courts Rules was amended, with effect from 2 September 2011. Rule 9 of the High Court Rules, which laid down the procedure in respect of arrests *tanquam suspectus de fuga*, was repealed by *GG* 35932, GN 992, Reg. No 9866 of 7 December 2012, with effect from 11 January 2013.

128The other possible alternatives (enumerated by Dendy, M: 'Attachment to found or confirm jurisdiction, and arrest *tanquam suspectus de fuga*: a long-standing lacuna filled' (1999) 116 *South African Law Journal* 586 (3) at 603–610, at 610, note 143), while available in theory, are not always practical. For instance, unless the plaintiff is a large commercial entity, the costs alone would probably render prohibitive the institution of action in the country to which the debtor is about to flee. Attachment of a debtor's assets (if any exist) is possible only if the creditor knows where these may be found, and it may not be easy to investigate their whereabouts before the debtor's departure. This factor would also hamper the bringing of an 'anti-dissapation interdict' or 'Mareva injunction.'

129See *Rosebank Mall (Pty) Ltd and Another v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (W) at 366B–C/D. See further Cilliers, AC, Loots, C and Nel, HC (2009) *Herbstein and Van Winsen*: *The Civil Practice of the High Courts of South Africa*, (fifth edition), 208–210.

130*Estate De Beer v Botha* 1927 CPD 140.

131*Muller's Executrix and Pretorius v Liquidators of the Small Farms Ltd; Henley Lighting and Water Board Ltd and Another* 1910 (TS) 189.

132*Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) and *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) at [44]. In such a case, a court may *mero motu* join the interested party. Where a local municipality would be obliged to ensure adequate accommodation for persons as a result of an eviction, it should be joined – see *Premier, Eastern Cape, and Another v Mtshelakana and Others* 2011 (5) SA 640 (ECM) at para[10] and *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA) at [37]. See Stage 1 Part 1 for the meaning of 'direct and substantial interest'.

133Similarly so for joint contracting parties or partners. See *Burger v Rand Water Board and Another* 2007 (1) SA 30 (SCA) para [7]. A party so joined is allowed to file an affidavit to place facts relevant to the issues before a court and should be allowed the opportunity to be heard (see *Pretorius v Slabbert* 2000 (4) SA 935 (SCA) at 939E).

134*Khumalo v Wilkins and Another* 1972 (4) SA 470 (N).

135*Amalgamated Engineering Union* supra.

136As to the jurisdiction of the Magistrates' Courts see p73.

137See, generally, Erasmus, HJ and van Loggerenberg, DE (1996) *Jones and Buckle: The Civil Practice of the Magistrates' Courts in South Africa, Vol I, The Act*, RS 10, 2016, Act-p290.

138Section 42(1)of the Magistrates' Courts Act 32 of 1944.

139*Nel v Silicon Smelters (Edms) Bpk en 'n Ander* 1981 (4) SA 792 (A); *Mpotsha v Road Accident Fund and Another* 2000 (4) SA696 (C).

140Per Corbett AJ in *New Zealand Insurance Co Ltd v Stone and Others* 1963 (3) SA 63 (C) at 69A–C. See also *Belford v Belford* 1980 (2) SA 843 (C) at 846.

141*Qwelane v Minister of Justice and Constitutional Development and Others* 2015 (2) SA 493 (GJ) at para 7.

142*Minister of Local Government and Land Tenure and Another v Sizwe Development and Others*: *In re Sizwe Development v Flagstaff Municipality*1991 (1) SA 677 (TK) 678–679.

143See also *Wynne v Divisional Commissioner of Police and Others* 1973 (2) SA 770 (E) where the applicants did not have such an interest. In this matter, a party to an application made serious allegations against the integrity of a third party and the third party was refused leave to intervene simply to clear his name.

1442007 (4) SA 97 (CC) at paras [11]–[13].

145*Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O).
146Act 34 of 1956.
147*Absa Brokers (Pty) Ltd v RMB Financial Services and Others* 2009 (6) SA 549 (SCA) at 554C–D.
148Ibid.
149*Khumalo v Wilkins and Another* 1972 (4) SA 470 (N).
150*Khumalo v Wilkins*, supra at 475.
151*Khumalo v Wilkins*, supra at 478.
152*Khumalo v Wilkins* 1972 (4) SA 470 (N) at 476 and 477.
153See *Herbstein and Van Winsen* (1997), op. cit., 181. See also *Luthuli v Santam Insurance Co Ltd and Another* 1977 (2) SA 97 (D) and *Geduld Lands Ltd v Uys and Others* 1980 (3) SA 335 (T).
154Previously, rule 28A(10) of the Magistrates' Courts Rules allowed for execution by a party who has discharged an obligation in terms of rule 28A. High Court rule 13 contained no similar provision. Rule 28A(10) has been removed so the two rules are not the same in this regard.
155A right to indemnity arises only from contract, express or implied, or by statute or where it is implied by law. See *Eimco (SA) (Pty) Ltd v P Mattioda's Construction Co (SA) (Pty) Ltd* 1967 (1) SA 326 (N).
156First Schedule to the High Court Rules.
157Form 7 First Schedule to the High Court Rules.
158Rule 13(7) of the High Court, and rule 28A(7) of the Magistrates' Courts Rules.
159Harms *Civil Procedure in the Superior Courts*, B13.10.
1601980 (3) SA 335 (T) at p340.
161However, see the case of *IPF Nominees (Pty) Ltd v Nedcor Bank Ltd (Basfour 130 (Pty) Ltd, Third Party*) 2002 (5) SA 101 (W) in which it was held that there is no reason in principle why a judgment sounding in money cannot be issued against a third party joined under rule 13(1)(*b*).
162*Hart and Another v Santam Insurance Co Ltd* 1975 (4) SA 275 (E) at 277.
163*Callender-Easby and Another v Grahamstown Municipality and Others* 1981 (2) SA 810 (E) at 813.
164See *Herbstein and Van Winsen* (2009), op. cit., Vol 2, 1454. (Strictly speaking, the term 'interdict' should be confined to applications to stop or prevent conduct, and an application to force someone to do something should be called an 'order'. However, the use of the term 'interdict' – also called an 'injunction' in some foreign jurisdictions – in both these senses is well-established in our law.)
165In terms of s 30(1) of the Magistrates' Courts Act 32 of 1944, a court is empowered to grant interdict orders, and rule 56(1) provides that an interdict order may be obtained *ex parte*.
166See *Airoad Express (Pty) Ltd v Chairman, Local Road Transportation Board, Durban and Others* 1986 (2) SA 663 (A) at 675–676.
167Although there is a practice in some areas also to call a mandatory interdict against a private person or corporation a *mandamus.*
168Erasmus et al. (1994) *Superior Court Practice*, RS 2, 2016, D6–3. Also see *Herbstein and Van Winsen* (2009), op. cit., Vol 2, 1464.
169See *Ladychin Investments (Pty) Ltd v South African National Roads Agency Ltd and Others* 2001 (3) SA 344 (N) at 356–357.
170Correctly used, the term 'interlocutory interdict' should be used only when referring to interdicts sought which are part of pending procedures, and are not final orders. See *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A).
171This is why interim interdicts are also called *temporary* interdicts.
172See *Herbstein and Van Winsen* (2009), op. cit., 1470.
173*Setlogelo v Setlogelo* 1914 AD 221; *Free State Gold Areas Ltd v Merriespruit (Orange Free State) Gold Mining Co Ltd and Another* 1961 (2) SA 505 (W); *ABSA Bank Ltd v Dlamini* 2008 (2) SA 262 (T).
174[1984] 2 All SA 366 (A); 1984 (3) SA 623A.
175See *V&A Waterfront Properties (Pty) Ltd and Another v Helicopter & Marine Services (Pty) Ltd and Others* 2006 (1) SA 252 (SCA) at 257–258.
176*Bamford v Minister of Community Development and State Auxiliary Services* 1981 (3) SA 1054 (C).
177Erasmus et al. (1994) *Superior Court Practice*, op. cit., OS, 2015, D6–13.
178*Natal Fresh Produce Growers' Association and Others v Agroserve (Pty) Ltd and Others* 1990 (4) SA 749 (N) at 753I.
179*Condé Nast Publications Ltd v Jaffe* 1951 (1) SA 81 (C) at 86.
180*Free State Gold Areas Ltd v Merriespruit (Orange Free State) Gold Mining Co Ltd and Another* 1961 (2) SA 505 (W) at 518A.

181*Mears v African Platinum Mines Ltd and Others* (1) 1922 WLD 48; *Grant-Dalton v Win and Others* 1923 WLD 180.

182*Ex Parte Lipschitz* 1913 CPD 737; *Seligman Bros v Gordon* 1931 OPD 164; *Pickles v Pickles* 1947 (3) SA 175 (W).

183Erasmus et al. (1994) *Superior Court Practice*, op. cit.,OS, 2015, D6–14.

184*Malcomess & Co v Reid* (1894) 8 EDC 186.

185*Reserve Bank of Rhodesia v Rhodesia Railways* 1966 (3) SA 656 (R).

186*Ebrahim v Twala and Others* 1951 (2) SA 490 (W).

187Erasmus et al. (1994) *Superior Court Practice*, op. cit., RS 2, 2016, D6–15.

188Erasmus et al., op. cit., RS 2, 2016, D6–15. *Rivas v Premier (Transvaal) Diamond Mining Co Ltd* 1929 WLD 1.

189*Candid Electronics (Pty) Ltd v Merchandise Buying Syndicate (Pty) Ltd* 1992 (2) SA 459 (C) at 465B–D and *Fourie v Uys* 1957 (2) SA 125 (C) at 129A.

190*Tullen Industries Ltd v A de Sousa Costa (Pty) Ltd and Others* 1976 (4) SA 218 (T).

191See *Erasmus and Others v Senwes Ltd and Others* 2006 (3) SA 529 (T).

192This is in accordance with the doctrine of *ubi jus ibi remedium*: 'Where there is a right there is a remedy.' The only area for discretion that the court has in these circumstances is the possibility of the existence of an alternative remedy.

193*Limbada v Dwarka* 1957 (3) SA 60 (N) at 62B–F.

194*Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (N).

1951948 (1) SA 1186 (W) at 1189.

196Innes JA in *Setlogelo v Setlogelo*1914 AD 221 referred (at 227) to a right which 'though *prima facie* established is open to some doubt'.

1971948 (1) SA 1186 (W) at 1189.

198*Bamford v Minister of Community Development and State Auxiliary Services* 1981 (3) SA 1054 (C) at 1061.

199*Braham v Wood* 1956 (1) SA 651 (N) at 655.

200See, generally, Erasmus et al. (1994), op. cit., OS, 2015, D6–19.

201*Cowen & Hammond v Campbell* 1906 TH 191 at 194.

202*Ndauti v Kgami and Others* 1948 (3) SA 27 (W) at 37.

203*Roberts v Chairman Local Road Transportation Board, Cape Town, and Another* (2) 1979 (4) SA 604 (C).

204*Hillman Bros (West Rand) (Pty) Ltd v Van den Heuvel* 1937 WLD 41 at 46.

20510 of 2013.

206Section 18(2) of the Superior Courts Act provides that, subject to 18(3), 'unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.'

207Section 18(3) of the Superior Courts Act provides that '[a] court may only order otherwise … if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.'

20859 of 1959.

209Section 18(2) of the Superior Courts Act 10 of 2013 provides that, as a general rule, the operation and execution of a decision which is an interlocutory order and which does not have the effect of a final judgment is not suspended when an appeal is lodged (and heard). This is so unless the court orders otherwise, which it will do only if exceptional circumstances are shown, on a balance of probabilities and only if, by not doing so, the person against whom the interlocutory order operates will suffer irreparable harm and the other party will not suffer irreparable harm. See *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another* 2014 (3) SA 189 (GJ) at para 16.

210*MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas, and Another* 2002 (6) SA 150 (C) at 156–157.

211*MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas, and Another* 2002 (6) SA 150 (C) at 156–157.

212*MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas, and Another* 2002 (6) SA 150 (C) at 156–157.

213*Norwich Union Life Insurance Society v Dobbs* 1912 AD 395.

214*Incubeta Holdings (Pty) ltd and Another v Ellis and Another* 2014 (3) SA 189 (GJ) at para 24; *Nyathi and Others v Tenitor Properties (Pty) Ltd: In re: Tenitor Properties (Pty) Ltd v Nyathi and Others* (06579/2015) [2015] ZAGPJHC 115 (9 June 2015) para 35; and *Actom (Pty) Ltd v Coetzer and Another* (A269/2015) [2015] ZAGPPHC 548 (31 July 2015) paras 9–13.

215See Du Plessis, et al. (2013) *Constitutional Litigation* at 122.

216In *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) the High Court granted an interim order which had the effect of extending the term of anti-dumping duties. On appeal to the Constitutional Court, it was held that the High Court should not have granted the order without taking into account the impact of its order on national and international trade policy. In *SCAW* para 101, it was make clear that '[w]hen a court is invited to intrude into the terrain of the executive, especially when the executive decision-making process is still uncompleted, it must do so only in the clearest of cases and only when irreparable harm is likely to ensue if interdictory relief is not granted.'

2172012 (6) SA 223 (CC).

218*Setlogelo v Setlogelo* 1914 AD 221.

219In this regard, the Constitutional Court held that '[t]he balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of Government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm. A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm.' See para 47.

220In this regard, the Constitutional Court held that '[i]t is neither prudent nor necessary to define "clearest of cases". However, one important consideration would be whether the harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights.' See para 47.

221See also *Retail Motor Industry Organisation and another v Minister of Water and Environmental Affairs and Another* 2014 (3) SA 251 (SCA) at para [4]–[5].

222Remember that the terms *interlocutory* interdict, *temporary* interdict and *interim* interdict are used interchangeably, and mean the same thing, namely an interdict to obtain provisional relief pending the court's final decision.

223Erasmus et al. (1994) *Superior Court Practice*, op. cit., RS 2, 2016, D6–24.

224Erasmus et al., op. cit., RS 2, 2016, D6–24.

2252015 (5) SA 600 (CC) at para [17] and [27].

226*Fakie NO v CCII Systems (Pty) Ltd* (653/04) [2006] ZASCA 52; 2006 (4) SA 326 (SCA) (31 March 2006).

227The US case of *Brown v Board of Education of Topeka* 349 US 294 (1955), is the source of the structural interdict in constitutional litigation.

228See, in general, Rycroft, A and Bellengère, A: 'Judicial innovation and the delinquent state: a note on the state and *Mfezeko Zuba* and 23 similar cases' (2004) 20 (2) *South African Journal on Human Rights* 321.

229See *S v Zuba & 23 Similar Cases* (ECJ 2004/004) [2004] ZAECHC 3 (19 February 2004).

230Rycroft and Bellengère (2004) *SAJHR*, op. cit., 325–326.

231Also see *Vumazonke and Others v MEC for Social Development and Welfare, Eastern Cape Province* (ECJ 050/2004) [2004] ZAECHC 40 (25 November 2004).

2322013 (1) SA 323 (CC); 2013 (1) BCLR 68 (CC).

233(CCT 53/03) [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) (1 October 2004) at para [39].

234This procedure got its name from the English case *Anton Piller KG v Manufacturing Processes Ltd and Others* [1976] 1 All ER 779 (CA), one of the first cases in which this type of order was granted and confirmed in the English Court of Appeal.

235See *Memory Institute SA CC t/a SA Memory Institute v Hansen and Others* 2004 (2) SA 630 (SCA) at 633.

236See, in general, *Universal City Studios Inc and Others v Network Video Pty Ltd* 1986 (2) SA 734 (A); *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam and Another*; *Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg and Others* 1995 (4) SA 1 (A); and Dendy, M: *Step-by-step Applications for Anton Piller Orders* (Practice note) (2003) September *De Rebus* 26.

237See *Shoba* supra, 18–20.

238See *Roamer Watch Company SA and Another v African Textile Distributors also t/a MK Patel Wholesale Merchants and Direct Importers* 1980 (2) SA 254 (W), and *Shoba* supra 15 F–J.

239*Universal City Studios Inc and Others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A).

240These will normally have to be listed in detail in the founding affidavit.

241The applicant must show that the evidence is of great importance to his case, but need not go as far as to show that the evidence is indispensable to his case. See *Shoba* (supra) 16A–C.

242*Sun World International Inc v Unifruco Ltd* 1998 (3) SA 151 (C) at 161.

243See, generally, *Mathias International Ltd and Another v Baillache and Others* 2015 (2) SA 357 (WCC) on *Anton Piller* orders as an example of the 'outer extreme of judicial power'. The Western Cape Division concluded that the procedure, which had been developed by the courts, constituted a law of general application within the meaning of s 36 of the Constitution (paragraphs [16] and [18] of the judgment).

244See *Dabelstein and Others v Hildebrandt and Others* 1996 (3) SA 42 (C).

245See Erasmus (1994) RS 2, 2016, D8–6.

246*Lourenco and Others v Ferela (Pty) Ltd NO and Others* (No 1) 1 1998 (3) SA 281 (T) (at 290), and *Pansolutions Holdings Ltd v P&G General Dealers & Repairers CC* 2011 (5) SA 608 (KZD) at para [9]. See Harms, op. cit., B35.37.

247*National Director of Public Prosecutions and Another v Mohamed NO and Others* 2003 (4) SA 1 (CC) at para [32].

248Harms, LTC (2003) *Civil Procedure in the Superior Courts* (Student edition, third edition) para B35.34. Also see *Herbstein and Van Winsen* (2009), op. cit., Vol 2, 1495.

249This portion of the order provides for the preservation of the material to be seized, and prudent applicants will include further directions in the draft order relating to the security of the goods to be held by the sheriff.

250The name of the interdict is derived from the Appellate Division decision of *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A).

251*Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) at 373 D. Mervyn Dendy's suggestion that this type of interdict be given the name of the case in which it was confirmed by the Appellate Division has been followed as a convenient method of describing this procedure.

252In the *Knox D'Arcy* case, the court rejected the name 'Mareva-type' interdict (following the similar English law remedy, the 'Mareva injunction', which name was derived from the case of *Mareva Compania Naviera SA v International Bulk Carriers SA*; *The Mareva* [1980] 1 All ER 213 (CA)) on the basis that its adoption may suggest the automatic application of English Law principles. The court also rejected two alternative names suggested by the court *a quo*, namely, the 'interdict *in securitatem debiti*', or the 'anti-dissipation' interdict, on the basis that both these names were misleading (in the latter case, the name suggests only the prevention of the dissipation of assets, whereas the interdict can also be used for the prevention of concealment of assets) (at 352 C–D.) They are also sometimes called 'freezing injunctions'.

2531996 (4) SA 348 (A) at 351F.

254*Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) at 351D–E.

255In *Knox D'Arcy* supra at 377B-378I, the court held that even the *bona fide* disposition of property by the defendant (for example, in the ordinary course of business), may be interdicted in exceptional circumstances.

256*Knox D'Arcy*, supra at 351E–F.

257*Knox D'Arcy*, supra at 373E–H.

258*Knox D'Arcy*, supra at 378J–379B.

259Ibid.

260*Knox D'Arcy*, supra at 379H.

261See *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd and Others* 2006 (5) SA 333 (W) at 353, and *Van Aardt and Another v Weehuizen and Others* 2006 (4) SA 401 (N) at 410.

262The intention here appears to have been to prevent reliance by respondents on the provisions of s 35 of the Constitution of the Republic of South Africa Act 108 of 1996. The constitutionality of s 37, i.e. whether this section merely provides a civil cloak to disguise criminal proceedings, has not yet been authoritatively decided.

2632011 (1) SACR 419 (KZP).

264Section 39 of POCA. Section 40 provides that the preservation order shall expire 90 days after the date of publication in the *Government Gazette*.

265Known as 'civil forfeiture'.

266Section 48(1) of POCA.

267Section 48(2) to (4) of POCA.

268This closely resembles a harassment order in terms of the Protection from Harassment Act 17 of 2011 which is designed to protect persons against harassment.

269Proc R11 *GG* 33075/1–4-2010.

270Males 65 years or older; females 60 years or older, S1 of POLA.

271*Nino Bonino v De Lange* 1906 TS 120 at 122.

272*Sillo v Naudé* 1929 AD 21.

273*Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* 2007 (6) SA 511 (SCA) at para [21].

274*Kgosana and Another v Otto* 1991 (2) SA 113 (W).

275*Greyling v Estate Pretorius* 1947 (3) SA 514 (W).

276*Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another* 2013 (1) SA 323 (CC); 2013 (1) BCLR 68 (CC).

277Importantly, the applicant need not show that he was entitled to possession or that his possession was lawful. He need merely show that he was *de facto* in possession (i.e. actually in possession) at the time of being despoiled. See *Zulu v Minister of Works, KwaZulu and Others* 1992 (1) SA 181 (D).

278The applicant must prove that the respondent deprived him of possession of the thing in an unlawful manner and against his will. Loss of control of the property is sufficient to constitute deprivation.

279In terms of rule 6 of the High Court Rules. See *Transvaal Canoe Union v Butgereit and Another* 1990 (3) SA 398 (T).

280See *Adbro Investment Co Ltd v Minister of the Interior* 1956 (3) SA 345 (A) and see Harms (2003) *Civil Procedure in the Superior Courts*, A4.18.

281See H3 and H4 below.

282The person seeking the order need not be a party to the main action or application, but must have a substantial interest in the outcome of the main proceedings. See *Milani and Another v SA Medical and Dental Council and Another* 1990 (1) SA 899 (T), and see *Erasmus* OS, 2015, A1–31 at footnote 90; *Prince v President, Cape Law Society, and Others* 2001 (2) SA 388 (CC); *Preston v Vredendal Co-operative Winery Ltd and Another*2001 (1) SA 244 (E).

283Section 21(1)(*c*) of the Superior Courts Act 10 of 2013, gives the High Court the power: '… in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.' The position under this Act, and s 19(1)(*a*)(iii) of the now repealed Supreme Court Act 59 of 1959 is, we submit, identical.

2841963 (1) SA 754 (A).

285See *Erasmus*, op. cit., OS, 2015, A1–31 at footnote 90. For an example of such an application, see *National Credit Regulator v Nedbank Ltd and Others* (19638/2008) [2009] ZAGPPHC 100; 2009 (6) SA 295 (GNP); [2009] 4 All SA 505 (GNP), handed down in the North Gauteng High Court by Du Plessis J on 21 August 2009, and discussed in Stadler, S: 'The High Court and debt review: debt review applications after the declaratory order' (2009) December, *De Rebus* 45. See, however, the more restrictive approach adopted in *South African Reserve Bank and Another v Shuttleworth and Another* 2015 (5) SA 146 (CC) at paras [74]–[77]. The Constitutional Court found that while Mr Shuttleworth had established own interest standing in respect of those portions of the challenged regulations that affected him, the Court did not allow a public interest challenge against those regulations that had no bearing on his case. The Constitutional Court held that 'the challenge against the specified regulations would be academic, hypothetical and speculative. Mr Shuttleworth has not demonstrated how the claim of constitutional infringements would have a material bearing on him and others similarly situated. He has not pointed to any practical usefulness of the outcome he contends for.' (paras [106] and [107]).

286*Langa and Others v Hlophe* (697/08) [2009] ZASCA 36; [2009] 3 All SA 417 (SCA); 2009 (8) BCLR 823 (SCA) (31 March 2009).

2872013 (3) SA 325 (SCA). See also *MEC for Education: KwaZulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC).

288At para [20]. The Supreme Court of Appeal ordered as follows:

> 'The appeal is upheld with costs that include the costs of two counsel. The order of the court below is set aside and substituted with the following orders:
>
> 1. It is declared that the First Respondent unreasonably delayed her decision whether to grant or withhold the visas relevant to this case and in so doing acted unlawfully.
>
> 2. The respondents are to pay the costs of the applicants, including the costs of two counsel.'

289Section 21(1)(*c*) of the Superior Courts Act 10 of 2013; *Naptosa and Others v Minister of Education, Western Cape, and Others* 2001 (2) SA 112 (C).

290*Shells Annandale Farm (Pty) Ltd v Commissioner, South African Revenue Service* 2000 (3) SA 564 (C).

291*Eagles Landing Body Corporate v Molewa NO and Others* 2003 (1) SA 412 (T).

292See *Ex Parte Nell* 1963 (1) SA 754 (A).

293*National Director of Public Prosecutions and Another v Mohamed NO and Others* 2003 (4) SA 1 (CC); *Rutherford v Ferguson and Others* 2000 (2) SA 275 (O).

294Also called 'stated cases'; see, in general, *Herbstein and Van Winsen* (1997), op. cit., 1038–1039.

295This procedure is available in trials by action and opposed applications.

296The parties must obviously be in actual agreement on the stated facts. See *Montsisi v Minister van Polisie* 1984 (1) SA 619 (A).

297This procedure disposes of the entire case, as the facts are agreed and the court merely determines the application of the law to the facts. See *Sibeko and Another v Minister of Police and Others* 1985 (1) SA 151 (W).

298The court is normally not confined to only these questions of law, and may deal with questions of law arising from the stated facts, but not stated on the papers. See *Sibeko* supra.

299The point was re-emphasised in *Bane and Others v D'Ambrosi*, 2010 (2) SA 539 (SCA) para 7 where it was stated that deciding such a case on *assumptions* as to the facts defeats the purpose of the rule, which is to enable a case to be determined without the necessity of hearing all, or at least a major part, of the evidence.

3002011 (3) SA 74 (SCA) para 21.

301*Minister of Police v Mboweni and Another* 2014 (6) SA 256 (SCA) at 260.

302Rule 33(2)(*b*): set down either as a trial or an opposed application, depending on proceedings.

303Rule 33(3).

304See, in general, *Rauff v Standard Bank Properties (A division of Standard Bank of SA Ltd) and Another* 2002 (6) SA 693 (W).

305This procedure is available in pending actions only, and cannot be used in application proceedings. See *Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd and Another* 1977 (1) SA 316 (T).

306*Lagesse v Lagesse* 1992 (1) SA 173 (D).

307See the discussion on the meaning of 'conveniently' in Erasmus *Superior Court Practice*, op. cit., OS, 2015, D1–435; *Denel (Edms) Bpk v Vorster*2004 (4) SA 481 (SCA); *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 90; and *Adlem and Another v Arlow* 2013 (3) SA 1 (SCA) at paras [4]–[6].

308A common example of separation of issues is in actions for bodily injury following motor vehicle collisions, where the normal practice is to separate the issues of liability and quantum.

309Rule 34A provides for interim payments in actions for damages arising from personal injury or death. See *Herbstein and Van Winsen* (2009), op. cit., Vol 2, 1422–1427.

310Section 16 of the Superior Courts Act 10 of 2013 deals with appeals generally. See *Costa da Oura Restaurant (Pty) Ltd t/a Umdloti Bush Tavern v Reddy* 2003 (4) SA 34 (SCA). See also High Court rule 49, SCA rule 5, and *Commissioner for Customs and Excise v Standard General Insurance Co Ltd* 2001 (1) SA 978 (SCA). Note, however, s 16(2)(*a*)(i) which provides that 'when at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone'.

311See *Herbstein and Van Winsen* (2009), op. cit., Vol 2, 1443–1450.

312See Du Plessis et al. *Constitutional Litigation* at 121.

313*Rail Commuters Action Group and Others v Transnet Limited t/a Metrorail and Others* 2005 (2) SA 359 (CC) at para 108.

314See Du Plessis et al. *Constitutional Litigation* at 121.

315Section 11 of the Small Claims Court Act.

316In terms of s 7(4) of the Small Claims Court Act, juristic persons must be represented in court by a duly nominated director or other officer.

317Section 7(2) of the Small Claims Court Act. This provision does not, however, prevent the plaintiff from receiving legal assistance prior to the start of legal proceedings. An attorney can, therefore, draft the letter of demand and summons for a plaintiff, and advise him on trial preparation and procedures.

318Hereafter called the Act.

319The provisions of s 14 are very similar to the provisions for the establishment of Magistrates' Courts jurisdiction.

320Section 15 of the Small Claims Court Act.

321Section 15(*a*). This amount may be altered from time to time by notice in the *Government Gazette*. Currently, the applicable monetary jurisdiction of the Small Claims Court is R15 000. In calculating the R15 000 limit, claims for interests and costs are not taken into account (s 17(3) of the Act). Given the current costs of bringing a Magistrates' Courts action, a limit of closer to R30 000 would, in our opinion, be much more appropriate.

322Section 16 of the Small Claims Court Act.

323See *Garber NO v Witwatersrand Jewish Aged Home* 1985 (3) SA 460 (W).

324Section 18(1) read with s 29 of the Small Claims Court Act.

325See the *Abel Achebe* case study at Section 6 below.

326Section 29(1)(*a*) of the Small Claims Court Act.

327The full amount of the claim may be demanded in the letter of demand, and abandonment need only take place when summons is issued to bring the claim within the jurisdiction of the Small Claims Court. Also, by mentioning the Small Claims Court in the letter of demand, you may prompt an offer of a much lower settlement figure should your claim exceed R15 000. (The *pro forma* letter of demand provided by the clerk of the Small Claims Court unnecessarily contains both a reference to the Small Claims Court and a provision for abandonment.)

328In terms of s 29(2) of the Small Claims Court Act.

329This written statement is called a statement of defence.

330Section 29(3) of the Small Claims Court Act.

331Section 7 of the Small Claims Court Act.

332Op. cit., s 7(4).

333Op. cit., s 27.

334Op. cit., s 29 provides that no summons may be issued unless the defendant has been given 14 days from the date of receipt of the letter of demand in which to settle the claim.

335See Section 6.6 below.

336Section 3 of the Act. Proceedings are therefore not tape-recorded and a transcript is therefore not available.

337Op. cit., s 41.

338Although the proceedings are informal, the Small Claims Court must nevertheless make a decision based on law and not on equity: *Nationwide Car Rentals (Pty) Ltd v Commissioner, Small Claims Court, Germiston and Another* 1998 (3) SA 568 (W).

339Section 23 of the Act.

340Op. cit., s 45.

341Op. cit., s 46. See *Smit v Seleka en Andere* 1989 (4) SA 157 (O).

342The Act.

343With acknowledgement to Palmer, R, Crocker, A and Kidd, M (2003) *Becoming a Lawyer: Fundamental Skills for Law Students.*

344What follows is the basic approach to drafting a legal opinion to provide a basis for understanding the contents of the letter of demand Abel will send to Ben.

345Following the 'FIRAC' approach: 1. Facts; 2. Issue; 3. Rule of law; 4. Apply to facts; 5. Conclusion.

346Section 15(*a*) of the Small Claims Court Act.

347Section 29(1) of the Small Claims Court Act.

348Nothing in the Small Claims Court Act requires you to indicate in your letter of demand that you intend to proceed in the Small Claims Court should your demand not be complied with.

349The interest that may legally be charged is linked to the repurchase rate and is published in the *Government Gazette* from time to time.

350In terms of s 37 of the Small Claims Court Act, the court may award costs for only the following: (a) court fees; (b) the prescribed amount for the issue of summons; and (c) the fees and travelling expenses of the sheriff.

351Section 1 of the Admiralty Jurisdiction Regulation Act 105 of 1983.

352Section 116 of the Tax Administration Act 28 of 2011.

353Section 118(1) of the Tax Administration Act 28 of 2011.

354In terms of ss 37(1) and 61(1) of the Competition Act 89 of 1998.

355In terms of s 2 read with s 7(3) of the Special Investigating Units and Special Tribunals Act 74 of 1996.

356In terms of s 42 of the Children's Act 38 of 2005.

357See s 146 of the National Water Act 36 of 1998; s 17(1) of the Patents Act 57 of 1978 and the Consumer Protection Act 68 of 2008.

ANNEXURES

ANNEXURES

A: Alternative dispute resolution (ADR) in civil practice

B: Impact of the National Credit Act and the Consumer Protection Act on Civil Procedure

C: Diagrams

D: Precedents

E: Citations

F: Short form, particulars of claim

ANNEXURES

A:Alternative dispute resolution (ADR) in civil practice

1 ADR and the civil justice system

Civil procedure is concerned with the *rules* and *practices* for bringing disputes before the High Court and Magistrates' Courts. The South African civil justice system, being adversarial in nature, has developed rules of civil procedure which are designed to sanitise and depersonalise the dispute by creating formality and by interposing legal representatives between the parties.

There are, however, a number of alternative mechanisms through which disputes may be handled outside of the court structures with an increased interest, at global and domestic level, in such mechanisms. Indeed, jurisdictions around the world have accepted that courts may no longer be the most appropriate way to solve civil disputes.

In 1997, the South African Law Reform Commission ('Commission') considered the role of *alternative dispute resolution or ADR* in civil practice in South Africa. [1] The Commission recommended that, in order to enhance access to justice, civil claims should be resolved using ADR mechanisms. The Commission recommended that ADR processes be integrated into the formal civil dispute system in courts.

In line with these recommendations, there has been a progressive incorporation of ADR mechanisms into formal court structures over the years. The best example of this is the new system of court-annexed mediation which exists in the Magistrates' Courts. 'Court-annexed mediation' has its origins in an access to justice conference held in July 2011, under the leadership of Chief Justice Mogoeng, at which a resolution was adopted to introduce alternative dispute resolution mechanisms into the court system. Following this, a court-annexed mediation framework was published and the Magistrates' Courts rules were amended to provide for voluntary 'court-annexed' mediation. [2]

The objective of court-annexed mediation is to assist litigants to determine at an early stage of the litigation whether proceeding with a trial is in their best interests. Where it is not, it aims to

find alternative solutions to the dispute. In terms of this process, a mediator is appointed to assist the parties to resolve the dispute by facilitating discussions between the parties, assisting them in identifying issues, clarifying priorities and exploring areas of compromise.

Court-annexed mediation is a voluntary process. If parties elect to proceed to mediation, a written agreement is concluded and filed at court and the parties lodge statements of claim which the mediator relies on to resolve the dispute between the parties. Parties may choose to be legally represented in this process but may also be unrepresented. The mediator is entitled to charge a fee for his services at a fixed tariff.

In December 2014, a pilot project for court-annexed mediation was initiated in selected Magistrates' Courts. The first pilot phase was implemented in the Magistrates' Courts of Johannesburg, Soweto, Randburg, Krugersdorp, Kagiso, Pretoria North, Shoshanguve, Palmridge, Temba, Sebokeng, Mmabatho and Potchefstroom. The intention is to gradually roll out court-annexed mediation to other Magistrates' Courts countrywide.

Another example of alternative dispute resolution is to be found in the Traditional Courts Bill which seeks to create a uniform legislative framework regulating the role and functions of the institution of traditional courts. In terms of s 5 of the Bill, traditional courts will have jurisdiction to hear civil disputes. The Bill is designed to update the current scheme of chief and headmen's courts under s 12 of the Black Administration Act to a more modern which promotes access to justice and encourages restorative justice. In terms of the Bill, chiefs and headmen may be authorised to hear and determine civil claims. This objective is supported by resolving disputes through processes which emphasise conciliation rather than confrontation. [3]

The Bill has, however, been controversial and a major point of contention is that it excludes legal representation in the traditional courts. Despite being introduced in Parliament in 2008, it has not been passed into law and its fate remains unclear.

2 Statutory subject-specific ADR processes

There are also several statutes which mandate the use of ADR. The most prominent example of statutory ADR is the compulsory referral of labour disputes to the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of the Labour Relations Act. [4]

Mediation in family disputes is also now an established feature of the civil practice (although a divorce cannot be obtained through mediation or agreement, and can only be granted by court order). [5] The Short Process Courts and Mediation in Certain Civil Cases Act[6] provides for formal mediation procedures and the Children's Act[7] makes mediation compulsory in some cases involving children. [8]

The courts have also made a ruling that obliges parties to explore ADR. For example, in addressing the petition for variation of custody of a 10-year-old child the High Court, in *Van den Berg v Le Roux*, [9] ordered the parties to pursue private mediation services in all future disputes concerning the child before approaching the court, [10] and in *Townsend-Turner and Another v Morrow*, [11] the parties were ordered to undergo private mediation in order to settle a dispute concerning access to a child. [12]

ADR also finds expression in certain provisions of the Consumer Protection Act, [13] the National Credit Act, [14] the Companies Act, [15] and the regulations to the Sectional Titles Act.

Another popular method of alternative dispute resolution worldwide is the ombud, which may be private or statutory.[16]Statutory ombuds include the Pension Funds Adjudicator established in terms of the Pension Funds Act 24 of 1956 and the Tax Ombudsman. A number of larger municipalities and educational institutions have also established ombuds. In addition, a number of voluntary ombudsmen have been established by the private sector for various industries. For example, the financial services sector is served by the Ombudsman for Long-term Insurance, the Ombudsman for Short-term Insurance; the Ombudsman for Banking Services; and the Credit Ombud.[17]

3 The primary objectives of ADR

There are a number of reasons why ADR has become so popular. The discussion below reflects some of the primary objectives.

3.1 ADR as a cost-cutting measure

ADR processes may assist parties to resolve their disputes more efficiently and cost-effectively.[18] In particular, negotiation and mediation may be more cost effective than arbitration and arbitration is usually cheaper than litigation. For example, the resolution of labour disputes in the CCMA is quicker and much less expensive than resorting to the Labour Court.

3.2 ADR results in cooperative and participatory dispute settlement

ADR offers the benefits of a cooperative dispute settlement mechanism and engenders a dialogue-based culture in which parties to a dispute work together with a neutral party in order to resolve contentious issues, and may agree to a mutually acceptable resolution of the dispute.

3.3 ADR helps facilitate access to justice

In several respects, ADR assists in facilitating access to justice. Effective use of ADR processes by legal practitioners can offer affordable solutions to parties and expedite the resolution of disputes. In a number of countries, attorneys have an ethical duty to inform clients of ADR systems which are available. For example, in England it is accepted that all members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR.

3.4 ADR helps relieve court congestion

Case-flow management studies in South Africa show that court rolls are often congested, and that cases may often endure for lengthy periods of time. ADR processes may assist to ease the congestion. Matrimonial disputes, in particular, may be speedily resolved through ADR processes and ‘settlement weeks’ are occasionally held, where specially appointed or volunteer mediators try to reduce civil court backlogs through mediation sessions arranged in conjunction with the Department of Justice and Constitutional Development.

4 ADR procedures: facilitative, adjudicative and evaluative processes

In present purposes, ADR means any procedure, other than litigation or civil application procedures that may be used to resolve civil disputes. ADR processes include, but are not limited

to, negotiation, [19] conciliation, facilitation, mediation, arbitration or any combinations of these procedures.

Most writers in the field classify ADR procedures into *facilitative processes* (negotiation, conciliation and mediation), *adjudicative processes* (formal or informal arbitration), and *evaluative processes* (expert appraisals and case evaluations). Each of these will be considered briefly.

4.1 Facilitative processes

4.1.1Negotiation

Negotiation precedes all other forms of ADR. During the process of negotiation, parties to a dispute discuss the issue(s) in dispute with the objective of reconciling their differences or reaching agreement. In short, negotiation refers to persuasive communication for the purpose of resolving a dispute. Negotiation is expedient because it is an informal process, driven by an exchange of direct communication between the parties. Because parties discuss issues between themselves without the intervention of a third party, such as a mediator, it is also a low-cost measure.

Negotiation is the simplest form of problem solving because it places more emphasis on the interests of the parties.[20] It is, of course, also a participatory process because the parties are directly involved in the process of bargaining a solution and are responsible for representing their positions and interests.

4.1.2 Mediation

Unlike negotiations, mediation requires the intervention of a neutral third party (the mediator) to assist the parties to reach a mutually acceptable resolution to their dispute. Unlike litigation and other types of ADR, it is not the mediator who decides how the dispute is to be resolved but the parties themselves.

Mediation in itself is not a binding process. However, once consensus has been reached, parties may be kept to their agreement by entering into a contract which may be enforced through the court. With the mediator's assistance, parties may reach an amicable and pragmatic solution based on their interests, rather than their legal rights. Mediation relies on a co-operative, dialogue-based approach to dispute resolution. Rather than pursuing an adversarial process, the parties engage with one another through the mediator – to avoid direct confrontation – in order to arrive at a mutually acceptable solution. Mediation is particularly helpful and appropriate as a dispute resolution tool in cases where parties will have a continuing relationship, such as disputes between business partners or family members, community conflicts, or in union-management disputes.

4.1.3 Conciliation

Conciliation also involves a neutral third party who expresses an opinion on the merits of the dispute and recommends a solution which the parties are free to accept or reject. The term 'conciliation' is often used interchangeably with mediation due to the similarities in parts of their procedures. Strictly speaking, however, the two processes are not synonymous.

4.2 Adjudicative processes

4.2.1 Arbitration

Private arbitration is often used as a final mechanism to resolve a dispute when other ADR processes (such as mediation) have been tried and have failed, but in most cases arbitration procedures are agreed to upfront in written contracts as the method for settling any disputes arising from the contract. 'Arbitration clauses', as they are known, are frequently included in commercial contracts such as construction contracts so there is certainty as to how disputes arising from the contract will be resolved.

The arbitrator fulfills a role similar to that of a judge in that an independent third party hears oral or written evidence and argument and makes a decision on the merits by considering the law. An arbitration clause will normally indicate the rules which will regulate the conduct of arbitration proceedings. The arbitrator's decision is called an award. Even though arbitration resembles the formal court process, it is nonetheless referred to as an 'alternative' to formal civil court procedures as it falls outside the public court process envisaged in section 34 of the Constitution.[21]

When the arbitration agreement is in writing, it is regulated by the Arbitration Act.[22] In terms of section 31(1) of the Arbitration Act, a person may apply to the High Court for the award to be made an order of court. Arbitration awards made orders of court may be enforced in the same manner as any judgment or order to the same effect, including execution by state mechanisms. However, arbitrators have no general powers to enforce their awards.

In *Telcordia Technologies Inc v Telkom SA Ltd*,[23] the Supreme Court of Appeal stressed the need, when courts have to consider the confirmation or setting aside of arbitral awards, for adherence to the principle of party autonomy, which requires a high degree of deference to arbitral decisions and minimises the scope for intervention by the courts.

There are a number of reasons for parties to consider arbitration as a mechanism for dispute resolution and why, in certain circumstances, it may be a more suitable tool than other forms of ADR. Some of the reasons for resorting to arbitration are the following:

1. *Time saving*: While arbitration and litigation share some common characteristics, arbitration usually takes less time than litigation because the rules may be relaxed and proceedings may be less technical. Also, long delays awaiting dates for court hearings caused by congested court rolls are avoided.
2. *Arbitrator's expertise*: While it cannot be assumed that a judge will bring specific knowledge and expertise to any given dispute, an arbitrator is usually appointed to resolve a dispute on the basis of his particular skill, experience and/or technical understanding of the matter in dispute, or the fact that he or she is from the ranks of senior counsel advocates and brings considerable skill and legal expertise to the decision-making process.
3. *Neutrality*: There is an element of neutrality in the arbitration process which may not be as intrinsic in litigation. This is particularly true, for example, of matters involving transnational disputes. In such cases, parties may be unwilling to accept adjudication by a court or other forum which represents the nationality of one of the parties. Depending on the arbitral rules, parties have some input in selecting the arbitrator.

4. *Confidentiality*: Arbitration proceedings presume a strong element of confidentiality. Generally, proceedings are held in private and are not accessible to the public. (See *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another*).[24]
5. *Cost-effectiveness*: Arbitration proceedings are usually more cost-effective than litigation and other civil court procedures.

4.2.2 Types of arbitration

Arbitration procedures may take a number of forms, including the following:

1. *Last-offer arbitration*: Last-offer arbitration is often used to resolve disputes involving money or claims for salary. In the United Kingdom, this type of arbitration is called 'pendulum' or 'flip-flop' arbitration. In the United States, it is sometimes called 'baseball' arbitration due to the fact that it is used to resolve financial disputes in professional baseball.[25] Last-offer arbitration operates to provide parties with an incentive to moderate or scale down their positions to such an extent that intervention by a third party may not be necessary. In practice, this form of arbitration entails that parties submit their last (or final) offers of settlement to the arbitrator, who then chooses the offer most fitting to the resolution of the dispute. Although the parties are bound by the arbitrator's decision, they have nonetheless contributed to limiting the arbitrator's award by proposing their last offers.
2. *Expedited arbitration*: This is a speedier form of arbitration in that certain formal rules of evidence are waived, and certain time periods for the exchange of documents are abbreviated.
3. *Documents-only arbitration*: This arbitration process is conducted purely on the basis of documents submitted by the parties, and no oral evidence is heard. This form of arbitration is suitable in matters where there is little or no dispute on critical facts, such as matters in which the issue is merely one of interpretation. This form of arbitration is similar to civil application procedures.
4. *Private judging* (also called consensual special magistrate's procedure): Private judging refers to a forum in terms of which a dispute is presented to a neutral third party (the 'private judge' or 'consensual special magistrate') in the same manner that a civil lawsuit is presented to a judge. The determination of the matter is binding, and parties have the right to appeal. This system is particularly utilised in the United States, but is not common in South Africa.

Private arbitration is an area of growing importance, both domestically and internationally. In a book of this nature we cannot provide a comprehensive analysis of this area and recommend that readers consult specialist texts in this regard.

4.3 Evaluative procedures[26]

4.3.1 Expert appraisal process

During this process, parties refer a dispute to an *independent expert* in the relevant field. Generally, an expert appraisal or determination is not binding, but can influence subsequent negotiations between the parties. The parties may, of course, contractually agree to accept the decision of the expert as binding.

4.3.2 Case evaluation

A case evaluation process is similar to that of neutral or expert evaluation, and is conducted in a similar manner. However, in such a matter, the neutral arbiter is not required to determine the outcome of the dispute, but rather to express, in the form of an opinion as to what the outcome

should or would be. This form of arbitration requires participation by the parties, namely, that both parties should instruct the evaluator, usually by each presenting their case to him in writing in a prescribed format, and agree to his terms of reference (i.e. what powers of decision the evaluator has).

After considering the submissions from each party, the arbiter will evaluate the respective evidence and arguments, and, depending on his terms of reference, offer an analysis of any pertinent points of law and give an opinion on the likely outcome of the dispute. The interaction of the parties may lead to a settlement or assist in facilitating a resolution of the dispute at a later stage. It is also possible that parties may gain insight as to their realistic probabilities of success should they elect to proceed to trial. Like mediation, case evaluation offers the advantage of resolving the dispute at an early stage, and, in so doing, avoiding expense.

The process of case evaluation may be particularly helpful in matters in which parties have an unrealistic view of the dispute and in which technical or scientific questions are to be addressed. The case evaluation processes may be used in combination with mediation or arbitration. As indicated above, the decision of the neutral arbiter or expert will *not be binding* unless the parties have by prior arrangement agreed to be so bound.

5 Hybrid ADR procedures

Hybrid dispute-resolution features are processes borne out of blending, in one way or another, different features of the various ADR processes. Hybrid processes are useful in situations in which no single particular process is suitable to facilitate a desirable resolution of the dispute: the procedure can then be tailor-made to suit the needs of the parties. Some of the more common hybrid ADR procedures are discussed below.

5.1 The mini-trial

A mini-trial assumes the form of a *semi-formal hearing*, combining elements of litigation and negotiation. The parties are usually assisted by a neutral third party, often a lawyer or technical expert, who chairs the meeting. Prior to the commencement of the mini-trial, parties must reach agreement on the duration of the mini-trial as well as the procedural rules to be applied.

The mini-trial process offers important advantages:

1. While parties are represented in a professional manner, formal rules of procedure and evidence are dispensed with.
2. The process allows each party to present their case and affords a thorough analysis of the matter, while eliminating the likelihood of a lengthy trial.
3. A mini-trial assimilates the characteristics of several forms of ADR processes. With the assistance of a neutral third party who contributes certain facilitative and advisory skills, the process allows the parties to retain control of the final outcome of the dispute. The process affords parties the opportunity to bring evidence from expert or other witnesses, and the adjudicator may question any or all of those appearing before him as he sees fit. The parties may agree in advance that documents may be exchanged or that such documents be submitted to the adjudicator.

The mini-trial process is also used as a test run to see how witnesses are likely to perform should the matter go to court, thereby acting as a lever for parties to settle.

5.2 Med-Arb: mediation culminating in arbitration

Med-Arb is a form of alternative dispute resolution in which the parties agree, in the first instance, to submit to mediation, with the intention that the dispute will thereafter be referred directly to arbitration if mediation is unsuccessful. It is acceptable for parties to appoint the same neutral third party to act as both mediator and arbitrator. Indeed, it may be advantageous to do so as the arbiter's familiarity with the facts may facilitate and expedite the resolution of the matter. It is possible that this arrangement may pose a risk to the interests of either party, such as the risk that the mediator/arbitrator may become privy to confidential information. For this reason, an agreement between the parties relating to the dispute-resolution process would usually allow either party the right to insist on a new person to act as arbitrator following an unsuccessful mediation.

In Med-Arb, the mediator may choose to hold discussions with the respective parties together or privately as she considers appropriate. Parties present their submissions to one another with the objective of resolving the dispute, if possible, during the mediation phase. Should issues remain in dispute after mediation, parties would proceed to the *binding arbitration process* as specified in the Med-Arb agreement. Med-Arb therefore avoids lengthy and costly litigation procedures in the event that mediation fails to resolve issues.

Med-Arb may be used in almost every case in which the parties seek a final and binding decision, together with the opportunity to discuss and resolve the issues in dispute before such decision is accepted.

5.3Arb-Med-Arb: arbitration followed by mediation and a final arbitration award

The *Arb-Med-Arb* (also called just Arb-Med) process commences with arbitration and then proceeds to mediation. In this regard, the arbitration process is non-binding, and the same person cannot act as both arbitrator and mediator. The process assumes that the standard arbitration process, as discussed above, will initially be conducted. At the conclusion of that process, parties will meet with a pre-selected mediator to engage in full mediation in relation to the issues which were addressed during the arbitration process. Arb-Med therefore provides for a reconsideration of the information which was presented during arbitration.

After the conclusion of the mediation phase, which seeks to reconcile the parties to the terms of the arbitration award, the parties will conclude a *settlement agreement*. The mediator will notify the arbitrator, in writing, of all the issues settled after mediation. The arbitrator will then issue a *final award* for the purpose of resolving all the issues which remain in dispute after the mediation process has been concluded. However, the arbiter will not issue such award until the mediator has notified him that the mediation process has been concluded and that the parties have signed the settlement agreement. An effective variation on this procedure is where the award is sealed in an envelope on completion of the arbitration, and only opened if the mediation fails, thereby acting as a spur to a successful consensual settlement.

Arb-Med-Arb is usually an appropriate mechanism in cases where the parties wish to retain a measure of control over the dispute-resolution process.

5.4 Med-Rec: mediation followed by a recommendation

Med-Rec is a form of mediation in which the mediator will offer a *recommendation* to the parties as an option for resolving the dispute. The mediation process follows the standard form, whereby the mediator encourages the parties to construct and agree to their own resolution. If the parties are unable to agree to a resolution, they may ask the mediator to recommend a resolution. The parties are free to accept or reject the mediator's recommendation.

5.5 MEDALOA: Mediation and last-offer arbitration

Mediation and last-offer arbitration, also referred to as MEDALOA, is a combination of mediation and last-offer (i.e. final offer) arbitration. This form of ADR is increasingly being utilised in the United States. MEDALOA is similar to, and therefore may be confused with, last-offer arbitration. However, in MEDALOA the parties agree to commence with mediation on the condition that should mediation fail, each party will submit the last offer made during mediation to a neutral arbiter. For MEDALOA to be successful, it is extremely important that parties be encouraged to settle their dispute through negotiation.

6 Advantages and disadvantages of ADR processes

Apart from negotiation, all ADR processes share a common characteristic, which is the involvement of a neutral third party with the task of facilitating a process through which the dispute between the parties may be resolved. ADR has several advantages over civil litigation, discussed below:

6.1 Flexible, informal and simplified procedures

ADR was originally developed and preferred because of its comparative informality and the simplicity of its procedures. It is also flexible and can be designed to fit the exact requirements of the parties.

6.2 Voluntariness and party autonomy

ADR is private in nature, and the parties are afforded autonomy and the opportunity to exercise greater control over the manner in which their dispute is resolved than would be the case if their dispute were resolved by way of litigation in court. Party autonomy is achieved due to the fact that, in contrast to court litigation, the parties themselves usually select the most appropriate decision-makers to adjudicate their dispute. In addition, they may often choose the law to be applied, as well as the place and language of the proceedings. When properly used, this results in a faster process as parties are free to devise the most efficient procedures.

6.3 Maintenance of relationships

Frequently, the inherent difficulty of dispute resolution lies in the inability or unwillingness of the parties to discuss effectively contentious issues without conflict. ADR processes encourage parties to communicate and to appreciate each other's positions in attempting to reach an amicable solution. ADR processes are directed at containing emotions, managing negativity, and preserving and building mutual trust and respect. The constructive process of communication, which is facilitated during the process, may also assist to create an enduring solution to points of difference between the parties. Litigation, however, usually entrenches division and conflict.

6.4 Confidentiality

The private nature of the ADR proceedings enables parties to attain a solution while maintaining the confidentiality of the proceedings and outcome. This allows them to focus on the merits of the dispute without being concerned about its public impact. This may be very important, for example, where commercial reputations and trade secrets are involved.

6.5 Reduction of costs

ADR does not necessarily avoid but may help reduce costs, for instance, by avoiding the costly multiplication of procedures. Parties may agree to use ADR to resolve a dispute involving, for example, intellectual property that is protected in a number of different countries. Conducting an ADR procedure rather than litigation will avoid the expense and difficulty of multi-jurisdictional litigation, as well as the danger of inconsistent results in different jurisdictions.

There may, of course, also be disadvantages in using ADR process. Before resorting to one of the ADR procedures, the following potential disadvantages should be considered.

6.6 Lack of court protection

If the parties agree that the ADR process will be binding, they normally forego the possibility of securing a court judgment and the protection this gives. For example, this protection includes a decision by a judge acting in terms of formal rules of evidence and procedure, as well as an established procedure for appeal and/or review.

6.7 The risk of incurring double costs

There is, of course, no guarantee that ADR processes will be successful in resolving a dispute. If a dispute is not resolved through ADR, the parties may have to expend further time and cost to conduct normal litigation in court. (The parties may prevent this problem by agreeing in advance that the arbitrator's decision will be final.)

6.8 Lack of access to sufficient information

ADR processes may generally afford parties less opportunity to acquire information about the other party's case than litigation procedures, for example, by utilising discovery powers in terms of the rules of court.

6.9 The danger of prescription

Proceedings must be instituted within specified periods of time (usually three years for most claims), [27] otherwise the dispute prescribes in terms of the Prescription Act and the wronged party will be legally precluded from bringing a civil action.[28] The inherent danger of ADR is that parties may incur the risk of exceeding the prescription period for a claim while a dispute is still in the process of being resolved using ADR procedures. There are however ways in which this can be handled as certain acts interrupt or delay the running of prescription. For example, when one party expressly or tacitly acknowledges his liability, prescription is interrupted in terms of section 14 of the Prescription Act.

6.10 Uncooperative parties

There are circumstances in which court procedures are preferable to ADR. For example, ADR's consensual nature makes it less appropriate if one of the two parties is extremely uncooperative. Moreover, a court judgment may be preferable if, in order to clarify his rights, a party seeks to

establish a public legal precedent rather than an award which is limited to the dispute between the parties.

1South African Law Commission (1997) Alternative Dispute Resolution, Project 94, Issue Paper 8 Available from: http://www.justice.gov.za/salrc/ipapers/ip08_prj94_1997.pdf

2See Rules Board for Courts of Law Act (107/1985): *Fees payable to mediators, qualification, standards and levels of mediators, GG* 38163, Notice No 854, 31 Oct 2014 and amended rules were published in *Government Gazette* 37448 on 18 March 2014 effective 1 August 2014.

3All these tribe-specific systems involve an interactive hearing with full community participation, usually requiring a full apology from the perpetrator in addition to community-approved redress or punishment. See, in general, Plaatjies, MF (2009) *A model for the implementation of restorative justice in the South African correctional system* (D Litt thesis, University of South Africa).

466 of 1995.

5For more information on mediation in family disputes see, generally, Boniface, AE, 'African-style mediation and western-style divorce and family mediation: reflections for the South African context.' 2012, Vol 15(5), PER 378; Scott-Macnab, D & Mowatt, JG 'Family mediation South Africa's awakening interest.' 1987 *De Jure* 41–52.

6103 of 1991.

738 of 2005.

8See Boniface, AE, 'Resolving disputes with regards to child participation in divorce mediation.' 2013, Vol. 27(1), *Speculum juris* 130-147; De Jong, M, 'Opportunities for mediation in the Children's Act 38 of 2005.' 2008, Vol 71, THRHR 630.

9*Van den Berg v Le Roux* [2003] 3 All SA 599 (NC).

10*Van den Berg v Le Roux* at 614.

11*Townsend-Turner and Another v Morrow* [2004] 1 All SA 235 (C).

12*Townsend-Turner and Another v Morrow* (supra) at 256.

1368 of 2008.

1434 of 2005.

1571 of 2008.

16See Melville, N 'Has ombudsmania reached South Africa? The burgeoning role of ombudsmen in commercial dispute resolution' (2010) 22(1) *SA Mercantile Law Journal*, 50.

17See Galgut, B 'South African ombudsman offices in the Financial Sector' *De Rebus* (2010) May 28.

18Cooley, JW (2002) *Mediation Advocacy* (second edition), National Institute for Trial Advocacy, 1.

19Negotiations, of course, always precede the settlement of civil disputes (see Stage Four, Part A 'Settlement'), but negotiation skills are seldom taught as part of university civil procedure course curricula.

20See Bernstein, R, Tackaberry, J, Marriot, AL and Wood, D (1988) *Handbook of Arbitration Practice* 585.

21Section 34 of the Constitution.

2242 of 1965.

23(26/05) [2006] ZASCA 112; [2006] 139 SCA (RSA); 2007 (3) SA 266 (SCA); [2007] 2 All SA 243 (SCA); 2007 (5) BCLR 503 (SCA) (22 November 2006).

242009 (4) SA 529 (CC).

25See Alford, HJ and Kaufman, KC 'Alternative Dispute Resolution: What is it?' (1999) *Federation of Insurance and Corporate Counsel Quarterly*439.

26These procedures are uncommon in South Africa.

27See the Prescription Act 68 of 1969, and Stage One, Part 2A 4.1 'Demand'.

28See Stage Two, Part 2A 'Special plea of prescription' p213.

B:Impact of the National Credit Act and the Consumer Protection Act on Civil Procedure

1 Introduction

This chapter provides some reflection on the impact of the National Credit Act[1] ('NCA') and the Consumer Protection Act[2]('CPA') on the practice of civil procedure.

These statutes were introduced in order to establish a framework for consumer protection in South Africa which would be comparable to those of foreign legal systems. Given that these statutes are peripheral to the body of traditional civil procedure, with which this book is primarily concerned, this chapter does not attempt to provide an exhaustive analysis of their provisions. Rather, the aim of the chapter will be to highlight those provisions of the statutes which are relevant to civil practice.

2 The National Credit Act 34 of 2005

2.1 Introduction

The NCA was enacted in 2005 and became fully effective on 1 June 2007. The overarching purpose of the NCA is to promote and advance the social and economic welfare of all South Africans in a fair, transparent, competitive, sustainable, responsible, efficient, and accessible credit market.

The NCA applies to credit agreements concluded between parties dealing at arm's length. 'Credit agreement', for purposes of the Act, means credit facilities, credit transactions (which include pawn transactions, instalment agreements, mortgaged or secured loans), and credit guarantees. As a general rule, the NCA will apply where an agreement defers a consumer's obligation to pay and a fee, charge, or interest is payable by the consumer for that deferral.

All such credit agreements entered into with natural persons are subject to the NCA, irrespective of their size. However, only credit agreements entered into with small juristic entities (i.e. entities with an asset value or annual turnover of less than R1 million) enjoy the protection of the NCA.[3]

Practitioners should bear in mind that credit agreements may take a variety of forms. For example, the courts have held than an acknowledgement of debt on which interest is levied may be regarded as a credit agreement to which the NCA applies.[4] Furthermore, suretyships and business trading accounts may also be subject to the NCA.[5]

These concepts are important because a credit provider for whom you may act may not know that the agreement which he seeks to enforce is in fact a credit agreement at all, or may not realise that it is an agreement to which the NCA applies. Practitioners should ensure this at the outset. If the NCA does apply to the agreement, you will be required to comply with certain additional procedures before it may be enforced.

2.2 Aspects of jurisdiction

Apart from introducing substantive provisions protecting consumers under credit agreements, the NCA provides for the establishment of administrative and quasi-judicial bodies. Most notably, this includes the National Consumer Tribunal ('Tribunal'). The Tribunal is an independent adjudicative entity that adjudicates applications made in terms of the NCA, which is described in greater detail below. Its decisions have the same status as High Court orders.[6]

Practitioners may appear before the Tribunal. These proceedings are not governed by the ordinary rules of civil procedure but in terms of the Rules for the Conduct of Matters before the National Consumer Tribunal, specialised Tribunal processes published in terms of the NCA.[7] Our focus for purposes of this book is not on this specialised area of litigation but rather on how the NCA affects 'everyday' litigation in the High Courts and Magistrates' Courts.

Both the High Court and the Magistrates' Court have jurisdiction in respect of NCA matters.[8] Notably, no monetary cap is placed on Magistrates' Courts' jurisdiction to hear NCA matters.[9] That means that practitioners may have an NCA enforcement matter in a Magistrates' Court for an amount in excess of R400 000.[10]

The High Court retains concurrent jurisdiction with the Magistrates' Courts in respect of NCA matters.[11] However, where an enforcement action is brought in the High Court, that court may decline to hear the matter if the amount in dispute is trivial. If the High Court decides to hear the matter, it will usually award costs only on the Magistrates' Court scale.[12]

Section 90 of the NCA, and s 90(2)(*k*)(vi)(*aa*) in particular, prohibits clauses in credit agreements that provide for consent to the jurisdiction of the High Court in circumstances where Magistrates' Courts have jurisdiction.[13] The idea which underlies this provision is that litigation in the High Court is costly and may deter consumers from approaching the court.

Another relevant provision is s 90(2)(*k*)(vi)(*bb*). It provides that any clause in a credit agreement which purports to provide consent to the jurisdiction of a court seated outside the area of jurisdiction of the court where the consumer resides or works is unlawful. This is to ensure that credit providers cannot designedly enforce credit agreements in Magistrates' Courts seated in far-flung jurisdictions where consumers are unlikely to be able to appear due to the cost and inconvenience.

So serious is this concern that, in the Western Cape Division decision of *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others*[14], the High Court declared the words that permit a judgment debtor to consent in writing to the jurisdiction of another court (in s 65J(2)(*a*) of the Magistrates' Courts Act) unconstitutional. The court held:

> **The right of access to courts is fundamental to the rule of law in a constitutional state. The … respondents are obtaining judgments and [emolument attachment orders] against the applicants in courts far removed from their homes and places of work and in places which they could not hope to reach, the right to approach the courts was seriously jeopardised, if not effectively denied. This violation of the rights of debtors to access courts and enjoy the protection of the law was the product of the … respondents' forum shopping for courts which would entertain**

their applications for judgments and the issuing of [emolument attachment orders].

The judgment has serious repercussions for civil debt enforcement. An appeal against the judgment and order (and an application for confirmation of the declaration of invalidity) is presently before the Constitutional Court and judgment is expected shortly.

2.3 Procedures and pleadings

2.3.1 Letter of demand to complete a cause of action

A letter of demand will be required to complete a creditor's cause of action in circumstances where the parties have agreed, either expressly or implicitly, that the creditor will not take any further steps until the debtor has been admonished, in writing, to comply with his obligations.

Boraine and Renke suggest that a s 129(1)(*a*) notice (discussed below) can serve the purpose of a final letter of demand, and that the final letter of demand can be worded in such a way so as to fit the requirements of a s 129(1)(*a*) notice.[15]

2.3.2 Notice as a prerequisite for legal proceedings

Section 129 has been described as a 'gateway' to the NCA enforcement process.[16] In terms of s 129(1)(*b*) of the NCA, when the consumer is in default, a credit provider may not commence any legal proceedings for the enforcement of a credit agreement before serving the consumer with a notice as contemplated in ss 129(1)(*a*) or 86(10). We consider s 129 notices below.

A s 129 notice must draw to the attention of the consumer his default, and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction (e.g. the banking ombud if the credit provider is a bank). The intention of the s 129 notice is for the parties to resolve their dispute or agree to a plan to bring the payments under the credit agreement up to date.[17]

The NCA prescribes no particular form for the s 129 notice. In terms of s 64(1)(*b*) of the NCA, all notices (which would include a s 129 notice) must be in plain language. The notice must not be 'a dry and mechanical reproduction of the subsection' but should meaningfully bring a variety of important facts and options to the attention of the consumer.[18]

In addition to satisfying the requirements in s 129, the credit provider must satisfy the requirements set out in s 130 before approaching a court. Section 130 provides that:

1. The credit provider may approach a court only if the consumer remains in default (i.e. the consumer has not yet remedied the default).
2. The consumer has been in default for at least 20 days.
3. At least 10 business days have elapsed since the credit provider delivered the notice.
4. The consumer has either not responded to the notice or has responded by rejecting the credit provider's proposal.
5. The matter is not pending before the Tribunal.

Delivery of the s 129 notice is therefore an important prerequisite for the institution of an action. The court will not hear the matter if a s 129 notice has not been served.[19]

Section 129 has been the subject of much litigation, most of which concerns whether a s 129 notice was 'delivered' to the consumer as required by the NCA in circumstances where the consumer never actually receives it – for example, where a s 129 notice is sent by post but is not delivered or collected. In *Sebola and Another v Standard Bank of South Africa Ltd and Another*, [20] the Constitutional Court considered whether the NCA requires that the consumer actually receives the s 129 notice. In *Sebola*, the s 129 notice had been sent to the consumer's post office box but, due to an error by the post office, had not reached the correct post office. The Constitutional Court held that, at the very least, s 129 letters must be sent by registered mail and, furthermore, that the credit provider must take reasonable measures to bring the notice to the attention of the consumer. This, the court held, would ordinarily mean that the credit provider must prove that the notice reached the correct post office.

In *Kubyana v Standard Bank of South Africa Ltd*, [21] the Constitutional Court elaborated further on this requirement. It held that there is no general requirement that the notice in fact be brought to the consumer's subjective attention by the credit provider, or that personal service on the consumer is necessary. It also held that the steps a credit provider must take are those that would bring the notice to the attention of a reasonable consumer. Mhlantla AJ held:

> **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 deduced 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.**[22]

Section 129 was amended in 2014 by the National Credit Act Amendment Act and now prescribes:[23]

> **(5)The notice contemplated in subsection (1)(*a*) must be delivered to the consumer**
>
> **(a)by registered mail**
>
> **(b)to an adult person at the location designated by the consumer.**
>
> **(6)The consumer must in writing indicate the preferred manner of delivery contemplated in subsection (5).**
>
> **(7)Proof of delivery contemplated in subsection (5) is satisfied by-**

(a)written confirmation by the postal service or its authorised agent, of delivery to the relevant post office or postal agency; or
(b)the signature or identifying mark of the recipient contemplated in subsection (5)(*b*).

2.3.3 Summons

2.3.3(a) Averments in the summons

A credit agreement may be enforced by action or application, depending on whether a dispute of fact has arisen. Where proceedings are by way of an application, the comments below apply *mutatis mutandi* to the founding papers in the application.

The usual procedure for commencing an action is, of course, by way of summons.[24]

In addition to the general requirements in terms of Magistrates' Courts rule 5 and High Court rule 17, the following averment should be contained in a summons if an order is sought declaring immovable property, which constitutes someone's residence, specially executable:

> **AND INFORM the defendant further that in terms of section 26(1) of the Constitution of the Republic of South Africa, that the defendant is afforded the right to have access to adequate housing and that should the defendant make claim that an order for the execution of immovable property belonging to the defendant will infringe its 26(1) right, it is incumbent on the defendant to place such information supporting such claim before this Honourable Court.**

2.3.3(b) Nature of the summons

In our view, it is preferable to use a combined summons to enforce NCA credit agreements.

2.3.4 The particulars of claim

In addition to the requirements by Magistrates' Courts rule 6 and High Court rules 18, the following averment should be contained in the particulars of claim:

1. Section 127 (dealing with surrender of goods under an instalment agreement, secured loan or lease, if applicable) has been complied with.
2. Section 129 has been complied with. In this regard, the following should be averred:
3.
    1. A s 129 notice has been sent and delivered in compliance with s 129(7) of the NCA (see below for documentation required in support of this averment). One might add that the notice informed the defendant of its breach and afforded the defendant 10 business days within which to rectify its breach or to refer the matter to a dispute resolution agent, the consumer court, or the relevant ombud.
    2. 10 business days have lapsed since the delivery of the s 129 notice.
    3. The defendants have been in default in excess of 20 business days.
    4. The plaintiff has no knowledge of any debt review proceedings to which the defendant is subject in terms of s 86 of the NCA.
4. Section 130 has been complied with. In this regard, the following should be averred:

1. In terms of s 130(3), the plaintiff has no knowledge of any matter concerning the credit agreement pending before the Tribunal which could result in an order affecting the issues to be determined by the court.[25]
2. The matter is not before a debt counsellor, alternative dispute resolution agent, consumer court, or the ombud which has jurisdiction.

The plaintiff must also annex documentation supporting these averments to the particulars of claim. In order to ensure compliance with s 129(7) of the NCA, this would include:

1. A copy of the s 129 notice;
2. Proof of registered posting;
3. A track and trace from the South African Post Office; and
4. Other written confirmation by the postal service (or its authorised agent) of delivery to the relevant post office or postal agency, or the signature of the consumer.

An up-to-date certificate of balance should also be annexed to the pleadings, indicating the amount due and payable by the defendant.

It is also important to note that different divisions have specific rules or requirements relating to NCA matters. For example, the Western Cape High Court Consolidated Practice Note provides:

> **33. National Credit Act 34 of 2005**
>
> **(1)In any proceedings instituted in terms of the National Credit Act 34 of 2005 (the Act) in respect of any claim to which the provisions of sections 127, 129 or 131 of the Act apply, the summons or particulars of claim, or, in motion proceedings, the founding papers, must contain sufficient allegations or averments to enable the court to be satisfied that the procedures required by those sections, read with s 130(1) and (2) of the Act, as may be applicable to the claim had been complied with before the institution of the proceedings. (The attention of practitioners are drawn to the judgment in *Rossouw and Another v FirstRand Bank Ltd* 2010 (6) SA 439 (SCA), in particular at paras 33–37.)**
>
> **(2)In order to satisfy the court of the matters referred to in section 130(3) of the Act, an affidavit by the credit provider must be filed when judgment is applied for.**

Practitioners are advised to have regard to the practice directives in the divisions in which they appear to familiarise themselves with these requirements.

2.4 Judgments and orders

2.4.1 Summary judgment

The provisions of s 129(1)(*b*) of the NCA would also apply to an application for summary judgment where the debt arises from a credit agreement to which the NCA applies. If the credit provider fails to deliver the s 129 notice as discussed in 2.3.2 above, the court will refuse the application for summary judgment and will grant leave to defend the action.

2.4.2 Consent to judgment

In order to obtain judgment in terms of s 58 of the Magistrates' Courts Act in respect of a cause of action arising from an NCA credit agreement, the plaintiff must:

1. Comply with the provisions of s 58 of the Magistrates' Courts Act;
2. Allege in the request for judgment that the requirements of s 129 and 130 of the NCA have been met. A blanket allegation that 'each requirement of s 130(3) has been met' will be insufficient. In the particulars of claim each requirement must be dealt with separately; and
3. Attach a copy of the s 129 notice to the application.[26]

2.4.3Default judgment

The registrar is entitled to deal with applications for default judgment falling under that NCA, except to the extent that the order sought is to have immovable property, which is a person's residence, declared specially executable. See the decision in *Gundwana v Steko Development and Others*[27] where it was declared that it is unconstitutional for the registrar to declare immovable properly specially executable when ordering default judgment under rule 31(5)(*b*). Such an application should be referred to court.

Where a clerk of the court is asked to grant default judgment, he may interrogate the application to establish whether the plaintiff is registered with the National Credit Regulator in terms of s 40 of the NCA.[28]

In *Kgomo and Another v Standard Bank of South Africa and Others*, [29] rescission of a default judgment was sought on the basis that it had been 'erroneously sought and erroneously granted in the absence of the party affected thereby', as contemplated in High Court rule 42(1)(*a*), because Standard Bank had failed to comply with the s 129 notice requirements before commencing with legal proceedings. The High Court held that, in terms of s 129(1)(*b*), the bank was precluded from commencing any legal proceedings without delivering a s 129 notice and, in terms of s 130(1)(*a*), 10 business days had to elapse after any notice before legal proceedings were commenced. These requirements had not been complied with and the judgment against the debtor had therefore erroneously been sought within the meaning of rule 42(1)(*a*).[30] On that basis the applicants were entitled to rescission of the judgment granted against them in their absence.

2.5 Statutory cap on amount which can be claimed – interest (*in duplum*)

In addition to the enforcement 'hurdles' created by ss 129 and 130 of the NCA, s 103(5) of the NCA contains a statutory limitation on the amount of interest a credit provider may recover from a consumer. Section 103(5) is a legislative embodiment of the longstanding common-law *in duplum* rule. The basic purpose of the *in duplum* rule is to protect debtors from being crushed by the never-ending accumulation of interest on an outstanding debt.[31] In its common-law guise, it provides that arrear interest ceases to accrue once the sum of the unpaid interest equals the amount of the outstanding capital.[32]

Section 103(5) of the NCA states that, despite any common-law or credit agreement to the contrary, any interest that accrues while the debtor is in default may not in aggregate exceed the unpaid balance of the principal debt. Section 103(5) of the NCA alters and extends the common-law *in duplum* rule for purposes of NCA credit agreements. The difference between the common-law rule and the statutory rule is that, under the common-law rule, interest ceases to accrue once the interest reaches, or is equal to, the outstanding capital sum; the statutory rule

includes not only default and contractual interest in this calculation, but also charges such as initiation fees, service fees, credit insurance costs, administration charges on interest, and collection costs. This legislative 'extension' of the rule offers more protection to consumers.[33]

2.6 The debt review procedure

The NCA provides an economic 'safety net' for consumers who are financially over-committed by allowing consumers to apply to be declared 'over-indebted'. Once a consumer is found, by a court or the Tribunal, to be over-indebted, the court or Tribunal may make an order to relieve the consumer's over-indebtedness, which may include rearranging the consumer's debt repayments or suspending credit agreements.[34]

In terms of s 79(1) of the NCA, a consumer is over-indebted when he is unable to satisfy his obligations under his credit agreements in a timely manner, having regard to his financial means, financial prospects, obligations, and history of debt repayment.

The debt review can be initiated in two ways:

1. The court *may* refer the matter to a debt counsellor for evaluation or *may* itself declare the consumer to be over-indebted;[35] or
2. The consumer can apply to a debt counsellor to be declared over-indebted.[36] If the debt counsellor reasonably concludes that the consumer is over-indebted, the debt counsellor will issue a proposal recommending that the Magistrates' Court make an order declaring one or more credit agreement reckless and/or restructuring the consumer's debt repayment obligations.

The timing of the second alternative is important because a consumer is not permitted to apply for debt review in respect of his credit agreement at a stage where the credit provider has already taken steps contemplated in s 130 to enforce the agreement.[37] Therefore, the consumer must apply for debt review before he receives summons from the credit provider.

In light of the decision in *FirstRand Bank Ltd v Olivier*, if a consumer has been notified of his default in terms of s 129(1) of the NCA, it is advised that he refers the matter to a debt counsellor within the ten-day period envisaged by the NCA.[38] The reason for this is that if the consumer decides to apply for debt review when the credit provider has approached the court to enforce the agreement, the court can use its discretion and refuse the application for debt review. The consumer should therefore refer the matter to a debt counsellor as soon as possible after receiving the s 129 notice.

When a debt counsellor concludes that a consumer is over-indebted, the finding must be referred to a Magistrates' Court.[39] This ensures judicial oversight of the process.[40] Where the debt counsellor concludes that a voluntary rearrangement of debts should take place, then in terms of s 86(8)(*b*) of the NCA, he must refer the matter immediately to the Magistrates' Court. A Magistrates' Court, after hearing the matter will then make an order declaring whether the credit was reckless, or make an order rearranging the debts of the consumer.[41]

2.6.1 The debt review order

The application for review should be in the form of a notice of motion as required by the provisions of Magistrates' Courts rule 55, and should be accompanied by the necessary affidavit and annexures supporting the motion.

In *National Credit Regulator v Nedbank Ltd and Others*, [42] the North Gauteng Division set out clearly the manner in which applications for debt review should be executed. These requirements are set out in the National Credit Regulations, 2006 ('Regulations'). [43]

As part of discharging the onus of proving, on a balance of probabilities, that the requirements of the NCA have been met, the application for debt review must comply with the following requirements:

1. The application for debt review is in the prescribed manner, meaning that the application is in the prescribed Form 16 as required by regulation 24(1) of the Regulations.
2. A notice as contemplated in regulation 24(2) and s 86(4)(*b*)(i) has been given to all credit providers in the prescribed form (Form 17.1).
3. The debt counsellor has verified all information provided by the consumer in his application for debt review by requesting documentary proof from the consumer, contacting the relevant credit provider or employer or any other method of verification. In the event that a credit provider fails to provide a debt counsellor with corrected information within five business days of such verification being requested, the debt counsellor may accept the information provided by the consumer as being correct.
4. The debt counsellor has assessed all the consumer's relevant and available income and expenditure within 30 days of receiving the application for debt review.
5. The debt counsellor has to make a decision about whether the consumer is over-indebted or whether the credit agreements were recklessly entered into.
6. After completion of the assessment, the debt counsellor has to submit Form 17.2 to all the affected credit providers and all registered credit bureaux within five business days.

The annexures to the affidavit should include the proposed payment plan provided by the debt counsellor; certificates of the debt balance provided by the credit providers; a list of the credit providers who complied with the request for information as well as those who failed to comply with the request; and most importantly, information regarding the personal circumstances of the consumer.

Typically, there are three affidavits which are served or exchanged. The first one is the founding affidavit, which should be attached to the notice of motion. Secondly, a confirming affidavit may be deposed to by another person with first-hand knowledge of the facts to confirm the facts in the founding affidavit, where necessary. The third one, a supporting affidavit, is normally prepared by the debt counsellor, which states that the counsellor or a third party has read the founding affidavit and confirmed the truth thereof.

As soon as a debt-rearrangement order is granted, the consumer must comply with it. Once breached, a credit agreement is enforceable without further notice. [44]

3 The Consumer Protection Act 68 of 2008

3.1 Introduction

The Consumer Protection Act (CPA) aims at protecting consumers, and acknowledges the vulnerability of consumers in the South African context. High levels of illiteracy, poverty and other forms of social and economic inequality are recognised by the CPA, and the preamble of the Act makes reference to the need to protect the rights of historically disadvantaged persons

and to promote their full participation as consumers in commercial activity. In addition to this, the Act aims to protect the interests of all consumers; ensure accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the marketplace; and give effect to internationally recognised customer rights.[45]

The primary purpose of the CPA is therefore to protect all consumers from exploitation in the marketplace and to promote social and economic welfare. More specifically, the Act aims to establish a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible, for the benefit of consumers generally; to promote fair business practices; and to protect consumers from unconscionable, unjust or unreasonable trade practices, as well as protecting vulnerable consumers from deceptive, misleading, unfair or fraudulent conduct. In addition to this, the Act provides for an accessible, consistent, harmonised, effective and efficient system of redress for consumers.

In order to achieve these objectives, the Act recognises a number of consumer rights, such as the right to equal treatment in the marketplace, the right to privacy, the right to choose suppliers, examine goods and return them, the right to a cooling-off period, the right to disclosure and information, the right to fair and responsible marketing, the right to fair and honest dealing, the right to fair, just and reasonable terms and conditions, and the right to fair value, good quality and safety.[46]

These rights, as set out in the CPA are protected and enforced not only through the courts, but also through institutions such as the National Consumer Commission and the National Consumer Tribunal, established in terms of the NCA (and discussed briefly above).

The CPA provides various sanctions for noncompliance with its provisions. These sanctions range from compliance notices to fines and criminal penalties.[47] The scope of the Act is wide, and it applies to most business transactions concluded within South Africa. Specifically, the Act applies to all transactions involving natural person consumers and juristic person consumers where the juristic person has an asset value or annual turnover below R2 000 000.

Section 5(2)(*d*) of the CPA excludes from the ambit of the CPA transactions that constitute credit agreements under the NCA.[48]

3.2 The CPA legal framework

The CPA seeks to prevent abuse by affording legislative recognition of consumer rights, prohibiting certain conduct, and establishing mechanisms for the enforcement of consumer rights.

While the CPA attempts to establish a *sui generis*, self-contained system for the resolution of consumer disputes which are covered by the Act, it has a number of implications for the practice of civil procedure in the High Court and Magistrates' Courts.

3.3 The National Consumer Commission, National Consumer Tribunal, and Consumer Courts

The National Consumer Commission ('the Commission') was established as provided by the CPA, and is working in conjunction with the Tribunal.The Commission was established as an

organ of state which is accountable to the Minister of Trade and Industry ('Minister'). It is the primary administrative regulator under the Act, and is responsible for carrying out education, research, investigation of complaints, and enforcement of the CPA.

Of all the above, the Commission is primarily aimed at ensuring compliance with the CPA. It is responsible for promoting the informal resolution of any dispute between a consumer and a supplier. However, it is not responsible for intervening in or directly adjudicating any such dispute. The Commission receives and investigates complaints concerning the alleged prohibited conduct or offences, and monitors the consumer market to ensure that prohibited conduct and offences are prevented, or detected and prosecuted. It is responsible for referring matters to the Tribunal as well as issuing and enforcing compliance notices, and negotiating and concluding undertakings and consent orders.[49]

In addition to this, the Commission has been assigned various additional roles in terms of the Act. A consumer may, for example, directly lodge a complaint regarding his rights or dispute with the Commission if there is no ombud with jurisdiction, or after an alternative dispute resolution agent has terminated the complaint process. The Commission may also initiate a complaint concerning any alleged prohibited conduct itself, when directed to do so by the Minister, or on the request of a regulatory authority or accredited consumer protection group.

With regard to the National Consumer Tribunal, its role is to conduct hearings on complaints under, *inter alia*, the CPA and adjudicate disputes concerning allegations of prohibited conduct under the CPA.

Established in terms of the National Credit Act, the Tribunal is a tribunal of record that has jurisdiction throughout South Africa. Since the CPA encourages parties to seek resolution of their disputes through mediation, conciliation and arbitration in their provincial consumer courts, through relevant ombuds or other such agencies, the Tribunal is the 'last resort' for consumers seeking redress within the structures created by the CPA.

Its function is to adjudicate applications made to it or allegations of prohibited conduct, and to impose remedies permitted by the Act.[50] The Tribunal has jurisdiction over the following matters:

1. Direct applications by consumers (if such a direct referral is permitted by the Act);
2. Referrals by consumers after they have been issued with a notice of non-referral by the Commission, with leave of the Tribunal;
3. Applications to have settlement agreements made an order of the Tribunal;
4. Referrals from the Commission alleging that a person has engaged in prohibited conduct;
5. Applications by a producer or importer to have notices issued by the Commission regarding the investigation or recall of goods suspected to be unsafe, set aside in whole or part of, in terms of s 60(3);
6. Applications to have a decision to cancel the registration of a business name reviewed in terms of s 80(4); and
7. Applications by a respondent for an order that the matter referred to a consumer court by the Commission instead be referred to the Tribunal.

Section 75 requires the Tribunal to conduct a hearing into any matter referred to it, in accordance with the applicable provisions of the NCA.

The Tribunal's decisions may be appealed to a full panel and then to the High Court in the form of either a review or an appeal.[51]

Finally, in terms of the CPA, provinces may set up Consumer Courts, which may hear consumer complaints. Its resolutions or settlements may be recorded as orders in terms of s 70 of the CPA. For example, the KwaZulu-Natal Consumer Protection Act[52] was recently enacted, which is providing that the Office of Consumer Protection be created where consumers may lodge complaints in KwaZulu-Natal.

Furthermore, a number of ombuds exist. By way of example, the Consumer Goods and Services Ombud office officially came into being in March 2013 (previously it operated under the ambit of the Consumer Goods Council of South Africa), to receive and deal with consumer goods complaints regarding alleged contraventions of the Consumer Goods and Services Industry Code of Conduct. Other examples include the Motor Industry Ombudsman of South Africa and the South African Automotive Industry Code of Conduct, which were accredited by the Department of Trade and Industry on 3 October 2014 for regulation of the motor industry.[53]

3.4 Jurisdiction in terms of the CPA

An aggrieved consumer has the right to institute proceedings in any South African court as a last resort. However, in terms of s 69(*d*) of the CPA, the parties are required first to exhaust available remedies before approaching a court to enforce their rights. This means that parties are required first to attempt to resolve the matter by approaching the Tribunal, an ombud with jurisdiction, a Consumer Court in the province with jurisdiction, or an alternative dispute resolution agent as contemplated in s 70 of the CPA.

An important observation should be made of the so-called 'ouster provisions' in the CPA. Section 115(*b*)(i) of the Act effectively ousts the jurisdiction of a civil court in matters where a person, having suffered loss or damage as a result of conduct prohibited by the CPA, has consented to an award for damages in a consent order. Section 115(*b*)(ii) contains a further restriction on the jurisdiction of the court: before a civil action for damages or loss can be instituted, a notice from the Chairperson of the Consumer Tribunal, which certifies whether the conduct forming the basis of the action was prohibited or required conduct in terms of the CPA, as well as the date of the Tribunal's finding, must be filed with the registrar or clerk of the court.

3.5 Consent to and confirmation of judgments

Any decision by the alternative dispute resolution agent needs to be recorded in the form of an order. Such order should then be submitted to the Consumer Tribunal or the High Court to be made a consent order with full legal force and effect.[54]Similarly, in terms of s 74 of the CPA, the Tribunal or the High Court may be approached for a consent order if a matter has been investigated by the Commission and both the Commission and the respondent have agreed to the proposed terms of the order.

3.6 Service and delivery of documents

Section 118 of the CPA provides that unless stated otherwise, any notice, order or other document that must be served on a person, will have been properly served when it has either been delivered in person or sent by way of registered post to such person's last known address. Section 118 of the CPA therefore resembles s 168 of the NCA.

3.7 The applicability of the Consumer Protection Act (CPA) to credit agreements entered into in terms of the National Credit Act (NCA)[55]

Here we consider the application of the CPA to transactions that fall within the ambit of the NCA.

3.7.1 The interpretation of section 5(2)(*d*) of the CPA

Section 5(2)(*d*) of the CPA provides:

This Act does not apply to any transaction –

> **(*d*)that constitutes a credit agreement under the National Credit Act, but the goods or services that are the subject of the credit agreement are not excluded from the ambit of this Act;**

The definition of a 'transaction' in s 1 of the CPA – which applies in respect of a person acting in the ordinary course of business – requires:

1. An agreement between the parties for the supply of the goods and services;
2. The actual supply of the goods; and
3. The performance of the services.

It is only the first of these, the agreement itself, that is relevant in the interpretation of s 5(2)*(d)*. The definition of 'agreement' is identical in both the CPA and the NCA (s 1 of the CPA and s 1 of the NCA), namely: 'an arrangement or understanding between or among two or more parties that purports to establish a relationship in law between or among them'.

As s 5(2)(*d*) of the CPA refers to 'a credit agreement under the National Credit Act', the meaning of 'credit agreement' must be considered. The definition given in s 1 of the NCA is 'an agreement that meets all the criteria set out in section 8'. Section 8 of the NCA catalogues the different classes of agreement. As discussed above, those agreements that fall within the scope of the NCA include credit facilities, credit transactions and credit guarantees.

This means that if a transaction is of such a nature that it would fall within the provisions of s 8 of the NCA, it would be covered by that Act, and would be excluded from the provisions of the CPA. Note, however, that the goods and services to which the agreement relate would be covered by the provisions of the CPA in terms of s 5(2)(*d*). This does not exclude them from also being covered by provisions of the NCA. An example of such a provision is s 97(2) of the NCA, which requires a consumer to disclose to the credit provider the location of the goods pertaining to the credit agreement.

A difficulty arises in respect of those activities that are not expressly dealt with by s 5(2)(*d*) of the CPA, read with the definition of 'transaction' in s 1 of the CPA and of 'credit agreement' in s 1 of the NCA. As has been shown above, s 5(2)(*d*) only excludes that aspect of a transaction that amounts to a credit agreement under the NCA from the CPA; the other two aspects of 'transaction' (the supply of goods and the performance of services) are not. It follows then, by implication, that these two aspects are covered by the CPA, even if they relate to goods and services supplied under credit agreements.

A further activity that is not expressly referred to in s 5(2)(*d*) of the CPA is the promotion of goods and services, which is a core element of what is covered by the Act in terms of s 5(1)(*b*). The term 'promote' encompasses activities ranging from advertising, displaying and offering to supply goods and services, to making representations regarding a willingness to supply goods and services (s 1 of the CPA), all of which are matters dealt with by the substantive provisions of the CPA. Just as was the case with the supply of goods and the performance of services, it is necessary to argue that this aspect is also, by implication, covered by the CPA even if it relates to goods and services supplied under credit agreements.

These implied exclusions from the NCA broaden considerably the extent to which the CPA also applies to aspects linked to NCA transactions.

With reference to the NCA, provisions of the CPA can therefore be classified into four categories:

1. Provisions that *do not apply* to credit agreements;
2. Provisions that *apply to goods and services* that are the subject of credit agreements;
3. Promotional activities; and
4. Provisions not relevant to credit agreements.

A full discussion of the extent to which each of these four categories is affected by the NCA is beyond the scope of this chapter.[56]

3.7.2 Conclusion

It is evident that s 5(2)(*d*) of the CPA lacks clarity in stating that the CPA does not apply to 'credit agreements' under the NCA (but impliedly nevertheless covers the 'goods and services' that are the subject of the agreement). Numerous sections of the CPA do not pertain directly to goods and services but to other matters, including marketing. A further difficulty is that there may, in some instances, be two separate agreements: the first relating to the sale of the goods, and the second relating to the financing of the purchase, with the result that the provisions of both the CPA and the NCA would appear to apply to these, creating confusion. Although the interpretation provisions of the CPA (read with Schedule 1) are of some assistance, it would have been preferable for the legislature to have specified precisely which provisions of the CPA do or do not apply to the goods and services that are subject to a credit agreement. Alternatively, it could have omitted s 5(2)(*d*) and specified in the intended sections themselves that they do not apply to NCA governed agreements as has been done in other parts of the CPA. For example, ss 16 and 17 state that they do not apply to a transaction covered by s 44 of the Electronic Communications and Transactions Act and to a franchise agreement, respectively.

These lingering uncertainties will continue to cause confusion, depriving consumers of the very protections from which they were intended to benefit.

3.8 The Commissioner's power to summons persons

In terms of s 102 of the CPA, the Commissioner may issue a summons to any person who is believed to be able to furnish any information on the subject of an investigation that is being conducted in terms of s 72(1)(*d*), to appear before the Commission in order to be questioned at a time and place specified in the summons, or to deliver or produce to the Commission any book, document or other object at a time and place specified in the summons.

This summons must be signed by the Commissioner or by an employee of the Commission designated by the Commissioner and it may be served in the same manner as a subpoena in a criminal case issued by the Magistrates' Court.

3.9 The CPA plain language requirements

Section 22 of the CPA provides that all notices, documents or visual representations need to be made to the consumer in plain, understandable language. The primary purpose of this provision is to ensure that the consumer is able to understand fully any agreement that he or she may enter into. A lack of sufficient understanding by the consumer could result in a situation where the consumer is in a subordinate position to the supplier as there is unequal bargaining power between the consumer and the supplier.

The definition of plain language implies that the notice, document or visual representation must be easily understood by the consumer. As there is a wide diversity of consumers in South African society, this means that the notice, document or visual representation must be able to be understood by a consumer of average literacy skills, and it must be understood by a consumer of the class of persons for whom the notice, document or visual representation is intended. This is particularly difficult to achieve as a document may be intended for more than one class of persons (for example, motor vehicle sale agreements). It is vital that consumers are able to understand not only the content of the document, notice or visual representation, but also its relevance and legal import. The consumer should be able to understand all of the above without undue effort.[57]

3.10 Statutory causes of action based on the CPA

The CPA also creates certain 'partly-statutory' causes of action which are not available to consumers in terms of the common law. For example, s 56 of the Act creates a statutory warranty against latent defects by 'reading in' an implied warranty by the supplier that goods sold are fit for purpose, are of a good quality, are in good working order, and are free of defects.

Another relevant provision is s 61 of the Act which creates no-fault (otherwise known as strict) liability for harm and loss suffered by a purchaser of goods. In terms of s 61 of the Act, a producer, importer, distributor or retailer of goods can be held liable for the harm suffered from defective goods without proving that party's fault. All that needs to be proven is that an item is unsafe, defective or hazardous and that this defect caused the harm. In such a case, an ordinary civil court would have the authority to resolve the claim; consumers do not have to go through the Tribunal or an ombud first.

3.11 General impact of the CPA on civil procedure

The CPA affects the law of civil procedure in numerous other ways. For example, as discussed above, s 115 of the CPA provides that once a person has consented to an award of damages in a consent order, that person may not institute a claim in a civil court for the damages.[58]

However, if a person considers herself entitled to institute such proceedings following a consumer dispute, she must file, with the registrar or clerk of that court, a notice certifying:

1. whether the conduct constituting the basis for the action has been found to be a prohibited or required conduct in terms of the CPA;
2. stating the date of the Tribunal's finding, if any; and
3. setting out the section of the CPA in terms of which the Tribunal made its finding, if any.

Another important effect of the CPA is that consumers are not required to consult with the supplier against whom they have a complaint. Section 69 states that a consumer may enforce a right or resolve a dispute with a supplier by:

1. referring the matter directly to the Tribunal;
2. referring the matter to the applicable recognised financial services ombud with jurisdiction over the supplier;
3. applying to the Consumer Court of the province with jurisdiction over the matter, if there is one;
4. filing a complaint with the Commission; or
5. approaching a court with jurisdiction over the matter after exhausting all the other remedies listed above.

Alternatively, the matter may be referred to another dispute resolution agent (a person or entity providing conciliation, mediation or arbitration services to assist in the resolution of consumer disputes).[59]

In terms of s 74, a Tribunal or court may, without hearing any evidence, confirm an agreement as a consent order.

After hearing a motion for a consent order, the Tribunal or a court:

1. must make an order as agreed to and proposed by the Commission and the respondent;
2. has to indicate any changes that must be made in the draft order before it will make the order; or
3. can refuse to make the order.

With the consent of a complainant, a consent order may include an award of damages to the complainant.

Section 72 of the CPA states that once the Commission has initiated or received a complaint, it may issue a notice of non-referral to the complainant if the complaint:

1. appears to be frivolous or vexatious;
2. does not allege any facts that would give rise to a remedy under the Act;
3. is referred more than three years after the act or omission occurred or the course of conduct has ceased;[60] or
4. relates to conduct that has been the subject of other proceedings under the CPA.[61]

If an investigation is launched, the Commissioner may issue a summons to any person whom it believes possesses any evidence or could provide information, to appear before it to be questioned or to produce the evidence.[62]

In terms of s 73(1) a Commission may, among other things, after concluding an investigation into a complaint:

1. refer the matter to the National Prosecuting Authority;
2. propose a draft consent order in terms of s 74; or
3. issue a compliance notice in terms of s 100 of the CPA.

1 34 of 2005.

2 68 of 2008.

3 Note, however, that even where the asset value or annual turnover is below this threshold, the credit agreement may nonetheless be exempt from the application of the NCA in terms s 4(1)(*b*) of the Act on account of it being a 'large credit agreement'. In *Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd and Another* (*No1*) 2010 (1) SA 627 (C), it was argued that s 4(1) of the NCA was unconstitutional in this regard – unsurprisingly, the challenge failed.

4*Carter Trading (Pty) Ltd v Blignaut* 2010 (2) SA 46 (ECP).

5See ss 8(5) and (6) of the NCA.

6Section 59(3) read with s 148 of the NCA.

7*GG* 30225, Notice No 789, 2007-08-28

8See s 29(1)(*e*) of the Magistrates' Courts Act 32 of 1944.

9*Nedbank Ltd v Mateman and Others*; *Nedbank Ltd v Stringer and Another* 2008 (4) 276 (T). See s 172(2) of the NCA and s 29(1)(*e*) of the Magistrates' Courts Act 32 of 1944. Furthermore, according to the case of *National Credit Regulator v Nedbank Ltd and Others* 2009 (6) SA 295 (GNP), there is no monetary limit to the Magistrates' Courts' jurisdiction regarding debt review referrals.

10See Stage 1, Part 1.

11See *Standard Bank of South Africa Ltd v Panayiotts* 2009 (3) SA 363 (W) and *FirstRand Bank Ltd v Maleke and Three Similar Cases* 2010 (1) SA 143 (GSJ).

12*Nedbank Ltd v Mateman and Others*; *Nedbank Ltd v Stringer and Another* 2008 (4) 276 (T).

13This will now apply to both District and Regional Magistrates' Courts.

142015 (5) SA 221 (WCC); [2015] 3 All SA 644 (WCC). See para 51.

15Boraine, A and Renke, S 'Some practical and comparative aspects of the cancellation of instalment agreements in terms of the National Credit Act 34 of 2005' (part 2) (2008) Vol 41(1) *De Jure* 1.

16*Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC).

17Despite the use of the word 'may' in s 129, the requirement for a credit provider to send a s 129 notice before commencing legal proceedings is compulsory.

18*BMW Financial Services (SA) (Pty) Ltd v Dr MB Mulaudzi Inc.* 2009 (3) SA 348 (B).

19Section 130(iv)(*b*) of the NCA.

202012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC).

21*Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC); 2014 (4) BCLR 400 (CC).

22Para 54 of the judgment.

23Section 32(*c*) of the National Credit Act Amendment Act 19 of 2014 (with effect from 13 March 2015).

24Subject to the provisions of s 59 of the Magistrates' Courts Act 32 of 1944.

25Section 130(3) of the NCA.

26*African Bank Limited v Additional Magistrate Myambo NO and Others* 2010 (6) SA 298 (GNP).

272011 (3) SA 608 (CC).

28As of May 2016, the new threshold for registration as a credit provider is R0 (nil), effectively eradicating the threshold altogether. This means that anyone who provides credit within the ambit of the NCA must be registered with the National Credit Regulator as a credit provider, irrespective of the number of loans or how small the loans are.

292016 (2) SA 184 (GP).

30Para [55].

31*Leech and Others v ABSA Bank Limited* [1997] 3 All SA 308 (W). See *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) for a discussion of the common-law *in duplum* rule.

32*LTA Construction Bpk v Administrateur, Transvaal* 1992 (1) SA 473 (A) at 482A-B and *Bellingan v Clive Ferreira & Associates CC and Others* 1998 (4) SA 382 (W).

33*Nedbank Ltd and Others v National Credit Regulator and Another* 2011 (3) SA 581 (SCA).

34Note that the provisions of the NCA dealing with over-indebtedness do not apply to juristic persons in their capacity as consumers in terms of a credit agreement.

35Section 85 of the NCA. See Vessio, ML 'What Does the National Credit Regulator Regulate?' (2008) 20 *SA Merc LJ* 227 at 238-240; Otto, JM and Ott, RL (2013) The *National Credit Act Explained* at 41-2 and 64-5.

36Section 86(1) of the NCA.

37Section 86(2) of the NCA, as amended with effect from 13 March 2015, read with s 129.

38See *FirstRand Bank Ltd v Olivier*, 2009 (3) SA 353 (SE).

39According to *National Credit Regulator v Nedbank Ltd and Others* 2009 (6) SA 295 (GNP), there is no monetary limit to the Magistrates' Courts' jurisdiction regarding debt review referrals.

40Otto et al. (2010) p62. See also *National Credit Regulator v Nedbank Ltd and Others* 2009 (6) SA 295 (GNP).

41During this period, the court has no power to make an emolument attachment order in terms of the Magistrates' Courts Act. See Otto et al. (2010) p62. During this period, the court has no power to make an emolument attachment order in terms of the Magistrates' Courts Act. See Otto et al. (2010) p62.

42 2009 (6) SA 295 (GNP).

43 *GG* 28864 of 31 May 2006.

44 See *Ferris and Another v FirstRand Bank Limited and Another* 2014 (3) BCLR 321 (CC); 2014 (3) SA 39 (CC) at paras [17]–[19]. Furthermore, if judgment is granted against a debtor where no notice has been given under s 86(10) to terminate a review, this would not justify rescission under High Court rule 42(1)(*a*). Failure to terminate debt review is a purely dilatory defense and not an irregularity that establishes that a judgment has been 'erroneously granted' as required by the rule.

45 Preamble of the CPA.

46 Set out in Chapter 2 of the CPA.

47 Chapter 6 of the CPA.

48 See also s 74 of the CPA.

49 Section 74 of the CPA.

50 Section 27(*a*) and (*b*) of the NCA.

51 See 148 of the NCA.

52 4 of 2013.

53 *Government Gazette* 38107(3); Government Notice 817.

54 See s 70(3) of the CPA.

55 See Melville, N and Palmer, R 'The applicability of the Consumer Protection Act 2008, to credit agreements' (2010) 22 *SA Mercantile Law Journal* 272.

56 For a full discussion, see Melville and Palmer (2010) *SA Merc LJ*, op. cit., 272.

57 Melville (2010), op. cit., 162.

58 Melville (2010), op. cit., 129.

59 Ibid., 127.

60 Section 116(1) of the CPA.

61 Section 116(2) of the CPA.

62 Section 102(1) of the CPA.

D: Precedents

1. *Precedents are guides only*: Precedents are like babies' dummies – they provide comfort, not nutrition. Always draft court pleadings, notices and other documents with reference to the relevant rule or section of the Act, and check, after drafting, that all the requirements contained in the rule or section have been met. It follows, then, that precedents should not be used blindly; they should be intelligently adapted to the circumstances of each matter, making allowance for the customs and usage of the courts in which you practise. A precedent represents only one (and not necessarily the best) approach to drafting in each instance; so another precedent with slight differences will not be wrong, provided it conforms to the rules and practice directions. The selection of precedents included in this book is not intended to be fully comprehensive, but should cover the most important civil procedures.

2. *High Court, District and Regional Magistrates' Courts precedents*: Note that we have only duplicated corresponding notices and processes in the High Court and Regional and District Magistrates' Courts where there are material differences. In addition, space does not permit the examples to be fully comprehensive, particularly with regard to pleadings. An important point to remember is that you should include all the parties' file references (where known) in any document you draft for service on an opposing party. This facilitates the forwarding of the document to the correct attorney, and prevents delay.

3. *Practice directives*: The various divisions of the High Court, the Supreme Court of Appeal and the Constitutional Court issue practice directives from time to time which are regularly updated and amended. These practice directives usually set out detailed steps and procedures that have to be followed when practising in the courts concerned, and must be read in conjunction with the applicable Rules of Court.

4. Also note that the starting times of the various divisions and rolls differ. For example, in the KwaZulu-Natal Division, Pietermaritzburg, motion court sits at 09h30, but two-judge appeals and admissions sit at 10h00. You should ensure that the starting time you state in your notice of motion is correct for the division and court in which you are appearing.

P1

PRECEDENT 1

RETURN OF SERVICE

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Our ref:

Case No:

In the matter between:

LINDIWE NGCOBO Plaintiff

and

JOHN DOE Defendant

RETURN OF SERVICE: COMBINED SUMMONS

THIS IS TO CERTIFY THAT ON THE 22ND DAY OF JANUARY 2016 AT 08H15 AT 21 ANTON LEMBEDE STREET, DURBAN, BEING THE DEFENDANT'S PLACE OF RESIDENCE, I DISPLAYED THE ORIGINAL COMBINED SUMMONS, PLAINTIFF'S PARTICULARS OF CLAIM AND ANNEXURES 'A' AND 'B' AND EXPLAINED THE NATURE AND EXIGENCY THEREOF TO THE DEFENDANT AND HANDED THE DEFENDANT PERSONALLY A COPY THEREOF. RULE 4(1)(*a*)(i).

DATED AT DURBAN THIS THE 25TH DAY OF JANUARY 2016.

_____

MM ZONDO
DEPUTY SHERIFF
DURBAN
TOTAL FEES: R511,40

TO:THE REGISTRAR, KWAZULU-NATAL DIVISION
DURBAN

TO:NKOMO INC
DX-007 – DURBAN

YOUR REF.: MR DAVIS/V/T004 (WVW 05 OF 5)
OUR REF:2017/01, 034,33.00

* Note that you will not be required to draft a return of service – this will be provided to you by the sheriff. You should, however, be able to read a return of service and detect whether it is defective.

P2

PRECEDENT 2

NOTICE OF MOTION – *EX PARTE* APPLICATION – HIGH COURT FORM 2 (SHORT FORM)

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No:

In the *ex parte* application:

LINDIWE NGCOBO Applicant

NOTICE OF MOTION

KINDLY TAKE NOTICE THAT application will be made on behalf of the above-named Applicant on [*insert date*] at 10:00 or as soon thereafter as counsel may be heard for an order in the following terms:

[*Here you would set out the order which the applicant is seeking*]

and that the affidavit of [*insert name of deponent*] annexed hereto will be used in support thereof.

Kindly place the matter on the roll for hearing accordingly.

_____
REGISTRAR OF THE KWAZULU-NATAL DIVISION
Dullah Omar Grove
DURBAN

_____
ATTORNEY FOR APPLICANT

P3

PRECEDENT 3

NOTICE OF MOTION, ON NOTICE APPLICATION: HIGH COURT FORM 2A (LONG FORM)

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No:

In the matter between:

LINDIWE NGCOBO Applicant

and

JOHN DOE Respondent

NOTICE OF MOTION

KINDLY TAKE NOTICE THAT the above-named Applicant intends to make application to this Honourable Court for an order in the following terms:

[*Here set out the terms of the order which the applicant is seeking*]

and that the accompanying affidavit of [*insert name of deponent*] will be used in support thereof.

TAKE FURTHER NOTICE that the Applicant has appointed the address of her attorneys set out here below at which she will accept notice and service of all process in these proceedings.

TAKE FURTHER NOTICE that if you intend opposing this application you are required:

1. to notify Applicant's attorney in writing on or before the [*insert date*] and;
2. within 15 (fifteen) days after you have so given notice of your intention to oppose the application, to file your answering affidavit, if any;

and further that you are required to appoint in such notification an address referred to in rule 6(5)(*b*) at which you will accept notice and service of all documents in these proceedings.

If no such notice of intention to oppose be given, the application will be made on _____ at 10h00.

_____

REGISTRAR OF THE KWAZULU-NATAL DIVISION
Dullah Omar Grove
DURBAN

_____

ATTORNEY FOR APPLICANT

P4

PRECEDENT 4

NOTICE OF INTENTION TO OPPOSE: HIGH COURT

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No:

In the matter between:

LINDIWE NGCOBO Applicant

and

JOHN DOE Respondent

NOTICE OF INTENTION TO OPPOSE APPLICATION

TAKE NOTICE that the Respondent hereby gives notice of his intention to oppose the above application.

TAKE NOTICE FURTHER that the Respondent appoints the address of his attorney below, where he will accept service of all further documents in the matter.

Respondent's Attorney

Address:

_____

_____

P5

PRECEDENT 5

NOTICE OF SET DOWN, APPLICATION: HIGH COURT

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No:

In the matter between:

JOE SOAP Plaintiff

and

LINDIWE NGCOBO Defendant

NOTICE OF SET DOWN

TAKE NOTICE that the above-mentioned matter has been set down for summary judgment in the Honourable Court on _____ [*the date*] at _____ [*time*] or as soon thereafter as the matter may be heard.

DATED at DURBAN on [*insert date*].

_____
NKOMO Inc
Attorneys for Plaintiff

PRECEDENT 6

APPLICATION TO SUE BY EDICTAL CITATION: HIGH COURT

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No:

In the *ex parte* application:

LINDIWE NGCOBO Applicant

In re:

LINDIWE NGCOBO Plaintiff

and

JOE SOAP *Defendant*

NOTICE OF MOTION

TAKE NOTICE THAT application will be made on behalf of the above-named Applicant on Friday the [*insert date*] at 10h30 or so soon thereafter as Counsel can be heard for an order in the following terms:

1. Applicant is given leave to proceed against Defendant by edictal citation for:
    1. a decree of divorce
    2. an order that Defendant forfeit the benefits of the marriage in community of property
    3. an order compelling Defendant to pay Applicant maintenance in the amount of R6 000,00 per month until her death or remarriage
    4. further and/or alternative relief
    5. costs of suit.
2. Service of the citation is to be effected upon Defendant personally.
3. Defendant is called upon to give notice to Applicant's attorneys of his intention to oppose the proceedings within 21 days after service upon him if he intends to oppose the relief set out above.

KINDLY TAKE NOTE that the affidavit of [*insert name*] will be used in support hereof.
BE PLEASED TO set the matter down for hearing accordingly.

DATED AT DURBAN this _____ day of _____ 2016.
NKOMO Inc
Applicant's Attorneys

Address

_____

To: The Registrar
KwaZulu-Natal Division, Durban

* A citation will be attached to the notice of motion, along with the affidavit in support of the application.

P7

PRECEDENT 7

PROVISIONAL SENTENCE SUMMONS: DISHONOURED CHEQUE

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No:

In the matter between:

LINDIWE NGCOBO Plaintiff

and

JOHN DOE Defendant

PROVISIONAL SENTENCE SUMMONS

To the Sheriff or his/her Deputy

INFORM: _____ (the Defendant(s))

_____ [*description of defendant(s)*]

TO TAKE NOTICE THAT:

1. He/she is hereby called upon immediately to pay to _____ (the Plaintiff) the sum of R _____, together with interest thereon at the rate prescribed in the Prescribed Rate of Interest Act *a tempore morae*, to run with effect from _____ to date of payment, plus costs of suit, claimed by the Plaintiff from the Defendant on the following grounds:
    1. On _____ 2016 the Defendant drew a cheque on _____ Bank, _____ Branch in favour of the Plaintiff, in respect of which cheque the Plaintiff is the legal holder for value;
    2. on or about _____ 2016 the said cheque was duly presented for payment at the said bank, where the same was payable, but was dishonoured by nonpayment;
    3. notice of dishonour is dispensed with by virtue of the provisions of section 48(2)(*c*) of the Bills of Exchange Act 34 of 1964, in that the drawee bank is not bound, as between itself and the drawer, to pay the said cheque;
    4. copies of the face and reverse sides of the said cheque are annexed hereto, marked ‘A’ and ‘B’ respectively;
2. Failing such payment, the Defendant is hereby called upon to appear before this Honourable Court personally, or by a legal representative, at Dullah Omar Grove, Durban, KwaZulu-Natal

on the _____ day of _____ 2016, at 9h30, or as soon thereafter as the matter can be heard, to admit or deny his/her liability for the Plaintiff's said claim;

3. If the Defendant denies liability for the same, he/she shall not later than noon on the _____ day of _____ 2016, file an affidavit with the Registrar of this Honourable Court and serve a copy on the Plaintiff's attorneys, which said affidavit shall set forth the grounds of his/her defence to the said claim and, in particular, shall state whether he/she admits or denies his/her signature to the said _____ or whether he/she admits or denies the signature or authority of his/her agent.

AND INFORM THE DEFENDANT FURTHER that in the event of him/her not paying the amount and interest mentioned above to the Plaintiff immediately and if he/she, the said Defendant, furthermore fails to file an affidavit as aforesaid, and to appear before this Honourable Court at the time stated above, provisional sentence may forthwith be granted against him/her with costs, but that against payment of the said amount, interest and costs, he/she will be entitled to demand security for the restitution thereof if the said sentence should thereafter be reversed.

AND SERVE a copy of this summons and of the said _____, annexed hereto, on the said Defendant and then return this summons to the Registrar with your return of what you have done thereon.

DATED at DURBAN this _____ day of _____ 2016.

_____

REGISTRAR OF THE KWAZULU-NATAL DIVISION
DURBAN

_____

PLAINTIFF'S ATTORNEY

P8

PRECEDENT 8

COMBINED SUMMONS: HIGH COURT

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No:

In the matter between:

LINDIWE NGCOBO Plaintiff

and

JOHN DOE Defendant

COMBINED SUMMONS

To:The Sheriff or his/her Deputy

Durban:

INFORM

JOHN DOE _____ [*describe defendant*]

_____

(hereinafter called the Defendant(s))

that

LINDIWE NGCOBO _____ [*describe plaintiff*],

_____

(hereinafter called the Plaintiff(s)), hereby institutes action against him/her in which action the Plaintiff(s) claims/claim the relief and on the grounds set out in the particulars annexed hereto.

INFORM the Defendant(s) further that if the Defendant(s) disputes/dispute the claim and wishes/wish to defend the action, the Defendant(s) shall:

1. Within 10 (TEN) days of the service upon the Defendant(s) of this summons, file with the Registrar of this Court at Dullah Omar Grove, Durban, notice of Defendant's intention to defend and serve a copy thereof on the attorneys of the Plaintiff(s), which notice shall give

an address (not being a post office or poste restante) referred to in rule 19(3) for the service upon the Defendant(s) of all notices and documents in the action.

2. Thereafter and within 20 (TWENTY) days after filing and serving notice of intention to defend as aforesaid, file with the Registrar and serve upon the Plaintiff a Plea, Exception, Notice to strike out, with or without a counterclaim.

INFORM the Defendant(s) further that if the Defendant(s) fails/fail to file and serve notice as aforesaid, judgment as claimed may be given against the Defendant(s) without further notice to the Defendant(s), or if having filed and served such notice, the Defendant(s) fails/fail to plead, except, make application to strike out or counterclaim, judgment may be given against the Defendant(s).

AND immediately thereafter serve on the Defendant(s) a copy of this summons and return the same to the Registrar with whatsoever you have done thereupon.

SIGNED at DURBAN on this _____ day of _____ 2016.

_____

REGISTRAR OF THE KWAZULU-NATAL DIVISION
DURBAN

_____

ATTORNEY FOR PLAINTIFF

P9

PRECEDENT 9

SIMPLE SUMMONS: HIGH COURT

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No:

In the matter between:

LINDIWE NGCOBO Plaintiff

and

JOHN DOE Defendant

SUMMONS

To the Sheriff or his/her Deputy:

INFORM

JOHN DOE _____[*describe defendant*]

_____

(hereinafter called the Defendant(s)) that

LINDIWE NGCOBO _____[*describe plaintiff*],

_____

(hereinafter called the Plaintiff(s)) hereby institutes action against him/her in which action the Plaintiff(s) claims/claim:

[*Here the plaintiff would set out in abbreviated form the particulars of claim on which her action is based*]

INFORM the Defendant(s) further that if the Defendant(s) disputes/dispute the claim and wishes/wish to defend the action, the Defendant(s) shall within 10 (TEN) days of the service upon the Defendant(s) of this summons file with the Registrar of this Court at Dullah Omar Grove, Durban notice of the Defendant(s) intention to defend and serve a copy thereof on the attorneys of the Plaintiff(s) which notice shall give an address (not being a post office or poste

restante) referred to in rule 19(3) for the service upon the Defendant(s) of all notices and documents in the action.

INFORM the Defendant(s) further that if the Defendant(s) fails/fail to file and serve notice as aforesaid, judgment as claimed may be given against the Defendant(s) without further notice to the Defendant(s), and immediately thereafter serve on the Defendant(s) a copy of this summons and return the same to the Registrar with whatsoever you have done thereupon.

DATED at DURBAN on this _____ day of _____ 2016.

_____

REGISTRAR OF THE KWAZULU-NATAL DIVISION
DURBAN

_____

ATTORNEY FOR PLAINTIFF

PRECEDENT 10

COMBINED SUMMONS – MAGISTRATES' COURTS – FORM 2B

[*Note that Form 2B of the Magistrates' Courts Rules was substituted by GN R545 of 30 June 2015 (with effect from 31 July 2015). A different form exists for District and Regional Magistrates' Courts' combined summons. To avoid prolixity, however, we have treated them together.*]

IN THE MAGISTRATES' COURT FOR THE DISTRICT/REGION OF _____ HELD AT_____

Case No:

In the matter between:

C.D. Plaintiff

and

A.B. Defendant

SUMMONS

To the Sheriff or his/her Deputy:

INFORM

A.B., of [*state residence or place of business and if known, gender, occupation and place of employment*]
(hereinafter called the Defendant), that
C.D., [*state gender and occupation*] of [*state residence or place of business*]

(hereinafter called the Plaintiff), hereby institutes action against Defendant in which action the Plaintiff claims the relief and on the grounds set out in the particulars annexed hereto.

INFORM the Defendant further that if he or she disputes the claim and wishes to defend the action he or she shall:

1. within _____ days of the service upon him or her of this summons file with the Registrar or Clerk of this Court at [*set out the address of the Registrar or Clerk*] notice of his or her intention to defend and serve a copy thereof on the Plaintiff or Plaintiff's attorney, which notice shall give an address referred to in rule 13(3) for the service upon the Defendant of all notices and documents in the action;

2. thereafter, and within 20 days after filing and serving notice of intention to defend as aforesaid, file with the Registrar or Clerk of the Court and serve upon the Plaintiff or Plaintiff's attorney a plea, exception, notice to strike out, with or without a counterclaim.

INFORM the Defendant further that if Defendant fails to file and serve notice as aforesaid judgment as claimed may be given against him or her without further notice to him or her, or if, having filed and served such notice, Defendant fails to plead, except, make application to strike out or counterclaim, judgment may be given against him or her. And immediately thereafter serve on the Defendant a copy of this summons and return the same to the Registrar or Clerk of the Court with whatsoever you have done thereupon.

DATED at DURBAN on this _____ day of _____ 2016.

_____

Registrar/Clerk of the Court

* Notice of intention to defend.

To the Registrar/Clerk of the Court.

Kindly take notice that the Defendant hereby notifies his or her intention to defend this action.

Dated at this _____ day of _____ 2016.

Defendant/Defendant's attorney

Address

Postal address

Facsimile (fax) number (where available)

Electronic mail (e-mail) address (where available)

* The plaintiff is prepared to accept all subsequent documents and notices at the facsimile address/electronic mail address/other address stated herein

_____

_____

(Give full address for acceptance of service of process or documents within fifteen kilometres from the Courthouse and also the postal address.)

* The original notice must be filed with the Registrar or Clerk of the Court and a copy thereof served on the Plaintiff or Plaintiff's attorney.

Defendant must take notice that –

1. in default of Defendant paying the amount of the claim and costs within the said period or of Defendant delivering a notice of intention to defend he or she will be held to have admitted the said claim and the Plaintiff may proceed therein and judgment may be given against Defendant in his or her absence;
2. if Defendant pays the said claim and costs within the said period judgment will not be given against Defendant herein and he or she will save judgment charges. Defendant will also save judgment charges if, within the said period, he or she lodges with the Clerk of the aforesaid Court a consent to judgment;
3. if Defendant admits the claim and wishes to consent to judgment or wishes to undertake to pay the claim in instalments or otherwise, Defendant may approach the Plaintiff or Plaintiff's attorney.

1. Notice:

1. Any person against whom a court has, in a civil case, given judgment or made any order who has not, within 10 days, satisfied in full such judgment or order may be called upon by notice in terms of section 65A(1) of the Act to appear on a specified date before the court in chambers to enable the court to enquire into the financial position of the judgment debtor and to make such order as the court may deem just and equitable.
2. If the court is satisfied that –

   aa)the judgment debtor or, if the judgment debtor is a juristic person, a director or officer of the juristic person has knowledge of the above-mentioned notice and that he or she has failed to appear before the court on the date and at the time specified in the notice; or

   bb)the judgment debtor, director or officer, where the proceedings were postponed in his or her presence to a date and time determined by the court, has failed to appear before the court on that date and at that time; or

   cc)the judgment debtor, director or officer has failed to remain in attendance at the proceedings or at the proceedings so postponed, the court may, at the request of the judgment creditor or his or her attorney, authorise the issue of a warrant directing a Sheriff to arrest the said judgment debtor, director or officer and to bring him or her before a competent court to enable that court to conduct a financial enquiry. [Section 65A(6) of the Act]
3. Any person who –

   aa)is called upon to appear before a court under a notice in terms of section 65A(1) or 65A(8)(*b*) of the Act (where the Sheriff, in lieu of arresting a person, hands to that person a notice to appear in court) and who wilfully fails to appear before the court on the date and at the time specified in the notice; or

   bb)where the proceedings were postponed in his or her presence to a date and time determined by the court, wilfully fails to appear before the court on that date and at that time; or

   cc)wilfully fails to remain in attendance at the relevant proceedings or at the proceedings so postponed, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three months. [Section 65A(9) of the Act]
4. On appearing before the court on the date determined in the notice in terms of section 65A(1) or (8)*(b)* of the Act in pursuance of the arrest of the judgment debtor, director or officer under a warrant referred to in section 65A(6) of the Act or on any date to which the proceedings have been postponed, such judgment debtor, director or officer shall be called upon to give evidence on his or her financial position or that of the juristic person and his or her or its ability to pay the judgment debt. [Section 65D of the Act]
5. Any person against whom a court has, in a civil case, given any judgment or made any order who has not satisfied in full such judgment or order and paid all costs for which he or she is liable in connection therewith shall, if he or she has changed his place of residence, business or employment, within 14 days from the date of every such change notify the Clerk or Registrar of the Court who gave such judgment or made such order and the judgment creditor or his or her attorney fully and correctly in writing of his new place of residence, business or employment, and by his or her failure to do so such judgment debtor shall be guilty of an offence and liable upon conviction to a fine or imprisonment for a period not exceeding three months. [Section 109 of the Act]

2. Consent to judgment.

I admit that I am liable to the Plaintiff as claimed in this summons (or in the amount of R _____ and costs to date) and I consent to judgment accordingly.

Dated at this _____ day of _____ 2016.

Defendant

WITNESSES:1 (full names) ……..(signature) ……

(address) ……

2 (full names) …….. (signature) …….

(address) …….

OR

* Notice of intention to defend.
To the Registrar / Clerk of the Court.

Kindly take notice that the Defendant hereby notifies his or her intention to defend this action.
DATED at _____ this _____ day of _____ 20____

Defendant/Defendant's attorney

15 km physical address from the Courthouse for acceptance of service of process or documents

_____
_
Postal address

_____
_
Facsimile (fax) number (where available) _____
Electronic mail (e-mail) address (where available) _____
* The Defendant is prepared to accept all subsequent documents and notices at the facsimile address/electronic mail address/other address stated herein.
(Delete whichever is not applicable)
* The original notice must be filed with the Clerk of the Court and a copy thereof served on the Plaintiff or Plaintiff's attorney.
Costs if the action is undefended will be as follows:
Summons R
Judgment R
Attorney's charges R
Sheriff's fees R
Sheriff's fees on re-issue R
Total: R

ANNEXURE
Particulars of Plaintiff's Claim
Plaintiff/Plaintiffs' Attorney
Address of Plaintiff/Plaintiffs' Attorney
Plaintiff's Advocate (if any)

PRECEDENT 11

SIMPLE SUMMONS – MAGISTRATES' COURTS
(Claim in respect of debt or liquidated demand)

IN THE MAGISTRATES' COURT FOR THE DISTRICT/REGION OF _____ HELD AT _____

Case No:

In the matter between:

C.D. Plaintiff

and

A.B. Defendant

SUMMONS

To the Sheriff or his/her Deputy:

INFORM
A.B., of [*state residence or place of business and if known, gender, occupation and place of employment*]
(hereinafter called the Defendant), that
C.D., [*state gender and occupation*]of, [*state residence or place of business*]

(hereinafter called the Plaintiff), hereby institutes action against him or her in which action the Plaintiff claims:

[*Here set out in concise terms Plaintiff's cause of action*]

INFORM the Defendant further that if Defendant disputes the claim and wishes to defend the action he or she shall within _____ days of the service upon him or her of this summons file with the Registrar or Clerk of this Court at [*set out the address of the Registrar's office*] notice of his or her intention to defend and serve a copy thereof on the Plaintiff or Plaintiff's attorney, which notice shall give an address referred to in rule 13(3) for the service upon the Defendant of all notices and documents in the action.

INFORM the Defendant further that if he or she fails to file and serve notice as aforesaid, judgment as claimed may be given against him or her without further notice to him or her.

And immediately thereafter serve on the Defendant a copy of this summons and return the same to the Registrar or Clerk of the Court with whatsoever you have done thereupon.

DATED at DURBAN on this _____ day of _____ 2016.

_____

Registrar/Clerk of the Court

Plaintiff/Plaintiff's Attorney
[*Address*]

_____

Postal Address

_____

Facsimile number

_____

Electronic Mail Address

* The Plaintiff is prepared to accept all subsequent documents and notices at the facsimile/electronic mail address stated herein. _____

Defendant must take notice that –

1. in default of Defendant paying the amount of the claim and costs within the said period or of Defendant delivering a notice of intention to defend he or she will be held to have admitted the said claim and the Plaintiff may proceed therein and judgment may be given against Defendant in his or her absence;
2. if Defendant pays the said claim and costs within the said period judgment will not be given against Defendant herein and he or she will save judgment charges. Defendant will also save judgment charges if, within the said period, he or she lodges with the Clerk of the aforesaid Court a consent to judgment;
3. if Defendant admits the claim and wishes to consent to judgment or wishes to undertake to pay the claim in instalments or otherwise, Defendant may approach the Plaintiff or Plaintiff's attorney.

1. Notice:
    1. Any person against whom a court has, in a civil case, given judgment or made any order who has not, within 10 days, satisfied in full such judgment or order may be called upon by notice in terms of section 65A(1) of the Act to appear on a specified date before the court in chambers to enable the court to enquire into the financial position of the judgment debtor and to make such order as the court may deem just and equitable.
    2. If the court is satisfied that –

        aa)the judgment debtor or, if the judgment debtor is a juristic person, a director or officer of the juristic person has knowledge of the above-mentioned notice and that he or she has failed to appear before the court on the date and at the time specified in the notice; or

        bb)the judgment debtor, director or officer, where the proceedings were postponed in his or her presence to a date and time determined by the court, has failed to appear before the court on that date and at that time; or

cc)the judgment debtor, director or officer has failed to remain in attendance at the proceedings or at the proceedings so postponed, the court may, at the request of the judgment creditor or his or her attorney, authorise the issue of a warrant directing a Sheriff to arrest the said judgment debtor, director or officer and to bring him or her before a competent court to enable that court to conduct a financial enquiry. [Section 65A(6) of the Act]

3. Any person who –

aa)is called upon to appear before a court under a notice in terms of section 65A(1) or 65A(8)(*b*) of the Act (where the Sheriff, in lieu of arresting a person, hands to that person a notice to appear in court) and who wilfully fails to appear before the court on the date and at the time specified in the notice; or

bb)where the proceedings were postponed in his or her presence to a date and time determined by the court, wilfully fails to appear before the court on that date and at that time; or

cc)wilfully fails to remain in attendance at the relevant proceedings or at the proceedings so postponed, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three months. [Section 65A(9) of the Act]

4. On appearing before the court on the date determined in the notice in terms of section 65A(1) or (8)(*b*) of the Act in pursuance of the arrest of the judgment debtor, director or officer under a warrant referred to in section 65A(6) of the Act or on any date to which the proceedings have been postponed, such judgment debtor, director or officer shall be called upon to give evidence on his or her financial position or that of the juristic person and his or her or its ability to pay the judgment debt. [Section 65D of the Act]
5. any person against whom a court has, in a civil case, given any judgment or made any order who has not satisfied in full such judgment or order and paid all costs for which he or she is liable in connection therewith shall, if he or she has changed his place of residence, business or employment, within 14 days from the date of every such change notify the Clerk or Registrar of the Court who gave such judgment or made such order and the judgment creditor or his or her attorney fully and correctly in writing of his new place of residence, business or employment, and by his or her failure to do so such judgment debtor shall be guilty of an offence and liable upon conviction to a fine or imprisonment for a period not exceeding three months. [Section 109 of the Act]

2. Consent to judgment.

I admit that I am liable to the Plaintiff as claimed in this summons (or in the amount of R _____ and costs to date) and I consent to judgment accordingly.

Dated at this _____ day of _____ 2016.
Defendant

WITNESSES:1 (full names) …… (signature) ……

(address) ……

2 (full names) …….. (signature) …….

(address) …….

OR

*3.Notice of intention to defend.

To the Registrar/Clerk of the Court.

Kindly take notice that the Defendant hereby notifies his or her intention to defend this action.

Dated at this _____ day of _____ 2016.

Defendant/Defendant's attorney

Address

Postal address

Facsimile (fax) number (where available)

Electronic mail (e-mail) address (where available)

(Give full address for acceptance of service of process or documents within 15 kilometres from the Courthouse and also the postal address.)

* The Defendant is prepared to accept all subsequent documents and notices at the facsimile address/electronic mail address/other address stated herein.

* The original notice must be filed with the Registrar or Clerk of the Court and a copy thereof served on the Plaintiff or Plaintiff's attorney.

Costs if the action is undefended will be as follows:

Summons R

Judgment R

Attorney's charges R

Sheriffs fees R

Sheriff's fees on re-issue R

Total: R

PRECEDENT 12

SUMMONS INCLUDING AUTOMATIC RENT INTERDICT: MAGISTRATES' COURTS

Summons commencing action (in which is included an automatic rent interdict)

Issued by Case No.

Date

Registrar/Clerk of the Court

Sued out by
Name and address of Plaintiff or Plaintiff's attorney
Postal address
Signature of Plaintiff or Plaintiff's attorney

In the Magistrates' Court for the District/Region of _____

held at _____ between Plaintiff and Defendant

To:

You are hereby summoned that you do within _____ days of the service of this summons deliver or cause to be delivered to the Registrar/Clerk of the aforesaid Court and also the Plaintiff or Plaintiff's attorney, at the address specified herein, a notice in writing of your intention to defend this action and answer the claim of the Plaintiff herein, particulars whereof are endorsed hereunder.

And take notice that –

1. in default of your paying the amount of the claim and costs within the said period or of your delivering a notice of intention to defend you will be held to have admitted the said claim and the Plaintiff may proceed therein and judgment may be given against you in your absence;
2. if you pay the said claim and costs within the said period judgment will not be given against you herein and you will save judgment charges. You will also save judgment charges if, within the said period, you lodge with the Registrar or Clerk of the aforesaid Court a consent to judgment;
3. if you admit the claim and wish to consent to judgment or wish to undertake to pay the claim in instalments or otherwise, you may approach the Plaintiff or Plaintiff's attorney.

And further take notice that you, the Defendant, and all other persons are hereby interdicted from removing or causing or suffering to be removed any of the furniture or effects in or on the premises described in the particulars of claim endorsed hereon which are subject to the Plaintiff's hypothec for rent until an order relative thereto shall have been made by the Court.

Costs, if the action is undefended, will be as follows:

Summons R
Judgment R
Attorney's charges
Sheriff's fees
Sheriff's fees on re-issue
Totals R
Total R

Notice:

1. Any person against whom a court has, in a civil case, given judgment or made any order who has not, within 10 days, satisfied in full such judgment or order may be called upon by notice in terms of section 65A(1) of the Act to appear on a specified date before the court in chambers to enable the court to enquire into the financial position of the judgment debtor and to make such order as the court may deem just and equitable.
2. If the court is satisfied that –

   aa)the judgment debtor *or*, if the judgment debtor is a juristic person, a director or officer of the juristic person, has knowledge of the above-mentioned notice and that he or she has failed to appear before the court on the date and at the time specified in the notice; or

   bb)the judgment debtor, director *or* officer, where the proceedings were postponed in his or her presence to a date and time determined by the court, has failed to appear before the court on that date and at that time; or

   cc)the judgment debtor, director or officer has failed to remain in attendance at the proceedings or at the proceedings so postponed,
3. the court may, at the request of the judgment creditor or his or her attorney, authorise the issue of a warrant directing a Sheriff to arrest the judgment debtor, director or officer and to bring him or her before a competent court to enable that court to conduct a financial inquiry. [Section 65A(6) of the Act]

   dd)is called upon to appear before a court under a notice in terms of section 65A(1) or (8)(*b*) of the Act (where the Sheriff, in lieu of arresting a person, hands to that person a notice to appear in court) and who wilfully fails to appear before the court on the date and at the time specified in the notice; or

   ee)where the proceedings were postponed in his or her presence to a date and time determined by the court, wilfully fails to appear before the court on that date and at that time; or

   ff)wilfully fails to remain in attendance at the proceedings or at the proceedings so postponed, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three months. [Section 65A(9) of the Act]
4. On appearing before the court on the date determined in the notice in terms of section 65A(1) or (8)(*b*) of the Act in pursuance of the arrest of the judgment debtor, director or officer under a warrant referred to in section 65A(6) of the Act or on any date to which the proceedings have been postponed, such judgment debtor, director or officer shall be called upon to give evidence on his or her financial position or that of the juristic person and his or her or its ability to pay the judgment debt. [Section 65D of the Act]
5. Any person against whom a court has, in a civil case, given any judgment or made any order who has not satisfied in full such judgment or order and paid all costs for which he or she is liable in connection therewith shall, if he or she has changed his or her place of residence, business or employment, within 14 days from the date of every such change

notify the Registrar or Clerk of the Court who gave such judgment or made such order and the judgment creditor or his or her attorney fully and correctly in writing of his or her new place of residence, business or employment, and by his or her failure to do so such judgment debtor shall be guilty of an offence and liable upon conviction to a fine or to imprisonment for a period not exceeding three months. [Section 109 of the Act]

1. Particulars of claim.
   Plaintiff's claim is –
   1. for arrears of rent due in respect of the Defendant's tenancy of and for confirmation of the interdict appearing in this summons.
      Particulars:
      Date
      Period
      Amount
      R
      and
   2. for ejectment.
      Particulars:
   3. Consent to judgment.
      I admit that I am liable to the Plaintiff as claimed in this summons (or in the amount of R and costs to date) and I consent to judgment accordingly.
      Dated at this _____ day of _____ 2017.
      Defendant

*3.Notice of intention to defend.

To the Registrar or Clerk of the Court.

Kindly take notice that the Defendant hereby gives notice of Defendant's intention to defend this action.

Dated at this _____ day of _____ 2017.

Defendant/Defendant's Attorney

Address where service of process or documents will be accepted
(within 15 kilometres from the Courthouse)
Postal address

* The original notice must be filed with the Registrar or Clerk of the Court and a copy thereof served on the Plaintiff or Plaintiff's attorney.

PRECEDENT 13

NOTICE OF INTENTION TO DEFEND: MAGISTRATES' COURTS

IN THE MAGISTRATES' COURT FOR THE DISTRICT OF DURBAN
HELD AT DURBAN

Case No:

In the matter between:

LINDIWE NGCOBO Plaintiff

and

JOHN DOE Defendant

DEFENDANT'S NOTICE OF INTENTION TO DEFEND

KINDLY TAKE NOTICE THAT it is the intention of the Defendant to defend the above action; and

KINDLY TAKE FURTHER NOTICE THAT the Defendant appoints the following address for service on the second Defendant of any further documents in the action:

JOHN SHOZI INC
52 Paul Road
Durban

KINDLY TAKE FURTHER NOTICE THAT the Defendant is willing to accept service of all subsequent documents and notices in the suit at the following address: [*fax/e-mail address*][1]

Alternatively

KINDLY TAKE FURTHER NOTICE THAT the Defendant is not prepared to accept service of all subsequent documents and notices in the suit through any manner other than the physical address [*or postal address*].

A possible addition may be the following:

KINDLY TAKE FURTHER NOTICE THAT the Plaintiff is requested to deliver a consent in writing to the exchange or service by both parties of subsequent documents and notices in the suit by way of facsimile or electronic mail.[2]

DATED at DURBAN this _____ day of _____ 2016.

DEFENDANT

TO: THE CLERK OF THE COURT
Magistrates' Court, Durban;

AND TO: PLAINTIFF'S ATTORNEYS
NKOMO INC
Durban

1Rule 13(3)(*b*) requires the defendant to indicate in the notice of intention to defend whether the defendant is prepared to accept service of all subsequent documents and notices in the suit through any manner other than the physical address or postal address and, if so, to state such preferred manner of service.

2Rule 13(3)(*c*) provides that the plaintiff may, at the written request of the defendant, deliver a consent in writing to the exchange or service by both parties of subsequent documents and notices in the suit by way of facsimile or electronic mail.

PRECEDENT 14

NOTICE TO PRODUCE IN TERMS OF RULE 35(12),
FORM 15 (HIGH COURT)/RULE 23(13) (MAGISTRATES' COURTS)

[*This notice may be delivered at any time before the hearing in an application or action and may therefore be dispatched before close of pleadings. It can perform the function of a limited request for further particulars.*]

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No:

In the matter between:

JOE SOAP Plaintiff

and

LINDIWE NGCOBO Defendant

NOTICE TO PRODUCE IN TERMS OF RULE 35(12)

TO:THE REGISTRAR OF THE ABOVE HONOURABLE COURT,
DURBAN

AND

TO:JOHN SHOZI INC

KINDLY TAKE NOTICE that the Plaintiff [*or defendant if applicable*] requires you to produce for inspection by the Plaintiff the following documents referred to in the Defendant's [*or plaintiff's if applicable*] [*declaration, plea or affidavit in the case of an application*] dated the [*insert day*] day of [*insert month and year*].

Details of documents: [*describe document required*]

DATED at DURBAN this [*insert day*] day of [*insert month and year*].

_____

PLAINTIFF'S ATTORNEYS
[*or defendant, if applicable*]

NKOMI INC

P15

PRECEDENT 15

NOTICE TO INSPECT IN TERMS OF RULE 35(14) (HIGH COURT)/ RULE 23(15) (MAGISTRATES' COURTS)

[*This notice is used for the purpose of drafting pleadings and is therefore delivered before pleadings close.*]

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No:

In the matter between:

JOE SOAP Plaintiff

and

LINDIWE NGCOBO Defendant

NOTICE TO INSPECT IN TERMS OF RULE 35(14)

TO:THE REGISTRAR OF THE ABOVE HONOURABLE COURT,
DURBAN
AND

TO:NKOMO INC

KINDLY TAKE NOTICE that the Defendant [*or plaintiff if applicable*] requires you within five days of service hereof, to make available for inspection and copying by the Defendant, the following document/s for the purpose of pleading.

Details of documents: [*Describe document required. Note that it must be a clearly specified document or tape recording in the possession of the opposing party which is relevant to a reasonably anticipated issue in the action.*]

DATED at DURBAN this [*insert day*] day of [*insert month and year*].

_____
DEFENDANT'S ATTORNEYS

[*or plaintiff's if applicable*]

JOHN SHOZI INC

P16

PRECEDENT 16

EXCEPTION, NO CAUSE OF ACTION: MAGISTRATES' COURTS

The following example will be used to consider an exception on the ground that the plaintiff's particulars of claim do not disclose a cause of action:

Imagine that Dirty Dan is suing the defendant, Joe Soap, for payment of the purchase price of land which Dirty Dan alleges he sold to Joe Soap in terms of a written contract.

You act on behalf of Joe and receive a copy of Dirty Dan's particulars of claim to which is attached a copy of the contract on which Dirty Dan is relying. After taking a careful look at the contract, you notice that it does not contain a signature in the space allocated for the purchaser's signature. Being the astute attorney that you are, you realise that in South African law (in terms of s 2(1) of the Alienation of Land Act of 1981), any contract for the sale of immovable land must be in writing and signed by the seller and the purchaser (or their agents acting on their written authority). As a result, you decide to except to Dirty Dan's particulars of claim based on the fact that the plaintiff's particulars of claim lack the averments necessary to sustain a cause of action. The exception might look something like this in the Magistrates' Courts (and the High Court):

IN THE MAGISTRATES' COURT FOR THE DISTRICT OF DURBAN HELD AT DURBAN

Case No:

In the matter between:

DIRTY DAN Plaintiff

and

JOE SOAP Defendant / Excipient

NOTICE OF EXCEPTION

TAKE NOTICE THAT the Defendant hereby excepts to the Plaintiff's particulars of claim on the grounds that they fail to disclose a cause of action for the reasons set out below:

1. The Plaintiff's claim as pleaded in the particulars of claim is for the payment of the purchase price of immovable property which the Plaintiff alleges the Defendant purchased in terms of a written contract, a true copy of which is alleged to be Annexure 'A' attached to the particulars of claim.
2. In terms of the Alienation of Land Act of 1981 a contract relating to the alienation of immovable property must be in writing and signed by the parties thereto, or agents acting on their written authority.
3. From the particulars of claim and Annexure 'A' attached thereto it is apparent that the contract sued upon by the Plaintiff has not been signed by the Defendant or his agent acting on his written authority.
4. The contract sued upon is accordingly void and the particulars of claim do not disclose a valid cause of action.

WHEREFORE the Defendant prays for an order:

1. upholding the exception;
2. dismissing the Plaintiff's action with costs.

DATED at Durban on this _____ day of _____ 2016.

_____

EXCIPIENT'S ATTORNEY
Address:

_____

To:The Clerk of the Civil Court
Durban Magistrates' Court

And to: Plaintiff's Attorney
Address:

_____

PRECEDENT 17

EXCEPTION, VAGUE AND EMBARRASSING: MAGISTRATES' COURTS

An exception based on the fact that the defendant's plea is vague and embarrassing may look something like this (note the extra allegation concerning the notice which was given to the defendant to remove the cause of the complaint):

IN THE MAGISTRATES' COURT FOR THE DISTRICT OF DURBAN HELD AT DURBAN

Case No:

In the matter between:

DIRTY DAN Plaintiff/Excipient

and

JOE SOAP Defendant

NOTICE OF EXCEPTION

TAKE NOTICE THAT the Plaintiff hereby excepts to the Defendant's plea on the grounds that the plea is vague and embarrassing in one or more or all of the following respects:

1. [*Give full details as to why the plea is vague and embarrassing*.]
2. The Defendant has been afforded the opportunity in terms of rule 19(1) to remove the cause of the complaint, but has failed or refused to do so.

WHEREFORE the Plaintiff prays for an order:

1. Upholding the exception;
2. The Defendant is given 10 days from the date when the exception is upheld to deliver a notice to amend;
3. Should the Defendant fail timeously to deliver a notice of intention to amend, or should he fail to duly amend his particulars of claim thereafter, the Plaintiff is given leave to set the matter down for an order dismissing the Defendant's plea.

DATED at Durban on this _____ day of _____ 2016.

_____

PLAINTIFF'S ATTORNEY

Address:

_____

To:The Clerk of the Civil Court
Durban Magistrates' Court

And To: Defendant's Attorney
Address:

_____

P18

PRECEDENT 18

REQUEST FOR DEFAULT JUDGMENT: MAGISTRATES' COURTS

IN THE MAGISTRATES' COURT FOR THE DISTRICT OF DURBAN
HELD AT DURBAN

Case No:

In the matter between:

LINDIWE NGCOBO Plaintiff

and

JOHN DOE Defendant

PLAINTIFF'S REQUEST FOR DEFAULT JUDGMENT

TAKE NOTICE THAT WHEREAS:

1. the Defendant has been duly served on _____[*date*];
2. the Defendant has entered an appearance to defend; and
3. the Defendant has failed to plead or otherwise to answer the claim of the Plaintiff notwithstanding the fact that the Plaintiff has requested him by means of a written notice in terms of rule 12(1)(*b*) to deliver his plea within 5 (five) days,

NOW THEREFORE the Plaintiff applies for judgment against the Defendant as claimed in the summons for:

1. R [*insert principal amount claimed in the summons*]
2. Interest on the above calculated at the rate of [*insert rate of interest agreed in contract, alternatively insert the prescribed legal rate]* from *[insert the date of mora agreed in contract or the date from which claimed in a letter of demand; or the date of service of summons; whichever is applicable*] to date of payment.
3. Costs

DATED at Durban on this _____ day of _____ 2017.

_____
PLAINTIFF'S ATTORNEY
Address:
_____

To:The Clerk of the Civil Court
Durban Magistrates' Court

And to: Defendant's Attorney

P19

PRECEDENT 19

APPLICATION FOR SUMMARY JUDGMENT THE AFFIDAVIT: MAGISTRATES' COURTS

IN THE MAGISTRATES' COURT FOR THE DISTRICT OF DURBAN
HELD AT DURBAN

Case No:

In the matter between:

LINDIWE NGCOBO Plaintiff/Applicant

and

JOHN DOE Defendant/Respondent

APPLICATION FOR SUMMARY JUDGMENT

TO: The Clerk of the Civil Court
Magistrates' Court
Durban

AND

TO:ATTORNEY FOR DEFENDANT

TAKE NOTICE THAT application will be made to the above-mentioned court on the _____ at 09:00 for summary judgment against the Defendant for:

1. Payment of the amount of R _____;

2. Interest at _____ per year calculated from _____ to date of payment;
3. Costs of the action.

AND TAKE FURTHER NOTICE THAT the affidavit of **LINDIWE NGCOBO** will be used in support of such application and that you may reply thereto by affidavit.

_____

PLAINTIFF'S ATTORNEY

IN THE MAGISTRATES' COURT FOR THE DISTRICT OF DURBAN
HELD AT DURBAN

Case No:

In the matter between:

LINDIWE NGCOBO Plaintiff/Applicant

and

JOHN DOE Defendant/Respondent

AFFIDAVIT

I, the undersigned,

LINDIWE NGCOBO

declare on oath as follows:

1.

I am the Plaintiff in this action and the facts herein stated are within my personal knowledge.

2.

I confirm that the facts and cause of action as set out in the summons are correct and confirm that the Defendant is indebted to the Plaintiff in the sum of R _____ plus interest and costs.

3.

I verify that I believe that the Defendant does not have a *bona fide* defence to the claim and that appearance has been entered solely for purpose of delay.

4.

In the premises, I therefore pray that summary judgment be granted against the defendant.

SIGNED AND SWORN TO AT Durban on this _____ day of _____ by the deponent having acknowledged that:

He/she knows and understands the contents hereof and that it is true and correct; and
He/she has no objection to taking the prescribed oath; and
That he/she regards the prescribed oath as binding on his/her conscience.

COMMISSIONER OF OATHS

_____

P20

PRECEDENT 20

THIRD PARTY NOTICE: HIGH COURT

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No:

In the matter between:

JOE SOAP Plaintiff

and

LINDIWE NGCOBO Defendant

THIRD PARTY NOTICE

To:**JOHN SMITH**
who resides at 6 Slim Avenue, Durban

TAKE NOTICE THAT the above-named Plaintiff has commenced proceedings against the above-named Defendant for the relief set forth in the Summons and particulars of claim, a copy of which is herewith served upon you.

The above-named Defendant claims against you the relief sought in the annexure hereto, on the grounds set forth in this annexure.

If you dispute those grounds or if you dispute the claim of the Plaintiff against the Defendant, you must give notice of your intention to defend within 10 (TEN) days of the date of service hereof upon you.

Such notice must be in writing and filed with the Registrar of this Honourable Court and a copy thereof served on the above-named Defendant at the address set forth hereunder. It must give an address (not being a post office box or poste restante) referred to in rule 6(5)(*b*) for the service upon you of notices and documents in the action, such address to be one within 15 (FIFTEEN) kilometres of the office of the Registrar of the above Honourable Court.

Within 20 (TWENTY) days of your giving such notice you must file a Plea to the Plaintiff's claim against the Defendant or a Plea to the Defendant's claim against you, or both such pleas.

DATED AT DURBAN ON THIS _____ day of _____ 2016.

_____

ATTORNEY FOR DEFENDANT
Address:

_____

_____

TO:THE REGISTRAR OF THE ABOVE HONOURABLE COURT,
DURBAN

AND TO: Plaintiff's attorneys

* An annexure containing the particulars of claim/statement of claim should be attached to third party notice. This should state the nature and grounds of the claim against the third party.

PRECEDENT 21

APPLICATION TO AMEND PLEADINGS: HIGH COURT

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No:

In the matter between:

JOE SOAP Plaintiff

and

LINDIWE NGCOBO Defendant

PLAINTIFF'S NOTICE OF INTENTION TO AMEND HIS PARTICULARS OF CLAIM IN TERMS OF RULE 28(1)

TAKE NOTICE that the Plaintiff intends to amend his particulars of claim in this action in the following respects:

PARAGRAPH 3.3:
By the deletion of paragraph 3.3 thereof and substitution with the following:
[*insert substitute paragraph*]

TAKE NOTICE FURTHER that:

1. unless written objection to the proposed amendments is delivered within 10 (TEN) days of the delivery of this notice, the Plaintiff will effect the said amendment to his particulars of claim;
2. in terms of the provisions of rule 28(3) an objection to the proposed amendment is required to state clearly and concisely the grounds upon which the objection is founded; and
3. if no objection complying with the said requirements in rule 28(3) is delivered within the said 10 (TEN) day period, every party who received notice of the proposed amendment shall be deemed to have consented to the amendments and the Plaintiff will effect the amendments.

P22

PRECEDENT 22

NOTICE OF SET DOWN IN THE MAGISTRATES' COURTS

IN THE MAGISTRATES' COURT FOR THE DISTRICT OF DURBAN
HELD AT DURBAN

Case No:

In the matter between:

LINDIWE NGCOBO Plaintiff

and

JOHN JAMES Defendant

NOTICE OF SET DOWN

TO:THE CLERK OF THE COURT
DURBAN

AND

TO:JOHN SHOZI INC

SIRS,

BE PLEASED TO TAKE NOTICE that the above matter has been set down for hearing on the _____ day of _____ 2016 at 8.30 a.m. or as soon thereafter as the matter may be heard.

DATED at DURBAN this [*insert day*] day of [*insert month and year*].

_____

PLAINTIFF'S ATTORNEYS
[*or defendant's, if applicable*]

NKOMO INC
DURBAN

PRECEDENT 23

NOTICE TO DISCOVER IN TERMS OF RULE 35(1) (HIGH COURT)/ RULE 23(1) (MAGISTRATES' COURTS)

[*Note that High Court rule 35 is virtually identical to the corresponding rule 23 of the Magistrates' Courts Rules. The following notices can therefore be used interchangeably in both courts, with minor amendment where necessary.*]

[*The first of the discovery notices, the notice to discover, initiates discovery by requiring the delivery of the other party's discovery affidavit. This notice is sometimes delivered together with all the other discovery notices, including, for example the notice to produce for inspection. The other notices are not really designed to be used in this fashion, and when delivered with this notice have to be drafted in general terms. To make the best use of the other notices, however, they should be individually drafted and delivered only after the opposing party's discovery affidavit has been delivered so that they can be drafted with reference to the discovery affidavit.*]

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No:

In the matter between:

JOE SOAP Plaintiff

and

LINDIWE NGCOBO Defendant

NOTICE TO DISCOVER IN TERMS OF RULE 35(1)

TO:THE REGISTRAR OF THE ABOVE HONOURABLE COURT,
DURBAN

AND

TO:JOHN SHOZI INC

KINDLY TAKE NOTICE that the Plaintiff [*or defendant if applicable*] hereby requires the Defendant [*or plaintiff if applicable*] to make discovery on oath within 20 days of the service hereof of all documents and tape recordings relating to any matter in question in this action (whether such matter is one arising between the Plaintiff or Defendant or not) which are or have at any time been in the Defendant's [*or plaintiff's if applicable*] possession or control.

DATED at DURBAN this [*insert day*] day of [*insert month and year*].

_____

PLAINTIFF'S ATTORNEYS
[*or defendant's, if applicable*]
NKOSI INC

P24

PRECEDENT 24

DISCOVERY AFFIDAVIT INCLUDING SCHEDULES

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No:

In the matter between:

JOLLY BUSINESS (PTY) LTD Plaintiff

and

LINDIWE NGCOBO Defendant

DISCOVERY AFFIDAVIT

I, the undersigned,

make oath and say:

1. I am the General Manager of Jolly Business (Pty) Ltd, the above-mentioned Plaintiff, and have personal knowledge of the contents hereof.
2. Plaintiff has in its possession or under its control the documents relevant to the issue in this action which are set out in the First and Second Parts of the First Schedule hereto.
3. The Plaintiff objects to discovery of the documents set out in the Second Part of the First Schedule.
4. The Plaintiff objects to discovery of such documents because they:
    1. were drawn up or written or obtained after litigation had been contemplated and with the intention to place them before Plaintiff's legal advisors to enable Plaintiff's legal advisors either to give legal advice or to conduct Plaintiff's case; or
    2. concern Plaintiff's case alone and do not support Plaintiff's case; or

3. comprise reports or enquiries which led to the privileged documents as mentioned herein. *(These are examples but the actual reason can and theoretically should be given.)*

5. The Plaintiff has had but has not now in its possession or power the documents relating to the matters in question in this action as set forth in the Second Schedule hereto.
6. According to the best of my knowledge and belief, the Plaintiff has not now and never has had in its possession, custody or power, or in the possession, custody or power of its attorney or agent or any other person on its behalf, any document or copy of or extract from any documents relating to any matters in question in this cause, other than the documents set forth in the First and Second Schedules hereto.

_____

DEPONENT

SIGNED AND SWORN TO AT Durban on this _____ day of _____ by the Deponent having acknowledged that:

He/she knows and understands the contents hereof and that it is true and correct; and
He/she has no objection to taking the prescribed oath; and
That he/she regards the prescribed oath as binding on his/her conscience.

COMMISSIONER OF OATHS

_____

SCHEDULE 1

PART 1

[*Include here a list of documents and tape recordings in the possession of the party required to make discovery which are relevant to the issue in the action and in respect of which that party has no objection to producing.*]

PART 2

[*Include here a list of the documents and tape recordings in respect of which the party has a valid objection to produce.*]

SCHEDULE 2

[*Include here a list of the documents that the party had but no longer has in his possession or power at the date of the affidavit.*]

PRECEDENT 25

NOTICE TO INSPECT UNDISCLOSED DOCUMENTS IN TERMS OF RULE 35(3) (HIGH COURT)/RULE 23(3) (MAGISTRATES' COURTS)

[*This notice should be delivered after receipt of a deficient discovery affidavit*.]

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No:

In the matter between:

JOE SOAP Plaintiff

and

LINDIWE NGCOBO Defendant

NOTICE TO INSPECT UNDISCLOSED DOCUMENTS IN TERMS OF RULE 35(3)

TO:THE REGISTRAR OF THE ABOVE HONOURABLE COURT,
DURBAN

AND

TO:JOHN SHOZI INC

KINDLY TAKE NOTICE in terms of rule 35(3) that the Plaintiff [*or defendant if applicable*] believes that there are in addition to the documents already disclosed by the Defendant in her discovery affidavit sworn to on _____[*date*], certain other documents which may be relevant to the matter in question in the possession of the Defendant or of any other party.

The Plaintiff [*or defendant if applicable*] accordingly requires the Defendant [*or plaintiff if applicable*] either:

to make the undiscovered documents available for inspection by the Plaintiff in terms of rule 35(6); [*or defendant if applicable*]

OR
to state on oath within 10 (TEN) days that such documents are not in the Defendant's [*or plaintiff's if applicable*] possession, in which event if known to the Defendant, [*or plaintiff if applicable*] to state their whereabouts.

Details of documents:

[*Identify or describe the documents believed to be relevant to the action that have not been disclosed. This might be a specific document but will frequently be a class or classes of documents such as those listed in the example below.*]

All correspondence with Spoornet from 29 May 2016 until 29 October 2016 with regard to the allocation of trucks for the carriage of containers from the Defendant's Johannesburg depot to Durban.

Records of despatches by rail from the Defendant's Johannesburg depot during the months of June, July and August 2016.

Records showing the receipts of trucks at the Durban Container Terminal, and the records showing the loading of those containers onto the vessel.

All records relevant to the containers available for railing at the Defendant's Johannesburg depot during the months of June, July and August 2016.

DATED at DURBAN this [*insert day*] day of [*insert month and year*].

_____

PLAINTIFF'S ATTORNEYS
[*or defendant's, if applicable*]
NKOSI INC

PRECEDENT 26

NOTICE TO PRODUCE IN TERMS OF RULE 35(6), FORM 13 (HIGH COURT)/ RULE 23(6), FORM 15 (MAGISTRATES' COURTS)

[*This notice should be delivered after receipt of the opposing party's discovery affidavit*.]

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No:

In the matter between:

JOE SOAP Plaintiff

and

LINDIWE NGCOBO Defendant

NOTICE TO PRODUCE IN TERMS OF RULE 35(6)

TO:THE REGISTRAR OF THE ABOVE HONOURABLE COURT,
DURBAN

AND

TO:JOHN SHOZI INC

KINDLY TAKE NOTICE that the Plaintiff [*or defendant if applicable*] requires you to produce within five days of the service hereof, for inspection by the Plaintiff the following documents referred to in the Defendant's [*or plaintiff's if applicable*] discovery affidavit, dated the [*insert day*] day of [*insert month and year*].

Details of documents:

[*Describe here the documents required. The notice will often be drafted in an imprecise fashion, requiring inspection of all the documents referred to in the opposing party's discovery affidavit. This is inevitably the case if it is delivered with the notice to discover. In this case, part of the notice's function inevitably becomes redundant and is replaced by less formal letters or telephone calls between the parties' attorneys, arranging for the copying and inspection of particular documents.*]

DATED at DURBAN this [*insert day*] day of [*insert month and year*].

PLAINTIFF'S ATTORNEYS
[*or defendant's, if applicable*]
NKOSI INC

P27

PRECEDENT 27

NOTICE TO INSPECT IN RESPONSE TO NOTICE TO PRODUCE IN TERMS OF RULE 35(6), FORM 14 (HIGH COURT)/RULE 23(6), FORM 15A (MAGISTRATES' COURTS)

[*This notice is sometimes discarded in practice, where the parties make arrangements less formally by letter or telephone.*]

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No:

In the matter between:

JOE SOAP Plaintiff

and

LINDIWE NGCOBO Defendant

NOTICE TO INSPECT IN TERMS OF RULE 35(6)

TO:THE REGISTRAR OF THE ABOVE HONOURABLE COURT,
DURBAN

AND

TO:JOHN SHOZI INC

KINDLY TAKE NOTICE that you may inspect the documents mentioned in your notice of the [*insert day*] day of [*insert month and year*] at my office, [*or insert other place*] between the hours of [*insert time*] and on the following days. [*The other party is entitled to inspect the documents for five days after the time stated during normal office hours.*]

[OR, *if there is a valid objection to permitting inspection*]

KINDLY TAKE NOTICE that the Defendant [*or plaintiff, if applicable*] objects to giving you inspection of the documents mentioned in your notice of the [*insert day*] day of [*insert month and year*] on the grounds that [*state the grounds*].

DATED at DURBAN this [*insert day*] day of [*insert month*] 2016.

_____

DEFENDANT'S ATTORNEYS
[*or plaintiff's, if applicable*]
NKOSI INC

P28

PRECEDENT 28

NOTICE TO SPECIFY IN TERMS OF RULE 35(8) (HIGH COURT)/ RULE 23(9) (MAGISTRATES' COURTS)

[*Note that this notice may be served at any time after the close of pleadings and as it requires particulars of documents or tape recordings that the opposing party intends to use at trial, it goes beyond the ambit of the discovery affidavit. While the particulars it requires would obviously include documents listed in the opposing party's discovery affidavit, it also includes documents that would not, such as documents that appear in the discovery affidavit of the party dispatching the notice, or a document produced in court under a subpoena* duces tecum *that has never at any time been in the possession or control of either party*.]

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No:

In the matter between:

JOE SOAP Plaintiff

and

LINDIWE NGCOBO Defendant

NOTICE TO SPECIFY IN TERMS OF RULE 35(8)

TO:THE REGISTRAR OF THE ABOVE HONOURABLE COURT, DURBAN

AND

TO:JOHN SHOZI INC

KINDLY TAKE NOTICE that the Plaintiff requires the Defendant to specify in writing particulars of dates and parties of or to any documents or tape recordings intended to be used at the trial. The Defendant shall not less than 15 (FIFTEEN) days before the said trial, give notice to the Plaintiff specifying:

1. the dates of and the parties to and the general nature of any such documents which are in the Plaintiff's possession;
2. such particulars as the Plaintiff may have to identify any such document not in its possession at the same time furnishing the name and address of the person in whose possession such document now is;

DATED at DURBAN this [*insert day*] day of [*insert month and year*].

_____

PLAINTIFF'S ATTORNEYS
[*or defendant's, if applicable*]
NKOSI INC

P29

PRECEDENT 29

NOTICE TO ADMIT IN TERMS OF RULE 35(9) (HIGH COURT)/ RULE 23(10) (MAGISTRATES' COURTS)

[*This notice calls upon the opposing party to admit that certain documents or tape recordings were properly executed and are what they purport to be in order to save the costs of proving this. This notice should specify which documents the opposing party is requested to admit*.]

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No:

In the matter between:

JOE SOAP Plaintiff

and

LINDIWE NGCOBO Defendant

NOTICE TO ADMIT IN TERMS OF RULE 35(9)

TO:THE REGISTRAR OF THE ABOVE HONOURABLE COURT,
DURBAN

AND

TO:JOHN SHOZI INC

KINDLY TAKE NOTICE that the Plaintiff [*or defendant, if applicable*] requires the Defendant [*or plaintiff, if applicable*] to admit within 10 (TEN) days of service hereof, that the following documents or tape recordings are properly executed and are what they purport to be.

Details of documents or tape recordings: [*Describe here the documents required to be admitted. Occasionally, a party will make a general sort of description encompassing all the documents to be used at trial, such as 'the bundle of documents which the Plaintiff has prepared from documents discovered by both the Plaintiff and the Defendant.'*]

DATED at DURBAN this [*insert day*] day of [*insert month and year*].

_____

PLAINTIFF'S ATTORNEYS
[*or defendant's, if applicable*]
NKOSI INC

PRECEDENT 30

NOTICE TO PRODUCE IN TERMS OF RULE 35(10) (HIGH COURT)/ RULE 23(11) (MAGISTRATES' COURTS)

[*This notice calls upon the opposing party to produce the original of any document or tape recording that they have discovered at trial, provided it is not privileged*.]

IN THE HIGH COURT OF SOUTH AFRICA
DURBAN LOCAL DIVISION, DURBAN

Case No:

In the matter between:

JOE SOAP Plaintiff

and

LINDIWE NGCOBO Defendant

NOTICE TO PRODUCE IN TERMS OF RULE 35(10)

TO:THE REGISTRAR OF THE ABOVE HONOURABLE COURT, DURBAN

AND

TO:JOHN SHOZI INC

KINDLY TAKE NOTICE that the Plaintiff [*or defendant, if applicable*] requires the Defendant [*or plaintiff, if applicable*] to produce at the hearing of this matter the original of either – the following documents [*which should then be specified and described below*, or any documents discovered in the Defendant's [*or plaintiff's, if applicable*] discovery affidavit which is in the Defendant's possession or under her control.

Details of documents or tape recordings: [*Describe here the specific documents the original of which is required to be produced, if the more general construction is not adopted*.]

DATED at DURBAN this [*insert day*] day of [*insert month and year*].

_____

PLAINTIFF'S ATTORNEYS
[*or defendant's, if applicable*]

[*Note that High Court rule 36 is virtually identical to the corresponding rule 24 of the Magistrates' Courts Rules. The following notices can therefore be used interchangeably in both courts*.]

P31

PRECEDENT 31

NOTICE IN TERMS OF RULE 36(10)(*a*) (HIGH COURT)/

RULE 24(10)(*a*) (MAGISTRATES' COURTS)

[*The following notice would also be used for other exhibits intended to be used in evidence such as plans, diagrams, or models which, together with photographs, cannot be used without notice*.]

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No:

In the matter between:

JOE SOAP Plaintiff

and

LINDIWE NGCOBO Defendant

NOTICE IN TERMS OF RULE 36(10)(*a*)

TO:THE REGISTRAR OF THE ABOVE HONOURABLE COURT,
DURBAN

AND

TO:JOHN SHOZI INC

KINDLY TAKE NOTICE that the Plaintiff [*or defendant, if applicable*] intends to tender in evidence three photographs depicting the scene of the collision.

AND TAKE NOTICE FURTHER that the aforesaid photographs are available for inspection during office hours at the address of the Plaintiff's [*or defendant's, if applicable*] attorneys referred to below and that the Defendant [*or plaintiff, if applicable*] is required to state within 10

(TEN) days of receipt of this notice whether the Defendant [*or plaintiff, if applicable*] has any objection to such photographs being admitted into evidence without proof.

AND TAKE NOTICE FURTHER that if the Defendant [*or plaintiff, if applicable*] fails within the aforesaid period to state whether he objects to the admission in evidence of the said photographs, they shall be received in evidence upon the mere production and without further proof thereof.

DATED at DURBAN this [*insert day*] day of [*insert month and year*].

_____

PLAINTIFF'S ATTORNEYS
[*or defendant's, if applicable*]
NKOSI INC

P32

PRECEDENT 32

**NOTICE IN TERMS OF RULE 36(2) (HIGH COURT)/
RULE 24(2) (MAGISTRATES' COURTS)**

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case No:

In the matter between:

JOE SOAP Plaintiff

and

LINDIWE NGCOBO Defendant

NOTICE IN TERMS OF RULE 36(2)

TO:THE REGISTRAR OF THE ABOVE HONOURABLE COURT,
DURBAN

AND

TO:JOHN SHOZI INC

KINDLY TAKE NOTICE THAT the Defendant requires the Plaintiff to submit to a neurological medical examination by:

Dr Naidoo Neurosurgeon
Addington Hospital
DURBAN
on [*insert day*] at [*insert time*].

TAKE NOTICE FURTHER that the Plaintiff's medical adviser may be present at the examination.

TAKE NOTICE FURTHER that the Defendant hereby tenders the remittance in respect of the reasonable expenses to be incurred by the Plaintiff attending such examination, in terms of and subject to the provisions of rule 36(2)(*a*), (*b*), and (*c*) thereof.

DATED at DURBAN this [*insert day*] day of [*insert month and year*].

_____

DEFENDANT'S ATTORNEYS
NKOSI INC

PRECEDENT 33

COMPOSITE NOTICE OF INTENTION TO CALL EXPERT WITNESS IN TERMS OF RULE 24(9)(*a*) AND (*b*) OF THE MAGISTRATES' COURTS RULES

[*The notice of intention to call an expert should be delivered at least 15 days before trial and then the summary ten days before trial. This particular example serves both functions and should accordingly be served at least 15 days before trial. An efficient attorney should consult experts before drafting pleadings and not at the stage of preparation for trial, which is really too late. If the attorney is efficient, no further opportunity for consulting an expert will be required and there is therefore little point in delivering the notice and summary separately*.]

IN THE MAGISTRATES' COURT FOR THE DISTRICT OF DURBAN
HELD AT DURBAN

Case No:

In the matter between:

LINDIWE NGCOBO Plaintiff

and

JOHN SMITH Defendant

NOTICE OF INTENTION TO CALL EXPERT WITNESS

TO:THE CLERK OF COURT
DURBAN

AND

TO:JOHN SHOZI INC

SIRS,

KINDLY TAKE NOTICE that the Plaintiff intends to call Harry Panday as an expert witness.

TAKE NOTICE FURTHER that a summary of the evidence which such expert witness will give at the trial and his opinions and reasons therefor are contained in Annexure 'A' hereto.

AND FURTHER TAKE NOTICE that the opinion of the aforesaid Expert is based upon his qualifications, knowledge and experience in the field of assessing damaged motor vehicles and the cost of repairing the same.

DATED at DURBAN this [*insert day*] day of [*insert month and year*].

_____

PLAINTIFF'S ATTORNEYS
[*or defendant's, if applicable*]
NKOSI INC

'A'

SUMMARY OF EXPERT WITNESS

1.

Harry Panday will state that he is a self-employed Insurance Assessor trading under the name and style of Motor and Theft Assessors. He has been an insurance assessor for approximately 26 years. He was previously employed at Nopay Insurance Company for a period of approximately 13 years and employed at Floyd's of London agents for a period of approximately 6 years.

2.

By virtue of his training and experience, he is an expert in the assessment of the market values of motor vehicles and the cost of repairing damage to motor vehicles.

3.

On 30 May 2016 he was called upon to inspect a BMW 320i bearing registration letters and numbers ND 007 (hereinafter referred to as 'the motor vehicle'). After assessing the motor vehicle, he found the motor vehicle to have been recently damaged and the damage to be consistent with it having been involved in a motor vehicle collision.

4.

After assessing a quotation from Crumple Panel Beaters Co Ltd relating to the repair of the Plaintiff's motor vehicle for an amount of R150 000,00 inclusive of VAT, he found the reasonable and necessary costs of repairs to be the sum of R150 000,00 inclusive of VAT. Copies of the quotation from Crumple Panel Beaters Co Ltd and also the final Tax Invoice are annexed hereto marked 'B' and 'C', respectively.

5.

He will state that in his opinion the said sum of R150 000-00 inclusive of VAT, did not exceed the pre-accident market value of the Plaintiff's motor vehicle. A copy of the assessment by Harry Panday is annexed hereto marked 'D'.

6.

He will state that his opinions and reasons therefore are based on his experience, training and knowledge in the field of assessing damaged motor vehicles and the costs of repairing the same.

PRECEDENT 34

APPEAL NOTICE: HIGH COURT

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case No:

In the matter between:

APPELLANT

JOE **SOAP**
(Defendant)

and

LINDIWE **NGCOBO**
(Plaintiff)

RESPONDENT

NOTICE OF APPEAL

To:The Registrar
Dullah Omar Grove
Durban

And to: LINDIWE NGCOBO
Respondent
C/o Wim Naidoo Attorneys

TAKE NOTICE that the above-named Appellant/Defendant, having been granted leave to appeal on the _____ day of _____ 2016 by Chetty J hereby notes an appeal to the Full Bench of the KwaZulu-Natal Division, Pietermaritzburg, against the whole of the judgment of His Lordship granted in this action on the 1st day of February 2016, in which His Lordship granted judgment for the Respondent/Plaintiff for the payment of the sum of R800, 000, interest and costs.

TAKE FURTHER NOTICE that the appeal is directed against the following finding of fact:

1. His Lordship's finding that SHAWN HECTOR had been duly authorised to represent the Defendant/Appellant in concluding the contract sued upon.

TAKE FURTHER NOTICE that the grounds upon which the appeal is founded are as follows:

1. There was no evidence to support his Lordship's finding

2. The finding was against the probabilities.

DATED at DURBAN this _____ day of _____ 2016.

_____
APPELLANT'S ATTORNEY

Address

_____

_____

P35

PRECEDENT 35

SECTION 65 NOTICE: MAGISTRATES' COURTS

IN THE MAGISTRATES' COURT FOR THE DISTRICT OF DURBAN
HELD AT DURBAN

Case No:

In the matter between:

LINDIWE NGCOBO Judgment Creditor

and

JOHN DOE Judgment Debtor

NOTICE TO APPEAR IN COURT IN TERMS OF SECTION 65A(8)(*b*) OF THE MAGISTRATES' COURTS ACT, 1944

To:_____ (Name)

_____ (Residential Address)

_____ (Occupation/Status)

You are hereby required to appear before the court at _____ (place) on _____ (date) at _____ (time) to enable the court to enquire into your/the juristic person's financial position in terms of Section 65D of the Act.

NOTICE:
Should you wilfully fail to appear before the said court on the said date and at the said time, or fail to remain present at the proceedings concerned, you will be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three months (Section 65A(9) of the Act).

Dated at _____ this _____ day of 2016.

Sheriff of _____

CERTIFICATE
I, _____ Sheriff/Deputy Sheriff of _____ hereby certify that I have handed the original of this notice to _____ and that I have explained to him or her the import thereof.

Sheriff of _____

Duplicate Original to the Clerk of the Court _____

P36

PRECEDENT 36

WRIT OF EXECUTION: HIGH COURT

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No:

In the matter between:

JOE SOAP Plaintiff

and

LINDIWE NGCOBO Defendant

WRIT OF EXECUTION

To the Sheriff for the District of Durban

You are hereby directed to attach and take into execution the movable goods of LINDIWE NGCOBO, the above-mentioned Defendant of _____ and to cause the same to be realised by public auction the sum of _____ together with interest thereon at the rate of _____ per annum from _____, and the sum of _____ for the taxed costs and charges of the said _____ which he recovered by judgment of this Court dated the _____ in the above-mentioned case, and also all other costs and charges of the Plaintiff in the said case to be hereafter duly taxed according to law, besides all your costs hereby incurred.

Further pay to the said _____ or his attorney the sum or sums due to him with costs as above-mentioned, and for your so doing this shall be your warrant.

And return you this writ with what you have done thereupon.

_____
REGISTRAR OF THE HIGH COURT

_____

P37

PRECEDENT 37

SETTLEMENT AGREEMENT

IN THE [NAME OF COURT]
Held at [Place]

Case No:

In the matter between:

JOE SOAP Plaintiff

and

LINDIWE NGCOBO Defendant

SETTLEMENT AGREEMENT

The parties hereby agree as follows:

1.

The Defendant agrees to pay the Plaintiff an amount of [*insert amount*] plus costs and interest as set out hereinafter.

2.

The Defendant agrees to pay the Plaintiff's taxed costs of the action, and also the Plaintiff's attorney-and-client costs, from the date hereof until the final date of payment of all the Defendant's liabilities in terms of this agreement in full.

3.

All amounts owing in terms of this agreement shall bear interest at the rate of [*insert interest rate*] per year calculated from date of this agreement. In respect of the taxed costs, interest shall run from the date of taxation.

4.

The Defendant agrees and undertakes to pay the above amounts in monthly instalments of [*insert amount*], commencing on [*insert date*] and thereafter on the first day of each succeeding month until all amounts, plus interest and costs owing in terms of this agreement are paid in full.

5.

Should the Defendant fail to pay any instalment in full on the due date thereof, the full balance owing in terms hereof, shall become immediately due and payable, and the Plaintiff shall be entitled to proceed against the Defendant in terms of section 65 of the Magistrates' Courts Act, 1984, or utilise any other execution proceeding without any application being made.

6.

The Defendant shall make all payments in terms of this agreement to the attorneys of the Plaintiff at [*insert address*].

7.

All payments shall be made by [*insert mode of payment: e.g. a bank guaranteed cheque*].

8.

Payments by the Defendant shall be applied to the reduction of the amounts due to the Plaintiff in the following order: attorney-and-client costs, thereafter the taxed costs, thereafter the interest and lastly the capital.

9.

It is recorded and agreed that this agreement constitutes the sole agreement between the parties relating to the settlement of the matter and no agreement or undertaking which may be at variance or in conflict with the terms of this agreement shall be valid or binding on the parties unless recorded in writing and signed by each of the parties.

10.

No indulgences or extension of time granted by the Plaintiff to the Defendant shall in any way prejudice the Plaintiff's rights in terms of this agreement which rights the Plaintiff will be entitled to enforce at any time. Neither will any such indulgence or extension of time create new rights for the Defendant and the Plaintiff is not bound to or liable for any representations other than those contained in this agreement.

11.

The parties request the Court to make this agreement an order of the court.

DATED at [*insert place*] on this [*insert day*] of [*insert month and year*].

_____ _____

[PLAINTIFF'S SIGNATURE] [DEFENDANT'S SIGNATURE]

P38

PRECEDENT 38

APPLICATION FOR JUDGMENT ON CONFESSION: HIGH COURT

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No:

In the matter between:

JOE SOAP Plaintiff

and

LINDIWE NGCOBO Defendant

APPLICATION FOR JUDGMENT ON CONFESSION RULE 31(1)

KINDLY TAKE NOTICE that the Plaintiff hereby applies that:

1. the Defendant having been duly served on the 23rd of May 2016;
2. the Defendant having consented in part to the claim contained in the summons: (see Consent annexed hereto)

Judgment be granted against the Defendant as follows:

1.Amount of consent to judgment	R520 750,00
Less Paid	R97 289,63
Total Outstanding	R423 460,37

2.Further and/or alternative relief.

DATED at DURBAN on this _____ day of _____ 2016.

_____
Plaintiff's Attorneys

Address

_____

_____

P39

PRECEDENT 39

ACKNOWLEDGMENT OF DEBT

I, the undersigned, _____

[*full names and Identity number*] (the Debtor) do hereby acknowledge myself to be truly and lawfully indebted to _____

[*full names*] (the Creditor) in the full and just sum of R500 000 (five-hundred thousand rand) (the Capital) in respect of monies lent and advanced.

I undertake to pay the said Capital to the Creditor upon demand.

I further undertake to pay, with effect from the [*date*] monthly in advance and on or before the first day of each and every month, interest on the Capital at a rate of [*enter rate with reference to the Prescribed Rate of Interest Act, 1975 and the National Credit Act, 2005*].

1. In the event of:
    1.1any payment due by me in terms of this document not being made on due date; or
    1.2my insolvency; or
    1.3my compromising with any of my creditors or endeavouring to do so; or
    1.4my death;
2. the full balance then outstanding shall become immediately due, owing and payable, and the Creditor shall be at liberty, without any notice whatsoever to me, to institute proceedings against me for the recovery of the full capital together with interest thereon calculated from the date of default to the date of payment, both days included.

In such event I agree to pay all the Creditor's costs on the scale of Attorney-and-own-Client, whether formal legal proceedings be commenced or not, and I consent to receive service of any process or notice upon me at (full physical address), which shall be valid service upon me. I also hereby appoint such address as my *domicilium citandi et executandi* for all purposes arising out of this document.

SIGNED at [City] this _____ day of _____ 2016.

WITNESSES:

1._____

2._____

_____

[Debtor]

SIGNED by me, the Creditor, at [City] on this _____ day of _____ 2017.

WITNESSES:

1._____

2._____

_____

[Creditor]

E: Citations

This annexure deals with the description of parties in pleadings. A number of examples are given for the manner in which to cite various parties in High Court and Magistrates' Courts pleadings.[1] Note that when a plaintiff is suing or a defendant is being sued in a representative capacity, it is necessary to aver the relevant capacity by alleging that the plaintiff is either suing or the defendant is being sued 'in his capacity as …' or words to this effect. Merely stating that the relevant party holds an office without specifically averring that he is suing or being sued in the capacity of that office, is insufficient and will merely be held to be descriptive.[2]

1 Citing the plaintiff

The plaintiff's full names and occupation must always be provided in terms of the rules of court. The High Court rule 17(4)(*b*) still provides for the citation to include the gender of the plaintiff. The Magistrates' Courts version of the rule also requires this. Forms 2 and 2B of the Magistrates' Courts Rules, which provide a model for the structure and content of the summonses, still make reference to the gender of the parties, however, and in this regard are somewhat out of kilter with the rules.

1.1 Citing the plaintiff: private individuals

1. Male: The plaintiff is Mandla Linda Ngcobo, an adult male teacher, who resides at 1 Long Street, Cape Town.
2. Female: The plaintiff is Nicola Ann Naidoo, an adult female teacher, who resides at 1 Long Street, Cape Town.
3. Child (under the age of seven): The plaintiff is Mandla Linda Ngcobo, an adult male teacher, who resides at 1 Long Street, Cape Town, who sues herein in his representative capacity as father and natural guardian of Cyril Nathi Ncgobo, a child, who resides at the same address as the plaintiff.
4. Child (seven years and older): The plaintiff is Cyril Nathi Ncgobo, a child and scholar, who resides at 1 Long Street, Cape Town, and who is duly assisted herein by his father and natural guardian, Mandla Linda Ncgobo, who resides at the same address as the plaintiff.
   [See the discussion in Stage One, Part 1B:3.1 and see ss 10 and 14 of the Children's Act 38 of 2005.]

1.2 Citing the plaintiff: business entities

1. Company: The plaintiff is ABC (Pty) Limited, a company with limited liability, duly incorporated and registered according to law, and having its registered office at 1 Brace Avenue, Pretoria, and its principal place of business within the jurisdiction of this Court at 1 Long Street, Cape Town, which is within the jurisdiction of this honourable Court [if that is the case and is relied on for jurisdiction].
   [The address of the registered office of the company or the principal place of business may be cited separately if they are situated in different jurisdictions.]
2. Close corporation: The plaintiff is Action Beds CC, a close corporation duly registered and incorporated in accordance with the provisions of the Close Corporations Act 69 of 1984, and which carries on the business of a bed retailer and has, as its registered office, 1 Long Street,

Cape Town. [The address of the principal place of business of the CC may be cited instead of the registered office.]

3. Firm: The plaintiff is Handy Hardware (sole proprietor: Joe Mark Soap), a firm carrying on business as hardware retailers at 1 Long Street, Cape Town.
   [In terms of rule 14(2) of the High Court Rules and 54(1)(*a*) of the Magistrates' Courts Rules, the firm can sue in its own name.]
4. Partnership: The plaintiff is the ABC partnership, a partnership carrying on business as insurance brokers at 1 Long Street, Cape Town. The partners are:
   1. Dinesh Pillay, an adult male businessman, who resides at 1 Loop Street, Cape Town; and
   2. John Doe, an adult, businessman, who resides at 2 Case Avenue, Durban.
5. Association: The plaintiff is Action Darts Club, an association not for gain, which is capable of suing and being sued in its own name in terms of its Constitution, and whose address is that of its secretary, for the time being, namely Joe Mark Soap, of 1 Ace Avenue, Durban.
   [See rule 14 of the High Court Rules.]
6. Trust: The plaintiffs are Joe Mark Soap and John David Doe, both adults males and advocates, of 666 Salmon Grove Chambers, 407 Anton Lembede, Durban, who sue herein in their representative capacities as trustees of the ABC Trust.

1.3 Citing the state as plaintiff: government departments and parastatals

Note that there is very little general guidance on how to cite the state as plaintiff. In most cases, the same form of citation is used, *mutatis mutandis*, as when citing the state as defendant, i.e. citing the Minister of the specific government department as the official representative of the state, in accordance with the provisions of the State Liability Act 20 of 1957. Also, statutes in terms of which parastatals – i.e. statutory bodies such as Eskom or Transnet – are established may prescribe the method of citation.

Example: The plaintiff is the Minister of [*insert name of ministry*], who sues in his capacity representing the State, in terms of s 1 of the State Liability Act 1957, of [*insert street address of the ministry concerned*], Pretoria.

2 Citing the defendant

The plaintiff cannot in all instances be expected to know the details of the defendant. The plaintiff need only provide the surname and first name or initials by which the defendant is known to the plaintiff, the defendant's residence or place of business and, where known, the defendant's occupation and employment address. However, the defendant's 'full and further names and occupation' might 'be to the plaintiff unknown'. The phrase 'which is within the jurisdiction of the above honourable Court' is sometimes added after citing the defendant's address. It is only made where the plaintiff relies on residence or domicile for jurisdiction in the High Court, or on s 28(1)(*a*) of the Magistrates' Courts Act in the Magistrates' Courts, but is not strictly necessary. However, when suing in the Magistrates' Courts, the summons must contain a specific allegation with regard to jurisdiction if s 28(1)(*d*) (cause of action), or s 28(1)(*g*) (property disputes) is relied on (in terms of rule 5(6)).

2.1 Citing the defendant: private individuals

1. Male: The defendant is Joe Mark Soap, an adult teacher, who resides at 1 Long Street, Cape Town, Alternatively: The defendant is JM Soap, an adult whose full and further names and occupation are to the plaintiff unknown, who resides at 1 Long Street, Cape Town. (Add 'which is within the jurisdiction of this honourable Court' if that is the case and is relied on for jurisdiction.)
2. Female: The defendant is Joanne Mary Soap, an adult teacher, who resides at 1 Thuso Street, Aliwal North. (Add 'which is within the jurisdiction of this honourable Court' if that is the case and is relied on for jurisdiction.)
3. Child (under the age of seven): The defendant is Marius Hugo Bosman, an adult teacher, who resides at 1 Ace Avenue, Durban, who is sued herein in his representative capacity as father and natural guardian of Pieter Bosman, a child, male, and who resides at the same address as the defendant. (Add 'which is within the jurisdiction of this honourable Court' if that is the case and is relied on for jurisdiction.)
4. Child (seven years and older): The defendant is Pieter Bosman, a child, scholar who resides at 1 Ace Avenue, Durban, and who is duly assisted herein by his father and natural guardian, Marius Hugo Bosman, who resides at the same address as the defendant. (Add 'which is within the jurisdiction of this honourable Court' if that is the case and is relied on for jurisdiction.)
   [See the discussion in Stage One, Part 1B:3.1.]
5. Residential address known; occupation and full name unknown: The defendant is J Soap, whose full and further names and occupation are to the plaintiff unknown, who resides at 1 Ace Avenue, Durban. (Add 'which is within the jurisdiction of this honourable Court' if that is the case and is relied on for jurisdiction.)
6. Business address cited: The defendant is John Jones, an adult machinist, who is employed by Action Beds Limited, of 1 Yimbhu Street, Louise Trichardt. (Add 'which is within the jurisdiction of this honourable Court' if that is the case and is relied on for jurisdiction.)
7. Residential address known; occupation unknown: The defendant is Joe Mark Soap, an adult, whose occupation is to the plaintiff unknown, and who resides at 1 Seymour Street, Grahamstown. (Add 'which is within the jurisdiction of this honourable Court' if that is the case and is relied on for jurisdiction.)
8. Citing the *domicilium citandi* from a contract: The defendant is Lerayo Mashaba, an adult teacher, who has chosen as his *domicilium citandi et executandi*, 1 Neptune Road, Port Elizabeth. [Note: the fact that a domicilium address is situated within the jurisdiction of a particular court does not in itself confer jurisdiction on such a court; it is merely the address at which the summons may be served. Some other ground for jurisdiction must be found: see Stage One, Part 1C:1.]

2.2 Citing the defendant: business entities

1. Company: the defendant is ABC (Pty) Limited, a company with limited liability, duly incorporated and registered according to law, and having its registered office at 1 Brace Avenue, Pretoria, and its principal place of business at 1 Queen Nandi Drive, Durban. (Add 'which is within the jurisdiction of this honourable Court' if that is the case and is relied on for jurisdiction.)
2. Close corporation: The defendant is Action Beds CC, a close corporation duly registered and incorporated in accordance with the provisions of the Close Corporations Act 69 of 1984, and which carries on the business of a bed retailer, and has its registered office at 1 Queen Nandi

Drive, Durban. (Add 'which is within the jurisdiction of this honourable Court' if that is the case and is relied on for jurisdiction.)

3. Partnership (partners not cited): The defendant is the ABC partnership, a partnership carrying on business as insurance brokers at 1 Queen Nandi Drive, Durban. (Add 'which is within the jurisdiction of this honourable Court' if that is the case and is relied on for jurisdiction.)
   [There is no need to cite the individual partners: see rule 14(3) of the High Court Rules and rule 54(1)(*a*) of the Magistrates' Courts Rules.]
4. Partnership (partner cited): The defendant is the ABC partnership, a partnership carrying on business as insurance brokers at 1 Queen Nandi Drive, Durban. The partners are:
   1. Joe Soap, an adult male, businessman, who resides at 1 Brace Avenue, Durban; and
   2. John Doe, an adult male, businessman, who resides at 2 Case Avenue, Durban.
   (Add 'which is within the jurisdiction of this honourable Court' if that is the case and is relied on for jurisdiction, although in this case it would have to apply to each partner.)
5. Firm: The defendant is Handy Hardware (sole proprietor: Joe Mark Soap), a firm carrying on business as a hardware dealer at 1 Queen Nandi Drive, Durban. (Add 'which is within the jurisdiction of this honourable Court' if that is the case and is relied on for jurisdiction.)
   [In terms of High Court rule 14(2) and rule 54(1)(*a*) of the Magistrates' Courts Rules, the firm can be sued in its own name.]
6. Firm (proprietor unknown): The defendant is Handy Hardware, a firm, the proprietor or partners whereof are to the plaintiff unknown, and which carries on business as a hardware dealer at 1 Queen Nandi Drive, Durban. (Add 'which is within the jurisdiction of this honourable Court' if that is the case and is relied on for jurisdiction.)
7. Association: The defendant is Action Darts Club, an association not for gain, which is capable of suing and being sued in its own name in terms of its Constitution, and whose address is that of its secretary, for the time being, namely Joe Mark Soap, of 1 Queen Nandi Drive, Durban. (Add 'which is within the jurisdiction of this honourable Court' if that is the case and is relied on for jurisdiction.)
   [See High Court rule 14.]
8. Trust: The defendants are Joe Mark Soap and John David Doe, both adult males and advocates, of 666 Salmon Grove Chambers, 407 Anton Lembede, Durban, who are sued herein in their capacities as trustees of the ABC Trust (hereinafter referred to as 'the defendant'). (Add 'which is within the jurisdiction of this honourable Court' if that is the case and is relied on for jurisdiction.)

2.3 Citing the state as defendant: government departments and parastatals

1. Government departments: The defendant is the Minister of Safety and Security, who is sued in his representative capacity in terms of s 1 of the State Liability Act 1957; of 123 Church Street, Pretoria, and whose address for the purpose of service of process in these proceedings is that of the State Attorney (KwaZulu-Natal), Sangro House, Anton Lembede, Durban.
2. Parastatal: The defendant is Thabile James Radebe, an adult male, businessman, who is sued herein in his capacity as Chairman and member of the National Transport Commission, a commission established under s 3 of the Transport (Co-ordination) Act 1948 (Act 44 of 1948), and having its offices at 123 Empire Building, Church Street, Pretoria. (Add 'which is within the jurisdiction of this honourable Court' if that is the case and is relied on for jurisdiction.)
   [Note: There are many statutory bodies which can sue and be sued in terms of the Acts under which they have been created. In such cases the citation of *locus standi* requirements will depend on the provisions of the particular Act.]

3. Local authority: The defendant is the Ethekwini Municipality, a metropolitan municipality with legal persona, established in terms of the Local Government: Municipal Structures Act 117 of 1998, read with Provincial Notice Number 342 of 2000 (KwaZulu-Natal), which is a body corporate capable of suing and being sued, seated at the City Hall Building, 110 West Street, Durban, KwaZulu-Natal. (Add 'which is within the jurisdiction of this honourable Court' if that is the case and is relied on for jurisdiction.)

1See also Stage Two, Part 2 with regard to citations at p186 above.

2*London & SA Exploration Co Ltd v McLelland and Another* (1898) 8 HCG 205.

ANNEXURES

F: Short form, particulars of claim

These are examples of the type of particulars of claim that are drafted in respect of simple summonses, each conforming to a generally accepted formulation.[1]

In the case of a simple summons, the criterion is that the claim should be for a liquidated debt or demand. While these particulars all disclose a cause of action, they do not provide sufficient particularity to enable the defendant to plead and would, if defended, require a declaration, which would have to conform to the requirements of rule 18 of the High Court Rules, or rule 6 of the Magistrates' Courts Rules as the case may be. As they stand, these particulars do not comply with these rules, of course, but that is permissible in respect of a simple summons, provided it discloses a cause of action, and is not vague and embarrassing. It is not compulsory to use any of the standard formulations set out below. In fact, there are certain circumstances where the particulars for simple summonses may need to be a lot longer, for instance, in the case of a claim based on a bank overdraft or mortgage bond. In this case it would be desirable to divide the averments into paragraphs as required by rules 18 or 6. The type of action will always be in respect of a liquidated claim, however, and simple summonses are always signed by an attorney, as opposed to an advocate, even in High Court practice. The phrase 'special instance and request' alludes to the agreement between the parties, in other words, it makes it clear that the defendant is not being charged for unsolicited goods or services. It is also advisable to include words to the effect that the debt is 'due owing and payable' as without this averment (unless it can be implied), there will be a failure to disclose a cause of action as a debt may well be owing, but not payable as yet. It might also be advisable to indicate the actual date from which the claim is due so as to allow the registrar or clerk of the court when granting default judgment, to grant interest from the earliest possible date, i.e. the due date or the date from which the debtor is in *mora*.

1 Goods sold and delivered

The plaintiff's claim is against the defendant for the amount of R150 000 being the amount due, owing and payable by the defendant to the plaintiff in respect of goods sold and delivered by the plaintiff to the defendant at the defendant's special instance and request during the period March to August 2016 (both months inclusive), which amount is due, owing and payable (as from …[*due date*]). [The due date is optional, but advisable.]

2 Balance due for goods sold and delivered

The plaintiff's claim is against the defendant for the sum of R150 000 being the balance due, owing and payable by the defendant to the plaintiff in respect of goods sold and delivered by the plaintiff to the defendant at the defendant's special instance and request during the period March to August 2016 (both months inclusive), which amount is due, owing and payable (as from …[*due date*]). [The due date is optional, but advisable.]

3 Work done and material supplied

The plaintiff's claim is against the defendant for payment of the sum of R150 000 being the amount due, owing and payable by the defendant to the plaintiff in respect of work done and material supplied in connection therewith by the plaintiff for and on behalf of defendant at the defendant's special instance and request during the period May to August 2016 (both months inclusive), which amount is due, owing and payable (as from …[*due date*]). [The due date is optional, but advisable.]

4 Professional services rendered

The plaintiff's claim is against the defendant for payment of the sum of R150 000 being the amount due and payable by the defendant to the plaintiff as the agreed, alternatively fair and reasonable remuneration for professional services rendered by the plaintiff to the defendant during the period May to August 2016 (both months inclusive) at the defendant's special instance or request, which amount is due owing and payable (as from …[*due date*]). [The due date is optional, but advisable.]

5 Promissory notes

The plaintiff's claim is for the sum of R150 000 being the amount due and owing by the defendant to the plaintiff under a certain promissory note dated _____ drawn by the defendant in favour of the plaintiff which was due and payable on the _____ but which was dishonoured upon presentation for payment on due date in accordance with its tenor. The plaintiff is the legal holder of the said promissory note. Notice of dishonour is dispensed with in terms of the provisions of Act 34 of 1964.

[Note that promissory notes have largely been replaced by post-dated cheques in modern commercial transactions and, of course, even these are rarely seen now.]

6 Cheques

The plaintiff's claim is for the sum of R150 000 being the amount of a cheque dated _____ drawn by the defendant in favour of the plaintiff or order which was due and payable at the _____ but which was dishonoured upon presentation for payment in accordance with its tenor. The plaintiff is the legal holder of the said cheque. Notice of dishonour is dispensed with in terms of the provisions of Act 34 of 1964.

7 Bills of exchange

Plaintiff's claim is for the sum of R150 000 being the amount of a certain Bill of Exchange dated the _____ drawn by the plaintiff in favour of the _____ or order and

payable on the _____ and which said Bill of Exchange was duly accepted by the defendant but dishonoured upon presentation for payment in accordance with its tenor. Notice of dishonour is dispensed with in terms of the provisions of Act 34 of 1964.

8 Acknowledgements of debt

The plaintiff's claim is against the defendant for the sum of R150 000 being the balance due, owing and payable in respect of a written acknowledgement of debt made by the defendant in favour of the plaintiff on the _____ day of _____ which amount is due (as from …[*due date*]). [The due date is optional, but advisable.]

9 Monies lent and advanced

The plaintiff's claim is against the defendant for payment of the sum of R150 000 being the amount due, owing and payable by the defendant to the plaintiff in respect of monies lent and advanced by the plaintiff to the defendant at the defendant's special instance and request during the period May to August 2016 (both months inclusive), which amount is due (as from …[*due date*]). [The due date is optional, but advisable.]

NOTE

1. Rule 5(6)(*a*) provides that where the defendant is cited under the jurisdiction conferred upon the court by s 28(1)(*d*) of the Magistrates' Courts Act,[2] which relates to jurisdiction based on the cause of action, the summons must contain the averment that the whole cause of action arose within the district or region (in the case of a Regional Magistrates' Court). The rule specifically requires that the summons should set out particulars in support of this averment. This means that the usual statement to the effect that 'the cause of action arose wholly within the jurisdiction of the above honourable court' is no longer valid for the purpose of a Magistrates' Court summons. This means that having averred that 'the cause of action arose wholly within the jurisdiction of the above honourable court', one should go on to aver the facts that support this statement, for example 'in that the offer was made and the agreement concluded in [place], delivery occurred in [place] and payment should have occurred at [place], but the defendant failed to make payment'.[3]
   Rule 5(6)(*b*) provides that when the plaintiff relies on s 28(1)(*g*) for jurisdiction (i.e. in an action relating to immovable property where the plaintiff avers that the immovable property concerned is situated within the district of the Magistrates' Court in question), the particulars should include the averment that 'the property concerned is situated within the district or region.'
2. Interest should be claimed in addition.[4] Should interest be claimed from a date earlier than that of the service of summons, the claim for interest should be accompanied by an allegation explaining why interest is being claimed from the particular date in question, should the reason for earlier date not be apparent from the rest of the particulars of claim. (See the discussion in relation to 'due date' above.)
3. An example of an allegation relating to interest (which would be added to the single long sentence containing the particulars in a simple summons) would be the following:

   together with interest at the rate of (set out the current rate)[5] per annum from 15 July 2016 (date by which payment was to be made in terms of letter of demand despatched on 1 July 2016) until date of final payment.' The prayer would

merely repeat the words: 'interest at the rate of (set out the current rate) per annum from 15 July 2016'.

Alternatively, one could make a separate allegation regarding interest, in its own paragraph (as indeed one would be obliged to do in the case of a normal particulars of claim) in the following manner: 'A letter of demand dated 1 July 2016 was despatched to the defendant requiring payment by 15 July 2016'.

To save space, this sort of allegation is occasionally included in the prayer of a Magistrates' Courts summons. This is not strictly speaking correct, as one may not claim in the prayer what has not been pleaded in the particulars, but with the shortened form of summons, has been accepted in certain districts.

4. The above situation relates to a *mora ex persona* situation; in a *mora ex re* situation, the longer form of particulars would generally be used. An example of the kind of allegation used in this situation would be:

It was a term of the agreement that payment was to be made on or before 15 July 2016.

Alternatively, when claiming the debt is 'due owing and payable', provide the actual date in addition.

Should an interest rate different from that of the Prescribed Rate of Interest Act be claimed, this must also be pleaded, for instance:

Interest at the rate of 20% per annum was to be paid on any outstanding amounts due and payable in terms of the agreement.

The prayer relating to the interest in the above situation would be:

Interest at the rate of 20% per annum from 15 July 2016 to date of final payment.

5. Note that law is never pleaded; for instance, none of the above examples relating to interest mention the words *mora ex persona* or *mora ex re*. They merely set out the facts relied on for the conclusions of law to be drawn. The only situation in which *mora* is expressly mentioned, is the 'lazy' form of prayer where interest is requested *a tempore morae*.

1See also Stage Two, Part 2 Actions 'Simple summons' at p182 above.

2 32 of 1944.

3Note that the overwhelming bulk of authority regarding the phrase 'cause of action arose wholly within the district' as provided for in s 28(1)(*d*) of the Magistrates' Courts Act, supports the notion that with regard to a contractual claim, this means that offer, acceptance and place of performance or breach should all have occurred within the jurisdiction of the court within which the action has been brought. The authors have difficulty with this state of affairs and would prefer that it included merely the place of breach, or at least, breach and only the place the agreement was concluded. See Stage Two Part 1 where this is discussed in detail.

4See also Stage Two, Part 2D: 3 'Interest' at p321 above.

5In terms of s 1(2) of the Prescribed Rate of Interest Act 55 of 1975, the legal rate of interest (i.e. the rate at which the interest is to be calculated when it is not governed by any other law or by an agreement or a trade custom or in any other manner) is determined with reference to the repurchase rate, as determined from time to time by the South African Reserve Bank, plus 3,5 percent per annum. At the date of publication, this is a rate of 10,5% per annum with effect from 1 May 2016 – GN 461 in *GG* 39943 of 22 April 2016.

Table of cases

A

AA Alloy Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd 2000 (1) SA 639 (SCA) 334
Abraham v City of Cape Town 1995 (2) SA 319 (C) 250
Abrahamse & Sons v SA Railways and Harbours 1933 CPD 626 102
Absa Bank v Barinor New Business Venture (Pty) Ltd 2011 (6) 225 (WCC) 187
Absa Bank Ltd v Bernert 2011 (3) SA 74 (SCA) 481
Absa Bank Ltd v De Villiers and Another 2009 (5) SA 40 (C) 127
Absa Bank Ltd v Dlamini 2008 (2) SA 262 (T) 81, 455
Absa Bank Ltd v Erasmus 2007 (2) SA 545 (C) 215
Absa Bank Ltd v Kernsig 17 (Pty) Ltd 2011 (4) SA 492 (SCA) 161
Absa Bank Ltd v Lekuku (32700/2013) [2014] ZAGPJHC 244 14 October 2014 12, 135
Absa Bank Ltd v Snyman 2015 (4) SA 329 (SCA) 198,401
Absa Bank Ltd v The Farm Klippan 490 CC 2000 (2) SA 211 (W) 238
Absa Bank Ltd v Van de Vyver NO 2002 (4) SA 397 (SCA) 412
Absa Bank Ltd v Van Eeden and Others 2011 (4) SA 430 (GSJ) 392
Absa Brokers (Pty) Ltd v RMB Financial Services and Others 2009 (6) SA 549 (SCA) 446
Absa Bank Ltd v Snyman *2015 (4) SA 329 (SCA) 198*, *401*
Academy of Learning (Pty) Ltd v Hancock and Others 2001 (1) SA 941 (C) 171
Actom (Pty) Ltd v Coetzer and Another (A269/2015) [2015] ZAGPPHC 548 (31 July 2015) 462
Adbro Investment Co Ltd v Minister of the Interior 1956 (3) SA 345 (A) 479
Adlem v Arlow and Another 2013 (3) SA 1 (SCA) 482
Administrateur, Transvaal v Van der Merwe 1994 (4) SA 347 (A) 372
Administrator Transvaal v Husband 1959 (1) SA 392 (A) 123
Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC) 158, 241
Africa v Africa 1944 CPD 78 135
African Farms and Townships Ltd v Cape Town Municipality 1963 (2) 555 (A) 171
African Share Agency Ltd v Scott, Guthrie & Co 1907 TS 410 73
African Wanderers Football Club (Pty) Ltd v Wanderers Football Club 1977 (2) SA 38 (A) 454
Afriforum v Minister of Trade and Industry and Others 2013 (4) SA 63 (GNP); [2013] 3 All SA 52 (GNP) 52
Ahlers NO v Snoeck 1946 TPD 590 236
Ahmadiyya Anjuman Ishaati-Islamlahore (SA) and Another v Muslim Judicial Council (Cape) 1983 (4) SA 855 (C) 218, 234
Ahmed v Belmont Supermarket 1991 (3) SA 809 (N) 51, 53
Airconditioning Design & Development (Pty) Ltd v Minister of Public Works, Gauteng Province 2005 (4) SA 103 (T) 125
Aircraft Completions Centre (Pty) Ltd v Rossouw and Others [2003] 3 All SA 617 (W) 331, 333, 334, 335
Airoad Express (Pty) Ltd v Chairman, Local Road Transportation Board, Durban and Others 1986 (2) SA 663 (A) 453
Albutt v Centre for the Study of Violence and Reconciliation and Others 2010 (3) SA 293 (CC) 341

Algoa Milling Co Ltd v Arkell and Douglas 1918 AD 145 234
Al-Kharafi & Sons v Pema and Others NNO 2010 (2) SA 360 (W) 217
Allen and Others NNO v Gibbs and Others 1977 (3) SA 212 (SE) 306
Allan Pohl, Otto and Theron (Pty) Ltd v Schoeman and Another 1954 (3) SA 589 (T) 55
All Purpose Space Heating Co of SA (Pty) Ltd v Schweltzer 1970 (3) SA 560 (D) 254
Alphedie Investments (Pty) Ltd v Greentops (Pty) Ltd 1975 (1) SA 161 (T) 230
AM v RM 2010 (2) SA 223 (ECP) 434
Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) 441
Amalgamated Footwear and Leather Industries v Jordan & Co Ltd 1948 (2) SA 891 (C) 230
Amavuba (Pty) Ltd v Pro Nobis Landgoed (Edms) Bpk 1984 (3) SA 760 (N) 207
Amcoal Collieries v Truter 1990 (1) SA 1 (A) 136
American Flag plc v Great African T-Shirt Corporation CC; American Flag plc v Great African T-Shirt Corporation CC: In re Ex Parte Great African T-Shirt Corporation CC 2000 (1) SA 356 (W) 112
Amod v SA Mutual Fire and General Insurance Co Ltd 1971 (2) SA 611 (N) 205
Anderson and Another v Port Elizabeth Municipality 1954 (2) SA 299 (E) 236
Anderson v Gordik Organisation 1960 (4) SA 244 (N) 217
Andries van der Schyff en Seuns (Pty) Ltd t/a Complete Construction v Webstrade Inv No 45 (Pty) Ltd and Others 2006 (5) SA 327 (W) 68
Andy's Electrical v Laurie Sykes (Pty) Ltd 1979 (3) SA 341 (N) 413
Anirudh v Samdei and Others 1975 (2) SA 706 (N) 234
Annandale v Bates 1956 (3) SA 549 (W) 278
Antares International Ltd and Another v Louw Coetzee & Malan Inc and Another 2014 (1) SA 172 (WCC) 36
Anton Piller KG v Manufacturing Processes Ltd and Others [1976] 1 All ER 779 (CA) 468
Aquatur (Pty) Ltd v Sacks and Others 1989 (1) SA 56 (A) 444
Arendsnes Sweefspoor CC v Botha 2013 (5) SA 399 (SCA) 138
Arma Carpet House (Johannesburg) (Pty) Ltd v Domestic and Commercial Carpet Fittings (Pty) Ltd and Another 1977 (3) SA 448 (W) 187
Arter v Burt 1922 AD 303; Schoeman v Moller 1949 (3) SA 949 (O) 303
AS v CS 2011 (2) SA 360 (WCC) 32, 434
Atkinson, Ex Parte 1918 CPD 127 290
Atlantic Continental Assurance Co of SA v Vermaak 1973 (2) SA 525 (E) 302
Audio Vehicle Systems v Whitfield and Another 2007 (1) SA 434 (C) 335

B

Baard v Estate Baard 1928 CPD 505 444
Badenhorst v Balju, Pretoria Sentraal, en Andere 1998 (4) SA 132 (T) 393
Badenhorst v Theophanous 1988 (1) SA 793 (C) 80
Baidoo v Blood-Dzraku 2015 NY Slip Op 25096 [48 Misc 3d 309] March 27, 2015 144
Bakoven Ltd v GJ Howes (Pty) Ltd 1992 (2) SA 466 (E) 313
Baluso v FirstRand Bank Limited t/a Wesbank [2016] ZACC 23 341
Balston v Van Zyl 1946 NPD 561 136
Bamford v Minister of Community Development and State Auxiliary Services 1981 (3) SA 1054 (C) 456, 460
Bane and Others v D'Ambrosi 2010 (2) SA 539 (SCA) 481

Bank of Lisbon and South Africa Ltd v Tandrien Beleggings (Pty) Ltd and Others 1983 (2) SA 621 (W) 272
Bannatyne v Bannatyne (Commission for Gender Equality as Amicus Curiae) 2003 (2) SA 363 (CC) 96
Barclays National Bank v Serfontein 1981 (3) SA 244 (W) 424, 425, 426
Barkhuizen v Napier 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) 127
Barens en 'n Ander v Lottering 2000 (3) SA 305 (C) 65, 85, 135
Beaufort Furniture and Joiner Manufacturing Co (Pty) Ltd v De Vos 1950 (1) SA 112 (C) 234
Beedle & Co v Bowley (1895) 12 SC 401 84
Beinash and Another v Ernst & Young and Others 1999 (2) SA 116 (CC) 145
Belford v Belford 1980 (2) SA 843 (C) 443
Bellstedt v SAR&H 1936 CPD 397 304
Benjamin v Sobac South African Building and Construction (Pty) Ltd 1989 (4) SA 940 (C) 241
Berrange NO v Hassan 2009 (2) SA 339 (N) 212
Beverley Building Society v De Courcy and Another 1964 (4) SA 264 (SR) 110
Beyers v Elf Regters van die Grondwetlike Hof 2002 (6) SA 630 (CC) 63
Bid Industrial Holdings (Pty) Ltd v Strang and Another (Minister of Justice and Constitutional Development, Third Party) 2008 (3) SA 355 (SCA) 15, 97, 110, 111, 112
Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd 1991 (1) SA 482 (A) 86, 97, 100, 109
Bisset and Others v Boland Bank Ltd and Others 1991 (4) SA 603 (D) 235
Blaikie-Johnstone v P Hollingsworth (Pty) Ltd 1974 (3) SA 392 (D) 260
Blend and Another v Peri-Urban Areas Health Board 1952 (2) SA 287 (T) 170
BMW Financial Services (SA) (Pty) Ltd v Harding [2007] 4 All SA 716 (C) 214
Body Corporate of Caroline Court, Ex Parte 2001 (4) SA 1230 (SCA) 165
Boivin and Associates v Scott 2011 QCCQ 10324 144
Boltman v Abrahams 1926 NPD 113 65
Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council and Another 1999 (4) SA 799 (W) 346, 372
Bosman v AA Mutual Insurance Association Ltd 1977 (2) SA 407 (C) 290
Bosman v Du Toit's Executors 1937 CPD 209 244
Botes v Goslin 1987 (2) SA 716 (C) 46
Botha v Andrade and Others 2009 (1) SA 259 (SCA) 71
Botha v Botha 1921 TPD 387 236
Botha v W Swanson & Company (Pty) Ltd 1968 (2) PH F85 (CPD) 253
Botha and Another v Rich NO and Others 2014 (4) SA 124 (CC); 2014 (7) BCLR 741 (CC) 127
Braham v Wood 1956 (1) SA 651 (D) 460
Braun v Blann and Botha NNO 1984 (2) SA 850 (A) 50
Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (T) 257
Bridon International GmbH v International Trade Administration Commission and Others 2013 (3) SA 197 (SCA) 265
Brighton Furnishers v Viljoen 1947 (1) SA 39 (GW) 162
Briscoe v Marais 1992 (2) SA 413 (W) 112
Britz v Weideman 1946 OPD 144 205
Broad v Bloom 1903 TH 427 222
Brooks v Maquassi Halls Ltd 1914 CPD 371 103, 109

Broughton v Manicaland Air Services (Pvt) Ltd 1972 (4) SA 458 (R) 244
Brown and Others v Yebba CC t/a REMAX Tricolor 2009 (1) SA 519 (D) 310
Brown v Board of Education of Topeka 349 US 294 (1954) 466
Brown v Vlok 1925 AD 56 211
Brümmer v Brümmer 1962 (3) SA 101 (O) 199
Brummer v Gorfil Brothers Investments (Pty) Ltd and Others 2000 (2) SA 837 (CC) 372
Brummund v Brummund's Estate 1993 (2) SA 494 (Nm) 240
Brunette and Others v Stanford (1859) 3 Searle 221 220
Buchner and Another v Johannesburg Consolidated Investment Co Ltd 1995 (1) SA 215 (T) 183
Buck v Parker 1908 TS 1100 65
Builders Ltd v Union Government (Minister of Finance) 1928 AD 46 205
Burger v Rand Water Board and Another 2007 (1) SA 30 (SCA) 53, 441
Butler v Swain 1960 (1) SA 527 (N) 222
Buys v Roodt (nou Otto) 2000 (1) SA 535 (O) 92

C

Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC and Others 2013 (6) SA 499 (SCA) 212
Cairns' Executors v Gaarn 1912 AD 181 371
Callender-Easby and Another v Grahamstown Municipality and Others 1981 (2) SA 810 (E) 230, 452
Caltex Oil Rhodesia (Pvt) Ltd v Perfecto Dry Cleaners (Pvt) Ltd 1970 (2) SA 44 (R) 276
Cambridge Plan AG v Cambridge Diet (Pty) Ltd and Others 1990 (2) SA 574 (T) 328, 334, 335, 354
Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another 2012 (11) BCLR 1143 (CC) 329, 330
Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa Ltd and Another 2006 (6) SA 103 (CC) 14
Canale v Canale 1995 (4) SA 426 (SE) 135
Candid Electronics (Pty) Ltd v Merchandise Buying Syndicate (Pty) Ltd 1992 (2) SA 459 (C) 458
Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others 1995 (4) SA 790 (A) 334
Cape Town Municipality v South African Local Authorities Pension Fund and Another 2014 (2) SA 365 (SCA) 36
Carlzeil Properties (Pty) Ltd v Goncalves and Others 2000 (3) SA 739 (T) 394
Carpede v Choene NO and Another 1986 (3) SA 445 (O) 269
Carter Trading (Pty) Ltd v Blignaut 2010 (2) SA 46 (ECP) 269
Cash Wholesalers Ltd v Cash Meat Wholesalers Ltd 1933 (1) PH A24 (D) 161
Cauvin v Landsberg (1851) 1 Searle 86 220
Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another 1990 (3) SA 547 (A) 241
Cecil Jacobs (Pty) Ltd v Macleod & Sons 1966 (4) SA 41 (N) 414
Centre for Child Law v Hoërskool Fochville and Another 2016 (2) SA 121 (SCA) 269
Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd and Another 1984 (4) SA 149 (T) 299
Chasen v Ritter 1992 (4) SA 323 (SE)

Chattanooga Tufters Supply Co v Chenille Corporation of South Africa (Pty) Ltd 1974 (2) SA 10 (E) 133
Chedburn v Barkett 1931 CPD 421 103
Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) 316
Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others 2013 (2) 213 (SCA)
Chinatex Oriental Trading Co v Erskine 1998 (4) SA 1087 (C) 317
Chong Sun Wood Products PTE Ltd v VK & T Trading Ltd and Another 2001 (2) SA 651 (D) 37
Christian Education South Africa v Minister of Education 1999 (2) SA 83 (CC) 101
Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd en 'n Ander 2002 (2) SA 447 (SCA) 105
Cinemark (Pty) Ltd v Alfetta Tune-Up Centre 1979 (4) SA 802 (W) 63
Cinemark (Pty) Ltd v Transkei Hotel 1984 (2) SA 332 (W) 241, 359
City of Cape Town and Another v Mgoqi 2006 (4) SA 355 (C) 257
City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2012 (2) SA 104 (CC) 99
City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others 2012 (6) SA 294 (SCA) 165
Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) 441
CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens 2012 (5) SA 604 (KZD) 441
Coetzee v Comitis and Others 2001 (1) SA 1254 (C) 143
Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others 1995 (4) SA 631 (CC) 14
Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison and Others 1995 (10) BCLR 1382 (CC) 13
Cohen and Another v Lench and Another 2007 (6) SA 132 (SCA) 402
Cohen v Cohen and Another [2002] 4 All SA 21 (C) 135
Cohen v Sherman & Co 1941 TPD 134 81
Collective Investments (Pty) Ltd v Brink and Another 1978 (2) SA 252 (N) 73
Collins v Van der Merwe 1908 TS 1086 172
Colman v Dunbar 1933 AD 141 244
Colonial Government v Southern Lands Co Ltd (1902) 12 CTR 3 135
Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) 310
Combustion Technology (Pty) Ltd v Technoburn (Pty) Ltd 2003 (1) SA 265 (C) 165
Commercial Union Assurance Co Ltd v Waymark NO 1995 (2) SA 73 (TK) 158
Commissioner for Customs and Excise v Standard General Insurance Co Ltd 2001 (1) SA 978 (SCA) 482
Commissioner, South African Revenue Service v Sprigg Investment 117 CC T/A Global Investment 2011 (4) SA 551 (SCA) 342, 358
Condé Nast Publications Ltd v Jaffe 1951 (1) SA 81 (C) 456
Conradie v Kleingeld 1950 (2) SA 594 (O) 170
Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd and Another 2002 (2) SA 580 (C) 207
Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd and Another (2) 2005 (6) SA 23 (C) 217, 241
Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd and Another [2005] 4 All SA 517 (C) 215

Consolidated News Agencies (Pty) Ltd (In Liquidation) v Mobile Telephone Networks (Pty) Ltd 2010 (3) SA 382 (SCA) 482
Constantaras v BCE Foodservice Equipment (Pty) Ltd 2007 (6) SA 338 (SCA) 234
Constantia Insurance Co Ltd v Nohamba 1986 (3) SA 27 (A) 307
Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd 2003 (2) SA 253 (SCA) 174
Cooper and Others NNO v Syfrets Trust Ltd 2001 (1) SA 122 (SCA) 369
Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MBH 1976 (3) SA 352 (A) 284
Copalcor Manufacturing (Pty) Ltd and Another v GDC Hauliers (Pty) Ltd (formerly GDC Hauliers CC) 2000 (3) SA 181 (W) 267, 268
Costa da Oura Restaurant (Pty) Ltd t/a Umdloti Bush Tavern v Reddy 2003 (4) SA 34 (SCA) 482
Countertrade Establishment (Pty) Ltd v EBN Trading (Pty) Ltd 1995 (1) SA 762 (N) 82
Cowen & Hammond v Campbell 1906 TH 191 460
Credcor Bank Ltd v Thomson 1975 (3) SA 916 (D) 253
Credit Corporation of SA Ltd v Bosman 1958 (3) SA 845 (T) 247
Crookes Brothers Ltd v Regional Land Claims Commission for the Province of Mpumalanga and Others [2013] 2 All SA 1 (SCA) 323
Cross v Ferreira 1951 (2) SA 435 (C) 242
CSARS v Capstone 556 (Pty) Ltd [2016] ZASCA 2; [2016] 2 All SA 21 (SCA); 2016 (4) SA 341 (SCA) (9 February 2016) 61
Culverwell v Beira 1992 (4) SA 490 (W) 317
Cupido v Kings Lodge Hotel [1999] (4) SA 257 (E) 50
Custom Credit Corporation (Pty) Ltd v Shembe 1972 (3) SA 462 (A) 83

D

Dabelstein and Others v Hildebrandt and Others 1996 (3) SA 42 (C) 469
Dabner v SA Railways and Harbours 1920 AD 583 344
Da Costa and Another v Da Silva and Another 1958 (1) SA 662 (T) 425
Da Mata v Menfred Properties (Pty) Ltd 1969 (3) SA 332 (W) 276
Da Mata v Otto 1972 (3) SA 858 (A) 149
Davehill (Pty) Ltd and Others v Community Development Board [1988] (1) All SA 388 (A) 127
David Beckett Construction (Pty) Ltd v Bristow 1987 (3) SA 275 (W) 218
David v Naggyah and Another 1961 (3) SA 4 (N) 75
De Beer en 'n Ander v Western Bank Ltd 1981 (4) SA 255 (A) 371
De Crespigny v De Crespigny 1959 (1) SA 149 (N) 380
Deeley-Barnard and Another v Thambi and Another 1992 (4) SA 404 (D) 236
De Freitas and Another v Society of Advocates of Natal and Another 2001 (3) SA 750 (SCA) 57
De Kock v Davidson and Others 1971 (1) SA 428 (T) 122, 128
Delius v Delius 1960 (1) SA 270 (N) 45
Democratic Alliance v African National Congress and Another 2015 (2) SA 232 (CC) 9
Democratic Alliance v Speaker of the National Assembly and Others 2016 (5) BCLR 577 (CC); 2016 (3) SA 487 (CC) 49
Dendy v University of the Witwatersrand and Others 2005 (5) SA 357 (W) 120
Denel (Edms) Bpk v Vorster 2004 (4) SA 481 (SCA) 482
Desai NO v Desai NNO and Others (718/93) [1995] ZASCA 113; 1996 (1) SA 141 (SCA) 213

De Sousa v Kerr 1978 (3) SA 635 (W) 313
De Villiers and Another v McIntyre NO 1921 AD 425 118
De Wet and Another v Paynter 1921 CPD 576 218
De Wet and Others v Western Bank Ltd 1979 (2) SA 1031 (A) 313, 317
De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd 1994 (4) SA 705 (E) 319
Dezius v Dezius 2006 (6) SA 395 (T) 380
DF Scott (EP) (Pty) Ltd v Golden Valley Supermarket 2002 (6) SA 297 (SCA) 51, 53, 54
Diamond Igoda View (Pty) Ltd and Another v Igoda Farms CC (EL 790/10, ECD 1590/10) [2011] ZAECELLC 5 (14 June 2011); 2011 JDR 0718 (ECB) 137
Dickinson and Another v Fisher's Executors 1914 AD 424 307
Dickinson v South African General Electric Co (Pty) Ltd 1973 (2) SA 620 (A) 429
Die Meester v Joubert en 'n Ander 1981 (4) SA 211 (A) 326
Dietrichsen v Dietrichsen 1911 TPD 486 91
Director of Hospital Services v Mistry 1979 (1) SA 626 (A) 168
Director of Public Prosecutions and Another v Mohamed NO and Others 2003 (4) SA 1 (CC) 174, 469, 480
District Bank Ltd v Hoosain and Another 1984 (4) SA 544 (C) 257
Doctors for Life International v Speaker of the National Assembly and Others 2006 (6) SA 416 (CC) 96
Dormehl v Minister of Justice 2000 (2) SA 987 (CC) 48
Double v Delport 1949 (2) SA 621 (N) 210
Dougan v Estment 1910 TS 998 126
Dowson & Dobson Ltd v Evans & Kerns (Pty) Ltd 1973 (4) SA 136 (E) 160
Doyle and Another v Fleet Motors PE (Pty) Ltd 1971 (3) SA 760 (A) 83
Drs Prinsloo en Mynhardt v O'Riley 1991 (3) SA 184 (T) 65
Du Bruyn v Joubert 1982 (4) SA 691 (W) 82
Duchen v Flax 1938 WLD 119 163
Duduzile v Road Accident Fund [2007] All SA 1241 (W) 242
Du Plooy v Anwes Motors (Edms) Bpk 1983 (4) SA 212 (O) 238
Du Preez v Du Preez 2009 (6) SA 28 (T) 436
Durbach v Fairway Hotel Ltd 1949 (3) SA 1081 (SR) 265
Durban City Council v Mndovu 1966 (2) SA 319 (D) 275
Durofin (Pty) Limited v Henque 4257 CC and Another (A676/2008) [2011] ZAGPPHC 93 (15 June 2011) 85
Dusheiko v Milburn 1964 (4) SA 648 (A) 90, 218, 231

E

Eagles Landing Body Corporate v Molewa NO and Others 2003 (1) SA 412 (T) 480
Ebotswana (Pty) Ltd v Sentech (Pty) Ltd and Others 2013 (6) SA 327 (GSJ) 296
Ebrahim v Twala and Others 1951 (2) SA 490 (W) 457
E C Chenia and Sons CC v Lamé & Van Blerk 2006 (4) SA 574 (SCA) 301
Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) 63
Edwards v Woodnutt NO 1968 (4) SA 184 (R) 234

Eikenhof Plastics Bottling Co (Pty) Ltd and Others v BOE Bank Ltd (formerly known as NBS Boland Bank Ltd) 2000 (2) SA 211 (W) 238
Eilon v Eilon 1965 (1) SA 703 (A) 100, 101, 106
Eimco (SA) (Pty) Ltd v P Mattioda's Construction Co (SA) (Pty) Ltd 1967 (1) SA 326 (N) 155
Einwald v The German West African Company (1887−1888) 5 SC 86 100
Eke v Parsons 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC) 308
Eley (formerly Memmel) v Lynn and Main Inc 2008 (2) SA 151 (SCA), [2008] 1 All SA 315 (SCA) 214
Elher (Pty) Ltd v Silver 1947 (4) SA 173 (W) 163
Elscint (Pty) Ltd and Another v Mobile Medical Scanners (Pty) Ltd 1986 (4) SA 552 (W) 99
Els v Els 1967 (3) SA 207 (T) 407
Embling and Another v Two Oceans Aquarium CC 2000 (3) SA 691 (C) 216, 241
Emdon and Another v Margau 1926 WLD 159 183
Eniram (Pty) Ltd v New Woodholme Hotel (Pty) Ltd 1967 (2) SA 491 (E) 236
Ensign-Bickford (South Africa) (Pty) Ltd and Others v AECI Explosives and Chemicals Ltd 1998 (2) SA 1085 (SCA) 359
Entabeni Hospital Ltd v Van der Linde; First National Bank of SA Ltd v Puckriah 1994 (2) SA 422 (N) 247
Erasmus and Others v Senwes Ltd and Others 2006 (3) SA 529 (T) 458
Erf 1026 Tygerberg CC t/a Aspen Promotions SA v Pick 'n Pay Retailers (Pty) Ltd 2005 (6) SA 527 (C) 234
Erf 1382 Sunnyside (Edms) Bpk v Die Chipi BK 1995 (3) SA 659 (T) 247
Eskom v Sowetan City Council 1992 (2) SA 703 (W) 160
Estate Agents Board v Lek 1979 (3) SA 1048 (A) 98, 104
Estate Breet v Peri-Urban Areas Health Board 1955 (3) SA 523 (A) 421
Estate De Beer v Botha 1927 CPD 140 359, 421
Estate Garlick v Commissioner for Inland Revenue 1934 AD 499 441
eThekwini Municipality v Ingonyama Trust (CCT 80/12) [2013] ZACC 7; 2013 (5) BCLR 497 (CC); 2014 (3) SA 240 (CC) (28 March 2013) 373
Evander Caterers (Pty) Ltd v Potgieter 1970 (3) SA 312 (T) 239
Ewing McDonald & Co Ltd v M & M Products Co 1991 (1) SA 252 (A) 97, 112
Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others 1995 (4) SA 877 (CC) 63
Ex parte Le Grange and Another; Le Grange v Le Grange (984/2011) [2013] ZAECGHC 75; [2013] 4 All SA 41 (ECG) 2013 (6) SA 28(ECG) (1August 2013) 416
Ex-TRTC United Workers Front and Others v Premier, Eastern Cape Province 2010 (2) SA 114 (ECB) 53

F

Fair v SA Eagle Insurance Co Ltd 1995 (4) SA 96 (E) 433
Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA) 307
Fanapi v East Cape Administration Board 1983 (2) SA 688 (E) 125
Farm Fare (Pty) Ltd v Fairwood Supermarket 1986 (4) SA 258 (C) 53
Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd 1962 (1) SA 736 (T) 182
Federated Insurance Co Ltd v Britz and Another 1981 (4) SA 74 (T) 287
Federated Insurance Co Ltd v Malawana 1986 (1) SA 751 (A) 137

Fedsure Life Assurance Co Ltd v Worldwide African Investment Holdings (Pty) Ltd and Others 2003 (3) SA 268 (W) 368
Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC) 14, 36, 38
Ferreira v Ntshingila 1990 (4) SA 271 (A) 371
Ferreira v Premier, Free State and Others 2000 (1) SA 241 (O) 168
Ferris and Another v FirstRand Bank and Another (CCT 52/13) [2013] ZACC 46; 2014 (3) SA 39 (CC) (12 December 2013); 2014 (3) BCLR 321(CC) 346
Fielding v Sociedade Industrial de Oleos Limitada 1935 NPD 540 221
Financial Mail (Pty) Ltd v Registrar of Insurance and Others 1966 (2) SA 219 (W) 299
Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others (363/2011) [2012] ZASCA 49; 2013 (2) SA 204 (SCA) 30March 2012 308
Firestone South Africa (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A) 308, 309
First National Bank of SA Ltd v Myburgh and Another 2002 (4) SA 176 (C) 258
First National Bank of SA Ltd v Strachan Family Trust [2000] 3 All SA 379 (T) 50
First National Bank of South Africa Ltd v Ganyesa Bottle Store (Pty) Ltd and Others 1998 (4) SA 565 (NC) 132
First National Bank of Southern Africa Ltd v Perry NO and Others 2001 (3) SA 960 (SCA) 230
First National Bank v Avtjoglou 2000 (1) SA 989 (C) 428
FirstRand Bank Ltd v Folscher and Another, and Similar Matters 2011 (4) SA 314 (GNP) 386
FirstRand Bank Ltd t/a FNB Home Loans v Sheriff, Brakpan and Others 2007 (3) SA 194 (W) 136
FirstRand Bank Ltd v Lenea and Another 2008 (3) SA 491 (E) 253
FirstRand Bank Ltd v Maleke and Three Similar Cases 2010 (1) SA 143 (GSJ) 70, 513
FirstRand Bank Limited t/a Wesbank v Nicolan Jason Manikkam KZD 26-08-2015 case no 14249/2010 (unreported) 144
FirstRand Bank Ltd v Olivier 2009 (3) SA 353 (SEC) 520
Florence v Criticos 1954 (3) SA 392 (N) 232
Florence v Government of the Republic of South Africa 2014 (6) SA 456 (CC); 2014 (10) BCLR 1137 (CC) 346, 372
Foize Africa (Pty) Ltd v Foize Beheer BV and Others [2012] 4 All SA 387 (SCA) 115
Foley v Taylor and Another 1971 (4) SA 515 (D) 519 392
Forbes v Golach & Cohen 1917 AD 559 308
Fortuin and Others v Various Creditors 2004 (2) SA 570 (C) 406
Fourie v Uys 1957 (2) SA 125 (C) 458
Fraind v Nothmann 1991 (3) SA 837 (W) 46
Fredericks and Others v MEC for Education and Training, Eastern Cape, and Others 2002 (2) SA 693 (CC) 96
Free State Gold Areas Ltd v Merriespruit (Orange Free State) Gold Mining Co Ltd and Another 1961 (2) SA 505 (W) 455, 457
Frenkel, Wise & Co (Africa) (Pty) Ltd v Consolidated Press of SA (Pty) Ltd 1947 (4) SA 234 (C) 313
Froman v Robertson 1971 (1) SA 115 (A) 429
FTC v PCCare247 Inc. 2013 WL 841037 (S.D.N.Y Mar. 7 2013) 144

G

Gafoor v Unie Versekeringsadviseurs (Edms) Bpk 1961 (1) SA 335 (A) 308
Galela v The State (20448/2014) [2014] ZASCA 152 (22 September 2014) 350
Gallagher Group Ltd and Another v IO Tech Manufacturing (Pty) Ltd and Others 2014 (2) SA 157 (GNP) 230
Gallo Africa Ltd and Others v Sting Music (Pty) Ltd and Others 2010 (6) SA 329 (SCA) 97, 100, 106, 107
Galp v Tansley NO and Another 1966 (4) SA 555 (C) 161
Ganes and Another v Telecom Namibia Ltd 2004 (3) SA 615 (SCA) 160
Garber NO v Witwatersrand Jewish Aged Home 1985 (3) SA 460 (W) 81, 485
Gardiner v Survey Engineering (Pty) Ltd 1993 (3) SA 549 (SE) 237
Gascoyne v Paul and Hunter 1917 TPD 170 307
Geanotes v Geanotes 1947 (2) SA 512 (C) 162
Geduld Lands Ltd v Uys and Others 1980 (3) SA 335 (T) 449
Gehle v McLoughlin 1986 (4) SA 543 (W) 226
Gelb v Hawkins 1960 (3) SA 687 (A) 327
General Accident Insurance Co SA Ltd v Mbonambi 1986 (4) SA 967 (N) 88
General Commercial and Industrial Finance Corporation Ltd v Pretoria Portland Cement Co Ltd 1944 AD 444 230
Genrec Mei (Pty) Ltd v Industrial Council for the Iron, Steel, Engineering, Metallurgical Industry 1995 (1) SA 563 (A) 9
Gentiruco AG v Firestone SA (Pty) Ltd 1972 (1) SA 589 (A) 375
George and Others v Minister of Environmental Affairs and Tourism 2005 (6) SA 297 (EqC) 212
George Loader & Co v Vosloo 1939 OPD 151 122
Gerber v Naude 1971 (3) SA 55 (T) 231, 232
Gerber v Uijs SC (2980/10) [2010] ZAWCHC 64 (3 March 2010) 59
Getaz v Stephen 1956 (4) SA 751 (N) 438
Geyser v Nedbank Ltd and Others: In re Nedbank Ltd v Geyser (430/04, 4/00430) [2006] ZAGPHC 50 (22 May 2006); 2006 4 SA 544 (W) 116
Ghomeshi-Bozorg v Yousefi 1998 (1) SA 692 (W) 112
Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others [2013 (3) BCLR 251 (CC) 38
Giddey NO v JC Barnard 2007 (5) SA 525 (CC) 346
Gijzen v Verrinder 1965 (1) SA 806 (D) 304
Globe Engineering Works Ltd v Ornelas Fishing Co (Pty) Ltd 1983 (2) SA 95 (C) 183
Goldberg v Union and SWA Insurance Co Ltd 1980 (1) SA 160 (E) 275
Golden Harvest (Pty) Ltd v Zen-Don CC 2002 (2) SA 653 (O) 242
Gold Fields Limited and Others v Motley Rice LLC 2015 (4) SA 299 (GJ) 332
Goldstein, Ex Parte 1916 CPD 483 115
Goldstuck v Mappin & Webb Ltd 1927 TPD 723 304
Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd and Others 1978 (1) SA 914 (A) 414
Goolam Ally Family Trust t/a Textile Curtaining and Trimming v Textile, Curtaining and Trimming (Pty) Ltd 1989 (4) SA 985 (C) 50
Gool v Minister of Justice and Another 1955 (2) SA 682 (C) 459
Gool v Policansky 1939 CPD 386 251

Gordon v Tarnow 1947 (3) SA 525 (A) 205
Gorfinkel v Gross, Hendler & Frank 1987 (3) SA 766 (C) 226
Gory v Kolver NO and Others (Starke and Others Intervening) 2007 (4) SA 97 (CC) 327, 335
Gouveia v Da Silva 1988 (4) SA 55 (W) 438
Gouws v Theologo and Another 1980 (2) SA 304 (W) 392
Government of the Islamic Republic of Iran v Berends 1998 (4) SA 107 (NmH) 315
Gqalana and Others v Knoesen and Another 1980 (4) SA 119 (E) 66
Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board 1950 (2) SA 420 (A) 60
Graham v Odendaal 1972 (2) SA 611 (A) 327
Granoth v Granoth 1983 (4) SA 50 (C) 115
Grant-Dalton v Win and Others 1923 WLD 180 162, 457
Grant v Grant 1949 (1) SA 22 (C) 287
Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O) 315, 316
Greeff v FirstRand Bank Ltd 2012 (3) SA 157 (NCK) 133
Greenhalgh v Rowley 1925 SR 30 232
Greenspan v Greenspan 2000 (2) SA 283 (C) 435
Green v Green 1987 (3) SA 131 (SE) 435
Green v Herridge & Co (1885) 4 EDC 358 135
Greyling v Estate Pretorius 1947 (3) SA 514 (W) 477
Greyvenstein v Hattingh 1925 EDL 308 231
Grindal v Grindal 1997 (4) SA 137 (C) 102
Griqualand West Diamond Mining Co Ltd v London and SA Exploration Co (1883) 1 Buch AC 239 205
Grobler v Potgieter 1954 (2) SA 188 (O) 41
Groenewald v Minister van Justisie 1972 (4) SA 223 (O) 219
Grootboom v National Prosecuting Authority and Another 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC) 371
Gruhn v M Pupkewitz & Sons (Pty) Ltd 1973 (3) SA 49 (A) 231
Guardian National Insurance Co Ltd v Searle NO 1999 (3) SA 296 (SCA) 343
Guardian National Insurance Co Ltd v Van Gool NO 1992 (4) SA 61 (A) 40, 41
Guggenheim v Rosenbaum (2) 1961 (4) SA 21 (W) 100
Gundwana v Steko Development and Others 2011 (3) SA 608 (CC) 246, 385

H

Hairman v Wessels 1949 (1) SA 431 (O) 308
Harris's Executor v Weinberg 1938 CPD 134 162
Harris v ABSA Bank Ltd t/a Volkskas [2002] 3 All SA 215 (T) 319
Harris v Absa Bank Ltd t/a Volkskas 2006 (4) SA 527 (T) 317
Harris and Others v Rees and Others [2010] 4 All SA 603 (GSJ); 2011 (2) SA 294 (GSJ) 46
Harrowsmith v Ceres Flats (Pty) Ltd 1979 (2) SA 722 (T) 426
Hart and Another v Santam Insurance Co Ltd 1975 (4) SA 275 (E) 452
Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd and Another 1977 (1) SA 316 (T) 482
Hassim v Harrop Allin 1974 (4) SA 412 (T) 444
Hatfield Town Management Board v Mynfred Poultry Farm (Pvt) Ltd 1963 (1) SA 737 (SR) 235
Hawkins v Gelb and Another 1959 (1) SA 703 (W) 705 328

Hay Management Consultants (Pty) Ltd v P3 Management Consultants (Pty) Ltd 2005 (2) SA 522 (SCA) 112
Health Professions Council of South Africa and Another v Emergency Medical Supplies and Training CC t/a EMS 2010 (6) SA 469 (SCA) 343
Hehde v Estate of the Late Blum and Master of the High Court 1940 (2) PH M87 (SWA) 47
Helen Suzman Foundation v President of the Republic of South Africa and Others 2015 (2) SA 1 (CC) 162
Hendricks v Santam Insurance Co Ltd 1973 (1) SA 45 (C) 164
Hennie de Beer Game Lodge CC v Waterbok Bosveld Plaas CC and Another 2010 (5) SA 124 (CC) 330
Henri Viljoen (Pty) Ltd v Awerbuch Brothers 1953 (2) SA 151 (O) 217, 444, 445
Herf v Germani 1978 (1) SA 440 (T) 46
Hermes Versekeringsmaatskappy v Dartnell 1980 (4) SA 279 (W) 104
Herold v Rand Debt Collecting Company 1965 (3) SA 752 (T) 92
Herold v Sinclair and Others 1954 (2) SA 531 (A) 334
Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council and Others 2002 (6) SA 66 (T) 52
Hillman Bros (West Rand) (Pty) Ltd v Van den Heuvel 1937 WLD 41 461
Hlongwane and Others v Rector, St. Francis College, and Others 1989 (3) SA 318 (D) 161
Hoch v Scoble 1916 TPD 642 47
Hofmeyer v Fourie; BJBS Contractors (Pty) Ltd v Lategan 1975 (2) SA 590 (C) 380
Hogsett v Buys 1913 CPD 200 84
Holdenstedt Farming v Cederberg Organic Buchu Growers (Pty) Ltd 2008 (2) SA 177 (C) 240
Hollard's Estate v Kruger 1932 TPD 134 136
Horwitz v Hendricks 1928 AD 391 231
Howard v Howard 1966 (2) SA 718 (R) 65
Hudson v Hudson and Another 1927 AD 259 233
Hugo v Wessels 1987 (3) SA 837 (A) 103, 106
Hulse-Reutter and Others v Godde 2001 (4) SA 1336 (SCA) 111

I

I v C and Another (1137/2013 [2014] ZAKZAHC 11 (4 April 2014) 39
Icebreakers No 83 (Pty) Ltd v Medicross Health Care Group (Pty) Ltd 2011 (5) SA 130 (KZD) 183
I'ons v Freeman & Frock 1916 WLD 64 136
Imprefed (Pty) Ltd v National Transport Commission 1990 (3) SA 324 (T) 219
Imprefed (Pty) Ltd v National Transport Commission 1993 (3) SA 94 (A) 189
Incorporated Law Society v Chick (1908) 25 SC 620 118
Incorporated Law Society v Wessels 1927 TPD 592 118
Incubeta Holdings (Pty) Ltd and Another v Ellis and Another 2014 (3) SA 189 (GJ) 461, 462
Independent Electoral Commission v Langeberg Municipality 2001 (3) SA 925 (CC) 14
Inglestone v Pereira 1939 WLD 55 430
Interim Ward S19 Council v Premier, Western Cape Province, and Others 1998 (3) SA 1056 (C) 52
International Harvester v Ferreira 1975 (3) SA 831 (SE) 183
International Shipping Co (Pty) Ltd v FC Bonnet (Pty) Ltd 1975 (1) SA 853 (D) 255, 257

International Trade Administration Commission v SCAW South Africa (Pty) Ltd 2012 (4) SA 618 (CC) 462
Internatio (Pty) Ltd v Lovemore Brothers Transport CC 2000 (2) SA 408 (SE) 219
IPF Nominees (Pty) Ltd v Nedcor Bank Ltd (Basfour 130 (Pty) Ltd, Third Party) 2002 (5) SA 101 (W) 452
Iscor Pension Fund v Jerling and Others 1978 (3) SA 858 (T) 393

J

Jacobs en 'n Ander v Waks en Andere 1992 (1) SA 521 (A) 35
Jacobson v Havinga t/a Havingas 2001 (2) SA 177 (T) 218
Jafta v Minister of Law and Order and Others 1991 (2) SA 286 (A) 119, 125
Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others 2003 (10) BCLR 1149 (C) 391
Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others 2005 (2) SA 140 (CC) 15, 243, 386, 391
James Brown & Hamer (Pty) Ltd v Simmons 1963 (4) SA 656 (A) 169
Jamieson v Sabingo 2002 (4) SA 49 (SCA) 112
Janse Van Rensburg and Others NNO v Steenkamp and Another; Janse Van Rensburg and Others NNO v Myburgh and Others 2010 (1) SA 649 (SCA) 217
Jasat v Interim National Medical and Dental Council 1999 (1) SA 156 (N) 102
JC v DC 2014 (2) SA 138 (WCC) 380
Jenkins v De Jager 1993 (4) SA 534 (N) 425
JG v CG 2012 (3) SA 103 (GSJ) 435
Jili v South African Eagle Insurance Co Ltd 1995 (3) SA 269 (N) 413
Jockey Club of South Africa v Forbes 1993 (1) SA 649 (A) 375
Johannesburg Consolidated Investment Co v Johannesburg Town Council 1903 TS 111 119
Johnson v Johnson 1931 AD 391 101
Johnstone v Wildlife Utilisation Services (Pvt) Ltd 1966 (4) SA 685 (R) 161
Jonathan v General Accident Insurance Co of SA Ltd 1992 (4) SA 618 (C) 44
Joss v Barclays Western Bank 1990 (1) SA 575 (T) 123
Jones v Krok 1995 (1) SA 677 (A) 340, 425
Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009 (5) SA 1 (SCA) 424
Jordaan v De Beer Scheepers and Another 1975 (3) SA 845 (T) 68
Jowell v Bramwell-Jones and Others 1998 (1) SA 836 (W) 231
Justice Alliance of South Africa v President of Republic of South Africa and Others 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC) 63

K

Karpakis v Mutual & Federal Insurance Co Ltd 1991 (3) SA 489 (O) 433
Karson v Minister of Public Works 1996 (1) SA 887 (E) 413
Kekana v Society of Advocates of SA [1998] 3 All SA 577 (A) 346
Kemp v Randfontein Estates Gold Company 1996 (1) SA 373 (W) 291
Kennedy v Steenkamp 1936 CPD 113 232
Kerbel v Kerbel 1987 (1) SA 562 (W) 212
Ketwa v Agricultural Bank of Transkei [2006] 4 All SA 262 (Tk) 328
Kgosana and Another v Otto 1991 (2) SA 113 (W) 477

Khumalo v Wilkins and Another 1972 (4) SA 470 (N) 447, 448
Khumalo and Others v Holomisa 2002 (5) SA 401 (CC) (2002 (8) BCLR 771) 344
Kings Transport v Viljoen 1954 (1) SA 133 (C) 90, 92
King Williams Town Transitional Local Council v Border Alliance Taxi Association (BATA) 2002 (4) SA 152 (E) 149
Klep Valves (Pty) Ltd v Saunders Valve Co Ltd 1987 (2) SA 1 (A) 170
Klokow v Sullivan 2006 (1) SA 259 (SCA) 228
Knight v Knight (1900) 14 EDC 162 290
Knox D'Arcy Ltd and Others v Jamieson and Others 1994 (3) SA 700 (W) 470
Knox D'Arcy Ltd and Others v Jamieson and Others 1996 (4) SA 348 (A) 470, 471
Kopelowitz v West and Others 1954 (4) SA 296 (W) 103
Kosak & Co (Pty) Ltd v Keller and Another 1962 (1) SA 441 (W) 256
Koth Property Consultants CC v Lepelle-Nkumpi Local Municipality Ltd 2006 (2) SA 25 (T) 230
Kotsopoulos v Bilardi 1970 (2) SA 391 (C) 230
Kouligas & Spanoudis Prop (Pty) Ltd v Boland Bank Bpk 1987 (2) SA 414 (O) 316
KPMG Chartered Accountants (SA) v Securefin Ltd and Another 2009 (4) SA 399 (SCA) 284
Kragga Kamma Estates CC and Another CC v Flanagan 1995 (2) SA 367 (A) 122
Kritzinger v Northern Natal Implement Co (Pty) Ltd 1973 (4) SA 542 (N) 316
KR Sibanyoni Transport Services CC and Others v Sheriff, Transvaal High Court, and Another 2006 (4) SA 429 (T) 317
Kruger v President of Republic of South Africa and Others (CCT 57/07) [2008] ZACC 17; 2009 (1) SA 417 (CC); 2009 (3) BCLR 268 (CC) (20October 2008) 36
Krygkor Pensioenfonds v Smith 1993 (3) SA 459 (A) 120
Kunene v Union National South British Insurance Co Ltd and Others 1976 (4) SA 782 (D) 314

L

Labuschagne v Van Schalkwyk 1949 (1) PH F34 (O) 244
Ladychin Investments (Pty) Ltd v South African National Roads Agency Ltd and Others 2001 (3) SA 344 (N) 454
Lagesse v Lagesse 1992 (1) SA 173 (D) 482
Landman Implemente (Edms) Bpk v Leliehoek Motors (Edms) Bpk 1975 (3) SA 347 (O) 183
Langa and Others v Hlophe (697/08) [2009] ZASCA 36; [2009] 3 All SA 417 (SCA); 2009 (8) BCLR 823 (SCA) (31 March 2009) 480
Langerman v Alport 1911 CPD 376 85
Langham Court (Pty) Ltd v Mavromaty 1954 (3) SA 742 (T) 69
Laskarides and Another v German Tyre Centre (Pty) Ltd (in liquidation) and Others NNO 2010 (1) SA 390 (W) 282
Law Society of the Cape of Good Hope v Windvogel 1996 (1) SA 1171 (C) 334
Law Society of the Northern Provinces and Another v Rules Board for Courts of Law and Others (34474/2009) [2009] ZAGPPHC 91 (26 June 2009) 133
Lawyers for Human Rights v Rules Board for Courts of Law and Another (78163/2009) [2012] ZAGPPHC 54; 2012 (7) BCLR 754 (GNP) (11 April 2012); [2012] 3 All SA 153 (GNP); [2012] JOL 28787 (GNP) 375
Lee v Minister of Correctional Services (CCT 20/12) [2012] ZACC 30; 2013 (2) BCLR 129 (CC); 2013 (2) SA 144 (CC); 2013 (1) SACR 213(CC) (11 December 2012) 370

Legal Aid Board v R and Another 2009 (2) SA 262 (D) 42
Legal-Aid South Africa v Magidiwana and Others (1055/13) [2014] ZASCA 141; 2015 (2) SA 568 (SCA) [2014] 4 All SA 570 (SCA) (26September 2014) 370
Leibowitz t/a Lee Finance v Mhlana and Others 2006 (6) SA 180 (SCA) 85
Lekota v Editor, 'Tribute' Magazine and Another 1995 (2) SA 706 (W) 291
Leo Manufacturing CC v Robor Industrial (Pty) Ltd t/a Robor Stewarts & Lloyds 2007 (2) SA 1 (SCA) 319
Le Roux v Le Roux 1998 (2) All SA 315 (O) 80
Le Roux v Yskor Landgoed (Edms) Bpk en Andere 1984 (4) SA 252 (T) 382
Lesotho Diamond Works v Lurie 1975 (2) SA 142 (O) 429
Levin v Saidman 1930 WLD 256 161
Levitan v Newhaven Holiday Enterprises CC 1991 (2) SA 297 (C) 230, 232
Lewis and Another v Vexma Properties 329 CC, In Re: Vexma Properties 329 CC v Lewis and Another [2015] ZAGPPHC 325 (8 May 2015) 350
Leymac Distributors (Pty) Ltd v Hoosen and Another 1974 (4) SA 524 (D) 254, 255
Ley v Ley's Executors and Others 1951 (3) SA 186 (A) 101
Lezard NO, Ex Parte 1917 CPD 453 47
Liberty Group Ltd v Singh and Another 2012 (5) SA 526 (KZD) 187, 258
Limbada v Dwarka 1957 (3) SA 60 (N) 458
Lindeijer and Another NNO v Butler 2010 (3) SA 348 (ECP) 247
Lindup v Lowe 1935 NPD 189 136
Lion Match Co Ltd v Paper Printing Wood and Allied Workers Union and Others 2001 (4) SA 149 (SCA) 377
Liquidators Wapejo Shipping Co Ltd v Lurie Bros 1924 AD 69 230, 231
Living Hands (Pty) Ltd and Another v Ditz and Others 2013 (2) SA 368 (GSJ) 213, 235
Lochrenberg v Sululu 1960 (2) SA 502 (E) 72
Lock v Keers 1945 TPD 113 220
Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd 2007 (6) SA 87 (SCA) 312
Lombard v Minister van Verdediging 2002 (3) SA 242 (T) 405
London & SA Exploration Co Ltd v McLelland and Another (1898) 8 HCG 205 186, 631
Longman Distillers Ltd v Drop Inn Group of Liquor Supermarkets (Pty) Ltd 1990 (2) SA 906 (A) 100
Loots v Loots 1974 (1) SA 431 (E) 331, 334
Lotzoff v Connel and Another 1968 (2) SA 127 (W) 278
Loureiro and Others v Imvula Quality Protection (Pty) Ltd 2014 (3) SA 394 (CC) 25
Lourenco and Others v Ferela (Pty) Ltd NO and Others (No 1) 1998 (3) SA 281 (T) 469
Lowrey v Steedman 1914 AD 532; S v McCarthy 1995 (3) SA 731 (A) 217
LTA Construction Bpk v Administrateur, Transvaal 1992 (1) SA 473 (A) 325, 519
Luthuli v Santam Insurance Co Ltd and Another 1977 (2) SA 97 (D) 449
Luttig v Jacobs 1951 (4) SA 563 (O) 231
Luxavia (Pty) Ltd v Gray Security Services (Pty) Ltd 2001 (4) SA 211 (W) 241, 242

M

M & V Tractor & Implement Agencies Bpk v Vennootskap DSU Cilliers & Seuns en Andere (Kelrn Vervoer (Edms) Bpk Tussenbeitredend; M & V Tractor & Implement Agencies BK v Hoogwartier Landgoed (ENMS) Bpk (Kelrn Vervoer (Edms) Bpk Tussenbeitredend); M & V Tractor & Implement Agencies BK v Olierivier Landgoed (Edms) Bpk (Kelrn Vervoer (Edms) Bpk Tussenbeitredend) 2000 (2) SA 571 (N) 153
Maccs and CC v Macassar Land Claims Committee and Others [2005] 2 All SA 469 (SCA) 341
Macdonald t/a Happy Days Cafe v Neethling 1990 (4) SA 30 (N) 57, 199
Madden v Madden 1962 (4) SA 654 (T) 435
Madikiza et Uuxor, Ex Parte 1995 (4) SA 433 (TkS) 175
Madzunye and Another v Road Accident Fund 2007 (1) SA 165 (SCA) 328
Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) 255, 256
Mahomed v Nagdee 1952 (1) SA 410 (A) 127, 327
Mail and Guardian Media Ltd and Others v Chipu N.O. and Others (CCT 136/12) [2013] ZACC 32; 2013 (11) BCLR 1259 (CC); 2013 (6) SA 367(CC) (27 September 2013) 370
Maisel v Anglo African Furnishing Co 1931 CPD 223 54
Maisel v Camberleigh Court (Pty) Ltd 1953 (4) SA 371 (C) 82
Maisel v Strul and Others 1937 CPD 128 258
Makate v Vodacom (Pty) Ltd (CCT52/15) [2016] ZACC 13; 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC) (26 April 2016) 214
Makgae v Sentraboer (Kooperatief) Bpk 1981 (4) SA 239 (T) 90
Makuwa v Poslson [2007] 4 All SA 1260 (T); 2007 (3) SA 84 (T) 199
Malachi v Cape Dance Academy International (Pty) Ltd and Others 2010 (7) BCLR 678 (WCC) 381
Malachi v Cape Dance Academy International (Pty) Ltd and Others 2010 (6) SA 1 (CC) 381
Malan v Law Society, Northern Provinces 2009 (1) SA 216 (SCA) 372
Malan v Meyer 1974 (1) SA 476 (T) 333
Malcomess & Co Ltd v Allkin & Co Ltd 1914 CPD 519 95, 200
Malcomess & Co v Reid (1894) 8 EDC 186 457
Malherbe v Britstown Municipality 1949 (1) SA 281 (C) 457
Malkiewicz v Van Niekerk and Fourouclas Investments CC [2008] 1 All SA 57 (T) 82
Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk 1957 (2) SA 347 (C) 160
Maltz v Meyerthal 1920 TPD 338 123
Maluleke v Du Pont NO 1967 (1) SA 574 (RA); 1967 (4) SA 31 (RA) 46
Mamojee v Pillay 1948 (1) SA 212 (N) 205
Manna v Lotter and Another 2007 (4) SA 315 (C) 110
Manong & Associates (Pty) Ltd v Minister of Public Works and Another 2010 (2) SA 167 (SCA) 56, 187
Mansell v Mansell 1953 (3) SA 716 (N) 420
Manton v Croucamp CC 2001 (4) SA 374 (W) 174
Man Truck & Bus (SA) (Pty) Ltd v Dorbyl Ltd 2004 (5) SA 226 (SCA) 341
Marais v Du Preez 1966 (4) SA 456 (E) 72
Marais v Engler Earthworks (Pty) Ltd; Engler Earthworks (Pty) Ltd v Marais 1998 (2) SA 450 (E) 46
Marais v Smith en ’n Ander 2000 (2) SA 924 (W) 240

Mareva Compania Naviera SA v International Bulk Carriers SA; The Mareva [1980] 1 All ER 213 (CA) 470
Marine & Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A) 302
Maritz v Erasmus 1914 CPD 120 85
Market Dynamics (Pty) Ltd t/a Brian Ferris v Grögor 1984 (1) SA 152 (W) 236
Marks and Kantor v Van Diggelen 1935 TPD 29 212
Marney v Watson and Another 1978 (4) SA 140 (C) 234
Marsay v Dilley 1992 (3) SA 944 (A) 340
Marshall Timbers Ltd v Hauser and Battaglia and Another (Pty) Ltd 1976 (3) SA 437 (D) 207
Mars Inc v Candy World (Pty) Ltd 1991 (1) SA 567 (A) 35
Martins v De Waal and Others 1963 (3) SA 787 (T) 69
Masamba v Chairperson, Western Cape Regional Committee, Immigrants Selection Board and Others 2001 (12) BCLR 1239 (C) 278
Masema (Pty) Ltd & Others v PP Mkhari & 4 Others (TPD) (unreported case 29781/07, 6-8-2007) 335
Masemola Taxi Association and Others v MEC of Roads and Transport (Limpopo Province) and Another [2016] ZAGPPHC 81 9
Masetlha v The President of the Republic of South Africa and Another 2008 (1) BCLR 1 (CC) 368
Mashifane v Suliman and Another 1931 TPD 331 248
Mason Motors (Edms) Bpk v Van Niekerk 1983 (4) SA 406 (T) 66
Mathias International Ltd and Another v Baillache and Others 2015 (2) SA 357 (WCC) 469
Matthiesen v Glas 1940 TPD 147 47
Maujean t/a Audio Video Agencies v Standard Bank of SA Ltd 1994 (3) SA 801 (C) 315, 319
Mauritz Marais Bouers (Pty) Ltd v Carizette (Pty) Ltd 1986 (4) SA 439 (O) 220
Mayne v Main 2001 (2) SA 1239 (SCA) 84, 85
Mazele v Minister of Law and Order 1994 (3) SA 380 (E) 272
McConnell v McConnell 1981 (4) SA 300 (Z) 65
McKelvey v Cowan NO 1980 (4) SA 525 (Z) 230
McKenzie v Farmers' Co-operative Meat Industries Ltd 1922 AD 16 89
Mears v African Platinum Mines Ltd and Others (1) 1922 WLD 48 457
MEC For Economic Affairs, Environment And Tourism, Eastern Cape v Kruizenga and Another 2010 (4) SA 122 (SCA) 55
MEC for Education: KwaZulu-Natal and Others v Pillay 2008 (1) SA 474 (CC) 480
MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute 2014(3) SA 481 (CC) 317
MEC for Public Works, Roads and Transport, Free State v Esterhuizen and Others 2007 (1) SA 201 (SCA) 335
Mehlwempi v Unit Insurance Limited (CA & R27/15, 1530/12) [2015] ZAECMHC 66 (15 September 2015) 89
Memory Institute SA CC t/a SA Memory Institute v Hansen and Others 2004 (2) SA 630 (SCA) 468
Menqa and Another v Markom and Others 2008 (2) SA 120 (SCA) 391
Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Company (Pty) Ltd 1971 (2) SA 388 (W) 170
Metlika Trading Ltd and Others v Commissioner, South African Revenue Service 2005 (3) SA 1 (SCA) 87, 115, 341

Metropolitan Industrial Corporation (Pty) Ltd v Hughes 1969 (1) SA 224 (T) 380
Meyerson v Health Beverages (Pty) Ltd 1989 (4) SA 667 (C) 46, 287
Mgobozi and Others v The Administrator of Natal 1963 (3) SA 757 (D) 444
Milani and Another v SA Medical and Dental Council and Another 1990 (1) SA 899 (T) 479
Millman NO v Goosen 1975 (3) SA 141 (O) 430
Mills v Starwell Finance (Pty) Ltd 1981 (3) SA 84 (N) 65, 102
Miloc Financial Solutions (Pty) Ltd v Logistic Technologies (Pty) Ltd and Others 2008 (4) SA 325 (SCA) 145
Minister of Defence and Others v South African National Defence Union; Minister of Defence and Others v South African National Defence Union and Another 2007 (1) SA 422 (SCA) 327
Minister of Finance and Others v Gore NO 2007 (1) SA 111 (SCA) 215
Minister of Home Affairs v Bickle 1983 (2) SA 457 (ZS) 46
Minister of Law and Order v Patterson 1984 (2) SA 739 (A) 88
Minister of Law and Order v Taylor NO 1990 (1) SA 165 (E) 237
Minister of Local Government and Land Tenure and Another v Sizwe Development and Others: In re Sizwe Development v Flagstaff Municipality 1991 (1) SA 677 (TK) 444
Minister of Native Affairs, Ex Parte 1941 AD 53 84
Minister of Police v Mboweni and Another 2014 (6) SA 256 (SCA) 481
Minister of Police v Nongwejane (CA&R63/2015) [2015] ZAECMHC 80 (20 November 2015) 245, 250
Minister of Police and Others v Premier of the Western Cape and Others 2014 (1) SA 1 (CC) 279
Minister of Police v Regional Magistrate, Oudtshoorn and Others (15587/2013) [2014] ZAWCHC 165 (6 November 2014) 4
Minister of the Interior and Another v Harris and Others 1952 (4) SA 769 (A) 2
Minister of the Interior v Cowley NO 1955 (1) SA 307 (N) 98
Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd and Others 2006 (5) SA 333 (W) 472
Minter NO v Baker and Another 2001 (3) SA 175 (W) 395
Mittal Steel South Africa Ltd t/a Vereeniging Steel v Pipechem CC 2008 (1) SA 640 (C) 56
Mjeni v Minister of Health and Welfare, Eastern Cape 2000 (4) SA 446 (TkH) 120
MKM Capital Pty Ltd v Corbo & Poyser unreported ACT Supreme Court, Master Harper 12-12-2008 143
Mkwanazi v Van der Merwe and Another 1970 (1) SA 609 (A) 304
MM O' Reilly v Estate Martens (1907) 28 NLR 158 232
Mobil Oil Southern Africa (Pty) Ltd v Mechin 1965 (2) SA 706 (A) 300
Mofokeng v General Accident Versekering Bpk 1990 (2) SA 712 (W) 64
Moghambaram v Travagaimmal 1963 (3) SA 61 (D) 250
Mohamed & Son v Mohamed 1959 (2) SA 688 (T) 72
Mohomed v Nomafusi (7576/2013) [2015] ZAKZDHC 67 (2 September 2015) 8
Mohlomi v Minister of Defence 1997 (1) SA 124 (CC) 14
Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae) 2001 (4) SA 491 (CC) 14
Mokgatla and Others v South African Municipal Workers Union and Others (21815/2014) [2014] ZAGPJHC 322 (12 November 2014) 348
Molala v Minister of Law and Order and Another 1993 (1) SA 673 (W) 198
Molemole Municipality and Another v Mokgehle and Another 63009/2014 [2014] ZAGPPHC 821 23 September 2014 8

Molotlegi and Another v President of Bophuthatswana and Others 1989 (3) SA 119 (BG) 52
Montreal Trust Co v Churchill Forrest Industries (Manitoba) Limited (1971) 21 D.L.R. (3d) 75 (Manitoba Court of Appeal) 117
Montsisi v Minister van Polisie 1984 (1) SA 619 (A) 481
Moolman v Estate Moolman and Another 1927 CPD 27 241
Morkel v Absa Bank Bpk en 'n Ander 1996 (1) SA 899 (C) 316
Moseneke and Others v The Master and Another 2001 (2) SA 18 (CC) 63
Moshal Gevisser (Trademarket) Ltd v Midlands Paraffin Co 1977 (1) SA 64 (N) 260
Mostert v Mostert 1913 TPD 255 82
Moulded Components and Rotomoulding SA (Pty) Ltd v Coucourakis and Another 979 (2) SA 457 (W) 226
Mouton and Another v Martine 1968 (4) SA 738 (T) 332
Mphela and Others v Haakdoornbult Boerdery CC and Others 2008 (4) SA 488 (CC); 2008 (4) BCLR 675 (CC) 346
Mphelo v Minister of Defence and Another (4190/2014) [2014] ZAFSHC 186 (16 October 2014) 125
Mpotsha v Road Accident Fund and Another 2000 (4) SA 696 (C) 443
Msunduzi Municipality v Natal Joint Municipal Pension/Provident Fund and Others 2007 (1) SA 142 (N) 236
Mukkadam v Pioneer Foods (Pty) Ltd and Others (CCT 131/12) [2013] ZACC 23; 2013 (5) SA 89 (CC); 2013 (10) BCLR 1135 (CC) (27 June 2013) 37
Mulla v Rajkumar 1982 (1) SA 246 (D) 413
Muller v Cook and Others 1973 (2) SA 247 (N) 233, 235
Muller's Executrix and Pretorius v Liquidators of the Small Farms Ltd; Henley Lighting and Water Board Ltd and Another 1910 (TS) 189 441
Muller v Moller and Another 1965 (1) SA 872 (C) 95
Mulligan v Mulligan 1925 WLD 164 46
Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd 2014 (3) SA 265 (GP) 111, 116
Murphy NO and Benjamin NO v Semphill and Others 1954 (3) SA 450 (W) 160
Murphy v Dallas 1974 (1) SA 793 (D) 110
Mutebwa v Mutebwa and Another 2001 (2) SA 193 (TkH) 313, 314
M v R 1989 (1) SA 416 (O) 120
MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas, and Another 2002 (6) SA 150 (C) 462
MV Alina II, Transnet Ltd v MV Alina II 2013 (6) SA 556 (WCC) 267
MV Banglar Mookh Owners of MV Banglar Mookh v Transnet Ltd 2012 (4) SA 300 (SCA) 265
MV Rizcun Trader (4); MV Rizcum Trader v Manley Appledore Shipping Ltd 2000 (3) SA 776 (C) 175
MV Urgup Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd and Others 1999 (3) SA 500 (C) 226

N

N v N (41999/15) [2015] ZAGPPHC 465 (26 June 2015) 47
Nader Tuis (Edms) Bpk 1962 (1) SA 751 (T) 174
Nagan v Hlophe (10061/08) [2009] ZAWCHC 56 (19 March 2009) 49
Nagar v Nagar 1982 (2) SA 263 (ZH) 415
Naidoo v Marine & Trade Insurance Co Ltd 1978 (3) SA 666 (A) 268
Nair v Chandler 2007 (1) SA 44 (T) 252, 257
N and Others v Government of the Republic of South Africa and Others (No 2) 2006 (6) SA 568 (D) 347
Naptosa and Others v Minister of Education, Western Cape, and Others 2001 (2) SA 112 (C) 480
Nasionale Aartappel Koöperasie Bpk v PriceWaterhouseCoopers Ing en Andere 2001 (2) SA 790 (T) 231
Natal Fresh Produce Growers' Association and Others v Agroserve (Pty) Ltd and Others 1990 (4) SA 749 (N) 456
Nathan (Pty) Ltd v All Metals (Pty) Ltd 1961 (1) SA 297 (N) 252
National Coalition for Gay and Lesbian Equality v Minister of Home Affairs and Others 2000 (2) SA 1 (CC) 346, 372
National Credit Regulator v Nedbank Ltd and Others (19638/2008) [2009] ZAGPPHC 100; 2009 (6) SA 295 (GNP); [2009] 4 All SA 505 (GNP) 480, 513, 520
National Director of Public Prosecutions v Abrina 6822 Ltd and Others 2011 (1) SACR 419 (KZP) 473
National Director of Public Prosecutions v King 2010 (2) SACR 146 (SCA) 344
National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) 445
National Educare Forum v Commissioner, South African Revenue Service 2002 (3) SA 111 (TkH) 104
National Treasury and Others v Opposition to Urban Tolling Alliance and Others (OUTA) 2012 (6) SA 223 (CC) 341, 462
National Union of Public Service and Allied Workers obo Mani and Others v National Lotteries Board 2014 (3) SA 544 (CC) 9
Nationwide Car Rentals (Pty) Ltd v Commissioner, Small Claims Court, Germiston and Another 1998 (3) SA 568 (W) 487
Naude NO, *Ex Parte* 1915 CPD 675 47
Naudé, *Ex Parte* 1964 (1) SA 763 (D) 314
Navidas (Pty) Ltd v Essop; Metha v Essop 1994 (4) SA 141 (A) 428
Navy Two CC v Industrial Zone Ltd [2006] 3 All SA 263 (SCA) 56
Naylor and Another v Jansen 2007 (1) SA 16 (SCA) 327, 346, 372
Ndauti v Kgami and Others 1948 (3) SA 27 (W) 460
Ndlovu v Ngcobo; Bekker and Another v Jika 2003 (1) SA 113 (SCA) 68
Ndlovu v Santam Ltd 2006 (2) SA 239 (SCA) 89
Neale v Edenvale Plastic Products (Pty) Ltd 1971 (3) SA 860 (T) 75
Nedbank Ltd v Jessa and Another 2012 (6) SA 166 (WCC) 386
Nedbank Ltd v Mateman and Others; Nedbank Ltd v Stringer and Another 2008 (4) SA 276 (T) 70
Nedbank Limited v Norris and Others (2978/2015) [2016] ZAECPEHC 5; 2016 (3) SA 568 (ECP) (1 March 2016) 374
Nedcor Bank Ltd v Hennop and Another 2003 (3) SA 622 (T) 14, 43

Nedcor Bank Ltd v Lisinfo 61 Trading (Pty) Ltd 2005 (2) SA 432 (C) 256
Nedcor Bank Ltd v Rundle 2008 (1) SA 415 (SCA) 216
Neethling v MBD Securitisation (A809/2012, 10843/1996) [2014] ZAGPPHC 377 (17 June 2014); 2014 JDR 1315 (GP) 132
Nel v Cloete1972 (2) SA 150 (A) 126
Nel and Others NNO v McArthur and Others 2003 (4) SA 142 (T) 230
Nell, *Ex Parte* 1963 (1) SA 754 (A) 479, 480
Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others 2004 (2) SA 81 (SE) 156
Nel v Federated Versekeringsmaatskappy Bpk 1991 (2) SA 422 (T) 433
Nel v Silicon Smelters (Edms) Bpk en 'n Ander 1981 (4) SA 792 (A) 83, 443
Nel v Waterberg Landbouwers Ko-operatieve Vereeniging 1946 AD 597 328
Nestle (South Africa) (Pty) Ltd v Mars Inc 2001 (4) SA 542 (SCA) 212
Neves Builders & Decorators v De la Cour 1985 (1) SA 540 (C) 182
Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd 2015 (4) SA 34 (SCA) 309
New Zealand Insurance Co Ltd v Stone and Others 1963 (3) SA 63 (C) 443
Nicholson v Nicholson 1998 (1) SA 48 (W) 435
Nino Bonino v De Lange 1907b TS 120 476
Njongi v MEC, Department of Welfare, Eastern Cape 2008 (6) BCLR 571 (CC) 215
Nkabinde and Another v Judicial Service Commission and Others [2016] ZACC 25 163, 351
Nkala and Others v Harmony Gold Mining Company Ltd and Others (48226/12, 31326/12, 48226/12, 08108/13) [2016] ZAGPJHC 97; [2016] 3 ALL SA 233 (GJ); 2016 (7) BCLR 881 (GJ); 2016 (5) SA 240 (GJ) (13 May 2016) 37, 223
Nongovu NO v Road Accident Fund 2007 (1) SA 59 (T) 300
Nonxago v Multilateral Motor Vehicle Accidents Fund [2005] 4 All SA 567 (SE) 241
Noord-Kaap Lewendehawe Koöp Bpk v Lombaard 1988 (4) SA 810 (NC) 133
Norwich Union Life Insurance Society v Dobbs 1912 AD 395 462
Ntame v MEC, Dept of Social Development, Eastern Cape; Mnyaka v MEC, Dept of Social Development, Eastern Cape [2005] 2 All SA 535 (SE) 213
Ntshingila v Minister of Police 2012 (1) SA 392 (WCC) 74
N v Lukoto 2007 (3) SA 569 (T) 49
Nxumalo v First Link Insurance Brokers (Pty) Ltd 2003 (2) SA 620 (T) 232
Nyandeni v Natal Motor Industries Ltd 1974 (2) SA 274 (D) 209
Nyathi v MEC for Department of Health, Gauteng and Another 2008 (5) SA 94 (CC) 384
Nyathi and Others v Tenitor Properties (Pty) Ltd: In re: Tenitor Properties (Pty) Ltd v Nyathi and Others (06579/2015) [2015] ZAGPJHC 115 (9June 2015) 462

O

O'Brien v Nurick 1930 WLD 322 244
Ocean Diamond Mining (SA) v Louw [2001] 1 All SA 241 (C) 149
O'Donoghue v Human 1969 (4) SA 35 (E) 134
O'Linsky v Prinsloo 1976 (4) SA 843 (O) 40
Olivier v Stoop 1978 (1) SA 196 (T) 82
Olympic Passenger Service (Pty) Ltd v Ramlagan 1957 (2) SA 382 (N) 458
Ongevallekommissaris v Unie en Nasionale Versekeringsmaatskappy Bpk 1969 (3) SA 438 (O) 104

Oosthuizen v Stanley 1938 AD 322 304
Optimal Property Solutions CC, *Ex Parte* 2003 (2) SA 136 (C) 132
Multichoice (Pty) Ltd and Others v National Prosecuting Authority and Another, In Re; S v Pistorius and Another Related Matter [2014] 2 All SA 446 (GP) 299
Oshry and Lazar v Taxing Master and Another 1947 (1) SA 657 (T) 295
Otto en ’n Ander v Basson 1994 (2) SA 744 (C) 82

P

Palmer v President Insurance Co Ltd 1967 (1) SA 673 (O) 180
Pansolutions Holdings Ltd v P&G General Dealers & Repairers CC 2011 (5) SA 608 (KZD) 469
Parekh v Shah Jehan Cinemas (Pty) Ltd and Others 1980 (1) SA 301 (D) 207
Parity Insurance Co Ltd v Wiid 1964 (1) SA 216 (GW) 88
Parker v Rand Motor Transport Co and Another 1930 AD 353 51
Patmore v Patmore 1997 (4) SA 785 (W) 436
Paulsen and Another v Slip Knot Investments 777 (Pty) Limited 2015 (3) SA 479 (CC) 325
Peacock v Marley 1934 AD 1 217
Pelidis v Ndhlamuti 1969 (3) SA 563 (R) 266
Pennington Health Committee, In Re 1980 (4) SA 243 (N) 67
Penta Communication Services (Pty) Ltd v King and Another 2007 (3) SA 471 (C) 226
Pepler v Hirschberg 1920 CPD 438 426
Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuza and Others 2001 (4) SA 1184 (SCA) 37, 116
Pesskin v The Incorporated Law Society 1966 (3) SA 719 (T) 118
Peterson v Cuthbert & Co Ltd 1945 AD 420 149
Pete’s Warehousing and Sales CC v Bowsink Investments CC 2000 (3) SA 833 (E) 234
PFE International and Others v Industrial Development Corporation of South Africa Ltd 2013 (1) SA 1 (CC) 266
Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang and Another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health and Another 2005 (3) SA 238 (SCA) 358
Pheko and Others v Ekurhuleni City 2015 (5) SA 600 (CC) 466
Philani-Ma-Afrika And Others v Mailula and Others 2010 (2) SA 573 (SCA) 344
Phillips and Another v National Director of Public Prosecutions and Others 2001 (4) SA 849 (W) 299
Phillips t/a Southern Cross Optical v SA Vision Care (Pty) Ltd 2000 (2) SA 1007 (C) 239, 319
Phil Morkel Bpk v Niemand 1970 (3) SA 455 (C) 45
Phuthi v Minister of Police (8540/2012) [2015] ZAGPPHC 159 (5 March 2015) 306
Pickles v Pickles 1947 (3) SA 175 (W) 457
Pick ’n Pay Retailers (Pty) Ltd h/a Hypermarkets v Dednam 1984 (4) SA 673 (O) 249
Pienaar and Versfeld v Incorporated Law Society 1902 TS 11 118
Pienaar v Pienaar en Andere 2000 (1) SA 231 (O) 392
Pillay v Krishna and Another 1946 AD 946 300
Pitsiladi and Others v ABSA Bank and Others 2007 (4) SA 478 (E) 234
PK Stores (Pty) Ltd t/a Eric’s Spar v Mike’s Kitchen 1994 (2) SA 322 (O) 53
Plaaslike Oorgangsraad, Bronkhorstspruit v Senekal 2001 (3) SA 9 (SCA) 359
Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) 149, 455

PL v YL 2013 (6) SA 28 (ECG) 310
PLJ van Rensburg en Vennote v Den Dulk 1971 (1) SA 112 (W) 316
PMG Motors Kyalami (Pty) Ltd v FirstRand Bank Ltd, Wesbank Division 2015 (2) SA 634 (SCA) 85
Pockets Holdings (Pvt) Ltd v Lobel's Holdings (Pvt) Ltd 1966 (4) SA 238 (R) 231
Pohlman and Others v Van Schalkwyk and Others 2001 (1) SA 690 (E) 120
Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others (No 2) 2008 (3) SA 129 (E) 371
Port Elizabeth Municipality v Smit 2002 (4) SA 241 (SCA) 370
Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC) 68
Portion 20 of Plot 15 Athol (Pty) Ltd v Rodrigues 2001 (1) SA 1285 (W) 138
Port Nolloth Municipality v Xhalisa and Others; *Luwalala and Others v Port Nolloth Municipality* 1991 (3) SA 98 (C) 165
Potgieter v S [2015] ZASCA 15 350
Pountas' Trustee v Lahanas 1924 WLD 67 161, 168
Premier Foods v Manoim NO (20147/2014) [2015] ZASCA 159; 2016 (1) SA 445 (SCA); [2016] 1 All SA 40 (SCA) 317
Premier, Eastern Cape, and Another v Mtshelakana and Others 2011 (5) SA 640 (ECM) 441
President Insurance Co Ltd v Yu Kwam 1963 (3) SA 766 (A) 41
President of the Republic of South Africa v Eisenberg & Associates (Minister of Home Affairs Intervening) 2005 (1) SA 247 (C) 311, 312
President of the Republic of South Africa and Others v M & G Media Ltd 2011 (2) SA 1 (SCA) 158
President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC) 163
Pressma Services (Pty) Ltd v Schuttler and Another 1990 (2) SA 411 (C) 170, 171
Preston v Vredendal Co-operative Winery Ltd and Another 2001 (1) SA 244 (E) 479
Pretoria Garrison Institute v Danish Variety Products (Pty) Ltd 1948 (1) SA 839 (A) 343
Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others 2003 (2) SA 385 (SCA) 175, 375
Pretorius v Slabbert 2000 (4) SA 935 (SCA) 441
PriceWaterhouseCoopers Inc and Others v National Potato Co-operative Ltd 2004 (6) SA 66 (SCA) 332
Prince v President, Cape Law Society, and Others 2001 (2) SA 388 (CC) 479
Prinsloo v RCP Media Ltd t/a Rapport 2003 (4) SA 456 (T) 299
Prophet v National Director of Public Prosecutions 2007 (6) SA 169 (CC) 369
Prudential Assurance Co Ltd v Swart 1963 (2) SA 165 (E) 88
Purchase v Purchase 1960 (3) SA 383 (N) 171

Q

Quayside Fish Suppliers CC v Irvin & Johnson Ltd 2000 (2) SA 529 (C) 226
Queensland Insurance Co Ltd v Banque Commerciale Africaine 1946 AD 272 321
Qwelane v Minister of Justice and Constitutional Development and Others 2015 (2) SA 493 (GJ) 443

R

R v Secretary of State for Trade and Industry, ex parte Eastaway [2000] 1 WLR 2222 353
Rabinowitz v Van Graan and Others 2013 (5) SA 315 (GSJ) 329
Rail Commuters' Action Group and Others v Transnet Ltd and Others 2006 (6) SA 68 (C) 217, 236
Rail Commuters Action Group and Others v Transnet Limited t/a Metrorail and Others 2005 (2) SA 359 (CC) 483
Ramdin v Pillay and Others 2008 (3) SA 19 (D) 215
Ras v Simpson 1904 TS 254 83
Rauff v Standard Bank Properties (A division of Standard Bank of SA Ltd) and Another 2002 (6) SA 693 (W) 219, 290, 482
Rees v Feldman 1927 TPD 884 54
Rees and Another v Investec Bank Ltd 2014 (4) SA 220 (SCA) 255
Reid NO v Royal Insurance Co Ltd 1951 (1) SA 713 (T) 328
Rellams (Pty) Ltd v James Brown and Hamer Ltd 1983 (1) SA 556 (N) 267
Rens v Gutman NO [2002] 4 All SA 30 (C) 168
Reserve Bank of Rhodesia v Rhodesia Railways 1966 (3) SA 656 (SR) 457
Retail Motor Industry Organisation and another v Minister of Water and Environmental Affairs and Another 2014 (3) SA 251 (SCA) 463
Reynolds NO v Mecklenberg (Pty) Ltd 1996 (1) SA 75 (W) 163
Rhino Hotel & Resort (Pty) Ltd v Forbes and Others 2000 (1) SA 1180 (W) 157
Rhodes Fruit Farms Ltd v Williams and Others 1939 CPD 50 183
Ribbens v Ribbens 1965 (1) PH F5 (T) 45
Rich and Others v Lagerwey 1974 (4) SA 748 (A) 425
Rivas v Premier (Transvaal) Diamond Mining Co Ltd 1929 WLD 1 458
Riversdale Divisional Council v Pienaar (1885) 3 SC 252 66
Road Accident Fund v Mdeyide (Minister of Transport intervening) 2008 (1) SA 535 (CC) 44, 45
Road Accident Fund v Mothupi 2000 (4) SA 38 (SCA) 369
Road Accident Fund v Ngubane [2007] SCA 114 (RSA) 415
Road Accident Fund v Rampukar Road Accident Fund v Gumede 2008 (2) SA 534 (SCA); [2007] JDR 1232 SCA 6
Roamer Watch Company SAand Another v African Textile Distributors also t/a MK Patel Wholesale Merchants and Direct Importers 1980 (2) SA 254 (W) 468
Roberts Construction Co Ltd v Willcox Bros (Pty) Ltd 1962 (4) SA 326 (A) 103,116
Roberts v Chairman Local Road Transportation Board, Cape Town, and Another (2) 1979 (4) SA 604 (C) 461
Robinson v Randfontein Estates GM Co Ltd 1925 AD 173 301
Robot Paints, Hardware & Timber Co (Pty) Ltd v South African Industrial Equipment (Pty) Ltd 1975 (4) SA 829 (T) 220
Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) 148, 170
Rosa's Heirs v Inhambane Sugar Estates Ltd 1905 TH 11 106
Rosebank Mall (Pty) Ltd and Another v Cradock Heights (Pty) Ltd 2004 (2) SA 353 (W) 440
Rösemann v General Council of The Bar of South Africa 2004 (1) SA 568 (SCA) 57
Rosslee v Rosslee 1971 (4) SA 48 (O) 129, 167, 202
Rossouw and Another v FirstRand Bank Ltd 2010 (6) SA 439 (SCA) 517

Rothschild and Others v Greenstreet (1884) 2 HCG 229 137
Rowe v Assistant Magistrate, Pretoria and Another 1925 TPD 361 302
Rowe v Rowe 1997 (4) SA 160 (SCA) 234
Rutherford v Ferguson and Others 2000 (2) SA 275 (O) 480
Rutherford v Ferguson en Andere (Standard Bank van Suid-Afrika Bpk toetredend) 1998 (4) SA 90 (O) 356
Ruyobeza and Another v The Minister of Home Affairs and Others 2003 (8) BCLR 920 (C) 378
R v Dhlumayo and Another 1948 (2) SA 677 (A) 345
Ryklof Beleggings (Edms) Bpk and Another v Du Plessis [2006] 4 All SA 474 (C) 81

S

SA Bank of Athens Ltd v Van Zyl 2005 (5) SA 93 (SCA) 257
SA Diamond Workers' Union v Master Diamond Cutters' Association of SA 1948 (2) PH A83 (T) 161
SA Fire and Accident Insurance Co Ltd v Hickman 1955 (2) SA 131 (C) 249
Sager Motors (Pty) Ltd v Patel 1968 (4) SA 98 (RA) 206
SA Instrumentation (Pty) Ltd v Smithchem (Pty) Ltd 1977 (3) SA 703 (D) 236
Sali v National Commissioner of the South African Police Service and Others (CCT164/13) [2014] ZACC 19; 2014 JDR 1186 (CC) 9
Salzmann v Holmes 1914 AD 152 236
SA Motor Industry Employers' Association v SA Bank of Athens Ltd 1980 (3) SA 91 (A) 341
Sampson v Union & Rhodesia Wholesale Ltd (in liquidation) 1929 AD 468 251
Sanan v Eskom Holdings Ltd 2010 (6) SA 638 (GSJ) 231
Sandton Square Finance (Pty) Ltd v Biagi, Bertola & Vasco and Another 1997 (1) SA 258 (W) 136
Santam Versekeringsmaatskappy Bpk v Leibrandt 1969 (1) SA 604 (C) 236
SA Railways & Harbours v Hermanus Municipality 1931 CPD 184 163
Saunders Valve Co Ltd v Insamcor (Pty) Ltd 1985 (1) SA 146 (T) 161
Savage and Others, Ex Parte 1914 CPD 827 47
Sayed v Editor, Cape Times, and Another 2004 (1) SA 58 (C) 244
Sayprint Textiles (Pvt) Ltd and Another v Girdlestone 1984 (2) SA 572 (ZH) 310
Schapiro v Schapiro 1904 TS 673 678 304
Schmidt Plant Hire (Pty) Ltd v Pedrelli 1990 (1) SA 398 (D) 278
Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another 2013 (1) SA 323 (CC); 2013 (1) BCLR 68 (CC) 467
Schultz v Schultz 1917 CPD 459 47
Schweizer Reneke Vleis Mkpv (Edms) Bpk v Die Minister van Landbou en Andere 1971 (1) PH F11 (T) 156
Sciacero & Co v Central South African Railways 1910 TS 119 88
Sealandair Shipping and Forwarding v Slash Clothing Co (Pty) Ltd 1987 (2) SA 635 (W) 64
Seatle v Protea Assurance Co Ltd 1984 (2) SA 537 (C) 312
Sebenza Forwarding & Shipping Consultancy (Pty) Ltd v Petroleum Oil and Gas Corporation of SA (Pty) Ltd t/a Petro SA and Another 2006 (2) SA 52 (C) 241
Sebopetia v S (CC 154/2013) [2016] ZAGPPHC 362 8
Seedat's Executors v The Master (Natal) 1917 AD 302 100
Seetal v Pravitha and Another NO 1983 (3) SA 827 (D) 120

Segal v Diners Club SA (Pty) Ltd 1974 (1) SA 273 (T) 438
Selero (Pty) Ltd and Another v Chauvier and Another 1982 (2) SA 208 (T) 273
Seligman Bros v Gordon 1931 OPD 164 457
Sentrachem Ltd v Prinsloo 1997 (2) SA 1 (A) 334
Service v Service 1968 (3) SA 526 (D) 435
Setlogelo v Setlogelo 1914 AD 221 462
SH v GF 2013 (6) SA 621 (SCA) 380
Shackleton Credit Management Pty Ltd v Microzone Trading 88 CC and Another 2010 (5) SA 112 (KZP) 256
Shell Auto Care (Pty) Ltd v Laggar and Others 2005 (1) SA 162 (D) 229
Shells Annandale Farm (Pty) Ltd v Commissioner, South African Revenue Service 2000 (3) SA 564 (C) 480
Shepard v Emmerich 2015 (3) SA 309 (GJ) 136
Sheriff Pretoria North-East v Flink and Another [2005] 3 All SA 492 (T) 328
Shield Insurance Co Ltd v Deysel and Another 1978 (2) SA 164 (SE) 287
Shield Insurance Co Ltd v Hall 1976 (4) SA 431 (A) 386
Shield Insurance Co Ltd v Zervoudakis 1967 (4) SA 735 (E) 451, 452
Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam and Another; Mphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg and Others 1995 (4) SA 1 (A) 468
Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC and Others 2003 (5) SA 354 (SCA) 355
Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd (27956/2010) [2011] ZAWCHC 439 (16 November 2011) 86
Sibeka and Another v Minister of Police and Others 1984 (1) SA 792 (W) 219
Sibeko and Another v Minister of Police and Others 1985 (1) SA 151 (W) 481
Siemens Ltd v Offshore Marine Engineering Ltd 1993 (3) SA 913 (A) 111
Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) 238
Sillo v Naudé 1929 AD 21 477
Siltek Holdings (Pty) Ltd (in Liquidation) t/a Workgroup v Business Connexion Solutions (Pty) Ltd [2009] 1 All SA 571 (SCA) 29
Silver v Silver 1934 NPD 396 278
Simpson's Motors v Flamingo Motors 1989 (4) SA 797 (W) 51
Sizwe Development v Flagstaff Municipality 1991 (1) SA 677 (TK) 444
Skead v Swanepoel 1949 (4) SA 763 (T) 76
Skeyi v Ordemann 1910 EDL 60 132
Skotnes v SA Library 1997 (2) SA 770 (SCA) 327
Slabber v Blanco and Others 1991 NR 404 (HC) 111
Slabbert v Herbst 1981 (4) SA 257 (NC) 110
Smit v Cramer 1913 OPD 123 109
Smit v Seleka en Andere 1989 (4) SA 157 (O) 487
Smit v Van Tonder 1957 (1) SA 421 (T) 317
Smith v Conelect 1987 (3) SA 689 (W) 234
Smith v Smith 1947 (1) SA 474 (W) 135
Society of Advocates of KwaZulu-Natal v Levin (4564/13) [2015] ZAKZPHC 35; 2015 (6) SA 50 (KZP); [2015] 4 All SA 213 (KZP) 330
Society of Advocates of Natal and Another v Knox and Others 1954 (2) SA 246 (N) 118

Society of Advocates of Natal v De Freitas and Another (Natal Law Society intervening) 1997 (4) SA 1134 (N) 57
Soffiantini v Mould 1956 (4) SA 150 (E) 148
Soller v President of the Republic of South Africa 2005 (3) SA 567 (T) 48
Sonfred (Pty) Ltd v Papert 1962 (2) SA 140 (W) 429
Sonia (Pty) Ltd v Wheeler 1958 (1) SA 555 (A) 99
Soundprops 1160 CC and Another v Karlshavn Farm Partnership and Others 1996 (3) SA 1026 (N) 237
South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others 2007 (1) SA 523 (CC) 120
South African Bureau of Standards v GGS/AU (Pty) Ltd 2003 (6) SA 588 (T) 259
South African Coaters (Pty) Ltd v St Paul Insurance Co (SA) Ltd and Others 2007 (6) SA 628 (D) 280
South African Congo Oil Co (Pty) Ltd v Identiguard International (Pty) Ltd 2012 (5) SA 125 (SCA) 393
South African Football Association v Stanton Woodrush (Pty) Ltd t/a Stan Smidt & Sons and Another 2003 (3) SA 313 (SCA) 375
South African National Parks v Ras 2002 (2) SA 537 (C) 234
South African Railways and Harbours v Chairman, Bophuthatswana Central Road Transportation Board and Another; South African Transport Services v Chairman, Bophuthatswana Central Road Transportation Board and Another 1982 (3) SA 24 (B) 110
South African Reserve Bank and Another v Shuttleworth and Another 2015 (5) SA 146 (CC) 480
South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A) 343
Southern Pride Foods (Pty) Ltd v Mohidien 1982 (3) SA 1068 (C) 156
South Peninsula Municipality v Evans and Others 2001 (1) SA 271 (C) 168
Spangenberg and Another v De Waal [2008] 1 All SA 162 (T) 31
Spencer v Du Toit 1942 (2) PH F66 (O) 136
Sperling v Sperling 1975 (3) SA 707 (A) 32
Spilhaus & Co Ltd v Coreejees 1966 (1) SA 525 (C) 255
Standard Bank of South Africa Ltd v Bekker and Another and Four Similar Cases 2011 (6) SA 111 (WCC) 386
Standard Bank of SA Ltd v Neugarten and Others 1987 (3) SA 695 (W) 170
Standard Bank of SA Ltd v Ngobeni 1995 (3) SA 234 (V) 248
Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation) 1998 (1) SA 811 (SCA) 325
Standard Bank of South Africa Ltd v Saunderson and Others 2006 (2) SA 264 (SCA) 246
Standard Bank of South Africa Ltd v Van Vuuren 2009 (5) SA 557 (T) 257
Standard Credit Corporation Ltd v Bester and Others 1987 (1) SA 812 (W) 64
Standard General Insurance Co Ltd v Eversafe (Pty) Ltd and Others 2000 (3) SA 87 (W) 238
Standard Trading Co (Knitting Mills Ltd) v Lacey Knitting Mills 1972 (3) SA 392 (A) 307
Stander and Others v Schwulst and Others 2008 (1) SA 81 (CC) 50
Stassen v Stassen 1998 (2) SA 105 (W) 39
Steenkamp v SABC 2002 (1) SA 625 (SCA) 342
Stephens v De Wet 1920 AD 279 236
Stern & Co v De Waal 1915 TPD 60 47

Steyn v Schabort en Andere NNO 1979 (1) SA 694 (O) 161
Steytler NO v Fitzgerald 1911 AD 295 97
Stork v Stork (1903) 20 SC 138 66
Strategic Liquor Services v Mvumbi T NO and Others 2010 (2) SA 92 (CC) (2009 (10) BCLR 1046) (CC) 358
Stratgro Capital (SA) Ltd v Lombard NO and Others 2010 (2) SA 530 (SCA) 393
Stratgro Capital (SA) Ltd v Theodorus NO and Others [2009] JOL 24610 (SCA) 392
Stride v Castelein 2000 (3) SA 662 (W) 172
Strydom v Kruger 1968 (2) SA 226 (GW) 256
Sun Packaging (Pty) Ltd v Vreulink 1996 (4) SA 176 (A) 234
Sunset Investments (Pty) Ltd v Bramdaw and Others 1973 (2) SA 415 (D) 260
Sun World International Inc v Unifruco Ltd 1998 (3) SA 151 (C) 468
Supreme Diamonds (Pty) Ltd v Du Bois Regent Neckwear Manufacturing Co (Pty) Ltd v Ehrke 1979 (3) SA 444 (W) 182
Supreme Service Station (1969) (PVT) Ltd v Fox & Goodridge (Pvt) Ltd 1971 (4) SA 90 (RA) 307
Susan v Kikillus 1955 (2) SA 137 (W) 183
S v Lubisi: In re S v Lubisi and Others 2004 (3) SA 520 (T) 120
S v Matisonn 1981 (3) SA 302 (A) 280
S v Siwela 1981 (2) SA 56 (T) 369
S v Wells 1990 (1) SA 816 (A) 310
S v Zuba & 23 Similar Cases (ECJ 2004/004) ZAECHC 3 (19 February 2004) 466
Swart en ’n Ander v Cronje en ’n Ander NNO 1991 (4) SA 296 (E) 281
Swartz v Van der Walt t/a Sentraten 1998 (1) SA 53 (W) 242
Swissborough Diamond Mines (Pty) Ltd and Others v Government of the RSA and Others 1999 (2) SA 279 (T) 367
Szedlacsek v Szedlacsek; Van der Walt v Van der Walt; Warner v Warner 2000 (4) SA 147 (E) 279

T

Taboryski v Schweizer and Apirion NO 1917 WLD 152 103
Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd 1982 (1) SA 398 (A) 145
Taute v Taute 1974 (2) SA 675 (E) 436
Technological Pump Developments CC t/a TPD Water Services v Irving 630 CC t/a B & M Pumps and Another 2007 (3) SA 370 (T) 255
Tedecom Electrical Engineering Services (Pty) Ltd v Berriman 1982 (1) SA 520 (W) 111
Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461 (SCA) 228
Terblanche NO and Others v Damji and Another 2003 (5) SA 489 (C) 65
Terry’s Motors Ltd v Seeck 1962 (2) SA 262 (SWA) 258
Tesven CC and Another v South African Bank of Athens 2000 (1) SA 268 (SCA) 257
Texas Co (SA) Ltd v Cape Town Municipality 1926 AD 467 332
Thabani Zulu & Co (Pty) Ltd V Minister Of Water Affairs and Another 2012 (4) SA 91 (KZD) 124
The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others 2012 (3) SA 325 (SCA) 317

Thelma Court Flats (Pty) Ltd v McSwigin 1954 (3) SA 457 (C) 160
Thembani Wholesalers (Pty) Ltd v September and Another 2014 (5) SA 51 (ECG) 354
Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd 1969 (2) SA 295 (A) 65, 98
Thesen's Steamship Co Ltd v Heitmann 1949 (2) SA 799 (SWA) 136
Thole v Trans-Drakensberg Bank Ltd (under judicial management) 1967 (2) SA 214 (D) 41
Thomas v BMW South Africa (Pty) Ltd 1996 (2) SA 106 (C) 90, 104
Thompson v Barclays Bank DCO 1965 (1) SA 365 (W) 278
Thornhill v Gerhardt 1979 (2) SA 1092 (T) 132
Thoroughbred Breeders' Association v Price Waterhouse 2001 (4) SA 551 (SCA) 334
Thwaites v Van der Westhuizen (1888-1889) 6 SC 259 218
Thyssen v Cape St Francis Township (Pty) Ltd 1966 (2) SA 115 (E) 218
Tiashi SA (Pty) Ltd v Molemela (A465/2007) [2008] ZAFSHC 142 (30 October 2008) 252
Tick v Broude and Another 1973 (1) SA 462 (T) 85
Timmerman v Le Roux 2000 (4) SA 59 (W) 391
Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others 1974 (4) SA 362 (T) 163
TM v ZJ 2016 (1) SA 71 (KZD) 434
Tshisa v Premier of the Free State and Another 2010 (2) SA 153 (FB) 74
Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others 2007 (6) SA 511 (SCA) 477
Todd v FirstRand Bank Ltd and Others [2013] 3 All SA 500 (SCA) 388
Topaz Kitchens (Pty) Ltd v Naboom Spa (Edms) Bpk 1976 (3) SA 470 (A) 300
Topol and Others v LS Group Management Services (Pty) Ltd 1988 (1) SA 639 (W) 313
Toumbis v Antoniou 1999 (1) SA 636 (W) 85
Towers v Paisley 1963 (1) SA 92 (E) 115
Tractor & Excavator Spares (Pty) Ltd v Groenedijk 1976 (4) SA 359 (W) 270
Trans-African Insurance Co Ltd v Maluleka 1956 (2) SA 273 (A) 241
Trans-Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd and Another 1967 (3) SA 632 (D) 241
Transkeian Territories General Council v Mngqibisa 1928 EDL 256 213
Transvaal Canoe Union v Butgereit and Another 1990 (3) SA 398 (T) 479
Tregea and Another v Godart and Another 1939 AD 16 300
Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Ltd 2015 (5) SA 245 (CC) 372
Triomf Kunsmis (Edms) Bpk v AE & CI Bpk en Andere 1984 (2) SA 261 (W) 161
Trope and Others v South African Reserve Bank 1993 (3) SA 264 (A) 230
Truck & Car Co (Pty) Ltd v Ewart 1949 (4) SA 295 (T) 76
Trust Bank of Africa Ltd v Hansa and Another 1988 (4) SA 102 (W) 256
Trustee Insolvent Estate Beckett v Nicolson (1904) 25 NLR 238 227
Trustees of Pretorius v AB (1876) 6 Buch 205 118
Truter and Another v Deysel 2006 (4) SA 168 (SCA) 215
Tshivhase Royal Council and Another v Tshivhase and Another, Tshivhase and Another v Tshivhase and Another 1992 (4) SA 852 (A) 312
Tshona v Principal, Victoria Girls High School and Others 2007 (5) SA 66 (E) 335
Tsung v Industrial Development Corporation of SA Ltd 2006 (4) SA 177 (SCA) 113
Tuckers Land and Development Corporation (Pty) Ltd v Loots 1981 (4) SA 260 (T) 230

Tuckers Land and Development Corporation (Edms) Bpk v Van Zyl 1977 (3) SA 1041 (T) 82
Tulip Diamonds FZE v Minister for Justice and Constitutional Development and Others 2013 (10) BCLR 1180 (CC) 38
Tullen Industries Ltd v A de Sousa Costa (Pty) Ltd and Others 1976 (4) SA 218 (T) 458
TW Beckett & Co Ltd v H Kroomer Ltd 1912 AD 324 86
Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank and Another (CCT 68/10) [2011] ZACC 2; 2011 (5) BCLR 505 (CC); 2011 (3) SA 1 (CC) (22 February 2011) 15, 424
TWK Agriculture Ltd v NCT Forestry Co-operative Ltd and Others 2006 (6) SA 20 (N) 229

U

Umvoti Municipality v ANC Umvoti Council Caucus and Others 2009 (2) SA 388 (N), 2010 (3) SA 31 (KZP) 160
Unilever plc and Another v Polagric (Pty) Ltd 2001 (2) SA 329 (C) 226
Union & SWA Insurance Co Ltd v Hoosein 1982 (2) SA 481 (W) 213
Union Share Agency & Investment Ltd v Spain 1928 AD 74 430
Union Spinning Mills (Pty) Ltd v Paltex Dye House (Pty) Ltd and Another 2002 (4) SA 408 (SCA) 345
Uniroyal Incorporated v Thor Chemicals SA (Pty) Ltd 1984 (1) SA 381 (D) 112
Unit Inspection Company of SA (Pty) Ltd v Hall, Longmore & Co (Pty) Ltd 1995 (2) SA 795 (A) 411
Unitas Hospital v Van Wyk and Another 2006 (4) SA 436 (SCA) 266
United Building Society v Steinbach 1942 WLD 3 136
United Plant Hire (Pty) Ltd v Hills and Others 1976 (1) SA 717 (A) 356
United Watch and Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another 1972 (4) SA 409 (C) 444
Universal City Studios Inc and Others v Network Video (Pty) Ltd 1986 (2) SA 734 (A) 468
Universal City Studios v Movie Time 1983 (4) SA 736 (D) 226
University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others (South African Human Rights Commission as amicus curiae) 2015 (5) SA 221 (WCC) 513
University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others; Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others (CCT 127/15) [2016] ZACC 32 (13 September 2016) 13
University of the Western Cape and Others v Members of the Executive Committee for Health and Social Services and Others 1998 (3) SA 124 (C) 378
Unlawful Occupiers, School Site v City of Johannesburg [2005] 2 All SA 108 (SCA), 2005 (4) SA 199 (SCA) 160
Uprichard v Scottish Ministers and Another [2013] UKSC 21 253
Utah International Inc v Honeth and Others 1987 (4) SA 145 (W) 99

V

V&A Waterfront Properties (Pty) Ltd and Another v Helicopter & Marine Services (Pty) Ltd and Others 2006 (1) SA 252 (SCA) 456

Vaatz v Law Society of Namibia 1991 (3) SA 563 (Nm) 162
Valentine v Wardon (1929) 13 PH F31 (W) 136
Van Aardt v Galway (923/10) [2011] ZASCA 201; 2012 (2) SA 312 (SCA); [2012] 2 All SA 78 (SCA) (24 November 2011) 365
Van Aardt and Another v Weehuizen and Others 2006 (4) SA 401 (N) 472
Van As v Appollus en Andere 1993 (1) SA 606 (C) 212
Van Aswegen and Another v Drotskie and Another 1964 (2) SA 391 (O) 171
Van Aswegen v MacDonald Forman & Co Ltd 1963 (3) SA 197 (O) 315
Van Coppenhagen v Van Coppenhagen 1947 (1) SA 576 (T) 325
Van der Merwe NO v Van der Merwe 1973 (1) SA 436 (C) 67
Van der Merwe v Bonaero Park (Edms) Bpk 2000 (4) SA 329 (SCA) 431
Van der Merwe v Meyer 1971 (3) SA 22 (A) 149
Van der Schyff v Taylor 1984 (2) SA 688 (C) 239
Van der Walt v Road Accident Fund (2014/12763) [2015] ZAGPJHC 86 (20 May 2015) 82
Van Heerden v Muir 1955 (2) SA 376 (A) 76
Van Niekerk and Another v Van Niekerk and Another 2008 (1) SA 76 (SCA) 343
Van Rensburg v Coetzee 1979 (4) SA 655 (A) 69
Van Ryneveld v Paxinos 1964 (3) SA 754 (O) 110
Van Staden v Venter 1992 (1) SA 552 (A) 82
Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration 1987 (4) SA 569 (A) 340
Van Wyk and Another v Boedel Louw en ’n Ander 1957 (3) SA 481 (C) 206
Van Wyk v The State (20273/2014) 350
Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae) 2008 (2) SA 472 (CC) 372
Van Wyngaardt NO v Knox 1977 (2) SA 636 (T) 427
Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (in liquidation) 1987 (4) SA 883 (A) 97, 109, 112
Venmop 275 (Pty) Ltd and Another V Cleverlad Projects (Pty) Ltd and Another 2016 (1) SA 78 (GJ) 238
Venter and Others NNO v Barritt; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd 2008 (4) SA 639 (C) 231
Venter v Du Plessis 1980 (3) SA 151 (T) 272
Venter v Kruger 1971 (3) SA 848 (N) 258
Venter v Standard Bank of South Africa [1999] 3 All SA 278 (W) 66
Verkouteren v Savage 1918 AD 143 244
Vermaak v Road Accident Fund (2509/03, ECJ020/2006) [2006] ZAECHC 10 64
Verster v Verster 1975 (3) SA 493 (W) 436
Victor Products (SA) (Pty) Ltd v Lateulere Manufacturing (Pty) Ltd 1975 (1) SA 961 (W) 82
Viljoen v Federated Trust Ltd 1971 (1) SA 750 (O) 218
Visagie v Gerryts en ’n Ander 2000 (3) SA 670 (C) 284
Volkskas Bank Ltd v Wilkinson & Three Similar Cases 1992 (2) SA 388 (C) 183
Volkskas Bpk v Scott 1981 (2) SA 471 (E) 427
Volkskas Motor Bank Ltd v Leo Mining Raise Bone CC and Others 1992 (2) SA 50 (W) 56
Volkwyn v Thomsen 1941 (2) PH F108 168
Von Gent v Venter 1946 TPD 506 212

Von Gordon v Von Gordon 1961 (4) SA 211 (T) 278
Vorster v John Jack Ltd 1925 TPD 793 54
Vorster v Keyser and Keyser 1943 WLD 150 106
Vumazonke and Others v MEC for Social Development and Welfare, Eastern Cape Province (ECJ 050/2004) [2004] ZAECHC 40 (25 November 2004) 467

W

Wahl v Prinswil Beleggings (Edms) Bpk 1984 (1) SA 457 (T) 316
Walbrugh v Newmark 1912 CPD 725 230
Wannenburg v MadamuTechologies (Pty) Ltd (AR87/2012) [2012] ZAKZPHC 35 (13 June 2012) 82
Ward v Burgess and Another 1976 (3) SA 104 (TK) 106
Webster v Mitchell 1948 (1) SA 1186 (W) 459
Wedge Steel (Pty) Ltd v Wepener 1991 (3) SA 444 (W) 321
Weissglass NO v Savonnerie Establishment 1992 (3) SA 928 (A) 111
Welcome Estate Ltd v Muller (1911) 28 (4) SALJ 521 183
Wellcome Foundation Ltd v Cape Industries (SA) (Pty) Ltd 1976 BP 505 276
Wendy Machanik Property Holdings CC v Guiltwood Properties (Pty) Ltd 2007 (5) SA 90 (W) 242
Werdmuller v Joubert (1900) 14 EDC 164 254
West Rand Estates Ltd v New Zealand Insurance Co Ltd 1926 AD 173 311
Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd 1986 (2) SA 555 (A) 356
Whitehead's Trustee v Van Eyk 1884 (4) EDC 4 208
Whitehead v Whitehead 1993 (3) SA 72 (SE) 435
Whitfield v Van Aarde 1993 (1) SA 332 (E) 117
Wichmann v Standard Bank van Suid-Africa Bpk en Andere [2002] 1 All SA 558 (T) 382
Wightman t/a J W Construction v Headfour (Pty) Ltd 2008 (3) SA 371(SCA) 149
Wildlife and Environment Society of SA v MEC for Economic Affairs, Environment and Tourism, EC Provincial Government and Others [2005] 3 All SA 389 (EC) 327
Wilken and Others NNO v Reichenberg 1999 (1) SA 852 (W) 383
Wilson v South African Railways and Harbours 1981 (3) SA 1016 (C) 206
Winlite Aluminium Windows & Doors (Pty) Ltd v Pyramid Freight (Pty) Ltd t/a UTI 2011 (1) SA 571 (SCA) 417
Winsor v Dove 1951 (4) SA 42 (N) 170
Wipperman v Wipperman 1916 EDL 411 47
Witwatersrand and District Nursery Trade Association and Others v Herholdt 1956 (4) SA 361 (T) 160
Wollach v Barclays National Bank Ltd 1983 (2) SA 543 (A) 426
Wolman and Others v Wolman 1963 (2) SA 452 (A) 41
Women's Legal Centre Trust v President of the Republic of South Africa and Others 2009 (6) SA 94 (CC) 96
Woodward v Chetvertakov, E.D. Mich., No. 2:13-cv-11943-GER-MKM 144
World Food Programme v Emile and Another (13927/2010) [2011] ZAGPJHC 141 (10 October 2011) 47
Wright v Westelike Provinsie Kelders Bpk 2001 (4) SA 1165 (C) 319

W v W 1976 (2) SA 308 (W) 299
Wynne v Divisional Commissioner of Police and Others 1973 (2) SA 770 (E) 445

X

Xayimpi v Chairman Judge White Commission [2006] 2 All SA 442 (E) 357

Y

Yarram Trading CC t/a Tijuana Spur v ABSA Bank Ltd 2007 (2) SA 570 (SCA) 50
Yates Investments (Pty) Ltd v Commissioner for Inland Revenue 1956 (1) SA 364 (A) 56
Yellow Star Properties 1020 (Pty) Ltd v MEC, Department of Development Planning and Local Government, Gauteng 2009 (3) SA 577 (SCA) 217
Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd 1977 (4) SA 682 (C); 1978 (2) SA 391 (C) 9
Yannakou v Apollo Club 1974 (1) SA 614 (A) 344
Yu Kwam v President Insurance Co Ltd 1963 (1) SA 66 (T) 41

Z

Za v Smith and Another 2015 (4) SA 574 (SCA) 25
Zeda Car Leasing (Pty) Ltd t/a Avis Fleet Services v Pillay 2007 (3) SA 89 (D) 187
Zietsman v Electronic Media Network Ltd and Another (771/10) [2011] ZASCA 169 (29 September 2011) 171
Zondi v MEC, Traditional and Local Government Affairs, and Others 2006 (3) SA 1 (CC) 310, 311
Zulu v Minister of Works KwaZulu and Others 1992 (1) SA 181 (D) 477
Zweni v Minister of Law and Order 1993 (1) SA 523 (A) 340
Zwyssig v Zwyssig 1997 (2) SA 467 (W) 85

Table of legislation

A

Administration of Estates Act 66 of 1965 483
section 96(3) 483
Admiralty Jurisdiction Regulation Act 105 of 1983 61, 495
section 1 495
section 2 61
Age of Majority Act 57 of 1972 139
Agricultural Credit Act 28 of 1966 216
Alienation of Land Act 68 of 1981 595, 598
Amendment of Certain Laws Amendment Act 20 of 2009 497
Apportionment of Damages Act 34 of 1956 446, 449
section 2 446
section 2(2) 447
section 2(4)(a), (b) 446
section 2(6)(a) 449
Arbitration Act 42 of 1965 211
section 6(1) 211
Attorneys Act 53 of 1979 57, 58
section 1 57
section 8(1) 58
Audit Arrangements Act 122 of 1992 124

B

Bills of Exchange Act 34 of 1964 33, 34, 574
section 44 33
section 48 34
section 48(2)(c) 574
Black Administration Act 38 of 1927 124, 497
section 12 497, 502

C

Child Justice Act 75 of 2008 40
section 7(1) 40
Children's Act 38 of 2005 27, 31, 32, 39, 40, 42, 61, 139, 496, 502, 631
section 10 631
section 14 42, 631
section 15(1) 42
section 15(2) 42
section 17 27, 40
section 18(3)(b) 40
section 18(4) 40
section 19 40
section 20 39, 40

section 21 39
section 42 496
section 42(1) 61
Civil Proceedings Evidence Act 25 of 1965 205, 268, 290
section 14 268
section 15 205
section 22 290
Close Corporations Act 69 of 1984 71, 137, 394
section 7 71
section 25 137
section 31 394
section 34A 394
Collective Investments Scheme Control Act 45 of 2002 137
section 101(3) 137
Companies Act 61 of 1973 87, 164
Companies Act 71 of 2008 36, 85, 86, 87, 137, 502
section 23(3) 86, 87, 137
Competition Act 89 of 1998 61, 331, 495
section 4(1) 331
section 36 61
section 37(1) 495
section 61(1) 495
Constitutional Court Complementary Act 13 of 1995 12
section 16 12
Constitution Seventeenth Amendment Bill of 2010 3
Constitution of the Republic of South Africa, 1996 4, 119, 124
Schedule 6 5, 6, 9
Section 12(1) 97, 110
section 16(4)(a) 5
section 16(6)(a) 5
section 9(1) 15, 43
section 9(3) 15, 43
section 16(1) 5
section 16(5)(c) 5
section 26(1) 15, 180, 196, 386, 516
section 26(3) 68
section 28 269
section 28(1)(h) 42
section 33 119
section 34 15, 505
section 35 472
section 36 469
section 38 14, 36, 39, 218, 483
section 38(a) 38, 483
section 38(b) 483
section 38(c) 37, 483
section 38(d) 483
section 38(e) 483
section 39(2) 120, 214, 349

section 58 49
section 58(1) 49
section 58(1)(b) 49
section 71 49
section 71(1) 49
section 117 49
section 166 3
section 166(c) 8
section 167(1) 9, 10
section 167(3) 367
section 167(4) 10, 62, 96
section 167(4)(e) 63, 352
section 167(6)(a) 63, 96, 352
section 167(6)(b) 353
section 167(7) 367
section 168 9
section 168(1) 9
section 169 96
section 169(a)(i) 96
section 169(a)(ii) 96
section 169(b) 96
section 169(2) 7
section 170 349, 352
section 172(1)(b) 483
section 172(2)(a) 352, 366
section 172(2)(b) 353
section 172(2)(d) 353
section 172(2)(2) 365
section 173 120, 121, 311, 351
section 174(6) 10, 11
section 178(1)(a) 10
Constitution Seventeenth Amendment Act 72 of 2013 xxxvi, 3, 5, 7, 9, 10, 32, 351, 367
Consumer Protection Act 68 of 2008 xxxii, 15,
30, 52, 384, 411, 497, 512, 521
section 1 525
section 5(2)(d) 524, 525
section 16 526
section 17 526
section 22 526
section 56 527
section 61 527
section 70 523
section 70(3) 524
section 72 528
section 72(1)(d) 526
section 73(1) 528
section 74 524, 528
section 79 52
section 80 528
section 100 528

section 102 526
section 102(1) 528
section 115(b)(i) 524
section 115(b)(ii) 524
section 116(1) 528
section 116(2) 528
section 118 524
Contingency Fees Act 66 of 1997 331
Correctional Services Act 8 of 1959 138
section 87(3) 138
Correctional Services Act 111 of 1998 138
section 99(4) 138
Credit Agreements Act 75 of 1980 250, 399
Customs and Excise Act 91 of 1964 123, 125
section 96 125

D

Deeds Registries Act 47 of 1937 164
Defence Act 44 of 1957 14, 124
section 113(1) 14
Diplomatic Immunities and Privileges Act 37 of 2001 47
section 3 47
section 4 47
section 5 47
section 6 47
section 7 47
section 9 47
Divorce Act 70 of 1979 31, 98, 113, 190,
198, 261
section 1(1) 113
section 2 31, 97
section 2(1) 114
section 2(1)(a) 114
section 2(1)(b) 114
section 2(2) 114, 115
section 2(4) 114
section 4 32
section 7(2) 32
section 7(3) 32, 190
section 7(4) 32, 190
section 7(5) 32, 190
section 7(6) 32, 190
section 9 32, 190
Domestic Violence Act 116 of 1998 473, 476
section 4(7) 475
section 5(2) 475
section 5(3) 475
section 5(4) 475
section 7 473

section 7(1) 475
section 8(1) 475
Domicile Act 3 of 1992 101, 102, 114
section 1 114
section 1(2) 101
section 3(1) 102

E

Education Affairs Act 70 of 1988 124
Education and Training Act 90 of 1979 124
Electoral Commission Act 51 of 1996 61
section 18 61
Electronic Communications and Transactions Act 25 of 2002 140, 526
section 44 526
Extension of Security of Tenure Act 62 of 1997 68

G

General Law Amendment Act 62 of 1955
123, 125
section 35 125
General Law Fourth Amendment Act 132 of 1993 43
section 29 43

H

Hire Purchase Act 36 of 1942 399

I

Income Tax Act 58 of 1962 61
section 86A 61
Insolvency Act 24 of 1936 45, 46, 164
section 23 46
section 54 45
Institution of Legal Proceedings Against Certain Organs of the State Act 40 of 2002
14, 123, 124
section 1(4) 124
section 3 124, 195
section 3(2)(a) 124, 125
section 3(2)(b) 124
section 4 124
section 4(1)(a) 124
section 4(2) 124
section 4(2)(b) 124
section 5 124
section 5(1)(b)(ii) 124
section 5(2) 124
Intelligence Services Act 38 of 1994 124

Interim Rationalisation of Jurisdiction of High Courts Act 41 of 20016
Interpretation Act 33 of 1957 84, 129, 130
section 2 84
section 4 129, 130

J

Judicial Matters Amendment Act 42 of 2013 438
section 2(a) 438
section 2(b) 438
Judicial Matters Amendment Act 24 of 2015 127
Judicial Service Commission Act 9 of 1994 10
Jurisdiction of Regional Courts Amendment Act 31 of 2008 178, 190
Justices of the Peace and Commissioners of Oaths Act 16 of 1963 158
section 10 159

L

Labour Relations Act 66 of 1995 61, 502
section 151 61
Law of Evidence Amendment Act 45 of 1988 161
Legal Practice Act 28 of 2014 58, 332
section 35 332
Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970 14, 124
section 2(1)(a) 14
Local Government: Municipal Structures Act 117 of 1998 50, 635
section 28(1)(b)(ii) 50
section 28(2) 50
Local Government: Municipal Systems Act 32 of 2000 138
section 115(3) 138
Long-term Insurance Act 52 of 1998 137
section 16(3) 137

M

Magistrates' Courts Act 32 of 1944 130, 153, **166** 4, 12, 57, 63, 70, 84, 93, 128, 195, 288, 290, 306, 309, 318, 320, 427, 435, 438, 454
section 1 4, 57
section 2 63
section 2(1)(iA) 72
section 4(3) 94
section 13 12
section 13A 12
section 17 389
section 21 57
section 22 57
section 28 75, 83, 84

section 28(1)(a) 76
section 28(1)(b) 84, 92
section 28(1)(c) 92, 93
section 28(1)(d) 76, 84
section 28(1)(e) 93
section 28(1)(e)(i) 93
section 28(1)(e)(ii) 95
section 28(1)(e)(iii) 95
section 28(1)(e)(iv) 95
section 28(1)(f) 94
section 28(1)(g) 195
section 28(2) 84
section 28(1A) 95
section 29 63, 75
section 29(1)(a) 67
section 29(1)(b) 68, 80
section 29(1)(c) 69
section 29(1)(d) 69, 427
section 29(1)(e) 513
section 29(1)(f) 70
section 29(1)(fA) 71
section 29(1)(g) 71
section 29(1A) 63, 67, 68, 69, 70, 71
section 29(1B) 72, 95, 190
section 29(1B)(a) 72, 435
section 29(1B)(b) 72
section 29(1C) 72
section 30*bis* 112
section 30 381
section 30(1) 438, 453, 454
section 30(3) 438
section 31 181, 196
section 32 197
section 35(2) 94
section 36 318
section 36(2) 320
section 37(1) 73
section 37(2) 74, 80
section 37(3) 74
section 38 64
section 38(1) 77
section 38(2) 77
section 39 64, 78
section 40 72
section 41 442
section 41(1) 443
section 42 442, 443
section 42(1) 442, 443
section 43 442
section 43(1) 73

section 45 64
section 45(1) 75, 80, 94
section 45(2) 77
section 46 75, 94
section 46(2)(a) 64, 80
section 46(2)(b) 80
section 46(2)(c) 64, 81
section 46(2)(c)(iii) 64
section 46(2)(d) 80
section 47(1) 222
section 47(2) 222
section 47(3) 222
section 48 309
section 48(b) 309
section 48(c) 309
section 51bis 283
section 51 306
section 52 289
section 52(1) 289, 290
section 52(2) 290
section 53 288, 289
section 53(1) 288
section 53(2) 290
section 54 291
section 54(1) 294
section 54(1)(e) 219
section 55 397
section 56 128
section 57 419
section 57(1) 422
section 57(2) 422
section 57(3) 423
section 58 419
section 58(1)(b)(ii) 422
section 59 516
section 63 198
section 65 13
section 65A 403
section 65A(1) 422
section 65A(1)(a) 403
section 65A(2) 403
section 65A(6) 403
section 65A(7) 403
section 65A(8) 404
section 65A(9) 404
section 65A(10)(a) 404
section 65A(10)(a)(i) 404
section 65A(10)(b) 404
section 65A(10)(c)(i) 404
section 65A(11) 404

section 65D 404
section 65J 520
section 65J(1)(a) 396
section 65J(1)(b)(i) 394
section 65J(1)(b)(ii) 396
section 65J(2)(a) 13, 395
section 65J(2)(b) 13
section 65J(2)(b)(ii) 395
section 65J(8) 396
section 66(8) 391
section 67 389
section 68 390
section 69 400
section 69(2) 93, 94
section 72 397
section 72(1) 397
section 74 406
section 74(1)(b) 406
section 74A(1) 406
section 74A(5) 406
section 74B(1)(a) 407
section 74B(1)(b) 407
section 74B(1)(c) 407
section 74B(1)(e) 407
section 74C 407
section 74D 407
section 74F(2) 407
section 74G(1) 407
section 74G(2) 408
section 74G(3) 408
section 74G(10)(a) 407
section 74G(10)(b) 408
section 74I(1) 408
section 74I(2) 408
section 74J(1) 408
section 74J(3) 408
section 80 326
section 80(2) 327
section 82 344
section 83 342, 344, 350
section 87 362
section 106 20
section 107 140
section 107(1) 140
section 107(2) 140
section 107(3)(a) 140
section 107(3)(b) 140
section 107(4) 140
section 108 118
section 109 194

section 110 349, 352
section 110(1) 349
section 110(2) 349
section 110(2)(a) 349
Magistrates' Courts Amendment Act 81 of 1997 13, 402
Maintenance Act 99 of 1998 61, 496
section 3 61
Maritime Zones Act 15 of 1994 9
Matrimonial Property Act 88 of 1984 43, 70, 190
section 2 190
section 9 190
section 11 43
section 15(2) 70
section 15(3) 70
section 16(1) 70
section 17(1) 43
section 17(1)(a) 43
section 17(1)(b) 44
section 17(1)(c) 44
section 17(2) 44
section 17(3) 44
Mediation in Certain Divorce Matters Act
24 of 1987 32, 437
Mental Health Act 18 of 1973 124
Mental Health Care Act 17 of 2002 45
Merchant Shipping Act 57 of 1951 124

N

National Credit Act 34 of 2005 70, 123, 125, 195, 212, 257, 322, 379, 411, 512
section 1 70
section 4 (1) 512
section 4(1)(b) 512
section 8 525
section 8(5) 512
section 8(6) 512
section 40 518
section 59(3) 513
section 64(1)(b) 514
section 79(1) 519
section 85 519
section 86 141, 517
section 86(1) 519
section 86(2) 520
section 86(4)(b)(ii) 520
section 86(7) 257
section 86(8)(b) 520
section 86(10) 125, 141, 514
section 90 513
section 90(2)(k)(vi)(aa) 64, 513

section 90(2)(k)(vi)(bb) 513
section 101(1)(d) 325
section 103(5) 325, 519
section 105 322
section 127 516
section 129 125, 180, 195, 257, 381, 514, 516, 517, 518, 519, 520
section 129(a) 125
section 129(1) 212, 257, 520
section 129(1)(a) 514
section 129(1)(b) 514, 518
section 129(7) 517
section 130 125, 180, 257, 514, 517, 518, 519, 520
section 130(1) 381, 517
section 130(1)(a) 518
section 130(2) 517
section 130(3) 517
section 130(iv)(b) 515
section 148 513
section 168 524
section 172(2) 404, 513
National Environmental Management Act 107 of 1998 483
section 32(1) 483
National Water Act 36 of 1998 497
section 146 497

O

Older Persons' Act 13 of 2006 476
section 26 476

P

Patents Act 57 of 1978 497
section 17(1) 497
Pension Funds Act 24 of 1956 503
section 7(2) 503
Petition Proceedings Replacement Act 35 of 1976 158
Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 49, 50
section 5 49
section 9 50
section 11 49
Prescribed Rate of Interest Act 55 of 1975 126, 127, 128
section 11 27
section 1(2) 639
section 2A(2)(a) 128
Prescription Act 68 of 1969 105, 213, 215, 216, 401, 511
section 1 105
section 11 214
section 11(a) 214

section 11(b) 214
section 11(c) 214
section 11(d) 214
section 12 215
section 12(1) 215
section 12(2) 215
section 12(3) 215
section 13 215
section 13(1) 216
section 14 216, 511
section 14(1) 216
section 14(2) 216
section 15 216
section 15(1) 216
section 15(2) 216
section 17(1) 213
section 17(2) 213
Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 68
Prevention of Organised Crime Act 121 of 1998 335, 472, 473
Schedule 1 473
section 37 472
section 38 473
sections 38–47 473
section 38(2) 473
section 39 473
section 48(1) 473
section 48(2)–(4) 473
section 56 473
Prince Edward Islands Act 43 of 1948 4
section 1(2) 4
Promotion of Access to Information Act 2 of 2000 ('PAIA') 265, 483
section 50 265
section 82 483
Promotion of Administrative Justice Act 3 of 2000 119, 483
section 8 483
Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000 483
section 21 483
Public Service Act 103 of 1994 124

R

Regional Courts Amendment Act 31 of 2008 4, 12, 72, 178
Renaming of High Courts Act 30 of 2008 6
Repeal of the Black Administration Act and Amendment of Certain Laws Amendment Act 20 of 2009 497
Restitution of Land Rights Act 22 of 1994 61
section 22 61
Right of Appearance in Courts Act 62 of 1995 156, 182, 184, 187
section 4 156
section 4(2) 187

Road Accident Fund Act 56 of 1996 24, 123, 192, 213
section 17(4)(c)(ii) 192
section 21(1) 25
section 21(2) 25
section 23 213
section 23(1) 213
section 23(2) 213
section 24(6) 123
Road Accident Fund Amendment Act 19 of 2005 192
section 17(1) 192
section 17(1A) 192
section 17(4)(c)(i) 192
section 17(4A)(a) 192
section 17(4B) 192
Rules Board for Courts of Law Act 107 of 1985 12

S

Sheriffs Act 90 of 1986 132
section 3 132
section 5 132
section 6 132
Short Process Courts and Mediation in Certain Civil Cases Act 103 of 1991 502
Short-term Insurance Act 53 of 1998 137
Small Claims Court Act 61 of 1984 484, 485, 486, 487, 490, 491, 492
section 2 484
section 3 487
section 7 484, 486
section 7(4) 484, 486
section 9 484
section 11 484
section 12 484
section 14 484
section 14(2) 484
section 15 484, 485
section 15(a) 484, 490
section 16 485
section 18 485
section 18(1) 485
section 23 487
section 29 485, 487, 490
section 29(1) 490
section 29(1)(a) 485
section 29(2) 486, 491
section 29(3) 486
section 37 492
section 46 487
South African Citizens in Antarctica Act 55 of 1962 4
South African National Life Assurance Company Incorporation (Private) Act 3 of 1954 137

section 91 137
South African Police Service Act 68 of 1995 124
Special Investigating Units and Special Tribunals Act 74 of 1996 496
section 2 496
section 7(3) 496
State Liability Act 20 of 1957 124, 384, 405, 632
section 1 632
section 2(2) 124
section 3 140, 384, 405
Superior Courts Act 10 of 2013 xxxii, xxxvi, 3, 6, 8, 12, 19, 48, 112, 130, 133, 138, 167, 279, 350, 354, 365, 373, 480
section 1 48, 354
section 5 9
section 5(1)(b) 9
section 6 3
section 6(1) 7
section 6(3)(c) 7, 8
section 6(4) 350
section 11(1)(a) 11
section 12(3) 373
section 13(1)(a) 350, 354
section 13(1)(b) 350, 354
section 13(2)(b) 373
section 13(3)(a) 373
section 13(5) 373
section 14(3) 350
section 14(4)(b) 373
section 14(5)(a) 373
section 14(8) 373
section 15 352, 365
section 16 482
section 16(1) 358
section 16(1)(a)(i) 354
section 16(1)(a)(ii) 354
section 16(1)(b) 350
section 16(2)(a) 370
section 16(2)(a)(i) 370
section 17 xxxvi
section 17(1) 370
section 17(2)(a) 354
section 17(2)(b) 354, 358
section 17(2)(c) 358
section 17(2)(d) 358
section 17(2)(f) 358
section 17(3) 356
section 17(6)(a) 355
section 18 xxxvi
section 18(1) 347
section 18(2) 461

section 18(3) 461
section 18(4) 348
section 18(5) 348
section 19 96
section 19(b) 368
section 21 97
section 21(1) 96, 354
section 21(1)(a) 343
section 21(1)(b) 374
section 21(1)(c) 479, 480
section 21(3) 112
section 22 340
section 24 167
section 24(a) 202
section 24(b) 202
section 25(1) 48
section 28 113
section 32 299
section 35 281
section 35(2) 281
section 35(3) 281
section 35(4) 281
section 36 281
section 36(1) 299
section 36(2) 299
section 36(4) 281
section 36(5) 280
section 37 281
section 38 305
section 42(2) 109
section 43(2) 133
section 44(1) 138
section 44(1)(a) 138
section 47 279
section 47(1) 48
section 47(2) 48, 49
section 50(1) 8, 60, 354
section 50(2) 8, 60
section 52(1) 8
Supreme Court Act 59 of 1959 6, 8, 48
section 6(2) 6
section 19 96, 97
section 19(1) 96
section 19(1)(a) 97
section 19(1)(a)(iii) 479
section 19(2)(b) 374
section 21A 371
section 25(1) 48
section 27 167
section 27(a) 202

section 27(b) 202
section 28(1) 113
section 39 382
section 42 282
section 42(1) 281

T

Tax Administration Act 28 of 2011 61, 495
Chapter 9 Part E 61
section 116 61, 495
section 118 495
Transport (Co-ordination) Act 44 of 1948 634
section 3 634

U

Usury Act 73 of 1968 322

V

Vexatious Proceedings Act 3 of 1956 81

Table of rules

Constitutional Court Rules

rule 16(2) 353, 356
rule 16(4) 353
rule 16(5) 353
rule 17 63
rule 18 352, 366
rule 18(1) 352
rule 18(2) 352
rule 19 350, 351, 353, 354, 365, 366
rule 19(1) 353, 366
rule 19(2) 350, 366
rule 19(3)(a)–(d) 351, 366
rule 19(4)(a) 351, 366
rule 19(4)(b) 366
rule 19(5) 366
rule 19(6) 351
rule 19(6)(a) 367
rule 19(6)(b) 367
rule 19(6)(c) 367
rule 20 351, 367
rule 20(1)(c) 367, 368
rule 20(1)(a)–(c) 367
rule 20(2) 368
rule 20(2)(a)–(i) 367

rule 20(3)(a) 368
rule 20(3)(b) 368
rule 20(4) 368
rule 20(5) 368
rule 20(6) 368
rule 21 366
rule 30 370
rule 31 369, 370
rule 32(2) 366

High Court Rules

Form 2 173, 569
Form 2(a) 164, 173, 570
Form 3 427, 428, 432
Form 7 450, 451
Form 8 53
Form 9 185
Form 10 185
Form 11 268, 269
Form 13 271, 611
Form 14 271, 612
Form 15 225, 593
Form 16 279, 280, 281
Form 17 436
Form 18 383, 564
Form 19 383
Form 20 386, 564
Form 21 387
Form 26 329
rule 1 130, 202
rule 4 132, 136, 144, 330
rule 4(1)(a) 134
rule 4(1)(a)(i) 134, 135, 568
rule 4(1)(a)(ii) 135
rule 4(1)(a)(iii) 136
rule 4(1)(a)(iv) 136
rule 4(1)(a)(v) 137
rule 4(1)(a)(vi) 137
rule 4(1)(a)(vii) 137
rule 4(1)(a)(viii) 137
rule 4(1)(a)(ix) 138
rule 4(1)(b) 131, 138
rule 4(1)(c) 138
rule 4(1)(d) 133, 138
rule 4(2) 135, 141
rule 4(9) 138
rule 4(10) 136
rule 4A 36, 134, 199
rule 5 141, 142

rule 5(2) 142
rule 5(3) 142
rule 6 145, 155, 164, 375, 434, 479
rule 6(1) 164
rule 6(2) 172
rule 6(3) 158
rule 6(4) 155, 172
rule 6(4)(b) 174
rule 6(5)(a) 164
rule 6(5)(b) 157, 167, 315, 399, 570, 601
rule 6(5)(b)(iii) 157
rule 6(5)(c) 167
rule 6(5)(d) 162
rule 6(5)(e) 162, 168
rule 6(5)(f) 169, 233
rule 6(5)(g) 170
rule 6(6) 171
rule 6(7) 171
rule 6(8) 174
rule 6(9) 164
rule 6(11) 164
rule 6(12) 173
rule 6(12)(b) 161
rule 6(12)(c) 155
rule 6(13) 167
rule 6(14) 440
rule 6(15) 162, 163
rule 7 55
rule 7(1) 56
rule 7(2) 56, 362
rule 8 33, 181, 424, 427, 432
rule 8(1) 427
rule 8(4) 428
rule 8(5) 428
rule 8(7) 429
rule 8(8) 430
rule 8(9) 430
rule 8(10) 430, 431
rule 8(11) 431
rule 9 438
rule 10 440, 441
rule 10A 442
rule 10(1) 441
rule 10(2) 441
rule 10(3) 441
rule 10(5) 442
rule 11 440,443
rule 12 440,444
rule 13 440,446, 449, 451, 452
rule 13(1)(a) 450

rule 13(1)(b) 450, 452
rule 13(2) 451
rule 13(3)(c) 451
rule 13(7) 451
rule 14 51, 52, 53, 252, 632
rule 14(1) 52
rule 14(2) 53, 632, 634
rule 14(3) 634
rule 14(5)(a) 52
rule 14(5)(b) 52
rule 14(5)(d) 53
rule 14(12) 52
rule 16(1) 57
rule 16(2) 57, 279
rule 16(3) 57
rule 16(4) 199
rule 16(4)(a) 57
rule 16(4)(b) 57
rule 17 43, 181, 185, 516
rule 17(1)(a) 185
rule 17(1)(b) 185
rule 17(2) 185
rule 17(2)(b) 182, 184
rule 17(3) 185, 210
rule 17(4) 15, 43, 207
rule 17(4)(b) 631
rule 18 182, 183, 184, 186, 187, 196, 203, 225, 227, 236, 636
rule 18(1) 185, 187
rule 18(2) 188
rule 18(3) 188, 208
rule 18(4) 188, 189, 190, 193, 196, 231, 237, 258, 553
rule 18(5) 204, 205
rule 18(6) 189, 553
rule 18(8) 190, 553
rule 18(9) 190
rule 18(10) 191, 553
rule 18(11) 192, 553
rule 18(12) 187, 189, 192, 193, 210, 553
rule 19 199
rule 19(1) 201
rule 19(2) 202
rule 19(3) 199, 200, 577, 578
rule 19(4) 200
rule 19(5) 202
rule 20 227
rule 20(1) 227, 246
rule 21(1) 244
rule 21(2) 225, 277, 278, 279
rule 21(4) 53, 279
rule 21(5) 279

rule 22 203, 418
rule 22(1) 203
rule 22(2) 203, 210, 236
rule 22(3) 210, 242
rule 22(4) 207
rule 22(5) 210
rule 23 189, 193
rule 23(1) 229
rule 23(2) 235, 269
rule 23(3) 232, rule 23(4) 233
rule 24 220, 221
rule 24(1) 220
rule 24(2) 220
rule 24(3) 220
rule 24(5) 221
rule 25 222, 250
rule 25(1) 222, 233
rule 25(2) 250, 263
rule 25(5) 223
rule 26 202, 222, 227, 224, 245, 246, 250, 251
rule 27 252
rule 27(1) 251, 315
rule 27(3) 371, 133, 238, 239, 251
rule 28 158, 223, 240
rule 28(1) 603
rule 28(3) 603
rule 29 224, 263
rule 29(b) 250
rule 30 189, 193, 206, 225, 231, 236, 238, 242
rule 30(1) 210
rule 30(3) 237
rule 30(4) 237
rule 30A 238, 239, 272
rule 312 60, 421
rule 31(b) 421
rule 31(1) 198, 260, 419, 421, 628
rule 31(1)(a) 198
rule 31(1)(b) 260
rule 31(2) 245
rule 31(2)(a) 243, 245, 247, 314
rule 31(2)(b) 248, 313, 314, 315, 317, 319
rule 31(3) 227, 246
rule 31(4) 245, 247
rule 31(5) 245, 247, 314
rule 31(5)(a) 243, 247, 248
rule 31(5)(b) 248, 385
rule 31(5)(d) 248, 313, 314
rule 31(5)(e) 248
rule 32 182, 252
rule 32(1) 253, 259

rule 32(2) 255, 256
rule 32(2)(b) 318
rule 32(3) 257
rule 32(4) 258
rule 32(5) 258
rule 32(7) 258
rule 32(9) 259
rule 32(9)(a) 259
rule 32(9)(b) 259
rule 33 341, 363, 481, 479
rule 33(1) 481, 482
rule 33(2) 481
rule 33(2)(a) 481
rule 33(3) 481
rule 33(4) 219, 292, 305, 481, 482
rule 33(6) 482
rule 34 204, 261, 411, 415, 416, 417
rule 34A 21, 433
rule 34A(1) 433
rule 34A(2) 434
rule 34A(4)(a) 434
rule 34A(4)(b) 434
rule 34A(5) 434
rule 34A(8) 434
rule 34A(10) 434
rule 34(1) 416
rule 34(2) 416
rule 34(4) 416
rule 34(5) 417
rule 34(6) 418
rule 34(7) 418
rule 34(8) 418
rule 34(12) 417
rule 34(13) 417
rule 35 265, 267, 291, 296, 605
rule 35(1) 155, 265, 266, 605
rule 35(2) 238, 266, 268, 269, 272
rule 35(2)(c) 267, 268
rule 35(3) 270, 609
rule 35(4) 270
rule 35(5) 267
rule 35(6) 270, 271, 611, 612
rule 35(7) 155, 238, 270, 271
rule 35(8) 271, 272, 291, 296, 613
rule 35(9) 273, 615
rule 35(10) 272, 273, 616
rule 35(12) 225, 226, 269, 593
rule 35(14) 226, 594
rule 35(15) 225, 226, 267
rule 36 274, 277, 617

rule 36(1) 274, 275
rule 36(2) 274, 275, 618
rule 36(2)(a), (b), (c) 618
rule 36(3) 275
rule 36(4) 276
rule 36(5) 275
rule 36(5A) 274
rule 36(6) 276
rule 36(7) 276
rule 36(8) 277
rule 36(8)(a) 275
rule 36(9) 284
rule 36(10) 285, 286
rule 36(10)(a) 285, 287, 617
rule 36(10)(b) 286, 287
rule 37 55, 279, 290, 291, 292, 293, 294, 296, 300, 305
rule 37A 291
rule 37(1) 265, 266
rule 37(2)(a) 291
rule 37(3)(a) 291
rule 37(4) 292
rule 37(5) 290, 300
rule 37(6) 292, 293
rule 37(6)(c) 291
rule 37(6)(j) 296
rule 37(7) 291, 293
rule 37(8) 291, 293
rule 37(9)(a) 293
rule 37(9)(b) 291
rule 38 279, 283, 288
rule 38(1)(a) 280, 283
rule 38(1)(b) 280
rule 38(2) 290, 292
rule 38(3) 287, 288
rule 38(5) 288, 289
rule 38(7) 288
rule 39 298
rule 39(1) 244
rule 39(2) 298
rule 39(3) 244
rule 39(5), (9) 301
rule 39(6) 302
rule 39(7), (8) 301
rule 39(10) 303
rule 39(11), (12), (13) 299, 300
rule 39(13), (14), (15) 300
rule 39(16)(d) 304
rule 39(20) 298
rule 40 58
rule 40(1)(a) 59

rule 40(2)(a) 58, 59
rule 40(2)(b) 59
rule 40(2)(c) 59
rule 40(3) 59
rule 40(7) 59
rule 41(2) 318
rule 41(3) 418
rule 41(4) 418, 421
rule 423 10, 313
rule 42(1) 311, 313
rule 42(1)(a) 311, 313, 518, 521
rule 42(1)(b) 312, 313
rule 42(1)(c) 312, 314
rule 43 21, 31, 433, 434, 435, 436
rule 43(1) 435
rule 43(2) 436
rule 43(3) 436
rule 43(4) 436
rule 43(5) 436
rule 43(6) 437
rule 43(7) 437
rule 45 381, 385
rule 45(1) 381,383
rule 45(3) 383
rule 45(3)(c) 383
rule 45(3)(c)(i) 383
rule 45(3)(c)(ii) 384
rule 45(4) 384
rule 45(5) 383
rule 45(6) 197, 384, 391
rule 45(7) 384
rule 45(8) 392, 393
rule 45(8)(a) 393
rule 45(8)(b) 393
rule 45(8)(c) 394
rule 45(9) 393
rule 45(10) 384
rule 45(12) 392, 393
rule 45(12)(a) 392
rule 45(12)(b) 392
rule 46 381, 385
rule 46(1) 386
rule 46(3) 136, 386
rule 46(4) 387
rule 46(5)(a) 387
rule 46(5)(b) 387
rule 46(7)(a) 387
rule 46(7)(c) 387, 388
rule 46(7)(d) 388
rule 46(8)(a) 388

rule 46(10) 388
rule 46(14)(b) 388
rule 49 362, 482
rule 49(1) 357
rule 49(1)(a) 357
rule 49(1)(b) 357
rule 49(1)(d) 357
rule 49(1)(e) 357
rule 49(2) 362
rule 49(3) 362
rule 49(4) 362
rule 49(6)(a) 362
rule 49(7)(a) 363
rule 49(7)(c) 363
rule 49(7)(d) 363
rule 49(8)(a) 363
rule 49(10) 363
rule 49(11) 347, 348
rule 49(12) 348
rule 49(13) 362
rule 49(15) 363
rule 50 359
rule 50(1) 360
rule 50(2) 360
rule 50(4) 360
rule 50(4)(c) 360
rule 50(5)(a) 361
rule 50(5)(b) 361
rule 50(6) 361
rule 50(7)(a) 361
rule 50(7)(b) 361
rule 50(7)(c) 361
rule 50(7)(d) 361
rule 50(8)(a) 361
rule 50(8)(b) 361
rule 50(9) 361
rule 53 375, 377
rule 53(1) 375
rule 53(2) 376
rule 53(3) 376
rule 53(4) 377
rule 53(5) 377
rule 53(6) 377
rule 57 44, 45, 80
rule 58 398
rule 58(1) 399, 400
rule 58(2) 399
rule 58(3) 399
rule 58(4) 399
rule 58(5) 399

rule 58(6) 399
rule 62 160, 297
rule 62(4) 297
rule 64 198
rule 703 26, 329, 330
rule 70(5)(a) 334

Magistrates' Courts Rules

Form 1A 165, 173
Form 2 185, 194
Form 2A 432
Form 2B 185, 580
Form 3 181, 194, 197
Form 5 247, 249
Form 5A 422
Form 8 256
Form 13 268, 269
Form 15 271, 611
Form 15A 271, 612
Form 15B 225
Form 16 520
Form 17.1 520
Form 17.2 521
Form 23 288
Form 24 283
Form 30 388
Form 31 388
Form 32 388
Form 36 400, 401
Form 44 406
Form 45 406
Form 51 407
rule (1)(a) 397
rule 1(3) 294
rule 2(1) 199, 201
rule 2(2) 130
rule 3(1) 133
rule 5 128, 133, 181, 193, 195, 516
rule 5(1) 185, 197
rule 5(1)(a) 185
rule 5(1)(b) 185
rule 5(2) 185
rule 5(2)(b) 182
rule 5(3) 185, 200
rule 5(3)(a)(i) 193
rule 5(3)(c) 194
rule 5(5) 194
rule 5(5)(b) 199
rule 5(6) 180, 194, 632

rule 5(6)(a) 194, 638
rule 5(6)(b) 195, 638
rule 5(6)(c) 195
rule 5(7) 195
rule 5(8) 181, 196, 197
rule 5(9) 196
rule 5(10) 196
rule 6 72, 181, 182, 183, 184, 186,187, 193, 203, 225, 227, 236, 432, 516, 636
rule 6(1) 187
rule 6(2) 188
rule 6(3) 188, 204, 208
rule 6(4) 188, 189, 193, 195, 196, 225, 231
rule 6(5) 204
rule 6(5)(d) 186
rule 6(6) 189
rule 6(8) 190
rule 6(9) 191
rule 6(10) 192
rule 6(11) 187
rule 6(12) 187, 196
rule 6(13) 187, 189, 192, 210
rule 9 132, 138, 140
rule 9(1)(e) 139
rule 9(3) 139
rule 9(3)(a) 139
rule 9(3)(b) 139
rule 9(3)(c) 139
rule 9(3)(d) 139
rule 9(3)(g) 140
rule 9(5) 140, 315
rule 9(7)(a) 140
rule 9(7)(b) 140
rule 9(7)(c) 140
rule 9(9)(a) 140
rule 9(10) 141
rule 9(12) 141
rule 9(13)(a) 249
rule 9(14) 140
rule 10 141, 142, 197, 198
rule 10(1)(b) 141
rule 10(3) 142
rule 11 261
rule 11(1) 261
rule 11(4) 261
rule 12 244, 248, 249
rule 12(1)(a) 243
rule 12(1)(b) 245, 598
rule 12(1)(c) 249
rule 12(3) 249
rule 12(4) 249

rule 12(5) 250
rule 12(6) 249
rule 13 199
rule 13(1) 251
rule 13(3) 199, 580, 584
rule 13(3)(b) 200
rule 13(3)(c) 200, 451
rule 13(3)(d) 200
rule 13(4) 200
rule 14 182, 252
rule 14A 33, 181, 432
rule 14A(2) 431
rule 14(1) 253, 259
rule 14(2) 255, 256
rule 14(3) 257
rule 14(4) 258
rule 14(5) 258
rule 14(7) 258
rule 14(10) 259
rule 14(10)(a) 259
rule 14(10)(b) 259
rule 15 226
rule 15(1) 227, 246
rule 15(5) 227, 246
rule 16 277
rule 16(2) 225, 279
rule 16(2)(a) 278
rule 16(4) 279
rule 16(5) 279
rule 17 203, 418
rule 17(1) 203
rule 17(2) 203, 210, 236
rule 17(3) 210, 236
rule 17(4) 207
rule 17(5) 204, 236, 418
rule 17(6) 210
rule 18 411, 416, 418
rule 18A 21, 433
rule 19 189, 193
rule 19(1) 229, 233, 597
rule 19(2) 235, 236
rule 19(3) 232
rule 19(4) 233
rule 20 220, 221
rule 20(1) 219, 220, 246
rule 20(2) 220
rule 20(3) 220
rule 20(4) 222
rule 20(5) 221
rule 20(5) − (7) 221

rule 20(7) 222
rule 20(8) 221
rule 21 222, 250
rule 21A 224, 263
rule 21(1) 222, 233
rule 21(5) 223
rule 21B 202, 223, 244, 245, 246, 250, 251
rule 21B(2) 265
rule 21B(3) 223, 246, 251
rule 22 294
rule 22(1) 264
rule 22(2) 264
rule 22(3) 264
rule 22(4) 294, 295
rule 23 265, 267, 605
rule 23(1) 239, 265, 266
rule 23(2) 266
rule 23(2)(b) 268
rule 23(2)(c) 267, 269
rule 23(3) 270
rule 23(4) 270
rule 23(6) 270
rule 23(6)(b) 271
rule 23(7)(b) 271
rule 23(8) 270, 271
rule 23(9) 271, 272
rule 23(10) 265, 273
rule 23(11) 272
rule 23(13) 225, 226, 593
rule 23(14) 226
rule 23(15) 226
rule 23(16) 267
rule 24 274, 277, 617
rule 24(2) 618
rule 24(3) 220
rule 24(3)(a) 275
rule 24(4) 276
rule 24(6) 276
rule 24(7)(b) 277
rule 24(9) 284
rule 24(9)(a), (b) 619
rule 24(10) 285, 287
rule 24(10)(a) 287
rule 24(10)(b) 287
rule 24(10)(c) 287
rule 25 294
rule 25(1), (2), (3) 294
rule 26 283
rule 26(2)(a), (b) 288
rule 26(3) 283

rule 26(4) 283
rule 26(5) 283
rule 27 423
rule 27(5) 419
rule 27(6) 423
rule 27(6) − (10) 419
rule 27(8) 423
rule 27(9) 419, 423
rule 28 440
rule 28A 446, 449
rule 28A(2)(b) 451
rule 28A(3)(a) 451
rule 28A(7) 451
rule 28A(10) 449
rule 28(1) 445
rule 28(2) 440, 446, 447, 448, 449
rule 28(3) 442
rule 28(4) 443
rule 28(5) 443
rule 29 305
rule 29(1) 305
rule 29(3) 305
rule 29(4) 305
rule 29(5) 306, 479
rule 29(6) 306
rule 29(7) − (12) 306
rule 29(11) 306
rule 29(12) 306
rule 29(14) 306
rule 29(15) 289
rule 30(1)(d) 304
rule 32(1) 218, 244
rule 32(2) 244
rule 32(3) 244
rule 33 326
rule 33(3) 336
rule 33(5)(c) 329
rule 33(8)(d) 334
rule 33(17)(b) 329
rule 36 385
rule 36(1) 389
rule 41 388, 391
rule 41(1)(a) 390, 391
rule 41(2) 390
rule 41(3) 390
rule 41(4) 391
rule 41(7)(a) 391
rule 41(8)(a) 392
rule 41(8)(c) 391
rule 41(9) 391

rule 42 388
rule 42(1) 389
rule 43 388
rule 44 400
rule 44(1) 400
rule 44(1)(c)(i)-(iii) 401
rule 44(2) 400
rule 45 403
rule 45(1)(a)–(d) 403
rule 47 397
rule 47(1) 397
rule 47(2) 397
rule 47(3) 397
rule 47(5) 397
rule 47(7) 398
rule 47(9) 398
rule 49(1) 315, 318
rule 49(2) 318
rule 49(3) 319
rule 49(4) 320
rule 49(5) 320
rule 49(5)(b) 320
rule 49(6) 320
rule 49(7) 318
rule 51 359
rule 51(1)(a) 359
rule 51(1)(b) 359
rule 51(2) 359
rule 51(3) 360
rule 51(4) 360
rule 51(7) 360
rule 51(8) 360
rule 52(1)(a) 57
rule 52(1)(b) 58, 187
rule 52(1)(c) 58
rule 52(2) 55, 58
rule 53 375
rule 53(1) 375
rule 54 50, 51, 53, 54
rule 54(1) 54
rule 54(1)(a) 634
rule 54(2) 54
rule 54(3) 54
rule 54(5) 54
rule 54(6) 54
rule 55 145, 153, 155, 164, 288, 520
rule 55A 72, 240
rule 55(g)(i) 167
rule 55(g)(ii) 168
rule 55(1) 166

rule 55(1)(a) 164
rule 55(1)(c) 175
rule 55(1)(d) 165
rule 55(1)(g) 167
rule 55(1)(h) 168
rule 55(1)(i) 168
rule 55(1)(j) 233
rule 55(1)(j)(ii) 169
rule 55(1)(k) 170
rule 55(2) 166
rule 55(2)(a) 171
rule 55(3) 155, 156, 176
rule 55(3)(c) 174
rule 55(3)(d) 174
rule 55(4)(a) 164
rule 55(5) 161, 173
rule 55(7) 171
rule 55(9) 162
rule 55(9)(a) 162
rule 564 38
rule 56(1) 453
rule 58 21, 31, 434, 435, 436
rule 58(1) 435
rule 58(7), (8) 437
rule 60 238, 239
rule 60A 189, 193, 206, 210, 221, 225, 231, 236, 242
rule 60A(2) − (4) 237
rule 60(2) 239, 272
rule 60(3) 239
rule 60(5) 239, 252
rule 60(7) 239

Supreme Court of Appeal Rules

rule 6 358
rule 7(1) 364
rule 7(2) 364
rule 7(3)(a) 364
rule 7(4) 364
rule 8(1) 364
rule 8(3) 364
rule 8(6) 364
rule 8(7) 364
rule 8(8) 364
rule 10(1)(a), 10(3)(e)(i) 364
rule 10(1)(b) 364

***A quo*:** (Latin) 'from which' e.g. The court *a quo* – the court from which the decision came.

***A tempore morae*:** Interest earned from the time of proof of claim.

Abatement *see* 'Special pleas in abatement'.

Abandonment (of portion of claim): A plaintiff is entitled to abandon that part of his claim that exceeds R400 000 (Regional Magistrates' Courts) or R200 000 (District Magistrates' Courts) so that the matter may be heard either in the Regional Magistrates' Courts or the District Magistrates' Courts, as the case may be (the general rule is that if a claim or value of a matter in dispute is over R400 000, the matter falls within the jurisdiction of the High Court, and if a claim or value of a matter in dispute is more than R200 000 but not more than R400 000, the matter falls within the jurisdiction of the Regional Magistrates' Courts). Amounts may also be abandoned to bring matters within the jurisdiction of the Small Claims Court (current limit: R15 000).

Absolution from the instance: Absolution from the instance is a judgment that may be given either at the end of the case, or immediately after the close of the plaintiff's case. Absolution is granted at the end of the case if neither the plaintiff nor the defendant has adduced sufficient evidence to secure judgment in their favour. The plaintiff is, however, entitled to reinstitute the action should additional evidence become available.

Absolution from the instance may also be granted at the conclusion of the plaintiff's case if the plaintiff has failed to adduce sufficient evidence upon which a reasonable court might grant judgment in favour of such plaintiff; or, stated differently, the plaintiff has not produced sufficient evidence to establish a *prima facie* case. Here, too, the plaintiff is entitled to reinstitute the action should additional evidence become available.

Acknowledgement of debt (document): A signed document in which one party admits a debt owed to another party, and agrees to repay the debt on the terms stated in the document.

***Actio ad exhibendum*:** The *actio ad exhibendum* is usually brought as an alternative to the *rei vindicatio*. Should the person who took the thing have disposed of it, the *actio ad exhibendum* allows the owner to recover damages from the person who took the thing.

***Actio redhibitoria*:** An action for rescission of a contract where there is a latent defect which rendered the *res vendita* (the thing sold) completely unfit for its purpose.

***Actio quanti minoris*:** An action for a reduction in the purchase price where there is a latent defect in the *res vendita* (the thing sold), but where the defect is not sufficiently serious to render the *res vendita* completely unfit for its purpose.

***Actio in personam*:** An action based on a personal right, for example the right of a particular person to enforce the terms of a contract entered into with another person.

***Actio in rem*:** An action based on a real right, for example the right of the owner of a residential property to eject anyone who illegally occupies that property.

***Actor sequitur forum rei*:** The plaintiff must follow the forum of the thing in dispute.

***Ad*:** Regarding (literally 'towards').

***Ad confirmandam jurisdictionem*:** To confirm jurisdiction.

Ad factum praestandum see 'Judgments not sounding in money'.

Ad pecuniam solvendam see 'Judgments sounding in money'.

Adjectival law: Adjectival law deals with the procedures to enforce legal claims in civil or criminal law. The law of civil procedure and the law of criminal procedure are the two main branches of adjectival law. Adjectival law is also called procedural law. *See* also 'Substantive law'.

Admiralty Court: The name sometimes given to a division of the High Court when it exercises its admiralty jurisdiction.

Admit (an allegation): When a party admits an allegation made in the pleadings (i.e. particulars of claim) of his opponent, the issue raised by the allegation is no longer in dispute, and it need therefore not be proved by the party making the allegation. The effect is that the allegation then becomes common cause.

Admission: An allegation that has been admitted in pleadings (admissions are usually contained in the defendant's plea). Admissions may also be made at pre-trial conferences or orally during trial proceedings.

ADR: Alternative dispute resolution.

Advice on evidence: A written document prepared by an advocate advising the instructing attorney on all the relevant aspects of the case which need to be considered in preparation for the upcoming trial. (The 'advice on evidence' format and methodology may also, of course, be used by an attorney to prepare for his own civil trial in which an advocate has not been briefed.)

Affidavit: A written statement which is sworn to or affirmed before a person legally recognised as a Commissioner of Oaths. The affidavit is written evidence, and therefore the law of evidence applies to it. The affidavit is the primary means of placing evidence before a court in application proceedings.

Affirmation: Where the deponent to an affidavit (*see* 'Affidavit') objects to swearing the prescribed oath (*see* 'Oath'), the deponent will be asked to make an affirmation instead. The affirmation will take the following form:

'I solemnly affirm that the contents of this declaration are true and correct.'

It has the same effect for all purposes in law as an oath.

Allegation (in pleadings): A statement contained in pleadings, in which a fact, as yet unproven, is alleged. Allegations are also called 'averments' or 'material facts'.

Alternative relief: A party claiming relief from a court is expected to specify, in the order sought in the papers, precisely what relief is being sought. A prayer (request) for 'further and/or alternative relief' is often included in the papers to cater for unforeseen circumstances.

Amendment (of pleadings): Parties to litigation may apply to amend their pleadings either before or during the proceedings, but before judgment has been given.

***Animo contrahendi*:** An offer made with the intention of entering into an agreement.

***Animo solvendi*:** An offer made with the clear intention to admit liability for a claim.

Answering affidavit: An affidavit in which the respondent in application proceedings deals, paragraph by paragraph, with the allegations and evidence contained in the applicant's (founding and supporting) affidavits.

Anton Piller **order**: An order which is sought urgently by way of application proceedings, without notice to the respondent, directing the preservation of evidence which the applicant fears will disappear if the respondent learns that legal action is about to be taken against him. The remedy gets its name from the first case in which it was granted: *Anton Piller KG v Manufacturing Processes Ltd* [1976] 1 All ER 779 (CA).

Appeal: A procedure whereby a judgment of a lower court is considered by a higher court to establish whether or not the lower court reached an incorrect decision due to an error of fact or law.

Appeal court: A term used to refer to any higher court, which is legally entitled to hear an appeal from another court (usually a court inferior to it).

Appellant: The party appealing a matter to a higher court.

Appellate Division: The previous term for the Supreme Court of Appeal.

Applicant: A party who initiates legal proceedings by way of an application.

Application: The term used for court proceedings brought by a notice of motion supported by affidavits. Oral applications may also be made by counsel from the bar at court.

Application to strike out: Certain allegations in affidavits or pleadings may be considered to be objectionable. Examples of objectionable allegations are those which are scandalous, vexatious or irrelevant. The opposing party may apply to court to have the objectionable allegations struck out, i.e. the court orders them to be deleted from the affidavit or pleading.

Apportionment of damages: Where damage has been caused by more than one wrongdoer, the court may order an apportionment of damages in accordance with the respective degrees of fault of each such wrongdoer (in terms of the Apportionment of Damages Act 34 of 1956).

Arbitration: Non-formal dispute-resolution mechanism where the arbitrator fulfils a role similar to that of a judge in that he hears oral evidence and argument, or considers written evidence, and finally makes a decision (called an '*award*').

Arrest *tanquam suspectus de fuga*: In the past, the arrest of a person against whom the claimant intends to institute an action, or against whom action has already been instituted, to prevent that person from fleeing the jurisdiction of the court with the purpose of avoiding or delaying the payment of claimant's claim. This procedure has been declared unconstitutional and is only mentioned for historical reference: *see* Stage 4, D.

Association: An organised body of persons who have joined together under some contract or statute for the purpose of carrying out some common object (*see* High Court rule 14, and Magistrates' Courts rule 54).

Attachment *ad fundandam juridictionem*: Attachment to found jurisdiction.

Attachment to found, or confirm, jurisdiction: Before a party is permitted to institute a claim sounding in money against a defendant/respondent who is a *peregrinus* of South Africa, it is necessary, for jurisdictional purposes, to establish some sort of connection to that person. Usually this is done by attaching his property.

Attorney-and-client costs: A court sometimes awards costs on an attorney-and-client scale to punish (i.e. it is a punitive costs order) a litigant for the way in which the litigant conducted his case; or alternatively, if a provision in an agreement provided for these costs in the event of litigation upon the agreement. (These costs orders fall between party-and-party costs and attorney-and-own-client costs.)

Attorney-and-own-client costs: These are costs which an attorney is entitled to recover from his own client for the disbursements made by him on his client's behalf, as well as for the professional services rendered by him to his client. A court usually awards costs on the attorney-and-own-client scale if it wishes to indicate its extreme displeasure at the way in which a party conducted his case.

***Audi alteram partem*:** Literally means 'hear the other side'. It is a principle of our law that courts will not generally grant an order without hearing the version of the party against whom the order is sought.

Automatic bar: Once the defendant in an action delivers his plea to the plaintiff, the plaintiff must deliver his replication in response to the plea within a set period of time. Should the plaintiff fail to do so within the set time period, he is automatically barred, and the pleadings are deemed to be closed (*see* also 'Barring').

Automatic rent interdict: In terms of s 31 of the Magistrates' Courts Act a landlord who is suing a tenant for arrears rent may include an automatic rent interdict as part of the summons. This prohibits any person from removing any furniture or other objects from the premises.

Averment *see* 'Allegation'. These are contained in your pleadings (i.e. particulars of claim and/or plea).

Balance of probabilities: The burden of proof in a civil trial is to prove one's case on a balance of probabilities. This means that the court accepts the most likely of the opposing versions as proving the case in favour of the successful party.

Bar: This could refer to either of two things, related in their origins. The 'bar' is the part of the courtroom from where legal representatives present and argue their cases. It is also the term used for the professional voluntary society (the Society of Advocates) to which most practising advocates belong, hence 'member of the Bar', and the English term for advocate, namely barrister.

Bare denial: When denying an allegation in pleadings, a mere denial may fail to address the substance of the allegation made. In such situations, a denial without an explanation is known as a bare denial and is not permissible. This is particularly the case where a denial of liability is preceded by an admission of fact. In this situation, a plea of confession and avoidance is required.

Barring: A party who fails to deliver a pleading within the time stated in the rules may be barred. The process by which the party is barred is known as barring.

Bill of costs: At the conclusion of litigation, the successful party will usually draw up a bill of costs in accordance with a set of tariffs in the Rules of Court. This bill of costs will either be agreed to by the other party, or will be 'taxed' by the taxing master, after which it becomes part of the judgment debt.

***Bona fide*:** Latin expression meaning 'in good faith'.

Burden of proof *see* 'Onus of proof'.

By consent: 'By consent' is a phrase used by legal representatives in certain circumstances when requesting a court for an order. The phrase indicates to the court that the opposing parties have agreed to the terms of the order.

Capacity to litigate: The general rule is that every natural person has legal capacity to litigate. Certain persons lack full legal capacity (for instance, the mentally disabled, and children) and require someone with full legal capacity to represent them or assist them in litigation.

Case-flow management: The rules for case-flow management are usually contained in the practice directives of the various divisions. It is designed to ensure that the case is ready to proceed to trial by requiring that the legal representatives appear before a judge in the High Court.

Cause of action: The material facts which a plaintiff or applicant must prove in order to win his case. The term 'cause of action' might also be used more loosely to describe the cause, or reason, which gives rise to the plaintiff's or applicant's complaint.

Chief Justice: The Chief Justice is the head of the judiciary, and presides over the Constitutional Court.

Citation (of parties): The legal description of the parties to a legal dispute in the pleadings. Various rules of court contain citing provisions that have to be complied with.

Civil procedure: That part of adjectival law which regulates all the procedures involved in the enforcement of civil claims (*see* 'Adjectival law').

Civil Regional Courts: Regional Magistrates' Courts (as distinguished from criminal Regional Courts.)

Claim in reconvention *see* 'Counterclaim' – these terms are synonymous.

Clear right: The first requirement to be established if a party wishes a court to grant him a final interdict is that he has a clear or definite right in terms of substantive law that entitles him to final relief. In order to prove a clear right, the applicant will need to establish the right on a balance of probabilities.

Clerk of the court (civil): The clerk of the civil court is an official in a District Magistrates' Court in charge of all the administration relating to the functioning of that court, whereas the clerk of a criminal court is in charge of the administration involved in the functioning of the criminal court. All the court files relating to civil matters in the District Magistrates' Courts are to be found in the office of the clerk of the civil court (*see* also 'Registrar').

Close corporation: A juristic person incorporated in terms of the Close Corporations Act 69 of 1984.

Close of pleadings: The purpose of pleadings is to define the issues in dispute between the parties. Once the issues in dispute have been defined, pleadings close and preparation for the trial

may begin. While pleadings may be closed formally with a pleading that alleges no new matter but merely 'joins issue', this is no longer a requirement, and by far the most usual method is merely to allow the last day for filing a replication or further pleading to lapse. This is usually accompanied, at least in High Court practice, by an exchange of correspondence between the parties, agreeing that pleadings are closed. Close of pleadings is also known by the Latin term *litis contestatio*.

Combined summons: A combined summons is one of three possible types of summons which may be used in the Magistrates' and High Courts. The combined summons may be used for any type of claim, and consists of a summons, together with separate 'particulars of claim' setting out the material facts upon which the plaintiff relies (*see* 'Simple summons').

Common cause: When an issue is common cause, it means that the parties to the litigation have agreed about the issue.

Company: A juristic person incorporated in terms of the Companies Act 71 of 2008.

Conciliation: An ADR procedure where a conciliator is actively involved in helping the parties negotiate a resolution.

Concurrent jurisdiction: Jurisdiction that a court shares with another court. For instance, the High Court has concurrent jurisdiction to hear matters that may be heard in a Magistrates' Court, and Magistrates' Courts have concurrent jurisdiction with Small Claims Courts.

Condonation: A court may, on good cause shown, condone (i.e. excuse) any noncompliance with the Rules of Court.

Confess and avoid (plea): A defendant must respond to every allegation in a plaintiff's particulars of claim or declaration. A plea of confession and avoidance is one of four possible responses, and means that the defendant admits the particular allegation, but sets out new facts which, if proved, would justify or excuse the defendant's admitted conduct.

Confession (to judgment): This is a formal document which, provided it complies with certain requirements set out in the High Court Rules of Court, enables the holder to apply for judgment against the party who executed the document. The application may be brought before a judge in chambers.

Consent (to jurisdiction): A procedure in terms of s 45 of the Magistrates' Courts Act by which a claim that exceeds either the R400 000 or the R200 000 monetary jurisdictional limit of either the Regional or District Magistrates' Courts as the case may be, may be brought within the jurisdiction of either the Regional or District Magistrates' Courts, as the case may be. The other two ways in which this may be accomplished are by means of the deduction of an admitted debt in terms of s 39, or by the abandonment of that portion of the claim that is over R400 000 or R200 000, as the case may be, in terms of s 38. In High Court matters, consent to jurisdiction (also termed *prorogatio*) becomes of practical relevance in relation to claims sounding in money against foreign *peregrini*. In such cases, should the foreign *peregrinus* consent to jurisdiction, an attachment of his goods to found or confirm jurisdiction will be impermissible.

Consolidation of actions (the High Court): Where separate actions have been instituted by different parties, and it appears to the court convenient to consolidate them, the court is empowered to make an order consolidating the separate actions (in terms of High Court rule 11).

Constitution, the: The Constitution of the Republic of South Africa, 1996 is the supreme law of South Africa.

Consumer courts: Courts for consumer disputes set up in terms of the Consumer Protection Act 68 of 2008.

***Contra proferentem*:** Given an interpretation most favourable to the non-drafter party to a contract.

Costs: The expenses involved in litigation. The word 'costs' may also be used as shorthand for 'costs order'. (*See* 'Attorney-and-client costs'; 'Attorney-and-own-client' costs, and Party-and-party costs.)

Costs *de bonis propriis*: Where a person acting in a representative capacity (for example, an attorney on behalf of a client) conducts litigation in a grossly negligent manner, the court may punish that representative by ordering that he pay the costs in the matter out of his own pocket.

Counterclaim: A defendant who believes he has a valid cause of action against a plaintiff, is entitled to bring a counterclaim against the plaintiff in the same proceedings. The defendant's counterclaim is usually lodged together with his plea. Another term for a counterclaim is a 'claim in reconvention'.

CPA: The Consumer Protection Act 68 of 2008.

Cross-appeal: Once a court has delivered its judgment in a matter, both parties may be unhappy with different aspects of the court's judgment. Should one of the parties appeal against a certain part of the court's judgment, the other party may cross-appeal against the same or a different part of the judgment.

***Curator ad litem*:** A Latin expression meaning 'curator for the purpose of suit', i.e. a person appointed by the court to protect the interests of some party to legal proceedings who is unable, or is alleged to be unable, to protect his own interests during litigation. A *curator ad litem* will, for example, be appointed to represent a person against whom an application is being brought for an order declaring such person to be of unsound mind and therefore incapable of managing his own affairs.

***Curator bonis*:** A Latin expression meaning 'curator of property', i.e. a person appointed by the court to manage and control the property of a person who is unable to manage or control his own property.

Damages: The loss, expressed in money, suffered by a party through, for example, a contractual breach or a delict committed against him. If he has a valid cause of action, he may choose to institute legal action to claim compensation for this loss (i.e. claim damages).

***De bene esse*:** A conditional, interim or pending legal proceeding.

Debt collection procedures: Once a litigant has obtained judgment in his favour in respect of a money claim he is entitled, as the 'judgment creditor', to take steps to enforce the judgment. These steps may include attachment of the judgment debtor's property by means of a warrant (or writ) of execution, or a court enquiry into the financial position of the judgment debtor in terms of s 65 of the Magistrates' Courts Act.

Debt or liquidated demand: The phrase 'debt or liquidated demand' is not defined in the High Court Rules of Court, but cases have interpreted it to mean that it is capable of prompt and speedy ascertainment. The phrase is used in High Court rule 31(5)(*a*). When default judgment is sought in respect of a claim which is a debt or liquidated demand, a plaintiff wishing to obtain default judgment may file a written application for default judgment with the registrar who may grant the order.

Declaration: If a defendant files a notice of intention to defend in response to a simple summons, the plaintiff is obliged to deliver a declaration to the defendant. The declaration is, essentially, the equivalent of the particulars of claim attached to a combined summons, which sets out the plaintiff's cause of action and prayer for relief.

Declaration of rights: In a declaration of rights the court declares what the law is on a specific issue, and consequently, what the rights of the parties are. This declaration may be based on a stated case, or merely on a specific issue.

Declarator: Another term for a declaration of rights.

Decree of perpetual silence: If a person abuses the legal system by continuously instituting legal action, the High Court may issue a decree of perpetual silence against such a person, who is

then prohibited from instituting any further legal action unless the court grants specific permission for such person to do so.

***De facto*:** A Latin expression meaning 'in fact', or 'factual'.

Default judgment: Where a defendant to an action is either in default of delivering his notice of intention to defend, or is in default of delivering his plea and has been barred, the plaintiff may seek default judgment against him.

Defendant: The parties to an action are cited as the plaintiff and the defendant. The plaintiff brings the action and the defendant defends the action. There may be more than one plaintiff or defendant. If a defendant counterclaims against the plaintiff, he (the defendant) becomes the plaintiff in reconvention (i.e. the plaintiff in respect of the counterclaim).

***De lege*:** A Latin expression meaning 'in accordance with law'.

Delict: A civil wrong giving rise to a claim for civil damages. A person who has suffered loss, caused by the wrongful act of another, which was committed either intentionally or negligently, is entitled to institute a delictual claim for damages against the wrongdoer.

***Delicti commissi*:** (or *locus delicti*). The place the delict was committed (also called *Lex loci delicti commissi*).

Delivery/Deliver: In the context of the Rules of Court, the term 'delivery' involves the twin actions of filing and serving documents, other than process served by the sheriff. The original of a document is 'filed' or lodged with the registrar or clerk of the court, and a copy is 'served' on the opposing party.

***De novo*:** Start anew.

Deny (an allegation): To deny is one of the four possible responses to allegations contained in pleadings. The effect of a denial is that the allegation becomes disputed, and the opposing party is 'put to the proof' and must lead evidence in support of the allegation at the trial stage. A defendant who denies an allegation must ensure that such denial does not amount to a bare denial (*see* 'Bare denial').

***Dies induciae*:** The time allowed to the defendant within which to deliver a notice of intention to defend is commonly known as the *dies induciae*.

***Dies non*:** Days on which court or legal procedures are not permitted, or days not counted for purposes of calculating legal time periods.

***Dilatory special pleas*:** Whereas a declinatory special plea or 'plea in abatement' will destroy a plaintiff's cause of action, a dilatory special plea merely serves to delay the prosecution of the plaintiff's claim, e.g. a special plea of *lis pendens* or arbitration.

Discovery: A pre-trial procedure whereby the parties to litigation call upon each other to reveal in writing and under oath, lists of each and every item of recorded information (documents, tape recordings, computer disks, video recordings, etc) which relate in any way to the matter in question.

Discovery affidavit: Discovery is made by disclosing the necessary information in an affidavit, which is known as a discovery affidavit. In this affidavit the party making discovery must list and describe two categories of documents: first, those documents relating to the matters in question in the action that are in the party's possession or under his control; and second, those documents the party objects to producing together with the reason (e.g. privilege) for the objection.

Dispute of fact: A dispute between parties to litigation regarding a material fact or set of facts. Where a party decides to initiate court proceedings against another party and foresees that a 'real dispute of fact' will arise between the parties, it is necessary for that party to proceed by way of action as opposed to application.

District Magistrates' Courts: The Magistrates' Court serving a particular magisterial district.

Division: One of a number of divisions of the High Court found around the Republic of South Africa. All divisions are either a main seat (which has jurisdiction throughout the entire province) or a local seat (which has concurrent jurisdiction with the main seat over smaller geographical areas within the province). For example, if a dispute arises in Durban it may be heard by both the KwaZulu-Natal Local Division, Durban (the local seat with jurisdiction in the greater Durban area) or the KwaZulu-Natal Division, Pietermaritzburg (which has jurisdiction over the whole KwaZulu-Natal province).

Doctrine of effectiveness: This is a basic doctrine underlying the various principles of jurisdiction. In order to satisfy itself that it has jurisdiction in a matter, a court must be satisfied that its judgment is capable of being enforced. The doctrine of effectiveness is particularly relevant in cases where the defendant or respondent is a *peregrinus* of South Africa (*see* 'Attachment to found, or confirm jurisdiction').

***Dolus*:** Intention.

***Domestic violence interdict*:** A special form of interdict granted in terms of the Domestic Violence Act 116 of 1998 to prevent domestic violence.

Domicile: Domicile is governed by the Domicile Act 3 of 1992, which provides that everyone may have a domicile of choice at a place where one lawfully is, or has been, and where one intends to stay, or return to for an indefinite period.

***Domicilium citandi et executandi*:** In simple terms, one's *domicilium citandi et executandi* is one's chosen address for the purpose of serving documents that institute legal proceedings. A contract will often specify the *domicilium citandi et executandi* of each of the parties in order to facilitate the service of legal process should litigation arise out of the contract (often shortened to '*Domicilium*').

***Dominus litis*:** Literally, the 'master of the suit or litigation'. In civil matters the plaintiff or applicant, as the case may be, is *dominus litis* in that he decides whether and when to initiate legal proceedings, and in which court to bring them.

Dual capacity: A guardian may be involved in litigation both on his own behalf and on behalf of his child. For example, a guardian may sue a defendant who has injured the guardian's child for compensation in respect of the medical expenses he as the guardian has incurred, as well as for compensation on behalf of the child for pain and suffering, loss of amenities of life, etc..

***Duces tecum*:** A legal order (usually a subpoena) commanding the recipient to appear at court on a stated date, bringing a specified object or document with him ('subpoena *duces tecum'*).

Duty to begin: In a trial the plaintiff is usually obliged to adduce evidence first because the overall onus is on him to prove his case on a balance of probabilities. However, there may be instances in which the defendant is under a duty to begin, e.g. if a defendant has raised a special plea, he may be obliged to lead evidence in support of that special plea at the start of the matter.

Edictal citation (High Court): In order to institute legal proceedings against a party or parties outside the Republic of South Africa, an application must be made to serve the documents which institute such legal proceedings by way of edictal citation.

Ejectment: An order whereby the owner or the lawful possessor of premises seeks the eviction or removal of a person that is in unlawful occupation of the premises.

Emoluments attachment order: An order in terms of s 65J of the Magistrates' Courts Act whereby the judgment creditor is able to attach part of the salary or wages of the judgment debtor to ensure that the judgment debt is repaid by the judgment debtor.

***Eo nomine*:** A Latin expression which means 'in one's own name'.

Evidence on commission: Where it is not possible for a witness to be physically present at a trial, a litigant may apply to court for an order to hear the evidence of that witness on commission. If the court allows this procedure, it will appoint a commissioner who will go to the witness and take his evidence in the form of a deposition.

Exception: Where a pleading (usually the plaintiff's particulars of claim, or the defendant's plea) is either vague and embarrassing or lacks averments which are necessary to sustain an action (in the case of the particulars of claim) or a defence (in the case of the plea), the opposing party may lodge an exception to that pleading. An exception implies that the pleading objected to, taken as it stands, is unable to fulfil its legal function, making it impossible for the party to whom it is directed to respond to it.

Execution (of judgment order): The process by means of which a judgment debtor's property is attached by the sheriff in terms of a writ of execution so that it can be sold in order to satisfy the judgment debt.

***Ex facie*:** A Latin expression which means 'on the face of it'.

Ex parte **application**: An application brought by a litigant in which no notice (warning) of the application is given to the other party. Applications may generally only be brought *ex parte* (as opposed to on notice) in exceptional circumstances.

***Ex tempore*:** Immediate; without preparation ('*ex tempore* judgment').

***Facta probanda*:** The facts that must be proved by the plaintiff or applicant, as the case may be, in order to make out a valid cause of action.

***Facta probantia*:** The evidence that is required to be led by the plaintiff or applicant, as the case may be, in order to prove the *facta probanda*.

FICA: An abbreviation for the Financial Intelligence Centre Act 38 of 2001.

Final interdict: An interdict based upon a clear right. Usually brought by way of an application in which the applicant requests the court to grant a final order prohibiting or mandating certain specified actions by the respondent or respondents.

Final judgment: A judgment of the court that finally determines the rights of the parties in dispute before it. The normal rule is that a judgment, once given, is final and not subject to amendment or supplementation by the court which has delivered it.

Firm: A firm is a business carried on by the owner (i.e. the sole proprietor) or owners of the business (e.g. a partnership) under a name other than his or their own names. The name under which a business is carried on is known as its 'trading name'. A firm trading under the name ABC Shoes owned by Jack Smith may be cited as: 'Jack Smith trading as ABC Shoes'. A firm may be owned by a close corporation or a company.

Foreign *peregrinus*: A person who is neither resident nor domiciled in South Africa *(see 'Peregrinus').*

Founding affidavit: The main affidavit that accompanies the notice of motion in a matter proceeding by way of application, setting out both the facts upon which the applicant's cause of action is based, as well as the evidence (which is often attached to the founding affidavit in the form of annexures) in support of those facts.

Freezing injunctions *see* '*Knox D'Arcy* Interdicts'.

Full-bench appeal: When the decision of a single judge of the High Court is appealed against, it is usually heard by a full bench of judges sitting as an 'appeal court'. (A full bench of the High Court consists of three High Court judges.)

Full court appeal *see* 'Full-bench appeal'.

***Functus officio*:** Reference to a court or public official who no longer has the power to act due to the procedure being completed. (Latin for 'having performed his office'.)

Further or alternative relief *see* 'Alternative relief'.

Further particulars *see* 'Request for further particulars'.

Further particulars for the purpose of trial: In both High Court and Magistrates' Courts practice, further particulars are only permitted for the purpose of trial. This request is made by way of a document delivered after close of pleadings.

Good cause: A requirement that one advance a sufficiently good reason before a court will find in one's favour. Often used in the context of condonation, i.e. a party must show good cause before a court will excuse noncompliance with the Rules of Court. It is also a requirement for rescission of judgment; *see* rule 31(2)(*b*) of the High Court Rules of Court and 49(1) of the Magistrates' Courts Rules.

***Government Gazette*:** The official government publication in which legal information relating to various functions of the government, as well as other information of an official and legal nature, is published. For example, Bills of Parliament which are to become law are published in the *Government Gazette*, as are regulations passed by Ministers in terms of various laws.

HCR: High Court Rules.

Heads of argument: This is a document in which a party's main points of argument are set out. The document serves before court as a summary of the legal and factual contentions made by a party.

High Court: There is a single High Court of South Africa consisting of a number of divisions.

High Court Rules: (previously called 'Supreme Court Rules'): *see* 'Uniform Rules.'

Hybrid ADR procedures: Hybrid dispute-resolution features are processes borne out of blending, in one way or another, different features of the various ADR processes.

***In camera*:** The exclusion of the public or non-essential persons from court. (Can also mean 'in chambers' in some jurisdictions.)

***In casu*:** 'In this case or matter'. (Can also mean 'in this instance.')

In chambers: In the judge's office (usually referring to decisions made by the judge outside the courtroom). A different meaning of chambers is the place where advocates keep offices and conduct their business as advocates.

***Incola*:** A person who is either domiciled or resident within a court's area of jurisdiction.

In duplum **rule**: South African common-law rule that holds that interest stops running when the interest owed equals the outstanding capital amount of the debt. The National Credit Act, in section 103(5), also contains a statutory *in duplum* rule which applies specifically to credit agreements regulated by the Act.

Incorporeal property: Incorporeal (intangible) property is the opposite of corporeal (tangible) property. Incorporeal property would include rights, shares in a company, and the goodwill of a business. Corporeal property would include land, motor vehicles, and furniture.

Inferior (or lower) court: For purposes of appeal, the courts in South Africa are ranked from top to bottom as follows: the Constitutional Court; the Supreme Court of Appeal; the High Court; and Magistrates' Courts. An appeal is said to be lodged from a lower (or inferior) court to a higher (or superior) court, but this does not in any way imply that the lower court is 'inferior' in a derogatory sense. The court from which an appeal is lodged is also known as the *court a quo*.

In forma pauperis **proceedings**: Proceedings *in forma pauperis* have been rendered largely obsolete by the introduction of the legal aid scheme. To the extent that it is still used, it is a method by which an indigent individual is able to secure legal representation in the High Court.

Inherent jurisdiction: Inherent jurisdiction is a discretionary power held by the High Court, the Supreme Court of Appeal, and the Constitutional Court. It enables these courts to avoid procedural injustices from occurring by either overriding the rules of court, or providing some procedural remedy where none exists.

Injunction: In English law, the term for interdict or certain kinds of court orders.

***In limine*:** Preliminary legal point.

***In mora*:** A party who has failed to perform his obligations on time, as required in terms of his contract with another party, is said to be *in mora*, and legal proceedings may be instituted against him. If no definite time for performance is agreed upon, either expressly or tacitly, performance within a reasonable time must be demanded of the recalcitrant party. Should such party fail to perform within the reasonable time stipulated, he will be in *mora*, and legal proceedings may be taken against him.

Insolvent: A person whose liabilities exceed his assets. The estate of a person who has been declared insolvent by the High Court will be sequestrated, and a trustee will be appointed to manage the affairs of the insolvent estate.

Inspection *in loco*: At any time during the hearing of an action, a court may decide (either of its own volition or upon application by a party to the proceedings) to conduct an inspection of the particular place which is relevant to the matter in question. For example, the court may decide to inspect the site of a motor vehicle collision which is the subject of litigation between the parties. The court's observations during the inspection *in loco* will then be read into the court record.

Intention to defend *see* 'Notice of intention to defend'.

Interdict: An order of court which obliges the respondent to do something (a mandatory interdict) or to refrain from doing something (a prohibitory interdict).

Interim Constitution: *see* 'Constitution'.

Interlocutory application: An interlocutory application is incidental to proceedings (either by way of action or application) that are already pending. For example, during proceedings by way of action in the Magistrates' Court, one of the parties may decide to launch an interlocutory application to compel the other party to answer a request for further particulars for the purpose of trial.

***Ipso facto*:** 'By that very fact'; or, 'by the fact itself'.

Interpleader: Where two or more persons make adverse claims to property which is in the custody of a third party (the stakeholder), then the stakeholder may use the interpleader procedure to request the court to decide which claimant is entitled to that property. Often, the sheriff of the court is put in the position of a stakeholder in relation to property which he has attached, which is claimed by the judgment creditor (who says that the property belongs to the judgment debtor) and another person (who says the property belongs to him and not to the judgment debtor).

Interim interdict: An interdict based upon a *prima facie* right. Usually brought by way of an application in which the applicant requests the court to grant a rule *nisi* (ordering the respondent to appear in court on a stipulated date – the return date – to answer the applicant's allegations), together with temporary relief. An interim interdict will usually take the form of an order prohibiting or mandating certain specified actions by the respondent or respondents, but only until the return date when the court will finally decide the matter.

Interlocutory: Generally, this means a secondary legal procedure which arises from the main procedure, and usually does not result in a final decision.

Interlocutory interdict: Another term for interim interdict, but can also mean an interdict arising as a secondary proceeding in another action or application.

Interrogatories: Where it is impossible for a witness to attend the trial in a matter, the party requiring the evidence of that witness may apply to court for leave to examine the witness by means of interrogatories (questions). If the application is granted, the questions will be drawn up by the parties and sent to the area where the witness resides. The questions will be put to the witness by a commissioner of the court, who will record the answers of the witness and return this information to the registrar of the court in which the trial is proceeding.

Intervening (in an action): Where a person has a direct and substantial interest in the subject matter of an action which is either pending or in progress, the court may allow that person to join as a party to the action. Such person is said to be intervening in the action.

Irregularity: An irregularity will usually arise when a party takes a step or acts in a manner which is not in conformity with the Rules of Court.

Irregular step: When a party takes a step which is not in conformity with the Rules of Court, for example issuing a simple summons instead of a combined summons in an action for divorce. The other party may then apply to court to have the irregular step set aside.

Issue (summons): When instituting an action or application, the summons or notice of motion must first be issued by the registrar (in the High Court and Regional Magistrates' Courts) or the clerk of the civil court (in the District Magistrates' Courts) before being served on the defendant/s or respondent/s. In issuing the documents, the registrar or the clerk of the court will allocate a case number to the particular matter, and will open a court file in which the original documents relating to the matter are then lodged.

Joinder: Two or more plaintiffs or defendants must be joined in the same action or application if there is sufficient overlap between the matters relating to each of them to make a separate trial or hearing in respect of each matter undesirable. (*See* also 'Non-joinder'.)

Judgment creditor: The party in whose favour judgment has been granted. The judgment creditor may demand performance from the judgment debtor in terms of the judgment.

Judgment debtor: The party against whom judgment has been granted. Performance may be demanded from the judgment debtor by the judgment creditor in terms of the judgment.

Judgment sounding in money: A judgment in which the judgment debtor is ordered to pay a specific amount of money to the judgment creditor.

Judgment not sounding in money: A judgment in which the judgment debtor is not ordered to pay a specific amount of money to the judgment creditor. For example, the judgment debtor may be ordered to transfer property to the judgment creditor, or not to interfere with the judgment creditor's property.

Jurisdiction: The power or competence of a particular court to hear and determine an issue between parties brought before it. In practical terms, determining jurisdiction in a matter means deciding, firstly, which general type of court may hear the particular matter (e.g. High Court, Magistrates' Court, Labour Court, Income Tax Court, Admiralty Court etc.); and, secondly, within that general type of court, which particular court or courts may hear the matter (i.e. which particular High Court, which particular Magistrates' Court etc.).

***Justus error*:** This is the Latin term for 'reasonable error', which, if shown, would provide a ground for obtaining relief from a contract mistakenly entered into.

Knox D'Arcy **interdict**: A special *sui generis* interdict which is brought *ex parte* to prevent the dissipation or alienation of assets: derived from the case of *Knox D'Arcy Ltd & Others v Jamieson and Others* 1996 (4) SA 348 (A). (Also called 'Mareva injunctions' or 'freezing injunctions'.)

Labour Court: A special High Court which has been created under the Labour Relations Act 66 of 1995 to deal with disputes involving labour law.

Land Claims Court: A special High Court created in terms of the Restitution of Land Rights Act 22 of 1994, and which has, as one of its primary functions, the role of adjudicating claims for restitution of land rights to people who have been dispossessed of land as a result of racial discrimination.

Latent defect: A defect in the *res vendita* (the thing sold) which is not immediately apparent upon purchase but which manifests itself later on.

Law Commission *see* 'South African Law Reform Commission'.

Leave of the court: Means with permission of the court.

Leave to appeal: In certain cases, a party who wishes to appeal a judgment of a particular court must request the judge/s who heard the matter, or the judges who are going to hear the matter, for permission (i.e. 'leave') to take the matter on appeal.

Legal person: The law recognises both natural persons (i.e. human beings) as well as juristic persons (e.g. companies and close corporations). Both natural and juristic persons are legal persons and may engage in litigation, either on their own or through representatives.

Letter of demand: A written request in terms of which payment or the performance of a legal obligation is demanded.

Liquidated amount: An amount of money which has been fixed by agreement, order of court or in some other way. For example, a claim demanding damages for pain and suffering is unliquidated, but becomes liquidated (i.e. certain) once the court gives judgment in the matter.

Liquidated demand: A claim for a fixed, certain or ascertained amount of money or thing, e.g. a claim for the purchase price of goods sold and delivered to the defendant. In respect of such claims a plaintiff is entitled to sue by means of a simple summons in the High Court or Magistrates' Courts (*see* 'Simple summons').

Liquid claim: This means a claim where the amount has been fixed by agreement, by an order of court or in some other manner.

Liquid document: A written instrument; signed by the defendant or his agent; which contains an acknowledgement of indebtedness; which is unconditional; for a fixed amount in money. Examples of liquid documents include a cheque, a written acknowledgement of debt, and a mortgage bond. The provisional sentence procedure may be used to recover a debt based upon a liquid document. This should not be confused with a liquidated amount or a liquidated demand.

***Lis pendens*:** A pending lawsuit; or, an uncompleted court case.

Litis contestatio see 'Close of pleadings'.

Local *peregrinus*: A person who, for the purposes of jurisdiction, is a *peregrinus* of the court in which the matter is to be heard, but who is nonetheless resident or domiciled within the borders of South Africa.

***Locus contractus*:** The place where the contract was entered into.

***Locus solutionis*:** All matters related to a contract are governed by the law of the place where the contract is to be performed.

***Locus standi*:** The full expression is *locus standi in iudicio* (meaning 'legal standing to litigate'). In order to possess *locus standi*, a person must have both legal capacity as well as a direct and substantial interest in the right which is the subject matter of the litigation.

Magistrates' Courts: The courts presided over by magistrates which serve the various magisterial districts within South Africa. (*See* 'Regional Magistrates' Courts'.)

Magisterial district: South Africa is divided up into many magisterial districts, created in terms of s 2 of the Magistrates' Courts Act 32 of 1944, each of which is presided over by a particular District Magistrates' Court.

Major (person): This term should no longer be used as the Age of Majority Act 57 of 1972 has been repealed; rather, 'adult' should be used: A 'child' is a person who is below 18 years of age, and an 'adult' is a person 18 years or older.

***Mala fide*:** A Latin expression meaning 'in bad faith'.

***Mandament van spolie*:** A *mandament van spolie* (also known as a spoliation order) is a summary remedy whereby a party's possession of certain property is protected and restored.

***Mandamus*:** A mandatory interdict where the act to be carried out must be performed by a government authority or public official (*see* 'Mandatory interdict').

Mandatory interdict: An order compelling a person to perform some positive act to remedy a wrongful state of affairs which the respondent has brought about, or to do something which he is in law obliged to do if the complainant is not to be deprived of his rights. An example would be an order for a party to demolish a building which is unlawfully encroaching on another party's land (*see* also '*Mandamus*').

Mareva injuction: *See* '*Knox D'Arcy* interdicts'.

MCR: Magistrates' Courts Rules.

Mediation: An ADR procedure which requires the intervention of a *neutral third party* (the mediator) to assist the parties to reach a *mutually acceptable resolution* to their dispute.

***Mero motu*:** 'Of its own accord' (where a court takes action without an application to act by one of the parties). Full name: *'Ex mero motu'*. *Suo motu* and *sua sponte* have the same meaning.

Mini-trial: An ADR procedure that assumes the form of a *semi-formal hearing*, combining elements of litigation and negotiation.

Minor (person): This term should no longer be used as the Age of Majority Act 57 of 1972 has been repealed: A 'child' is a person who is below 18 years of age, and an 'adult' is a person 18 years or older.

Misjoinder: A term used to describe the situation where a party, who should not have been joined to an action, has been erroneously joined.

***Mora*:** Legal default ('*in mora*': due to failure to comply with your legal – usually contractual – obligations).

Motion proceedings *see* 'Application' proceedings.

***Mutatis mutandis*:** With the necessary changes for the change in context.

National Consumer Tribunal: Tribunal set up in terms of the Consumer Protection Act 68 of 2008.

National Credit Regulator: Regulator of the credit industry – set up in terms of the National Credit Act 34 of 2005.

NCA: The National Credit Act 34 of 2005.

***Nomine officio*:** A Latin expression meaning 'in the name of the office'. The term is used to refer to a person (such as a guardian, or trustee, or curator) who sues or is sued in his official capacity as the representative of another, as opposed to on his own behalf (i.e. in his own name or *eo nomine*). The letters 'NO' after the person's name are usually used to indicate that such person is acting in a representative capacity.

Non-admission (plea): A plea of non-admission is used when the opposing party has no or insufficient knowledge of the allegation and is therefore unable to admit or deny its veracity. Its effect is that the allegation becomes contested and the opposing party is 'put to the proof' and must lead evidence in support of the allegation at the trial stage.

Non-joinder: The failure to join a party to proceedings where he has a direct and substantial interest in an order the court may make in such proceedings is known as 'non-joinder'. Where the party is a necessary party, the court will not deal with the issues until the non-joinder has been resolved, i.e. until the joinder has been effected.

Notice (court): This is an official court document which a litigant uses to inform his opponent of an action he is intending to take in terms of the Rules of Court, or in terms of any other statute.

Notice of intention to defend: A notice by the defendant in action proceedings in which he indicates that he intends to defend the action being brought by the plaintiff.

Notice of motion: A document that the applicant serves on the respondent, which serves as a notice that application will be made to court on a certain day for an order (the terms of which are set out in the notice of motion) against the respondent.

Notice of opposition: A notice by the respondent in application proceedings in which he indicates that he intends to oppose the application being brought by the applicant.

Notice of set down: A notice (usually drafted by the plaintiff) in action proceedings which serves to place the matter on the awaiting trial roll in the Magistrates' Courts, and informs the other parties that a trial date has been set in the High Court.

Nulla bona **return**: A return of the sheriff of the court reporting that a judgment debtor has no goods, or insufficient goods, with which to satisfy a warrant of execution (Magistrates' Courts) or writ of execution (High Court) issued against the judgment debtor in an effort to recover the judgment debt. (Not to be confused with a return of non-service where the sheriff was unable to serve a process for one or other reason.)

Oath: An oath is a declaration made by a witness prior to giving evidence in court or a deponent before signing an affidavit, to the effect that the evidence about to be given or the contents of the affidavit are true. In the latter case, the oath is administered by a commissioner of oaths, and in both cases the formula requires the witness or deponent to confirm his intention to speak the truth by ending the oath with the words: 'So help me God'. Once administered, the witness or deponent may be charged with perjury if found to be lying under oath.

Ombudsman: (Also called **'**Ombud**'.**) Statutory or private official tasked with receiving, advising on and resolving complaints of members of the public.

On notice application: This is a reference to motion proceedings where the opposing party is informed that proceedings are being brought (*see*'*Ex parte* applications').

Onus of proof: The onus placed on a party by law and which that party must overcome in order to succeed in the case at hand.

***Pari passu*:** In the same degree or proportion (i.e. equal treatment).

Particulars of claim: A document (which forms part of pleadings) which is attached to the summons and which sets out the material facts upon which the plaintiff relies in support of his case.

Party (plural 'parties'): A term used to describe a person who is directly involved in litigation as a litigant, for example the plaintiff and defendant in actions, the applicant and respondent in applications, and the appellant and respondent in appeals.

Party-and-party costs: These are the normal costs that are usually awarded to the successful party in terms of the Rules of Court.

***Pendente lite*:** A Latin expression meaning 'before litigation'; used, for example, to refer to the maintenance that a spouse may obtain before litigation by way of rule 43 or rule 58 proceedings in the High and Magistrates' Courts, respectively.

***Peregrinus*:** A *peregrinus* is a person who is neither domiciled nor resident within the court's area of jurisdiction. The word is used in two senses: firstly, to refer to someone who is outside the court's jurisdiction, but inside South Africa's borders, and, secondly, to refer to someone outside the country (the latter is also called a 'foreign *peregrinus*').

***Per se*:** As such; by itself.

Personal service: The court document to be served is delivered to the defendant or respondent in person by the sheriff.

PIE: An abbreviation for the Prevention of Illegal Eviction from and the Unlawful Occupation of Land Act 19 of 1998.

Plaintiff: The person or legal entity that institutes an action is known as the plaintiff.

Plea: A document (which forms part of pleadings) in which the defendant sets out his defence to the plaintiff's claim.

Pleadings: Pleadings are documents made by and exchanged between the parties to an action. They contain brief summaries of the material facts on which the plaintiff relies for his cause of action and the defendant for his defence, respectively. Their purpose is to limit and define the issues to be adjudicated upon by the court at trial.

Plea on the merits: A plea by the defendant which deals with the substance of the plaintiff's case.

Pleading over: The term used for the situation where a defendant, having raised a special plea, proceeds also to plead on the merits.

POCA: Abbreviation for the Prevention of Organised Crime Act 121 of 1998.

Point *in limine*: A legal issue raised orally in court, or on the pleadings. The legal issue raised is a point of law which is argued before the merits of the case are considered.

Practice directives: Rules of practice issued by the High Court, SCA, and Constitutional Court from time to time which set out detailed steps and procedures to be followed that supplement the Rules of Court.

Pre-trial conference: A conference held between litigants' legal representatives, no later than six weeks before the trial goes to court, to discuss matters pertinent to the trial. *See* High Court rule 37.

Prescribed rate of interest: The prescribed or statutory rate of interest which attaches to various debts is regulated by the Prescribed Rate of Interest Act 55 of 1975. This rate of interest applies only in respect of debts for which no other rate of interest applies. It is therefore a 'fallback' rate and is also known as the '*mora*' rate of interest.

Prescription: Prescription is of two kinds, acquisitive and extinctive. Acquisitive prescription is a mode of acquiring property. Extinctive prescription is a measure by which an action can be repelled on the ground that the time fixed by law, and within which the action should have been raised, has expired.

Prima facie **right**: The first requirement for an interim interdict is a *prima facie* right. A *prima facie* right is a right that exists in substantive law, the possession of which the claimant has merely shown *prima facie* (i.e. on the face of it) but has not proven conclusively on a balance of probabilities.

Principal case: This phrase is used in provisional sentence proceedings. It refers to the underlying transaction between the parties as a result of which a negotiable instrument has been issued, the merits of the underlying transaction now being in dispute.

Principal place of business: The principal place of business of a company has been held to be the place at which the main management and control of the company or close corporation are situated, that is, its head office.

***Pro amico*:** An expression meaning 'for a friend', and indicating a situation where a legal representative appears on behalf of a person who is known to him, such as a friend or relative, usually for nothing or for a reduced fee.

Probabilis causa **certificate (in** *in forma pauperis* **proceedings)**: The term comes from the Latin expression *probabilis causa litigandi*, which means a probable ground of litigating. Where a person applies to bring or defend proceedings *in forma pauperis*, the attorney and advocate appointed to represent him must, if the facts warrant it, sign a statement that they are satisfied that the person concerned is unable to pay fees and that they are acting for that person in their professional capacities in the proceedings to be instituted by him. In addition, the advocate must sign a certificate *probabilis causa* confirming that in his opinion there is a good cause of action or defence.

Procedural law *see* 'Adjectival law'.

***Pro deo*:** An expression meaning 'for God', and indicating a situation where a legal representative appears on behalf of a party for a (usually reduced) fee that is paid by the state.

Prohibitory interdict: An interdict which prevents the respondent from interfering with the applicant's rights or stops an interference that has already commenced.

***Pro rata*:** In proportion, or 'proportionately'. (Can also mean 'according to the rate applicable' as a financial term.)

Prorogatio see 'Consent to jurisdiction'.

Provisional sentence: Provisional sentence is a procedure that provides a creditor who is armed with a liquid document a 'speedy remedy for the recovery of the money due to him without having to resort to the more expensive, cumbersome and often dilatory machinery of an action.'

Quantum merit: A legal claim for a portion of the total amount the claimant is entitled to, *see Morgan v Moodley* 1965 (2) SA 737 (N).

Quorum: A term used to describe the complement of judges who sits in any particular case. A quorum of judges in a full-bench appeal, for instance, will consist of three High Court judges.

***Ratione causae continentiae*:** A term expressing the jurisdictional principle that more than one claim against different persons or in respect of different things in different jurisdictional areas, can be joined in one process before one court if it can be said that together they really constitute one case and that the one begins where the other ends. The underlying consideration is to avoid duplication of proceedings and conflicting decisions in the same matter, and to dispose more conveniently of cases.

***Ratione contractus*:** Jurisdiction by reason of the contract having been concluded within the territorial area of a particular High Court.

***Ratione delicti commissi*:** Jurisdiction by reason of the delict having been committed within the territorial area of a particular division of the High Court.

***Ratione domicilii*:** Jurisdiction by reason of the defendant/respondent being domiciled within the territorial area of a particular division of the High Court.

***Ratione rei gestae*:** Juridiction by reason of the cause of action arising within the territorial area of a particular division of the High Court.

***Ratione rei sitae*:** Jurisdiction by reason of the property which forms the subject of the dispute being situated in the territorial area of a particular division of the High Court.

Real action: An action in respect of a real right.

Real dispute of fact: A material dispute of fact between the parties which would oblige the claimant to pursue the case by way of action as opposed to by way of application.

Regional Magistrates' Courts: Intermediate civil courts established by Act 31 of 2008. Regional Courts, as they are otherwise known, also have criminal jurisdiction.

Registered office: For purposes of service, the Companies Act 71 of 2008 provides that every company must have a registered office within the Republic of South Africa, at which office all process (court documents) may be served.

Registrar: The official in a Regional Magistrates' Court or in the High Court who performs all the organisational work necessary to ensure the smooth functioning of that court. (*See* 'Clerk of the Court'.)

***Rei vindicatio*:** A vindicatory remedy is a type of mandatory interdict in terms of which an owner has his property restored to him.

Rejoinder: The defendant's reply to the plaintiff's replication.

Replication: The response which the applicant/plaintiff may wish to make to the respondent's answering affidavit/defendant's plea.

Replying affidavit: The applicant's affidavit which sets out the applicant's response to the averments contained in the respondent's answering affidavit.

Rescission (of judgment): The setting aside of a judgment of a court.

Residence: A residence is where a person lives, in other words, place of abode, home or the place where one generally sleeps after the work of the day is done. Having a residence at a particular place does not necessarily imply residing there, however, and a person can have more than one residence, and may also reside in more than one district while spending time between the two residences. A person must be sued in the district in which he is residing when the summons is served. A company or other juristic person can also have a residence.

Res judicata*: *Res judicata is a special plea in abatement. It may be raised where the plaintiff's claim has been previously heard by any court that has given final judgment. A matter is *res judicata* where the parties are the same and the cause of action is the same. In this situation the matter may not be heard again.

Respondent: The person or legal entity against whom an application is brought is known as the respondent.

Restitution: To restore the *status quo ante* (*see* '*status quo ante*').

Return day: A rule *nisi* acts as a notice to a person to appear before court on a certain date (the return date) to show cause why the final order the court proposes to make should not be made.

Return of service: A written report from the sheriff stating when, where and how he served a particular court document. (Also called the return.)

Review: The process whereby the proceedings of lower courts, both civil and criminal, are brought before the High Courts in respect of irregularities or illegalities that occurred during the course of such proceedings.

Rule *nisi*: If, during an *ex parte* application, it appears to the court that the rights of other persons may be affected by the order it will grant, the court will not make a final order but will order a rule *nisi* to be issued. This acts as a notice to such persons to show cause why the order should not be made final on the return day of the rule.

Rule 43 proceedings: A quick and inexpensive procedure available in the High Court (and now also in the Magistrates' Courts in terms of rule 58) to a spouse who may seek emergency interim relief before judgment, claiming either interim maintenance for herself and/or her children, a contribution towards the costs of a pending matrimonial action, or interim custody of or access to a child.

Section 65 procedure: A procedure, set out in the Magistrates' Courts Act, for the collection of judgment debts, and which involves a financial enquiry at which the financial position of the judgment debtor can be properly assessed.

Sequestration: A process whereby a court, at the instance of a creditor, places the estate of a natural person, a partnership, or a trust which is insolvent or deemed to be insolvent under the control of the Master of the High Court until the appointment by the Master of the trustee, who administers the estate for the benefit of its creditors.

Service (of legal documents): A term used to describe the process whereby the person against whom relief is claimed (and any other party with an interest in the matter) is formally notified of the intended action or application. (*See* also 'Delivery'.)

Set down *see* 'Notice of set down'.

Settlement agreement: An agreement in writing which records the terms on which the parties to a legal dispute have agreed to settle the dispute between them (*see* also 'Acknowledgment of debt').

Sheriff: The official who acts as the messenger of court and serves documents relating to court proceedings, as well as performing other duties such as attaching the property of judgment debtors.

Simple summons: A form of summons used only for a 'debt or liquidated demand.' A simple summons must disclose a cause of action, but is extremely brief, and need not comply with the requirements of rules 18 or 6 of the High and Magistrates' Courts, respectively. Should the matter be defended, however, because the particulars are so brief, and usually fail to comply with the provisions of rules 18 or 6, the filing of a declaration is required.

Small Claims Court: A court specifically created by statute to deal with small claims which do not involve amounts of more than R12 000.

South African Law Reform Commission (previously called the South African Law Commission): A government body consisting of legal experts who consider the development of South African law and conduct research projects designed to promote legal reform in areas of the law which may have become outdated. (Also called the Law Commission.)

Special pleas: A special plea is a plea which the defendant may raise in response to the plaintiff's particulars of claim and which does not deal with the merits of the plaintiff's case, but attempts to either delay or destroy the plaintiff's case on a legal or procedural point.

Special pleas in abatement: A form of special plea which the defendant may raise in response to the plaintiff's action which has the effect of destroying the cause of action. For example, if the claim on which the plaintiff is relying has prescribed, the defendant will successfully destroy the plaintiff's cause of action by raising a special plea of extinctive prescription'.

Specific performance: An order of court which obliges the unsuccessful party to perform an act as opposed to paying an amount of money to the successful party.

Splitting (of claims): A matter which involves a single claim that exceeds the monetary jurisdiction of the Magistrates' Courts cannot be split into two or more claims in order to bring the matter within the jurisdiction of the Magistrates' Courts.

Spoliation order *see 'Mandament van spolie'*.

Stated case: A stated case is a written statement of facts agreed upon by the parties to an action or application, and the court then declares what law is applicable to these facts.

***Status quo ante*:** A Latin expression meaning the 'condition or position which existed before'.

Statutory rate of interest *see* 'Prescribed rate of interest'.

Subpoena: A court document which serves to inform a person that he is required to come and give evidence before a court as a witness or to prove a document.

Subpoena *duces tecum*: If any witness has in his possession or control any deed, instrument, writing or object which the party requiring his attendance wishes to be produced in evidence before the court, a subpoena *duces tecum* may be issued which specifies the document or object, and requires the witness to produce it at the trial. In practice, the witness must also produce the document or object for the registrar of the court in advance of the trial so that the party requiring it can inspect it.

Substantive law: Substantive law deals with the question of whether or not a legal claim exists in any particular situation (*see* 'Adjectival law').

Substituted service: If it is impossible to effect service in any manner specified in the rules, the court may, upon application of the person wishing to cause service to be effected, give directions about substituted (i.e. alternative) means of service.

Sue (legal): To institute legal proceedings (whether by action or application) against another party.

***Sui generis*:** A Latin expression meaning 'of its own kind or class'.

Suit (legal): A term used to describe the legal case which exists after one party has sued (instituted legal proceedings against) another party.

Summary judgment: Summary judgment is a procedure used to obtain the swift enforcement of a claim against a defendant who has no real defence to the claim. It may be obtained in respect of four types of claim only: (1) on a liquid document; (2) for a liquidated amount in money; (3) for delivery of specified movable property; and (4) for ejectment; together with any claim for interest and costs in each case.

Summons: A document issued by the plaintiff in an action which informs the defendant that legal proceedings are to be instituted against him (the defendant).

Superannuation (of judgment): Judgments of certain courts are in force for a certain time period from the date on which it has been pronounced. After that date, it superannuates and is no longer effective.

Suo moto see '*Mero moto'*.

Supporting affidavit: An affidavit which sets out evidence in support of the applicant's claim or the respondent's defence, as the case may be.

Supreme Court: The Supreme Court of South Africa was the institution that embodied the superior court system in this country until 1996. It was not a single court but consisted of the Appellate Division, together with various provincial and local divisions. It has now been replaced by the High Court of South Africa. The appellate courts, the Supreme Court of Appeal and the Constitutional Court, are completely separate and falls outside the High Court system (*see* also 'High Court').

Supreme Court of Appeal: The Supreme Court of Appeal, which sits in Bloemfontein, may decide appeals in any matter and is, in the ordinary course, the appellate court which will be approached after the High Court.

Surrejoinder: A pleading by the plaintiff in reply to the defendant's rejoinder.

Sworn statement *see* 'Affidavit'.

Tanquam suspectus de fuga see 'Arrest *tanquam suspectus de fuga*'. This procedure no longer exists and is only referred to for historical reference.

Taxing master: An official who is appointed to check the bills of costs put forward by parties to a legal dispute and to tax (calculate) which costs are allowable in terms of a prescribed tariff.

Temporary interdict: A term used as an alternative to 'interim interdict', and sometimes also synonymous with the term 'Interlocutory interdict'.

Tender: Another word for 'offer', used in the context of settlement agreements.

Territorial jurisdiction: In civil proceedings, the jurisdiction a court has over events, persons and property within its territorial area.

Third party procedure: The method by which one of the parties to legal proceedings can bring an outside party into the action or application; such outsider then becomes a third party to the proceedings.

***Transactio*:** The completed compromise in settlement negotiations.

Traversing: The process of responding to pleadings by replying to each allegation raised.

Tribunal: *see* 'National Consumer Tribunal'.

Trust: A trust is a legal institution *sui generis* (of its own kind or class), created for a particular purpose, such as administering funds for a scholarship, or administering the assets of a particular family or person.

***Ubi jus ibi remedium*:** Where there is a legal right, there must be a legal remedy.

***Universitas*:** A *universitas* is a reference to a juristic person (for example, a close corporation) which can sue and be sued in its own name.

Unconditional payment into court: A payment made without conditions attached, by the defendant, to the clerk of court in the Magistrates' Courts, for the full amount claimed by the plaintiff.

Uniform Rules: The uniform set of rules applicable to the High Court of South Africa, also known as the 'Uniform Rules of Court'. Each division of the High Court also has its own set of practice rules, called practice directives or a practice manual, which sets out the practice in that division.

Urgent application: An application which is brought urgently. In a case of urgency, the judge may dispense with the forms and service provided for in the rules and may hear the matter at such time and place and in such a manner and according to such procedure as the circumstances require.

Usual order: When summary judgment has been applied for, and the plaintiff has received an affidavit from the defendant that discloses a defence, the plaintiff's attorney is unlikely to persist in attempting to obtain summary judgment. He will usually obtain the defendant attorney's consent to request the court to grant the 'usual order' instead. The usual order means: (1) summary judgment refused; (2) the defendant granted leave to defend; (3) costs to be reserved.

Vague and embarrassing: A term used to describe pleadings which, due to some defect, ambiguity or incompleteness in the manner in which it is set out, results in embarrassment to the defendant. The defendant is then entitled to except to the pleadings.

Variation (of judgment): While the normal rule is that a judgment once given is final, in certain defined circumstances a judgment may be varied, for example, where the court has made an obvious clerical error in its judgment, or where the parties by agreement request the court to add something to the order which the court granted.

Vindication *see 'Reivindicatio'*.

***Viva voce*:** This is Latin for 'with living voice', and is usually used in the context of *viva voce* evidence, meaning direct oral evidence given by witnesses in court.

Voetstoots: A Dutch term which means that the res vendita (the thing sold) is sold 'as is', with all its faults, and which implies thereby that the seller will not be liable for any latent defects that may later materialise.

Warrant of arrest: A warrant which authorises the arrest of an individual. These are seldom used in civil matters and appear mostly in criminal matters.

Warrant of execution: *see* 'Writ of execution'.

Wasted costs: Wasted costs are those legal costs incurred as a result of a procedure that is aborted, such as a trial which is adjourned due to the unavailability of witnesses. The side that has caused the delay would generally be ordered to pay the wasted costs.

Writ of execution: A document which entitles the sheriff to execute (in the legal sense of the word) the property of the judgment debtor.

References

Table of academic articles

Annual Survey of South African Law

Burchell, JM and Dendy, M: 'Law of delict' (1985) *Annual Survey of South African Law* 179
Dendy, M: 'Law of delict' (1988) *Annual Survey of South African Law* 171
Dendy, M: 'Law of delict' (1991) *Annual Survey of South African Law* 358
Dodson, A: 'Civil and constitutional procedure and jurisdiction' (2002) *Annual Survey of South African Law* 863
Dodson, A: 'Civil and constitutional procedure and jurisdiction' (2003) *Annual Survey of South African Law* 826
Dodson, A: 'Civil and constitutional procedure and jurisdiction' (2004) *Annual Survey of South African Law* 707
Dodson, A: 'Civil and constitutional procedure and jurisdiction' (2005) *Annual Survey of South African Law* 707
Dodson, A: 'Civil and constitutional procedure and jurisdiction' (2006) *Annual Survey of South African Law* 763
Hurter, E: 'Civil and constitutional procedure and jurisdiction' (2007) *Annual Survey of South African Law* 131
Hurter, E: 'Civil and constitutional procedure and jurisdiction' (2008) *Annual Survey of South African Law* 112
Kahn, E: 'Conflict of laws' (1969) *Annual Survey of South African Law* 407
Kahn, E: 'Conflict of laws' (2000) *Annual Survey of South African Law* 871
Snyckers, F: 'Civil and constitutional jurisdiction and procedure' (1997) *Annual Survey of South African Law* 657
Snyckers, F: 'Civil and constitutional procedure and jurisdiction' (1998) *Annual Survey of South African Law* 667
Snyckers, F: 'Civil and constitutional procedure and jurisdiction' (1999) *Annual Survey of South African Law* 595
Snyckers, F: 'Civil and constitutional procedure and jurisdiction' (2000) *Annual Survey of South African Law* 725
Snyckers, F: 'Civil and constitutional procedure and jurisdiction' (2001) *Annual Survey of South African Law* 728
Snyckers, F and Unterhalter, D: 'Civil and constitutional jurisdiction and procedure' (1996) *Annual Survey of South African Law* 740

De Jure

Boraine, A: 'Some thoughts on the reform of administration orders and related issues' (2003) 36 *De Jure* 217
Boraine A and Renke S: 'Some practical and comparative aspects of the cancellation of instalment agreements in terms of the National Credit Act 34 of 2005' (2008) 41 *De Jure* 1
Van Loggerenberg, D, Dicker, L and Malan, J: 'Civil procedure: Attachment and arrest to found or confirm jurisdiction' (2008) May *De Jure*

De Rebus

2010

Galgut, B: 'South African ombudsman offices in the financial sector' (2010) May *De Rebus* 28

Matlala, D: 'Law reports: Civil procedure: Application for default judgment for failure to enter appearance or file a plea should be lodged with the registrar' (2010) Aug *De Rebus*

Matlala, D: 'Law reports: Civil procedure: Condonation for late serving and filing of appeal record; Non-joinder of mortgage bank on demolition of unauthorized structure on mortgaged property' (2010) Dec *De Rebus*

Matlala, D: 'Law reports: Civil procedure: Copy of written contract should be attached to pleadings' (2010) Jun *De Rebus*

Ramonyai, E: 'Practice note: Application for summary judgment for part of claim; Practice directions in terms of r 32(2)' (2010) Jul *De Rebus* 23

Smith, C and van Niekerk, SJ: 'Practice notes: Execution against immovable property: negotiating the tightrope of s 26 (2010) Jan-Feb *De Rebus*32

2009

Bobroff, R: 'Practice note: Suggested procedures for lodgement of claims in terms of the RAF Amendment Act' (2009) Jan-Feb *De Rebus* 16

Bobroff, R: 'Practice note: Suggested procedures for lodgement of claims in terms of the RAF Amendment Act' (2009) Mar *De Rebus* 26

Matlala, D: 'Law reports: Civil procedure: Power of court to raise issues *mero motu*' (2009) Jan-Feb *De Rebus* 43

Matlala, D: 'Law Reports: Civil procedure: Finality of appealability of decision; Substitution of the plaintiff' (2009) Dec *De Rebus* 25

Matlala, D: 'Law reports: Civil procedure: Variation of a court order' (2009) Apr *De Rebus*

Matlala, D: 'Law reports: Civil procedure: When raising a question of law for the first time on appeal is permissible' (2009) Aug *De Rebus* 29

Mills, L: 'Practice note: National Credit Act 34 of 2005: section 129 notice – dispatch or receipt?' (2009) Aug *De Rebus* 27

Naude, L and Klein, M: 'Practice notes: Appointing a *curator bonis* without a court order' (2009) Apr *De Rebus*

Stadler, S: 'The High Court and debt review: consumer law' (2009) Dec *De Rebus* 46

2008

Dicker, L: 'Practice notes: Civil procedure: The new age of majority revisited' (2008) Jan-Feb *De Rebus* 46

Dicker, L: 'Practice notes: New tariff of witness fees in civil cases' (2008) Jun *De Rebus*

Herbst, W: 'Passop vir die slaggat! [Beware of the trap]' (2008) Jun *De Rebus*

Kanyane, M: 'Beware the power of the mighty pen' (2008) Mar *De Rebus* 22

Matlala, D: 'Law Reports: Civil procedure: Effect of irregular procedure in motion proceedings; Joinder of parties' (2008) Dec *De Rebus* 28

Matlala, D: 'Law Reports: Civil procedure: Leading of oral evidence in application proceedings to be done in exceptional cases only' (2008) May *De Rebus*

Matlala, D: 'Law Reports: Civil procedure: Order declaring mortgaged property executable can be issued by way of summary judgment' (2008) Aug *De Rebus*

Matlala, D: 'Law Reports: Civil procedure: Particulars of claim that set out a cause of action are not vague and embarrassing' (2008) Oct *De Rebus*

Matlala, D: 'Law Reports: Civil procedure: Removal of civil proceedings from one division of the High Court to another' (2008) Jun *De Rebus*

Matlala, D: 'Law Reports: Civil procedure: Setting aside of a *subpoena*' (2008) Jan-Feb *De Rebus* 54

Matlala, D: 'Law Reports: Civil procedure: Stay of vexatious proceedings' (2008) May *De Rebus*

Matlala, D: 'Law Reports: Constitutional practice: Inordinate delay in lodging application for leave to appeal' (2008) Jun *De Rebus*

Matlala, D: 'Law Reports: Sale in execution: Sale in execution without judicial oversight is invalid' (2008) May *De Rebus*

Matlala, D: 'Law Reports: Suretyship: Claim based on judgment prescribes after 30 years' (2008) May *De Rebus*

Modise, J: 'Jurisdiction of courts. In relation to claims lodged in terms of the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 and the Road Accident Fund Act of 56 of 1996' (2008) Jan-Feb *De Rebus* 38

Schulze, H: 'Law Reports' (2008) Jan-Feb *De Rebus* 53

Schulze, H: 'Law Reports: Civil procedure' (2008) Mar *De Rebus*

Schulze, H: 'Law Reports: Civil procedure' (2008) Apr *De Rebus*

Van Loggerenberg, D, Dicker, L and Malan, J: 'Practice notes: Civil procedure: Aspects of debt enforcement under the National Credit Act' (2008) Jan-Feb *De Rebus* 46

Van Loggerenberg, D, Dicker, L and Malan, J: 'Practice notes: What constitutes a real, genuine or *bona fide* dispute of fact in motion proceedings?' (2008) Jun *De Rebus*

2007

Dicker, L: 'Practice notes: Procedure in urgent applications' (2007) May *De Rebus* 31

Govender, M: 'Taking of evidence abroad' (2007) Aug *De Rebus* 24

Mabuza, RJ: 'Case notes: Constitutional Court rules on leave to appeal' (2007) Jul *De Rebus* 58

Matlala, D: 'Law reports: Civil procedure: Authority to depose to an affidavit; Execution of judgment pending appeal; Non-compliance with court orders' (2007) Jan-Feb *De Rebus* 39

Matlala, D: 'Law reports: Civil procedure: Discharge of Anton Piller order' (2007) Apr *De Rebus* 27

Matlala, D: 'Law reports: Civil procedure: Joinder of third party after close of pleadings; Rescission of summary judgment' (2007) Oct *De Rebus* 31

Matlala, D: 'Law reports: Defamation: Interdict as a remedy; Written apology as sufficient remedy' (2007) Aug *De Rebus* 35

Rontgen, KM: 'Practice notes: Pre-trial procedure (rule 37) latest ruling (TPD)' (2007) May *De Rebus* 33

Schulze, H: 'Law reports: Civil procedure' (2007) Mar *De Rebus* 25

Schulze, H: 'Law Reports: Execution' (2007) Jul *De Rebus* 46

Van Loggerenberg, D, Dicker, L and Malan, J: 'Practice notes: Applications for security for costs' (2007) Aug *De Rebus* 28

Van Loggerenberg, D, Dicker, L and Malan, J: 'Practice notes: Claims for interest in action proceedings' (2007) Jul *De Rebus* 35

Van Loggerenberg, D, Dicker, L and Malan, J: 'Practice notes: Expert witnesses' (2007) Jun *De Rebus* 29

Van Loggerenberg, D, Dicker, L and Malan, J: 'Practice notes: The new Children's Act' (2007) Nov *De Rebus* 25

2006

Hopkins, K and Mahon, O: 'When witnesses lie in court: rescinding judgments obtained by perjury' (2006) Apr *De Rebus* 24

Jones, T: 'Courts' jurisdiction: … whether a choice-of-law clause can confer jurisdiction in a particular court' (2006) Nov *De Rebus* 26

Ka-Mbonane, I: 'Unfriendly courts for friendly sequestrations?' (2006) Jun *De Rebus* 26

Matlala, D: 'Law reports: Civil procedure' (2006) Apr *De Rebus* 27

Matlala, D: 'Law reports: Civil procedure' (2006) Jun *De Rebus* 35

Matlala, D: 'Law reports: Civil procedure: Contempt of court; Jurisdiction of the High Court; Order declaring specially hypothecated immovable property executable; Rescission of judgment; Stay of proceedings' (2006) Oct *De Rebus* 39

Matlala, D: 'Law reports: Jurisdiction of the High Court: *Geyser v Nedbank Ltd and Others* (2006) Dec *De Rebus*

Steenkamp, H: 'Removing the immovable' (2006) Aug *De Rebus* 12

Van Loggerenberg, D, Dicker, L and Malan, J: 'Practice notes: Civil procedure' (2006) Mar *De Rebus*

Van Loggerenberg, D, Dicker, L and Malan, J: 'Practice notes: Civil procedure: Applications to the Supreme Court of Appeal for leave to appeal; Amended practice directive for TPD' (2006) Jun *De Rebus*

Van Loggerenberg, D, Dicker, L and Malan, J: 'Practice notes: Civil procedure: Step-by-step trial techniques' (2006) Apr *De Rebus* 21

Van Loggerenberg, D, Dicker, L and Malan, J: 'Practice notes: Civil procedure: Taking exception in the High Court' (2006) Oct *De Rebus* 33

2005

Deosaran, T: 'Case note: Implications for sales in execution' (2005) Jul *De Rebus* 39

Matlala, D: 'Law reports: Civil procedure' (2005) Apr *De Rebus* 34

Matlala, D: 'Law reports: Civil procedure' (2005) Oct *De Rebus* 33

Matlala, D: 'Law reports: Civil procedure: Administrative order; *Audi alterum partem* rule' (2005) Jan-Feb *De Rebus* 42

Matlala, D: 'Law reports: Civil procedure: Appeal' (2005) Dec *De Rebus* 29

Matlala, D: 'Law reports: Civil procedure: Liquid document and liquidated amount of money; Submission to the jurisdiction of the court' (2005) Jun *De Rebus* 32

Matlala, D: 'Law reports: Civil procedure: Proof of mandate to act on behalf of a client in the absence of a power of attorney' (2005) Aug *De Rebus* 32

Van der Want, M: 'Rescission by consent' (2005) May *De Rebus* 34

Van Loggerenberg, D, Dicker, L and Malan, J: 'Practice note: Civil procedure' (2005) Mar *De Rebus* 29

Van Loggerenberg, D, Dicker, L and Malan, J: 'Practice note: Civil procedure' (2005) May *De Rebus* 36

Van Loggerenberg, D, Dicker, L and Malan, J: 'Practice note: Civil procedure' (2005) Sep *De Rebus* 25

Van Loggerenberg, D, Dicker, L and Malan, J: 'Practice note: Civil procedure' (2005) Nov *De Rebus* 27

Van Loggerenberg, D, Dicker, L and Malan, J: 'Practice note: Civil procedure: Amendments to pleadings in the magistrate's court' (2005) Jul *De Rebus* 26

Van Loggerenberg, D, Dicker, L and Malan, J: 'Practice note: Civil procedure: Rescission of a judgment where the defendant does not intend defending the action' (2005) Dec *De Rebus* 27
Van Loggerenberg, D, Dicker, L and Malan, J: 'Practice note: Civil procedure: Separation of issues in terms of r 33(4)' (2005) Aug *De Rebus* 30
Van Loggerenberg, D, Dicker, L and Malan, J: 'Practice note: Civil procedure: Voluntary associations' (2005) Apr *De Rebus* 30
Van Loggerenberg, D, Dicker, L and Malan, J: 'Practice note: New Pretoria court procedures' (2005) Jan-Feb *De Rebus* 35

2004
Dendy, M: 'Step-by step anti-dissipation interdicts' (2004) 3 *De Rebus* 30
Pieterse, A and Curlewis, L: 'Area of jurisdiction and seat of the Labour Court' (2004) 3 *De Rebus* 47
Pretorius, L: 'Step-by-step maintenance applications in the Maintenance Court' (2004) 1/2 *De Rebus* 36

2003
Beyl, A: 'Step-by-step collections in the Magistrates' Courts (Practice note)' (2003) 1/2 *De Rebus* 38
Burger, S: 'Case note: Attorney-and-client bills of costs: clarity at last? (Law reports)' (2003) 9 *De Rebus* 37
Cilliers, A: 'Tale en die Grondwet' (2003) 3 *De Rebus* 56
Dendy, M: 'Step-by-step application (motion) procedure (Practice note)' (2003) 7 *De Rebus* 39
Dendy, M: 'Step-by-step applications for *Anton Piller* orders (Practice note)' (2003) 9 *De Rebus* 26
Dendy, M: 'Step-by-step choice of forum in civil proceedings (Practice note)' (2003) 4 *De Rebus* 32
Dendy, M: 'Step-by-step choice of procedure in civil litigation (Practice note)' (2003) 5 *De Rebus* 35
Dendy, M: 'Step-by-step provisional sentence proceedings (Practice note)' (2003) 6 *De Rebus* 29
Dendy, M: 'Step-by-step urgent applications (Practice note)' (2003) 8 *De Rebus* 32

2002
Bam, F: 'Land Claims Court practice direction 6 (Practice note)' (2002) 4 *De Rebus* 55
Mpushe, S: 'Divorce actions and application proceedings involving minor children (Practice note)' (2002) 12 *De Rebus* 44
Webbstock, T: 'Administration fees under s 74 of the Magistrates' Courts Act (Opinion)' (2002) 8 *De Rebus* 59

2001
Anderson, A: 'Step-by-step protection against domestic violence (Practice note)' (2001) 4 *De Rebus* 40
Beatson, M: 'Step-by-step application for admission as an attorney (Practice note)' (2001) 5 *De Rebus* 40
Bobroff, R: 'Attorney-and-client costs agreements' (2001) 8 *De Rebus* 30
Giliomee, C: 'Step-by-step civil appeals from the Magistrate's Court (Practice note)' (2001) 2 *De Rebus* 22
Holliday, C: 'Collecting costs and interest in the Magistrate's Court' (2001) 9 *De Rebus* 34

Meintjes-Van der Walt, L: 'Step-by-step guidelines for lawyers and expert witnesses (Practice note)' (2001) 1 *De Rebus* 36
Parmanand, SK: 'Step-by-step checklist for appeals (Practice note)' (2001) 11 *De Rebus* 42
Pillay, ML: 'Step-by-step pre-trial procedures in High Court civil matters (Practice note)' (2001) 3 *De Rebus* 40
Van der Merwe, P: 'Attorney counsel may not charge more than advocates, KwaZulu-Natal judge rules in "test" case (News)' (2001) 2 *De Rebus* 7
Van Dyke, H: 'Step-by-step specific costs orders (Practice note)' (2001) 9 *De Rebus* 42

2000
Cilliers, A: 'Civil procedure and costs' (2000) 1 *De Rebus* 39
Cilliers, A: 'Civil procedure and costs' (2000) 3 *De Rebus* 49
Cilliers, A: 'Civil procedure and costs' (2000) 7 *De Rebus* 43
Cilliers, A: 'Civil procedure and costs' (2000) 9 *De Rebus* 41
Cilliers, A: 'Civil procedure and costs' (2000) 11 *De Rebus* 47
Cilliers, A: 'Burgerlike prosesreg en koste' (2000) 2 *De Rebus* 33
Cilliers, A: 'Burgerlike prosesreg en koste' (2000) 4 *De Rebus* 40
Cilliers, A: 'Burgerlike prosesreg en koste' (2000) 5 *De Rebus* 46
Cilliers, A: 'Burgerlike prosesreg en koste' (2000) 6 *De Rebus* 41
Cilliers, A: 'Burgerlike prosesreg en koste' (2000) 8 *De Rebus* 41
Cilliers, A: 'Burgerlike prosesreg en koste' (2000) 10 *De Rebus* 59
Cilliers, A: 'Burgerlike prosesreg en koste' (2000) 12 *De Rebus* 47
Davis, D: 'Step-by step insolvency procedure' (2000) 3 *De Rebus* 38
Howie, R: 'Summary judgement. Speedy relief for liquidators under rule 32(1)(b)' (2000) 4 *De Rebus* 20
Lambrechts, H: 'Practice notes: Claims against the police' (2000) 9 *De Rebus* 33

1999
Cilliers, A: 'Civil procedure and costs' (1999) 1 *De Rebus* 41
Cilliers, A: 'Civil procedure and costs' (1999) 3 *De Rebus* 37
Cilliers, A: 'Civil procedure and costs' (1999) 5 *De Rebus* 47
Cilliers, A: 'Civil procedure and costs' (1999) 9 *De Rebus* 51
Cilliers, A: 'Civil procedure and costs' (1999) 11 *De Rebus* 53
Cilliers, A: 'Civil procedure and costs. The Contingency Fees Act 66 of 1997' (1999) 7 *De Rebus* 51
Cilliers, A: 'Burgerlike prosesreg en koste' (1999) 2 *De Rebus* 49
Cilliers, A: 'Burgerlike prosesreg en koste' (1999) 4 *De Rebus* 49
Cilliers, A: 'Burgerlike prosesreg en koste' (1999) 6 *De Rebus* 49
Cilliers, A: 'Burgerlike prosesreg en koste' (1999) 8 *De Rebus* 43
Cilliers, A: 'Burgerlike prosesreg en koste' (1999) 10 *De Rebus* 53
Cilliers, A: 'Burgerlike prosesreg en koste' (1999) 12 *De Rebus* 59
Cilliers, A: 'Step-by-step civil appeal procedure. Civil appeal from a Magistrate's court to a High Court' (1999) 12 *De Rebus* 44
Henderson, A: 'Show me the money: damages and costs in constitutional cases and challenging the rules in "normal" proceedings' (1999) 2 *De Rebus* 25
Registrar, Central Divorce Court, Johannesburg: 'Revised divorce court rules' (1999) 1 *De Rebus* 38

Yssel, R: 'Alice in the debtor's court' (1999) 373 (Feb) *De Rebus* 21

1998
Cilliers, A: 'Civil procedure and costs' (1998) 1 *De Rebus* 30
Cilliers, A: 'Civil procedure and costs' (1998) 3 *De Rebus* 32
Cilliers, A: 'Civil procedure and costs' (1998) 5 *De Rebus* 35
Cilliers, A: 'Civil procedure and costs' (1998) 7 *De Rebus* 34
Cilliers, A: 'Civil procedure and costs' (1998) 9 *De Rebus* 33
Cilliers, A: 'Civil procedure and costs' (1998) 11 *De Rebus* 43
Cilliers, A: 'Burgerlike prosesreg en koste' (1998) 2 *De Rebus* 27
Cilliers, A: 'Burgerlike prosesreg en koste'(1998) 4 *De Rebus* 34
Cilliers, A: 'Burgerlike prosesreg en koste' (1998) 6 *De Rebus* 46
Cilliers, A: 'Burgerlike prosesreg en koste' (1998) 8 *De Rebus* 40
Cilliers, A: 'Burgerlike prosesreg en koste' (1998) 10 *De Rebus* 36
Cilliers, A: 'Burgerlike prosesreg en koste' (1998) 12 *De Rebus* 37
Yssel, R: 'The resurrection of the long dead: the "new" s 65 procedure' (1998) May *De Rebus* 69

Federation of Insurance and Corporate Counsel Quarterly

Alford, H and Kaufman, K: 'Alternative dispute resolution: what is it?' (1999) *Federation of Insurance and Corporate Counsel Quarterly* 439

High Court Motion Procedure: A Practical Guide

Joffe, MM, Neukircher, B, Sc, Fourie, HR and Haupt, LC: 'High Court Motion Procedure a Practical Guide' 1 (2008) 1-23
Joffe, MM, Neukircher, B, Sc, Fourie, HR and Haupt, LC: 'High Court Motion Procedure a Practical Guide' 1 (2008) 1-45
Joffe, MM, Neukircher, B, Sc, Fourie, HR and Haupt, LC: 'High Court Motion Procedure a Practical Guide' 1 (2008) 1-88

Juta's Quarterly Review of South African Law (Available online with subscription)

Brand, D: 'Administrative law' (2008) January to March (1) *Juta's Quarterly Review of South African Law*
Sharrock, R: 'Contract' (2007) October to December (4) *Juta's Quarterly Review of South African Law*

South African Journal of Criminal Justice (SACJ)

Cowling, M: 'Fighting organised crime: comment on the Prevention of Organised Crime Bill 1998' (1998) 11 *SACJ* 350

South African Journal on Human Rights (SAJHR)

Rycroft, A and Bellengère, A: 'Judicial innovation and the delinquent state: a note on *The State and Mfezeko Zuba and 23 similar cases*' (2004) 20 *SAJHR* 321

South African Law Journal (SALJ)

Coaker, J: 'Pre-trial conferences' (1960) 77 *SALJ* 368
Dendy, M: 'A structural and nomenclative muddle: the Superior Courts in the new constitutional order' (1997) 114 *SALJ* 425
Dendy, M: Attachment to found or confirm jurisdiction, and arrest *tanquam suspectus de fuga*: a longstanding lacuna filled' (1999) 116 *SALJ* 586
Erasmus, HJ: 'Anton Piller orders' (1996) 113 *SALJ*
Peter, J: 'Consent, confusion but no effect' (1993) 110 *SALJ* 15
Pollak, W: 'Domicile' (1933) 50 *SALJ* 449
Taitz, JL and Hulme, DH: 'The inherent power of the supreme court to stay a sale in execution in order to prevent an abuse of process' (1996) 113 *SALJ* 45

South African Law Reports

October 2010 (5) *South African Law Reports* (325-648); [2010] 3 All SA Law Reports September No 1 (467-576) and No 2 (577-639)
June 2010 (3) *South African Law Reports* (327-652); [2010] 2 All SA Law Reports May No 1 (195-293) and No 2 (295-408)
April 2010 (2) *South African Law Reports* (333-660); [2010] 1 All SA Law Reports March No 1 (383-472) and No 2 (473-556)
October 2009 (5) *South African Law Reports* (345-676); [2009] 3 All SA Law Reports September No 1 (373-486) and No 2 (487-565)
June 2009 (3) *South African Law Reports* (329-677); [2009] 2 All SA Law Reports May No 1 (225-317) and No 2 (319-427)
February 2009 (1) *South African Law Reports* (337-666); All SA Law Reports January No 1 (1-101) and No 2 (103-196)
December 2008 (6) *South African Law Reports* (344-667); [2008] All SA Law Reports November No 1 (207-296) and No 2 (297-387)
October 2008 (5) *South African Law Reports* (339-652); (2008) 4 All SA Law Reports September No 1 (425-506) and No 2 (507-611)
August 2008 (4) *South African Law Reports* (325-647); (2008) 3 All SA Law Reports July No 1 (1-119) and No 2 (121-218)
June 2008 (3) *South African Law Reports* (355-689); (2008) 2 All SA Law Reports May No 1 (223-371) and No 2 (373-485)
April 2008 (1) *South African Law Reports* (319-651); (2008) 1 All SA Law Reports March No 1 (421-528) and No 2 (529-653)
March 2008 (2*) South African Law Reports* (1-318); (2008) 1 All SA Law Reports February No 1 (181-313) and No 2 (315-420)
February 2008 (1) *South African Law Reports* 343 to 668; (2008) 1 All SA Law Reports January No 1 (1-88) and No 2 (89-178)
January 2008 (1) *South African Law Reports* 1 to 341; (2007) 4 All SA Law Reports December No 1 (1207-1329) and No 2 (131-1459)
December 2007 (6) *South African Law Reports* (313-642); (2007) 4 All SA Law Reports November No 1 (955-1072) and No 2 (1073-1206)
November 2007 (6) *South African Law Reports* 1 to 312; (2006) 2 All SA Law Reports Vol 4 October No 1 (679-845) and No 2 (847-954)
August 2007 (4*) South African Law Reports* (315-645); [2007] 3 All SA Law Reports July No 1 (1-107) and No 2 (109-122)

June 2007 (2) *South African Law Reports* (323-666); May [2007] 2 All SA Law Reports No 1 (227-355) and No 2 (357-446)
May 2007 (3) *South African Law Reports* 1-322 (Week 1-Week 3); [2007] 2 All SA Law Reports Vol 1 April No 1 (1-125) and No 2 (127-225)
February 2007 (1) *South African Law Reports* (315-624); January [2007] 1 All SA Law Reports No 1 (1-132) and No 2 (133-220)
January 2007 (1) *South African Law Reports* 1-331 (Week 1-Week 3); [2006] 4 All SA Law Reports Vol 4 December No 1 (417-514) and No 2 (515-638)
December 2006 (6) *South African Law Reports* (309-619); November [2006] 4 All SA Law Reports No 1 (215-326) and No 2 (327-415)
October 2006 (5) *South African Law Reports* (319-609); September [2006] 3 All SA Law Reports No 1 (411-509) and No 2 (511-606)
August 2006 (4) *South African Law Reports* (309-606); July [2006] 3 All SA Law Reports No 1 (1-94) and No 2 (95-218)
April 2006 (2) *South African Law Reports* 311-619; March [2006] 1 All SA Law Reports No 1 (429-560) and No 2 (561-662)
February 2006 (1) *South African Law Reports* 297-603; [2006] 1 All SA Law Reports No 1 (1-101) and No 2 (103-195)
October 2005 (5) *South African Law Reports* 315-641; [2005] 3 All SA September No 1 (409-518) and No 2 (519-609)
August 2005 (4) *South African Law Reports* 319-629; [2005] 3 All SA July No 1 (1-99) and No 2 (101-209)
June 2005 (3) *South African Law Reports* 323-632; [2005] 2 All SA Law Reports No 1 (225-341) and No 2 (343-453)
April 2005 (2) *South African Law Reports* 359-629; [2005] 1 All SA Law Reports March No 1 (515-633) and No 2 (635-793)
February 2005 (1) *South African Law Reports* 309-664; [2005] 1 All SA Law Reports No 1 (1-148) and No 2 (149-272)
November 2004 (6) *South African Law Reports* 1 to 331 (Week 1-Week 3); [2004] 4 All SA Law Reports Vol 4 October No 1 (1-132) and No 2 (133-260)

SA Mercantile Law Journal (SA Merc LJ)

Campbell, J: 'The *in duplum* rule: relief for consumers of excessively priced small credit legitimised by the National Credit Act' (2010) 22(1) *SA Mercantile Law Journal* 1
Melville, N: 'Has ombudsmania reached South Africa? The burgeoning role of ombudsmen in commercial dispute resolution' (2010) 22(1) *SA Mercantile Law Journal* 50
Melville, N and Palmer, R: 'The applicability of the Consumer Protection Act 2008 to credit agreements' (2010) 22 *SA Mercantile Law Journal* 272

Sibergramme (Available online at www.siberink.co.za with subscription; ISSN 1814-0564)

Dendy, M: 'Civil Procedure' (2008) 1 *Sibergramme*
Dendy, M: 'Civil Procedure' (2008) 1 *Sibergramme* 7
Dendy, M: 'Civil Procedure' (2008) 1 *Sibergramme* 8
Dendy, M: 'Civil Procedure' (2008) 1 *Sibergramme* 12
Dendy, M: 'Civil Procedure' (2008) 1 *Sibergramme* 13
Dendy, M: 'Civil Procedure' (2008) 1 *Sibergramme* 14

Dendy, M: 'Civil Procedure' (2008) 2 *Sibergramme* 5
Dendy, M: 'Civil Procedure' (2008) 2 *Sibergramme* 6
Dendy, M: 'Civil Procedure' (2008) 3 *Sibergramme* 4
Dendy, M: 'Civil Procedure' (2008) 3 *Sibergramme* 7
Dendy, M: 'Civil Procedure' (2008) 3 *Sibergramme* 12
Dendy, M: 'Civil Procedure' (2008) 3 *Sibergramme* 15
Dendy, M: 'Civil Procedure' (2008) 4 *Sibergramme* 3

Stellenbosch Law Review (Stell LR)

De Vos, WL: 'South African civil procedural law in historical and social context' (2002) 2 *Stell LR* 236

Tydskrif vir die Suid-Afrikaanse Reg (TSAR)

Van Heerden, C: 'Summiere vonnis: nog 'n stuiwer in the armbeurs' (1999) 12 *TSAR* 304
Van Heerden, CM and Otto, JM: 'Debt enforcement in terms of the National Credit Act 34 of 2005' (2007) 4 *TSAR* 655

Tydskrif vir Hedendaagse Romeins-Hollandse Reg (THRHR)

De Vos, W and Kelbrick, R: 'Discretionary powers of the judge in South Africa' (2000) 63 *THRHR* 537
Kelbrick, R: 'Malice in Wonderland: or how to dispose of a claim against you by its sale in execution' (2003) 66 *THRHR* 232
Schoeman, E: 'Domicile of choice and *animus*: how definite is indefinite?' (1999) 62 *THRHR* 272
Schoeman, E: 'Domicile of choice and *animus*: how definite is indefinite?' (continued) (1999) 62 *THRHR* 325
Schulze, WG: 'Attachment *ad fundandam jurisdictionem* of the rights under a documentary letter of credit: some questions answered, some questions raised' (2000) 63 *THRHR* 672

Vindobona Journal of International Commercial Law and Arbitration

Sibanda, O: 'National court intervention in international commercial arbitration' (2008) 12 *Vindobona Journal of Commercial Law and Arbitration*154

Table of reports

South African Law Commission (1998) *Report on the Recognition of Class Actions and Public Interest Actions: Project 88*,
SALC http://www.justice.gov.sa/salrc/reports/r_prj88_classact_1998aug.pdf
South African Law Reform Commission (1997) *Alternative Dispute Resolution*, Project 94, Issue Paper 8, SALRC http://www.justice.gov.za/salrc/ipapers/ip08_prj94_1997.pdf

Table of theses and dissertations

Plaatjies, MF (2008) A model for the implementation of restorative justice in the South African correctional system (D Litt thesis, University of South Africa)
Coetzee, H (2009) The impact of the National Credit Act on civil procedural aspects relating to debt enforcement (LLM dissertation, University of Pretoria)

Table of academic textbooks

Butler, D and Finsen, E (1993) *Arbitration in South Africa: Law and Practice*, Juta

Cameron, E et al. (2002) *Honore's South African Law of Trusts* (fifth edition), Juta

Carnelley, M (2006) 'Costs' in Joubert, WA et al. (eds) *Law of South Africa (LAWSA)* Vol 3, part 2

Christie, RH (2006) *The Law of Contract* (fifth edition), LexisNexis Butterworths

Cilliers, AC, Loots, C and Nel, HC (2009) *Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (fifth edition), Juta

Cooley, JW (1996) *Mediation Advocacy*, National Institute for Trial Advocacy

Cooley, JW (2002) *Mediation Advocacy* (second edition), National Institute for Trial Advocacy

Cronjé, DSP and Heaton, J (2008) *The South African Law of Persons* (third edition by J Heaton), LexisNexis

Devenish, G, Govender, K, and Hulme, D (2001) *Administrative Law and Justice in South Africa*, Butterworths

De Waal, J, Currie, I and Erasmus, G (2005) *The Bill of Rights Handbook* (fifth edition), Juta

Erasmus, HJ et al. (1993) *Workbook for Civil Procedure*, Digma

Erasmus, HJ et al. (1994) *Superior Court Practice*, Revision Service 35, 2010, Juta

Erasmus, HJ and Van Loggerenberg, DE (1996) *Jones and Buckle: The Civil Practice of the Magistrates' Courts in South Africa* Vol I The Act (ninth edition), Service 24, 2010, Juta

Erasmus, HJ and Van Loggerenberg, DE (1997) *Jones and Buckle: The Civil Practice of the Magistrates' Courts in South Africa*, Vol II The Rules (ninth edition), Service 26, 2010, Juta

Faris, JA and Hurter, E (2002) *The Student Handbook on Civil Procedure* (fourth edition), LexisNexis Butterworths

Forsyth, CF (1990) *Private International Law: the Modern Roman-Dutch Law including the Jurisdiction of the Supreme Court* (second edition), Juta

Forsyth, CF (2003) *Private International Law: the Modern Roman Dutch Law including the Jurisdiction of the High Courts* (fourth edition), Juta

Gautschi, A and Guidozzi, Y (1999) *Motion Court Manual for Pupils* (second edition) General Council of the Bar of South Africa

Harms, LTC (1998) *Amler's Precedents of Pleadings* (fifth edition), Butterworths

Harms, LTC (1998) *Civil Procedure in the Supreme Court* (Student edition, second edition), Butterworths

Harms, LTC (2002) *Civil Procedure in the Magistrates' Courts*, SI 26, September 2010, LexisNexis (Online)

Harms, LTC (2002) *Civil Procedure in the Superior Courts*, SI 41, 2010, LexisNexis (Online)

Harms, LTC (2003) *Civil Procedure in the Superior Courts* (Student edition, third edition), LexisNexis Butterworths

Harms, LTC (2009) *Amler's Precedents of Pleadings* (seventh edition), LexisNexis Butterworths

Herbstein and Van Winsen (1997) – *See* Van Winsen et al. (1997)

Herbstein and Van Winsen (2009) – *See* Cilliers, AC, Loots C and Nel HC (2009)

Hoffmann and Zeffertt – *See* Zeffertt, DT, Paizes, AP and Skeen, AStQ (2003) and Zeffertt, DT and Paizes, AP (2009)

Jones and Buckle, Vol I, The Act – *See* Erasmus, HJ and Van Loggerenberg, DE (1996)

Jones and Buckle, Vol II, The Rules – *See* Erasmus, HJ and Van Loggerenberg, DE (1997)

Marnewick, CG (2002) *Litigation Skills for South African Lawyers*, Butterworths

Marnewick, CG (2003) *Litigation Skills for South African Lawyers* (first revised edition), LexisNexis Butterworths

Marnewick, CG (2007) *Litigation Skills for South African Lawyers* (second edition), LexisNexis Butterworths
Melville, NJ (2010) *The Consumer Protection Act Made Easy*, Book of Life Publications
Mullins, J and Da Silva, C (2010) *Morris: Technique in Litigation* (sixth edition), Juta
Neethling, J, Potgieter, JM and Visser, PJ (2001) *Law of Delict* (fourth edition), LexisNexis Butterworths
Neethling, J, Potgieter, JM and Visser, PJ (2006) *Law of Delict* (fifth edition), LexisNexis Butterworths
Neethling, J, Potgieter, JM and Visser, PJ (2010) *Law of Delict* (sixth edition), LexisNexis Butterworths
Palmer, R and McQuoid-Mason, D (2000) *Basic Trial Advocacy Skills*, Butterworths and Blackstone Press
Palmer, R and Crocker, A (2007) *Becoming a Lawyer: Fundamental Skills for Law Students*, (second edition), LexisNexis Butterworths
Palmer, R, Crocker, A and Kidd, M (2003) *Becoming a Lawyer: Fundamental Skills for Law Students*, Butterworths
Paterson, TJM (2001) *Eckard's Principles of Civil Procedure in the Magistrates' Courts*, (fourth edition), Juta
Paterson, TJM (2005) *Eckard's Principles of Civil Procedure in the Magistrates' Courts*, (fifth edition), Juta
Pistorius, D (1993) *Pollak on Jurisdiction* (second edition), Juta
Pollak, W (1937) *South African Law of Jurisdiction*, Hortors
Prest, CB (1993*) Interlocutory Interdicts*, Juta
Roos, FJ (1947) *Taxation of Bills of Cost in the Superior Courts of South Africa*, Juta
Saner, JS (2000) 'Prescription' in Joubert, WA et al. (eds) *Law of South Africa (LAWSA)* Vol 21, First re-issue
Scholtz, JW et al. (2008) *Guide to the National Credit Act*, 2008, LexisNexis
Sharrock, R (1999) *Business Transactions Law* (fifth edition), Juta
Sharrock, R (2007) *Business Transactions Law* (seventh edition), Juta
Tackaberry, J and Marriott, A (2003) *Bernstein's Handbook of Arbitration and Dispute Resolution Practice* (fourth edition), Sweet and Maxwell
Taitz, J (1985) *The Inherent Jurisdiction of the Supreme Court*, Juta
Van Blerk, P (1998) *Legal Drafting: Civil Proceedings*, Juta
Van Dijkhorst, K (2004) 'Courts' in Joubert, WA et al. (eds) *Law of South Africa (LAWSA)* Vol 5, part 2, p95
Van Winsen, H deV et al. (1997) *Herbstein and Van Winsen: The Civil Practice of the Supreme Court of South Africa* (fourth edition), Juta
Zeffertt, DT and Paizes, AP (2009) *The South African Law of Evidence: formerly Hoffmann and Zeffertt* (second edition), LexisNexis Butterworths
Zeffertt, DT, Paizes, AP and Skeen, AStQ (2003) *The South African Law of Evidence: formerly Hoffmann and Zeffertt*, LexisNexis Butterworths

Index

A

abandonment
of judgments 317–318
section 38 77–78
Small Claims Courts 485
absence of any other satisfactory remedy 456–457
absolution from instance 302–303
access to justice, and alternative dispute resolution (ADR) 503
acknowledgement of debt 419–420
particulars of claim 638
precedent 629
action or application decisions 18, 145–149
choosing between 147
real disputes of fact? 147–149
trial courts vs motion courts 146–147
actions 18–19
amendments to the Magistrates' Courts Rules 177
defined 145–146
diagram 549
introduction 176
stages of 176–177
see also pleadings
actio quanti minoris 31
actio redhibitoria 31
additional procedures, overview 20–21
adjudicative processes in alternative dispute resolution (ADR) 505–506
administration orders 20, 407
administrators
appointment and tasks 407
payments 408
Admiralty Courts 495
admission of liability and consent to judgment in the Magistrates' Courts 422–423
advice on evidence 295–296
affidavits
as evidence 290
form and content 158–161
inadmissible evidence 161–163
opposing and replying 428–429
striking out inadmissible evidence 163
alien enemies, capacity to litigate 47
alternative dispute resolution (ADR)
and access to justice 503
adjudicative processes 505–506
advantages and disadvantages 509–511
arbitration 505–506
Arb-Med-Arb: arbitration followed by mediation and final arbitration award 508–509
case evaluation 507

and the civil justice system 501–502
conciliation 505
cooperative and participatory dispute settlement as result 503
as cost-cutting measure 503
and court congestion 503
evaluative procedures 507
expert appraisal process 507
facilitative processes 504–505
hybrid procedures 507–509
MEDALOA: Mediation and last-offer arbitration 509
Med-Arb: mediation culminating in arbitration 508
mediation 504
mini-trials 507
negotiation 504
primary objectives 503
processes 504–507
statutory subject-specific ADR processes 502–503
amendment of pleadings 240–242
amount in issue 73–74
Anton Piller orders 468–470
appeal notice: High Court (precedent) 622–623
appeal process (diagram) 561–562
appeals 19
application to the High Court for leave to appeal 357–358
different routes to follow 349–355
discretionary matters, principles governing 346–347
disputing validity of law in Magistrates' Courts 349
on facts vs on law 344–346
grounds for granting leave to appeal and special leave to appeal 356–357
from High Court 354–355
High Court matters 340–342
to High Court, procedure 359–362
judgments, orders and rulings 340–344
leapfrog to Constitutional Court 353, 355
leave to appeal 356–359
from Magistrates' Courts 350–353
Magistrates' Courts matters 342—344
noting of 359–360
pending appeals, effects on judgment of lower court 347–348
petition to the Supreme Court of Appeal for special leave to appeal 358–359
preliminary issues 340–349
and reviews 19
vs reviews 339
shortcut appeals directly to the Constitutional Court 351–355
appeals procedures
Constitutional Court 365–368
full court of High Court 362—363
Supreme Court of Appeal (SCA) 363–365
applications 18
to amend pleadings: High Court (precedent) 603

defined 146
distinguishing characteristics 155–157
to the High Court for leave to appeal 357–358
for judgment on confession: High Court (precedent) 629
on notice applications 164–171
notices of motion, general principles 157–158
to sue by edictal citation: High Court (precedent) 573
for summary judgment the affidavit: Magistrates' Courts (precedent) 599–600
see also affidavits
Apportionment of Damages Act, inviting intervention 446–447
apprehension of irreparable harm 460
arbitration 505–506
Arb-Med-Arb: arbitration followed by mediation and final arbitration award 508–509
area to which claim may be linked - section 28 83–95
cause of action arising 'wholly' 89–92
defendant's residence or business or employment 84–89
other grounds of territorial jurisdiction 92–95
arrears rent, actions in Magistrates' Courts (diagram) 554
arrest *tanquam suspectus de fuga* 21, 438–439
assault (example) 27–28
associations, capacity to litigate 51–54
attaching a debt owed to the judgment debtor by a third party 392
attachment and sale
of corporeals 381–391
of corporeals in the High Court (diagram) 564
of immovables 385–388
of movables 383–385
attachments to found and confirm jurisdiction 110–112
attorney-and-client scale costs 333–334
attorney-and-own-client scale costs 334–335
Auto Dealer's Digest 26

B

balance due for goods sold and delivered, particulars of claim 636
balance of convenience 460–461
barring 250–252
Bill of Rights, impact on civil procedure 13–15
bills of exchange, particulars of claim 637
bodily injuries actions, interim relief pending judgment 433–434
bona fide defence 316
breach of contract (diagram) 531–532
breach of interdicts, remedies 465–466
business entities
citing as defendants 633–634
citing as plaintiffs 631–632
buyer's remedies
diagram 534
example 30–31

C

calculation of R200 000 and R400 000 limits 72–74
calculation of time limits 18
capacity to litigate
alien enemies 47
associations 51–54
children 39–42
diplomats 47
firms 51–54
fugitives from justice 46
insolvents 45–46
judges 48–49
married women 42–44
members of Parliament, provincial legislatures and municipal councils 49–50
mentally disabled persons 44–45
partnerships 51–54
prodigals 45
trusts 50
carries on business', meaning 87–89
case evaluation process 507
case-flow management 296
causation 26
cause of action 17
claims based on liquid documents 33–34
contractual claims 28–31
delictual claims 24–28
divorce actions 31–32
certain additional claims, jurisdictional principles applicable 109–117
cheques, particulars of claim 637
Chief Justice 10–11
child, definition 40
children
capacity to litigate 39–42
Children's Act and the Bill of Rights 42
costs 40–41
curator ad litem appointment 41
dual capacity 41
litigation without assistance 42
Children's Courts 496
circumstances where demand *must* be made 123–126
citations
defendants 632–635
plaintiffs 631–632
civil courts, other 495–497
civil procedure (diagram) 529
civil procedure, place within legal system 1–3
civil recovery of property 472–473
civil vs criminal law 1–3
claims

based on liquid documents 33–34
for divorce and associated relief 113–115
foreign *peregrini* 109–113
for interdicts 115
property-related 105–107
single claims involving two or more jurisdictions 115–116
sounding in money 108–113
class actions 37
clear right, defined 455–456
clerks of courts 12
Close Corporations Act 69 of 1984 71
close corporations, residence 85–87
close of pleadings 223–224
closing addresses at trials 303–304
combined summons
High Court (precedent) 576–577
Magistrates' Courts (precedent) 580–583
combining of separate claims 73
common law
offers at settlements 411–415
rescissions 316–317
companies, residence 85–87
Competition Appeal Courts 495
composite notice of intention to call expert witness (precedent) 620–622
conciliation 505
condonation of noncompliance with rules 371–373
condoning noncompliance 237–240
confession to judgment in the High Court 421
confidentiality benefit of ADR 510
consent 74–75
to jurisdiction 112–113
and territorial jurisdiction 94–95
consolidation of actions 443–444
Constitutional Court 9–10
jurisdiction 62–63
Constitution, impact on civil procedure 13–15
Consumer Protection Act (CPA)
applicability to credit agreements entered into ito National Credit Act 524–526
civil procedure, general impact on 527–528
Commissioner's power to summons persons 526
Commission, Tribunal and Courts 522–524
consent to and confirmation of judgments 524
jurisdiction 524
legal framework 522
plain language requirements 526–527
service and delivery of documents 524
statutory causes of action based on the CPA 527
contract (diagram) 531
contractual claims 28–31
corporeals, attachment and sale 381–391, 564

costs
on the attorney-and-client scale 333–334
on the attorney-and-own-client scale 334–335
awarding of, general rules 327–328
awards, types of 332–336
charged by an attorney to his client 330–332
de bonis propriis 335–336
demands 127–128
and interest, demands 127–128
interim orders 336
on the party-and-party scale 332–333
special orders 293
tariffs 329–330
counter-applications to on notice applications 171
court congestion, and alternative dispute resolution (ADR) 503
court days and calendar days 129–130
court files, indexing and paginating 297
court layouts (diagram) 547
court officials 10–12
court orders, on notice applications 169–171
court record and subsequent procedures in appeal hearings 361–362
court records required for reviews 378
court system
Constitutional Court 9–10
High Courts 4–9
magistrates' courts 3–4
practical approach to 3
Supreme Court of Appeal 9
credit agreements 70
criminal vs civil law 1–3
Customs and Excise Act 91 of 1964 125

D

damages 26
date from which interest runs
liquidated debts 322–323
mora ex persona situation 323
mora ex re situation 323
unliquidated debts 323–325
de bonis propriis costs 335–336
debt
acknowledgements of 419–420
owed to the judgment debtor by a third party 392
debt collection procedures 19–20
administration orders 406–408
juristic persons and the state 404–405
section 65 procedure 402–405
see also writs and warrants of execution
debt review procedure 519–521
declarations of rights 479–480

and stated cases 21
deduction of an admitted debt 78–79
default judgments 318–320
applying for 246–250
barring 250–252
default of appearance 243–244
default of pleadings 244–246
National Credit Act 518
defective pleadings, responses to 228–242
defendant's case 303
defendants, citations 632–635
delictual claims 24–28
diagram 530
demands 18
circumstances where demand *must* be made 123–126
contents of 123
costs and interest 127–128
costs relating to the issue of summons 127–128
defined 122
demand essential to complete a cause of action 126–127
forms of 122
to give right of cancellation 127
other consequences 127–128
statutory requirement 123–126
unliquidated debts: delivering demand to start the running of interest 128
depositions as evidence 287–288
diagrams 529–566
as evidence 285–287
dies induciae, High Court (diagram) 555
different routes appeals may follow 349–355
diplomats, capacity to litigate 47
direct and substantial interest
actions based on Bill of Rights 36–39
common-law position 35–36
discovery affidavit including schedules (precedent) 607–608
discovery and related procedures 265–273
discovery process (diagram) 560
discretionary matters, principles governing appeals 346–347
dishonoured cheques, summonses 574–575
disputing validity of law in Magistrates' Courts 349
district and regional magistrates' courts 3–4
division of court to hear case 65
divorce
and associated relief, claims for 113–115
jurisdiction 72, 95
divorce actions 31–32
interim relief pending judgment 434–437
doctrine of effectiveness 98–99
Domestic Violence Act 116 of 1998, protection orders 473–476
drafting particulars of claims (diagram) 553

drastic procedures 21
Anton Piller orders 468–470
civil recovery of property 472–473
Older Persons' Act 476
Prevention of Organised Crime Act 472–473
protection orders, Domestic Violence Act 473–476
spoliation orders 476–478
duties of the sheriff and issue of process 133–134
duty to begin trial 299–300

E

edictal citation and substituted service 141–144
ejectment 67–69
emoluments attachment orders 394–396
diagram 565
vs garnishee orders 394
enforcing compliance and condoning noncompliance 237–240
Equality Courts 496
evaluative procedures in alternative dispute resolution (ADR) 507
evidence on commission 287–288
evidentiary burden, provisional sentence 429–430
exceptions
no cause of action: Magistrates' Courts (precedent) 595–596
vague and embarrassing pleas: Magistrates' Courts (precedent) 597
ex parte applications 157, 172–175
utmost good faith requirement 175
expert evidence 284–285

F

facilitative processes in alternative dispute resolution (ADR) 504–505
final interdicts 455–458
final orders 174
final preparation for trial 295–297
final vs interim interdicts 453–454
firms
capacity to litigate 51–54
defined 52
first limitation 75
FOLI: first out last in 129
forced intervention in a matter
Apportionment of Damages Act 446–447
joinder in terms of rule 28(2), Magistrates' Courts 447–449
need for 445–446
third party procedure 449–452
form and content of affidavits 158–161
forms 12
fugitives from justice, capacity to litigate 46
further evidence on appeal and the raising of new points 368–370
further particulars

and declarations 225–228
requests for 225–226
for trial, requests for 277–279

G

garnishee orders 397–398
diagram 565
vs emoluments attachment orders 394
general settlement agreements 419–420
good cause shown, and rescindments 319–320
good reason, and rescindments 318–319
goods sold and delivered, particulars of claim 636
government departments
citing as defendants 634–635
citing as plaintiffs 632
grounds for granting leave to appeal and special leave to appeal 356–357
grounds for reviews 375

H

hearings
for administration orders 407
appeal hearings 368–373
on notice applications 169–171
hearsay evidence, in affidavits 161–162
High Court
ex parte applications 172–174
main issues relating to jurisdiction 63–65
on notice applications 165, 166, 167
notices of motion 164–165
representation of parties 56–57
respondent’s notice of intention to oppose on notice application 166–167
rule 14 51–53
rules 12
service of application papers for on notice applications 166
system 4–9
usual methods of service 134–138
High Court and Magistrate’s Courts, main issues relating to jurisdiction 63–65
hybrid procedures 507–509

I

immovable property, and territorial jurisdiction 95
immovables, attachment and sale 385–388
inadmissible evidence in affidavits 161–163
inadmissible new matter in affidavits 162
incidental proceedings, and territorial jurisdiction 92–93
incorporeal property
attachment and sale of 392–398
procedure for attaching 392–394
indexing and paginating the court file 297

indigent persons, representation of parties 58–59
in duplum rule 325
inherent jurisdiction of the High Court 117–121
injury actually committed or reasonably apprehended 456–457
insolvents, capacity to litigate 45–46
inspections *in loco* 304
Institution of Legal Proceedings against Certain Organs of State Act 124–125
interdicts 21
applying for, procedures 464–465
claims for 115
diagram 566
final 455–458
final vs interim 453–454
interim 458–463
and separation of powers 462–463
interim or final, which to apply for 463–464
jurisdiction to grant 454
Knox D'Arcy interdicts 470–472
prohibitory vs mandatory 453
purposes 454–455
remedies for breach of 465–466
structural 466–467
types of 453
interest
claims for, drafting 325–326
and costs not taken into account 74
date from which interest runs 322–325
in duplum rule 325
rates 321–322
interim costs orders 336
interim interdicts 458–463
vs final interdicts 453–454
General Law Amendment Act 125
against the government 125
interim or final interdicts, which to apply for 463–464
interim relief pending judgment 21
bodily injuries actions 433–434
divorce actions 434–437
interlocutory applications 155
interpleader proceedings 398–401
and territorial jurisdiction 93–94
interrogatories as evidence 289–290
intervention in *ex parte* applications 174–175
irrelevant matter in affidavits 162
'is employed', meaning 89
issue of process and duties of the sheriff 133–134

J

joinder applications 171
joinder in terms of rule 28(2), Magistrates' Courts 447–449

joinder of parties and causes of action 440–443
Judge President 11
judges of appeal 11
judgment
abandonment of 317–318
appeal hearings 373
at close of defendant's case 308
at close of plaintiff's case 307–308
default 318–320
in the High Court 307–309
interest and costs 19
interpreting 308–309
in the Magistrates' Courts 309
orders and rulings, appeals against 340–344
rescission, in High Court 313–317
variation and setting aside of 310–321
void 317
see also variation and setting aside of court's judgment
jurisdiction 17
Constitutional Court 62–63
Consumer Protection Act (CPA) 524
defined 60–61
division of court 65
focus on High Court and Magistrate's Courts 61–63
general introduction 60–65
general introduction (diagram) 536–537
High Court (diagram) 541–546
importance of choosing right court 65
interdicts, granting 454
magistrates' courts (diagram) 538–540
main issues relating to High Court and Magistrate's Courts 63–65
National Credit Act (NCA) 513–514
nature of claim 64–65
reviews 374–375
vs service of legal documents 144
Small Claims Courts 62, 484–485
specialist courts 61
Supreme Court of Appeal 62
time of determination 65
value of claim 63–64
jurisdiction of Magistrates' Courts
calculation of R200 000 and R400 000 limits 72–74
general overview 66
main issues 63–65
nature of the claim - section 46 79–83
see also area to which claim may be linked; value of claim
jurisdiction of the High Court
attachments to found and confirm jurisdiction 110–112
certain additional claims 109–117
consent to jurisdiction 112–113

doctrine of effectiveness 98–99
general overview 96–98
inherent jurisdiction 117–121
money, claims sounding in 108–113
property-related claims 105–107
ratione domicilii 100–102
ratione rei gestae 102–104
ratione rei sitae 104–105
three most common grounds 99–105
juristic persons and the state 404–405

K

Knox D'Arcy interdicts 470–472

L

Labour Courts 495
Land Claims Court 496
laws, where to find 12–13
leapfrogging to superior courts, appeals 355
leave to appeal 356–359
liquidated debts, interest 322–323
liquid documents 69–70
claims based on 33–34
example 33–34
provisional sentence 425–427
local authorities, citing as defendants 635
locus standi 17
diagram 535
direct and substantial interest 35–39
protection order applications 475
small Claims Courts 484
see also capacity to litigate

M

Magistrates' Courts 3–4
Pro deo proceedings 59
representation of parties 57–58
rule 54 53–54
see also jurisdiction of Magistrates' Courts
magistrates, terms of address 11
Maintenance Courts 496
mandament van spolie vs *reivindicatio* 477
mandatory vs prohibitory interdicts 453
Mareva type interdicts 470–472
married women
capacity to litigate 42–44
consent to litigate - marriages in community of property 43–44
marital power, abolition of 42–43
Matrimonial Property Act 70–71

matter excluded by the use of inherent jurisdiction from affidavits 163
MEDALOA: Mediation and last-offer arbitration 509
Med-Arb: mediation culminating in arbitration 508
mediation 504
medical examinations 274–276
members of Parliament, provincial legislatures and municipal councils, capacity to litigate 49–50
mental capacity 80
mentally disabled persons, capacity to litigate 44–45
mind map of civil procedure 16–22
actions 18–19
additional procedures 17, 20–21
appeals and reviews 19
applications 18
debt collection procedures 19–20
litigation 16
parts 17–21
preliminary questions 17–18
pre-litigation issues 18
stages 16–17
mini-trials 507
miscellaneous other civil courts 497
models as evidence 285–287
money, claims sounding in, jurisdiction of the High Court 108–113
monies lent and advanced, particulars of claim 638–639
mortgage bonds 69–70
motion courts, vs trial courts 146–147
motions *see* applications
motor vehicle collision (example) 24–27
movables, attachment and sale 383–385
multiple parties and actions 21
consolidation of actions 443–444
forced intervention in a matter 445–452
joinder of parties and causes of action 440–443
voluntary intervention in a matter 444–445
municipal councils, capacity of members to litigate 49–50

N

National Credit Act 34 of 2005 125
debt review procedure 519–521
effects on of writs and warrants of execution 380–381
interest rate 322
interest *(in duplum)*, statutory cap on amount which can be claimed 519
judgments and orders 518
jurisdiction, aspects 513–514
procedures and pleadings 514–517
summonses 516
natural persons, residence 84–85
nature of claim 64–65
negligence 25
negotiation 504

no appeal or order granted without a practical effect or result 370–371
noncompliance with the rules, responses to 228–242
notice
to admit (precedent) 615
of breach clauses 126
to discover (precedent) 605–606
to inspect in response to notice to produce (precedent) 612
to inspect ito rule 35(14) (precedent) 594
to inspect undisclosed documents (precedent) 609–610
of intention to defend 198–202
of intention to defend: Magistrates' Courts (precedent) 591–592
of intention to oppose: High Court (precedent) 571
of intention to tender exhibits 617–618
medical examinations 619
of motion
ex parte application - High Court (precedent) 569
on notice application - High Court (precedent) 570
of motion, *Anton Piller* orders 469–470
to produce (precedent) 611, 616–617
to produce ito rule 35(12) (precedent) 593
of set down: High Court (precedent) 572
of set down in the Magistrates' Courts (precedent) 604
to specify (precedent) 613–614
noting of appeals 359–360

O

offers
at common law 411–415
of compromise 412–415
to settle during litigation 415–418
Older Persons' Act 13 of 2006 476
on notice application in the High Court (diagram) 548
open court 299
opening addresses at trials 301, 305
opposing and replying affidavits 428–429
other civil courts 22, 495–497
own interest in terms of section 38(a) of the Constitution 38–39

P

parastatals
citing as defendants 634–635
citing as plaintiffs 632
Parliament, capacity of members to litigate 49–50
particulars of claims, drafting 186–193
parties not present at trials 298
partnerships
capacity to litigate 51–54
residence 87
and territorial jurisdiction 92

party-and-party scale costs 332–333
payable on demand 126
pending appeals, effects on judgment of lower court 347–348
perpetual silence 80–81
petition to the Supreme Court of Appeal for special leave to appeal 358–359
photographs as evidence 285–287
placing a debtor *in mora* 126–127
plain language requirements, Consumer Protection Act (CPA) 526–527
plaintiff's case 301–302
plaintiffs, citations 631–632
plans as evidence 285–287
plea and counterclaim 202–222
pleadings 19
amendment of pleadings 240–242
application to set aside an irregular step 236–237
application to strike out 235–236
close of pleadings 223–224
declarations 226–228
diagram 550–551
enforcing compliance and condoning noncompliance 237–240
exceptions 229–235
further particulars and declarations 225–228
general overview 178–179
notice of intention to defend 198–202
particulars of claims 180, 186–193
plea and counterclaim 202–222
provisions for summonses relating exclusively to the Magistrates' Courts 193–197
replication (and possible further steps) 222–223
responses to defective pleadings and noncompliance with the rules 228–242
steps involved 178–179
summonses 179–180, 181–186
superannuation of summonses and judgments 197–198
two sides of the argument 178
see also shortcut judgments
pleas (diagram) 556
power of attorney 55–56
powers of the court on reviews 378
practice manuals 12–13
preliminary questions 17
pre-litigation issues 17–18
President of Supreme Court of Appeal 11
pre-trial (diagram) 559
pre-trial conference 290–295
pre-trial procedures 19
discovery and related procedures 265–273
final preparation for trial 295–297
introduction 262
medical examinations 274–276
pre-trial conference 290–295
request for further particulars for trial 277–279

set down 263–265
special evidence 283–290
subpoena of witnesses 279–283
technical inspections, claims relating to objects 276–277
Prevention of Organised Crime Act 121 of 1998 472–473
prima facie right 458–460
private individuals
citing as defendants 633
citing as plaintiffs 631
privileged communications, in affidavits 162
procedural safeguards, *Anton Piller* orders 469
procedure leading up to appeal hearing
359–368
Pro deo proceedings in the Magistrates' Courts, representation of parties 59
prodigals, capacity to litigate 45
professional services rendered, particulars of claim 637
prohibitory vs mandatory interdicts 453
promissory notes, particulars of claim 637
property
corporeal 381–391
incorporeal 392–397
property-related claims, jurisdiction of the High Court 105–107
prosecution of appeals 360–361
protection orders, Domestic Violence Act 116 of 1998 473–476
provincial legislatures, capacity of members to litigate 49–50
provisional sentence 20
consequences 430–431
evidentiary burden 429–430
in the High Court 427–432
liquid documents 425–427
opposing and replying affidavits 428–429
possible outcomes 431–432
in the Regional and District Magistrates' Courts 432
requisites 424–425
summons 427–428
provisional sentence summons: dishonoured cheque (precedent) 574–575

R

rates of interest 321–322
ratione domicilii 100–102
ratione rei gestae 102–104
ratione rei sitae 104–105
real disputes of fact? 147–149
recalcitrant witnesses 299
reference to a referee 305
Regional and District Magistrates' Courts 3–4
ex parte applications 173
methods of service 138–140
notices of motion 165
registrars of courts 11, 12

relevant law, where to find 12–13
remedies for breach of interdicts 465–466
rendering of an account 82
reopening cases 304
replication, and possible further steps 222–223
representation of parties
in forma pauperis proceedings in the High Court 58–59
in the High Court 56–57
indigent persons 58–59
in the Magistrates' Courts 57–58
power of attorney 55–56
pro deo proceedings in the Magistrates' Courts 59
request for default judgment: Magistrates' Courts (precedent) 598
responses to defective pleadings and noncompliance with the rules 228–242
return of service: combined summons (precedent) 568
reviews 19
vs appeals 339
court records 378
diagram 563
grounds for 375
jurisdiction 374–375
opposing applications for 377
powers of the court 378
procedure to bring a matter under review 375–377
time limits 377
urgent 378
right of way 69
routes appeals may follow 349–355
rule 37 minutes 292–293
rules *nisi* 174
rules to read with statutes 12–13

S

sale for cash - seller's remedies (example) 29–30
sale on credit - seller's remedies (example) 28–29
scandalous matter in affidavits 162
second limitation 75–77
section 65 notice: Magistrates' Courts (precedent) 625
section 65 procedure 20, 402–405
seller's remedies (diagram) 533
separating issues in pending actions – rule 33(4) 482
separation of powers and granting of interim interdicts 462–463
service of court process 130–131
service of legal documents 18
edictal citations 142–143
electronic media for substituted service 143–144
introduction 132
issue of process and duties of the sheriff 133–134
jurisdiction vs service 144
methods of service in Regional and District Magistrate's Courts 138–140

methods of service in terms of the Rules Court 134–140
outside the country 142–144
protection orders 475
substituted service and edictal citation 141–144
usual methods of service in the High Court 134–138
set down 263–265
settlement agreement (precedent) 627–628
settlements 20
agreements to settle, methods of recording 418–423
offers at common law 411–415
offers of compromise 412–415
offers to settle as a defensive weapon 415–416
offers to settle during litigation 415–418
unconditional offers 411–412
settlements during litigation in the Magistrates' Courts, recording 423
sheriffs of courts 12
shortcut appeals directly to the Constitutional Court 351–355
shortcut judgments
default judgment 243–252
High Court (diagram) 558
summary judgment 252–261
see also pleadings
simple summons (precedent) 578–579, 584–587
single claims involving two or more jurisdictions 115–116
Small Claims Court Act 61 of 1984 126
Small Claims Courts
abandonment 485
case study 488–494
concurrent jurisdiction with the District Magistrates' Courts 485
jurisdiction 62, 484–485
legal action, instituting 486
locus standi 484
procedures 21, 486–487
special cases and points of law - rule 33 481–482
special evidence 283–290
Special Investigating Units (SIUs) and Tribunals 496
specialist courts 61
special orders as to costs 293
specific performance claims 81–83
splitting of single claims 72–73
spoliation orders 476–478
state
citing as plaintiff 632
residence 87
stated cases on appeal, in the Constitution and other statutes 482–483
status claims 80
statutes 12
statutory requirement that demand be given 123–126
striking out inadmissible evidence in affidavits 163
structural interdicts 466–467

subpoena of witnesses 279–283
substituted service and edictal citation 141–144
summonses
combined 181–182
defined 179–180
diagram 552
dishonoured cheques 574–575
drafting 185–186
main elements 179–180
National Credit Act (NCA) 516
provisional sentence 427–428
provisional sentences 185, 574–575
simple 182–184
summons including automatic rent interdict: Magistrates' Courts (precedent) 588–590
superannuation of judgments 401
superannuation of summonses and judgments 197–198
Supreme Court of Appeal 9, 62

T

tariffs of costs 329–330
Tax Courts 495
taxing masters 12
technical inspections, claims relating to objects 276–277
third party joinders 449–452
third party notice: High Court (precedent) 601–602
time limits
calculation 18, 129–131
for reviews 377
time of determination of jurisdiction 65
transfer or delivery of property 67, 83
trial bundles, preparation of 296–297
trials 19
in the High Court 298–305
in the Magistrates' Courts 305–306
trusts, capacity to litigate 50

U

unconditional offers of settlement 411–412
uncooperative parties in Alternative Dispute Resolution 511
unliquidated debts
date from which interest runs 323–325
delivering demand to start running of interest 128
urgent applications 155–157
urgent reviews 378
utmost good faith requirement, *ex parte* applications 175

V

validity of law in Magistrates' Courts, disputing 349
value of claim 63–64

exceptions to the general rule 74–79
question 66
variation and setting aside of court's judgment
in the High Court 310–318
in the Magistrates' Courts 318–320
see also judgment
vexatious matter in affidavits 162
vicarious liability 26–27
void judgments 317

W

warrant of execution in the Magistrates' Courts 388–392
well-grounded apprehension of irreparable harm 460
wills 80
'without prejudice' offer or tender, consequences 416–417
witnesses
composite notice of intention to call expert witness (precedent) 620–622
fees, calculating 282–283
recalcitrant 299
subpoena of 279–283
work done and material supplied, particulars of claim 637
writ of execution: High Court (precedent) 626
writs and warrants of execution 20
attaching a debt owed to the judgment debtor by a third party 392
attachment and sale of corporeals 381–391
attachment and sale of immovables 385–388
attachment and sale of incorporeals 392–398
attachment and sale of movables 383–385
attachment itself 390–391
attachments, what can and cannot be attached 389–390
emoluments attachment orders 394–396
execution 391–392
garnishee orders 397–398
interpleader proceedings 398–401
National Credit Act, effects of 380–381
procedure for attaching incorporeal property 392–394
superannuation of judgments 401
warrant of execution in the Magistrates' Courts 388–392
writs of execution in the High Court 381–388, 626
see also debt collection procedures
wrongful acts 25