Department of Criminal and Procedural Law

Civil Procedure

MODULE 2

only study guide for

CIP301K

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Contents

Orientation

HOW TO USE THE STUDY GUIDE

Getting started

Before commencing your studies, it is important that you orientate yourself in respect of the second module of Civil Procedure. Please read this introduction carefully.

Module outcomes

Up to now, the greatest part of your law studies has centred on substantive law, which **defines** a person's legal rights, duties (or obligations) and remedies; procedural law concerns itself with the **enforcement** of these rights, duties and remedies. Procedural law can refer to either criminal procedure or civil procedure. Since this course focuses on civil procedure we concern ourselves with the rules which regulate the general conduct of litigation, namely those rules that are aimed at the **enforcement** of the above rights, duties and remedies in civil courts. Redress in court is achieved by instituting (and defending) legal proceedings, and obtaining a judicial order which can be enforced ("executed").

In Module 1 (**CIP201G),** you learnt that a court of law will not entertain legal proceedings unless it has the necessary jurisdiction to do so. In this module you are taught that a judicial order will be neither granted nor enforced unless the proceedings have been instituted in the proper form and conducted in the proper manner. Therefore, in order to litigate successfully, various procedural obstacles, such as determining the correct form of proceedings, the correct documents to be prepared and filed with the court, their method of service, the conduct of proceedings in court, whether an order is subject to an appeal or a review, etc, have to be faced. This module seeks to prepare you to meet and overcome these obstacles in practice. Once you have finished studying this module, you should

- know and understand the rules of civil procedure
- explain the choice of appropriate procedures
- demonstrate the ability to meet and overcome various procedural obstacles in practice

Structure of the study guide

The tutorial matter for **CIVIL PROCEDURE MODULE 2 (CIP301K)** has been divided into Part 1: Civil Proceedings in the High Court, Part 2: Procedure in the magistrates' courts and Part 3: Variation of judgments, review and appeal. Where necessary, the units have been further subdivided into paragraphs and points. The study units form the core of this study guide. Each study unit forms a complete whole and deals with a specific aspect of the tutorial matter.

Structure of a study unit

In order to gain the maximum benefit from the study guide, it is important that you understand the manner in which each study unit has been structured. Each study unit consists of —

- an overview
- learning outcomes
- a reference to compulsory reading material, if any
- the tutorial matter that comprises the unit
- an activity
- the related feedback

Numbering of study units

Each study unit describes and analyses a particular procedure or process, and a system of cross-referencing to other study units, enables you to place that particular procedure or process in the context of its procedural relevance as a whole and on the other hand, to determine the relevance of every process and procedure within the framework of civil procedure. In order to facilitate cross-referencing, the study units have been numbered consecutively from the beginning to the end of the study guide.

To illustrate the interrelatedness of the study units consider Part II which deals with procedure in the magistrates' courts, and in which numerous cross-references are made to the study units in Part I that relate to procedure in the High Court. This is the case because the procedure in both courts is so similar. Therefore, it is important that you follow up the cross-referencing in order to place the subject matter of a specific study unit in its general procedural context. However, be aware that different rules apply in the High Court and the magistrate's court.

PRESCRIBED TEXTBOOK

There is only one prescribed textbook for the course. The details are as follows:

Faris and Hurter

The Student Handbook for Civil Procedure Butterworths (2002) Fourth Edition soft cover 233 pages

Remember that the prescribed work supplements the information in the study guide. Therefore, you cannot solely rely on the contents of the study guide.

The prescribed text, *The Student Handbook for Civil Procedure* contains the Rules of Court and the relevant statutes that relate to civil procedure.

COMPULSORY READING MATERIAL

You will find it difficult to understand the tutorial material without simultaneously referring to the compulsory reading material.

It is essential that, whenever directed to do so, you consult the *Student Handbook* when you are working through the study guide. The section, "Compulsory reading material" contains the exact references to Rules of Court or legislation that relate to a particular study unit.

However, this does not mean that you need to memorise the court rules and sections or even the

rule and section numbers. The content is what is important, and a good summary of the content will generally suffice. You should be guided by the instructions in the study guide and in the activity questions: for example, sometimes you will be required to note the procedure as prescribed by the rules, and at other times you would simply need to write down the type of claims which could give rise to the use of a particular procedure.

All compulsory reading is viewed as part of the course material and must be studied carefully.

LEARNING OUTCOMES

Please pay attention to the study objectives for a particular study unit. They are there to show you what information is contained in that particular study unit. This enables you to start your work with a clear idea of what you are expected to learn from any particular study unit.

PRESCRIBED CASES

Please note that, save for cases contained in a tutorial letter as case studies, there is no prescribed case law for this module.

You are not required to memorise all the case names mentioned in the study guide. **However, you are expected to acquaint yourself with the principles of those cases which have been set out in the study guide.** Ensure that you acquaint yourself **fully** with these principles.

Note that names of important cases appear in the margin.

ACTIVITIES AND FEEDBACK

At the end of each study unit, you will find an activity. The activities consist mostly of problem-type questions or short questions aimed at guiding you through the tutorial material and testing your insight and understanding of a particular study unit.

Each activity is followed by feedback that contains the answers to the questions posed in the activity.

Practically speaking, each activity is, in effect, a mini assignment for a specific study unit. The feedback contains the necessary comments that enable you to evaluate the correctness of your answers. Therefore, you must work carefully and meticulously through the activities and related feedback since they form an important part of your continuous self-assessment.

Please note that the feedback does **not contain model answers,** but provides broad guidelines for answering questions. Therefore, you should note that should a question contained in an activity be asked in the examination, your answer should contain more detail than the related commentary.

END-PLAY

Your study of this module ends with an examination. However, the examination is also a beginning, for you should now have attained the basic skills for entering the practice. Study this

module well because it contains some of the most basic information that you will be using in practice.

As your lecturers, we wish you every success with your studies.

A FEW INTRODUCTORY REMARKS ON CIVIL PROCEDURE IN THE HIGH COURT AND THE MAGISTRATES' COURTS

In order to prepare yourself for the study of this module, we advise you to read study units 5 and 6, Module 1 (CIP201G) attentively in conjunction with the remarks which follow.

The High Court

One should distinguish between the law of procedure which applies to the High Court and the law of procedure which applies to other courts, such as magistrates' courts, certain indigenous courts and other bodies vested with judicial and quasi-judicial powers which were established by virtue of particular legislation. The reason for this is that the civil procedure of the High Court does not consist solely of statutory provisions and court rules; a substantial part of it consists of common law rules. Because of this, the High Court is sometimes said to have 'inherent jurisdiction' (as opposed to the other courts). Inherent jurisdiction simply means that the High Court derives its powers from the common law, and not from a statute (although a statute, in certain cases, may limit or increase this jurisdiction). The High Court is empowered, for example, to condone noncompliance with procedure in appropriate circumstances, even where the provisions of a particular rule are binding (see Rule 27(3) of the Uniform Rules of Court).

The Supreme Court Act 59 of 1959 was passed to consolidate and amend the law relating to the Supreme Court of South Africa. In terms of section 43(1) of this Act, the Chief Justice and the Judges of Appeal could make rules regulating the conduct of proceedings in the Appellate Division and, in terms of section 43(2)(a), the Chief Justice and the Judges-President of the various divisions could make rules for the various provincial and local divisions. (To this day this Act still performs the same function in the present dispensation.)

In terms of this latter section, Rules were promulgated on 12 January 1965, regulating, with effect from 15 January 1965, "the conduct of the proceedings of the provincial and local divisions of the Supreme Court of South Africa" and are still known as the "Uniform Rules of Court". They still ensure that all proceedings are conducted in a uniform manner in all the various divisions of the High Court. In practice, the only rules of the various divisions which have not been affected are those relating to court terms, vacations, sessions and set-down.

The power to make rules for the Appellate Division, as well as for provincial and local divisions, in terms of the provisions of section 43(1) and 43(2)(a) has now been conferred upon the Rules Board for Courts of Law.

The Rules Board was established in 1985, and its powers and functions are regulated by the provisions of the Rules Board for Courts of Law Act 107 of 1985. The purpose of this Act is to facilitate the making of rules of court for the efficient and uniform administration of justice in both the different divisions of the Supreme Court and in the various lower courts; hence the competence to make rules for all courts now vests solely in the Rules Board.

Unless expressly stated to the contrary, all subsequent references to "Rule" or "Rules" constitute references to the Uniform Rules of Court, and reference to "rule" or "rules" to the magistrates' courts rules.

The magistrates' courts

The civil procedure of the magistrates' courts is governed by the Magistrates' Courts Act 1944, as amended. Section 2 of the Magistrates' Courts Act empowers the Minister of Justice to create magistrates' courts by means of a notice in the *Government Gazette*, and to define the limits within which such court may exercise its jurisdiction. Therefore, the Republic is divided into numerous magisterial districts with each district having a magistrate's court. The name of the district does not necessarily coincide with the place in which specific court sessions occur. To illustrate this, court sessions are held in Nylstroom with regard to the district for the magistrate's court of Waterberg. Section 4(3) provides that every process issued out of the court will apply throughout the Republic. To illustrate this, if the magistrate's court for the Pretoria district issued a warrant of *arrest suspectus de fuga*, this could be executed by the sheriff of the court for the Warmbaths district if the person named in the warrant were resident in Warmbaths.

Magistrates and court officials are involved in the administration of justice in the magistrate's court. Every magistrate's court has one magistrate, one or more additional magistrates, or one or more assistant magistrates. Please note that although a magistrate usually presides in civil trials in the magistrate's court, section 34 provides that the court may request the assistance of one or two persons of skill and experience in the matter to which the action relates who may be willing to sit and act as assessors in an advisory capacity.

The court officials comprise the clerk of the court, the sheriff and legal representatives. The functions of the clerk of the court coincide with those of the Registrar of the High Court. These functions include the issuing and filing of summonses, the filing of pleadings, the storing and safekeeping of court files and the taxation of accounts in respect of the costs. The functions of the sheriff of the magistrate's court coincide with those of the sheriff of the High Court, and these relate to the service of process and the execution of judgments. It is submitted that advocates, attorneys and certain candidate attorneys may appear in connection with any process in any magistrate's court. However, candidate attorneys are not authorised to sign pleadings.

Please also note that the discussion of civil procedure in the magistrate's court will be based mainly on the Act and Rules. The Magistrates' Courts Act is divided into five parts:

Part I : Courts (chs I–V; ss 2–25)

Part II : Civil Matters (chs VI–XI; ss 26–88)

Part III : Criminal Matters (chs XII–XVI; ss 89–105)

Part IV : Offences (ch XVII; ss 106–109)

Part V : General and supplementary (ch XVIII; ss 110–117)

However, in this module we shall devote more attention to Part II of the Act. When we refer to the Magistrates' Courts Act or the magistrates' courts rules, we shall use abbreviations, that is, "Act" or "rules", and when we refer to a particular section or rule in the Act or rules respectively, we shall simply refer to "section X" or "rule Y". This will be done to avoid lengthy repetitions.

A FEW REMARKS ON THE CONDUCT OF PRACTITIONERS

The conduct of legal practitioners (attorneys or advocates) in practice is subject to a professional code of conduct. The main sources of this code of conduct are the Attorneys Act 53 of 1979 (as amended) and the Regulations promulgated under it, the rules and rulings of the various law societies and bar councils, court decisions, the common law, textbooks, and the influence of international codes. The purpose of a professional code of conduct is to provide the norms in terms of which it can be established whether prospective practitioners and current practitioners are fit and proper persons to practice law.

You should bear in mind that a practitioner is admitted to practice by the High Court, and therefore a practitioner is termed an "officer of the court". Because a practitioner is part of the legal system he or she is compelled to uphold the law at all times, and to promote the general administration of justice. This includes a practitioner's duty not to abuse the processes of court, and not to hamper his or her opponents in the conduct of their cases. The professional conduct of practitioners crops up in various relationships, such as in the relationship with their clients, other practitioners, the courts, the state, the community and the particular professional body (law society or bar society). In all these relationships it is expected that practitioners will conduct themselves with integrity, objectivity, dignity, good judgment, sufficient knowledge and skill, respect for the law, commitment, equity and fairness. Serious breaches of the code of conduct can lead to the removal from the roll of attorneys or advocates, as the case may be. The duty of practitioners is well expressed in the following principles laid down in the "General Principles of Ethics" of the International Bar Association:

"1 Lawyers shall at all times maintain the highest standards of honesty and integrity towards all those with whom they come into contact.

2 Lawyers shall treat the interests of their clients as paramount, subject always to their duties to the Court and the interests of justice, to observe the law and to maintain ethical standards.

10 Lawyers shall use their best efforts to carry out work in a competent and timely manner, and shall not take on work which they do not reasonably believe they will be able to carry out in that manner.

12 Lawyers shall always behave towards their colleagues with integrity, fairness and respect."

Keep these comments in mind when studying the contents of this module, and when applying your acquired knowledge in practice. Remember that these principles are not limited to the professional sphere, but also apply to every aspect of a lawyer's personal life.

PART 1

Civil proceedings in the High Court

STUDY UNIT

1

THE FORMS OF PROCEEDINGS

Abel sells his farm to Jafta for R500 000. Jafta takes occupation of the farm and begins to farm. Despite a reminder, he refuses to make any payments for the purchase price of the farm in terms of the contract of sale. Jafta alleges that the farmhouse is derelict and the borehole is not as strong as he thought, which means that he will not be able to irrigate as much land as he planned to.

Abel wants to cancel the sale and take possession of his farm again. The question now is which form of proceedings Abel ought to use to achieve the desired relief.

Overview

Learning outcomes

Once you have finished studying this study unit, you should

- be able to distinguish between the two main forms of proceedings
- be aware of the practical application of the *audi alteram partem* maxim on the different forms of proceedings
- have a general background which will prepare you for a more intensive study of the different forms of proceedings in the later chapters

Compulsory reading material

None

1.1 BACKGROUND

The law of procedure forms part of formal law and while substantive law defines rights, obligations and remedies, formal law deals with the proof and enforcement of rights, obligations and remedies. Civil Procedure fulfills this function in the civil (as opposed to the criminal procedural) sphere. Although a sound knowledge of substantive law is essential to a practitioner, that knowledge alone will not lead to the required relief: it will only determine whether a client has a particular right, if such right has been infringed and what the nature of the remedy is. A client will then have to look to Civil Procedure because only the courts offer recourse. Consequently practitioners have to institute or defend actions in courts before a judicial officer who ultimately makes an order. Only then enforcement of a client's right and remedy take place.

Civil procedure is characterised by a great amount of documentation which has to be prepared by the various parties before a case can be heard by the court. Parties use this documentation, for example, to formulate their claims a well as to set out their defences against such claims. Depending on the type of action, these documents are called process documents or pleadings.

Since there are different ways in which an action can be instituted, for various reasons it is important to use the correct form of procedure in a particular case. Firstly, if the incorrect form is used the court may

(1) refuse to hear the case or to hear it in its present form
(2) penalise the party which used the incorrect form when it issues an order for costs, even if the court is prepared to condone the use of the incorrect form.

Example

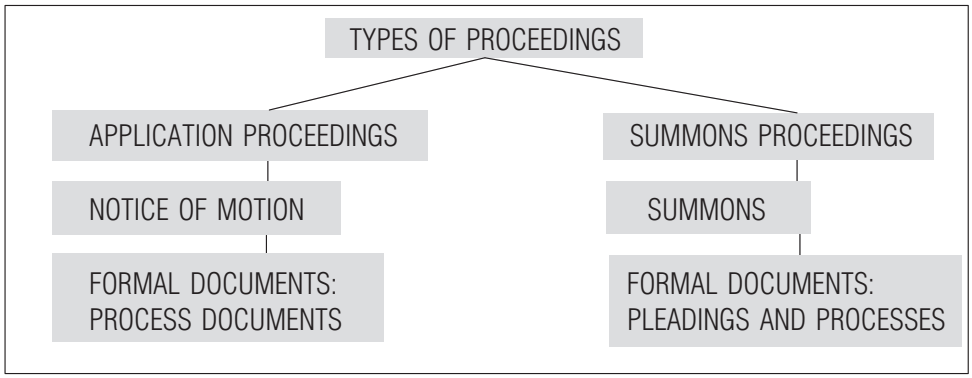
Secondly, there are certain advantages attached to the different process forms, including speed and cost saving. **For example**:

> if A's neighbour, B, starts breaking down the wall between their respective properties, A would apply to court by way of **notice of motion** for an order restraining B from breaking down the wall. He would select this form of process because it affords him or her the speediest remedy.

A particular form of proceedings may also be selected because it affords the most inexpensive means of approaching the court. The litigant can naturally make this choice only if the law allows him or her to do so, that is if the law does not compel him or her to use a particular form of proceeding or does not prohibit him or her from using a particular form.

Generally, there are **two** ways in which a litigant may approach the court, namely by means of an application or by means of a summons.

Consequently, one speaks of application proceedings and summons proceedings. In the case of application proceedings, all applications are directed to the court by means of notice of motion, while in the case of summons proceedings, the court is approached by means of a summons. The following is a schematic representation hereof:



1.2 THE MAXIM *AUDI ALTERAM PARTEM*

The *audi alteram partem* rule is fundamental to all proceedings, whether by way of notice of motion or summons, and an understanding of the maxim will help you to grasp the rules of pleading, as well as many of the provisions in regard to the prosecution of an action.

Literally translated, the maxim means "hear the other side". When applied to the sphere of civil procedure it means that every person is entitled to be heard before an order or judgment is granted against him or her. This explains why our courts meticulously enforce the requirement that an opponent should be notified timeously of the steps to be taken against him or her, and that he or she should be given an opportunity of replying to the case stated against him or her, and of placing his or her own defence before the court.

This also partly explains why pleadings and process documents are used: each party knows exactly what the basis to the opposing party's claim is and will therefore know how to reply to it. Hence this prevents any party from being caught out unprepared during the trial.

1.3 THE DISTINCTION BETWEEN SUMMONS PROCEEDINGS AND APPLICATION PROCEEDINGS

Summons proceedings are characterised by a clear distinction between the pleading stage and the trial stage. Next, we explain what is meant by this.

1.3.1 The pleading stage

In illiquid summons proceedings the pleadings consist of printed or written statements which are made and which are exchanged by the parties to an action; the material facts upon which the parties respectively rely in order to establish their claims or defences must be concisely set out therein (see *Bullen & Leake's Precedents of Pleadings*, 1). It is important to note that the facts are set out in **summary form**. In practice, this really means that **conclusions of fact** are pleaded. One of the functions of pleadings in an illiquid action is to formulate and crystallise the nature and extent of the factual dispute between the parties, and **not** to set out the full body of facts on either side. The pleadings consist of "printed or written statements". Except where a party is appearing in person he or she does not draft or sign the pleadings; this is done by the legal representative.

1.3.2 The trial stage

Once the process of pleading has been completed, the action is set down for trial. At the trial the

parties endeavour, by means of witnesses **who appear in person and who give evidence** *viva voce* (ie orally), and who hand in documents or other real evidence, to prove by such evidence the basic facts formulated in the pleadings. These witnesses are examined in chief, are cross-examined and are re-examined. After all the evidence has been led, argument is addressed to the court on the pleadings and on the evidence, and judgment is then delivered.

In contrast to summons proceedings, there is no such distinction between the pleading stage and the trial stage. We do not speak of pleadings in the case of the application: the equivalent documents in the lastmentioned procedure are called "processes". These processes contain not only the **formulation of the factual dispute, but also the evidence** which the different parties offer as proof of their respective factual allegations. This is possible because these processes are drafted in the form of affidavits. The processes not only consist of the applicant's affidavit, but also of the supporting affidavits of the witnesses. Therefore, it is clear that not only the claims or defences of the respective parties are formulated in these documents, but also all the evidence in the possession of such parties. Hence, when the case comes before the court, the claim, defence and supporting evidence are all in the court's possession. Consequently, the hearing of the application consists exclusively of the arguments of the legal representatives of the respective parties. In exceptional cases (see hereunder) *viva voce* evidence may be heard.

If the application is opposed, the facts, as set out in the documents, are accepted. The only question which must be answered is whether a case can be made for granting the requested order (eg that the company be liquidated or that X be admitted as an attorney).

1.4 THE IDENTIFICATION OF THE APPLICABLE FORM OF PROCEEDINGS

Now that you understand the nature of application and summons proceedings and can distinguish between them, it is important to know how to determine which is the most correct or appropriate form to use in a particular situation. In some circumstances, using the wrong form of proceedings may have cost implications for the party who institutes the proceedings.

From the beginning, you should know that there is no magic formula nor any absolute rules to determine which choice to make. This is clearly illustrated by the fact that there has been an increase in the use of application proceedings, which were normally instituted by means of summons proceedings, and the courts are extending this practice rather than limiting it. (See eg *Abaany Property Investments Ltd v Fatima Ayob & Sons Ltd* 1994 (2) SA 342 (T) 343J.)

***Abaany Property Investments Ltd v Fatima Ayob & Sons Ltd* 1994 (2) SA 342 (T)**

The main reason for this phenomenon is obvious: application proceeedings are much faster and are therefore far cheaper than summons proceedings. However, it must be pointed out that application proceedings are not permissable in all circumstances and the courts often have to decide on this issue. Determining which form of proceedings should be used can only be established by means of a process of elimination. Hence, the following questions must be asked:

Example

(1) Does legislation or the Uniform Rules of Court prescribe whether the application procedure must be used? **Examples** include applications for liquidation of companies (s 346 of the Companies Act of 1973) and for sequestration of estates as well as the revision thereof (Rule 53 of the Uniform Rules of Court), applications in respect of marital matters (Rule 43 of the Uniform Rules of Court) and applications for the appointment of curators *ad litem* (Rule 57 of the Uniform Rules of Court).

Example

(2) Is it compulsory to use summons proceedings? **Examples** of instances where it is include divorce proceedings and unliquidated claims for damages, compensation or enrichment.

(3) Does the matter fall neither within the ambit of (1) or (2) above? For purposes of this discussion, this third category, namely cases where application proceedings are neither prescribed or forbidden, is the most important. In these cases, the following principle is applied:

An application by means of notification of motion may be made if (1) there is no real dispute over any fundamental question of fact *or* (2) if there is such a dispute, it can nevertheless be satisfactorily decided without the necessity of oral evidence.

1.5 WHEN IS THERE A "DISPUTE OF FACT"?

There is a dispute of fact when

(1) the respondent denies material allegations made by the deponents on the applicant's behalf, and produces positive evidence by deponents to the contrary

(2) the respondent admits the allegations contained in the applicant's affidavit, but alleges **other** facts which the applicant disputes

Room Hire Co (Pty) Ltd & Jeppe Str Mansions 1949 (8) SA 1155 (T)

(3) the respondent concedes that he or she has no knowledge of the main facts stated by the applicant, but may deny them, putting applicant to the proof and himself or herself giving, or proposing to give, evidence to show that the applicant and his or her deponents are biased and untruthful, or otherwise unreliable, and that certain facts upon which the applicant and his or her deponents rely to prove the main facts are untrue.

On the other hand, a dispute of fact does **not** arise where the respondent merely states that he or she disputes the truth of the applicant's statements, but offers no evidential reply to them, in other words, where there is simply a bare denial. The reason for this is that, if motion proceedings could be delayed or terminated merely by a bare denial, such proceedings would be of no value. The attitude of the courts is that a firm and practical approach to disputes must be adopted in motion proceedings in order to ensure that they (the courts) function effectively and that justice is done.

Note that a **real** dispute of fact has to occur: the mere fact that the parties are not in agreement on all facts does not mean that a real dispute on any material question of fact has occurred. See activity question 3 below as an illustration.

1.6 PROCEDURE WHERE A DISPUTE OF FACT ARISES

Where a genuine dispute of fact arises which cannot be settled without the hearing of *viva voce* evidence, the court hearing the motion proceedings may

Read Rule 6(5)(g)

(1) dismiss the application (although this happens very seldom, if ever, in practice) (see Rule 6(5)(g))

(2) order oral evidence to be heard on specified issues (see Rule 6(5)(g))

(3) order the parties to trial with appropriate directions as to pleadings, the definition of issues, et cetera (see Rule 6(5)(g))

ACTIVITY

Carefully read the set of facts at the beginning of the study unit. Now answer the following questions:

(1) What is the nature of the dispute which arose between Jafta and Abel?

.....

(2) What is the reason for your answer?

.....

(3) Would your answer to questions (1) and (2) above have differed if the dispute between the two parties had been about whether there was a legal contract between them? Substantiate your answer.

.....

.....

.....

(4) With reference to the set of facts, which type of proceedings would be appropriate in the light of the above questions? Substantiate your answer.

.....

.....

.....

.....

FEEDBACK

(1) There was a dispute in law between the parties. ("Nature" refers to the **type** of dispute, ie a dispute in law or a factual dispute.)

(2) Abel wants to cancel the contract owing to Jafta's behaviour. The question whether Abel has grounds for cancellation is clearly a question of law.

(3) Yes, the answers would have differed. In this case, the dispute is factual in nature: the one party would make a number of factual allegations which would indicate that there had indeed been an agreement (eg that it had been agreed that Rx would be the price for the **specific** farm and that the parties had wanted to purchase and sell the farm) while the other party would deny some or all of these allegations. The facts of the case are therefore in dispute. Since the dispute is about the *essentialia* (see your course on the law of contract) of a contract of purchase, the dispute is not simply superficial, but concerns the **actual** facts. The true state of affairs can be established only on hearing the oral evidence and testing it. (In practice, depending on the facts of a case, there may also be a legal dispute if there is evidence of cancellation. However, when deciding on the appropriate proceedings, the question remains whether oral evidence is necessary or not.)

(4) Application proceedings. We are dealing with a legal dispute and not with a genuine dispute of facts. Consequently, the dispute may be decided simply on the basis of the documents before the court.

STUDY UNIT

2

THE CONDUCT OF APPLICATION PROCEEDINGS

Sandra has passed her attorney's admission examination and her contract as a candidate attorney expires soon. She would like to be admitted as an attorney and must approach the court with an application to be admitted. Sandra's principal advises her to draw up the application herself, and she must decide which type of application is the correct one.

On his divorce from his wife, Theresa, Paul was awarded custody of their minor child. As agreed, Theresa takes the child on holiday but at the end of the holiday she refuses to return the child to Paul. Paul is very worried about the child's welfare and school attendance, and approaches the court for an order to have the child removed from Theresa's possession and care and be returned to him. You are the candidate attorney with whom Paul is consulting. Paul wants to know what legal procedure can be used in these circumstances and also how soon he can expect the relief he seeks.

Overview

Learning outcomes

Once you have finished studying this study unit, you should

- be aware of the two types of applications, as well as the circumstances in which each one is used
- be familiar with the operation of application proceedings as a form of litigation

Compulsory reading material

Rule 6, read together with Rule 62; Form 2 and Form 2(a), First Schedule

2.1 BACKGROUND

There are two forms of notice of motion which can be used in order to institute litigation:

- *Ex parte* applications

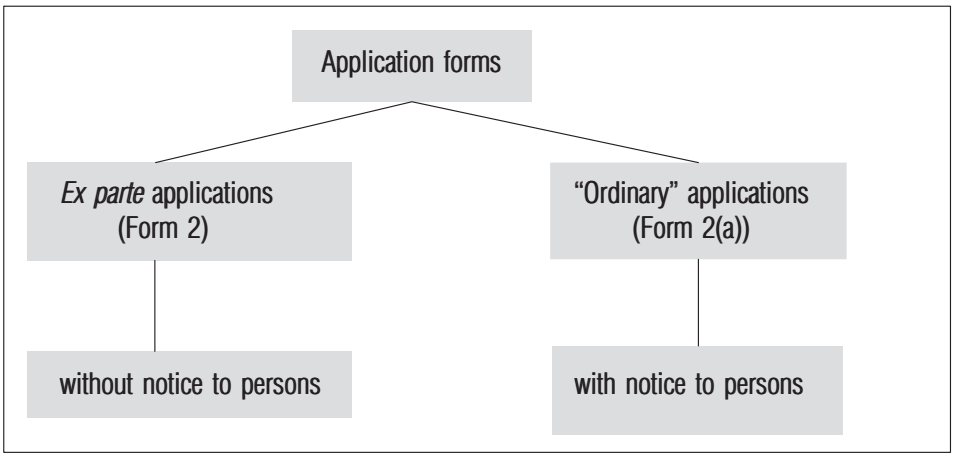
These applications are used only if it is unecesssary to notify another party of the proceedings. Such notice must be in accordance with Form 2 of the First Schedule to the Uniform Rules of Court.

- "Ordinary" applications

These applications are used when notice of the proceedings must be given to other parties. Such notice must be in accordance with Form 2(a) of the First Schedule to the Uniform Rules of the Court.

When you study Form 2 and Form 2(a), you will notice that a notice of motion is simply a prescribed form which is typed up and into which the missing information is entered. Once the documents have been completed and all the relevant annexures have been attached to the notice (**study** and see Rule 6(1) for an explanation of the two sections which make up both types of applications) the application is "issued" in the Registrar's office, that is, a court file is opened for the application and it is given a case number.

The following is a schematic representation of the application forms:



2.2 APPLICATION FORMS

We shalll now take a closer look at the two abovementioned application forms.

2.2.1 *Ex parte* applications (Form 2)

We covered the *audi alteram partem* principle in study unit 1 and showed that the general rule is that notice of litigation must be given to everyone whose rights may be affected by any order in the legal poceedings, or who has any interest in any such order. Since an *ex parte* application can be heard by a court without notice being given to anyone, it can be said that in this respect, this form of application is an exception to the general rule. Therefore, it is obvious that it is used only in the following exceptional circumstances:

(1) When the applicant is the only person who is interested or affected by the relief sought, for example an application for admission as a sworn translator.
(2) Where the relief sought is a preliminary step in the proceedings, for example an application to sue by edictal citation or to attach property *ad fundandam jurisdictionem*.
(3) Where this procedure (ie an *ex parte* application) has been laid down by Act of Parliament or the Uniform Rules of Court.
(4) Where, though other persons may be affected by the order sought, immediate relief is essential because a delay could be dangerous, or because, if notice were given to the person affected, such notice would in fact precipitate the very harm which the application is endeavouring to prevent, for example an application for an urgent interdict.
(5) In certain circumstances, although other parties may be affected by the order, a court will grant an order without notice to the respondents where the latter are so numerous that it would be highly inconvenient, very expensive and time-consuming to serve the application on them all.

Note, however, that, when any application is made *ex parte*, an onerous duty rests upon the applicant (and equally so on the applicant's attorney and counsel) to disclose fully **all** material facts which may affect the decision of the court, even though such facts could be detrimental to the success of the application.

Where, however, the rights of other persons may be affected by any order granted in pursuance of an *ex parte* application, the court will not grant a final order, but will issue what is known as a *rule nisi*. The *rule nisi* is an order calling upon the respondent, or on all interested parties, to show cause on a day fixed in the rule (known as the "return day of the *rule nisi*", and being the day upon which these parties may, if they are so advised, oppose the application) why the relief specified in the *rule nisi* should not be finally granted. Where immediate relief is essential to the applicant (see eg (4) above), the court will ordinarily further order that the *rule nisi* operate as an interim order (usually in the form of an interim interdict) pending the confirmation or discharge of the *rule nisi* on the return day.

The court may, if it is deemed desirable to do so, order that the *rule nisi* be served on certain interested parties, for example the Master of the High Court, the Registrar of Companies, the state, et cetera. Although these persons or bodies are not parties to the application, the court may, in view of their official capacity, consider it necessary that they receive notice of such an order. For example, where a company has been deregistered and an order for reinstatement as a registered company is applied for, the court will normally order that the *rule nisi* be served on

the Registrar of Companies by virtue of his or her interest in proceedings which affect companies.

Read Rule 6(2)

Rule 6(4)(a)–(c), read with Rule 6(2), deals specifically with *ex parte* applications. For the moment, **read** this rule for background purposes, since it is discussed in more detail in study unit 2.3.3. You must, however, examine Form 2 and endeavour to complete it yourself.

2.2.2 "Ordinary" applications (Form 2(a))

As was already indicated in 1 above, this form of application differs from an *ex parte* application in that notice of the application is given to another person or persons. Such person or persons receive notice of the application in that it is "served" on them after it has been issued, that is, a copy of the application is handed to them. Rule 6(5), read together with Rule 6(2), contains the prescriptions applicable to this type of application.

2.2.3 Related forms in which applications can appear

- *Interlocutory applications*

In the preceding sections we looked at the two forms of notice of motion used to institute legal proceedings. However, often a party may want to approach the court for relief in respect of matters related to proceedings that have already been instituted. This is particularly the case in respect of summons proceedings.

Example

> C sues D. The parties prepare for the hearing and D fails to disclose some documents. C's preparation is prejudiced by this failure and C approaches the court in terms of Rule 35(7) for an order to force D to disclose.

Study Rule 6(11)

Rule 6(11) of the Uniform Rules of Court determines that in these cases, the court must be approached by means of interlocutory applications. However, note that although Rule 6(11) refers to "notice", the courts have decided that this does not mean "notice of motion". Interlocutory applications are therefore brought purely by way of notice. As a result, the parties are not bound by the severity of the Rules. **Study** Rule 6(11) in this regard and note the provision in regard to set-down. In terms of Rule 4(1)(aA), such applications may be served on the opposite party's attorney of record, and do not therefore have to be served by the Sheriff.

Although there is no prescribed form with which the notice must comply, in practice the form reminds one very much of the *ex parte* form (Form 2) — with differences in respect of the number of parties concerned, the exposition of relief and set-down (as already referred to).

- *Urgent applications*

A further form of the application procedure is the urgent application.

It sometimes happens that relief is needed urgently but that there is simply not enough time for following prescribed procedures in placing a matter before court. Examples are where a divorced spouse is about to take his or her child out of the country in breach of a divorce order granting the other spouse access to that child, or where a newspaper or magazine is about to publish

articles or photos that could harm a particular person or organisation. Rule 6(12) makes provision for this type of application.

This does not mean that an applicant may disregard the usual requirement for applications entirely. The principle is that, as far as possible, the normal rules of procedure should be followed, and that any departure from such normal rules of procedure must be justified by the urgency of the matter. In other words, the mere fact that an applicant views the matter as urgent does not mean that he or she may bring the application in any form and at any time and place, or with too short a time limit for responses by the respondent. If a departure cannot be justified, the court may strike the application off the roll with costs, or may postpone the matter to afford the respondent more time to respond to the application. In *Luna Meubel Vervaardigers (Edms) Bpk v Makin (h/a Makin's Furniture Manufacturers* 1977 4 SA 135 (W) it was held that the degree of relaxation of the normal rules should not be greater than the urgency of the case demands.

***Luna Meubel Vervaardigers (Edms) Bpk v Makin (h/a Makin's Furniture Manufacturers* 1977 4 SA 135 (W)**

Carefully read Rule 6(12) — you will notice that, in terms of such rule, the normal rules of procedure may be dispensed with.

If time permits the notice of motion must be prepared in accordance with Form 2(a) of the First Schedule. The usual prayers for relief should include an additional prayer that the forms and service provided for in the Uniform Rules of Court be dispensed with and that the matter be heard as one of urgency. The founding affidavit (see unit 2.3.2) must obviously also set out very clearly the circumstances which render the matter urgent, as well as the reasons why a hearing in the normal course of events will not afford proper redress.

Bear in mind that an applicant may not himself or herself create urgency by, for example, waiting too long to act so that the ordinary rules can no longer be applied. In various divisions of the High Court it is the practice that a certificate of urgency signed by the applicant's advocate must accompany the documents before the Registrar will place the application on the roll.

ACTIVITY

Carefully read through the first set of facts at the beginning of the study unit and answer the following questions:

(1) Indicate what factors must be considered in determining the correct type of application to be used.

.....

.....

.....

(2) In the light of these factors, what type of application must Sandra lodge?

.....

(3) What documents comprise this application?

.....

.....

.....

FEEDBACK

(1) To put it simply, they are determined by the questions you must ask yourself if you find yourself in this kind of situation. Thus, the first question you must ask is

— are proceedings being instituted or is the application related to existing proceedings (ie proceedings which have already been instituted)?

Logically, the second question which follows is

— whose rights or interests are affected by this application?

(2) An *Ex parte* application: the above questions should have indicated that (independent) proceedings will be instituted and that the interests and rights of no-one other than Sandra will be affected by the application. Therefore, she is not obliged to give notice of the application to anyone else.

(3) Rule 6(1) determines that an application consists of a notice of motion, supported by an affidavit containing the facts on which the application rests.

You would not have been able to answer this question without looking up this Rule in the *Student Handbook*. If you are told to study a particular rule, its content is considered to be part of your study material and you may therefore be examined on it.

2.3 FORMAL ASPECTS OF APPLICATION PROCEEDINGS

2.3.1 The form and content of the application proceedings

When you studied Rule 6(1), you would have noticed that an application comprises two separate sections. These two sections cannot function independently or on their own, and form an entity. Since you have already compared Form 2 and Form 2(a) with each other, we shall only discuss a few of the aspects related to the supporting affidavit.

The supporting affidavit consists of consecutively numbered paragraphs. As far as possible, each paragraph must contain separate statements or allegations. As in the case of any other affidavit, this affidavit must be duly confirmed on oath in terms of section 6 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963, and supplemented by the Regulations contained in Government Notice R1258 of 21 July 1972 (as amended). Note, too, the provisions of Rule 62 as regards the appearance of the affidavit.

Example

To illustrate this we will take the case of a child whom, in terms of Rule 57, wishes to approach the court to have a *curator litem* appointed for his parent who is incapable of managing his own affairs. In broad outline, the supporting affidavit would look like this:

IN THE HIGH COURT OF SOUTH AFRICA

(XXX SECTION)

In the *ex parte* application of

JAN PIETER ELS Applicant

AFFIDAVIT

I, the undersigned

JAN PIETER ELS

hereby declare under oath and say:

1

I am the applicant in this application and the facts contained herein are to my personal knowledge. I am an adult businessman and reside at 21 Church Street, Pretoria.

2

My father is PIETER KOOS ELS. I am my father's only close relative and he presently lives with me. I respectfully submit that I have *locus standi* to bring this application.

3

(Set out the grounds on which the court asserts its jurisdiction.)

(All other relevant and required declarations are set out in the same way, until the applicant's case has been fully dealt with. The affidavit is then signed by the applicant (usually called the "Deponent") before the Commissioner of Oaths once he has made the prescribed oath. If he has a conscientious objection to the oath, the truth of the content of the declaration is asserted. Now, the Commissioner signs the declaration.)

The content of the affidavit must be approached carefully, since it is the equivalent of the pleadings in a summons. Hence the facts must be correct and sufficient to disclose a cause of action.

Read Rule 6(5)(b)

Read Rule 6(5)(b) carefully. You will notice that the requirements set for the content of the notice of motion apply only to the "ordinary" application. Naturally, these requirements are set because interested parties must be given notice of the application to make it possible for them to be heard in terms of the *audi alteram partem* principle. In conclusion, you must note that notice is **served** on the interested parties — see Rule 6(5)(a).

In both types of applications the notice of motion must be signed by the applicant or his or her attorney. A power of attorney does not have to be filed for purposes of application proceedings.

2.3.2 The different types of affidavits

In the case of *ex parte* applications, there is only one type of affidavit, namely the supporting affidavit. If an "ordinary" application is unopposed, there will also obviously only be a supporting affidavit. However, if the application is opposed, the situation differs. (For the sake of clarity it is pointed out that a party opposes an application by giving written notice to the applicant within the *dies induciae* stated in the notice of motion of his or her intention to oppose the application — see Rule 6(5)(d)(i). This notice fulfils the same function as the notice of intention to defend in summons proceedings — see study unit 9.2.)

The general rule is that in all application proceedings which are opposed, the papers will be restricted to the following three sets of affidavits:

(1) The **supporting** affidavit of the applicant, which is attached to the notice of motion.
(2) The **answering** affidavit by the respondent in terms of Rule 6(5)(d)(ii). In this affidavit, the respondent, supported in so far as may be necessary by other affidavits, deals paragraph by paragraph with the allegations and evidence contained in the supporting affidavit. Compare the general rules relating to pleadings, which are discussed more fully in unit 23.
(3) The **replying** affidavit by the applicant in terms of Rule 6(5)(e), in which the applicant deals paragraph by paragraph, in so far as may be necessary, with the allegations and evidence contained in the respondent's answering affidavit.

The court is empowered, in its discretion, to permit the filing of further sets of affidavits (see Rule 6(5)(e)). This means that a further set of affidavits will be required from the respondent. The court will exercise its discretion in this regard only in exceptional circumstances, for example where there is something unexpected in the applicant's replying affidavit where new matter is raised therein, or where the court requires more detailed information on record.

2.3.3 The proceedings

The procedure which is followed in the case of *ex parte* applications is set out mainly in Rule 6(4)(a), whereas that in the case of "ordinary applications" is laid down mainly by Rule 6(5). You are not expected to know the content of these Rules in detail, but you must know the principal features of the procedural steps involved. Note that, where a party does not oppose an application, the procedure for set-down corresponds substantially to that for the *ex parte* application (cf Rule 6(4)(a) and Rule 6(5)(c)).

2.3.4 Remedy in the case of defects: motion to strike out

An affidavit may not, save in exceptional cases of urgency, contain hearsay evidence, any other inadmissible evidence, or matter which is argumentative, irrelevant, vexatious or scandalous. Where an opposing party wishes to object to such matter, he or she may apply to have the offending matter struck out. Such application is brought by means of notice of motion, upon proper notice to the other side (see Rule 6(15)).

ACTIVITY

Read through the second set of facts at the beginning of the study unit and then answer the following questions:

(1) Advise Paul on the type of application which must be used in his case.

(2) Advise Paul on the steps which must be followed to ensure that the case is served more quickly than usual before the court.

FEEDBACK

(1) The "ordinary" application will be used since Theresa must be given notice of the application in order to have the opportunity to put her side of the story.

(2) This application can be brought before the court as a matter of urgency in terms of Rule 6(12). The application will be the same as any other application, except that it will be accompanied by a certificate of urgency, and the notice of motion will show that the court is asked for leave to deviate from the prescribed forms of service and that the application be dealt with as an urgent application.

Example

In an abbreviated form, the notice of motion will look like the following:

(Heading)

NOTICE OF MOTION

TAKE NOTICE that applicant intends on ..... or as soon as possible thereafter as applicant's counsel may be heard, to make application for an order with the following provisions:

(a) Leave be given to deviate from the forms and service prescribed in Rule 6 and this application be dealt with as an urgent application in terms of Rule 6(12)(a);

(b) An order be given for the Deputy Sheriff of Pretoria to remove the minor child, ..., from the possession and care of the respondent and return him to the applicant;

(c) That the respondent be charged with paying the costs of this application;

(d) Further and/or alternative relief.

AND KINDLY TAKE NOTICE THAT the affidavit of the applicant, ... , will be used in support of this application.

NOTE: Any additional paragraphs that might be necessary will be added in the same way. In addition to this, the notice will be signed and will include an indication of the persons on whom it will be served.

STUDY UNIT

3

THE CONDUCT OF SUMMONS PROCEEDINGS

Overview

Learning outcomes

Once you have finished studying this study unit, you should

- have an overall idea of summons proceedings, the different types of summonses, as well the conduct of summons proceedings, so that you are able to view and study the entire process as an integrated whole
- have a general background which will serve as the basis for a more intensive study of all aspects of the proceedings in further study units

Compulsory reading material

None

3.1 AN EXPLANATION OF THE WAY THE WORK IS DIVIDED

As in the case of application proceedings, there are different summonses which can be used in the conduct of summons proceedings to institute litigation. However, before summons proceedings can come into operation, there are some preliminary aspects of the proceedings which have to be considered, namely parties and service.

Example

In an effort to help you to see the entire process as a logical and interrelated whole, we have decided to begin with these preliminary aspects of the procedure. From as early as the first consultation with a client, these issues must be seen to: thus, for example, the court will first be approached by means of an application if it is found that the defendant is overseas, since normal service is not possible in such a case. At this stage it must also be decided how to deal with potential multiple defendants or claimants, since this will affect the format of the summons.

After this we will distinguish between the illiquid summons and the liquid summons and each one will be dealt with separately. In our opinion, the different summonses can be studied more meaningfully in this way. The principles of pleading and the rest of the litigation process will then be discussed since they apply to both types of summons proceedings to a greater or lesser extent.

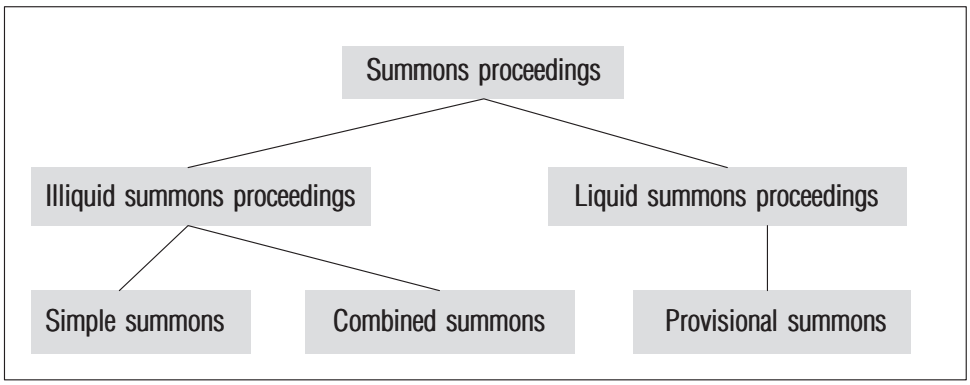
3.2 INTRODUCTION

By this stage you should have mastered one of the forms of litigation, namely application proceedings. The other form, namely summons proceedings, can thus now be studied.

The summons proceedings is divided into the illiquid summons proceedings and the liquid summons proceedings. The latter is instituted by way of the provisional sentence summons (study unit 7), whereas the former is instituted either by way of the combined summons or by way of the simple summons (study unit 6.2 and study unit 6.3 respectively). It can thus be stated that action proceedings (summons proceedings) are instituted by way of one of three types of summonses.

Although, as already stated, it is possible for a defendant to enter appearance in provisional sentence proceedings, and that a plea stage can be indicated (see study unit 8), this is exceptional. Consequently, in 3.3 hereunder the emphasis falls on illiquid summons proceedings and a synopsis is provided of the course of the summons proceedings.

The following is a schematic representation hereof:



3.3 A GENERAL EXPLANATION OF THE CONDUCT OF THE PROCEEDINGS

It is important that you understand this study unit well, so that you are able to view the conduct of the proceedings as an integrated whole. We suggest that you consult the schematic explanation at the end of this discussion while you are reading through this work. You should also refer back to it while you are studying the study units dealing with procedure.

When a summons is issued, a claim is actually being instituted. Therefore, the person instituting the claim is called the **plaintiff**. This claim is called a **claim in convention.** The person who is defending himself or herself against this claim is called the **defendant**. However, it is also possible for the defendant to have a claim against the plaintiff, in which case it is referred to as **counterclaim**. If the defendant institutes a counterclaim it is referred to thereafter as a **claim in reconvention.**

The plaintiff commences the claim in convention by means of either a **simple summons** or a **combined summons**. Because the simple summons is issued in respect of a liquidated claim, it is not accompanied by any other document setting out the details of the claim — the amount and nature of the claim are merely stated in the summons. On the other hand, because the combined summons is used in respect of an unliquidated claim, it is accompanied by a document known in this instance as the **particulars of claim**. The particulars of claim are attached to the summons; hence the term "combined summons". If, in the case of a simple summons, the defendant has formally indicated that he or she intends to defend the action, the plaintiff files his or her **declaration** (setting out the material details of the claim) only at this stage (see study unit 6.2). Before a plaintiff delivers a declaration, he or she will consider whether or not to apply for summary judgment (see study unit 12.4). Where such an application is unsuccessful, or where the application is abandoned, a declaration must also be delivered.

Once a summons has been served (see study unit 5), and, if the defendant wishes to defend the action, he or she must, within the time stipulated in the summons, deliver and file **a notice of intention to defend** (see study unit 9.2). (At this stage, if the plaintiff has filed a simple summons, he or she will now file his or her declaration.) Thereafter, the defendant must raise his or her defence by filing his or her **plea on the merits** (see study unit 9.3) to the plaintiff's declaration or particulars of claim, as the case may be. Alternatively, the defendant may raise a **special plea** (see study unit 10.6) to object to an issue not apparent *ex facie* the declaration or particulars of claim, as the case may be.

The defendant may, together with his or her pleadings, file a **counterclaim**. By means of the counterclaim, the claim in reconvention is introduced, and the pleadings in reconvention are usually filed simultaneously with the pleadings in convention which might follow. The plaintiff (now the defendant in reconvention) responds to the defendant's (now the plaintiff in reconvention) counterclaim by means of a **plea in reconvention**. The pleadings in reconvention which might now follow are the same as the pleadings in convention discussed below (see study unit 9.3 and 9.4).

To return to the pleadings in convention: usually, the pleadings close after the defendant's plea has been delivered and filed, but this need not necessarily be the case. The plaintiff could respond to the defendant's plea by means of a **replication** (see study unit 9.4), and, if issues are not joined hereby, the defendant may reply to the replication by means of a **rejoinder** (see study unit 9.4). At this stage, the **pleadings should close** (see study unit 9.4); the matter is then set down for trial and the pre-trial preparation stage commences. However, although this will not be

dealt with again in this study guide, it should, for the sake of completeness, be mentioned that, after rejoinder, the parties may exchange the following pleadings: a surrejoinder to the rejoinder; a rebutter to the surrejoinder; and a surrebutter in response to the rebutter.

In the normal course of pleadings, certain irregularities in the pleadings might need to be corrected, rectified or be objected to in this respect. Procedurally, this may be effected by means of the following processes or pleadings: **a notice of amendment** (see study unit 10.4), a **motion to strike out** (see study unit 10.3), or the raising of an **exception** (see study unit 10.5). These procedural remedies may be used in respect of any pleadings.

Prior to the trial stage, it is possible to obtain a judgment known as a **pre-trial judgment**. Should the defendant not timeously file a notice of intention to defend or a plea, as the case may be, the plaintiff may apply for **default judgment** to be granted against the defendant (see study unit 12.3). Likewise, if a defendant has in fact filed a notice of intention to defend but has no *bona fide* defence and has done so merely to delay proceedings, the plaintiff may apply for **summary judgment** (see study unit 12.4). So, too, when the plaintiff has **failed to deliver timeously his or her declaration** and has been barred from doing so, the defendant may have the matter set down for hearing; the court may grant absolution from the instance, or make any order it deems fit (see study unit 12.3). Lastly, the defendant may **consent to judgment**. The consent is furnished to the plaintiff, who applies to the Registrar to have it converted to a judgment by a judge in chambers (see study unit 12.2).

It is also possible to institute a claim by means of a third summons, the **provisional sentence summons.** This is an extraordinary procedure and is specifically designed to assist a creditor, armed with sufficient documentary proof (see 7.2.2.1), in recovering his or her money speedily without resorting to the illiquid summons proceedings. However, the judgment is provisional in the sense that a defendant may enter into the principal case within two months after provisional sentence has been granted (see 7.3). In such case, the summons is **deemed** to be a combined summons, and the usual litigation process (as described above) then follows.

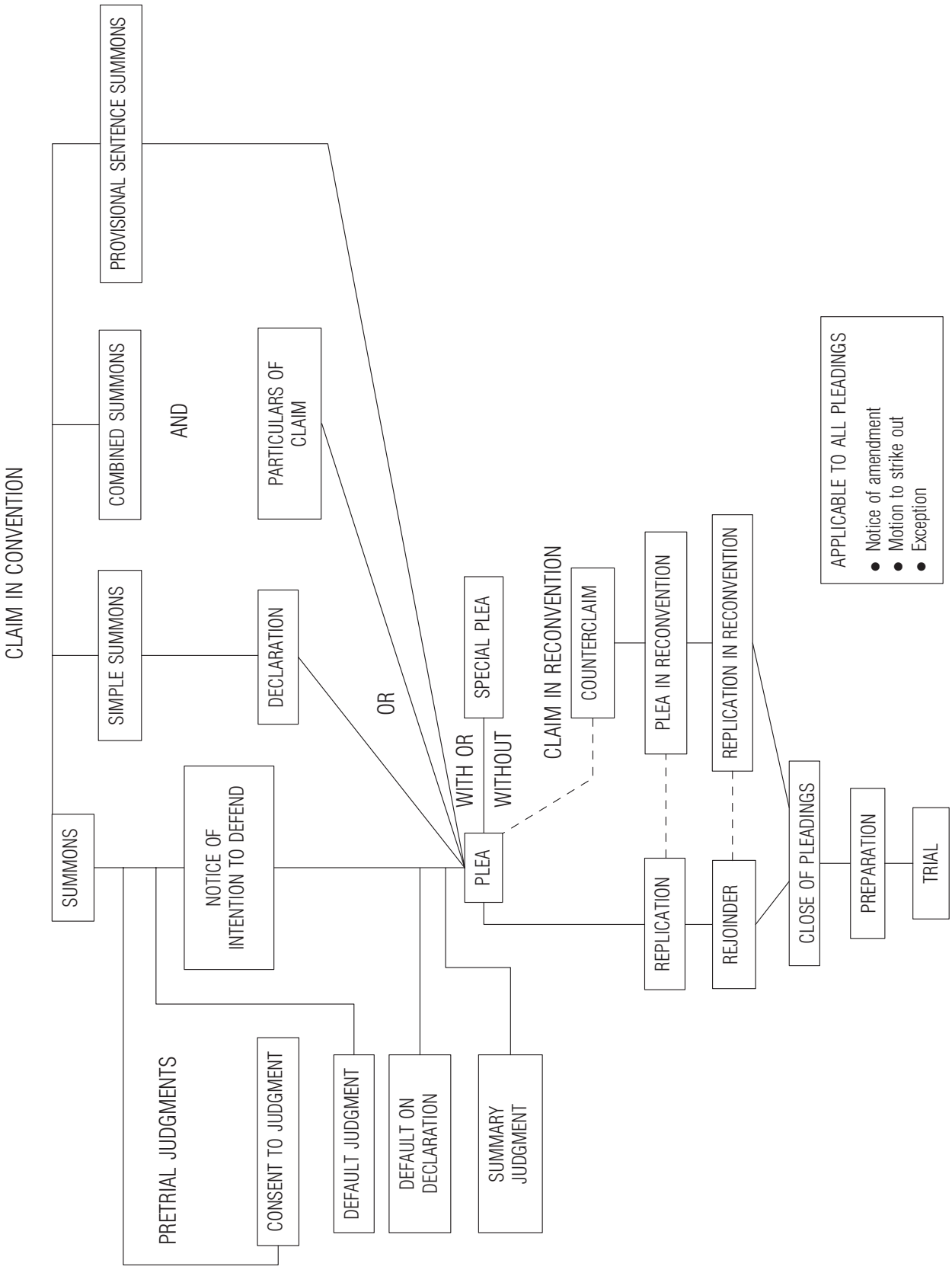
The schematic outline in 3.5 below provides a visual representation of this unit.

3.4 ADDITIONAL INFORMATION

You will notice that in this course we do not deal with letters of demand (as the precursors to the institution of legal actions). From your studies of substantive law you should by now be aware that the question of whether or not a letter of demand is essential for the completion of a cause of action can be answered only on the basis of the relevant principles of substantive law.

You should bear in mind that, in practice, several statutes provide that a letter of demand is a prerequisite for the institution of an action, and also lay down the period within which legal proceedings must be instituted. For a more detailed discussion hereof, consult Harms on *Civil procedure in the High Court* (1992, loose-leaf ed, 35*ff*).

3.5 SCHEMATIC OUTLINE



STUDY UNIT

4

THE PARTIES TO LITIGATION

A *Pegasus Airlines* plane takes off from Durban airport with 450 passengers on board. A hundred sea miles east of Durban, the plane crashes into the Indian Ocean. After analysing the flight recorder, it is clear that the cause of the accident was due to *Pegasus's* failure to maintain the plane adequately. Approximately 200 of the deceased have dependants who are now in financial difficulty. These dependants hold *Pegasus* liable for their situation. *Pegasus* faces the possibility of receiving hundreds of individual claims, and each of these hundreds of potential plaintiffs will have to prove basically the same claim. What practical solution is there to save costs and time?

Overview

Learning outcomes

Once you have finished studying this study unit, you should be able to determine

- who the parties to the litigation are and how they are cited
- how someone can act on their behalf
- what is done when there are several people who can act as parties

Compulsory reading material

Section 4.1: Rule 17(3) and 17(4); Rule 5(1), Rules of the Supreme Court of Appeal
Section 4.2: Rule 7, read together with Rule 16
Section 4.3: Rule 10; Rule 12
Section 4.4: Rule 13; Form 7, First Schedule
Section 4.5: Rule 40

4.1 A DESCRIPTION OF THE PARTIES

Read Section 1 of the Supreme Court Act 59 of 1959

In the case of any action with is instituted by means of summons proceedings, there is a plaintiff and a defendant. The plaintiff is the person who institutes the action to enforce his or her alleged rights, and the defendant is the person against whom the plaintiff's claim is enforced. See, in this regard, the definition clause in section 1 of the Supreme Court Act 59 of 1959.

In order to institute an action, the plaintiff must have a vested interest in the subject-matter of the action and must also have *locus standi in iudicio* (in other words, he or she must have full legal capacity to litigate without assistance).

Persons without the legal capacity to act as litigants, can indeed act as litigants with the necessary support. Typically, those who do not have *locus standi* are minors, insolvents and those who are under curatorships (ie majors who are incapable of managing their own affairs). The legal capacity of these people is augmented by the necessary support of a parent and natural guardian or a curator (curator *bonis* or curator *ad litem*, depending on the circumstances) respectively.

Read Rule 17(4)

Read Rule 17(4) and note that the parties must be very well defined in the summons.

4.2 REPRESENTATION BY POWER OF ATTORNEY

In principle, every natural person who is a party to civil proceedings is entitled to represent himself or herself personally. For practical purposes, however, such a person would usually instruct an attorney to act on his or her behalf. These instructions are confirmed and specified in a document known as a power of attorney.

Herbstein & Van Winsen The civil practice of the Supreme Court of South Africa 210 describes a power of attorney as a written document in which an agent is given the authority to act on behalf of his or her principal either in a specific situation or to act on behalf of such principal in respect of all actions which the principal could perform himself or herself.

Although a client may terminate his or her mandate to an attorney at any time, an attorney may, after accepting a client's brief, withdraw only with sound reasons. It is also important to note that a practitioner is duty-bound to adhere to the specific instructions of a client, provided that the instructions are not improper.

4.2.1 When is a power of attorney required in litigation?

Read Rule 7(1)–(3); Rule 5(1), Rules of the Supreme Court of Appeal

In terms of Rule 7(1), the filing of a power of attorney is not required for the issuing of a summons or the entering of an appearance. However, it is required for the conduct or defence of a civil appeal (see Rule 7(2) and 7(3)) in the High Court. However, this position differs from that in the Supreme Court of Appeal. Rule 5(1) of the Rules of the Supreme Court of Appeal provides that a power of attorney need not be filed with the registrar unless the authority of a legal practitioner to act on behalf of a party is disputed. In such an event a power of attorney has to be filed within a stipulated period.

4.2.2 Why is a power of attorney then drawn up?

A carefully drawn up power of attorney is essential for the protection of both the attorney and the client, and to determine the extent of the attorney's brief. Therefore, there should always be a power of attorney kept on the client's file.

The power of attorney generally contains details of the action to be instituted and of the relief to be claimed. A client does not wish to be involved, unknowingly or unwillingly, in expensive or protracted litigation, or in an appeal which he or she never contemplated. The attorney, on the other hand, is entitled to protection as far as his or her own costs are concerned. Should an attorney conduct litigation without the authority of the client, he or she will not be entitled to recover the costs incurred from his or her client, since no contractual relationship will exist.

Study Rule 7(1)

Should an attorney's power to act be disputed, proof of his mandate must be given. **Study** Rule 7(1) in this regard and familiarise yourself with the procedure which must be followed in instances where a mandate is disputed.

4.3 JOINDER

4.3.1 Introduction

Under common law, it was generally not possible for different plaintiffs with different causes of action to join in the same action against the same defendant. It was also impossible to sue two different defendants, liable on different causes of action, in one summons.

The Uniform Rules of Court have, however, amended the common-law position, with the result that joinder is in fact possible, **provided** that the provisions of Rule 19(1) and Rule 10(3) are complied with.

The common-law provisions in respect of the **compulsory** joinder of parties have not been altered by the Uniform Rules of Court, and such provisions thus still apply.

4.3.2 Voluntary joinder

4.3.2.1 Plaintiffs

Read Rule 10(1)

Read Rule 10(1). Note that a number of requirements are laid down for a proper joinder, and that there are two circumstances in which joinder may take place. To assist you to understand the Rule, we provide you with the following analysis:

- *Requirements*

Each person (plaintiff) must have a claim + must act against the same defendant(s) + one or more of the plaintiffs must be entitled to act against the defendant(s) in a separate action.

- *Circumstances*

The legal claim **must** depend on **substantially the same question of law or fact**. This question of law or fact must be one which would have originated in each individual action which could have been instituted (and which is now not being instituted on account of the intended joinder).

A further circumstance is that where joinder occurs **conditionally**, that is, where joinder occurs only if the claim of any other plaintiff fails.

The essence of joinder of plaintiffs lies in the expression, "substantially the same question of law or fact".

4.3.2.2 Defendants

Read Rule 10(3)

Read Rule 10(3). Again, the essence of joinder in this instance lies in the expression, "substantially the same question of law or fact". Note, however, how this Rule differs from Rule 10(1) as regards the requirements which are laid down.

Joinder of defendants will, for example, arise in the following case:

Suppose that a pedestrian has been injured as a result of a collision between two cars, but does not know which driver was negligent. He or she may sue them jointly, and also alternatively, and is not expected to take the risk of first proceeding against the one, and then against the other.

4.3.3 Compulsory joinder

In contrast to the abovementioned position where the party to the proceedings has the option of joinder, there is another situation where the court, irrespective of the wishes of the parties, will not hand down a judgment nor make an order unless another (third) party is joined in the action.

The court will determine that joinder of a third party as a party to the proceedings is necessary if such a party has, or may have, a direct and real interest in any order which the court may make, or if such order will prejudice that party, unless the court is satisfied that the party has distanced himself or herself from his or her right to be joined in the proceedings.

Example

Example:

> A sells a farm to B, and informs B at the time of the sale that he has verbally granted a servitude to C over the farm. If B wishes to sue A for transfer of the farm free of the servitude, he must join C in the action.

4.3.4 Joining of persons as plaintiffs or defendants

Rule 12 provides that any person who is entitled to join as a plaintiff or who is exposed to joinder as a defendant in an action, may, after notice to all parties at any stage of the action, apply for leave to join as a plaintiff or defendant. The court may in its discretion make an order upon such a request (also as regards costs) and may lay down the further procedure in the

action. However, before leave to intervene is granted, the applicant must show that he or she has a *prima facie* case and that his or her application is made seriously and not frivolously.

4.4 THIRD-PARTY PROCEDURES

Read Rule 13

Read through Rule 13 carefully — although you are not required to have an in-depth knowledge of this procedure for examination purposes, for the sake of completeness you should have a broad knowledge of the procedure and the circumstances in which it is used, since you may occasionally be required to utilise it in practice. Therefore, you should have a broad knowledge of the content of the following discussion for puposes of this module.

The purpose of third-party procedures is twofold. First, it enables a litigant to avoid instituting multiple actions in respect of the same matter. (The term "third party" refers to a person who is not initially a party to a suit, but who is later involved in such suit in terms of Rule 13.) Secondly, it enables a third party's liability (if any) to be determined by a court at the same time that the liability of the other party is determined.

Any party (ie a plaintiff or a defendant) to an action may employ this procedure. However, such procedure may be resorted to only in the following circumstances, namely where a party claims that

- he or she is entitled to a contribution or indemnity from the third party in respect of any payment which he or she may be ordered to make

  or

- a question or matter in dispute in the action is substantially the same as that which arose, or will arise, between him or her and the third party, and should be decided not only between the parties to the action (ie the plaintiff and the defendant), but also between one or more of them and the third party.

The **effect** of the third-party notice is that, after service on the third party, such party becomes a party to the action (see Rule 13(5)). "Joinder" therefore occurs irrespective of the wishes of the third party, and no provision is made in the Rule for such joinder to be opposed. The third party may, in terms of Rule 13(9), merely request that the case be tried separately, and may except to the notice and plead thereto.

The following is a typical situation in which the third-party procedure is employed:

Example

Two motorboats steered by A and C respectively are involved in a collision. A passenger (B) in A's motorboat issues summons against C for damages as a result of injuries sustained by him (the passenger) in the collision. C denies that the collision was caused solely by his negligence, and alleges that A is equally liable and that, as regards B's claim against him, he (C) is entitled to a 50 per cent contribution from A. C issues a third-party notice against A, with the result that A is now in the position of a defendant *vis-à-vis* (see Rule 13(7)(a)).
At the trial there will thus be two matters before the court, namely

B:C (action for damages), and
C:A (claim for a contribution)
The court hears both matters jointly and gives judgment in both.

For **practical** purposes, the third-party notice may also be viewed as a summons (Rule 13(a)), the third party is, after service, a party to the action (Rule 13(5)), and the pleadings which are exchanged are those which are exchanged in the course of the normal litigation process. A lacuna in the Rule is that no *dies induciae* is laid down for appearance (see Rule 13(4)).

4.5 IN *FORMA PAUPERIS* PROCEEDINGS

Rule 40 lays down a procedure in terms of which indigent persons may obtain free legal aid by approaching the Registrar, after which legal representatives are appointed.

Study Rule 40

Briefly study the procedure laid down in Rule 40. You are at least expected to know

- who qualifies for this form of legal aid (Rule 40(2)(a))
- what documentation must be submitted to the Registrar when instituting an action in terms of this Rule (Rule 40(2))
- what steps may be taken against a litigant *in forma pauperis* (Rule 40(6))
- the position with regard to costs (Rule 40(7))

ACTIVITY

Read through the set of facts at the beginning of this study unit carefully and answer the following questions:

(1) Imagine that 234 plaintiffs, each of whom has a legally valid claim, get together because they do not want to institute individual claims against *Pegasus* for financial reasons. They seek a solution for their dilemma. Advise these potential plaintiffs on possible actions which save time and money.

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(2) Would other plaintiffs who are not part of this group of 243 people, be able to join in the action which has already been instituted? Explain.

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(3) You are the attorney for the plaintiffs mentioned in (2) above. During the court proceedings, the attorney for *Pegasus* argues that you do not have a mandate to act for the plaintiffs. What should you do now?

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FEEDBACK

(1) In terms of Rule 10, the 243 plaintiffs may voluntarily join as plaintiffs, since each of them has a claim against *Pegasus* (the same defendant) and each of them (ie one or more) would be entitled to institute a separate action against *Pegasus*. In addition, the action would depend on the same legal or factual question (each person is a dependant of one of the deceased and each one's damage is the result of negligence on the part of *Pegasus*.)

(2) Yes: Rule 12 provides that a person may join as plaintiff to an action. Where, in terms of Rule 12, a person is entitled to joinder, he or she may apply for leave to join as plaintiff. However, such an applicant will have to show the court that he or she has a *bona fide* case and that his or her application is made seriously.

(3) Answer the question yourself with the help of Rule 7(1).

STUDY UNIT

5

SERVICE OF SUMMONS

D is about to serve a summons on E. A tracing agent has established E's address. Since E merely has short-term lease on the property, he does not have a telephone. However, D has been lucky enough to come across E's cell phone number. She phones the number and introduces herself as an agent for the cell phone network provider. In this way she discovers that E does not live at his given address and that he intends moving to the Free State where he plans to drive from flea market to flea market, doing business in this way. He has no idea where he will be taking up residence. D's claim is in danger of becoming prescribed and hence the summons must be served as soon as possible. The question is: in what way should D go about serving the summons?

Overview

Learning outcomes

Once you have finished studying this study unit, you should

- understand the practical application of the maxim *audi alteram partem*
- be able to identify the appropriate method of service in the case of a particular set of facts
- be able to give a practical illustration of the application of section 26(1) of the Supreme Court Act of 1959

Compulsory reading material

Rule 4(1)(a), 4(2), 4(3); Rule 5; Form 1, First Schedule

5.1 INTRODUCTION

Now that you have the background to litigation by way of the summons procedure, and you are familiar with the *audi alteram partem* maxim, it makes sense to look at the way in which litigation is set into motion. Before we look at the drawing up of a summons, we shall first discuss service, since the method of service depends on where the defendant is. The answer to this, in turn, determines the form of summons.

5.2 FUNCTION AND METHOD OF SERVICE

One of the fundamental principles of civil procedural law is that the process and documents arising out of any proceedings must be brought to the attention of the opposite party. This requirement may be said to be derived from the *audi alteram partem* rule (see study unit 1.2).

This means that, after issue thereof, a summons must be served on the opposite party. It is by means of service that proceedings are therefore brought to the attention of such party.

It is appropriate to explain briefly what is meant by the term "issue". Once a summons has been drawn up and is ready to be served, it must first be taken to the office of the Registrar of the relevant provincial or local division. Here it is signed by the Registrar or Assistant Registrar, a case number is assigned to it, a court file is opened and the revenue stamps are cancelled on the original summons. The office of the Registrar also officially stamps the original summons and copies thereof.

Once a summons has been issued, it cannot be altered without the consent of the person issuing it, or without leave of the court.

The summons must be served by the Sheriff, or an officer in the employ of the Sheriff. After service has been effected, the official concerned must draw up a document under his or her signature, known as a "return of service", in which he or she records the manner in which service of the summons was effected, and any other relevant details.

The return of service serves as proof or service, and the original return or service must be filed in the court file.

5.3 MANNER OF SERVICE

There are different ways in which a summons may be served, that is by

- normal service
- substituted service
- edictal citation

5.3.1 Normal service

Normal or ordinary service refers to the service of summons effected in accordance with the Uniform Rules of Court. This is the usual manner of service, and may be effected in the following ways:

- Service must, if possible, be personal (see Rule 4(1)(a)(i)).
- If personal service cannot be effected, the summons may be served at the defendant's place of residence or business by leaving a copy thereof with the person apparently in charge of the premises. The latter must be a person apparently not less than 16 years of age (see Rule 4(1)(a)(ii)).
- Service may be effected at the defendant's place of employment (see Rule 4(1)(a)(iii)).
- Service on a company may be effected by service on a responsible employee at the company's registered office or at its principal place of business within the court's jurisdiction, or, if the foregoing is not possible, by affixing a copy to the main door of such office or place of business (see Rule 4(1)(a)(v)).
- Service on a partnership, firm or voluntary association is effected in terms of Rule 4(1)(a)(vii) — merely **read** this rule for information purposes.
- As regards matrimonial actions, the Rules make no specific mention of service in such actions. It was the invariable practice in the Transvaal (and in other provinces as well) to insist on personal service in such matters, and it is a practice which will, no doubt, continue.

5.3.2 Substituted service

Rule 4(2) makes provision for substituted service and must be read together with Rule 5(2) for an exposition of the procedural requirements which must be complied with by a person wishing to make use of this means of service.

Where a person is believed to be within the Republic, but service cannot be effected on him or her in terms of the Rules of Court because it is not known precisely where such person is to be found, an application may be made to the High Court for leave to sue by substituted service, and the court will then give directions as to how such service is to be effected.

It is important to bear in mind that substituted service is an extraordinary method of service, since it deviates from the normal method of service provided for in the Rules. Consequently, an application to court must be made on notice of motion seeking the court's permission to serve the summons by means of substituted service, and requesting the court to give directions as to how the summons must be served. An abbreviated summons must accompany the application for consideration thereof by the court. On hearing the application, and on being satisfied that it is a proper case for substituted service, the court will give directions as to how service is to be effected, for example by registered post, by service on a relative, by publication in the *Government Gazette*, or by any combination of these methods.

5.3.3 Edictal citation

Rule 5 prescribes how service must be effected on a defendant who is, or is believed to be, outside the Republic. This is so even when his or her exact whereabouts are known and even when personal service is possible. Such a person cannot be summonsed before our courts in any manner other than by means of edictal citation.

The consent of the court must be obtained to serve

(1) any process or document which initiates proceedings, or
(2) any process or document which does not initiate proceedings

Study Rule 5(2)

In the case of (1), Rule 5(2) provides that the leave of the court must be obtained in respect of an application by way of notice of motion. **Acquaint yourself** with the contents of such application as set out in this Rule.

In the case of (2), Rule 5(3) provides for an alternative, informal procedure for obtaining the court's consent — **acquaint yourself** with this procedure. This rule refers to "information from the bar", which merely means information from the advocate who is appearing for the applicant during the court proceedings.

5.4 SERVICE WITHIN THE REPUBLIC, OUTSIDE THE COURT'S JURISDICTION

In terms of section 26(1) of the Supreme Court Act, 1959, the civil process of a provincial or local division is valid throughout the Republic and may be served or executed within the area of jurisdiction of any division. Thus, summons may be served in any division of the High Court. (Refer to Module 1: "Jurisdiction" which deals with section 26(1).)

ACTIVITY

Go back and read through set of facts at the beginning of this study unit, and then answer the following questions:

(1) Simply identify the appropriate form of service.

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(2) Give reasons for your answer in (1) above.

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(3) What is the essential difference between substituted service and edictal citation?

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(4) In what way does service ensure that the *audi alteram partem* maxim is acknowledged?

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FEEDBACK

(1) Substituted service.

(2) E is within the Republic, but personal service will not succeed since his exact whereabouts are uncertain.

(3) In the case of substituted service, the defendant is **within** the borders of the Republic, but his or her exact whereabouts are unknown. In contrast to this, the edictal citation is used where the defendant is **outside** the borders of the Republic, even if his or her whereabouts overseas are known.

(4) The maxim means that the other party to the litigation must be heard before an order can be granted against such person. The purpose of service is that this party is given notice that an action is being instituted against him or her. In this way, he or she will be able to defend himself or herself against the action (ie he or she will be heard).

STUDY UNIT

6

THE ILLIQUID SUMMONS

X and Z take early retirement and decide to build a smaller house. Z, however, still appears regularly in advertising slots on television and at the cinema, to supplement his pension. Z concludes a contract with Y, in terms of which Y agrees to build a house for R3 000 per square metre. According to the architect's plan which is in an annexure to the contract and which was initialed by both parties, the total surface of the planned house is 280 square metres. Unfortunately, the building does not go well and there is a dispute over the contract price which must be paid. Z alleges that Y delivered poor workmanship and that he is entitled to far less money than was agreed to in the contract. While Z and his attorney are inspecting the site, Z falls down a shaft which Y's workers have negligently failed to secure. Z lands up in hospital. Apart from suffering expensive hospital costs, he will no longer be able to appear in advertising slots because of the injuries to his face. Now Z and Y plan to sue each other. The question is: what kind of a summons will each have to issue?

Overview

Learning outcomes

Once you have finished studying this study unit, you should

- be able to draw a theoretical distinction between the two types of illiquid summonses
- be able to apply the theoretical distinction to a given set of facts

Compulsory reading material

Rules 17, 18 and 20; Form 9 and 10, First Schedule

6.1 INTRODUCTION

In study unit 3 you came across the expressions "illiquid summons", "simple summons" and "combined summons". We shall now discuss the lastmentioned two types of summonses in detail.

If you refer to Forms 9 and 10 of the First Schedule, you will note that a summons may be defined as a written instruction to the Sheriff to notify a person (normally termed the defendant) against whom the plaintiff wishes to obtain relief (in the form of an order), to give notice within a specified time (the *dies induciae*) of his or her intention to defend the action if the claim is disputed. (There are naturally differences between the external appearance of the two forms. Examine these yourself. The reason for the differences will become apparent after studying this chapter, and are associated with the nature and purpose of each type of summons.)

Note that, although Rule 17(1) refers to "a summons or a combined summons", in this study guide we shall refer to the two types as the **simple** summons and the combined summons respectively. Elsewhere you may find that the simple summons is referred to as the "ordinary summons" or the "summons for a debt or liquidated demand".

The simple summons and the combined summons may be distinguished from each other on the basis of the nature of the claim in respect of which each is applied, as well as on procedural grounds.

6.2 THE SIMPLE SUMMONS AND DECLARATION

In the aforegoing introduction we showed you that (and you should have noted this when going through Forms 9 and 10 of the First Schedule) that the simple summons and the combined summons differ from each other as regards form. This difference in form explains the different names given to the two types of summonses. Since using the wrong type of summons can give rise to certain penalties against a practitioner, you must have a thorough knowledge of the circumstances in which each type of summons is the correct or most appropriate one. To help you with this, the answers to the following two questions are important.

6.2.1 When is the simple summons employed?

When

The simple summons is employed, and may only be employed, where the plaintiff's claim is for a **debt or liquidated demand**.

6.2.2 What is meant by the expression "a debt or liquidated claim?"

Meaning

Unlike the previous Transvaal, Natal and Orange Free State Rules of Court, the Rules contain no

definition of what "a debt or liquidated demand" is. As a result, the meaning to be attached to the expression was left to judicial interpretation. In the course of time, the courts assigned reasonably clear interpretations to the expression in various judgments. Some of these interpretations will be indicated below. Naturally, the interpretations are not comprehensive, but they do nevertheless provide clear guidelines.

- In the case of the old Transvaal Rule 42, the expression was interpreted 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".
- The courts have also indicated that the debt is liquidated where it is admitted, or where the monetary value is capable of being ascertained speedily. Examples in this regard are the current market price of a particular article which is sold, or the reasonable, accepted remuneration for the rendering of specific services.
- In order to be a "liquidated demand", the demand must be described in such a way that the amount thereof may be determined merely by mathematical calculation.
- What "ascertained speedily" embraces is a question of fact, and the courts will thus exercise their discretion in deciding whether or not a particular claim is capable of being ascertained speedily.

Students must note, in particular, that neither an action for divorce nor an action for damages constitute a claim for a debt or a liquidated demand.

From the above questions it is therfore clear that the **nature of the claim** (ie whether we are dealing with a debt or a liquidated claim) determines whether a simple summons must be employed.

As regards the **form** of the summons, such summons must be drawn up so as to correspond as closely as possible to Form 9 of the First Schedule of the Rules. From an examination of Form 9 it clearly appears that only the cause of action need be set out concisely. In practice, this means that the nature of the relief requested must be set out.

6.2.3 The procedural events which give rise to the use of a declaration

After service of the simple summons, the **defendant** has two choices:

(1) He or she may fail to react to the summons within the stipulated period indicated therein (the *dies induciae*). In such a case, the plaintiff **may** make application for judgment by default (see study unit 12.3).

or

(2) He or she may, within the *dies induciae*, react by serving a notice of intention to defend on the plaintiff and by filing it with the court. In this case, the plaintiff must, within a prescribed period, react by serving and filing a declaration (provided that the plaintiff does not apply for summary judgment — see study unit 12.4).

A plaintiff who wishes to proceed with a particular action is only obliged to serve a declaration on the defendant, and to file such declaration, if the defendant has delivered a notice of intention to defend.

To sum up, it may be said that the **application** of the declaration is restricted to, and is compulsory in, those instances where

(1) the plaintiff's claim is for a debt or liquidated demand

AND

(2) the defendant has delivered a notice of intention to defend

The declaration must be delivered by the plaintiff within 15 days of receipt of the notice of intention to defend (see Rule 20(1)).

The declaration is a document containing a concise statement of the facts on which plaintiff's claim is based. Rule 20(2) provides that the declaration must contain the following:

(1) the nature of the claim
(2) the legal conclusion which the plaintiff will be entitled to deduce from the facts indicated therein
(3) a prayer for the desired relief

Read **Rule 18(4)**

This Rule must, however, be read together with Rule 18(4) — acquaint yourself with the contents thereof.

In **substance**, the declaration is identical to the particulars of the plaintiff's claim contained in the annexure to the combined summons, and the factual allegations forming the substance of the action are dealt with and are presented in an identical manner.

In **form**, the declaration differs only in a few respects from the particulars of the plaintiff's claim annexed to the combined summons. The declaration must be headed by the name of the particular provincial or local division of the Supreme Court, followed by the names of the parties. Below this, the name of the pleading, "PLAINTIFF'S DECLARATION", is set out as a heading. The first paragraphs of the declaration must contain a full and proper citation of the parties. After the first paragraphs, in which the parties are cited and described, the declaration is identical in form to the annexure of the combined summons'.

Both the declaration and the annexure to the combined summons are, of course, subject to the general rules governing pleadings — see Rule 18.

Provided that the formal requirements set out above are complied with, a declaration is drawn up in a form similar to that of the "particulars of claim" set out in study unit 6.2.

6.3 THE COMBINED SUMMONS AND PARTICULARS OF CLAIM

As in the case of the simple summons, the **nature of the claim** determines whether the combined summons should be used. Consequently, we ask the same two questions as posed in study unit 6.1 above.

6.3.1 When is the combined summons employed?

When

The combined summons is used where the plaintiff's claim is **unliquidated**, that is, where it is not a claim for a debt or liquidated demand as defined in study unit 6.1 above.

6.3.2 What does the expression "unliquidated claim" mean?

Meaning

An unliquidated claim would therefore refer to any claim in respect of which the *quantum* thereof must be determined (eg a claim for damages), or where the status of the parties is affected (eg an action for divorce).

6.3.3 The combined summons and particulars of claim

In every case where the claim is not for a debt or liquidated demand, the plaintiff must annex to his or her summons particulars of the material facts relied upon by him or her in support of the claim (Rule 17(2)). This rule also requires that the particulars of claim must comply with the provisions of Rules 18 and 20.

Study **Rule 18(4); Rule 20(2)**

In this regard, **study** Rule 18(4) and Rule 20(2), and ensure that you are acquainted with the contents thereof.

This summons, together with the particulars of claim, is known as a "combined summons", since it combines in one document a summons and a declaration.

The big difference, however, is that the particulars of claim, unlike the declaration, do not constitute a separate pleading and are inseparably linked to the summons; hence the designation "combined summons". The summons and the particulars of claim thus form a unit. A declaration may thus never be used in the case of a combined summons.

As regards the **form** of the summons, it must be drawn up so as to correspond as closely as possible to Form 10 of the First Schedule of the Rules. An examination of this Form clearly reveals that the combined summons is a unit.

ACTIVITY

Go back and read through the set of facts at the beginning of the study unit and then answer the following questions:

(1) What single factor will determine which summons Y and Z will issue respectively?

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(2) Y sues Z for the payment of the contract price. What type of summons should Y use? Give reasons for your answer.

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(3) Z sues Y for damages which he sustained during his fall. What type of summons should Z use? Give reasons for your answer.

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(4) In which one of the abovementioned actions will the need for a declaration arise and in which circumstances?

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FEEDBACK

(1) The nature of the claim (ie the type of claim).

(2) The simple summons because the nature of the claim is a "debt" or it is "liquidated". The reason for this is that the contract price (ie the monetary value of the claim) can be established by means of an ordinary mathematical calculation. (Remember, the surface of the house was given and the building cost was calculated at a specific amount per square metre. In addition, the parties agreed to this.)

(3) The combined summons because the nature of the claim is unliquidated. The reason for this is that damages are determined by the court only after hearing evidence — therefore it can never be liquidated (unless the parties themselves come to an agreement on the *quantum*/ monetary value of the claim).

(4) When a simple summons has been issued **and a notice of intention to defend has been filed by the defendent** the plaintiff's next step is to repond with a declaration.

STUDY UNIT

7

THE LIQUID SUMMONS (PROVISIONAL SENTENCE SUMMONS)

SS Security Services CC offers a private security service in Scareville. Those who want to make use of SS's services, must pay a fixed sum to SS monthly. Although some of SS's clients pay this monthly sum per debit order, others choose to pay it by cheque. Many of the cheques from the lastmentioned clients are received from the bank, marked "Refer to drawer/insufficient funds". These defaulters have a negative effect on SS's cash flow and SS wants to sue them for the arrears. Obviously, SS wants to get payment as quickly as possible.

Peter and Sandra get divorced. In terms of the deed of settlement, Peter has to pay R250 000 in cash to Sandra, and agrees to do this out of the proceeds of the sale of their beach house in Hermanus. However, Sandra insists that Peter signs an acknowledgement of debt for this sum. Peter accepts that he is obliged to pay this sum and does so. Interest on this amount is also set out in the acknowledgement of debt. Peter fails to pay the principal debt. Sandra needs this money to buy herself a place to stay. Naturally, she would like to receive payment as soon as possible.

Overview

Learning outcomes

Once you have finished studying this study unit, you should

- be familiar with the nature, purpose and operation of the provisional sentence summons

- be able to distinguish, on theoretical grounds, between this type of summons and the illiquid summons in respect of their fields of application and procedural grounds
- be able to apply the theoretical distinction if you are confronted with a given set of facts

Compulsory reading material

Rule 8; Form 3, First Schedule

7.1 INTRODUCTION

Provisional sentence is an extraordinary and summary procedure. The exceptional nature of the procedure lies therein that the case can be decided **before trial**, and that the court is concerned only with *prima facie* proof. Judgment is given on the assumption that the documents submitted are genuine and valid.

A basic aspect of provisional sentence is that it is fundamentally an executory procedure. It accelerates the procedure for granting judgment — although such judgment is provisional — and entitles a successful plaintiff to execute the judgment immediately, subject to giving the defendant the necessary security *de restituendo*.

The essence of the procedure is that it provides a creditor who has sufficient documentary proof (ie a liquid document) with a remedy for recovering his or her money without it being necessary to resort to the more cumbersome, more expensive and frequently protracted illiquid summons proceedings.

In Roman-Dutch law such procedure was termed *namptissement*. Although, in the past, criticism was levelled at the provisional sentence procedure, it should be pointed out that this procedure fulfils a useful role in commerce and contributes to the fact that the payment of an amount owing to the creditor is not delayed by the mere wilful action of the debtor. Moreover, the defendant is not unprotected — payment of the judgment amount occurs only against provision of security *de restituendo* by the plaintiff. In addition, the defendant may also enter into the principal action (in specific circumstances).

7.2 THE PROVISIONAL SENTENCE SUMMONS

This is the third type of summons with which an action can be instituted in the High Court. It can be used only if the cause of action is based on a liquid document. The defendant presents his or her defence by way of affidavit to which the plaintiff may reply, also by way of affidavit. Provisional sentence may then follow, and after that the defendant may enter the principal case. The principal case follows the course of any other litigation process in the summons procedure.

The form this type of summons takes and the requirements for its use differ from those of the illiquid summons. We shall now look at this matter.

7.2.1 The form of the provisional sentence summons

Familiarise yourself with the form of the summons by referring to Form 3 of the First Schedule. Note the way in which the instruction to the sheriff differs from that contained in Forms 9 and 10, with which you are already acquainted. As a result of this instruction, the ensuing conduct of the defendant (see eg Rules 8(1) and 8(5)) is only natural, as you saw when studying the ordinary and combined summons. **Read** Rule 8 attentively and **study** Rule 8(1) and 8(3) to 8(7) so that you are able to summarise these subrules in **broad outline** for the purposes of a possible discussion of the procedural characteristics of this procedure.

Read Rule 8
Study Rule 8(1); Rule 8(3)–(7)

7.2.2 The requirements for the use of the summons

As in the case of the illiquid summons, the **nature of the claim** determines whether a provisional sentence summons ought to be used. Once again, the questions posed in respect of the two types of illiquid summons, are applicable. Hence, we ask when should a provisional sentence summons be used and what is the meaning of a particular technical concept which is used in this connection.

When

If a plaintiff is armed with adequate documentary evidence (ie a liquid document), he or she can make use of this type of summons. Owing to the fact that provisional summons is actually an enforcement procedure, the court will allow a provisional summons only if

(1) the plaintiff's claim is based on a liquid document,

and

(2) the defendant is not able to provide such counter-proof as to satisfy the court that the probabilities of success in the principal action will probably not be in the plaintiff's favour

These two requirements will now be dealt with separately.

7.2.2.1 A liquid document

Definition

A liquid document may be defined as a document in which the debtor acknowledges, by means of his or her signature (or that of a duly authorised representative), his or her liability for the payment of a certain and ascertainable amount of money, or is legally deemed to have acknowledged such liability without the signature concerned having in reality being appended thereto (*Herbstein & Van Winsen The Civil Practice of the Supreme Court of South Africa*).

The following points in the above definition merit mention:

(1) The document must attest to a **monetary debt**. An obligation to do something other than the payment of a sum of money (eg to perform a specific act) constitutes an unliquidated claim.

(2) The amount of the debt must be certain and ascertainable. Obviously, this amount must be clearly apparent from the document itself. An undertaking in a deed of sale to pay "agent's commission according to the prevailing scale" does not comply with this requirement, for extrinsic evidence must be led in order to determine the amount.

(3) To constitute a liquid document, the indebtedness must appear unconditionally and clearly *ex facie* the document. If evidence is necessary to establish the indebtedness, the document cannot be regarded as a liquid document; in other words, the document must contain an unconditional acknowledgment of debt.

That the indebtedness must appear *ex facie* the document means, moreover, that the identity of the parties must be apparent from the document.

(4) Where the **payment** — in contradistinction to the **indebtedness** — in terms of the document is made to depend on the happening of some simple event, the liquidity of the document is not destroyed thereby. In this case, extrinsic evidence concerning the occurrence of the simple event may be placed before the court if such event is disputed. If it is not disputed, it is proved merely by alleging in the summons that the simple event occurred. An example of a simple condition is the provision that payment of a certain amount will be made only after receipt of a notice by the debtor. If the debtor does not deny that the notice was received by him or her, a mere averment that such a notice has been properly forwarded to the debtor will be sufficient.

What will constitute such a **simple** condition on which liability depends, will be determined by the facts of each case.

(5) Probably the most common examples of liquid documents are negotiable instruments (bills of exchange, cheques and promissory notes). Another example is an acknowledgment of debt.

7.2.2.2 Probability of success and onus of proof

From an analysis of the judgments of the courts in respect of these matters, the position may be summarised as follows:

The question of the onus of proof is relevant in two situations, namely as regards

(1) the onus in the provisional sentence case itself,

and

(2) the onus in the principal action

a In the provisional sentence case itself

The **plaintiff** needs to prove nothing initially. He or she merely avers in the summons that he or she is the holder of a liquid document, and the document is handed in. The plaintiff may then ask for judgment. Earlier (see "BACKGROUND"), it was pointed out that judgment is given on the assumption that the documents submitted are authentic and valid. One may therefore state that a presumption of law exists regarding liability.

If the defendant attacks the liquidity of the document by disputing his or her signature, **or** if a condition appears *ex facie* the document which must be fulfilled before payment can take place, and such fulfilment is disputed, the plaintiff must prove that the defendant signed the document, or must prove that the condition has been fulfilled. The reason for this is that, on the one hand, proof of signature is linked to the assumption of the authenticity of the document submitted, and, on the other, that fulfilment of the condition is still part of the plaintiff's case which is brought before the court.

The **defendant** bears the onus of showing that the probabilities of success in the principal case lie in his or her favour. Even where the defendant raises a defence which is unconnected with the liquid document (eg the defendant acknowledges that the signature is his or hers, but denies liability on the grounds of other facts), the onus on the defendant remains the same.

REMEMBER: The whole purpose of provisional sentence is to benefit a plaintiff (in contrast to the debtor) who is in possession of a liquid document. If the rule had been that the plaintiff in

provisional sentence proceedings must show that the balance of probabilities lay in his or her favour, the procedure would have been useless to the plaintiff, and the plaintiff would have been in the same position as that where he or she instituted an ordinary action.

b In the principal case

Here, the onus may rest either on the plaintiff or the defendant. The question as to where the onus rests is a relevant one, for it is one of the aspects which must be considered in order to determine what the probabilities of success are in the principal action. Should the court be of the opinion that the probabilities of success are not in favour of either of the parties, the principle is that provisional sentence must be granted.

7.3 NATURE AND EFFECT OF PROVISIONAL SENTENCE

Read **Rule 8(8); Rule 8(11)**

Read Rule 8(8) to 8(11) **attentively** before studying the following comments:

(1) The plaintiff is of right entitled to payment, or, failing such payment, to take out a writ of execution against the defendant's property under security *de restituendo*.

Security *de restituendo* is the security which the plaintiff must give for the restitution of the money he has received from the defendant in terms of the judgment in the event of defendent defending and succeeding in the main case.

(2) The judgment is provisional, however, in the sense that the defendant may still defend the main action, but only within two months of the granting of provisional sentence, and then only if he or she has paid the judgment debt and costs.

(3) A defendant who may and who wishes to enter into the principal case must deliver notice of his or her intention (see study unit 9.2) to do so within two months after provisional sentence has been granted, in which case the summons will be deemed to be a combined summons (see study unit 6.3) on which the defendant must deliver a plea (see study unit 9.3) within 10 days. In default of such notice or plea, the provisional sentence automatically becomes a final judgment and the security given by the plaintiff falls away (Rule 8(11)).

ACTIVITY

Go back and read through the set of facts at the beginning of this study unit, and then answer the following questions:

(1) SS's attorney decides to sue the defaulters by means of a provisional sentence summons. The attorney's registered candidate attorney who has recently passed Civil Procedure Law, is of the opinion that it would be more correct to use the simple summons procedure. Which of the two procedures is the correct one to use under these circumstances? Substantiate your answer.

.....

.....

.....

.....

.....

.....

.....

.....

(2) Why is an admission of debt a liquid document?

.....

.....

.....

.....

.....

(3) The provisional summons procedure is an enforcement procedure which may be instituted after hearing *prima facie* evidence only. What protective mechanism is built in for the defendant in the procedure?

.....

.....

.....

FEEDBACK

(1) Both types of summonses can be used: the provisional sentence summons can be used because it is specifically designed for the institution of an action where the claim is based on a liquid document. Since the liquid document is evidence of an established monetary debt, the claim that arises also falls within the definition of a "debt or liquidated claim" (see study unit 6.2 above). This means that in these circumstances, a plaintiff **can choose** which type of summons will be used. (The fastest, most effective and cheapest type of summons is a question of fact. In theory, it is the provisional sentence procedure.)

(2) It is a **document** which evidences a **definite and established monetary debt.** In addition, the document contains an **unconditional admission of debt**.

(3) Although after the granting of sentence, the plaintiff can immediately go to the enforcement thereof, this can **only** happen if the plaintiff provides the defendant with the necessary security *de restituendo*.

STUDY UNIT

8

PRINCIPLES OF PLEADING

Overview

Learning outcomes

Once you have finished studying this study unit, you should

- be conversant with certain basic concepts in respect of pleadings
- be able to draw a distinction between pleadings and process documents
- be familiar with the purpose and function of pleadings in the litigation procedure

Compulsory reading material

Rule 18

8.1 BASIC PRINCIPLES

Before we discuss the litigation procedure in the following study units, it is important that you are familiar with certain concepts. It is particularly important that you can distinguish between pleadings and process documents, since certain remedial steps (see study unit 10) can be taken only in respect of defective pleadings.

(1) **Pleading stage**: This stage extends from the issue of summons up to the close of pleadings, and is **normally** relevant in illiquid summons proceedings.

(2) **Pleading**: This is a written document containing averments by the parties to an action in which the material facts on which they rely in support of their claim or defence are concisely set out, and which is exchanged between such parties.

Note that, here, the term "pleading" is used in a generic sense to include all types of pleadings. It must not be confused with the "plea", which refers to the defendant's statement of his or her defence to the plaintiff's claim, and which is merely one species of the genus "pleadings".

Dorfman v Deputy Sheriff, Witwatersrand 1908 TS 703

(3) **Process**: There is a difference between a pleading and a process. Although "process" is not defined in the Act, the phrase "process of the court" was interpreted in *Dorfman v Deputy Sheriff*, *Witwatersrand* 1908 TS at 703 to mean "something which 'proceeds' from the court; some step in legal proceedings which can only be taken with the aid of the court or of one of its officers". Included in this concept are, inter alia, subpoenas, notices and the like. This definition is important when distinguishing between a pleading and a process in the analysis of the various aspects of procedure.

8.2 FUNCTION OF PLEADINGS

- Pleadings serve to define and limit the disputed issues of fact and law for the benefit of both the court and the parties. In this way time and money are saved, and justice can be dispensed more quickly and effectively. In addition, they may also encourage the settlement of a dispute.
- Pleadings also serve to appraise each party of the case he or she is expected to answer. The parties are therefore given the opportunity of preparing their cases and the evidence which they intend leading in support of their own contentions and in rebuttal of their opponent's. The pleadings prevent the parties from being taken by surprise at the trial, thus obviating time- and money-consuming adjournments.
- The pleadings constitute a formal, summary record of the issues in dispute between the parties which may be decided at the trial. In this way they serve to prevent future disputes between the parties regarding issues which have already been adjudicated upon.

8.3 RULES FOR THE DRAFTING OF PLEADINGS

With the passage of time, a number of rules have been formulated which must be borne in mind when drawing up pleadings. The most important of these are contained in Rule 18(4). Other rules have been developed by the courts against the background of this Rule. What follows is a summary of the most important rules, since you will encounter them in greater detail in the course, Introduction to Legal Practice.

Study Rule 18(4)
Read Rule 18(3); 18(5); 18(7)

Study Rule 18(4) and **read** Rule 18(3), 18(5) and 18(7) attentively. Rule 18(8) to 18(11) contains provisions in respect of specific matters, and you are not expected to study these provisions.

- Pleadings must contain clear and concise statements of the material facts upon which the claim, defence or reply is based; but there must be adequate details so that the pleadings are not vague and embarrassing.

- Details must be reflected clearly, logically and in a comprehensible form.
- Facts, and not the law, must be pleaded. Evidence must, however, not be pleaded.

ACTIVITY

Think back on what you have already learned about the different types of summonses. Now classify the following documents as pleadings or process documents. Briefly explain the reason for the choices you have made.

(1) The simple summons

.....

.....

(2) The combined summons

.....

.....

(3) The declaration

.....

.....

FEEDBACK

(1) Process. A summons is a printed form which is merely a step in the litigation process and whereby litigation is instituted. This step can only be taken with the help of a court official (the registrar or assistant-registrar must first issue the summons before the plaintiff can use it any further).

(2) Both. However, the combined summons is a unique document in that the summons and the particulars of the claim cannot be separated from each other. Technically, the summons section is a process (see (1) above) and the particulars of a claim is a pleading (since it contains a formal, concise but more complete version of the plaintiff's claim to which the defendant must answer).

(3) Pleading. (See the explanation of the particulars of claim in (2) above.)

STUDY UNIT

9

PROCEEDINGS UP TO AND INCLUDING CLOSE OF PLEADINGS

One morning, D, a champion cyclist, rides into F, an outstanding marathon athlete on a public road. Both are injured and for months after the accident suffer pain. F is sponsored by XYZ Sports Drink Company and owing to her injuries can no longer meet her sponsorship commitments. D is sued by F for damages to the amount of R300 000. D is very upset by the sueing and feels that F was responsible for the accident and therefore for his (F's) damages (to his cycle).

Overview

Learning outcomes

Once you have studied this study unit, you should

- be familiar with the sequence of the litigation procedure and with the close of pleadings
- be able to classify the different documents which are part of the litigation procedure as either processes or pleadings
- be familiar with the purpose and function of the different pleadings which are exchanged between the parties to the litigation

Compulsory reading material

Rule 19, Rule 22, Rule 24, Rule 25, Rule 29

9.1 INTRODUCTION

Read

Read through study unit 3 above as well as the schematic representation of the summons procedure to prepare yourself for this study unit.

By now you are familiar with the different summonses and the different methods of serving them. In this chapter we deal with that stage of proceedings where a party has accepted service and wishes to defend the action against him or her. Pleadings and processes which are normally exchanged by the parties to an action up to and including close of pleadings, will now be dealt with in the sequence in which they occur.

9.2 NOTICE OF INTENTION TO DEFEND

Upon receipt of an illiquid summons, that is, either a simple or a combined summons, the defendant must, within the period laid down in the summons (termed the *dies induciae*), indicate whether he or she wishes to defend the action. This is done by filing a notice of intention to defend with the Registrar, and by delivering a copy thereof to the plaintiff.

The notice of intention to defend is not a means of raising a defence. Instead, a defence is raised by means of a plea (see study unit 9.3). As the name indicates, a notice of intention to defend is merely a notice and, as such, informs the plaintiff that the defendant intends defending the action. It is in this context that it is said that the defendant is "defending the action". Another expression which is also encountered when referring to the notice of intention to defend is that the defendant "enters an appearance", or, in short, gives "notice of appearance".

Study Rule 19(5)

The defendant who neglects to file and deliver a notice of intention to defend timeously, runs the risk of having a judgment by default (see study unit 12.3) given against him or her. However, **study** Rule 19(5) to determine up to what stage proper delivery of such notice may still be effected.

In his or her notice of intention to defend the defendant must appoint an address — not a post office box or *poste restante* — within eight kilometres of the court where the filing of all documents and process in the case may be effected. This provides the plaintiff with a convenient address for the delivery of all further process and documents, and enables him or her to regulate further the next steps in the conduct of the action.

Example

The following is an example of such a notice in an abbreviated form:

(Heading)

_____

NOTICE OF INTENTION TO DEFEND

_____

KINDLY take notice that the Defendant hereby intends to defend this matter. The offices of the Defendant's attorneys, as indicated hereunder, are the address at which all documents in this action shall be accepted.

Signed at Pretoria this .. day of May 20..

.....
XXX Incorporated
Defendant's attorneys
17th floor XX Building
123 Church Street, Pretoria
(Ref .....)

TO:
The Registrar of the High Court
Pretoria

AND TO:
XX and Partners, Plaintiff's attorneys
10th Floor XX Building
234 Proes Street, Pretoria
(Ref .....)

Received a copy hereof on the
.... day of May 20..
.....
for the Plaintiff's attorneys

9.3 THE PLEA ON THE MERITS AND COUNTERCLAIM

A plea on the merits is the only way in which a defendant may raise a defence against the plaintiff's claim. A plea must therefore deal with the merits of the plaintiff's case as set out in the plaintiff's particulars of claim or declaration, depending on the case.

Although the defendant must deal with each allegation in the particulars of claim or declaration, a plea deals especially with all the factual allegations. Just as the particulars of claim or the declaration must fully disclose the plaintiff's claim, so must the defendant's plea disclose his or her defence fully.

In such plea the plaintiff's factual allegations are admitted, are denied, are placed in issue, or are confessed and avoided, and all the material facts upon which the defendant relies are stated clearly and concisely. It is also permissible, where the facts warrant it, for a defendant to plead that he or she has no knowledge of a particular allegation and is not in a position to admit or deny it (see Rule 22(2) and Rule 22(3)).

Read Rule 22(1)

Rule 22(1) indicates the *dies induciae* within which the plea must be delivered in the case of a combined summons and a declaration. Consult this rule yourself.

Study Rule 24(1)

Rule 24(1) provides that a defendant may, together with his or her plea, or at a later stage with the leave of the plaintiff, or if refused, the court, deliver a claim against the plaintiff. This is known as a counterclaim. **Study** this sub-rule in order to know what **form** the counterclaim takes.The counterclaim is called a **claim in reconvention**. (The claim which is instituted by means of a summons is called a **claim in convention**.) Since a counterclaim is similar to a claim which is instituted by a plaintiff in convention, the plaintiff has the opportunity to answer to the

counterclaim with a **plea on the counterclaim**, which corresponds with the defendant's plea as regards form and content. The same pleadings as are exchanged between the parties in convention, are exchanged in reconvention; the only difference is that the parties act in the reverse order. In other words, the plaintiff in convention acts as the defendant in reconvention. The pleadings in reconvention are also exchanged until close of pleadings occurs.

When the counterclaim is served at the same time as the plea, in practice it is contained in the same document as follows:

Example

(Heading)

PLEA

Defendant pleads as follows on the particulars of Plaintiff's claim as attached to her summons:

1

AD PARAGRAPH 1 THEREOF:

The allegations contained in this paragraph are acknowledged.

2

AD PARAGRAPH 2 THEREOF:

Defendant has no knowledge of the allegations in this paragraph, and therefore does not acknowledge them, and demands that Plaintiff prove them.

... (All other allegations are dealt with in a similar manner and the plea is concluded as follows:)

THEREFORE DEFENDANT PRAYS that Plaintiff's claim be dismissed with costs.

(The counterclaim is formulated directly after this plea in the following way:).....

DEFENDANT'S COUNTERCLAIM

(The defendant's counterclaim is now set out paragraph by paragraph in the folllowing way:)

WHEREFORE DEFENDANT PRAYS that ....

Signed at XX on the ... day of May 20...

DEFENDANT'S COUNSEL

DEFENDANT'S ATTORNEY
(address, etc)

(Indicates who must be served and provides for an acknowledgement of receipt by the plaintiff's attorney. In practice, the Registrar's acknowledgement of receipt is effected by an official stamp of this office.)

9.4 REPLICATION, REJOINDER AND CLOSE OF PLEADINGS

Study Rule 25(2)

A replication contains the plaintiff's reply to the defendant's plea. Rule 25(1) prescribes the *dies induciae* for the delivery of the replication. This plea is, however, not essential and is necessary **only** where the defendant raises new averments as to facts in his or her plea. **Study** Rule 25(2) in this regard so that you are aware of when replication is unnecessary. A replication will typically be relevant in the case where a defendant's defence is one of confession and avoidance. For example, a defendant in defamation action admits in her plea the publication of the alleged defamatory statements, but avers that such statements were made in privileged circumstances. The plaintiff will then deal with these in replication.

A plaintiff who fails to deliver a replication within the prescribed *dies induciae* is *ipso facto* (or automatically) barred from replicating (see Rule 26, read with Rule 25(1)). Where a replication is not necessary, joinder of issue will be assumed and the pleadings will be deemed to be closed when the last day for filing the replication has elapsed (see Rule 25(2) and Rule 29(b)).

Rule 25(5) makes provision for the exchange of further pleadings by the parties, and also prescribes the *dies induciae* within which such pleadings must be delivered. The further pleadings which are intended have already been mentioned in this section. The most common of these is the rejoinder. If the plaintiff raises new averments of fact in the replication, the defendant is given an opportunity of reacting thereto by way of rejoinder.

Study Rule 29

Rule 29 lays down when pleadings are deemed to be closed. **Study** this Rule as a whole, since you must be familiar with the circumstances in which close of pleadings occurs.

Example

The following is an illustration of a replication. (You can take it that in her plea, the defendant denies that she was negligent or that she caused the accident and alleges that the plaintiff was negligent. Naturally, the allegation of negligence on the part of the plaintiff is a new factual allegation to which the plaintiff must answer.)

(Heading)

REPLICATION

Plaintiff replicates as follows to Defendant's plea:

1

Plaintiff denies that he was negligent as alleged or that he was contributory negligent as alleged, and demands Defendant to prove it.

Signed at ... on this ... day of May 20...

(Signatures)

(Indicates who must be served. Provides for acknowledgement of receipt by the defendant's attorneys.)

ACTIVITY

(1) Simply **name** the pleadings (in the correct order) which can be exchanged **in convention** between D and F (referred to in the set of facts at the start of this study unit) upon service of the combined summons.

.....

.....

.....

.....

(2) Explain briefly why the notice of intention to defend is excluded from the answer to (1) above.

.....

.....

.....

.....

(3) Briefly indicate when pleadings will be regarded to be closed.

.....

.....

.....

.....

FEEDBACK

(1) The plea on the merits (at the same time the defendant can institute his counterclaim against F. The same pleas as are exchanged in convention, may also be exchanged in reconvention).

The replication (since in his counterclaim, D would have indicated that F was negligent — therefore, a new factual allegation)

The rejoinder (if the plaintiff made new factual allegations in her replication)

(2) The notice of intention to defend (as is the case with all notices) is a **process,** not a pleading.

(3) The four circumstances in which pleadings are regarded to be closed, are clearly set out in point form in Rule 29. Fill in these circumstances yourself in the space provided under question 3 above.

STUDY UNIT

10

FURTHER PLEADINGS AND PROCESSES UP TO AND INCLUDING CLOSE OF PLEADINGS

E and the Grootberg Local Council litigate in the local High Court. E is the registered owner of a small holding within the area of the Grootberg Local Council (GLC). All registered landowners are statutarily obliged to pay tax to the GLC. In the summons, the GLC alleges that E is in arrears with the payment of tax and that E is liable for the payment of such arrears for specific period of time. Just after E's attorneys entered appearance, GLC's attorneys notice that their information in the formulation of the claim is faulty. Once the new formulation is served on E's attorneys, it appears that E's attorneys are unhappy about the formulation of the claim. The question arises how the different defects must be dealt with and corrected in practice.

Overview

Learning outcomes

Now that you are already familiar with pleadings which are normally exchanged between parties, as well as the concept of interlocutory applications, after you have studied this study unit, you should

- be familiar with the other pleadings and procedures which may be exchanged during the pleading stage
- know about the circumstances in which such documents may be used, and about the specific puposes which can be met by using them
- be able to apply these different documents practically to a given set of facts
- be able to see the law of civil procedure more clearly as an integrated whole, with referrence to examples of interlocutory applications

Compulsory reading material

Rule 35(14); Rule 23(2), 23(4); Rule 28; Rule 23(1), 23(3), 23(4); Rule 30

10.1 INTRODUCTION

The rules in regard to pleading are not rigid and unbending, and not every technical mistake in a particular pleading will render it open to objection.

Where there has been some breach of pleading (or, in certain cases, a process), the opposite party can take certain steps to rectify the situation.

A party can also take certain steps to rectify a *bona fide* error in his or her pleadings, or to enable him or her to deliver a pleading.

10.2 INSPECTION

Study Rule 35(14)

Study Rule 35(14). Note **at what stage** of the proceedings inspection can be requested, for what **purposes** and **precisely in respect whereof.** It is important to note that **any** party can obtain inspection, but not merely in respect of any type of document or tape recording.

10.3 APPLICATION TO STRIKE OUT

Where any pleading contains averments which are "scandalous, vexatious, or irrelevant", the opposing party may, within the period allowed for any subsequent pleading, apply for the striking out of such matter (see Rule 23(2)). Although Rule 23(2) refers only to pleadings, it is commonly accepted that offending passages in affidavits relating to motion proceedings may also be struck out. "Irrelevant" in this context means irrelevant in relation to the points in dispute which have been raised and which must be decided by the court.

This procedure is used to rectify that part of an opposing party's pleading which contains an averment which is "scandalous, vexatious or irrelevant". **It does not relate to the pleading as a whole.** Below, the bold portion of an extract from a ficticious pleading indicates the nature of an averment which may be struck out:

Example

" 5.

The said accident was caused by the negligence of the defendant in that he:

(a) drove recklessly **as he is in the habit of doing.** "

The opposing party may apply to have the offensive words, which have been emphasised, struck out.

Unlike Rule 23(1), which provides that exception may be taken to vague and embarrassing matter (see study unit 10.5 in regard to exceptions), no provision is made in Rule 23(2) that such matter may be struck out. However, it can be argued that vague and embarrassing matter is vexatious and may be struck out on this ground. But, it should be noted that, where the embarrassment goes to the root of the pleading, the pleading must be excepted to, after the opponent has been given an opportunity of removing the cause of embarrassment.

A court will grant such an application only if it is satisfied that the applicant will be prejudiced in the conduct of his or her claim or defence if the application is not granted. The striking-out procedure is not intended to be used for raising technical objections which are of no advantage to either party, but which merely increase costs.

Note that the application to strike out is **set down** for trial in terms of Rule 6(5)(f). Rule 23(2), read with Rule 6(5)(f), does not therefore refer to the application procedure as such. Since we are here concerned with proceedings which have already been instituted (are thus pending), this application is interlocutory in nature and is therefore made merely by way of notice.

If you are uncertain about this matter, refer to study unit 2.3.3 which deals with interlocutory applications.

10.4 AMENDMENT OF PLEADINGS AND DOCUMENTS

Rule 28 provides that any party may amend any of his or her **own** pleadings or documents (but excluding an affidavit) which have been filed in regard to any proceedings. Such a party must, however, give notice of such intention to amend to all parties concerned, **and** must set out the details of the amendments in the relevant notice (see Rule 28(1) and 28(2)).

***Study* Rule 28**

Study Rule 28 with regard to the relevant procedural requirements, and make your own summaries. Approach this Rule by first of all drawing a distinction between the procedures where an objection to the intended amendment is lodged and the procedure where no objection is lodged. Thereafter, note how the party who may amend must proceed in effecting the amendment (Rule 28(7)). Also note that application to amend may be made both before and during the trial (but before judgment) (see Rule 28(10)). The test in the latter case is whether there will be any prejudice to the opposing party.

The amendment procedure is used for a variety of purposes, the most common of these being to correct errors in pleadings, to amplify the cause of action, to introduce a further or alternative cause of action, or to extend or limit the relief claimed.

Example

This procedure may be illustrated by means of the following example. A pleading might contain the following statement: "... the contract of lease was signed on **6 July 1956** ...". The date given as "6 July 1956" should have read "6 June 1965". The procedure described above may be used to rectify this error.

Embling v Two Oceans Aquarium CC [2000]2 All SA 346 (A)

The general rule in regard to all amendments is that the court will grant an amendment, unless the application for amendment is made *mala fide,* or the opposing party will suffer prejudice which cannot be compensated for by a postponement and/or an order as to costs (see *Embling v Two Oceans Aquarium CC* [2000]2 All SA 346 (A)).

Furthermore, an amendment will be refused if it would render the pleading so amended excipiable.

Example

Since we are dealing with notification, the document will again look like the following:

(Heading)

NOTIFICATION OF AMENDMENT

Kindly take note that Plaintiff hereby amends her particulars of claim by striking out paragraph 2 thereof in its entirety and replacing it with an amended paragraph to which reads as follows:

" 2.

The defendant is ....."

(The usual signatures and details of service.)

10.5 THE EXCEPTION

Instead of replying to a particular pleading on the merits, a party may except to the pleading on one of the following grounds:

(1) that the pleading as drafted is vague and embarrassing, or
(2) that it discloses no cause of action or defence, that is, even if it is accepted that the party can prove all the allegations in the pleading under attack, the pleading will not in law constitute a valid claim or defence

The purpose of excepting to a pleading may be twofold. In the case of a pleading that is vague and embarrassing, an exception is taken in order to prevent the person excepting from being taken by surprise or being prejudiced in his or her pleading, or at the trial. Where a pleading discloses no cause of action or defence, an exception provides a speedy and inexpensive method of determining the issue without having to embark on the lengthy and expensive procedure of a full trial.

For this reason an exception is adjudicated upon separately before the trial.

The principal distinguishing feature of an exception, as opposed to a plea on the merits or a special plea (see study units 9.3 and 10.6 respectively), is that the exception must appear *ex facie* the pleading which is being excepted to. This is a legal argument, and no fresh facts may be alleged in the exception; for the purpose of deciding the exception, the facts stated in the pleading being attacked must be taken to be true. For example, if, in the particulars of claim in which a widow claims damages for the death of her husband, the allegation of negligence is omitted, the summons may be excepted to on the ground that it discloses no cause of action. Assuming the correctness of all the facts in the particulars of claim, the plaintiff would still not be entitled to succeed, for, unless the defendant caused the damage in a negligent manner, he or she is not in law obliged to compensate the party suffering such damage. (Fault is indeed one of the elements which must be proved in order to establish that a delict has been committed.)

A further important distinguishing feature of an exception is the fact that it must be taken **to the pleading as a whole,** and **not** to a portion of the pleading, unless such portion constitutes a separate cause of action or defence.

The notice of exception must be filed within the period allowed for filing any subsequent pleading (Rule 23(1)).

It is important to note, however, that where a party intends to except to a pleading on the ground that it is vague and embarrassing, he or she must, by notice, afford his or her opponent an opportunity of removing the cause for complaint.

Whenever an exception is taken to any pleading, the grounds upon which the exception is founded must be clearly and concisely stated (Rule 23(3)).

As in the case of an application to strike out (study unit 10.3), set-down also occurs in terms of Rule 6(5)(f). What was stated in respect of the interlocutory nature of the application therefore also applies here.

Example

To make this discussion less abstract, we provide you with the following examples to illustrate the documents which are served:

(Heading)

DEFENDANT'S NOTIFICATION IN TERMS OF RULE 23

Kindly take notice of Defendant's contention that Plaintiff's particulars of claim are vague and embarrassing and that, alternatively, they do not disclose any cause of action in respect of what is set out hereunder.

Further, kindly take notice that Defendant hereby gives Plaintiff the opportunity to remove the causes of the objections within ..... days.

The grounds of Defendant's objection are as follows:

1.

(a) In paragraph 3.1 of Plaintiff's particulars of claim it is alleged that defendant would be liable for the payment of taxes for the period ..... to ..... .

(b) There is no explanation in Plaintiff's particulars of claim by virtue whereof Defendant would be liable for these particular taxes.

Signed at Pretoria this ..... day of May 20 .....

_____

Attorneys for Defendant

If the objections are not removed, the notification of exception will look something like this:

(Heading)

_____

DEFENDANT'S NOTICE OF EXCEPTION

_____

Kindly take notice that Defendant hereby lodges an exception against Plaintiff's particulars of claim on the ground that they are vague and confusing, and alternatively that they do not disclose any cause of action.

The grounds of Defendant's objection are as follows:

1.

(a) In paragraph 3.1 of Plaintiff's particulars of claim it is alleged that .....

(b) There is no explanation in Plaintiff's particulars of claim for .....

Wherefore Defendant pleads that the exception is upheld with costs and that Plaintiff's particulars of claim are set aside with costs.

Signed at Pretoria this ..... day of May 20 .....

_____

Counsel for Defendant

_____

Attorneys for Defendant

Note: The allegations which appear in the notice of exception correspond with those that appear in the foregoing notice, and therefore are not repeated in full. By now, you should know that the pleadings end with places for signatures and service that have been left out in order to save space.

10.6 THE SPECIAL PLEA

A plea on the merits, as its name indicates, deals with the merits of the plaintiff's claim as set out in his or her declaration or particulars of claim, as the case may be. A special plea, on the other hand, is a means of raising an objection on the basis of certain facts which do not appear

in the plaintiff's declaration or particulars of claim, and has the effect of destroying or postponing the action.

Please note that if a defendant intends to serve and file a special plea, he or she must **still** deliver a plea on the merits. Therefore, a special plea does not replace the plea on the merits. A failure to deliver the lastmentioned document will expose a defendant to a request for default judgment.

10.6.1 The difference between the special plea and the exception

As stated above, an exception is limited to an attack on the allegations in the pleading as a whole, on the assumption that such allegations are true, and with one of the distinguishing features being that no factual allegation outside the pleading attacked may be introduced. The pleading is judged exactly as it stands. In common with an exception, a special plea assumes the truth of all the allegations in the declaration, and does not deal with the merits of the action at all. It differs from an exception in two respects. First, as its name indicates, it alleges special facts unconnected with the merits of the action as a result of which the action is either destroyed or postponed.

Secondly, a special plea may only be pleaded to a declaration or particulars of claim, whereas an exception can be brought against any pleading.

10.6.2 The two categories of special pleas

Although the nomenclature may vary, special pleas are usually divided into two categories: those special pleas which seek to destroy the action **(pleas in abatement)** and those special pleas which seek to postpone the action **(dilatory pleas)**.

10.6.2.1 Dilatory pleas

- Where the defendant disputes the plaintiff's authority to sue because of the absence of a formal requirement which is a condition for suing.
- *Lis pendens.* If an action is already pending between the parties, and the plaintiff brings another action against the defendant or relating to the same cause and in respect of the same subject-matter, whether in the same or in different courts, the defendant can take the objection of *lis pendens.*
- *Arbitration.* The defendant may raise this as a special plea where the parties have previously agreed to submit their dispute to arbitration.

10.6.2.2 Pleas in abatement

- Special plea of prescription
- Special plea of non-joinder or mis-joinder
- Special plea of *res iudicata*
- Special plea in respect of the jurisdiction of the court (this is sometimes also referred to as a plea in bar)

10.7 APPLICATION TO SET ASIDE IRREGULAR PROCEEDINGS

Where a party has taken an irregular step or proceeding during the course of litigation, Rule 30 provides the other party with a mechanism by means of which the irregularity may be set aside or otherwise dealt with.

Study Rule 30(2)

Study Rule 30(2) for the procedure which must be followed in order to set aside irregular proceedings. It is not important to know the specific *dies induciae* in each case.

10.7.1 The meaning of an "irregular proceeding"

An irregular proceeding is not defined in the Rules.

However, it may be stated that the irregularity concerns **formal** irregularities; in other words, noncompliance with formal requirements in respect of procedural matters. For examples hereof, compare, for instance, Rules 18(12), 22(5) and 24(5) where it is explicitly stated that noncompliance with the provisions of specific Rules will be deemed to be an irregular step. Other examples of irregular proceedings are the failure by an advocate to sign the particulars of claim (as required by Rule 18(1)), the premature set-down of a case, and the use of the wrong type of summons.

Minister of Law and Order v Taylor 1990 (1) SA 165 (EC)

The period within which the applicant must act commences as soon as a party takes notice that a step has been taken or that a proceeding has occurred, and **not** once the irregularity thereof has come to his or her notice. This interpretation was given in *Minister of Law and Order v Taylor* 1990 (1) SA 165 (EC). However, such an application may be launched only if the objector has not taken some further step in the litigation after becoming aware of the existence of an irregularity.

10.7.2 The meaning of a "further step"

Kopari v Moeti 1993 (4) SA 184 (BGD)

In *Kopari v Moeti* 1993 (4) SA 184 (BGD) 188H the step is described as "some act which advances the proceedings one stage nearer completion".

A further step would therefore include the next sequential exchange of pleadings and any objection to the content of a pleading (eg an exception or motion to strike out). It would not include the filing of a notice of intention to defend; our courts have held that this is merely an act done to enable the defendant to put forward his or her defence.

Rule 30(2) provides that an application in terms of this Rule must be accompanied by notice to all parties. Such an application is naturally also interlocutory in nature.

Rule 30(4) provides that, until the party against whom the order was made has complied with it, he or she may take no further steps in the main action. Where a party is in default in complying with a request or notice in terms of Rule 30, the other party who made the request or gave the notice may approach the court (after notice of intention to do so has been given to the defaulting party) for an order

(1) that the notice or request be complied with, or
(2) that the claim or defence be struck off

The court may, in its discretion, grant such an order.

ACTIVITY

M sues N for damages on ground of breach of contract. After M has served his simple summons, he realises that his attorney's typist has typed in the amount claimed as R3 000 000 instead of R300 000. N is very upset about the summons which has been served on her and goes to see her attorney. She tells him, amongst other things, that she and M are already involved in litigation in the Cape High Court in respect of an identical cause of action. N's attorney reads through the summons and points out to N that M has issued the wrong type of summons against her. Answer the following questions in respect of this set of facts.

(1) Simply **name** the type of procedure that N's attorney must follow owing to the use of the wrong type of summons.

.....

(2) Briefly indicate why N's attorney acts correctly by serving and filing a notice of intention to defend **despite** the procedure which is followed in (1) above.

.....

.....

.....

.....

(3) Simply **name** the procedure which M may follow to correct the incorrect amount claimed in the summons.

.....

(4) Say that M serves his declaration on N immediately after he has received her notice of intention to defend. What procedure must N's attorney use to address the fact that M has already instituted an identical action in the Cape High Court? Explain briefly.

.....

.....

.....

.....

(5) M believes that N is in possession of a tape recording of the negotiations that M and N have had and which gave rise to the conclusion of the contract. Briefly explain in what circumstances M may request inspection hereof.

.....

.....

.....

FEEDBACK

(1) An application to set aside the summons as an irregular proceeding.

(2) The filing of a notification of intention to defend does not initiate a "further step" which could obstruct the procedure in (1) above. It has already been decided that it is simply an action with the purpose of allowing the defendant to raise a defence.

(3) Application to amend.

(4) N's attorney must file a special defence since N has raised an objection *of lis pendens.*

(5) The answer to this question is contained in Rule 35(14). Make a short summary of the content of this Rule for yourself.

STUDY UNIT

11

OFFER TO SETTLE, TENDER AND INTERIM PAYMENTS

Solly owns a red microbus which he uses as a taxi. Solly is a registered taxi driver. One Friday afternoon while he is busy transporting a full load of passengers home, he is involved in an accident with another vehicle. The driver of the other vehicle is seriously injured while occupants of the microbus mainly suffer damage to their possessions (radios, clothing and groceries). Solly is insured with MVO Insurers Ltd. Although everyone who suffered damage instituted claims for damages, the finalisation of the claims takes a long time and there is some financial hardship. The insurer is also anxious to finalise the claims as soon as possible in order to save costs.

Overview

Learning outcomes

Once you have finished studying this study unit, you should

- be familiar with the ways in which a matter can be settled in terms of the Rules
- be able to identify the most applicable method of settlement on a given situation
- be able to compare settlement in terms of the Rules with settlement outside the Rules

Compulsory reading material

Rule 34 and Rule 34A

11.1 INTRODUCTION

A defendant in a claim sounding in money, or in a claim for the performance of an act, is at liberty to attempt to settle such matter. A settlement is often reached by agreement between the parties, but, where such negotiations fail, the defendant can utilise the procedure laid down in Rule 34 in a further attempt at settling the matter. The benefits derived from a settlement are, first, that the action is extinguished, and, secondly, that no further costs are incurred.

An offer to settle need, however, not be made in terms of Rule 34, but such an offer provides no protection against costs being awarded to the other party, unless it is pleaded. This type of offer is known as a tender.

Another way of attempting to achieve a settlement between parties is by way of an interim payment.

In 1986 the Commission of Enquiry into the Handling of Litigation in terms of the Motor Vehicle Accident Act of 1986 (the Vivier Commission) identified the need for interim payments in actions for damages in terms of the Motor Vehicle Accident Act of 1986. Such need arose as a result of the delay in the finalisation of litigation, which frequently happens in actions for damages as a result of personal injuries and death. These delays can often lead to undue financial hardship for the plaintiff and/or his or her next of kin. Interim payments not only eliminate these hardships, but can also facilitate a reasonable and equitable settlement between the parties, and, in so doing, shorten the litigation process.

11.2 OFFER TO SETTLE

In terms of Rule 34, a defendant may, **at any time, unconditionally or without prejudice,** offer to settle a plaintiff's claim where

(1) payment of a sum of money is claimed (Rule 34(1))

or

(2) the performance of an act is claimed (Rule 34(2))

11.2.1 Claim for payment of a monetary sum

Note that an offer to pay a monetary sum must be in **writing** and must be signed by the defendant **or** by the defendant's duly authorised attorney.

For the purposes of Rule 34, a defendant includes any person joined as a defendant or as a third party in terms of Rule 13, as well as a defendant in reconvention or a respondent in application proceedings (Rule 34(14)). If several defendants are cited, any of them may make such an offer (Rule 34(4)).

Study **Rule 34(5)**

Now **study** Rule 34(5). Ensure that you know to whom notice of the offer must be given **and** what the requirements are with which such an offer must comply. For the purposes of this Rule, the following expressions have the following meanings:

- unconditional = liability in respect of the claim is accepted
- without prejudice = liability is denied

The plaintiff may, within 15 days of receiving the notice of the offer, accept the offer by

delivering a notice of acceptance at the address of the defendant indicated for the purposes hereof (Rule 34(6) and Rule 34(8)). If the plaintiff fails to accept the offer within such period, it may thereafter be accepted only with the written consent of the defendant, or with the court's consent.

The defendant must, within 10 days of delivery of the notice of acceptance, effect payment as offered. If he or she fails to do so, the plaintiff may, after giving five days' written notice to this effect, apply through the Registrar to a judge for judgment in terms of the offer, plus costs (Rule 34(7)). To receive payment, the plaintiff would then have to take steps to obtain execution against the defendant, which is an unsatisfactory aspect of this procedure (compared to the situation prior to the November 1987 amendments where the amount offered was actually paid into court). Not only may finalisation of the matter be delayed, but a plaintiff may find in the end that a defendant does not have sufficient means to satisfy the judgment. Apart from these matters, such further steps also have cost implications for both parties.

It is important to note that the fact that an offer has been made may not be disclosed in court before judgment has been given, and no reference to such offer may appear on any file in the office of the Registrar containing the papers of the case (Rule 34(10)) — any party acting contrary to this Rule will be liable to have costs given against him or her, even if he or she is successful in the action. The offer is, however, brought to the attention of the judge concerned before any order as to costs is made, since the fact that an offer was made is relevant to the apportionment of costs.

11.2.2 Performance of an act

Unless the defendant offers to perform the act **personally,** he or she must draw up an irrevocable power of attorney for the performance of the act (Rule 34(2)) which authorises another to perform such act on his or her behalf.

Such power of attorney must be delivered to the Registrar together with the offer (or "tender" as it is called in Rule 34(2)). Should the offer be accepted, the power of attorney is returned by the Registrar, after he or she has satisfied himself or herself that the requirements of Rule 34(6) regarding the acceptance of an offer have been complied with.

The procedure and requirements for an offer to perform (other than those set out immediately above) are in accordance with the procedure in respect of claims sounding in money discussed above.

11.3 COMMON-LAW TENDER

A party to litigation is not obliged to offer a settlement in terms of the Rules. A tender can be made even before proceedings are instituted. If such a tender is satisfactory, it will provide a defendant with protection against costs which accrue from the summons stage.

The concept of tender is derived from common law. Broadly speaking, tender is equivalent to payment by way of an offer of settlement. Common law requires that payment be made in money — *met opene Beurse en klinkende Gelde.* The amount thus offered in settlement need not be paid into court, and need be available only in the form of money or a cheque. The plaintiff must be notified of the manner in which payment is available.

If a defendant wants to use a tender in order to protect himself or herself against costs, he or she

must plead a tender which must be proved like any other fact. Where a tender is raised as a defence, it is done to show that the tender is accepted (and that therefore the cause of action is extinguished) or that the plaintiff is not entitled to costs from the date on which the tender is made. However, it is important to note that a tender must be **unconditional**. If the tender is not accepted, the tendered amount must be paid back; however, if the tender is accepted, the plaintiff may not sue for the balance of the claim.

11.4 INTERIM PAYMENTS

Read Rule 34A(1)

Read Rule 34A(1) attentively and keep it at your side when studying this unit. We wish to draw your attention to the following:

- Interim payments may be ordered only in an action for damages as a result of **either** personal injuries **or** the death of a person (usually the breadwinner). Personal injuries naturally refer to the plaintiff's own injuries.
- An application for an order for such payments may be made at any time after the lapse of the *dies induciae* in respect of the intention to defend.
- The damages which are relevant are confined to

  (1) the plaintiff's medical costs
  (2) the plantiff's loss of income as a result of his or her physical incapacity
  (3) the plaintiff's loss of income as a result of the death of another person.

Note that the order is made by way of **application,** and that Rule 34A(2) lays down that the provisions of Rule 6 must be complied with. Acquaint yourself with the requirements of Rule 34A(2) in respect of the contents of the plaintiff's affidavit.

Read Rule 34A(4); Rule 34(5)

Read Rules 34A(4) and 34(5) attentively. You will notice that, in terms thereof, the court is not obliged to make an order for an interim payment, but has a discretion. In addition, the court must be satisfied that certain prescriptions have been complied with. The plaintiff (applicant) must thus satisfy the court that

(1) the defendant (respondent) has in writing admitted liability in respect of the plaintiff's damages (Rule 34A(4)(a))

or

(2) that he or she (the plaintiff) has obtained judgment against the defendant for the damages, the amount *(quantum)* of which still has to be determined (Rule 34A(4)(b))

and

(3) that the defendant is insured in relation to the plaintiff's claim, **or** that the defendant has the means to make such an interim payment (Rule 34A(5))

Study Rule 34A(8)
Read Rule 34A(6); Rule 34A(9) to (10)

Study Rule 34A(8) as regards the prohibition on disclosure, and merely **read** Rules 34A(6) and 34A(9) to (10) for information purposes.

ACTIVITY

(1) Briefly indicate the requirements which an offer must meet in terms of Rule 34.

.....

.....

.....

.....

(2) Briefly indicate what the content of the prohibition on disclosure is in terms of Rule 34A(8).

.....

.....

.....

.....

Go back and read the set of facts at the beginning of the study unit and then answer the following questions:

(3) **Simply** name the procedure which X, the seriously injured driver of the vehicle which Solly crashed into, must follow if he needs financial aid to cover his medical expenses.

.....

(4) From the set of facts it appears that the passengers in the minibus also suffered damage in that their property was either damaged or destroyed. To what extent can they make use of the procedure contained in Rule 34A? Briefly explain.

.....

.....

.....

FEEDBACK

(1) These requirements are set out clearly in Rule 34(5). Summarise the four requirements briefly for yourself in the space provided above. Do it as if you were answering an examination question.

(2) These provisions are also set out very clearly in the Rule, and you must summarise them yourself.

(3) An application for interim payment in terms of Rule 34A.

(4) They cannot use this procedure, since the procedure can only be used in actions for damages for **personal injuries** or the **death of a person (usually the breadwinner).** Actions for damages for damage to property are therefore excluded.

STUDY UNIT

12

PRE-TRIAL JUDGMENTS

Homework CC sues Computer Mecca CC for damages for the provision of defective hardware and installation. Homework CC not only lost data, but also clients. Although Computer Mecca CC enters appearance, it fails to deliver the pleadings which should follow thereupon. Homework CC is dissatisfied with this since it delays finalising the action. The question is what action can be taken by the plaintiff?

John, a handyman, buys a large number of items on credit at his local hardware shop. John has known the owner of the hardware shop for years. The things are delivered at John's house and a copy of the invoice is handed to him once he has signed the original. The total amount for the items is R120 000. Despite requests, John refuses and/or fails to pay his account. The owner of the shop suspects that John simply does not have the money to pay owing to the generally poor economic situation. John is sued and he enters an appearance to defend. What should the plaintiff do now?

Overview

Learning outcomes

Once you have completed studying this study unit, you should

- be aware of the fact that a court can pass a judgment even before hearing a matter which can bring the matter to a close
- be familiar with the different actions which can be taken when an opposing party neglects to deliver pleadings and process documents timeously (ie within the prescribed *dies induciae*) and what the results of such failure are
- be familiar with the action which can be taken when an opposing party litigates in a vexacious way
- furthermore be able to see the law of civil procedure as an interconnected whole, by being able to group the different procedures which belong together from a procedural point of view (eg the simple summons and summary judgment)

Compulsory reading material

Rule 26; Rule 31; Rule 32; Rule 39(1) and 39(3)

12.1 INTRODUCTION

Now that you have mastered the difference between a pleading and a process, as well as the entire course of the litigation process, we take you one step further in the litigation procedure by showing you that a court may deliver a judgment even before hearing the matter to bring the matter to a close.

There are various instances in which a party may approach a court for relief prior to a trial. Such relief may assume different forms, and varies from the granting of judgment against a defendant to the dismissal of the plaintiff's claim.

In this chapter, we shall pay attention to the following:

(1) where the opposite party fails to file a pleading or process within the time laid down in the Rules (referred to as the party "in default") (Note that the parties are naturally at liberty to agree among themselves on an extension of time, and the court itself may also be approached for such an extension — see Rule 27(1) in this regard.)
(2) where a defendant does in fact enter appearance timeously, but does so merely as a delaying tactic, knowing full well that no *bona fide* defence exists (In such a case, summary judgement is relevant.)
(3) where a defendant consents to judgment

We shall begin with this last-mentioned case.

12.2 CONSENT TO JUDGMENT

Study Rule 31(1)

Study Rule 31(1). The contents of the Rule are self-explanatory and do not warrant further comment. Note that, in certain cases, consent is excluded. Where the Rule provides that application by the Registrar must be made before a judge, this simply means that a judge sitting elsewhere (usually in chambers) than in open court, may grant judgment.

12.3 DEFAULT JUDGMENT AND BAR

As indicated in 12.1 above, a party which fails to deliver a pleading or process document in time, is "in default". Depending on the type of pleading or process, the other party can request a judgment immediately or another step may first have to be taken before judgment may be requested. This step is known as the giving of a notice of bar. Judgment by default can therefore only be studied properly in conjunction with bar, which is dealt with in Rule 26. We shall first explain what is meant by "bar".

12.3.1 Bar

Bar applies only in respect of pleadings.

Rule 26 clearly states that a party who fails to deliver a **replication** and the **ensuing pleadings,** is *ipso facto* (ie automatically) barred from doing so. This means that the party who is in default will no longer be entitled to deliver the specific pleading concerned.

In the case of **all other pleadings** a party must **first** receive a notice of bar, and, if such party still fails to deliver within the period indicated in the notice of bar (or within a period agreed upon), he or she will be in default as regards the specific pleading and will *ipso facto* be barred.

The type of order which a court is empowered to make where a party is barred, depends on the specific pleading concerned and will be dealt with in more detail below. Note, however, that the court is **not compelled** to grant an order, but has a discretion by virtue of Rule 27, in which provision is made for the extension of time, the removal of bar and condonation. **Study** Rule 27(1)–(3) only in **broad outline.**

Study **Rule 27(1)–(3)**

12.3.2 Default judgment

Default judgment is relevant in the following cases:

(1) where the defendant does not timeously give notice of intention to defend
(2) where the defendant does not deliver a plea timeously
(3) where the plaintiff does not deliver a declaration timeously
(4) where a party fails to appear at the trial

12.3.2.1 Failure to file a notice of intention to defend

Rule 31(4) contains provisions pertaining to set-down of proceedings, but where the defendant does not enter an appearance, obviously no notice of set-down need be given to him or her.

Study **Rule 31(2) and 31(5)**

Study Rule 31(2) and 31(5). From these subrules it appears that a distinction must be drawn between

- claims for a debt or liquidated demand
- unliquidated claims

When a judgment by default is requested in respect of claims for a debt or liquidated demand, and the defendant is in default of delivery of a notice of intention to defend or of a plea, the plaintiff must submit to the registrar of the court a written request for judgment. The registrar is empowered to make a variety of orders and no evidence in respect of the claim need be led.

In contrast with the aforegoing, when judgment by default is requested in respect of unliquidated

claims, and the defendant is in default of delivery of a notice of intention to defend or of a plea, judgment by default may be granted only once evidence has been led in respect of the *quantum* of the claim.(**Note:** Please note that some divisions of the court require that under certain circumstances, evidence must also be led in respect of the cause of action; at this stage, this practice is not yet uniform.)

Where a defendant enters an appearance out of time, but before default judgment is granted, the plaintiff cannot merely ignore this and proceed to request judgment by default — the correct procedure is for the plaintiff to approach the court first to have the appearance set aside as an irregular proceeding, before any other action is considered. Also refer to Rule 19(5) which specifically provides that, where appearance is out of time and the plaintiff has already filed the application for default judgment (but before judgment is granted), such plaintiff is entitled to costs.

12.3.2.2 Failure to file a plea

Study Rule 31(2)

Once again **study** Rule 31(2). What has been said above as regards this Rule, applies here as well. It is, however, **very important** to note that, although this Rule refers to a defendant who "is in default of ... a plea", and thus creates the impression that default judgment may be requested where the defendant is late in delivering a plea, the position is that a notice of bar must **first** be delivered. Only where the defendant still fails to deliver the plea, will he or she be in default. Refer to Rule 31(4) which deals with the procedure in respect of set-down of an illiquid claim, yourself.

12.3.2.3 Failure to deliver a declaration

Study Rule 31(3); Rule 31(4)

Study Rule 31(3) together with Rule 31(4) as regards the procedure for set-down. Note that here, the plaintiff fails to deliver a pleading and, because a pleading other than a replication or one of the ensuing pleadings is in issue, a notice of bar must first be served on the plaintiff. Should the plaintiff thereafter fail to deliver a pleading, he or she will be in default and will *ipso facto* be barred from doing so. Take note of the orders which the defendant may request, namely

(1) absolution, owing to the fact that the plaintiff has not proved his or her claim

or

(2) "judgment" (This simply means that a judgment in contrast to that which is granted against a defendant, is requested; in other words, instead of a claim being allowed, it is requested that a claim be dismissed.)

12.3.2.4 Failure to appear at the trial

Read Rule 39(1); 39(3)

Here pleadings are exchanged in the normal manner, and, after close of pleadings, the case is set down. Merely **read** Rule 39(1) and 39(3) with regard to the types of orders which may be granted.

12.3.2.5 Setting aside of default judgment

In terms of Rule 31(2)(b) a defendant may, in respect of a claim not for a debt or liquidated demand, within 20 days after he or she has knowledge of a default judgment, apply to court to set aside such judgment. In terms of Rule 31(5)(d) a defendant may, in respect of a claim for a debt or liquidated demand set the matter down for reconsideration by the court.

Note that the court has a **discretion** whether or not to set aside a judgment. The defendant must also advance sound reasons for the failure concerned.

The courts have held that "sound reasons" mean that

(1) a reasonable explanation must be given for the failure
(2) the application must be *bona fide* and not merely a delaying tactic
(3) the defendant must have a *bona fide* defence

Once again "application" does **not** refer to a notice of motion.

12.4 SUMMARY JUDGMENT

Summary judgment procedure is designed to protect a plaintiff, who has a claim of a particular nature, against a defendant who has no valid defence to his or her claim, and who has simply entered an appearance to defend for the purpose of gaining time and preventing the plaintiff from obtaining the relief he or she seeks and deserves.

Summary judgment should not be granted lightly, and the courts will deprive a defendant of his or her defence in this manner only in clear cases. The courts are cautious and conservative in this regard because of the *audi alteram partem* rule, since summary judgment procedure does to a certain extent infringe on this principle.

12.4.1 Grounds

Study Rule 32(1)

Study Rule 32(1) so that you will be able to set out the types of claims which may give rise to an application for summary judgment.

You will immediately realise that these types of claims fall within the definition of a "debt or liquidated demand" (see study unit 6.2 which deals with an ordinary/simple summons). Rule 32(1) furthermore refers to a defendant's notice of intention to defend, which indicates that an action has already been instituted. This application is thus made within the framework of existing proceedings. From what has already been said, it should be clear that an application for summary judgment should follow only from a simple summons.

Note: We are aware that in some divisions a new practice emerged, namely allowing an application for summary judgment where the action was instituted by means of a combined summons. This practice is not recommended.

12.4.2 Procedure and content of affidavit

Rule 32(2) provides that the plaintiff must, within a specified period after receipt of a notice of intention to defend, deliver a notice of application for summary judgment, together with an affidavit made by himself or herself, or by someone else who can confirm the facts upon which the cause of action and the amount (if any) are based. The affidavit must indicate

(1) that, in his or her opinion, there is no *bona fide* defence to the action
(2) that the purpose of entering appearance is merely to delay the action

No further averments are permitted.

If the claim is based on a liquid document, a copy thereof must be attached to the application. In addition, the application must contain a date on which the application will be heard.

12.4.3 Courses of action which the defendant may take in response to the application

Study Rule 32(3)

Study Rule 32(3) in this regard. We merely wish to point out that, although the plaintiff is not permitted to include evidence in support of his or her claim in the affidavit (see Rule 32(4)), the defendant must **fully disclose the nature and grounds of his or her defence.** The reason for this is related to the **nature** of the claim (ie that it is liquid, which means, inter alia, that it is certain and fixed), which, in turn, results in the fact that the court grants summary judgment on the assumption that the plaintiff's claim is unimpeachable. Consequently, the defendant must convince the court that this is not in fact the case.

12.4.4 Powers of the court when hearing the application

Although the parties are not permitted to cross-examine anyone who gives *viva voce* evidence or evidence under oath, the court may put questions for the purposes of clarification. If the defendant provides security, or convinces the court that he or she has a *bona fide* defence, the court will grant the defendant leave to defend. In this instance, the case proceeds as if there had been no application for summary judgment. If the court does not grant such leave, summary judgment is granted against the defendant.

12.4.5 Costs

Read Rule 32(9)

Read Rule 32(9) and note that, where either the plaintiff or the defendant acts unreasonably or improperly in summary judgment proceedings, he or she can, for such conduct, have an order as to costs awarded against him or her on the attorney and client scale.

12.4.6 Summary dismissal

Summary dismissal is the counterpart of summary judgment procedure and affords the defendant an inexpensive and speedy method of dismissing the plaintiff's action if it is vexatious or frivolous. The High Court has inherent jurisdiction to prevent an abuse of its process.

ACTIVITY

(1) Briefly state the grounds on which summary judgment may be requested.

.....

.....

.....

.....

(2) Briefly explain the procedure which must be followed when judgment by default is requested where the plaintiff fails to deliver a declaration.

.....

.....

.....

Go back and read through the set of facts at the beginning of this study unit, and then answer the following questions:

(3) Briefly explain the procedure which the plaintiff in the first set of facts must follow to acquire judgment by default.

.....

.....

.....

.....

.....

(4) **Name** the procedure that the plaintiff in the second set of facts may follow in the given circumstances.

.....

(5) Explain what action the defendant may follow in reply to the procedure mentioned in (4) above.

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FEEDBACK

(1) The grounds are clearly set out in Rule 32(1) and require no further explanation. Write down the grounds yourself in the space provided above.

(2) The procedure is clearly described in Rule 31(3) and 31(4). Summarise this procedure yourself in the space provided above. Write it down as you would answer an examination question.

(3) Firstly, the pleading which follows the notification of intention to defend is naturally the plea on the merits. Consequently, before the plaintiff may apply for judgment by default, it will first mean a notification of bar of the defendant. If the defendant still fails to deliver the plea, the plaintiff can go on to request a judgment by default.

Secondly, the claim is one for compensation for damages. This means that the claim is **unliquidated.** Consequently, the plaintiff must approach the court in terms of Rule 31(2) and evidence in respect of the *quantum* of the claim must be led.

(4) An application for summary judgment.

(5) You must also answer this question on the basis of Rule 32(3). The actions open to the defendant are set out clearly in this Rule and do not require any further explanation.

STUDY UNIT

13

PREPARATION FOR TRIAL

S and T are involved in a car accident. S suffers some serious injuries to his back and has had to have several operations. It is also expected that he will have to have future operations to his back. S sues T and claims damages. The pleadings are closed and both parties begin to prepare for the trial. On the one hand, both parties must be informed of the steps which may be taken to prevent them from being caught unprepared by the opposing party at the trial. On the other hand, they must also be informed about the steps they must take to shorten the trial as required by the Rules. In conclusion, the parties must also be informed on how they may present their evidence to the court.

Overview

Learning outcomes

Once you have studied this study unit, you should

- be familiar with both the steps that may be taken as well as the steps which must be taken during the preparation phase of the trial
- understand the purpose of the steps taken during the preparation phase
- be familiar with the ways in which evidence can be submitted to the court

Compulsory reading material

Rule 21; Rule 35; Rule 36; Rule 37; Rule 38(2)–(8)

13.1 INTRODUCTION

Study units 13.2 to 13.4 deal with the steps that have to be taken by the litigants in a civil action in order to prepare their cases for trial. Although all the topics which will be dealt with in study units 13.2 to 13.4 do not fall into the chronological order we have thus far maintained, we are nevertheless of the opinion that they are related to one another and that discussing them together will lead to a better understanding of such topics. The topics may, generally speaking, be divided into two broad categories, namely steps which may be taken both before and after the close of pleadings, and steps which may be taken only after the close of pleadings. These various steps may serve one, or both, of two functions. They are either taken to obtain information from another party to the action, or they are taken in order to allow the party taking them to adduce certain evidence.

13.2 STEPS WHICH MAY BE TAKEN BOTH BEFORE AND AFTER THE CLOSE OF PLEADINGS

13.2.1 Medical examinations

Rule 36(1) to (3), Rule 36(5) and (5A), and Rule 36(8) are relevant here.

Note that the Rule applies only where a party to an action claims compensation or damages in respect of an alleged physical injury and **if** the party's **state of health is relevant** in the determination of the amount.

Any party causing such an examination to be undertaken must ensure that the person conducting the examination provides a complete, written report on his or her findings (Rule 36(8)(a)); must, on request, furnish any other party with a complete copy thereof (Rule 36(8)(b)); and must bear the expense of the examination (Rule 36(8)(c)).

13.2.2 Examination of inanimate objects

Rule 36(6) and (7) is of relevance here.

This examination is relevant where the condition of the inanimate object may have a bearing on deciding a point of dispute in an action.

Note that this examination can be applied to any sort of action.

13.2.3 Medical reports, hospital records, x-ray photographs and similar documents

Rule 36(4) is of relevance here.

Any party who is entitled to demand a medical examination such as that set out in paragraph 13.2.1 above, may, by written notice, require that the above-mentioned documents be made available to him or her if they are relevant to the assessment of damages.

13.2.4 Expert evidence

Study Rule 36(9)

Rule 36(9) is of relevance here.

No party may, except with the leave of the court or with the consent of all parties to the action, make use of expert evidence, **unless** the provisions of the above subrule have been complied with. **Study** this subrule with regard to the requirements concerned.

The purpose of the abovementioned provisions relating to expert evidence is to prevent a party being surprised at the trial, and to give a party the opportunity of arriving in court prepared to rebut the expert evidence presented by the opposite party. If the expert witnesses themselves get together to exchange opinions, this could shorten the duration of the trial.

13.2.5 Admission of plans, diagrams, models and photographs

Study Rule 36(10)

Rule 36(10) is of relevance here.

In this case as well, the above-mentioned items may not be used as evidence unless certain requirements have been met. **Study** this subrule with regard to such requirements.

13.3 STEPS WHICH MAY BE TAKEN ONLY AFTER THE CLOSE OF PLEADINGS

13.3.1 Request for further particulars for trial

Study Rule 21(2)

Rule 21(2) is of relevance here.

Note that the request for further particulars for trial, and the reply thereto, do **not** form part of the pleadings which are exchanged. Also note that only **particulars that are, strictly speaking, necessary to prepare** for trial may be requested. This does not mean that the requesting party is entitled to know what **evidence** the other party is going to lead, but he or she is entitled to such particulars as are necessary to put him or her in a position to prepare for the trial and to prevent him or her from being taken by surprise by evidence given against him or her, which he or she could not reasonably anticipate would be produced.

13.3.2 The pre-trial conference

Study Rule 37

Rule 37 is of revelance here.

Rule 37(3)(a) now lays down that the conference must not take place later than six weeks before the date of trial. Although the purpose of the Rule has always been to shorten the trial, the present Rule contains numerous peremptory provisions (in contrast to the previously directory provisions) which indicate that a more serious effort is being made to achieve the purpose concerned. In fact, Rule 37(9)(a) now provides that, at the trial, the court must consider whether a special order as to costs should not be made against a party, or his or her attorney, owing to failure to attend the conference, or because there has been substantial failure to promote the effective disposal of litigation.

Study Rule 37(4)–(7)

Study Rule 37(4) to (7) so that you are aware of the obligations with which the parties must comply before, during and after the pre-trial conference.

Also note that a conference may be held before a judge in chambers (see Rule 38(8)), after which minutes are prepared which must be filed with the Registrar.

Note: We shall not deal with Rule 37A at this stage, since it is still merely an experimental rule which, at the moment, applies only in the Cape Provincial Division.

13.3.3 Discovery of documents and tape recordings

You are not expected to study the specific sections of Rule 35, but are only required to **read** it. We recommend that you refer to Form 11 of the First Schedule for the formal appearance of a discovery affidavit. For study purposes, the information provided below is sufficient.

Save for the procedure created by Rule 35(14), discovery may not be requested until after the close of pleadings. The purpose of discovery is, as the name indicates, to ascertain from other parties to the action what documents and tape recordings are in existence which might be relevant to the action. This enables a party to prepare fully and properly for trial and prevents him or her from being taken by surprise. The party thus knows what documents are in existence which may assist him or her to establish his or her own case, or to break down the case of his or her adversary, or what documents may assist an opponent, or weaken his or her own case.

Discovery is obtained by written notice addressed to any party to the action to make discovery under oath within 20 days of such request.

Discovery relates to all documents relevant to any matter in dispute in the action (whether or not such matter is one arising between the party requiring discovery and the party required to make discovery) which **are, or have at any time been, in the possession or under the control** of such other party.

Discovery must be made within 20 days, and is made by disclosing the necessary information in an affidavit — known as a discovery affidavit.

In this discovery affidavit the party making discovery must set out

(1) those documents relating to the matters in dispute in the action which are in his or her possession or are under his or her control
(2) those documents which, although relating to the matters in dispute in the action and being in the party's possession or control, the party objects to producing, and the reasons for such objection must be stated
(3) those documents which he or she has had in his or her possession or which were under his or her control, but which he or she does not now have in his or her possession or which are not now under his or her control. Such party must also state when such documents were

last in his or her possession or under his or her control, and where such documents now are.

If the party who requires discovery believes that certain documents have not been disclosed, such party may, in terms of Rule 35(3), require the party who has made discovery to make them available for inspection in accordance with Rule 35(6), or to state under oath that such documents are not in his or her possession, in which event he or she must state their present whereabouts if known.

A party may validly object to the discovery of a document if he or she is able to claim privilege for its contents. Examples are communications made "without prejudice", incriminating documents and documents which affect the security of the state. Privilege is usually seen as a matter falling within the law of evidence, so see your study guide for the Law of Evidence, and, for a more complete discussion of privilege, also see 25.3 *infra*.

13.3.4 Inspection of documents and tape recordings

Once a party has received the discovery affidavit from an opponent, he or she will, of course, be anxious to discover precisely what the documents are, and what they contain. In order to achieve this, the party so discovering may be required in terms of Rule 35(6) to make available the documents disclosed (with the exception, of course, of those documents which the party discovering may validly object to disclosing) for inspection and copying. The party on whom the notice is served, may choose the time and place of production.

13.3.5 Specifying documents and tape recordings to be used at the trial

After the close of pleadings, a party may require any other party to specify in writing particulars concerning the dates of and parties to any document which is intended to be used at the trial on behalf of such party. The party so requested must specify whether or not the document is in his or her possession and must provide the particulars regarding such document as are required in Rule 35(8). Merely **read** this for information purposes.

13.3.6 Production of documents and tape recordings (Rule 35(10))

Any party may give notice to any other party who has made discovery of a document, to produce the original of such document in the party's possession at the hearing. When the document is so produced at the hearing, the party who has requested its production may simply hand in the document as an exhibit, which will then be admissible as evidence as if it had been produced in evidence by the party in whose possession it was.

13.3.7 Set-down of cases for trial

The plaintiff is *dominus litis* and consequently has the right to apply for set-down in the first instance. After pleadings have closed, the plaintiff may, by giving notice to the Registrar, forthwith set down the case on the roll for the allocation of trial dates. If the plaintiff neglects to do so within a certain period after close of pleadings, the defendant may set the matter down in a similar manner.

Set-down is governed by the rules of the various provincial divisions, and not by the Uniform Rules of Court.

13.3.8 Transfer of cases

Section 9 of the Supreme Court Act 59 of 1959 provides that application may be made to have proceedings transferred from one division of the High Court to another.

Removal is not a matter of right but of discretion, and each case must be judged according to own facts and circumstances. The broad basis on which a court will exercise its discretion is whether it would be more convenient to hear or determine the case at the suggested new venue.

13.4 SECURING THE NECESSARY EVIDENCE

13.4.1 Advice on evidence

On commencement of the preparation phase, it is advisable to request advice concerning evidence for the purposes of the trial from the advocate who will be appearing in the proceedings. Copies of all pleadings and other relevant documents are forwarded to the advocate. After consideration thereof, the advocate will indicate whether the available evidence is adequate, how it must be proved at the trial, and which witnesses will be necessary. Usually, the advocate also indicates what the chances of success are in the action.

13.4.2 Ways in which evidence may be placed before the trial court

(1) Unless special circumstances exist, a witness must give evidence *viva voce* and in open court (Rule 38(2)).

If a person is within the Republic, such a person can be compelled to attend any High Court in the Republic by issuing a subpoena from the office of the Registrar and by having it served on the witness required by the Sheriff (Rule 38(1))

The form and contents of the subpoena have to conform to Form 16 of the First Schedule of the Act.

Note that, where a witness is required by a subpoena to make available at the trial a document, instrument or object which is in his or her possession, or is under his or her control, such a subpoena is termed a *subpoena duces tecum.*

(2) If a witness cannot give evidence in person, and if the necessary circumstances are present, he or she may be allowed to give evidence in the following ways:

(a) on commission (commission *de bene esse*)

Study Rule 38(3) to (8)

Study Rule 38(3) to (8) in **broad outline** so that you know when a court will order this, in what way evidence is given, and in what way such evidence is placed before the trial court. Note that application must be made to the court for evidence to be given in this way.

(b) by way of interrogatories

Interrogatories differ from commissions *de bene esse* in that, while in the latter case

evidence is given generally, in the former case specific evidence only is taken, and for this purpose specific questions are formulated which must be put to the witness by the commissioner.

(c) by way of affidavit

Study Rule 38(2)

Study Rule 38(2) in broad outline so that you know when evidence will be taken down by way of affidavit, and when such practice will not be permitted.

The courts are reluctant to grant such leave, and are usually disposed to do so only when the evidence so required is of a formal nature.

ACTIVITY

(1) With reference to the set of facts at the beginning of the study unit, simply **name** the different steps that the plaintiff will have to take in preparation for his case.

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(2) Briefly indicate when evidence may be taken down by way of affidavit and when this will not be permitted.

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FEEDBACK

(1) The plaintiff will have to give notice of his intention to call expert witnesses and will also have to make summaries of their evidence available to the opposing party; notice will also have to be given of any plans, photographs, et cetera which will be used. (Remember, this was a collision and in all likelihood there will be a police plan and possibly even photographs of the scene of the accident.) The plaintiff will also request further details for trial purposes, will have to disclose documents, request inspection of the defendant's discovery and possibly also demand that the defendant specify documents that he is going to use in the trial. (Note that the steps will depend on the facts of the particular case and that not necessarily all the steps will be taken in every case.)

(2) The court will permit it **if there is adequate reason.** If the court believes that the opposing party has reason to want to cross-examine a witness, and the witness can be brought before court, evidence by way of affidavit will not be permitted.

STUDY UNIT

14

THE TRIAL AND COSTS

X and Y are involved in litigation. During the preparation for the trial, X's attorney comes across some documents which are in X's possession and which support Y's case. He intentionally fails to disclose these documents. X and his attorney also make it impossible for Y's attorney to consult certain witnesses. During the trial, it appears that such a consultation would have shortened the trial considerably and that the witnesses support Y's case in an important respect. Both these things are disclosed during the trial. The question is what would an appropriate action against X and his attorney be.

Overview

Learning outcomes

Once you have finished studying this study unit, you should

- be familiar with the trial procedure and certain related matters
- be familiar with the principles which determine the granting or not granting of costs and be able to apply them in practice

Compulsory reading material

Rule 39

14.1 CONDUCT OF THE TRIAL

14.1.1 General trial procedure

The procedure to be followed during a trial is set out in Rule 39. You are not expected to study the relevant provisions in detail, but you must read them for background purposes. The information which follows is sufficient for study purposes. A reading knowledge of such information will be adequate.

All cases are set down for trial on specific dates. When the trial date arrives, the cases set down for that day are called. The advocates then indicate whether they are ready to begin with a specific case (ie that the case has not been settled and that a postponement is not requested), and what the duration of the case is expected to be. A court is then assigned for the trial of the case.

If the burden of proof is on the plaintiff, his or her advocate will address the court first and will briefly outline the facts he or she intends to prove to found his or her cause of action. He or she will then call the various witnesses (including the plaintiff) who can attest to these facts.

The plaintiff's advocate will ask each of his or her witnesses brief questions to guide them through their evidence-in-chief. After a witness has given this evidence, the defendant's advocate may cross-examine him or her. The plaintiff's advocate will then, by way of re-examination, attempt to minimise or eradicate problems or ambiguities which have arisen from cross-examination.

Once all the plaintiff's witnesses have given evidence and have been cross-examined, the plaintiff will close his or her case. If the defendant is of the opinion that a *prima facie* case has not been made out by the plaintiff, he or she may at this stage ask for absolution from the instance. If this is not requested or not granted, the defendant's advocate will briefly outline the facts he or she intends to prove and will call his or her witnesses. All defence witnesses may be cross-examined by the plaintiff's advocate.

After the defendant has closed his or her case, the advocates for both parties address the court on the interpretation of the facts presented to the court and on any legal points arising therefrom.

Thereafter, judgment is either given immediately or the trial is postponed for the judge to consider the evidence and give judgment at a later date. Together with a judgment on the main issues, the court will also make an order as to costs. In this regard, see study unit 14.2.

All superior courts are courts of record, and a record must be made of all evidence, arguments and judgments. This record is usually either taken down in shorthand or is mechanically recorded. The record is, however, not transcribed unless the court so directs, or unless one of the parties requests a transcript.

14.1.2 Re-opening a case already closed

The general rule is that a party who has closed his or her case is not entitled to present further evidence, save in rebuttal. This rule, however, may be departed from at the court's discretion.

A party's application for leave to reopen a case for the purpose of leading new evidence will usually be judged according to the following principles, as enunciated in various decisions of the High Court:

(1) It must be shown that the applicant has displayed proper diligence in endeavouring to procure the evidence at the trial.
(2) When it can be shown that the applicant did not search for the evidence he or she now seeks to adduce, because he or she could not reasonably have known that it was relevant to the case, the court may grant him or her leave to re-open his or her case in order to lead this evidence. The applicant cannot, however, claim that he or she has been taken by surprise because the particular issue on which he or she wishes to lead evidence does not appear in the pleadings, if such issue is in fact fully canvassed in evidence during the trial.
(3) The evidence which the applicant proposes to lead must be material. It is, however, not necessary to show that the evidence would, if believed, be practically conclusive.
(4) The court must always bear in mind the danger of prejudice to the opposite party in so far as the possibility exists that the latter might not be able to recall his or her witnesses.

14.2 COSTS OF THE ACTION

We now return to the stage in the proceedings when the court has delivered its judgment on the main issues before it, and has to consider the question of costs.

A court has a wide discretion when awarding costs. That a party who loses a case will automatically be ordered to pay the winner's costs, is by no means a foregone conclusion. Factors which play a role and which are considered by the court are, for example, the conduct of the parties and any fact which may be relevant. The court is guided by the question as to what order regarding costs would be correct and equitable in the circumstances of a specific case.

The most important types of cost order will now be discussed.

14.2.1 Costs payable by the client to his or her attorney

Costs payable by the client to his or her attorney are commonly referred to as "attorney and client costs".

14.2.1.1 Meaning of the concept

The liability of a client to pay costs to his or her attorney arises from the contractual relationship between them and is wholly unrelated to the outcome of the legal proceedings in which he or she may have been involved. These costs, payable by a client to his or her attorney in terms of the contract between them — "attorney and client costs" properly called — include remuneration for **all** professional services rendered by the attorney as well as all expenses incurred by the attorney (including counsel's fees) in the execution of his or her client's instructions.

It is important that an attorney agrees with a client on the costs payable at the commencement of his or her mandate where costs are not statutorily fixed. The utmost care should be taken to ensure that costs are not excessive. A client who feels that costs are excessive may have such costs taxed. Practitioners found guilty of charging excessively may be struck off the roll. The various law societies provide guidelines for practitioners to assist them in determining reasonable costs.

14.2.1.2 The awarding of attorney and client costs

A court will not lightly grant attorney and client costs. The most common ground on which a court will order a party to pay the other party's attorney and client costs is that where the former party has been guilty of dishonesty or fraud in conducting the suit, or where his or her motives have been vexatious, reckless or malicious, or where he or she has seriously misconducted himself or herself in the course of the proceedings. Apart from the court's inherent power to grant attorney and client costs, there are also the following two cases where the court has such a power:

Read Rule 32(9)(a)

(1) Rule 32(a)(a). As an illustration, **read** this Rule yourself.

(2) Section 50 of the Magistrates' Courts Act 32 of 1944 where the removal of a case to the High Court by a defendant was unnecessary.

14.2.2 Party and party costs

14.2.2.1 Meaning of the concept

Party and party costs are those costs which have been incurred by a party to legal proceedings **and which the court orders the other party to pay him or her.** These differ from attorney and client costs, in that they do **not** include **all** the costs which the party to litigation may have incurred, but only such costs, charges and expenses as were incurred in the actual litigation and which are allowed by the Taxing Master.

The foregoing requires a word of explanation: the Taxing Master is a civil servant who is attached to the office of the Registrar of each Supreme Court and whose function it is to check bills of costs. This he or she does according to a tariff, in which is laid down the maximum fee permitted for each item in the litigation process (see Rule 70); for example "Taking instructions to sue", "Issue of summons", "Attending court, per hour", and so forth. According to this Taxing Master's view of the complexity of the case, he or she decides whether or not the fee charged by the attorneys is reasonable. Once a "reasonable" figure has been ascertained, the bill of costs is then presented to the other party for payment.

But, as mentioned earlier, only costs incurred in the actual litigation process are included in this amount. Generally, costs incurred before the issue of summons are not considered party and party costs, for example the cost of obtaining counsel's opinion as to a party's prospect of success in a contemplated action.

The result is, as you will realise, that a party who wins a court case and who is awarded party and party costs, does not have **all** his or her expenses paid by the loser. Only his or her taxed party and party costs are paid — the balance owing to his attorneys will have to be paid out of his or her own pocket, unless, of course, attorney and client costs are awarded by the court.

14.2.2.2 The awarding of party and party costs

The general principles regarding the awarding of party and party costs may be summarised as follows:

(1) As a general rule, the successful party is entitled to his or her costs.

(2) In determining who the successful party is, the court must look to the substance of the judgment and not merely its form.
(3) Although the general rule is that costs are awarded to the successful party, the court may, in its discretion, deprive the successful party of part, or all, of his or her costs. In exercising his or her discretion in this regard, the judge will take into account the following circumstances in connection with the successful party's conduct:

    (a) whether the demands made are excessive
    (b) how the litigation was conducted
    (c) the taking of unnecessary steps or the adoption of an incorrect procedure.
    (d) misconduct

14.2.3 Costs *de bonis propriis*

This cost order is relevant only where a person acts in a representative capacity.

ACTIVITY

(1) Briefly discuss in what two important ways attorney and client costs and party and party costs differ from each other.

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(2) Re-read the set of facts at the beginning of the study unit. Identify the type of order as to costs applicable in these circumstances. Explain briefly.

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FEEDBACK

(1) Attorney and client costs arise out of the contractual relationship between client and attorney and are not at all related to possible litigation. Party and party costs, however, are those costs which a party incurs on taking legal steps and which are payable by an opposing party in terms of a court order. However, these costs are only estimated costs and expenses, while attorney and client costs are remuneration for all professional services and expenses flowing from the attorney's mandate and are not statutorily fixed. Party and party costs are taxed by the Taxing Master in accordance with a fixed prescribed scale, thus ensuring that only such charges and costs actually incurred in the course of litigation are allowed. Attorney and client costs are a form of punitive measure for improper behaviour.

(2) Attorney and client costs. The actions of X and his attorney point to misconduct: the intentional non-disclosure of documents and the obstruction of access to a witness are unacceptable behaviour in the conduct of a trial.

STUDY UNIT

15

ENFORCEMENT OF JUDGMENT

K sues L for damages on the ground of breach of contract. K succeeds in his action and the court orders L to pay K damages to the amount of R200 000. Despite reminders, L refuses and/or fails to do so. K wants to know if there are any legal steps that he can take against L, since asking nicely has not worked.

Overview

Learning outcomes

Once you have finished studying this study unit, you should

- be familiar with the purpose of the enforcement of judgment
- be familiar with the distinction between the enforcement of orders *ad pecuniam solvendam* and orders *ad factum praestandum*

Compulsory reading material

None

15.1 INTRODUCTION

Litigation is not instituted to obtain a judgment *per se* — which is merely a piece of paper — but the relief which was requested, that is, enforcement of the judgment. Procedures exist which compel the party against whom judgment has been given to comply with such judgment, if he or she refuses to do so voluntarily.

No judgment or order of a court would be of any use to a successful plaintiff if it could not be enforced, for the very object of litigation is to obtain the money or other relief claimed. If the defendant refuses to comply voluntarily with the judgment, steps must be taken to enforce such judgment. The process whereby satisfaction of any judgment, decree or sentence is enforced is known as execution.

Example

Judgments of court can either be of immediate effect or of such a nature that they demand compliance. An example of the former is a decree of divorce, whereas orders to pay a certain amount of money, or orders to pay maintenance of a certain amount per month, are examples of the latter.

Such judgments are subdivided into judgments *ad pecuniam solvendam* (ie judgments in which the debtor is ordered to pay a sum of money) and judgments *ad factum praestandum* (ie judgments in which a person is ordered to perform, or to refrain from performing, some act).

Note that judgments *ad pecuniam solvendam* are enforced against the **property** of the judgment debtor, while judgments *ad factum praestandum* are enforced against his or her **person**.

15.2 THE ENFORCEMENT OF JUDGMENTS *AD PECUNIAM SOLVENDAM*

15.2.1 Enforcement by means of execution against the debtor's property

If a debtor does not voluntarily comply with a judgment *ad pecuniam solvendam*, the creditor may approach the Registrar of the court to issue a writ of execution. This writ is addressed to the Sheriff, who is required to execute it by attaching property of the debtor and by selling this in execution to satisfy the judgment.

The attachment which takes place in this instance must be distinguished from attachment for jurisdictional purposes which was discussed in Module 1. The former takes place **after** judgment and the provisions of section 26(1) apply, that is, attachment can take place anywhere in the Republic. The two types of attachment differ fundamentally as regards their purpose — in the present instance attachment takes place so that the attached property can be sold to pay the judgment debt, while, for jurisdictional purposes, attachment takes place to vest a court with jurisdiction and the property is not sold, but is merely secured until judgment.

Movable property must be attached and sold in execution before immovable property. Immovable property can only be attached and sold in the following three cases:

(1) Where a writ has been issued against the movables and the Sheriff has made a *nulla bona* return, that is, has indicated that no movable property exists which can be attached.
(2) Where a special order, setting out that there is no movable property which can be attached and sold in execution, has been made by the court on notice of motion to the debtor.
(3) Where, at the time when judgment was obtained, the court made a special order declaring

certain property executable, for example in the case of provisional sentence in respect of a mortgage bond.

A debtor's rights in respect of incorporeal property may also be attached in execution.

15.2.2 Enforcement against the debtor's person

The process used in this type of enforcement was known as *civil imprisonment*, but such process was abolished by the Abolition of Civil Imprisonment Act 2 of 1977.

If, therefore, a debtor has no assets or income against which execution can be levied, the judgment cannot be enforced.

15.3 THE ENFORCEMENT OF JUDGMENTS *AD FACTUM PRAESTANDUM*

As stated above, judgments *ad factum praestandum* direct a person to perform, or to refrain from performing, a specific act. Examples of such orders are orders to transfer property, to deliver movable property or to allow a right of way.

The general remedy available to the party in whose favour a judgment *ad factum praestandum* has been given, is the common law concept of contempt of court. Contempt of court constitutes a criminal offence, notwithstanding the fact that the judgment in question has been given in a civil case.

Although it is possible to lay a criminal charge against the judgment debtor and for a state prosecution then to take place, what usually happens is that the judgment creditor institutes civil proceedings for contempt. He or she approaches the court by means of a notice of motion for an order to commit the defendant to prison for contempt. The court will, as a rule, suspend imprisonment pending compliance with the original court order.

The requirements for an order to commit the defendant for contempt of court are

(1) the existence of an order *ad factum praestandum*
(2) knowledge by the defendant of the order, usually, but not necessarily, as a result of its having been served on him or her
(3) the ability of the defendant to comply with the order
(4) disobedience of the order; and
(5) wilfulness on the part of the defendant regarding the disobedience of the order

ACTIVITY

Briefly distinguish between orders *ad pecuniam solvendam* and orders *ad factum praestandum* in respect of their nature and means of enforcement.

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FEEDBACK

Orders *ad pecuniam solvendam* are orders in terms of which the debtor is ordered to pay a sum of money, while orders *ad factum praestandum* are orders in terms of which a person is ordered to perform or not to perform a certain action.

Orders *ad pecuniam solvendam* in respect of the defendant's property are enforced by means of a writ for execution, whereas orders *ad factum praestandum* in respect of the person of the debtor are enforced by means of a contempt of court.

STUDY UNIT

16

INTERDICTS AND EXTRAORDINARY PROCEDURES

Ben's neighbour has a row of pine trees on his property which runs the entire length of the border they share. The trees are very old and are all taller than 15 metres. One afternoon on returning home from work, Ben sees that his neighbour is making preparations to chop down the trees with the help of some untrained workers. His road is blocked by branches that have already been chopped off and which have fallen onto his property. He notices that the wall that divides the properties has already been damaged and that some branches are caught in the electric fence on top of the wall. By looking at the way in which some of the trees are being chopped down, there is the distinct possibility that not only will his wall be seriously damaged but also his house if the trunks fall in the wrong direction. B's neighbour refuses to stop cutting down the trees and points out that his house is cold and damp because of the deep shade of the trees. He also argues that they are his trees and that he can do what he likes on his property. Ben is highly upset and phones his attorney with the request that he "do something".

Overview

Learning outcomes

Once you have finished studying this study unit, you should be familiar with the

abovementioned unique procedures. The aims of this study unit are best explained by means of the following short commentary on these procedures:

INTERDICTS

When studying this unit, bear in mind that an interdict is a remedy (ie a form of relief) and not a specific procedure.

Existing procedures (ie action or motion proceedings) are used to obtain this relief. The procedure which is used depends, as always, on whether a material dispute of facts exists, or, alternatively, on whether a final determination of rights is sought.

For this reason, a clear distinction must be drawn between final and temporary interdicts, and between the requisites for the granting of each type.

Extraordinary procedures

Brief descriptions are given of various procedures which do not conform to the usual action or application proceedings. In practice, these procedures are rarely used and you must merely be aware that they exist.

Arrest *suspectus de fuga*

A clear distinction must be drawn between this form of arrest and arrest for jurisdictional purposes. Bear in mind that the latter form of arrest cannot be used to enforce a judgment, but serves merely to keep a debtor in the Republic until judgment is given.

A specific procedure is prescribed by Rule 9, and such procedure should be studied in broad terms. Note the differences between this procedure in the High Court and that in the magistrates' courts.

16.1 THE INTERDICT

An interdict may be defined as a summary remedy of an extraordinary nature, the object of which is to protect a person against the unlawful deprivation of his or her rights.

16.1.1 The different kinds of interdicts

16.1.1.1 Prohibitory interdicts

A prohibitory interdict is an interdict in the more literal and restricted sense of the word, and may be described as an order requiring a person to abstain from committing a threatened wrong, or from continuing an existing one.

16.1.1.2 Mandatory interdicts

A mandatory interdict is an order compelling a person to perform some positive act in order to remedy a wrongful state of affairs which the respondent has brought about, or to do something which he or she is in law obliged to do if the complainant is not to be deprived of his or her

rights. Where the act to be carried out must be performed by a public official, the order is called a *mandamus*.

16.1.1.3 Restitutory interdicts

Where a person is unlawfully disturbed in the possession of property, he or she is entitled to immediate restitution — even before the merits of the dispute are investigated by a court. This type of order restores the *status quo ante* and is known as a *mandamenten van spolie*.

16.1.2 The requirements for an interdict

16.1.2.1 Distinction between temporary and final interdicts

An interdict may be either temporary or final. A temporary interdict is an order granted provisionally, and does not finally determine the rights of the parties. It is granted on an interim basis and remains in force only until the respective rights of the parties have been finally determined by the court.

A final interdict, as the name suggests, is of permanent effect. The requirements for these two types of interdicts differ, and will be dealt with separately.

16.1.2.2 Final interdicts

The requirements for the granting of a final interdict are

(1) **a clear right** established on a balance of probabilities
(2) an actionable wrong or interference already committed, or, at least, a reasonable apprehension that such an act will be committed
(3) the absence of any other ordinary and satisfactory remedy affording similar protection to the applicant

Generally speaking, the fact that the applicant may sue for damages, and that such damages will provide adequate compensation, is sufficient to bar an application for an interdict where the infringement of the right is capable of being assessed in monetary terms.

There are three exceptions to this general rule. Even if the injury could be compensated for by awarding damages, the court will usually grant an interdict if

- the respondent is not financially competent to pay any award of damages, or
- the injury is a continuing violation of the applicant's rights, or
- the amount of damages is difficult to assess

16.1.2.3 Temporary interdicts

The requirements for the granting of a temporary interdict are as follows:

(1) There must be a **clear right** or, if this cannot be established, one that is *prima facie* established, though open to some doubt.
(2) If the right is established only *prima facie*, the applicant **must show in addition**, that, if the interdict were to be refused, he or she would suffer **irreparable** harm, whereas, if the interdict were to be granted, the respondent would not suffer such irreparable harm.
(3) The balance of convenience must favour the granting of the interdict. The court must weigh

up the prejudice which each of the parties will suffer if the interdict is granted or refused, and, if there is greater possible prejudice to the respondent, will refuse to grant the interdict.

(4) There must be no other satisfactory remedy available to the applicant.

***Myflor Investments (Pty) Ltd v Everett NO* [2000]1 All SA 586 (C)**

(See *Myflor Investments (Pty) Ltd v Everett NO* [2000]1 All SA 586 (C).)

16.1.3 Procedure

(1) Although final interdicts are usually sought by way of action, they may also be sought by way of notice of motion where the facts are not in dispute.

(2) Where a temporary interdict is sought, the applicant always approaches the court by way of notice of motion. Temporary interdicts are always sought by way of the application procedure and will be granted despite the existence of a factual dispute, **provided** the applicant fulfilled the requirements set out above (see 16.1.2.3).

A temporary interdict will, if granted, be valid only

(a) until action has been instituted to establish the rights of the parties, where a dispute of fact exists, or
(b) until the application which was launched to obtain the temporary interdict is finally determined, or
(c) until the order is confirmed on the return day stated in the temporary order

Once the dispute has been finally determined, the temporary interdict will be confirmed (ie will have the effect of a final interdict), or, if not confirmed, will cease to be of any effect.

(3) In matters of urgency the applicant approaches the court by way of application, without giving notice to the respondent. In such a case, a *rule nisi* is issued, calling on the respondent to show cause on the return day why the rule should not be confirmed and an interdict granted. Here, the *rule nisi* operates as a temporary interdict pending confirmation on the return day.

On the return day, the court has a wide discretion as to whether it should grant an interdict, and, if so, on what terms. Where there are facts in dispute which cannot be settled on the papers, the court will usually refer the matter to trial, with the temporary interdict remaining in force *pendente lite*.

16.2 EXTRAORDINARY PROCEDURES

16.2.1 Cases where no pleadings or processes are filed

We shall now proceed to deal with some of the cases in which proceedings may be initiated by means of summons, but in which no pleadings are filed; or may be initiated by means of notice of motion, but in which no replying and answering affidavits are filed.

16.2.1.1 Special cases

It may happen that the parties to a dispute agree about the facts of the case, but differ from each other as regards the **legal conclusion** which may be drawn from the facts. Rule 33 lays down that the parties may agree, after the institution of proceedings, (which may be by summons or notice

of motion) to a written statement of facts in the form of a special case for the adjudication of the court.

In practice, this rule is not often implemented — even in motion proceedings where no material dispute of fact exists, the parties are seldom in agreement to the extent that a special case may be drafted.

16.2.1.2 Questions of law on appeal

(1) Rule 49(10) provides that, when the decision of an appeal from a single judge to the full bench of the court depends exclusively on a point of law, the parties may agree to submit the decision to the court in the form of a special case, in which event copies need be made only of such portions of the record as may be necessary for a proper decision of the appeal.

(2) Section 23 of the Supreme Court Act also makes provision for the position where different divisions of the High Court have given conflicting decisions on a point of law. In such instances, the Minister of Justice may submit the question to the Supreme Court of Appeal for argument and decision. All other divisions of the High Court will then be bound by the decision of the Supreme Court of Appeal.

16.2.1.3 Declaration of rights

In terms of the common law, the courts could not decide the future rights of parties: there had to be an actual infringement on a party's rights.

However, legislation changed the position. In terms of section 9(1)(a)(iii) of the Supreme Court Act 59 of 1959, the applicant must be an "interested party" to an "existing, future or conditional right or obligation". A "future right" means an already existing right which will be enforceable only in the future. There does not have to be an existing dispute between parties. However, a court will not decide on matters which are completely academic. Depending on whether there is a factual dispute or not, a declaration of rights can be made by means of a summons or motion proceedings.

16.2.1.4 De lunatico inquirendo

When it is suspected that a person is of unsound mind, or that he or she is incapable of managing his or her own affairs on account of some mental or physical defect, an application may be made to court for an order in terms of which such a person is declared of unsound mind, or is declared incapable of managing his or her own affairs, and in terms of which a curator is appointed to manage the affairs of such person. A form of *ex parte* application procedure is then used. This procedure is contained in Rule 57.

16.2.2 Perpetual silence and vexatious proceedings

16.2.2.1 Perpetual silence

In certain circumstances, a prospective litigant may be ordered to institute litigation within a specific time or be perpetually barred from doing so. Such an order will be requested

- if the applicant's rights are disturbed or interfered with by demands or threatened action or
- if his or her reputation is suffering damage or
- if a delay would prejudice the applicant's ability to defend the threatened action

In deciding whether such an order should be granted, the court has a discretion and will consider factors such as the nature of the claim, the likelihood of prejudice and the balance of convenience. The court may also consider the possibility of testimony being lost owing to the death of witnesses or the loss of documents.

16.2.2.2 Vexatious proceedings

Where there has been repeated litigation between the parties, the court may make a general order prohibiting further litigation without its leave. The Vexatious Proceedings Act 3 of 1956 governs this position. Before granting such an order, the court must be satisfied that the person has persistently and without reasonable grounds instituted proceedings. An order may be granted prohibiting the institution of proceedings for an indefinite period, or for such period as the court may determine.

16.3 ARREST *SUSPECTUS DE FUGA*

16.3.1 Introduction

An order of arrest *suspectus de fuga* is available to a creditor who fears that a debtor is about to leave the country to avoid payment of a debt. The arrest prevents the debtor from leaving the jurisdiction of the court — unless he or she can give security for the debt — so that the court can give an effective judgment. The arrest of the debtor remains in force only until judgment is given. It is thus an arrest to abide by the judgment of the court and not to perform the judgment.

If such a form of arrest were not available, a debtor could flee South Africa with his or her assets, if any, and the creditor would be powerless to enforce his or her claim, since a court would refuse to hear the matter because it would not be in a position to give an effective judgment, that is, a judgment which could be enforced.

Once judgment has been given, the arrest will cease to be effective. However, the creditor can then enforce the judgment in most countries of the world.

Note the distinction between this form of arrest and an arrest to found or confirm jurisdiction: an arrest *suspectus de fuga* will only be granted if that court has jurisdiction to hear the creditor's action, while an arrest to found or confirm jurisdiction serves to vest a court with jurisdiction (see Module 1). Note also that an arrest *suspectus de fuga* cannot be used to enforce a judgment — see study unit 15 which deals with the ways in which a judgment may be enforced.

Although, in theory, an arrest in terms of the common law is possible, in practice, all arrests *suspectus de fuga* take place in terms of Rule 9 of the Uniform Rules.

16.3.2 Procedure

Study Rule 9

Rule 9 sets out the procedure to be followed and must be **studied**. What follows is merely a brief description.

The procedure cannot be used unless the claim has a minimum value of R400. An arrest can take place either before or after summons has been issued. A writ of arrest is issued by the Registrar of the court, and an application to the court is not necessary. The writ authorises the Sheriff to arrest the debtor and also authorises the officer commanding the prison to which the Sheriff takes the debtor, to keep him or her imprisoned until security has been provided, or until the date on which the court hears the creditor's action (the return day).

An affidavit by the creditor plaintiff must accompany the writ. Study Rule 9(4) and (5) to ascertain what information must be included in the affidavit.

A debtor who has been arrested can obtain his or her release

(1) by providing security at the time of his or her arrest, or at any subsequent time, or
(2) by paying the Sheriff the amount mentioned in the writ, as well as all costs, or
(3) by satisfying the claim and costs mentioned in the writ, or
(4) when judgment is given (See in this regard Rule 9(8), (9) and (13).)

ACTIVITY

Simply **name** the procedures applicable in the given situations:

(1) X's 90-year-old father is sometimes found wandering around town where he arbitrarily withdraws money from the ATM and hands it out to onlookers.

.....

(2) Read the set of facts at the beginning of the study unit. Now act for your client.

.....

(3) A and B have been neighbours for fifteen years. In the third year in which they were neighbours, A was unsuccessful in an action against B, and since then has instituted six actions against B. Although all the actions appear different at first glance, the facts are only slightly different and the actions are essentially the same.

.....

(4) Y arrives at his holiday house one weekend. To his surprise, he sees that about ten people have taken possession of his property. When he tries to chase them away, they threaten him with serious bodily harm.

.....

(5) Z sues B. Z believes that B has two passports, that he has sold his luxury house and that his wife and children have already left for the country of which he is a second passport holder.

.....

FEEDBACK

(1) A *de lunatico inquirendo* application (or rather an application to declare him unfit to manage his own affairs).

(2) Prohibitive interdict.

(3) An order which prohibits vexatious proceedings.

(4) Restitution interdict.

(5) Arrest *suspectus de fuga*.

PART 2

Procedure in the Magistrate's Court

STUDY UNIT

17

THE APPLICATION PROCEDURE

Tom issues summons against Samuel in the amount of R50 000 for goods sold and delivered. Samuel undertakes to settle the matter. Meanwhile, Tom hears from some business colleagues that Samuel has liquidated his assets, and that he is making plans to relocate to Zimbabwe. Tom also discovers that Samuel holds a Zimbabwean passport because his mother is Zimbabwean by birth. Tom needs to act quickly.

Peter and Solly enter into a contract. A dispute arises between them. Peter wishes to approach the magistrate's court for relief. The dispute relates to the legal interpretation of various clauses of the contract.

Overview

Learning outcomes

After you have finished studying this study unit, you should be able to

- discuss the application procedure in the magistrates' courts

- explain the courts' powers after hearing an *ex parte* application
- explain what effect the *ex parte* order will have on the affected party
- discuss the different types of applications which the magistrates' courts may make
- discuss the documents which may be used
- discuss the steps which the respondent may take
- discuss the orders which the court may make

Compulsory reading material

Rule 56(1)-(3), 56(6)-(12) of the Magistrates' Courts Rules
Rule 55(1)-(2) of the Magistrates' Courts Rules

17.1 INTRODUCTORY REMARKS

You are advised to refer to introductory remarks on civil procedure in the magistrates' courts on page ix before commencing with this study unit.

The plaintiff must first decide whether his or her claim falls within the jurisdiction of a magistrate's court, and choose the correct magisterial district to institute the action. The plaintiff must then take the necessary steps to institute his or her action, and to proceed with it.

Litigation in the magistrate's court may occur by means of either the application procedure (also known as the motion procedure), or the action procedure (also known as the summons procedure), and the choice between the two is based on the same considerations that apply in the case of litigation in the High Court (see study unit 1).

17.2 *EX PARTE* APPLICATIONS

17.2.1 Sphere of application

Claasens v Zeneca Suid-Afrika (Edms) Bpk 1996 (1) SA 627 (OPD)

An *ex parte* application is one in which notice is not given to the person against whom legal relief is sought, prior to the initial hearing (See *Claasens v Zeneca Suid-Afrika (Edms) Bpk* 1996 (1) SA 627 (OPD)).

In order to succeed, the applicant must show that it is really necessary to bring the application without notice to the respondent, that is he or she must show some urgency or some other good reason. If the application is brought with undue haste and without good reason, the court will not grant the application and the applicant will have to bear the costs of the failed application. The founding affidavit contains the applicant's reasons for his or her application, namely the facts upon which his or her cause of action is based and why no notice has been given to the respondent. An applicant is obliged to furnish the court with all the possible facts, including adverse facts.

The general rule is that *ex parte* applications may only be brought in those instances where the applicant cannot request an order against a person. An exception to this general rule is found in rule 56 in that applications for arrests *tanquam suspectus de fuga*, interdicts, attachments to secure claims, and *mandamenten van spolie* may be made by means of *ex parte* applications. The reason for this exception is that a speedy remedy, where relief is urgently required, would be frustrated if the other party is notified of the intended application in advance. To illustrate this, consider a person who has to be arrested. If he or she is notified before the application is made, such notice will obviously result in him or her fleeing the country (this is thus an example of an arrest *tanquam suspectus de fuga*).

Example

In *Office Automation Specialists CC v Lotter* 1997 (3) SA 443 (ECD), the court held that an application for a spoliation order may be brought *ex parte* in terms of rule 56(1) of the Magistrates' Courts Rules, without notice to the person against whom relief is sought and without alleging urgency. However, an applicant bringing such application does so at his peril if he or she does not make a good and proper case as to why an order should be granted without notice to the other party.

***Office Automation Specialists CC v Lotter* 1997 (3) SA 443 (ECD)**

17.2.2 Powers of the court

The *ex parte* application is an exception to the *audi alteram partem* principle which literally means "hear the other side". Therefore, the court will not issue a final order without the person concerned (usually the person against whom the order is made) being given an opportunity to put his or her case.

After hearing the *ex parte* application, the court grants a temporary order and determines a return day on which the respondent must give reasons why the order should not be made final — termed the *rule nisi*.

The court may, when hearing the application, require the applicant to provide security for any losses which may be caused. The court may also require any additional evidence it deems relevant (rule 56(3)).

17.2.3 Discharge of the *ex parte* order

Any person affected by an *ex parte* order may apply to court, after at least 12 hours' prior notice, to have the order discharged.

However, an *ex parte* order is *ipso facto* discharged upon security being provided by the respondent for the amount to which the order relates (rule 56(10)). In the case of a *mandamenten van spolie*, the respondent cannot, by merely providing security, effect the discharge of the order if he or she is still in possession of the property to which the order relates.

ACTIVITY

Go back and read through the first set of facts at the beginning of this study unit and then answer the following questions:

(1) What procedure must Tom use?

.....

.....

(2) How must this procedure be instituted?

.....

.....

(3) What is the reason for such application?

.....

.....

(4) Write concise notes on *ex parte* applications in magistrates' courts procedure.

.....

.....

.....

.....

.....

.....

FEEDBACK

(1) Tom must bring an application for arrest *tanquam suspectus de fuga.*

(2) It must be brought by *ex parte* application.

(3) Relief is urgently required. The purpose of it is that if the person is notified he will flee the country to avoid payment of the debt. The arrest prevents Samuel from leaving the court's jurisdiction unless he can give security for the debt so that the court can give an effective judgment.

(4) *Ex parte* applications may be brought only in those instances where the applicant cannot request an order against a person. Rule 56 provides an exception in that applications for arrests *tanquam suspectus de fuga*, interdicts, attachments to secure claims, and *mandamenten van spolie* may be made by means of *ex parte* applications. The reason is that a speedy remedy, where relief is urgently required, will be frustrated if the other party is notified of the intended application in advance.

The court grants a temporary order and determines a return day on which the person against whom the order is made must give reasons why the order should not be made final *(rule nisi)*. The court may also require the applicant to provide security for any losses suffered and may require any additional evidence where relevant. Any party affected by the *ex parte* order may apply to court after 12 hours' prior notice to have the order discharged. The order is *ipso facto* discharged upon security being provided by the respondent for the amount to which the order relates.

17.3 THE APPLICATION PROCEDURE WHERE THE RESPONDENT IS CITED

17.3.1 Types of application

Three types of applications may be distinguished in the magistrates' courts. They are as follows:

(1) Applications by notice of motion without affidavits. Rule 55(2) is applicable in this instance.
(2) Applications by notice of motion supported by affidavits. These applications are those in which an order is sought in terms of section 30, namely orders for arrest *tanquam suspectus de fuga*, attachments, interdicts and *mandamenten van spolie*.
(3) Applications for which a special form is prescribed, that is, applications for summary judgment, for trials with assessors and for administration orders.

Only the first two types of applications are discussed in this study unit. Applications for summary judgment are discussed in study unit 20.

17.3.2 Procedures in terms of section 30 orders

17.3.2.1 Procedure for obtaining an interdict

It is usual to ask for a final interdict by way of action, because a dispute of fact which requires oral evidence usually exists. A temporary interdict is usually sought by way of an application.

If the application procedure is followed, the provisions of rule 56 must be complied with. This rule provides that all applications for orders for arrest, interdict, attachment or *mandamenten van spolie* may be made *ex parte.* An *ex parte* application is one where no notice of the application is given to the respondent. Applications must be accompanied by an affidavit in which the facts on which the application is based and the type of order which is sought are set out. The court may call for more evidence before granting the application, and may require the applicant to give security for any damages which may be caused to the respondent by the order. After the order has been granted, the respondent is given an opportunity to show the court why the order should not have been granted, and the order may then be discharged, varied or confirmed.

17.3.2.2 The procedure for obtaining a "mandamenten van spolie"

The *mandamenten van spolie* is usually obtained by means of an *ex parte* application, in which case the procedure set out in magistrate's courts rule 56 is followed. The action procedure may of course also be followed.

In his or her sworn affidavit the applicant must show

(1) that he or she was in peaceful and undisturbed possession of the thing to which the application relates and
(2) that he or she was forcibly and unlawfully deprived of possession by the respondent

17.3.2.3 Procedure for obtaining an order of arrest "suspectus de fuga"

If a creditor wishes to arrest someone, he or she should apply *ex parte* in terms of rule 56. It is

advisable to use this *ex parte* procedure since this ensures that the debtor is not warned behorehand that the creditor intends to have him or her arrested.

Section 30(3) also contains provisions governing such arrests. In terms of these provisions the applicant must allege that

- the cause of action amounts to at least R40
- the applicant has no security for the debt
- the respondent is about to leave the Republic

Rule 56 provides that any person who has been arrested in terms of section 30 must be released if he provides security for the amount of the claim.

17.3.2.4 Procedure to obtain attachments

Attachment in terms of section 30 will take place in terms of the rule 56 *ex parte* application procedure. However, if property is attached which is subject to a credit instalment under the Credit Agreements Act 75 of 1980, an application for attachment must be made in terms of the Act, and not in terms of rule 56.

17.3.3 Documentation

The notice of motion for the first two types of application mentioned above is drawn up in accordance with the example in Schedule 1 to the Rules.

Example

The notice will look like this:

(Heading)

NOTICE OF APPLICATION

Kindly take notice that application will be made to the abovementioned Honourable Court on the ..... at ..... for an order (State terms of order applied for).

Signed at Pretoria on this ... day of ..... 20.. .

.....
Applicant's Attorney
Address

TO: XX

AND XX

Issued by ..... XX .....
..... XX .....

(Attorney)

.....
Clerk of Court

Date: XX
R XX revenue stamps

Rule 1(2)(a) provides that this form may be used with such amendments as circumstances dictate. If

a supporting affidavit is filed together with the notice of motion, this takes the place of *viva voce* evidence during the application procedure. Such affidavit contains the applicant's and other interested persons' evidence in support of the order applied for. Therefore, the cause of action as well as the corroborating facts, must be set out clearly in the affidavit. See, further, study unit 2 dealing with the High Court regarding the documentation pertaining to the application procedure.

17.3.4 Steps which the respondent may take

A respondent may oppose the application on the merits of the case. If the respondent wishes to raise a preliminary objection (also termed an "objection *in limine*"), it is not necessary for him or her to give notice of the objection. However, in *Turkstra v Friis* 1952 (2) SA 342 (T) it was mentioned that, especially in those cases where such objection is not reflected in the papers before the court, it is desirable that the grounds for objection should be set out clearly by the respondent.

Turkstra v Friis 1952 (2) SA 342 (T)

When an objection *in limine* is raised, the court will decide whether the application must be adjudicated in its present form before it may be heard on the merits.

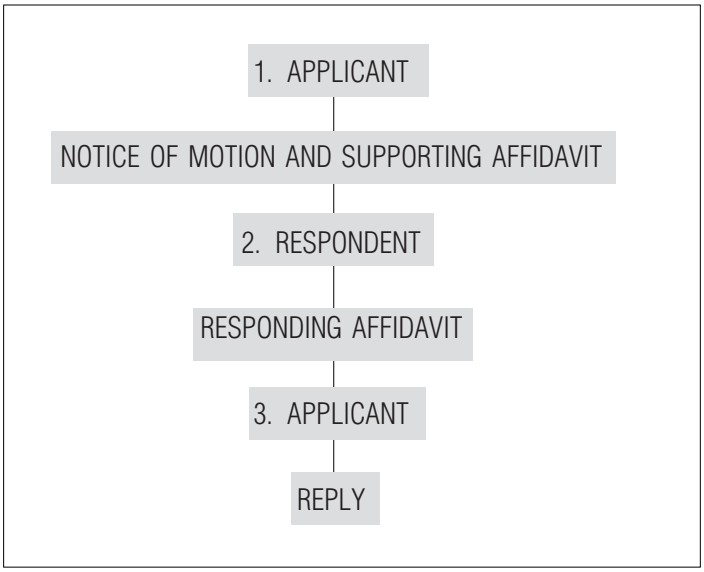
17.3.5 Responding affidavit and reply

In the responding affidavit, the respondent replies to the applicant's allegations as embodied in his or her supporting affidavit. On hearing the application, the court will act on the premise that those allegations of the applicant which the respondent does not deny, are true.

The applicant also has the opportunity of replying to the respondent's replying affidavit. The purpose of such reply is to adduce new facts which serve as a reply to the respondent's defence. It would be wrong for the applicant merely to repeat his or her own case in the reply.

Note that further affidavits are seldom filed in application proceedings in the magistrates' courts. Further affidavits are permitted only if there is something in the replying affidavit which the applicant must answer or if there is good reason for placing further information before the court. The presiding officer has a discretion to decide whether, in the light of the circumstances of each particular case, to allow further affidavits to be filed.

The following is a flow-chart diagram on documentation exchanged between the parties:



17.3.6 Orders which the court is empowered to make

Van Rensburg v Reid 1958 (2) SA 249 (EC)

The nature of the orders which the court is empowered to make after hearing the application, differs according to whether or not a dispute of fact exists between the parties. The court is obliged to apply the provisions of rule 55(2) in all cases where a dispute of fact arises (*Van Rensburg v Reid* 1958 (2) SA 249 (EC) — this decision dealt with rule 55's predecessor, namely rule 31 of the old Magistrates' Courts Act 32 of 1917, which contained materially the same provisions as the present rule 55). Rule 55(2) provides that the court may, in the case of a dispute of fact,

(1) receive evidence either *viva voce* or in the form of an affidavit, and try the issues in dispute in a summary manner, or
(2) order that the issues be tried by means of action, coupled with an order that the applicant will be the plaintiff and the respondent will be the defendant, and that the notice of application will stand as a summons

If a dispute of fact has not arisen, the court may, after hearing the application, grant or dismiss the application. Costs can be awarded either in favour of the applicant or in favour of the respondent, or, in the case of interlocutory applications, the court can order that the costs of the application be deemed costs in the cause, in which case the magistrate will make a special finding at the end of the trial stage of the main action.

ACTIVITY

Go back and read through the second set of facts at the beginning of this study unit, and then answer the following questions:

(1) Name the form of proceeding that Peter should use to approach the court for relief.

.....

.....

(2) Briefly describe the documents which may be exchanged between Peter and Solly in the opposed application proceedings in the magistrates' courts.

.....

.....

.....

.....

.....

FEEDBACK

(1) Motion or application procedure.

(2) The applicant, Peter, will initiate the proceedings by drawing up a **notice of motion** which conforms with Form 1 of the Magistrates' Courts Rules. Attached to this notice of motion is

a **supporting affidavit**. Such affidavit sets out Peter's and other interested persons' evidence in support of the order applied for. The respondent, Solly, replies to Peter's allegations as contained in the supporting affidavit, in the **responding affidavit**. Peter has an opportunity to reply to Solly's responding affidavit. The purpose of such **reply** is to adduce new facts which serve as a reply to the respondent's defence. The court has a discretion to allow the filing of further affidavits.

STUDY UNIT

18

INSTITUTING THE ACTION: THE SUMMONS

John and Peter are involved in a motor collision in Johannesburg. Peter contends that the collision was due solely to the negligence of John. Peter suffers damages in the amount of R80 000. Peter wishes to institute proceedings in a magistrate's court in the amount of R80 000. John intends to defend the action.

Overview

Learning outcomes

After you have finished studying this study unit, you should be able to

- describe the form and contents of the summons
- explain how a summons is issued
- explain how a summons is served
- explain how a summons may be amended before service and after service respectively
- explain what happens if there is a delay in serving the summons
- apply the contents of this study unit to solve problems

Compulsory reading material

Rules 5(1)–(2); 6(1)(a), 6(2)(a)–(b), 6(3), 6(5)–(6); 7(1)–(3)(b); 8(1); 9(1), 9(3)(a)–(f), 9(4)–(5), 9(12); 52(2) of the Magistrates' Courts Rules

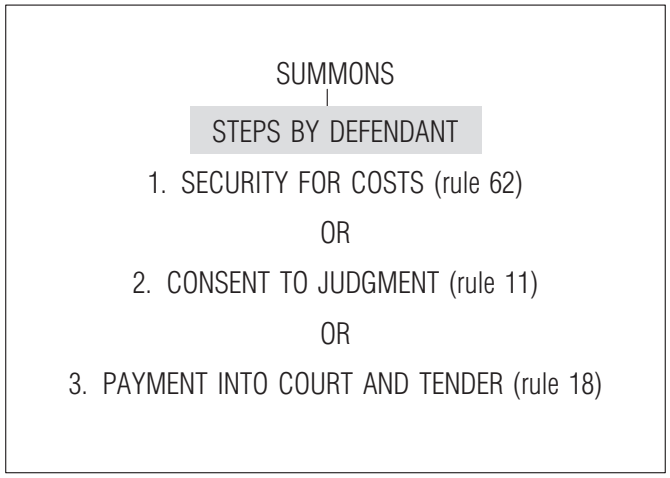
18.1 INTRODUCTORY REMARKS

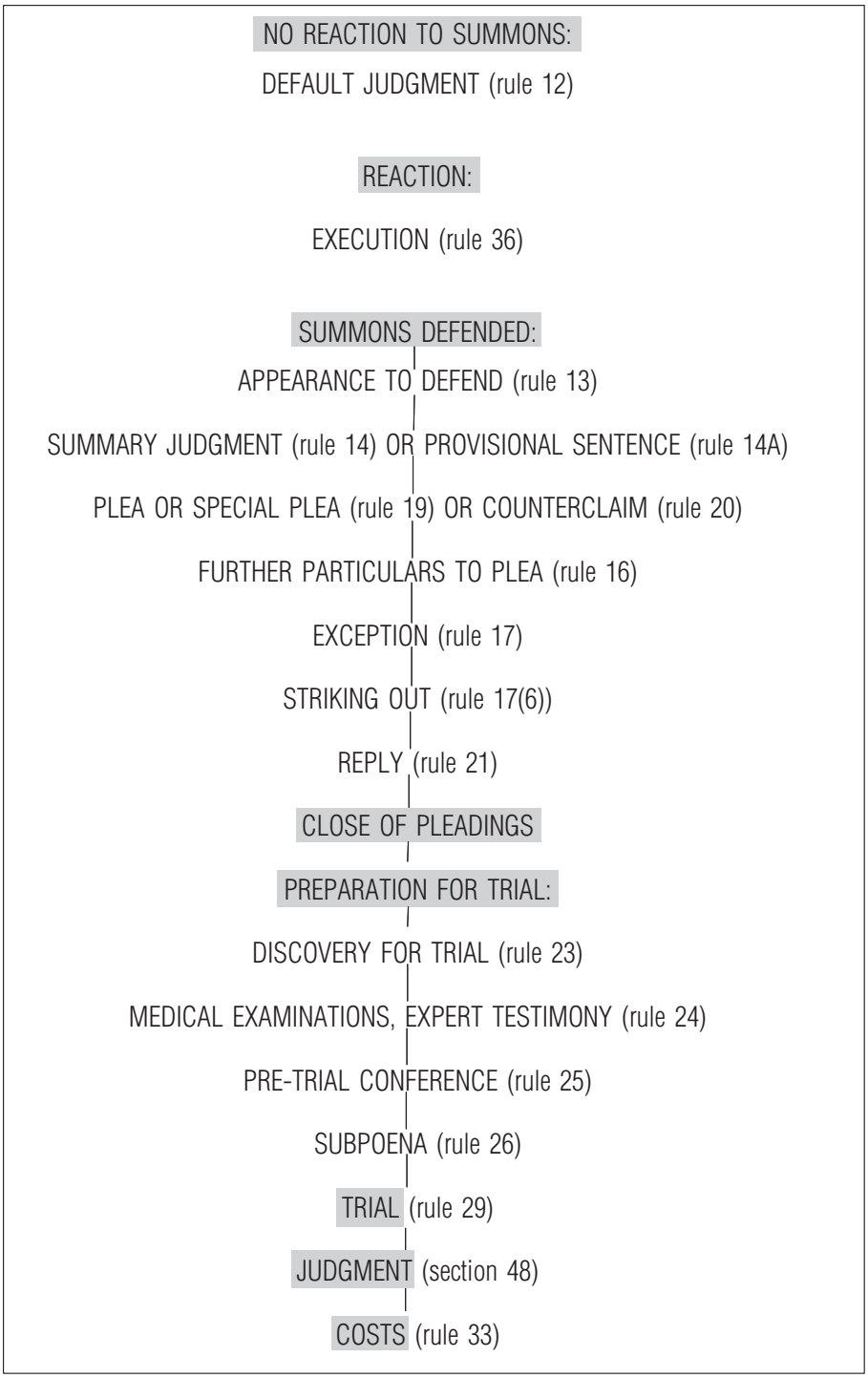
The action procedure in a magistrate's court is instituted by means of a summons. The action procedure is discussed in study units 18 to 28. Since there is a large measure of similarity between litigation by means of the illiquid summons procedure in the High Court and the action procedure in a magistrate's court the study units concerned also largely overlap. Therefore, we discuss the action procedure in a magistrate's court only briefly and try to emphasise the more important aspects, and try to indicate some important differences between the procedures in the High Court and those in the magistrate's court.

In this study unit, we discuss the summons in a magistrate's court and its various aspects — namely, the summons as the first document in the process, its form and content, how it is issued and served, how it is amended, and the consequences attaching to a delay in the continuance of an action.

18.2 SCHEMATIC OUTLINE

The following diagram provides a schematic outline of magistrate's court proceedings. You are advised to study magistrate's court proceedings with reference to this outline, since it will aid your understanding.





18.3 THE SUMMONS AS THE FIRST DOCUMENT IN THE ACTION

The summons is the first document to be filed in the course of action. Therefore, revenue stamps to the correct amount have to be affixed to the summons.

A power of attorney does not have to be filed, since rule 52(2) provides that it is not necessary

for anyone to file a power of attorney to act in a magistrate's court. However, the authority of a person acting for a party may be challenged by the other party within ten days after he or she has received such notice that such person is so acting, or with the court's leave, for good cause shown at any time before judgment. When a person's authority is challenged in this manner, he or she may not, without the court's leave, act any further without satisfying the court that he or she had authority to act. The court may adjourn proceedings in order to enable him or her to do so.

18.4 FORM AND CONTENT OF THE SUMMONS

A summons may be described as a process of court used to commence an action. It calls upon the defendant to appear in person to defend the action within a certain period (*dies induciae*) and to respond to the plaintiff's claim, and it warns the defendant of the consequences of failure to do so (rule 5(1)).

Rule 1(2)(a) provides that, in all respects, a summons must conform either to Form 2 of Schedule 1 of the Act (in the case of an "ordinary summons"), or to Form 3 (in the case of a summons including an automatic rent interdict).

Rules 5 and 6 contain the most important provisions regarding the content of a summons. The following particulars must be included in the summons:

(1) the *dies induciae*
(2) a warning of the consequences which will result if the defendant fails to comply with the request in the summons
(3) a notice of consent to judgment
(4) a notice of intention to defend
(5) a notice drawing the defendant's attention to the provisions of section 109 of the Act
(6) a notice (in the case of a summons where the claim is founded on a debt) in which the defendant's attention is drawn to sections 57, 58, 65A and 65D
(7) the address at which the plaintiff will receive pleadings
(8) a description of the parties
(9) averments in respect of jurisdiction
(10) particulars of claim
(11) the prayers

Please note that the above aspects are not fully discussed here. However, note the following important provisions discussed hereunder.

18.4.1 *Dies induciae*

This refers to the stipulated period mentioned in the summons within which the defendant is called upon to enter an appearance to defend after service of the summons. Rule 5(1) provides that appearance to defend the action must be entered within five days after service of the summons.

18.4.2 Address for service of pleadings

Rule 6(2)(c) provides that if the address for service is situated in a place where three or more attorneys are practising independently of one another, such place should not be more than eight kilometres from the court-house. The clerk of the court may refuse to issue a summons in which the full addresses required by rule 6(2)(b) have not been set out or in which the stipulated address is not situated within a distance of eight kilometres of the court as required by rule 6(2)(c).

18.4.3 Particulars of claim

The particulars of claim contain the basis of the action and the relief sought by the plaintiff. If the particulars of claim comprise more than 100 words, they may be contained in a separate page (annexure), which must form part of the summons (rule 6(3)(d)). The particulars of claim must contain sufficient detail to enable the defendant to identify the claim (*San Sen Woodworks v Govender* 1984 (1) SA 486 (N)).

San Sen Woodworks v Govender 1984 (1) SA 486 (N)

18.4.4 The plaintiff as cessionary

Where the plaintiff sues as cessionary, the name, address and description of the cedent, and the date of the cession, must be mentioned in the summons (rule 6(5)(c)).

18.4.5 Averments of jurisdiction

Usually, the plaintiff is not required specifically to allege in the summons that the court has jurisdiction. The jurisdictional facts are usually evident from the defendant's address, and from the value and nature of the claim. However, there are the following two exceptions to this rule:

(1) If the plaintiff relies on jurisdiction in terms of section 28(1)(d), he or she must state in the summons that the whole cause of action arose within the court's area of jurisdiction (rule 6(5)(f)).
(2) If the plaintiff relies on the court's jurisdiction in terms of section 28(1)(g), he or she must specifically allege that the property concerned is situated within the district (rule 6(5)(g)).

18.5 ISSUE OF SUMMONS

The Clerk of the civil court issues summons by furnishing the summons with a serial number, and by signing and dating it.

The Clerk of the court may refuse to issue a summons in which an excessive amount is claimed for attorney's costs or court fees, or if the address of service does not comply with the provisions of the Act (rule 6(4)).

Bianchelli v Vic Procter 1982 (4) SA 725 (C)

In *Bianchelli v Vic Procter* 1982 (4) SA 725 (C), a summons was issued by the Clerk of the Court in spite of the fact that such summons had not been signed by the plaintiff or his attorney. The court decided that, although the summons was invalid, the defendant would be running the risk of default judgment against him if he did not take steps to defend the action. Therefore, the court awarded costs in favour of the defendant (who had entered appearance), incurred from the date of service of the summons up to withdrawal of the claim.

The issue of summons has certain consequences. The preferred view is that an action is instituted at the time that the summons is issued and **not** by the service of the summons. This view affords greater certainty to the plaintiff. The issue of a summons also establishes jurisdiction. To illustrate this, the issue of a summons out of a particular court implies that the court has jurisdiction to try the case. Unless the court decides that it does not have jurisdiction, all further steps in the proceeding, including the trial itself, will take place in that court.

It should also be noted that the issue of a summons does not interrupt the running of prescription. Prescription is **only interrupted by the service** of the summons.

18.6 SERVICE OF SUMMONS

Rule 9(3) prescribes the different methods of service such as personal service, service at the defendant's residence or place of business, service upon an agent, service upon the defendant's place of employment and so on. Here, service of summons is basically similar to service of summons in the High Court. However, the summons is served by the Sheriff of the magistrate's court, and not by the Sheriff of the High Court. Note further that the summons is addressed to the defendant, whereas in the High Court it takes the form of an order to the Sheriff.

Barens en 'n Ander v Lottering 2000 (3) SA 305 CPD

The court had to consider what constitutes proper service in *Barens en 'n Ander v Lottering* 2000 (3) SA 305 CPD. The court held that a defendant may have more than one 'residence' for purposes of service under rule 9(3)(b), and proper service may be effected at any such residence. The court also held that processes must be served according to the rules, and the sheriff's habit of resorting to 'easy' service by affixing processes to the intended recipient's door or gate without any inquiry or investigation is unacceptable.

Edictal citation is the process whereby the defendant is cited by way of court order in cases where service in terms of the normal procedure is impossible. In practice, the term "edictal citation" is used only when reference is made to an order authorising service outside the Republic. **Substituted service** is also authorised by the rule, and occurs where the defendant is within the borders of South Africa, but he or she is not available and service cannot take place in the normal manner.

To illustrate the difference between edictal citation and substituted service, please refer to the following example:

Example

> Abe and Mary were married for three years. Abe abandons Mary and goes to work in the UK. Mary has no contact with Abe, and she decides to divorce him after one year. She only has his last-known work address. She must serve her **divorce summons by edictal citation** as Abe resides outside the country. If Abe abandoned her and went to work somewhere in the Northern Cape and Mary does not have Abe's fixed address, she must serve her divorce summons by **substituted service**.

In the case of edictal citation, an official outside of the Republic is generally authorised to serve the documents. However, in the case of substituted service, service is generally effected by publication of the documents in a newspaper.

Pretoria-Noordse Stadsraad v Stander 1964 (3) SA 210 (T)

A magistrate was originally authorised to issue an edict in respect of persons within the borders of the Republic (see *Pretoria-Noordse Stadsraad v Stander* 1964 (3) SA 210 (T) at 213 C–E). A magistrate is now also empowered to issue edicts in respect of persons outside the Republic in terms of section 30 *bis*.

18.7 AMENDMENT OF SUMMONS

Amendments to the summons may be effected at any time before service, provided that they are initialled by the Clerk of the court. If the amendments are not initialled, they have no effect (rule 7(2)).

Amendments to the summons after service may be brought about only by following the procedure set out in rule 55(A) (rule 7(3)(b)).

However, amendments concerning the defendant's first name or initials can be brought about at the plaintiff's request without the court's intervention (rule 7(3)(a)).

18.8 DELAY IN THE CONTINUANCE OF THE ACTION

Manyasha v Minister of Law and Order (1997) 1 All SA 729 (E); *Langenhowen v Comyn t/a Rags to Riches* 1998 (1) SA 710 (T)

The summons lapses if it is not served within 12 months after issue, or, if it is served, the plaintiff fails to take further steps within 12 months thereafter. However, rule 10 provides that the plaintiff may, in particular instances, obtain an extension of time. Rule 10 is aimed at penalising a supine plaintiff. The phrase "summons in an action" implies that rule 10 applies to both defended and undefended actions (see *Manyasha v Minister of Law and Order* (1997) 1 All SA 729 (E) and *Langenhowen v Comyn t/a Rags to Riches* 1998 (1) SA 710 (T)).

ACTIVITY

Go back and read through the set of facts at the beginning of this study unit, and then answer the following questions:

(1) In what circumstances will it be necessary for Peter's attorney to file a power of attorney?

.....

.....

.....

(2) Who is responsible for issuing the summons?

.....

.....

.....

(3) Name the instances when the issue of a summons may be refused.

.....

.....

.....

(4) What procedure must Peter follow if he decides to amend the summons after service?

.....

.....

(5) What particulars will Peter's summons contain?

.....

.....

.....

FEEDBACK

(1) A power of attorney does not have to be filed since rule 52(2) provides that it is not necessary for anyone to file a power of attorney to act in a magistrate's court unless the attorney's authority to act is challenged.

(2) The Clerk of the Civil Court.

(3) The Clerk of the Court may refuse to issue a summons in the following instances: when an excessive amount is claimed for attorney's costs or court fees, or if the address of service does not comply with the provisions of the Act (rule 6(4)).

(4) Peter may amend the summons after service by following the procedure set out in rule 55(A).

(5) Peters's summons will contain the following particulars:

(a) the *dies induciae*
(b) a warning of the consequences which will result if the defendant fails to comply with the request in the summons
(c) a notice of consent to judgment
(d) a notice of intention to defend
(e) a notice drawing the defendant's attention to the provisions of section 109 of the Act
(f) a notice in the case of a summons where the claim is founded on a debt in which the defendant's attention is drawn to sections 57, 58, 65A and 65D
(g) the address at which the plaintiff will receive pleadings
(h) a description of the parties
(i) averments in respect of jurisdiction
(j) particulars of claim
(k) the prayers

STUDY UNIT

19

STEPS THAT MAY BE TAKEN BY THE DEFENDANT AFTER SERVICE OF THE SUMMONS

John and Peter are involved in a motor-vehicle collision in Johannesburg. Peter contends that the collision was due solely to the negligence of John. Peter suffers damages in the amount of R80 000. Peter wishes to institute proceedings against John in the magistrate's court. Peter issues summons in the amount of R80 000 against John. John may take various steps after being served with the summons.

Overview

Learning outcomes

After you have finished studying this study unit you should be able to

- explain what steps the defendant may take after service of summons
- identify the contents of a notice of intention to defend and default judgment
- explain what happens if a notice is defective
- explain what happens if the defendant fails to take steps
- apply the contents of this study unit to solve problems

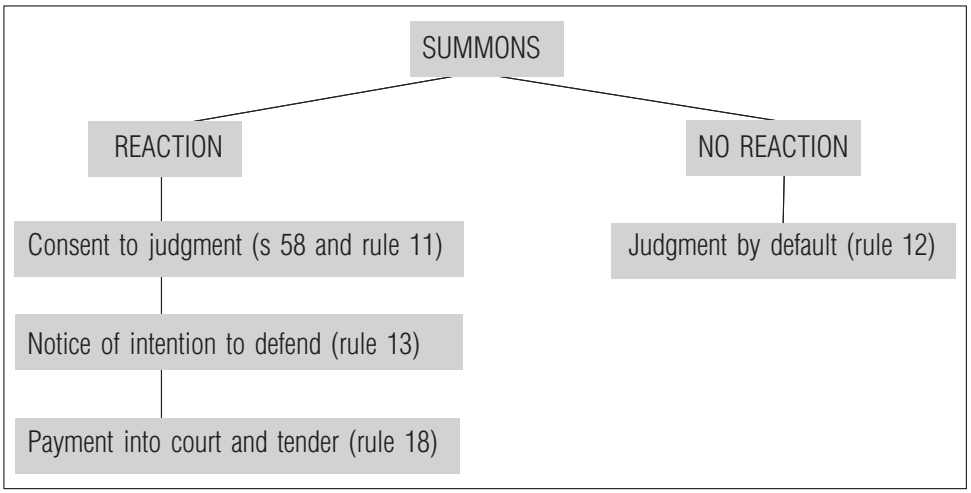
Compulsory reading material

Rules 11(1)–(2); 12(1)(a),12(2)(a),12(7);13(1),13(3);18(1)–(2) of the Magistrates' Courts Rules

19.1 INTRODUCTION

The defendant must decide within a certain period *(dies induciae)* after he or she has received the summons, what steps to take. Various options are open to the defendant and these are dealt with in this study unit.

The following is a schematic representation of the various options:



19.2 SECURITY FOR COSTS BY THE PLAINTIFF

Rule 62 provides that the defendant may, in specified circumstances, require the plaintiff to provide security for costs of the action. The specified circumstances include the situation where the plaintiff

(1) is not a resident or working within the Republic
(2) is an unrehabilitated insolvent
(3) is a registered or incorporated company or a close corporation
(4) has no substantial interest in the cause of action
(5) is a person in respect of whom the court has made an order in terms of section 74 of the Act
(6) is a person to whom assistance is rendered in terms of the Agricultural Credit Act, 28 of 1996 (rule 62(1)).

The plaintiff must then, subject to certain exceptions, provide security within 10 days of the request. Failing this, the court may, on request, suspend or even dismiss the proceedings.

Please note that, in terms of the rule, "plaintiff" and "action" do not include a plaintiff in reconvention or a counterclaim.

19.3 CONSENT TO JUDGMENT

If the defendant admits that he or she owes the amount claimed in the case of a liquidated claim, he or she may pay the amount of the claim. However, the problem arises that the defendant is usually not in a position to pay this amount immediately. Therefore, the Act provides that the defendant may consent to judgment and an instalment order (ss 57 and 58).

Rule 11 also provides for consent to judgment. This consent may be given in respect of all types of claims including unliquidated claims. Please note the following in respect of consent to judgment in terms of rule 11:

(1) Consent to judgment may be given before or after entering appearance to defend.
(2) When consent occurs before entering appearance to defend, the defendant must sign the prescribed form on the original summons. The Clerk of the Court is required to notify the plaintiff of the consent. (The sheriff returns the original to the court after service.)

    The defendant may also sign the form of the copy of the summons, but he or she is then responsible for the lodgment thereof with the Clerk of the Court. The defendant may also sign a similar form, but this form must then also be signed by two witnesses, and their names and addresses must be furnished. This form must then be submitted to the Clerk of the Court.

(3) If consent to judgment is given before the Sheriff of the court has been ordered to serve the summons, the defendant will not be responsible for the costs of service. If consent to judgment is given before the expiry of the period allowed for the filing of notice of intention to defend, the defendant will also not be responsible for the costs of service.
(4) It is also possible to consent to judgment after appearance to defend (rule 11(4)). The plaintiff may take judgment in the amount for which consent has been given, but he or she would have to prove the balance of the claim as he or she would in a normal trial.
(5) The defendant may also consent to judgment in an amount less than that claimed in the summons, and he or she may still file his or her notice of intention to defend regarding the balance of the claim.
(6) The purpose of the procedure is to limit costs in two ways: to ensure that no further costs are payable after total consent, and to ensure that costs may be calculated at a lower scale in the case of partial consent.
(7) Where the defendant has consented to judgment, the Clerk of the Court must record judgment in favour of the plaintiff for such amount, unless the consent is contained in the defendant's plea, in which case it must be referred to court.

19.4 NOTICE OF INTENTION TO DEFEND

If the defendant wishes to defend the action, he or she must file a notice of intention to defend. If the notice is defective in that certain requirements in terms of the rules have not been complied with, for example if

(1) it has not been properly served
(2) it has not been properly signed, or
(3) it does not comply with the requirements in respect of address for service, the plaintiff must, firstly, file a written notice requesting the defendant to file a proper notice within five days of service of the plaintiff's said notice (rule 12(2)(a)).

The contents of such a notice are as follows:

Example

NOTICE IN TERMS OF RULE 12(2)

Kindly take notice that the Defendant's notice of intention to defend, served on the plaintiff on ....., is defective in that it has not been properly signed by the Defendant or his legal representative.

Further, kindly take notice that the Defendant is required to deliver a proper notice of intention to defend within 5 days of receiving this notice.

The plaintiff is entitled to apply for default judgment if the defendant fails to submit a proper notice of intention to defend.

Please note that, even if the defendant does not timeously give notice of intention to defend, his or her notice will nevertheless be valid, provided that it is submitted before a request for default judgment. If the notice of intention to defend and the request for default judgment are delivered on the same date, the notice remains valid, provided that judgment has not been granted. Therefore, the defendant is allowed to submit a late notice of intention to defend, provided that default judgment has not been granted, and such notice will be considered valid in spite of its late delivery. In the High Court, the plaintiff may, in terms of Uniform Rule 30, apply for rescission of a late notice of intention to defend. The magistrate's court procedure therefore differs from that of the High Court in this respect.

Note, further, that entry of appearance to defend takes place without prejudice to any exception which the defendant may raise. Special provision is also made for the recording of appearance by the Clerk of the Court on behalf of illiterate persons who do not have legal representation.

19.5 FAILURE TO TAKE STEPS: DEFAULT JUDGMENT

If the defendant takes no further steps in respect of the summons, the plaintiff is entitled to apply for default judgment. A default judgment is regarded as a judgment entered or given in the absence of the party against whom it is given. Default judgment may be granted in the following instances:

(1) If the defendant fails to enter appearance to defend within the time stipulated in the summons (*dies induciae).*

(2) Where the defendant enters appearance to defend, but thereafter fails to deliver a plea within the time stipulated in the notice of bar (5 days) (rule 12(1)(b)). In *Speelman v Duncan* 1997 1 SA 868 (C), it was held that five days written notice in terms of rule 12(1)(b) means five days from the date of receipt of the notice within which the defendant may comply with it and not, five days from the date on which the notice was delivered to the clerk of the court.

Speelman v Duncan 1997 1 SA 868 (C)

(3) If the plaintiff or applicant does not appear at the time set down for the hearing in the trial of the action or in the application.

(4) If a party fails to comply with a court order obliging him or her to comply with the provisions of the rules of court in terms of rule 60(2) and (3). To illustrate this, the court may have ordered a plaintiff to supply further particulars and he or she fails to furnish further particulars within the time stipulated in the court order. The judgment is granted on application in terms of rule 60(3).

The following aspects of rule 12 which deals with default judgment are important:

(1) The application for default judgment is not ordinarily heard in open court. The plaintiff merely lodges a written request with the Clerk of the Court.
(2) The Clerk of the Court may grant the judgment in all liquidated claims.
(3) In any unliquidated claim, such as a claim for damages, the request for judgment must be referred to a magistrate in chambers. The plaintiff must give evidence either orally or on affidavit regarding his or her *quantum* of damages (rule 12(4)). In *Barclays Western Bank Ltd v Creser* 1982 (2) SA 104 (T), it was decided that the plaintiff does not have to prove his or her cause of action in this respect. The plaintiff merely has to identify his or her claim by showing, for instance, that it is a claim for specific performance or damages. Thereafter, the magistrate can determine the amount which the plaintiff is entitled to recover according to rule 12(4), and can grant an apposite judgment.

Barclays Western Bank Ltd v Creser 1982 (2) SA 104 (T)

(4) In any request for judgment made in respect of a claim arising out of a credit agreement governed by the Credit Agreements Act, the request must also be referred to the court.
(5) If the application is based on a liquid document, this document must be filed before judgment is entered. If the original document cannot be located, the plaintiff must file an affidavit setting out reasons why the original liquid document cannot be attached to the request.
(6) Please note that the proceedings only take place in open court when evidence is led. Furthermore, an official of the court may grant judgment in certain cases.

19.6 PAYMENT INTO COURT AND TENDER

Another course of action open to the defendant is to try to achieve a settlement with the plaintiff. If the defendant does not succeed in persuading the plaintiff to settle the matter by means of negotiation, there are the following three procedures which the defendant may adopt in terms of the rules in order to bring about settlement, or, alternatively, to minimise his or her liability for costs:

(1) unconditional payment into court
(2) payment into court without prejudice of rights by way of an offer in settlement of the plaintiff's claim
(3) tender

An attorney is under a duty to obey a client's instructions, and must not substitute his or her own judgment for the specific instructions of the client. It is important to observe this rule when it comes to settlements: written instructions should be obtained from the client to accept an amount in settlement, and it should be explained to him or her exactly what the settlement offer entails.

19.6.1 Unconditional payment into court

This involves a simple procedure in which the defendant unconditionally pays the amount claimed into court to try and dispose of the matter and thereby save additional legal costs. Unconditional payment into court takes place in terms of rule 18(1). The defendant remains liable for the costs until the date of payment. It is therefore in his or her own interest to make payment as soon as possible, before too many costs have been incurred. The effect of payment in terms of rule 18(1) is that the plaintiff can forthwith recover the costs as at the date of payment, as if an order had been granted by the court for the payment of such costs. This procedure may only be used when the claim sounds in money, and cannot be used in cases where the plaintiff claims the delivery of property or an order of ejectment.

19.6.2 Payment without prejudice of rights by way of an offer in settlement

Payment without prejudice of rights by way of an offer in settlement is usually referred to as "payment into court". This payment takes place in terms of rule 18(2). The defendant must indicate in the notice which he or she has to deliver together with the payment, whether the payment includes the settlement of both the claim and the costs. If the plaintiff does not accept the payment made in terms of rule 18(2), and does not, at the trial, succeed in proving that he or she is entitled to more than the amount of the payment, he or she will be liable for all costs incurred after the date of payment. Please note that the payment into court is not disclosed to the court in the pleadings, until after the court decides liability. This procedure enables the plaintiff to reassess whether he or she wishes to persist in the original claim or whether he or she intends to accept the amount paid into court. This procedure is also only used in cases where the claim sounds in money. Note that when payment in terms of rule 18 is accepted, litigation is terminated as the whole cause of action is destroyed (see *Hallick v Plumtree Motors CC* 1997 (3) SA 703 (CPD)).

***Hallick v Plumtree Motors CC* 1997 (3) SA 703 (CPD)**

19.6.3 Tender

Tender also takes place in magistrate's court actions, and entails the defendant making the offer, by means of tender to the plaintiff, to settle the matter for the amount tendered. A tender may be made even before issue of summons.

If the tender is accepted by the plaintiff, the plaintiff is not entitled to recover the balance of the claim (which is not tendered) as well. A tender also implies an undertaking by the defendant to pay the costs as at the date of tender.

ACTIVITY

(1) Complete the following notice:

> NOTICE OF XXXXXXXXX
>
> Take notice that the Defendant intends to defend the action.
>
> Take further notice that XXXXXXXX

(2) What is the definition of a judgment by default?

.....

.....

.....

.....

(3) What is the position if appearance to defend is entered late but before lodgement of the request for judgment?

.....

.....

.....

.....

(4) What documents must be forwarded to court in order to obtain judgment by default?

.....

.....

.....

(5) What steps may the court take when a request for judgment is referred to it by the Clerk of Court?

.....

.....

.....

FEEDBACK

Example

The contents of such a notice are as follows:

(1)

NOTICE OF INTENTION TO DEFEND
Take notice that the Defendant intends to defend the action. Further kindly take notice that the Defendant gives the address of his attorneys for acceptance of service of process or documents in this case.

(2) It is a judgment given in the absence of a party against whom it is granted. See rule 2(1)(b).

(3) The appearance to defend will be valid provided it is submitted before request for default judgment or default judgment has not been granted.

(4) The following documents, namely

(a) The original summons with return of proper service.
(b) The written request for default judgment in duplicate.
(c) In the case of unliquidated claims (eg damages as a result of motor-vehicle collision) affidavits which prove the nature and extent of the damages must be attached.
(d) In the case of a claim based on a liquid document, the original document duly stamped or an affidavit setting out reasons to the court's satisfaction why such original cannot be filed.
(e) In the case of an action based on a credit agreement which is subject to the Credit Agreements Act, the agreement and certain affidavits must be lodged.
(f) In the case of an action based on a written agreement, the agreement duly stamped must be lodged. (See rule 12)

(5) The court may take any of the following steps:

(a) The court may call upon the plaintiff to produce either written or oral evidence if default judgment is sought, to support his or her claim.
(b) If judgment by consent is sought, the court may call upon the plaintiff to produce

evidence to satisfy the court that the consent has been signed by the defendant and it is a consent to the judgment sought.

(c) Give judgment in terms of the plaintiff's request or for so much of the claim as has been established to its satisfaction.
(d) Give judgment in terms of the defendant's consent.
(e) Refuse judgment.
(f) Make such order as may be just (rule 12(7)).

STUDY UNIT

20

SUMMARY JUDGMENT AND PROVISIONAL SENTENCE

John, a spaza shop owner, purchases goods to the value of R80 000 from Peter, the owner of a retail merchandise store. The goods are delivered at John's shop. John receives a copy of the invoice after having signed the original. Despite repeated requests John refuses and/or fails to pay for the goods delivered. Peter issues summons against John in the amount of R80 000 for goods sold and delivered. John enters an appearance to defend.

Overview

Learning outcomes

After you have finished studying this study unit, you should be able

- to list the grounds for summary judgment
- to define a liquid document
- explain how the application is initiated
- explain the steps which the defendant may take after initiating the application
- explain the procedure applicable at the hearing of a summary judgment application
- discuss the orders which a court may make at the hearing of an application for summary judgment
- apply the abovementioned principles to a given set of facts

Compulsory reading material

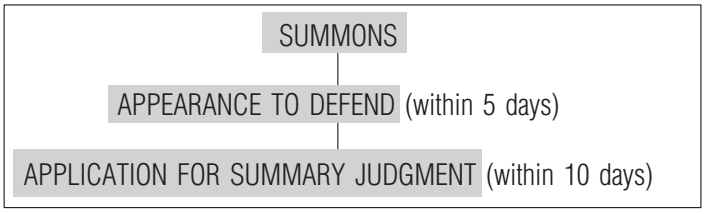
Rules 14(1)–(3), 14(5)–(9) and 14A of the Magistrates' Courts Rules

20.1 SUMMARY JUDGMENT

As in the case of the High Court, the plaintiff may, in a matter before a magistrate's court, apply for summary judgment after the defendant has given notice of intention to defend (in terms of rule 14). If the plaintiff's application is successful, the action is finalised. If the plaintiff does not succeed, the action proceeds as described in study unit 21 onwards. Summary judgment is described as an extraordinary procedure that is designed to protect the plaintiff in certain instances, against a defendant who is merely defending the matter in order to delay its finalisation.

Summary judgment in the magistrate's court is discussed briefly in this study unit.

The following is a schematic representation of summary judgment:



20.1.1 Claims in respect of which summary judgment may be granted

An application for summary judgment may be made on the following four types of claims:

(1) claims based on a liquid document such as a cheque
(2) claims for a liquidated amount of money
(3) claims for the delivery of specified movable property
(4) claims for ejectment (rule 14(1))

According to Jones and Buckle, a liquid document (in terms of rule 14(1)(a)) is a document from which an acknowledgement of debt or an undertaking to pay is clearly apparent, and in respect of which no extrinsic evidence (evidence of the document itself) is required to prove the debt.

Van Eeden v Sasol Pensioenfonds 1975 (2) SA 167 (0)

A liquid document need not, however, be a single document. It may comprise a number of documents, for example a hire-purchase agreement and a cession thereof — *Van Eeden v Sasol Pensioenfonds* 1975 (2) SA 167 (0).

The test generally applied by a magistrate's court in determining whether or not a document qualifies as a liquid document, is whether the High Court would grant provisional sentence on such document. A wide interpretation is given to the concept of a **liquidated amount of money**; for example, a claim for work done and material supplied has, on occasion, been regarded as a claim for a liquidated amount in money.

The concept of a liquidated amount in money is used to indicate an amount that is fixed and certain. It is an amount that has been precisely quantified, or that is readily capable of accurate determination and that is not in dispute.

S Dreyer and Sons Transport v General Services 1976 (4) SA 922 (C)

In *S Dreyer and Sons Transport v General Services* 1976 (4) SA 922 (C), Diemont J, in adopting a literal interpretation of the concept, stated as follows:

> ... The claim sounds in money and since the exact amount down to the last cent is stated, it is *prima facie* liquidated and not merely an unliquidated estimate such as a claim for damages which remains unliquidated until it is determined by a judge and an award made (at 923 C–D)

As the judge correctly remarks, there will be a wide variety of examples of what may be regarded as a liquidated sum of money, such as an account rendered to a shopkeeper, insurance premiums, and taxed bills of costs. It is submitted that the determination of this question rests in the discretion of the judicial officer concerned.

20.1.2 Initiating the application

Study Rule 14(2)

It should be stressed that the application for summary judgment may be made only after the defendant has entered appearance to defend. The plaintiff is required to bring the application for summary judgment on at least 10 days' notice to the defendant and the application must be brought not more than 10 days after the defendant's appearance to defend has been delivered.

The plaintiff proceeds by way of application. If the claim is based on a liquidated amount of money or for the delivery of specified movable property or for ejectment, the plaintiff must attach a copy of an affidavit made by him or her by someone else who is able to confirm the facts under oath. The cause of action and the amount (if any) claimed must be confirmed and the plaintiff must aver that in his or her belief there is no *bona fide* defence to the claim and that the notice of intention to defend has been given solely for the purpose of delaying the action.

If the claim is based on a liquid document, the plaintiff is required to attach a copy of the liquid document to the application. However, the original liquid document must be handed in at the hearing of the application.

20.1.3 Steps which the defendant may take to ward off a summary judgment application

Study Rule 14(3)

Rule 14(3) sets out the steps which may be taken by the defendant if he or she wishes to ward off summary judgment.

20.1.4 Procedure

Study Rule 14(5), 14(6), 14(7), 14(8)

These rules describe the procedure applicable at the hearing of an application for summary judgment.

20.1.5 Orders

Study Rule 14(9)

Rule 14(9) prescribes the orders which a magistrate's court may make at the hearing of a summary judgment application.

20.2 PROVISIONAL SENTENCE

Provisional sentence proceedings provide a speedy remedy for a creditor in possession of a liquid document. If a debtor is unable to dispute the validity of the document, a provisional

judgment will be entered against him or her. The debtor will only be able to enter into the merits of the matter after giving satisfactory security or paying the judgment debt or costs.

20.2.1 The procedure for applying for provisional sentence

The provisional summons used must follow Form 2A of Annexure 1. It is served in the usual way. The *dies induciae* in the summons is 10 days.

A copy of the document upon which the claim is founded must be attached to the summons (rule 14A(3)).

Once the summons is served the plaintiff has to set the matter down not later than three days before the day upon which it will be heard.

The defendant may oppose the provisional sentence summons by appearing personally, or by way of a practitioner as representative on the day named in the summons, or she may not later than 3 days prior to that date deliver an affidavit stating the grounds upon which she disputes the liability (rule 14A(5)(a)).

The plaintiff is given a reasonable opportunity to reply to the opposing affidavit (rule 14A(5)(b)).

The defendant may admit liability either before or at the hearing. The defendant must sign a written admission of liability which must be witnessed by an independent attorney. The court will award a final judgment for the plaintiff (rule 14A(6)).

A defence against a provisional sentence summons is aimed at the following:

(1) the authenticity of the signature on the document or the authority of the person signing
(2) the merits of the claim

If the provisional sentence is refused, the defendant may be ordered to file a plea within a stated time, and the court may award any order of costs which it deems fit (rule 14A(8)(a)). This is a discretionary step, and the court must be satisfied that the defendant has a case before ordering this. If the court does not order the defendant to file a plea, the matter is at an end.

If the defendant does not succeed in warding off a provisional sentence, the court will grant the plaintiff a provisional sentence. The sentence is provisional in the sense that the defendant may defend the matter to a full trial, but on certain conditions.

The defendant may demand from the plaintiff security *de restituendo* to the satisfaction of the clerk of the court (rule 14A(a)). Such security covers the defendant should he succeed in the principal action. If the plaintiff provides such security, the defendant must pay the amount of the judgment together with costs (rule 14A(10)).

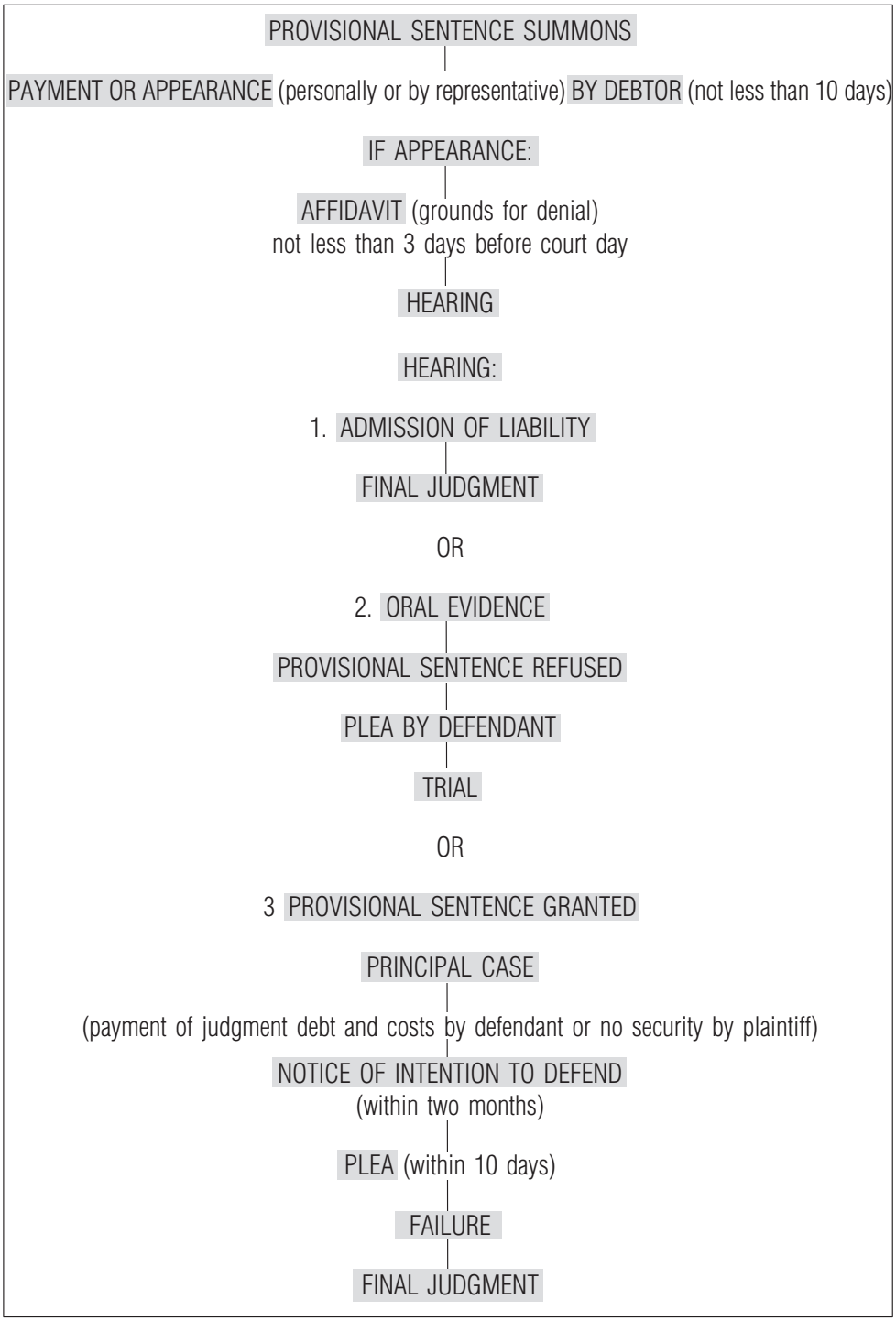
The defendant initiates the process within two months of the granting of the provisional sentence by delivering a notice of intention to enter the principal case, and by delivery of a plea ten days after the notice.

If the defendant does not take these steps timeously, the provisional sentence becomes a final judgment (rule 14A(11)).

Once the plea has been filed the matter is conducted as a normal trial action.

Study Rule 14A

The following is a flow chart diagram on provisional sentence in the magistrate's court. It must be studied in conjunction with Rule 14A.



ACTIVITY

Go back and read through the set of facts at the beginning of this study unit, and then answer the following questions:

(1) What procedure may Peter use when applying for summary judgment?

.....

(2) What are the three requirements for the supporting affidavit which must be filed by the plaintiff together with the notice for summary judgment?

.....

.....

.....

(3) What steps may the defendant John take to ward off the summary judgment application?

.....

.....

.....

(4) What allegations must be contained in John's opposing affidavit?

.....

.....

.....

(5) What orders may the court make at the hearing of the summary judgment application?

.....

.....

.....

(6) Suppose John pays the amount of R80 000 to Peter by cheque and the cheque is dishonoured by the bank. What type of summons may Peter now use?

.....

.....

(7) What is a defence against provisional sentence based on?

.....

.....

(8) What do you understand by the term "security *de restituendo*"?

.....

.....

FEEDBACK

(1) The plaintiff, Peter, proceeds by way of application procedure. This procedure involves an application for which a special form is prescribed, namely summary judgment, and must be distinguished from an application by means of notice of motion with or without supporting affidavits.

(2) The three requirements are as follows:

(a) It must be signed by the plaintiff personally and he or she must state that he or she has personal knowledge of the facts; or in the case of a legal person, it must be signed by someone who alleges that he or she is duly authorised to make the affidavit; in addition, he or she must state his or her capacity in respect of the plaintiff and that he or she has personal knowledge of the facts.
(b) The plaintiff must verify or confirm the amount or cause of action.
(c) The deponent must state that in his or her belief there is no *bona fide* defence to the claim and that appearance has been entered solely for the purpose of delaying the action (rule 14(2)).

(3) The defendant, John, may take the following steps:

(a) He may pay into court the amount for which he or she is sued together with such costs as the court may determine or may give security to the satisfaction of the plaintiff for such sum.
(b) The defendant may give security that he will satisfy whatever judgment may be given against him in the action.
(c) The defendant may give evidence that he or she has a *bona fide* defence or counterclaim against the plaintiff (rule 14(3)).

(4) John's opposing affidavit must contain the following:

(a) the allegation that he has a *bona fide* defence
(b) a denial that the appearance to defend has been entered solely for the purpose of delaying the plaintiff's action
(c) a disclosure of the nature and grounds of the defence or counterclaim.

(5) The court may grant the following orders:

(a) The court may give leave to defend to a defendant so entitled and give judgment against a defendant not so entitled.
(b) It may give leave to defend to a defendant as to such part of the claim and give judgment against the defendant as to the balance of the claim unless the defendant shall have paid such balance into court.
(c) It may make both such orders (rule 14(9)).

(6) Peter may now use a provisional-sentence summons.

(7) A defence against a provisional sentence summons is based on the authenticity of the signature on the document or the authority of the person signing, and the merits of the claim itself.

(8) The term refers to the security which the plaintiff must give for the restitution of money he or she has received from the defendant in terms of a judgment in the event of the defendant defending and succeeding in the main case.

STUDY UNIT

21

STEPS TAKEN BY THE DEFENDANT IN THE CASE OF A DEFECTIVE SUMMONS OR A SUMMONS WITH INCOMPLETE PARTICULARS

Peter and John are involved in a motor-vehicle collision in Johannesburg. Peter suffers damages in the amount of R80 000. Peter issues summons against John in the amount of R80 000. John intends to defend the action.

Overview

Learning outcomes

After you have finished studying this study unit, you should be able to

- discuss the different steps that the defendant may take when the summons is defective or when the summons has incomplete particulars
- discuss a request for further particulars
- discuss the grounds for exception
- discuss the grounds for striking out
- explain the differences between exception and striking out

Compulsory reading material

Rules 15(1)–(3); 16; 17(1)–(2); 17(5)–(6)(a); 60(2)–(3) Magistrates' Courts Rules

21.1 INTRODUCTION

If a summons contains insufficient particulars, the defendant may act in accordance with rules 15 and 16, which are discussed in 21.2 and 21.3 below. It sometimes happens that the summons has certain serious defects, in which case the remedies of exception and application to strike out are available to the defendant. These remedies are discussed in 21.4 and 21.5 below.

The following is a schematic representation of this study unit:

DEFECTIVE SUMMONS OR INCOMPLETE PARTICULARS OF CLAIM:

- REQUEST FOR COPIES OR ACCOUNTS (rule 15)
- REQUEST FOR FURTHER PARTICULARS (rule 16)
- EXCEPTION (rule 17)
- STRIKING OUT (rule 17(6)(a))

21.2 APPLICATION FOR COPIES OF DOCUMENTS OR ACCOUNTS UPON WHICH THE ACTION IS FOUNDED (RULE 15)

Rule 15 provides that the defendant may request the plaintiff to furnish copies of documents upon which the action is founded within 10 days of receipt of a notice to this effect. Only a defendant who has entered an appearance to defend and who has not been served with a notice of bar in terms of rule 12(1)(b) and who has not yet pleaded, may resort to this procedure. Aim of rule 15: to assist with preparing one's defence.

The defendant's right in this regard is strictly limited to documents or accounts on which the action is based. It does not apply to documents which are incidental or collateral to the action, or are merely of evidentiary value.

Jones and Buckle (vol II 124–125) give the following examples of documents and accounts upon which an action may be based: an arbitrator's award, a foreign judgment, and a taxed bill of costs. On the other hand, it is clear that in an action for the payment of the purchase price of goods sold and delivered, the plaintiff's claim is not founded on an account, since the account is merely evidence required to prove the purchase price. Therefore, in terms of this rule, the defendant will not be entitled to request copies of the account.

It is often difficult to draw this distinction. To illustrate this, where the plaintiff institutes action on the ground of an undertaking by the defendant to pay his or her (the plaintiff's) taxed costs, the action is based not on the taxed bill but on the agreement.

The plaintiff must, within 10 days of the request, deliver the necessary copies of documents and accounts to the defendant. The plaintiff must also allow the defendant access to the original documents should the latter request this. The inspection of the original documents may be important when a claim is based upon a written contract, a liquid document or a suretyship.

Should the plaintiff fail to deliver the documents as requested, or, if so requested, fail to make them available for inspection, the court may, on application by the defendant in terms of rule 60(3), dismiss the action with costs.

21.3 REQUEST FOR FURTHER PARTICULARS

Unlike the High Court, there is no provision for a request for particulars for the purposes of trial in the magistrate's court. Particulars in terms of Rule 16 are merely intended for the purpose of pleading. A request may be made after an appearance to defend or a plea or counterclaim. It may also be made after judgment on an exception.

The purpose of the request for further particulars is to put oneself in a position to take the next step in the proceeding without being at a disadvantage. To illustrate this, if an implied term in a contract is alleged, the other party is entitled to be informed regarding the circumstances from which it is sought to prove the implied term. Where the summons fails to disclose sufficient detail to enable a plea in the case where a tender or payment into court is pleaded, the defendant may ask for further particulars. This does not apply to actions for damages or compensation in that further particulars may not be requested to establish the other party's evidence.

If the other party fails to comply timeously with a legitimate request for particulars, the party so requesting may apply to court in terms of rule 60(2), for an order compelling the other party to furnish the particulars.

Example

The following is an example of such an application:

(Heading)

NOTICE IN TERMS OF RULE 60(2)

Kindly be pleased to take notice that the Defendant will apply to the above Honourable Court on ..... at 09:00 for an order compelling the Plaintiff to answer, within 10 days of the said order, the Defendant's request for further particulars dated ..... together with an order for the costs of this application.

Signed at Pretoria on this ... day of ..... 20... .

.....
Defendant's attorneys

TO: The Clerk of the Court

AND TO:
Plaintiff's attorneys

Copy hereof received on
..... at .....

.....
Plaintiff's attorneys

If the plaintiff does not comply with the court order referred to within the time limit stipulated in the order, the court will be empowered to grant judgment against the plaintiff immediately on application (rule 60(3)). However, the court usually grants judgment only in the case of a wilful failure by the plaintiff to respond, or where the plaintiff's case seems hopeless or the court is convinced that the plaintiff does not seriously intend proceeding with his or her case (Jones and Buckle, vol II, 433).

Please note that rule 60 applies to all cases where a provision of the rules, or a request in terms thereof, is not complied with. Therefore, this rule does not apply only to the present instance.

Service Master Eastern Transvaal (Pty) Ltd v V & S Engineering (Pty) Ltd t/a VGS Precision Motor Engineering 1983 (1) SA 540 (T)

Also note that the defendant may not approach the court in terms of rule 60(2) for an order compelling the plaintiff to supply further particulars, if such defendant did not request the particulars within the prescribed time limit (*Service Master Eastern Transvaal (Pty) Ltd v V & S Engineering (Pty) Ltd t/a VGS Precision Motor Engineering* 1983 (1) SA 540 (T)). The plaintiff may ignore a request for further particulars which is delivered late. The defendant may apply for condonation regarding a late delivery in terms of rule 60(5).

Delivery of an application for copies of documents or accounts in terms of rule 15 does not mean that the ten-day time limit within which further particulars must be requested, commences upon delivery of the documents or accounts in response to the rule 15 notice. In *Service Master Eastern Transvaal supra*, the court found that a notice in terms of rule 15 and the response thereto did not constitute a "pleading" as contemplated in rule 16. Rule 16 provides that the request for further particulars must be submitted within 10 days of the delivery of a notice of intention to defend, or within 10 days of the delivery of any other pleading. Since the notice delivered in terms of rule 15 did not qualify as a "pleading", the defendant in the present case had only 10 days after delivery of the notice of intention to defend in which to deliver his or her request for further particulars. The court also decided that the effect of rule 16(1) is that, excluding the case of an unsuccessful exception to the summons, a defendant, after entering appearance, is in all cases limited to a period of 10 days in which to request further particulars.

It is also important to note that a request for further particulars in terms of rule 16 does not in itself constitute a pleading. Rather the rule refers to a notice.

21.4 EXCEPTION (RULE 17)

Exception to a summons may be taken before or after a request for further particulars.

The exception is used to object to the plaintiff's summons. The exception procedure is used because it is unfair to the defendant to allow the matter to proceed to trial if the defendant is prejudiced in his or her defence by a defective summons or by defective service of summons. It thus provides a cheap and quick way of settling a dispute without resorting to a lengthy and protracted trial. Study 10.5 on exception in the High Court as regards the nature of an exception.

The only exceptions which may be taken by the defendant are that

(1) the summons does not disclose a cause of action
(2) the summons is vague and embarrassing
(3) the summons does not comply with the requirements of rules 5 or 6
(4) the summons has not being properly served
(5) the copy of the summons served upon the defendant differs materially from the original (rule 17(2))

The following example illustrates the abovementioned grounds for exception:

Example

Jan issues summons against Peter on the basis of damages sustained by him in a motor collision caused by Peter's alleged negligence. Jan must allege the following facts to disclose a cause of action, namely that he has suffered harm as a result of a collision with a vehicle driven by Peter, and the cause of the collision was due to Peter's negligence. Should Jan fail to disclose any of the above facts in his summons, Peter can except to the summons on the basis that it does not disclose a cause of action.

Example

The following is an example of a notice of exception:

(Heading)

NOTICE OF EXCEPTION

Kindly be pleased to take notice that the Defendant notes exception to the Plaintiff's particulars of claim on the basis that the particulars fail to disclose a cause of action.

The grounds upon which the Defendant excepts are:

(a) no averment has been made that the cause of the collision was due to the Defendant's fault

(b) *ex facie* the Plaintiff's averments it does not appear that the Defendant is liable to him.

WHEREFORE the Defendant prays that the Plaintiff's claim be dismissed with costs.

Signed at Pretoria on this ... day of ..... 20... .

.....
Defendant's attorneys

TO: The Clerk of the Court

AND TO:
Plaintiff's attorneys

Copy hereof received on .....
at .....

.....
Plaintiff's attorneys

Similarly, if the particulars of claim do not contain the averment that the cause of action occurred wholly within the district of the court out of which the summons is issued, the summons will be excipiable because it does not comply with the provisions of rule 6(5)(f). Similarly, a summons is said not to be properly served where the defendant is advised of the summons but a copy of the summons is not handed to him or her at the time of service.

For the procedure regarding when an exception may be taken, read rule 17(5). An exception is taken by way of notice of motion without an affidavit. It must be taken within 10 days of the filing of notice of intention to defend or within 10 days of the delivery of further particulars.

Alternatively, the exception may be taken within 10 days after the defendant has given the plaintiff notice in terms of rule 17(5)(c) that the summons is vague and embarrassing and the plaintiff is given 10 days to remove the cause of complaint.

An exception will only be taken if the court is satisfied that the defendant would be prejudiced in his or her defence, if the summons were allowed to stand. This occurs where the complaint is that the summons does not comply with the provisions of rules 5 and 6.

It is important to note that, when an exception is taken on the ground that the summons is vague and embarrassing, the defendant must, before taking exception, deliver a notice to the plaintiff setting out the passages in the summons which are vague and embarrassing, and notifying the plaintiff that, if he or she (the plaintiff) does not remove the cause of complaint from his or her summons, the defendant intends excepting to it. The notice must be given in terms of rule 17(5)(c). Although it is not obligatory to request further particulars in terms of rule 16 before excepting to a summons, the notice in terms of rule 17(5)(c) must be properly given.

A defendant who excepts on the ground that the summons does not comply with the requirements of rules 5 or 6, must set out particulars of the alleged noncompliance.

21.5 STRIKING OUT

A defendant may apply to strike out any one of two or more claims in a summons which, not being in the alternative, are mutually inconsistent, or are based on inconsistent averments of facts, or may apply to strike out any vexatious, irrelevant, superfluous or contradictory matter — Rule 17(6)(a).

Example

The application to strike out reads as follows:

(Heading)

NOTICE OF APPLICATION TO STRIKE OUT

Kindly be pleased to take notice that the Defendant hereby makes application to the above Honourable Court for the striking out with costs from the Plaintiff's particulars of claim of the matter set out below, on the basis that the aforesaid matter is argumentative, irrelevant or superfluous:

1. Para 4 from the words 'and the Plaintiff ...' up to and including the words 'duty to act'.

Signed at Pretoria on this ... day of ..... 20... .

.....
Defendant's attorneys

TO: The Clerk of the Court

AND TO:
Plaintiff's attorneys

Copy hereof received on ..... at .....

.....
Plaintiff's attorneys

The following grounds for striking out may be considered:

(1) Where two or more claims, which, not being in the alternative, are mutually inconsistent or are based on inconsistent averments of fact.

Example

The following examples may be used to illustrate this: Where a person claims (a) the balance of the purchase price under a contract of sale, and (b) the return of the article sold on the ground that the contract is void, such claims must be pleaded in the alternative. Where a person claims (a) rental for leased property, and (b) ejectment on the basis of wrongful occupation, such claims must also be pleaded in the alternative.

(2) Where there is any argumentative, irrelevant, superfluous or contradictory matter.

Unfortunately, this part of the rule does not appear to be well phrased. A portion of the summons may be vague and embarrassing, but not so vague and embarrassing to render the whole summons excipiable (that is, an exception is taken against the summons). Such portion may be vague and embarrassing without being argumentative, superfluous, irrelevant or contradictory. Eckard maintains that the idea behind these terms is that the summons should set out only the facts which form the basis of the claim (Paterson, p 161). Thus the summons may not contain arguments and reasoning but only the salient averments may appear in it.

ACTIVITY

Go back and read through the set of facts at the beginning of this study unit and then answer the following questions:

(1) John notices that the summons contains insufficient particulars. What steps may John take to remedy this defect in the summons?

.....

.....

(2) Peter fails to comply timeously with the request for further particulars. What step may John now take?

.....

.....

(3) Peter fails to allege in the summons that he has suffered harm as a result of the collision, and that the collision was due solely to John's negligence. What step may John now take?

.....

.....

(4) What procedure is used when an exception is taken?

.....

(5) Explain the difference between a request for further particulars and a notice of exception.

.....

.....

.....

(6) Peter alleges in the summons that John is responsible for the collision because he drove recklessly as he is **in the habit of doing.** What step may John now take?

.....

.....

(7) Discuss the differences between the application to strike out and an exception.

.....

.....

FEEDBACK

(1) John may make a request for further particulars to Peter in terms of rule 16. He may also apply for copies of documents or accounts upon which the action is founded in terms of rule 15.

(2) John may apply to court for an order compelling Peter to furnish the particulars in terms of rule 60(2). Please note that if Peter fails to comply with the above-mentioned order the court will grant judgment against Peter immediately on application (rule 60(3)).

(3) John may file a notice of exception because the summons does not disclose a cause of action.

(4) By application or notice of motion procedure without an affidavit. An interlocutory application must be clearly distinguished from a notice of motion procedure. A notice of motion is used to institute an action, and notice to other person or persons is necessary. An interlocutary application on the other hand, is used where proceedings have already been instituted and such application is related to these proceedings. An example of an interlocutary application is where a party is compelled to discover in terms of rule 35(7).

(5) A **request for further particulars** is intended for the purpose of pleading, whereas a **notice of exception** gives the defendant an opportunity of removing the cause of complaint from the plaintiff's summons. The defendant may utilise rule 60 if the request for further particulars is not complied with by the plaintiff. This may lead to the court granting judgment against the plaintiff on application in terms of rule 60(3). Similarly, if the plaintiff does not remove the cause of complaint from his or her summons, the defendant may except to it. The exception will be upheld if the court is satisfied that should the summons be allowed to stand, the defendant would be prejudiced in his or her defence.

(6) John may file an application to strike out the offensive words (in bold). The summons contains an averment which is irrelevant or superfluous.

(7) The application to strike out is thus used to rectify that part of the opposing party's pleadings containing the inconsistent, vexatious, irrelevant, superfluous or contradictory averments. It has no bearing on the pleadings as a whole. On the other hand, the exception may be taken to the pleading as a whole and not to a portion of the pleading, unless such portion constitutes a separate cause of action or defence. An exception is used to note an

objection to the pleading as a whole, while the application to strike out is used to raise an objection to certain portions of a pleading. Thus an exception goes to the root of a particular claim or defence contained in a pleading whereas an application to strike out attacks individual paragraphs in a pleading which do not comprise an entire claim or defence.

STUDY UNIT

22

PLEADINGS BY THE DEFENDANT

John and Peter are involved in a motor-vehicle collision in Johannesburg. Peter contends that the collision was due solely to the negligence of John. Peter suffers damages in the amount of R80 000. Peter issues summons against John in the amount of R80 000. John files his notice of intention to defend.

Overview

Learning outcomes

After you have finished studying this study unit, you should be able to

- discuss plea on the merits, special plea and counterclaim
- explain the differences between plea on the merits and special plea

Compulsory reading material

Rules 19(1), 19(3)–(4), 19(6), 19(10),19(12); 20(1)–(3) Magistrates' Courts Rules

22.1 INTRODUCTION

This study unit deals with that stage of process in magistrate's court proceedings where the defendant is given the opportunity of stating the case on which his or her defence against the plaintiff's claim is based. This occurs by means of the plea. The defendant may also institute a counterclaim against the plaintiff at this stage. The plea on the merits, special plea and counterclaim will be discussed in this study unit.

22.2 PLEA ON THE MERITS

There are many ways in which a defendant may defend a matter such as raising an exception, filing a special plea or making a payment into court. However, the most common way of defending a matter is to raise a defence on the merits. The plea contains the defence. It contains the defendant's answer to the plaintiff's averments in the particulars of claim attached to the summons.

Rule 19 embodies precisely formulated provisions governing the form, content, time and manner of pleadings. The following provisions governing the form and content of the plea are important, namely it must

(1) have a case number (rule 3(2))
(2) be in writing (rule 19(1))
(3) be dated and signed by the defendant or his or her attorney (rule 19(3))
(4) it must comply with the provisions of subrules 19(4) and 19(6).

Pretorius v Fourie NO 1962 (2) SA 280 (O); *Du Plessis v Doubells Transport (Edms) Bpk* 1979 (1) SA 1046 (O)

Please note that the defendant may file one plea only (see *Pretorius v Fourie NO* 1962 (2) SA 280 (O) and *Du Plessis v Doubells Transport (Edms) Bpk* 1979 (1) SA 1046 (O)).

Also note that a new defence may be pleaded orally on application at the trial, if it appears during the trial that there is *prima facie* evidence of a plea on a ground other than that pleaded (rule 19(11)).

22.2.1 The provisions of subrules 19(4) and 19(6)

The plea must be formulated sufficiently clearly to inform the plaintiff precisely of the basis of the defendant's defence. A bare denial of liability or a defence of general issue is not permissible, although specific allegations in the summons may be denied in so far as such denials are not inconsistent with the rest of the defence. Every allegation in the summons, and details with regard thereto, must thus be dealt with separately in the defence. The defence must consequently

— admit or
— deny; or
— confess and avoid all the material facts alleged in the summons, and,

— clearly and concisely state the nature thereof and
— provide all the material facts on which his or her defence rests

22.2.1.1 Admission

Admissions relate not only to facts explicitly admitted, but also to the necessary implications or results of facts explicitly admitted. All facts admitted expressly, or by necessary implication or result, need not be proved at the trial. Great circumspection must be used in drafting a defence.

Example

To illustrate this, where a defendant denies the existence of a contract but not the amount of the claim, he or she will be deemed to have admitted the amount. The plaintiff must only prove the existence of the contract to succeed in the claim. The defendant may withdraw an admission only in exceptional circumstances and then only with the court's permission. Where permission

is granted for such a withdrawal, the court will generally also issue an order for postponement and costs as may be reasonable in the circumstances.

22.2.1.2 Denial

The defendant must clearly and explicitly deny all the facts which he or she wishes to deny. A vague denial may lead the court to find that certain facts have not been placed in issue, and need consequently not be proved. The defendant must thus ensure that he or she does not make a general or bare denial which is inadmissible. To illustrate this, the plaintiff avers that his motor vehicle was damaged on 2 January in a collision involving the defendant's vehicle. The defendant merely denies the contents of this paragraph in his plea. Thus it is not clear what the defendant is denying, namely that it is the plaintiff's vehicle that is damaged; that the collision occurred on 2 January; that a collision occurred at all or that the defendant was the driver of the other vehicle. Such a general denial is vague and embarrassing and does not inform the plaintiff of the basis of the defendant's defence.

Example

Please refer to rule 19(10) in this respect.

Instances will arise where the defendant will be unaware of certain of the plaintiff's allegations, and will consequently not be in a position to admit or deny them. It is customary to plead in such circumstances that the specific allegation falls outside of the defendant's knowledge, but that he or she does not admit it and requires proof thereof.

22.2.1.3 Confess and avoid

This type of plea arises where the defendant admits all, or certain, of the facts in the plaintiff's summons, but proceeds to raise other facts which put a different complexion on the facts admitted, thereby neutralising them. An example of this is the case where a plaintiff sues a defendant for monies loaned and advanced. The defendant admits that the transaction took place, but pleads that the plaintiff absolved him or her from repayment at a later date.

Example

22.2.1.4 The nature of the defence must be clear and concise

This means that the defendant must indicate whether he or she admits or denies the allegations, whether confession and avoidance will apply or whether he or she will file a special plea. In the last-mentioned two instances, he or she must indicate fully the special plea or new facts he or she wishes to raise.

22.2.1.5 Material facts on which the defence rests

The defendant must not only indicate the nature of his or her defence; he or she must also indicate the actual facts on which his or her defence rests. Therefore, it is insufficient for a defendant to aver that he or she acted lawfully in the circumstances; he or she must indicate the facts on which he or she relies for justification, for example self-defence.

22.3 SPECIAL PLEA

Please refer to study unit 10.6 dealing with the High Court regarding the nature of a special plea, and the difference between a special plea and a plea on the merits.

A special plea is a defence which is not an answer to the factual allegations made by the plaintiff but which goes beyond the merits. Examples of special pleas are

- the court has no jurisdiction
- the plaintiff's claim has become prescribed
- the defendant or the plaintiff has no *locus standi* — legal capacity to institute action
- *lis pendens* — special defence that an action is already pending between the same parties (or their successors in title) which arises from the same cause of action or in relation to the same subject matter in dispute
- *res judicata* — special defence that the entire matter is *res judicata.* This defence amounts to a plea that a judgment has already been given by a competent court in a matter between the same parties in which the point in dispute was the same.
- arbitration
- splitting of claims
- non-joinder and misjoinder. Non-joinder — an example of where the plea will be successful will be where only one owner of property owned by several co-owners is sued or where there is joint financial or proprietary interest not based upon co-ownership.

Usually the onus rests on the defendant to prove his or her special plea.

All "special pleas" prior to the 1944 Act were known as "objections" and were dealt with according to the procedure pertaining to exceptions, except that evidence could be led at the hearing of an objection. However, the present position is that special pleas must be drawn up in the same manner as a plea on the merits. Rule 19(12) provides that a special plea may be set down by either party for a separate hearing upon 10 days' notice at any time after such defence has been raised. Rule 19(12) creates the possibility of speedy adjudication without the need of a long, protracted trial.

22.4 COUNTERCLAIM (ALSO KNOWN AS A CLAIM IN RECONVENTION)

Study unit 9.3 dealing with the counterclaim in the High Court. The counterclaim is also used in a magistrate's court. Rule 20(2) provides that the counterclaim (claim in reconvention) is made by filing, within the time period laid down for the delivery of a plea, a statement in writing giving such particulars of the claim in reconvention as are required for claims in convention. Therefore, rule 20(2) is intended to prescribe the same time limits for bringing a counterclaim as for delivering a plea. It is also not intended to exclude a counterclaim which is delivered late by consent, or delivered outside the time limits provided in rule 19(1) and rule 12(1)(b) where such limits have been extended by consent. (See *Sekhoto v Qwa Qwa Auto Industries CC Panel Beaters & Spray Painters* 1998 (1) SA 164 (O) in this regard.)

Sekhoto v Qwa Qwa Auto Industries CC Panel Beaters & Spray Painters 1998 (1) SA 164 (O)

The defendant who institutes a counterclaim is known as the plaintiff in reconvention, while the plaintiff (in the main claim) is known as the defendant in reconvention. Rule 20(1) provides that the provisions of the rules of the magistrate's court apply *mutatis mutandis* to claims in

reconvention, except that it is not necessary for the defendant in reconvention (ie the plaintiff in the main action) to enter appearance. The effect of rule 20(1) is that, from the time a claim in reconvention is delivered, it is treated as any claim in convention as at the moment the defendant enters appearance to such claim.

ACTIVITY

Go back and read through the set of facts at the beginning of this study unit and then answer the following questions:

(1) What pleading must John file in order to disclose his defence?

.....

.....

.....

(2) When must the pleading referred to in (1) above be filed?

.....

.....

.....

(3) What is the difference between a special plea and an exception?

.....

.....

.....

.....

(4) John alleges that Peter was also negligent. He wishes to institute proceedings against Peter. What pleading must John file?

.....

.....

(5) When must the pleading referred to in (4) above be filed?

.....

.....

FEEDBACK

(1) John must file his plea.

(2) Rule 19(1) sets out the instances when the defendant may deliver his or her plea. In terms of aforesaid Rule, the defendant may **within ten days**

(a) after entry of appearance to defend; or
(b) after delivery of documents or particulars in terms of rule 15 or 16; or
(c) after the dismissal of an application for summary judgment, if such application is made; or
(d) after the making of an order giving leave to defend; or
(e) after the dismissal of an exception or application to strike out, if such exception or application to strike out is set down for hearing in terms of rule 17(7); or
(f) after any amendment of the summons allowed by the court at the hearing of such exception or application, deliver a plea. However, if an appeal is noted against a decision on exception, or such proceedings are brought on review, the plea shall be delivered within such time as may be directed by the court of appeal or, on application by the court.

(3) Both these procedures are used to point out a technical defect in specific pleadings, and both procedures can result in a matter being extinguished. In both instances the correctness of the averments in the documents is presupposed and therefore the merits of the action are not dealt with. The exception can be distinguished from the special plea in that the exception must appear *ex facie* the pleading to which the exception is raised, while a special plea is used to raise an exception on the basis of certain facts which do not appear in certain of the plaintiff's specific pleadings. An exception can also be raised against any pleading, while a special plea can be raised only against the plaintiff's declaration or particulars of claim. An exception is raised against a pleading as a whole and not merely against a portion thereof, while the purpose of a special plea is to destroy or to postpone the operation of the plaintiff's cause of action. Finally, there are specific procedural requirements relating to the exception (such as the time period within which a notice of the exception has to be given and set down) which do not apply to a special plea.

(4) John must file his counterclaim.

(5) The particular pleading may be filed within the time period laid down for the delivery of a plea. See rule 20(2) in this respect.

STUDY UNIT

23

STEPS BY THE PLAINTIFF AFTER SERVICE OF PLEA

John and Peter are involved in a motor-vehicle collision in Johannesburg. Peter contends that the collision was due solely to the negligence of John. Peter suffers damages in the amount of R80 000. Peter issues summons against John in the amount of R80 000. John files his notice of intention to defend. He thereafter files his plea. The plea contains a mere denial that John is responsible for the collision.

Overview

Learning outcomes

After you have finished studying this study unit, you should be able to

- discuss the different steps that the plaintiff can take after service of plea
- name the grounds for exception

Compulsory reading material

Rules 19(15), 19(17); 21 Magistrates' Courts Rules

23.1 INTRODUCTION

The plaintiff may take certain steps after service of the defendant's plea. These steps are mostly directed at clarifying or remedying defects. These steps are set out very briefly below.

The following is a schematic representation of the steps that the plaintiff may take:

PLEA — FURTHER PARTICULARS TO PLEA (RULE 16)
— EXCEPTION (RULE 19)
— STRIKING OUT (RULE 19)
— REPLY (RULE 21)

23.2 FURTHER PARTICULARS

Rule 16 provides that the plaintiff is entitled to request further particulars in respect of the defendant's plea.

23.3 EXCEPTION

The plaintiff is entitled to except to the defendant's plea on one of the following grounds:

(1) that it discloses no defence
(2) that it is vague and embarrassing
(3) that it does not comply with the requirements of rule 19

(See particularly rule 19(14) and rule 19(15).)

***Neugebauer and Co Ltd v Bodiker and Co (SA) Ltd* 1925 AD**

The same rules that apply to exceptions to a summons are applicable to exceptions to a plea. However, a stricter view is taken of the plea than of the summons (see *Neugebauer and Co Ltd v Bodiker and Co (SA) Ltd* 1925 AD at 321).

It must be remembered that a notice similar to the one prescribed by rule 17(5)(c) must be given by the plaintiff to the defendant if he or she wishes to except to the latter's plea on the ground that it is vague and embarrassing (rule 19(15)(c)). Also note that rule 19(15)(a) and rule 19(15)(b) correspond to rule 17(5)(a) and rule 17(5)(b).

23.4 STRIKING OUT

The plaintiff may move to strike out any defence or matter in the plea on exactly the same grounds (*mutatis mutandis*) that the defendant may strike out claims and matters in his or her summons (rule 19(17)(a)).

The application to strike out matter from the plea may be set down for hearing by either party on 10 days' notice (rule 19(18)). If the application to strike out is granted and no application is made for amendment or an application for amendment is refused, the court may give judgment for the plaintiff if the plea then discloses no defence (rule 19(19)).

23.5 REPLY TO THE PLEA

The plaintiff may file a reply to the plea in terms of rule 21 (known as replication in the High Court). The reply is the final pleading that may be delivered by the parties during the exchange of pleadings in the course of a trial action in the magistrate's court.

The purpose of the reply is to answer any new averments made by the defendant in his or her plea. Where the defendant's plea is other than a bare denial of one or more of the allegations in the summons, the plaintiff may file a reply within 10 days of delivery of the plea or further particulars. Therefore, the plaintiff will deliver a reply only if he or she wishes to qualify the averments made by the defendant in his or her plea. To illustrate this, the plaintiff claims payment of an amount of R3 000 for goods sold and delivered by him or her to the defendant. The defendant pleads that he or she purchased the goods but that he or she is entitled to refuse to pay for them because the plaintiff failed to deliver them on time. The plaintiff may reply to this by averring that the defendant condoned the late delivery by accepting the goods without demur. Examples of pleas which may be replied to are estoppel, benefits of suretyship, justification in defamation actions, novation, prescription, and the case where the plaintiff himself or herself wishes to raise estoppel. In such reply, the plaintiff replies to the new factual allegations in the plea.

Example

The same rules apply to a reply as to a plea. Rule 21(3) provides that if the plaintiff fails to reply, he or she is deemed to have denied all the allegations in the defendant's plea. The same exceptions may be taken to a replication as are taken to a plea, and the same procedure must be followed.

The rule makes no provision for any further pleadings, and rule 21(4) provides that, upon delivery of the reply or, where no reply is delivered, upon expiry of the period limited for reply, the pleadings are deemed to be closed. Close of pleadings means that the exchange of all pleadings in which the plaintiff and defendant formulate their respective cases, is complete.

ACTIVITY

Go back and read through the set of facts at the beginning of this study unit and then answer the following questions:

(1) Peter discovers that the plea discloses no defence. What step may Peter take?

.....

.....

(2) When will the court uphold an exception?

.....

.....

(3) What is the final pleading that may be delivered by the parties during the exchange of pleadings in the course of a trial action in the magistrate's court?

.....

.....

(4) What is the purpose of a reply to a plea?

.....

.....

FEEDBACK

(1) Peter may file a notice of exception because John's plea does not disclose a defence.

(2) The court will not uphold any exception unless it is satisfied that the plaintiff would be prejudiced in the conduct of his or her case if the plea were allowed to stand (rule 19(15)(a)). The court will also not uphold an exception that the plea is vague and embarrassing unless the plaintiff has delivered a notice to the defendant giving him or her the opportunity to remove the cause of complaint before taking the exception (rule 19(15)(c)).

(3) The reply to a plea (replication).

(4) If the defendant raises new factual allegations in his or her plea, the plaintiff may file a reply.

STUDY UNIT

24

AMENDMENT OF PLEADINGS

Peter issues summons against Tom for goods sold and delivered in the amount of R60 000. Peter subsequently discovers that he made an error regarding the amount in that an amount of R50 000 is still outstanding. He wishes to amend the error.

Overview

Learning outcomes

After you have finished studying this study unit, you should be able to

- discuss how pleadings may be amended

Compulsory reading material

Section 111(1)–(2), Magistrates' Courts Act of 1944
Rule 55A(1)–(5), 55A(7)–(9), Magistrates' Courts Rules

24.1 INTRODUCTION

Rosner v Lydia Swanepoel Trust 1998 (2) SA 123 (WLD)

A party may conclude during the exchange of pleadings or during preparation for trial, that there is an error in his or her pleadings which he or she wishes to rectify. In *Rosner v Lydia Swanepoel Trust* 1998 (2) SA 123 (WLD), the court held that the general rule was that an amendment of a notice of motion, a summons or pleading in an action, would always be allowed unless the application to amend was *mala fide* or the amendment would cause an injustice or prejudice to the other side which could not be compensated by an order for costs.

The main aim in allowing an amendment is to obtain a proper solution to the dispute between the parties and to identify the real issues in the matter. However, a party seeking to amend its pleadings should not consider itself to have the right to that effect. Instead, it is seeking an

Embling v Two Oceans Aquarium CC [2000] 2 ALL SA 346 (A)

indulgence, and has to offer an explanation as to the reasons for the amendment (*Embling v Two Oceans Aquarium CC* [2000] 2 All SA 346 (A)).

24.2 AMENDMENT OF PLEADINGS

Section 111(1) provides that the court may, at any time before judgment, amend a pleading. The considerations for the amendment of pleadings which are applicable in the High Court, also apply in the magistrates' courts. Consult unit 10.4 which deals with the High Court in this regard.

Rule 55A provides an easy way of effecting amendments to pleadings. A party wishing to amend a pleading, must deliver the following notice:

Example

> NOTICE IN TERMS OF RULE 55A
>
> Take notice that Plaintiff intends to amend his particulars of claim as follows:
>
> **Ad paragraph 2:** By deleting the words "right turn" and inserting the words "left turn" instead.
>
> Further take notice that unless objection in writing is delivered within 10 days of the delivery of this notice, the amendment will be effected.

If the other party objects to the proposed amendment, the party who wishes to amend must, within 10 days, lodge an application for leave to amend.

ACTIVITY

Go back and read through the set of facts at the beginnng of this study unit and then answer the following questions:

(1) How will the amendment be effected?

.....

.....

(2) If the error appeared in the further particulars, could the further particulars be amended?

.....

.....

(3) What procedure must Peter follow if Tom lodges an objection to the proposed amendment?

.....

.....

(4) What are the grounds for refusal of an amendment?

.....

.....

(5) Who is responsible for the costs of an amendment?

.....

.....

FEEDBACK

(1) An amendment of pleadings will be effected in terms of section 111 and rule 55A.

(2) Yes, because further particulars form part of the pleadings.

(3) If the other party (Tom) objects to the proposed amendment, the party who wishes to amend (Peter) must, within 10 days, lodge an application for leave to amend.

(4) No amendments will be made by which any party other than the party applying for such amendment may be prejudiced in the conduct of his or her action or defence (s 111(1)).

(5) The party giving notice of such amendment, that is, Peter unless the court directs otherwise (rule 55A(9)).

STUDY UNIT

25

PREPARATION FOR TRIAL

Peter issues summons against John in the amount of R80 000 for damages sustained in a motor-vehicle collision. Peter alleges that the collision was due solely to the negligence of John. John defends the action. Pleadings have been closed between the parties. The parties now begin to prepare for trial. The parties need to disclose to each other certain aspects of the evidence which they hope to adduce at the trial.

Overview

Learning outcomes

After you have finished studying this study unit, you should be able to

- discuss what steps a party may take in order to prepare for trial
- explain what you understand by the concept of discovery of documents
- discuss pretrial conference
- discuss subpoenas

Compulsory reading material

Section 54(1)–(3) Magistrates' Courts Act of 1944
Rules 23(1), 23(2); 24(1), 24(8), 24(9); 25 of the Magistrates' Courts Rules;
Rule 22; Rule 27(5)

25.1 INTRODUCTION

Adjudication of the dispute between the parties occurs at the trial. The pleadings delimit the issues between the parties. The parties are obliged to disclose to each other certain aspects of the evidence they wish to place before the court before the matter can go to trial. The aim of the pretrial procedures is to facilitate an orderly and speedy trial and to prevent the parties from being taken by surprise at the trial by unexpected evidence.

25.2 SET-DOWN OF TRIAL

As *dominus litus* it is the plaintiff's duty to set down a matter for trial. However, if the plaintiff fails to set down the matter timeously (within 15 days after the pleadings have closed), the defendant may set down the trial. Rule 22 describes the procedure for setting down a matter for trial. The defendant may decide not to pursue the matter further, and may allow the matter to die a natural death. The defendant also has an option to apply for dismissal of the plaintiff's action in terms of rule 27(5).

25.3 DISCOVERY OF DOCUMENTS

Discovery is the process whereby each party can compel the other to reveal the documentary evidence which it hopes to adduce at the trial, and also to reveal other documents in its possession which tend to prove or disprove its case. In order that the parties may prepare for trial and not be taken by surprise (which would entail unnecessary postponements, delays and costs), it is deemed expedient that each party should know what books and documents the other has in his or her possession, or under his or her control. He or she is entitled to be informed only of those books in the custody or under the control of his or her adversary which the latter intends using in the action, or which tend to prove or disprove either case.

Read Rule 23

Rule 23 sets out the application for such information and the way in which such information is to be furnished. **Read rule 23 carefully**. Please note that pleadings have to be closed.

Documents in respect of which privilege is claimed must be listed separately in the schedule, and the grounds for each particular claim of privilege must be specified. Note that confidential communications between attorney and client are "privileged" from disclosure. Legal professional privilege applies to communications between attorney and client in the following circumstances:

1 Where the communication pertains to the professional, or intended professional, relationship,

2 made for the dominant purpose of seeking or giving legal advice, or for use in existing or anticipated legal proceedings,

3 whether written or oral, or even

4 where the client confesses to the attorney the commission of a prior crime or fraud.

Rule 23(2) refers to the consequences of a failure to disclose. However, one party can compel the other to disclose by means of rule 60(2). If the party called upon to make discovery fails to comply with the request to do so, the party calling for discovery may make an application in terms of rule 60(2) before the trial to compel compliance with the request. If an order is made

compelling discovery within a certain period and the other party persists in his or her default, a further application can be made for judgment against the defaulting party.

Rule 23(4) provides that the parties may be compelled to produce the books or documents disclosed in their schedules, and/or any other books or documents specified in a notice to that effect, at the trial.

Rule 23(3) provides that each party is allowed to inspect and make copies of the documents so disclosed, and of the documents specified in rule 23(4).

25.4 THE PROVISIONS OF RULE 24

Rule 24 contains similar provisions in respect of medical examinations, the examination of objects, and the adducing of expert evidence in the form of a plan, diagram, model, or photograph as we find in respect of the High Court. Refer to unit 13.2 which deals with the High Court in this regard.

25.5 PRETRIAL CONFERENCE

Section 54(1), read together with rule 25, provides that a party to a suit may request the court to convene a pretrial conference.

At such a pretrial conference, the parties attempt to limit the points in issue by, *inter alia* making admissions not already contained in the pleadings. Therefore, the parties try before the trial to restrict and delimit the points in dispute so as to curtail the time taken up by the conduct of the trial. The parties try to reach agreement on matters that may be mutually admitted and the precise points in issue between them. This helps to curb the leading of unnecessary evidence.

25.6 SUBPOENAS

Witnesses can also be summoned to appear in court as in the case of the High Court (sect 51, rule 26, Form 24). The subpoena compels the witness to present himself or herself at a civil trial. A subpoena *duces tecum* directs a witness to make books or documents in his or her possession or under his or her control available at the trial and to produce them to the court. A witness failing without lawful excuse, to comply with a subpoena may be fined with an amount not exceeding R300,00 and, in default of payment, face imprisonment for a period not exceeding three months (s 51(2)(a)).

***Marais v Smith en 'n Ander* 2000 (2) SA 924 WPD**

The court made pertinent remarks regarding a witness appearing by virtue of a subpoena *duces tecum in Marais v Smith en 'n Ander* 2000 (2) SA 924 WPD. The court found that if such a witness intends claiming privilege in respect of the documents he was called upon to produce, he has to do so in person, and not through his legal representative. If the witness should feel aggrieved by an overruling of the privilege claimed by him, he is entitled to approach the High Court for a suitable order. The court also held that if a witness is not paid his witness or travelling fees, it does not mean that the magistrate is entitled without hearing evidence to excuse the witness on the ground that the subpoena did not conform to the provisions of s 51(2) of the Magistrate's Courts Act. Such a finding would lead to an irregularity. However, such a witness was free to approach the court for an order compelling payment of his fees.

ACTIVITY

(1) What is the reason for discovery?

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.....

.....

(2) When does discovery take place?

.....

.....

(3) What is the procedure involved?

.....

.....

(4) What are the consequences of failure to disclose?

.....

.....

(5) When is it necessary to submit to a medical examination in terms of rule 24?

.....

.....

(6) What matters may be discussed at a pre-trial conference?

.....

.....

.....

FEEDBACK

(1) Discovery of documents is important so that parties may prepare for trial and not be taken by surprise. This would prevent unnecessary postponements, delays and costs.

(2) Discovery takes place when pleadings have been closed.

(3) Rule 23 describes the procedure involved. See rule 23. After the close of pleadings, but not later than 15 days before the date of trial, either party may deliver a notice to the other party calling on him or her to deliver a schedule specifying the books and documents in his or her possession or under his or her control relating to the action and which he intends to use in the action or which tends to prove or disprove either party's case. Such schedule, verified by affidavit, shall be delivered by the party required to do so within 10 days after the delivery of the notice. If privilege is claimed for any of the books or documents scheduled, such books or documents shall be separately listed in the Schedule and the ground on which privilege is claimed in respect of each shall be set out.

(4) In terms of rule 23(2), a book or document not disclosed may not be used for any purpose on the trial of the action by the party in whose possession or under whose control it is without the court's leave on such terms as to adjournment and costs as may be just. However, the other party may call for and use such book or document in the cross-examination of a witness.

(5) A medical examination is relevant in the following instance: Any party to proceedings in which damages or compensation in respect of alleged bodily injury is claimed may require any party claiming such damages or compensation whose state of health is relevant to the determination of such damages or compensation to submit to an examination by one or more duly registered medical practitioners (rule 24(1)).

(6) The court may at any stage in any legal proceedings in its discretion or upon the request in writing of either party direct the parties or their representatives to appear before it in chambers for a pretrial conference. The following issues/matters are addressed at a pre-trial conference:

   (a) the simplification of the issues
   (b) the necessity or desirability of amendments to the pleadings
   (c) the possibility of obtaining admissions of fact and of documents with a view to avoiding unnecessary proof
   (d) the limitation of the number of expert witnesses
   (e) such others matters as may aid in the disposal of the action in the most expeditious and least costly manner (s 54(1)).

STUDY UNIT

26

THE TRIAL

Peter issues summons against John in the amount of R80 000 for damages sustained in a motor-vehicle collision. Peter contends that the collision was due solely to the negligence of John. John defends the action. The pleadings are closed. The parties have discovered relevant documentary evidence which they hope to adduce at the trial. The parties go to trial.

Overview

Learning outcomes

After you have finished studying this study unit, you should be able to

- explain where the trial takes place
- explain the procedure involved in the trial
- explain the conduct of the parties

Compulsory reading material

Rule 29(1)–(3) Magistrates' Courts Rules

26.1 PLACE OF TRIAL

Save in exceptional circumstances, the trial must take place in open court (s 5) at the

courthouse from which the summons was issued, unless the court has ordered otherwise (Rule 29(1)).

26.2 PROCEDURE AND CONDUCT

The complete procedure and conduct of the trial is not described here. However, certain important aspects will be emphasised.

A witness who is **not a party to the action** may be ordered by the court either to leave the court until his or her evidence is required, or after his or her evidence has been given, or to remain in court after the evidence has been given until the trial is terminated or adjourned.

Before proceeding to hear evidence, the court may require the parties to state briefly the issues of fact or questions of law which are in dispute, and may record the issues so stated. If it appears to the court that there is a question of law or fact which may conveniently be decided separately, it may order the proceedings to be stayed until the question has been disposed of. If the question in issue is a question of law, and the parties are agreed upon the facts, the facts may be admitted in court, either *viva voce* or by way of a written statement by the parties. The judgment may then be given without further evidence. Where questions of law and issues of fact arise in the same case, and the court is of the opinion that the case may be disposed of upon the questions of law alone, it may require the parties to argue upon these questions only. In such an instance, the court will give its decision thereon and will deliver final judgment without dealing with the issues of fact.

The party on whom the onus of proof rests according to the pleadings, has the duty to lead his or her evidence first. Usually, it is the plaintiff who is obliged to lead evidence first, because the necessity for proof of a cause of action requires the plaintiff to establish the facts giving rise to his or her cause of action, while the defendant is required to prove a special defence raised by him or her. Unless absolution from the instance is then decreed, the defendant must then adduce his or her evidence. If the onus of proof is on the defendant, he or she must first adduce his or her evidence, and, if necessary (ie if the defendant has discharged the onus), the plaintiff must adduce his or her evidence.

However, there are cases where the burden of proving one or more issues is on the plaintiff, and that of proving the other issues is on the defendant. The plaintiff must then first adduce his or her evidence in respect of any issues he or she has to prove, and he or she may then close his or her case. The defendant will then be obliged to adduce his or her evidence on all the issues (ie unless absolution from the instance is granted in his or her favour). If the plaintiff has not adduced any evidence (other than that necessitated by the burden resting upon him or her), he or she will be entitled to do so after the defendant has closed his or her case. If he or she has adduced evidence on any issue in respect of which the burden of proof is not upon him or her, he or she will have no such right.

Rule 29(10) provides that the court must, in the case of a disagreement as to the party on whom the onus rests, direct which party must first adduce evidence. Either party may with the court's leave, adduce further evidence at any time before judgment. However, such leave will not be granted if it appears to the court that the evidence concerned was intentionally withheld.

Rowe v Assistant Magistrate, Pretoria 1925 TPD 361

The court may of its own motion, or on application by either party and at any time before judgment, recall any witness for further examination. **However, the court is not competent of its own motion to call any new witness in any civil proceedings** (*Rowe v Assistant Magistrate, Pretoria* 1925 TPD 361). Every witness may be examined by the court as well as by both parties. After the evidence on behalf of both parties has been led, the party who first adduced evidence may first address the court, and, thereafter, the other party may reply.

ACTIVITY

Go back and read through the set of facts at the beginning of this study unit and then answer the following questions:

(1) Which party bears the onus of proof?

.....

.....

(2) Give reasons for your answer in (1) above.

.....

.....

.....

.....

(3) What happens if the parties disagree regarding the question of on whom the onus of proof rests?

.....

.....

FEEDBACK

(1) Peter.

(2) Usually it is the plaintiff (Peter, in this instance) who has to lead evidence first. Peter has to establish the facts giving rise to the cause of action. Peter must prove on a balance of probabilities that John is negligent, and therefore responsible for the damages.

(3) The court will direct which party must first adduce evidence (rule 29(10)).

STUDY UNIT

27

JUDGMENT

Peter issues summons against John in the amount of R80 000 for damages sustained in a motor-vehicle collision. Peter contends that the collision was due solely to the negligence of John. John defends the action. The pleadings are closed. The parties have discovered relevant discovery evidence which they hope to adduce at the trial. The parties go to trial. Peter's attorney adduces his evidence first. He closes his case after presenting all the evidence which he wishes to lead to the court.

Overview

Learning outcomes

After you have finished studying this study unit, you should be able to

- discuss the judgments which a court may make in terms of section 48
- explain what you understand by the concept "absolution from the instance"

Compulsory reading material

Section 48 Magistrates' Courts Act, 1944

27.1 INTRODUCTION

Read section 48

Section 48 sets out the judgments which a magistrate's court may make in an action.

An order for absolution from the instance referred to in section 48(c), merits further discussion. The effect of such an order is to leave the parties in the same position as if the case had never been brought. The plaintiff may take out a summons and sue on the identical cause of action.

Absolution from the instance may be given at the close of the plaintiff's case or at the close of the defendant's case.

27.2 ABSOLUTION FROM THE INSTANCE AT THE CLOSE OF THE PLAINTIFF'S CASE

Absolution from the instance at the close of the plaintiff's case will be discussed first. In this case, absolution will be granted if there is insufficient evidence upon which the court may reasonably find for the plaintiff. It should be refused where there is evidence on which a reasonable person may find for the plaintiff.

Gordon Lloyd Page and Associates v Riviera 2001 (1) SA 88 (SCA)

The principles regarding absolution from the instance were laid down in *Gordon Lloyd Page and Associates v Riviera* 2001 (1) SA 88 (SCA). It was held that a plaintiff has to make out a *prima facie* case regarding all the elements of the claim in order to survive absolution. The inference from the evidence which is relied upon by the plaintiff must be a reasonable one, and not the only reasonable one. The court should be concerned with its own judgment, and not with that of another "reasonable" person or court. Absolution at the end of the plaintiff's case should be granted sparingly, but when the occasion arises a court should order it in the interests of justice.

27.3 ABSOLUTION FROM THE INSTANCE AT THE CLOSE OF THE DEFENDANT'S CASE

The issue of granting absolution from the instance at the close of the defendant's case arises in two situations, namely when the burden of proof rests on the plaintiff, and when the burden of proof rests on the defendant. Both situations will be considered hereunder.

27.3.1 Onus on plaintiff

Where the court is unable to find that the plaintiff has proved his or her case on a balance of probabilities at the close of the defendant's case, and the court also cannot find that the defendant has established his or her defence on a balance of probabilities, it must grant absolution from the instance. Therefore, if the court cannot decide on which side the truth lies, after hearing the evidence of both parties, the proper judgment is absolution. However, if the court has, on the evidence, found against the plaintiff, judgment for the defendant, rather than absolution, must be granted. If the final decision of a case depends entirely upon the credibility of witnesses, and the court cannot find that either set of witnesses is untruthful, it should also grant absolution (*Forbes v Golach and Cohen* 1917 AD 559; *Hairman v Wessels* 1949 (1) SA at 433 (O)).

Forbes v Golach and Cohen 1917 AD 559; *Hairman v Wessels* 1949 (1) SA 433 (O)

27.3.2 Onus on defendant

Where the onus is on the defendant, the court can **never** grant absolution from the instance at the end of the entire case. Where the defendant fails to discharge this onus on a balance of probabilities, the court must give judgment for the plaintiff. Where the defendant does discharge this onus on a balance of probabilities, the court must give judgment in his or her favour. Thus is there no room for a judgment of absolution in this situation (*Hirschfeld v Espach* 1937 TPD 19; *Ah Mun v Ah Pak* 1974 (4) SA 317 (E) 320).

Hirschfeld v Espach 1937 TPD 19; *Ah Mun v Ah Pak* 1974 (4) SA 317 (E) 320

ACTIVITY

Go back and read through the set of facts at the beginning of this study unit and then answer the following questions:

(1) Suppose Peter has failed to discharge his onus on a balance of probabilities. What step may John take at the end of Peter's case?

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(2) What is the effect of such an order?

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(3) Discuss whether the above order can be applied for if the onus rested on John and he failed to discharge his onus on a balance of probabilities.

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(4) What judgments may the court grant after the plaintiff and the defendant have closed their cases and presented argument?

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FEEDBACK

(1) John's attorney may apply for absolution from the instance. This order may be applied for when there is insufficient evidence on which the court may reasonably find for the plaintiff (Peter, in this instance).

(2) The parties are left in the same position as if the case had never been brought.

(3) No. The court can **never** grant absolution from the instance when the onus rests on the defendant. The court will grant judgment in favour of the plaintiff (Peter) when John (defendant) fails to discharge his onus on a balance of probabilities.

(4) The court may grant the following judgments:

   (a) judgment for the plaintiff in respect of his claim in so far as he or she has proved the same
   (b) judgment for the defendant in respect of his or her defence in so far as he or she has proved the same
   (c) absolution from the instance, if it appears to the court that the evidence does not justify the court in giving judgment for either party
   (d) such judgment as to costs (including costs as between attorney and client) as may be just
   (e) 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 satisfaction of the judgment
   (f) 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 sections 65J or 73 (s 48)

STUDY UNIT

28

COSTS

Overview

28.1 Costs

Learning outcomes

After you have finished studying this study unit, you should be able to

- discuss the different types of cost orders which a court may make
- explain the differences between attorney and client costs and party and party costs

Compulsory reading material

Rule 33(1), 33(2) Magistrates' Courts Rules

28.1 COSTS

Section 48(d) provides that the court may grant "such judgment as to costs ... as may be just".

Hoosan v Joubert 1964 (4) SA 291 (T)

In *Hoosan v Joubert* 1964 (4) SA 291 (T) the court held that a magistrate's court had no jurisdiction to grant costs on an attorney and client scale. However, in terms of section 3 of Act 48 of 1965, the power to make an order for attorney and client costs was specifically conferred on magistrates' courts.

The question of costs is a matter within the discretion of the magistrate, but this discretion must be exercised judicially and in accordance with the well-established general rules as to costs.

Table A, Part III of Schedule 2 of the Act contains scales in terms of which costs in the magistrates' courts are taxed in respect of opposed actions. The scale which is applicable depends on the amount of the dispute. On application by a party the court may, in certain circumstances, award costs on a higher scale than would usually be applicable (rule 33(8)).

Refer to 14.2 in dealing with the High Court in respect of the different cost orders that may be made by the court and the general principles involved.

A client's liability for his or her attorney's costs can easily give rise to a complaint against the attorney. Therefore, it is imperative to clarify this aspect with the client at the commencement of the mandate. The attorney must be careful to avoid excessive fees, because to charge seriously in excess of what is reasonable is to overreach the payer. An attorney found guilty of overreaching can expect to be struck off the roll. An attorney must also be careful regarding trust monies deposited in his or her trust account. An attorney must strive to invest his or her client's funds, for the benefit of the client, in an interest-bearing account.

ACTIVITY

(1) What do you understand by the following terms?

(a) Attorney and client costs
(b) Party and party costs
(c) Costs *de bonis propriis*

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(2) The attorney and client costs between attorney John Smith and his client Abel Dixon amount to R5 000. According to the cost order granted by the court, the defendant Joshua Simelane, is obliged to reimburse Abel for his costs on the party and party scale. The party and party costs are taxed at R3 800. Will Joshua be liable for R5 000 or R3 800? Give reasons for your answer.

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(3) Why is an order for costs granted?

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FEEDBACK

(1) (a) The amount due for services rendered and expenses incurred for which the client is liable to his or her attorney is known as **attorney and client costs**.

(b) The court usually makes an order at the end of a case to the effect that one of the parties (eg the defendant) is to pay the legal costs incurred by the other party (plaintiff). This is known as **party and party costs** and must be paid by one party (defendant) to the other party (plaintiff) and not to the plaintiff's attorney. The defendant therefore reimburses the plaintiff for costs that he or she (plaintiff) must pay to his or her attorney. Also note that party and party costs are determined by a tariff rather than a contract between attorney and client as is the case with attorney and client costs.

(c) **Costs *de bonis propriis*** are costs of suit which the court directs are to be paid by the unsuccessful party out of his or her own pocket where he or she instituted proceedings or defended the matter in a representative capacity. This usually applies where the litigation in question has been *mala fide*, negligent or unreasonable.

(2) Party and party costs are calculated according to a fixed tariff. These party and party costs are less than the attorney and client costs because only certain items of cost may be recovered on the party and party scale and even those costs which are recoverable can be recovered only at the given tariff. Joshua therefore pays only part of Abel's costs namely, R3 800 (not the entire R5 000) to John Smith. Abel then remains liable for payment of the balance of the amount namely, R1 200.

(3) The reason for granting an order for costs is that the successful party (eg the plaintiff) must be compensated for the costs that he or she is obliged to pay his or her attorney for conducting the case on his or her behalf.

STUDY UNIT

29

THE ENFORCEMENT OF JUDGMENT

Peter sues John for damages sustained in a motor-vehicle collision. Peter succeeds in his action, and the court orders John to pay Peter damages in the amount of R80 000. Despite reminders John refuses and/or fails to comply with the court judgment. Peter wishes to know if there are any legal steps that he can take against John to enforce the judgment.

Overview

Learning outcomes

After you have finished studying this study unit, you should be able to

- discuss how the process of execution takes place
- discuss when the execution process is used
- discuss how execution takes place against the judgment debtor's property
- discuss when execution takes place
- discuss the order in which execution takes place
- discuss how execution of immovable property takes place

Compulsory reading material

None

29.1 THE PROCESS OF EXECUTION

29.1.1 Introductory remarks

No court judgment or order would be of any use to a successful plaintiff if it could not be enforced. This is so because the object of litigation is to obtain the money or other relief claimed. If the defendant refuses to comply voluntarily with the judgment, steps must be taken to enforce such judgment. The process whereby compliance with any judgment, decree or sentence is enforced, is known as **execution**.

Execution may be defined as a court process whereby a successful litigant can enforce the court judgment or order granted in his or her favour. Jones and Buckle (Vol I 238) summarises this process as follows:

> Having obtained his judgment, the creditor sues out a warrant; the messenger then attaches so much movable property of the debtor as will satisfy the judgment or, if there will be insufficient movable property or the court on good cause so directs, immovable property. Thereafter a sale in execution takes place, and the proceeds are distributed.

The process of execution may be used against the person or property of the debtor.

29.1.2 The judgment debtor's person

Execution against the judgment debtor's person has been abolished.

Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officer, Port Elizabeth Prison **1995 (10) BCLR 1382 (CC)**

Sections 65F and 65G of the Magistrate's Court Act 32 of 1944, which ordered the committal of debtors to prison for failure to satisfy the judgment debt, were declared invalid by the Constitutional Court in *Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officer, Port Elizabeth Prison* 1995 (10) BCLR 1382 (CC) and consequently repealed.

29.1.3 The judgment debtor's property

Section 68 contains provisions regarding the property of the debtor which is executable. Execution may be levied against the following property of the judgment debtor:

(1) movable property
(2) immovable property
(3) certain incorporeal property

The Sheriff of the magistrate's court is expressly authorised in terms of section 68(1)–(3) to attach certain incorporeal property.

Section 67 refers to certain property which is exempt from execution. However, you need not study the provisions of this exclusionary section.

29.2 PROCEDURE ADOPTED WHEN LEVYING EXECUTION

29.2.1 Procedure

As was stated in the preceding pages, the execution process may be used against the person or property of the debtor. Here, the process in question relates to execution against the debtor's property.

Execution may occur when the court gives judgment for the payment of a sum of money or makes an order for the payment of money, in instalments, and the debtor fails to pay the money forthwith, or fails to pay any instalment at the time and in the manner ordered by the court. However, section 65E(4) provides that, where a warrant of execution is issued before an enquiry into the financial position of the judgment debtor and a *nulla bona return* is made, the judgment creditor will not be entitled to costs in connection with the issue and execution of such warrant.

Section 66(1)(a) (as amended by Act 63 of 1976) prescribes the order in which execution must be levied, namely: first against the movable property of the judgment debtor and then against his or her immovable property, provided that there is not sufficient movable property to satisfy the judgment or order, or if the court, on good cause shown, orders that execution be levied against the debtor's immovable property.

Therefore, where a party desires that property which is specially hypothecated be declared executable, it is not necessary to proceed in the High Court, because section 66(1)(a) (and its predecessor) empowers the magistrate's court to grant such an order.

However, section 66(2) still imposes an important proviso on execution against immovable property which is subject to a preferent claim. Such execution will not be allowed

(1) unless the judgment creditor gives personal notice in writing of the intended sale to the preferent creditor; or
(2) the magistrate of the district in which the property is situated has given directions as to how the intended sale is to be brought to the preferent creditor's notice; and
(3) unless the proceeds of the sale are sufficient to satisfy the preferent creditor's claim in full; or
(4) the preferent creditor confirms the sale in writing

Middelburg Town Council v McKenzie 1952 (1) SA 63 (T)
Johannesburg City Council v Swale 1955 (4) SA 150 (A)

However, in the case of proviso (2), it will often still be necessary to approach the High Court for an order declaring such property executable (see *Middelburg Town Council v McKenzie* 1952 (1) SA 63 (T), which is equally applicable to the amended section, and which was followed regarding the amended section in *Johannesburg City Council v Swale* 1955 (4) SA 150 (A)).

ACTIVITY

(1) What kind of movables may be attached?

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(2) List the items that are exempt from execution.

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(3) When may a warrant be issued against immovable property?

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(4) When do you issue a warrant of execution?

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(5) May a creditor at will elect to issue a warrant of execution against movable property or immovable property?

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FEEDBACK

(1) Corporeal things, incorporeal things, bills of exchange, cheques, promissory notes, bonds, and securities for money belonging to the execution debtor (s 68).

(2) The following items are exempt from execution in terms of section 67:

(a) the necessary beds, bedding and wearing apparel of the execution debtor and of his family
(b) the necessary furniture (other than beds) and household utensils in so far as they do not exceed in value the sum of R2 000
(c) stocks, tools and agricultural implements of a farmer in so far as they do not exceed in value the sum of R2 000
(d) the supply of food and drink in the house sufficient for the needs of such debtor and of his family during one month
(e) tools and implements of trade, in so far as they do not exceed in value the sum of R2 000

(f) professional books, documents or instruments necessarily used by such debtor in his profession, in so far as they do not exceed in value the sum of R2 000

(g) such arms and ammunition as such debtor is required by law, regulation or disciplinary order to have in his or her possession as part of his equipment:

Provided that the court shall have a discretion in exceptional circumstances and on such conditions as it may determine to increase the sums referred to in paragraphs (b), (c), (e) and (f)

(3) If the debtor does not possess sufficient movable goods but does own immovable property, or if the court, may on good cause shown, order such attachment (s 66).

(4) When compliance with a judgment is sought.

(5) No, this may not be done. Sections 66(1) and 66(2) are relevant here. Section 66(1) provides that execution may first be levelled against the movable property of the judgment debtor and then against his or her immovable property, provided that there is not sufficient movable property to satisfy the judgment or order, or if the court, on good cause shown, orders that execution be levied against the debtor's immovable property. Section 66(2) refers to execution against immovable property which is subject to a preferent claim. Refer to section 66(2) above regarding the instances when such execution will be allowed.

PART 3

Variation of judgments, review and appeals

STUDY UNIT

30

THE RESCISSION OR VARIATION OF JUDGMENTS

Thomas purchases goods to the value of R90 000 from Sibeko. Thomas takes delivery of the goods, but despite demand, refuses to pay the purchase price. Thomas alleges that the goods are defective. Sibeko institutes proceedings against Thomas in the magistrate's court to obtain payment of the purchase price. Thomas fails to respond timeously to the summons, and default judgment is granted against him. Thomas is now displeased because the judgment was granted in his absence and he has a valid defence to the action.

Overview

Learning outcomes

After you have finished studying the study unit, you should be able to

- explain why there are rescission or variation procedures
- discuss the grounds for the rescission or variation of judgments
- explain the procedure for rescission or variation of judgments in the magistrates' courts and the superior courts respectively
- apply the contents of this study unit to solve problems

Compulsory reading material

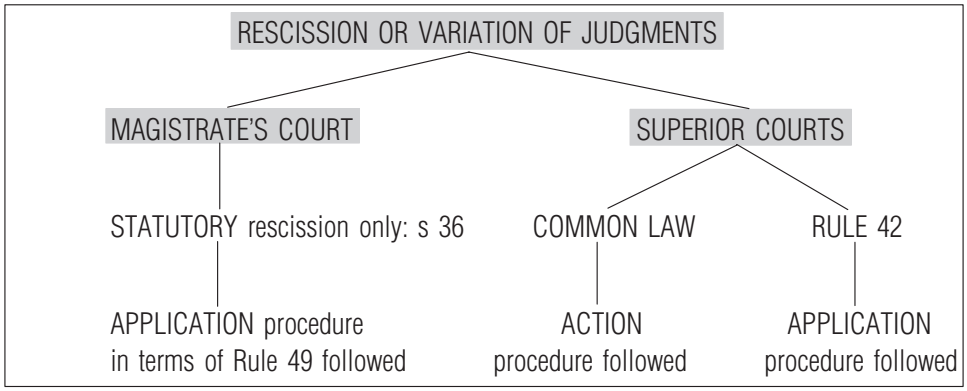
Section 36 of the Magistrates' Courts Act of 1944; Uniform Rule 42(1)
Rule 49(1)–(2) of the Magistrates' Courts Rules; Uniform Rule 42(2)–(3)

30.1 INTRODUCTON

A court's judgment becomes final and unalterable by it under common law when the judgment is pronounced by the judicial officer. The judicial oficer thereafter becomes *functious officio* ("having performed his or her office").

However, a judgment might not necessarily reflect the intentions of either of the parties to an action, or the judicial officer. To illustrate this, a judgment might be given in the absence of a party who is affected thereby; the judgment could be ambiguous; the judgment could contain a patent error; or the judgment could have been granted as a result of a common mistake. A party to the action may in such circumstances request that the judgment be varied in terms of certain statutory provisions, or be set aside in terms of the common law.

The following is a schematic representation of this study unit:



30.2 GROUNDS FOR THE RESCISSION OR VARIATION OF JUDGMENTS

We now consider the grounds for the variation of judgments. We will first consider the grounds for variation in the magistrate's courts.

30.2.1 Magistrate's Courts

Judgments given by a magistrate's court may only be statutorily rescinded in terms of section 36. This differs from the Superior courts in that no rescission in terms of the common law is required. Section 36 of the Magistrates' Courts Act was amended on 17 January 2003 in *Government Gazette* no 24277. Note that the grounds remain the same. However, an addition has been made to that particular section. The new section reads as follows:

What judgments may be rescinded

Section 36: (1) 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 origine* or was obtained by fraud or mistake common to the parties;
(c) correct patent errors in any judgment in respect of which no appeal is pending;
(d) rescind or vary any judgment in respect of which no appeal lies.

(2) If a plaintiff in whose favour a default judgment has been granted has agreed in writing that the judgment be rescinded or varied, a court must rescind or vary such judgment on application by any person affected by it.

Study Section 36

The following judgments may be varied in terms of section 36, which must be studied carefully.

(1) You should note that decrees, orders and rules are also regarded as judgments in terms of the definition of a judgment. There are many instances in which a court may grant judgment in the absence of the defendant in terms of the provisions of subsection 36(a). Judgment may be granted in the following instances:

- the case of a failure to file appearance to defend (rule 12)
- the filing of consent to judgment (rule 11)
- failure to plead (rule 12(1)(b))
- noncompliance with a court order regarding compliance with the rules of court (rule 60)
- non-appearance at the trial and withdrawal (rule 32)

De Allende v Baraldi t/a Embassy Drive Medical Centre 2000 (1) SA 390 (T)

The case of *De Allende v Baraldi t/a Embassy Drive Medical Centre* 2000 (1) SA 390 (T) is instructive regarding section 36(a). The court found that if a practitioner represents a natural or artificial person who is a party to litigation, that person, even if he or she is not physically present in court, is not regarded as "absent". That is what is usually understood by legal representation. Therefore, when a judgment is granted against a litigant who is not physically present but who is represented at the proceedings by a practitioner, the court is not authorised in terms of section 36(a) to thereafter vary or rescind the order.

(2) The provisions of subsections (b) and (c) are clear and require no further comment.

(3) In order to determine which judgments may, in terms of subsection (d), be rescinded or varied, one must first determine whether an appeal lies from such a judgment. The judgments affected by the subsection are those which do not have the effect of a final judgment. In this regard, refer to the discussion of section 83(b) in study unit 32.1.2, and to the test applied in *Pretoria Garrison Institute v Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 (A).

Pretoria Garrison Institute v Danish Variety Products (Pty) Ltd 1948 (1) SA 839 (A)

Where the rescission or variation of a judgment from which no appeal lies is applied for and the application is dismissed, the judgment becomes a final judgment (rule 49(9)) and will consequently be appealable.

The application must, however, have been rejected on the merits and not as a result of a procedural fault (eg noncompliance with uniform rule 49(3)). In cases where formal or procedural requirements have not been complied with, the application should not be dismissed, but rather struck from the roll.

It would appear that a successful application for rescission or variation of a judgment (unlike the unsuccessful application) does not acquire the status of a final judgment. Therefore, it is not appealable.

30.2.2 Superior Courts

A judgment may be set aside in terms of the common law, or varied in terms of Rule 42 in the High Court.

30.2.2.1 The common law

The grounds upon which a judgment will be set aside in terms of the common law are the following:

(1) Fraud

A judgment procured by fraud committed by one of the parties cannot be allowed to stand. It must, however, be shown that the successful litigant was a party to the fraud or perjury. In *Swart v Wessels* 1924 OPD 187, it was held that a party seeking to have a judgment set aside on the ground of fraudulent evidence must prove the following:

Swart v Wessels 1924 OPD 187

(a) that the evidence was in fact incorrect
(b) that it was given fraudulently and with intent to mislead
(c) that it diverged to such an extent from the true facts that the court would, had the facts been placed before it, have given a different judgment from that which it had given based on the incorrect evidence

(2) New documents

If new documents come to light which, had they been available at the trial, would have entitled the party claiming relief to judgment in his or her favour, the judgment can be set aside in certain circumstances. The following are examples of such circumstances:

(a) where judgment has been given regarding a will, and a later will is discovered
(b) where a document was not produced at the trial owing to fraud by the other party
(c) where the document was not produced although this was not the fault of the party claiming relief

(3) Error

Rule 42 lays down provisions as to when a judgment may be rescinded or varied because of error. However, under common law, nonfraudulent misrepresentation inducing *iustus error* on the part of the court is not a ground for setting aside a judgment induced by such error (see *Groenewald v Gracia* 1985 (3) SA 968 (D)).

Groenewald v Gracia 1985 (3) SA 968 (D)

(4) Irregularities in procedure

A party may apply for a judgment to be set aside if it was obtained in his or her absence and he or she was not in court owing to improper service, or the lack of service.

30.2.2.2 Statutory rescission

The statutory provisions which govern the rescission or variation of judgments in the High Court are contained in rule 42(1), which must be studied carefully.

Study Rule 42(1)

Note that, in order to establish *locus standi*, the applicant must show that he or she has an interest in the subject-matter of the judgment which is sufficiently direct to entitle him or her to have intervened in the original litigation in respect of which the judgment was given.

The provisions of the various subsections are clear and require no further comment.

30.3 PROCEDURE FOR THE RESCISSION OR VARIATION OF JUDGMENTS

30.3.1 Magistrates' courts

The provisions of rule 55, which govern the application procedure in general, must be complied with. In addition to these provisions, rule 49 contains the following special provisions governing applications to set aside judgments. Study rule 49.

Study Rule 49

(1) The application must be made within 20 days of the judgment having come to the notice of the applicant (rule 49(1)). Please refer in this regard, to the presumption created by rule 49(2). The case of *Phillips t/a Southern Cross Optical v SA Vision Care (Pty) Ltd* 2000 (2) SA 1007 CPD which dealt with rule 49(1) is also instructive. Rule 49(1) provides that a court may rescind or vary a default judgment on such terms as it may deem fit upon **good cause** shown; or if it is satisfied that there is **good reason** to do so. The court stated that the term "good cause" in the context of rescission of judgments is generally accepted to mean that the applicant must provide a reasonable explanation for his or her default; he or she must show that he or she has a *bona fide* defence; and that the application is made *bona fide*. The introduction of the concept "good reason" in rule 49(1) as amended in 1997, was intended to expand the discretion of the magistrates' courts regarding the rescission of default judgments by introducing a less stringent criterion.

Phillips t/a Southern Cross Optical v SA Vision Care (Pty) Ltd 2000 (2) SA 1007 CPD

(2) The supporting affidavit must furnish reasons for the failure to file an appearance to defend, or to plead. The grounds of defence to the main action or proceedings must also be set out (rule 49(3)). Please refer to *F and J Car Sales v Damane* 2003 (3) SA 262 (WLD) regarding what needs to be disclosed in a supporting affidavit.

(3) Before the application may be set down, the applicant must furnish security to the respondent for the amount of the costs awarded against him or her in terms of the judgment, together with a further amount of R200 to cover the cost of the application.

(4) An application on the grounds set out in section 36(b) may be made within one year of the applicant having become aware of such voidness, fraud or mistake. (rule 49(8))

(5) Contrary to the practice in other cases, the court may, in the cases mentioned in section 36(c), act *mero motu*.

30.3.2 Superior courts

The procedure to be followed differs, depending on whether setting aside in terms of the common law or variation in terms of Rule 42 is sought.

The correct procedure to be followed when setting aside a judgment in terms of the common law, is by means of the action procedure (see *Seme v Incorporated Law Society* 1933 TPD 213). This appears to be accepted as general practice, and the various rules governing the action procedure must be complied with.

Seme v Incorporated Law Society 1933 TPD 213

Rule 42 specifically provides that, where variation of a judgment is sought in terms of this rule, the application procedure must be followed. The provisions of Rule 6, which govern the application procedure in general, must be complied with. In addition, Rule 42(2) and (3) contain specific provisions governing applications for the variation or rescission of judgments, and these must be studied carefully.

Study Rule 42(2)–(3)

ACTIVITY

Go back and read through the set of facts at the beginning of this study unit and then answer the following questions:

(1) What procedure must Thomas follow to set aside the judgment?

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.....

(2) What information must be contained in the supporting affidavit?

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.....

(3) What judgments may be rescinded by a court in terms of section 36(1) of the Magistrates' Courts Act 32 of 1944?

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(4) What judgments may be varied or rescinded by the High Court in terms of Rule 42(1)?

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(5) Name the procedure to be followed when variation of judgment in terms of Uniform Rule 42 is sought.

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(6) Name the procedure to be followed when variation of judgment in terms of the common law is sought.

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.....

.....

FEEDBACK

(1) Thomas must apply to court for rescission of the judgment in terms of rule 49.

(2) The supporting affidavit must contain reasons for the defendant's absence or default and the grounds of the defendant's defence to the claim (rule 49(3)).

(3) In terms of section 36(1), the magistrate's court may

(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 origine* 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
(d) rescind or vary any judgment in respect of which no appeal lies

(4) The High Court may, in addition to any powers it may have *mero motu* or upon the application of any party affected, rescind or vary:

(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby
(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission
(c) an order or judgment granted as the result of a mistake common to the parties (Rule 42(1))

(5) The application procedure must be followed.

(6) The action procedure must be followed.

STUDY UNIT

31

REVIEW

Peter Rendell, a disc jockey, is sued in the magistrate's court by Tony Mokaba, a supplier of stereo sound equipment, for the non-payment of his account. Peter contends that the equipment that he purchased was defective. The magistrate, in passing judgment in favour of Tony Mokaba, states *inter alia* that: "only a lying, thieving, degenerate and drunken DJ would neglect to pay his debts like all other law-abiding citizens".

Overview

Learning outcomes

After you have finished studying this study unit, you should be able to

- understand the concept "review"
- distinguish between appeal and review
- discuss the grounds for review in the lower courts
- discuss the grounds for reviewing the proceedings of quasi-judicial bodies
- discuss the procedure pertaining to review
- apply the contents of this study guide to solve problems
- discuss the powers of the courts on review

Compulsory reading material

Section 24(1) Supreme Court Act of 1959; Uniform Rule 53(1)–(6)

31.1 INTRODUCTION

31.1.1 Meaning of the term "review"

The meaning of the term "review" was laid down as follows by Innes CJ in the leading case of *Johannesburg Consolidated Investment Company Ltd v Johannesburg Town Council* 1903 TS 111:

> In its ... most usual signification it denotes the process by which, apart from appeal, the proceedings of inferior courts of justice, both civil and criminal, are brought before this Court in respect of grave irregularities or illegalities occurring during the course of such proceedings ... .

This, then, is the hallmark of a review. It is aimed not so much at an incorrect finding of fact or ruling on a point of law by a court whose decision is appealed against, as at correcting irregularities which allegedly occurred in connection with the trial. As will be mentioned below, because the irregularities complained of might not appear on the record (eg as a result of the receipt of a bribe by the presiding officer), the court is competent to go beyond the record on review.

We may also mention at this stage that, since both appeal and review are aimed at correcting the proceedings before a lower court, overlapping sometimes occurs. In certain instances, the applicant appellant will therefore have a choice of which procedure to adopt (see 31.2 below).

The term "review" is also used when the proceedings of various statutory bodies are reconsidered by a superior court. While a superior court's authority to review proceedings of inferior courts is derived from statute, its authority to review the proceedings of other bodies is founded in the superior court's inherent jurisdiction.

Previously, there were two main ways of bringing a matter on review, depending upon the nature of the lower tribunal, namely by way of summons and by way of motion. The former method has now been abolished and all reviews are today brought by means of notice of motion, except where a statute provides otherwise.

31.1.2 Distinction between appeal and review

Traditionally, appeal and review may be distinguished as follows:

(1) An appeal is aimed at the **result** of the trial, whereas a review is aimed at the **method** by which the result is obtained. This does not appear to be a very satisfactory distinction, because the ultimate aim of both forms of proceedings is to reverse the judgment of the court *a quo*. However, the distinction lies rather in the **methods** employed to achieve this end.

    In an appeal, the appellant accepts that the record correctly reflects the proceedings in the lower court (if he or she does not, and still wishes to appeal, he or she must have the record amended), and that the proceedings were conducted properly. He or she alleges, however, that the presiding officer made false deductions and findings of fact on the evidence (although acting perfectly properly), or that his or her legal conclusions were incorrect.

The very object of a review is to show that the proceedings were improperly conducted, and it seeks to have the judgment set aside on these grounds without being concerned with the merits of the case.

(2) The second distinction (which is simply another facet of the first) is that, in the case of an appeal, the parties are **restricted to the record** of the proceedings and may not go beyond it, whereas in the case of a review, the parties may, by virtue of the nature of review, go **beyond the record**.

The converse (ie that in review one can never argue the matter **without** going beyond the record) is not true, as we shall see. A sound starting point is the proposition that, in the case of an appeal, one cannot go beyond the record. If one wishes to go beyond the record, one must resort to review proceedings; appeal proceedings may never be used for this purpose.

As Innes CJ expressed it in *R v Bates and Reidy* 1902 TS 199:

> The difference between appeal and review is that an appeal is based upon the matters contained in the record, while in review the appellant may travel beyond the record in order to rely on certain grounds, such as gross irregularity and the admission of incompetent evidence. If the appellant desires to appeal, but is not satisfied with the record as it stands, he may proceed to apply for leave to amend it.

(3) The third distinction is that the rules governing civil appeals usually provide that an appeal must be **noted within a stipulated number of days**, and that the steps to prosecute it must be taken within a further limited period. In regard to reviews, however, there is generally no **fixed period** within which the proceedings must be brought, but this must be done within a "reasonable time". What is "reasonable" will depend upon the facts of each case. The reason for there being no fixed period is that an irregularity might come to light months — or even years — after the case has been tried.

(4) The final (and most obvious) distinction is that the procedure differs. An appeal must be noted and prosecuted according to **statutory provisions**, supplemented by the rules of court. Reviews, on the other hand, are brought on **notice of motion**.

31.2 GROUNDS FOR REVIEW

31.2.1 Grounds for reviewing the proceedings of lower courts

Study s 24

Section 24 of the Supreme Court Act of 1959 lays down uniform grounds for the reviewing of the proceedings of any lower court, and these must be studied carefully.

The following grounds for review are mentioned in section 24(1):

(a) absence of jurisdiction on the part of the court
(b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer
(c) gross irregularity in the proceedings
(d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence

The provisions of subsection (c) require some clarity. All the other grounds are clear and require no further comment.

The meaning of "gross irregularity"

The phrase "gross irregularity" refers not only to incidents in the court room, but also to any irregularity which leads to prejudice to any of the parties. To illustrate this, if a court makes a ruling against a party without giving him or her the opportunity to present his or her case, then this will lead to gross irregularity in the proceedings. Similarly, if a court conducts an inspection *in loco* in the absence of the parties, the court's conduct will amount to gross irregularity. A gross irregularity must be prejudicial before review proceedings will proceed.

However, as mentioned above, there are instances where either review proceedings or an appeal may be instituted, but naturally only when it is not necessary to go beyond the record.

Example

The following two examples will illustrate this:

(1) Where the court *a quo* had no jurisdiction, the proceedings may be reviewed in terms of section 24(1)(a) of the Supreme Court Act. However, the judgment can also be appealed against (see eg *King's Transport v Viljoen* 1954 (1) SA 133 (C), which was discussed in relation to s 28(1)(d) of the Magistrates' Courts Act).

King's Transport v Viljoen 1954 (1) SA 133 (C)

(2) Where a magistrate has admitted inadmissible or incompetent evidence, the proceedings may be reviewed in terms of section 24(1)(d) of the Supreme Court Act. It is also permissible to appeal in a proper case (see eg *Retief Bros v Du Plessis* 1928 CPD 387), but then the appellant is restricted to the record.

Retief Bros v Du Plessis 1928 CPD 387

31.2.2 Grounds for reviewing the proceedings of quasi-judicial bodies

As was stated earlier, superior courts have inherent jurisdiction to entertain all causes arising within their areas of jurisdiction. If a statutory body (eg a liquor licensing board, which is not a court in the usual sense of the word) does not conduct its proceedings in a fair and reasonable manner, a superior court will have the inherent jurisdiction necessary to correct such shortcomings. This type of review is therefore often termed a "review under the common law", as opposed to a review of inferior court proceedings authorised by statute.

A superior court has jurisdiction to review the proceedings of any body or tribunal empowered to perform statutory duties, as well as to review the proceedings of quasi-judicial bodies.

The principles which should guide a superior court were set out as follows by Bristowe J in *Africa Realty Trust v Johannesburg Municipality* 1906 TS 179:

> If a public body or an individual exceeds its powers the court will exercise a restraining influence; and if, while ostensibly confining itself within the scope of its powers, it nevertheless acts *mala fide* or dishonestly, or for ulterior reasons which ought not to influence its judgment, or with an unreasonableness so gross as to be inexplicable, except on the assumption of *mala fides* or ulterior motive, then again the court will interfere. But once a decision has been honestly and fairly arrived at upon a point which lies within the discretion of the body or person who has decided it, then the court has no functions whatever. It has no more power than a private individual would have to interfere with the decision merely because it is not one at which it would itself have arrived.

It should be noted that a court will not interfere on review with a decision taken by a quasi-judicial tribunal, unless the party requesting review has suffered prejudice (*Jockey Club of South Africa v Feldman* 1942 AD 340). Where it has been proved that a party has suffered prejudice as

Jockey Club of South Africa v Feldman 1942 AD 340

Virginia Land and Estate Co Ltd v Virginia Valuation Court and Another 1961 (4) SA 479 (0)

a result of an irregularity, the onus of disproving prejudice must be discharged by the tribunal that committed the irregularity (*Virginia Land and Estate Co Ltd v Virginia Valuation Court and Another* 1961 (4) SA 479 (O)).

In addition to review under the common law, various statutes also make provision for the review of decisions taken by tribunals or officials. The provisions of these statutes vary and will not be dealt with here.

31.3 PROCEDURE ON REVIEW

The procedure pertaining to review is set out in Rule 53. The Rule provides that motion proceedings must be used when the review of a decision of any inferior court or quasi-judicial body is sought.

What does the notice of motion contain?

The notice of motion calls upon the presiding officer to dispatch the record of the original proceedings to the Registrar of the relevant division of the High Court where review proceedings have been instituted. This record must be dispatched within **15 days** after receipt of the notice of motion. The notice must contain reasons for judgment which the presiding officer must, or wishes, to furnish. The notice also calls upon the other interested parties (ie parties who would be affected by review proceedings) to show cause why the decision should not be reviewed. The notice of motion must also be accompanied by a supporting affidavit setting out the grounds, facts and circumstances on which the applicant relies for requesting the review.

Example

The following is an illustration of a notice of review:

(Heading)

NOTICE OF REVIEW

Kindly take notice that the Applicant Ned Petersen hereby calls upon Honourable Magistrate Tom Jones to show cause why the proceedings in the matter between Solly Steyn (Plaintiff) and Ned Petersen (Defendant) heard under case number XXXX of 20.... ..... in the magistrate's court for the district of Johannesburg held at Greenside should not be reviewed and corrected.

Further, kindly take notice that Honourable Magistrate Tom Jones is called upon to dispatch, within fifteen days after receipt of this notice, to the registrar of the abovementioned Honourable Court the record of the proceedings in the abovementioned 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.

Further, kindly take notice that the Applicant applies for review on the basis that during the trial of the abovementioned matter and before the Applicant had called all of his witnesses and closed his case, the Honourable Magistrate indicated to Solly Steyn that he would grant judgment against the Applicant and that the said conduct of the Honourable Magistrate constitutes a gross irregularity.

Further, kindly take notice that the affidavit of Ned Petersen attached hereto will be used in support of the application.

The presiding officer then sends the record to the Registrar, who must permit the applicant to

make copies thereof. The applicant gives two copies to the Registrar (for use by the judges hearing the application), and a copy to every other party to the proceedings.

After receipt of the record, the applicant has a **ten-day period** within which he or she may amend or add to his or her notice of motion or affidavit by means of a notice together with a supplementary affidavit. He or she may only do this if the record contains further information which he or she wishes to bring to the court's attention.

If the presiding officer, or any interested party, wishes to oppose the application for review, he or she must file a **notice of intention to oppose within 15 days** of receipt of the notice of motion. He or she must also file an **answering affidavit within 30 days** of the filing of the applicant's supplementary affidavit. (It should be noted that, because the applicant is afforded an opportunity of amending or adding to his or her notice of motion and supporting affidavit, the respondent is only required to file his or her answering affidavit after the period for amendment has expired — otherwise he or she would not have the opportunity of dealing with any new matter raised by the applicant in his or her supplementary affidavit.)

After the answering affidavit has been filed by the respondent, the applicant may file a replying affidavit.

The application will then be set down for hearing in accordance with the procedure set out in Rule 6 of the Uniform Rules of Court.

From the above, it is clear that the normal, opposed application procedure is followed in review proceedings, with two important additions, namely

(1) the provision for making the record available to all parties and
(2) the provision that the applicant may amend or add to the documents on the basis of which he or she institutes review proceedings, after receipt of the record.

31.4 POWERS OF THE COURT ON REVIEW

If review proceedings are successful, the High Court will set aside the decision or the proceedings that it has reviewed, and remit the matter to the particular body to decide in accordance with the correct procedure. However, the court will not substitute its own discretion for that of the body or official whose decision it has reviewed, unless there are exceptional circumstances (see *Roopsingh v Rural Licensing Board for Lower Tugela and Others* 1950 (4) SA 248 (N)). It should also be noted that the court will not remit the matter to the particular body whose proceedings are reviewed, in the following circumstances:

***Roopsingh v Rural Licensing Board for Lower Tugela and Others* 1950 (4) SA 248 (N)**

- when the end result is clear and referring it back will merely waste time
- when a remittance will be futile
- when there are valid reasons why the court should exercise its discretion in favour of the applicant and substitute its own decision for that of the respondent

ACTIVITY

Go back and read through the set of facts at the beginning of this study unit and then answer the following questions:

(1) Should Peter appeal against the judgment or take it on review in terms of the requirements of section 24 of the Supreme Court Act of 1959? Explain.

.....

.....

.....

(2) Depending on your answer to (1) above, state the procedure that must be used.

.....

.....

(3) Name two distinctions between appeal and review.

.....

.....

.....

(4) Name two instances when a court will interfere with a decision taken by a quasi-judicial body.

.....

.....

.....

FEEDBACK

(1) In determining which procedure is appropriate, one should begin by enquiring what one's grounds of complaint are. Generally, if one complains of the **reasoning** employed by the court in coming to a decision, one will proceed by way of appeal. But if one complains about the **process** which led to the decision of the magistrate, one will proceed by way of review. From the facts, it seems that Peter should take the judgment on review in terms of **section 24(1)(b)** of the Supreme Court Act of 1959. Section 24(1)(b) provides that a court will interfere with the judgment where there is interest in the cause, bias, malice or corruption on the part of the presiding judicial officer. Peter should use the above review procedure because the magistrate's comments display bias and/or malice. It should be noted that a court may also interfere in other instances (not applicable to this answer though):

   (a) In the absence of jurisdiction on the part of the court (s 24(1)(a)).
   (b) Gross irregularity in the proceedings (s 24(1)(c)).
   (c) Where a magistrate has admitted inadmissible or incompetent evidence, or rejected admissible or competent evidence, the proceedings will be reviewed (s 24(1)(d)).

(2) Motion proceedings must be used because review of a decision of a magistrate's court is being sought.

(3) Please refer to 31.1.2 above to answer this question.

(4) The court will interfere in the following instances:

   (a) If a public body or individual exceeds its powers, the court will exercise a restraining influence.

(b) If a public body although confining itself within the scope of its powers, acts *mala fide* or dishonestly, or for ulterior reasons which ought not to influence its judgment.

STUDY UNIT

32

APPEALS

Jane Smith institutes proceedings in a magistrate's court against John Richards for damages arising out of breach of contract. The magistrate grants judgment against John. John is dissatisfied, and takes the matter on appeal.

Fanie Botha institutes an action for damages against Solly Sibeko in the High Court. Both the court *a quo* and, on appeal, the full bench of the provisional division, reject his claim. Fanie wishes to appeal to the Supreme Court of Appeal.

Overview

Learning outcomes

After you have finished studying this study unit, you should be able to

- explain what is meant by "appeal"

- discuss how one can appeal against a magistrate's court decision
- discuss appeals from decisions of superior courts
- discuss the effect of noting an appeal against judgments in the magistrates' courts and the higher courts respectively
- discuss the composition of the various courts of appeal
- discuss procedure on appeal
- apply the contents of this study guide to solve problems

Compulsory reading material

Sections 78; 82; 83; 85; 86; 87 Magistrates' Courts Act of 1944
Rule 51(1)–(4), 51(8) Magistrates' Courts Rules
Sections 12(1)(a)–(b); 13(1)–(2); 20(1)–(3); 20(4) Supreme Court Act of 1959
Uniform Rule 49(1)(a)–(b); 49(6)(a) ; 49(7); 49(11); 41(2); 50(1); 50(4)(a)
Rules 6–13 of the Rules of the Supreme Court of Appeal of 1998

32.1 INTRODUCTION AND GROUNDS OF APPEAL

32.1.1 Introduction

Before dealing with this topic in greater detail, a few preliminary points must be made.

A litigant who is not satisfied with the decision of a court of first instance may, subject in certain instances to leave thereto being granted, appeal against such decision to a higher court. An appeal lies to the appropriate provincial or local division of the High Court from judgments of magistrates' courts and certain other lower courts. Moreover, appeals against the judgments of superior courts may be brought, if leave to appeal is granted, either to the full bench of the appropriate provincial or local division, or to the Supreme Court of Appeal.

Note that, in respect of the decisions of magistrates' courts, an aggrieved litigant is allowed only **one** appeal as of right. No appeal as of right is available to an aggrieved litigant in respect of decisions of the High Court, and leave from the court concerned (or failing that, leave from the Supreme Court of Appeal) must be obtained.

What is meant by "appeal"?

By now, all of you probably know what an appeal is, but, formally, it may be defined as "an approach to a higher court for relief from the decision of a lower one".

You should also note the meanings attached to the following phrases:

- **"court of first instance"** — the court before which a matter was first heard
- **"court *a quo*"** — the court against whose decision an appeal is noted
- **"full bench/full court"** — usually, three judges of the relevant provincial or local division

32.1.2 Appeals against magistrate's court decisions

Study s 82

Section 82 provides that, by consent, the court's decision will be final. Study this section.

Study s 83

Subject to the above limitation, section 83 sets out when an appeal may be noted. Section 83 provides that appeals may be brought against three types of decision:

1 any judgment described in section 48
2 any rule or order having the effect of final judgment, including an order relating to execution in terms of Chapter IX of the Act and on an order as to costs
3 in certain circumstances, any decision overruling an exception

Study this section carefully.

Pretoria Garrison Institute v Danish Variety Products (Pty) Ltd 1948 (1) SA 839 (A)

What is meant in section 83(b) by a rule or order "having the effect of a final judgment"? The leading case here is *Pretoria Garrison Institute v Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 (A), in which it was held that the test for determining whether a rule or order has this effect is whether it disposes of any issue, or any portion of any issue, in the main action, or irreparably anticipates or precludes some of the relief which would, or might, be given at the main hearing.

If the effect of a rule or order is final, this means that the matter has ended for one of the parties. Therefore, he or she can appeal against that order or rule. This differs from an interim order in that the granting of an interim order does not mean that a party has lost the case. Thus the party may not appeal against a provisional or interim order.

Example

Makhetha v Libamba 1998 (2) All SA 496 (W); 1998 (4) SA 143 (W)

Examples of orders that are final and definitive are the granting or refusal of a final interdict, the granting of a summary judgment, the upholding of a special plea that the court lacks jurisdiction and the upholding of a defence of prescription. In *Makhetha v Limbada* 1998 (2) All SA 496 (W); 1998 (4) SA 143 (W), it was held that the grant of provisional sentence in a manner that would render it pointless to go into the principal case, had the effect that the provisional sentence order was final in effect and accordingly appealable.

Example

Livanos v Absa Bank Ltd [1999] 3 All SA 221 (W)

Examples of orders which are interlocutory with no final effect are: a refusal to grant absolution from the instance at the end of the plaintiff's case, or an order for (or refusal to order) further particulars. In *Livanos v Absa Bank Ltd* [1999] 3 All SA 221 (W), the court held that an order granting leave to execute subject to security *de restituendo* is interlocutory and not appealable.

Note that a judgment which may be rescinded or varied in terms of section 36 is not immediately appealable; a party must first exhaust his or her remedies in the lower court before appealing.

A somewhat anomalous position exists when it comes to an appeal against the costs awarded in pursuance of a non-appealable judgment or order. In terms of section 83(b), "... a party ... may appeal ... against ... any order as to costs". Thus section 83 also renders appealable any order as to costs.

Koen v Baartman 1974 (3) SA 419 (C)

In deciding whether the award of costs was correctly made, however, "the merits of the dispute in the Court below must be investigated in order to decide whether the order as to costs made in that dispute was properly made or not", per Watermeyer CJ (with whom Tindall and Centlivres JJA concurred) at page 863 of the *Pretoria Garrison* case (see, too, *Koen v Baartman* 1974 (3) SA 419 (C)). The result is that a court of appeal may allow an appeal as to costs where it is of the opinion that the dispute in regard to which the costs were awarded was wrongly decided, but it cannot alter the judgment or order — even if it is of the opinion that such judgment or order was incorrectly made.

32.1.3 Appeals from decisions of superior courts

As stated above, the traditional distinction between appeals as of right and appeals with the leave of the court has been dispensed with. No appeal lies against the decision of a court of a

provincial or local division of the High Court without leave from either the court concerned or the Supreme Court of Appeal.

The position is as follows:

(1) *Decisions of a single judge.* The leave of the court appealed from, or, if this is refused, the leave of the Supreme Court of Appeal, is required (sect 20(4)(b)).

    The provisions of section 20(2) discussed *supra* must be borne in mind here.

(2) *Decisions of a full bench sitting as a court of first instance* (for instances when this will occur, see s 13(1)). The leave of the court appealed against, or, if refused, the leave of the Supreme Court of Appeal, is required (s 20(4)(b)).
(3) *Decisions of a full bench sitting as a court of appeal.* The leave of the Supreme Court of Appeal is required (s 20(4)(a)).

32.2 THE EFFECT OF NOTING AN APPEAL AGAINST THE ORIGINAL JUDGMENT

32.2.1 Magistrates' courts

32.2.1.1 Execution of judgment

The noting of an appeal automatically suspends execution of the judgment, pending the outcome of the appeal. Upon application, however, the court may order that the judgment be put into effect (see, generally, s 78 of the Magistrates' Courts Act). Therefore, the onus rests on the successful party who is now seeking to execute, to approach the court for an order allowing execution despite the noting of an appeal.

32.2.1.2 Peremption (lapse) of appeal

Study s 85

Section 85 must be studied. This section provides that there is no "peremption of appeal" in the circumstances detailed therein. A party does not lose the right of appeal if he or she satisfies the judgment in respect of which he or she appeals. Under common law, peremption of appeal may be brought about by the conduct of the unsuccessful litigant, which necessarily points to the conclusion that he or she has acquiesced to the judgment (ie accepted the judgment). This rule applies generally to all appeals. However, section 85 introduces an exception to the rule in the circumstances indicated.

32.2.1.3 Abandonment of judgment

It sometimes happens that, on an appeal being noted or anticipated, the party in whose favour the judgment in the lower court was given decides that he or she cannot support the judgment on appeal. He or she can use the provisions of section 86 to avoid being liable for the costs of appeal by abandoning the judgment in whole or in part. This he or she may do by filing with the Clerk of the court and serving on the opposite party a written notice of abandonment stating whether he or she abandons the whole, or part of, the judgment — and, if the latter, what part.

On abandonment by the defendant or respondent, judgment in respect of the part abandoned is entered for the plainfit or applicant in terms of the claim in the summons or application. On

abandonment by the plaintiff or applicant, judgment in respect of the abandoned part is entered for the defendent or respondent, with costs. Such judgments have the same effect as if they were originally pronounced by the court.

32.2.2 Higher courts

32.2.2.1 Execution of judgment

Firstly, it should be noted regarding this provision, that it is not merely the right to levy execution which is suspended, but the "operation and execution" thereof.

South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A)

The common-law rule of practice in the higher courts is that the execution of a judgment is automatically suspended upon the noting of an appeal (*South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A)).

Study Rule 49(11)

This common-law rule of practice is reflected in both the Rules and the Supreme Court of Appeal Rules. Rule 49(11) must be studied.

It should first of all be noted in regard to this provision that it is not merely the right to levy execution which is suspended, but "the operation or execution" thereof. This has the result that, pending the appeal, the judgment cannot be carried out and no effect can be given to it.

Secondly, to obtain leave to execute the judgment, the party in whose favour judgment was given must apply to the court which gave the judgment, and only this court is competent to grant leave to execute.

Finally it should be noted that the applicant bears the onus of showing why the judgment should be carried into execution, and, if his or her application is successful, he or she will be required to furnish security *de restituendo*.

Rule 49(11) relates to appeals to a full bench, but it is clear from Supreme Court of Appeal Rule 6(1) that the aforegoing also reflects the position with regard to appeals to the Supreme Court of Appeal.

32.2.2.2 Peremption (lapse) of appeal

The Supreme Court Act of 1959 does not contain a section that corresponds with section 85 of the Magistrates' Courts Act of 1944. The position in regard to the peremption of appeals is therefore governed by the common law, in terms whereof a person who has acquiesced to a judgment cannot subsequently appeal against it. Such acquiescence will be inferred from any act which is inconsistent with the intention to appeal, for example payment, or acceptance of payment, in terms of a judgment. If peremption of appeal is raised during proceedings, the onus of proof is on the person alleging such acquiescence.

32.2.2.3 Abandonment of judgment

Study Rule 41(2)

Rule 41(2) must be studied.

Unlike the corresponding provisions in the Magistrates' Courts Act, this subrule makes no mention of a party's liability for costs. It appears that the party abandoning would be liable for costs up to the date of abandonment.

32.3 THE VARIOUS COURTS OF APPEAL

32.3.1 The Supreme Court of Appeal

The Supreme Court of Appeal is the final court of appeal in all matters, excepting constitutional matters. The Court is situated in Bloemfontein. The Supreme Court of Appeal is a court of appeal with general jurisdiction, unlike the Constitutional Court which may only hear constitutional matters. The Supreme Court of Appeal has jurisdiction to hear and determine an appeal against any decision of a High Court. Decisions of the Supreme Court of Appeal are binding on all courts of a lower order, and the decisions of the High Courts are binding on magistrate's courts within the respective areas of jurisdiction of the divisions.

The quorum of the Supreme Court of Appeal in all civil matters is five judges (s 12). However, the Chief Justice may direct that an appeal in a civil matter be heard before three judges (s 12(1)(bA)). The Chief Justice may also, in view of the importance of a specific matter, direct that such appeal be heard before a larger number of judges than is required in terms of the Act.

The Chief Justice may also, in view of the importance of a specific matter, direct that such appeal be heard before a larger number of judges than is required in terms of the Act (s 12(1)(c)).

32.3.2 The full bench

All provincial divisions of the High Court have appeal jurisdiction. No local division, except the Witwatersrand Local Division, has appeal jurisdiction (s 20(3)(c)). The Witwatersrand Local Division does not, however, have appeal jurisdiction comparable to that of a provincial division. An appeal against the decision of a single judge of the Witwatersrand Local Division must be heard by a full bench of the Transvaal Provincial Division, unless the Judge President of the Transvaal Provincial Division directs that a full bench of the Witwatersrand Local Division hear the appeal.

A court of first instance is usually constituted before a single judge (s 13(1)(a)). A court hearing an appeal from an inferior court must comprise at least two judges (s 13(2)(a)(i)).

A full bench hearing an appeal against the judgment or order of a single judge, must comprise at least three judges (s 13(2)(a)(ii)). However, the single judge whose judgment or order is being appealed against, is precluded from sitting on the full bench hearing the appeal (s 13(2)(b)).

32.4 PROCEDURE ON APPEAL

32.4.1 Procedure on appeal from a magistrate's court

An appeal may be noted either by an appellant in person or by his or her duly authorised legal representative. The procedural steps to be taken in an appeal from a magistrate's court decision are the following:

***Study* Rule 51(1)**

(1) *Reasons for judgment before noting an appeal.* Rule 51(1) must be studied carefully. Rule 51(1) provides that the appellant must within 10 days after judgment in writing request the judicial officer against whose judgment he or she wishes to appeal to hand to the clerk of the court a written judgment, which becomes part of the record in the case. The judicial

officer must furnish the written judgment within 15 days of the request to the clerk of the court. The following is an example of a written request:

Example

(Heading)

REQUEST FOR REASONS FOR JUDGMENT

Kindly take notice that the Plaintiff in the abovementioned case hereby requests that the Honourable Magistrate ..... within fifteen days of the date hereof hands to the clerk of the court a written judgment in the abovementioned case forming part of the record showing:

(a) the facts he found to be proved, and

(b) his reasons for judgment.

Dated at ..... on this ... day of ..... 20.... .

.....
Plaintiff's attorneys
Address

TO: The Clerk of the Court
.....

(2) *Noting an appeal.* This matter is regulated by rule 51(3).

(a) If a party wishes to appeal, he or she **must** note the appeal within 20 days of the date of the judgment appealed against, **or** within 20 days of the Clerk of the Court providing a copy of the written judgment, whichever period is the longer. He or she notes the appeal by **delivering a notice**, and, unless the court of appeal directs otherwise, by **furnishing security** for the respondent's costs of appeal to an amount of R1 000. No security is required from the state.

(b) A notice of appeal must state

- whether the judgment as a whole, or only part of the judgment or order, is being appealed against, and if only part, then what part
- the grounds of appeal, specifying the findings of fact or rulings of law appealed against

Note that the grounds of appeal must be clearly specified. A notice which merely sets out that "the judgment is bad in law and against the weight of the evidence" will generally be regarded as fatally defective and the appeal will be struck from the roll. Where it is absolutely clear what the grounds of appeal as to facts and law are, so that the respondent will not be taken by surprise, then such a notice will be allowed.

Example

The following is an example of a notice of appeal:

(Heading)

NOTICE AND GROUNDS OF APPEAL

Kindly take notice that the Appellant hereby gives notice of appeal against the entire judgment of the Magistrate delivered on ..... in case no ..... held in the magistrate's court for the District of ..... at ....., in which he dismissed the Plaintiff's claim for damages in the amount of R ..... with costs.

The grounds of appeal are as follows:

1. The Honourable Magistrate incorrectly decided that the Plaintiff failed to discharge the onus of proof resting upon him.
2. The Honourable Magistrate erred in law in finding that,.....
3. The Honourable Magistrate erred in making the following findings of law:
   (i) in deciding that .....
   (ii) in deciding that .....
4. The Honourable Magistrate erred in making the following findings of fact:
   (i) .....
   (ii) .....

(3) *Reasons for judgment after the appeal has been noted.* Within 15 days after the notice of appeal has been delivered, the judicial officer must deliver to the Clerk of the court a statement in writing showing (as far as may be necessary, having regard to any written judgment already delivered by him or her)

(a) the facts he or she **found** to be proved (ie **found** but did not include in his or her original judgment; not facts which he or she now finds)
(b) the grounds upon which he or she arrived at any finding of fact specified in the notice of appeal as appealed against
(c) his or her reasons for any ruling of law, or for the admission or rejection of any evidence, so specified as appealed against (rule 51(8)).

This statement becomes part of the record. The same procedure applies to the noting of a cross-appeal.

***Regent Insurance Co Ltd v Maseko* 2000 (3) SA 983 WPD**

In *Regent Insurance Co Ltd v Maseko* 2000 (3) SA 983 WPD, the court held that rule 51(8) was peremptory and had to be complied with. The magistrate's written explanation formed an integral part of the appeal record. The reasoning behind it was to encourage the speedy and effective disposal of appeals by placing the Court of Appeal in a position to get to the heart of the appeal and deal with it in a speedy, efficient and cost-effective manner. Failure to comply with the provision undermined and delayed effective legal administration.

(4) *Prosecution of appeal.* Once the appeal has been noted, it remains to prosecute it. The first

step is to have it set down for hearing. Application must be made to the Registrar for a date within 40 days of noting the appeal, on notice to all other parties (Rule 50(4)). Should the appellant fail to apply for a date within this period, the respondent may apply for a hearing date within the next 20 days. If neither party has applied within the relevant time limits, the appeal will lapse. On receipt of the application, which must be accompanied by two copies of the record of the proceedings, the Registrar selects a date for the hearing. The Registrar must immediately give the applicant written notice of such date, whereupon the applicant must immediately deliver a notice of set-down, and give notice in writing thereof to the Clerk of the court from which the appeal emanated.

At the hearing of the appeal, the parties must be represented either in person or by counsel. The appeal must be heard by at least two judges.

If the appellant is in default on the day of the hearing, the respondent is entitled to an order that the appeal be struck off the roll, with costs. If the respondent is in default, the appellant will have to persuade the court of appeal that the judgment of the lower court ought to be reversed.

Study s 87

The powers of the High Court when hearing an appeal from a magistrate are set out in section 87. Study this section carefully.

(5) *Further appeal.* As we have stated, there is, as a general rule, only one appeal as of right. If a magistrate's decision has been taken on appeal to a provincial division, there is a further appeal to the Supreme Court of Appeal, but only with the leave of the division appealed to in the first instance, or, if it refuses leave, with the leave of the Supreme Court of Appeal.

ACTIVITY

Go back and read through the first set of facts at the beginning of this study unit, and then answer the following questions:

(1) Must John apply for leave to appeal to a High Court?

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(2) How many judges must hear the appeal?

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(3) Describe how John must note his appeal to a High Court.

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(4) Explain the implications for John if Jane abandons part of the judgment granted in her favour.

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(5) How does the noting of the appeal affect the execution of the judgment given in the magistrate's court?

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FEEDBACK

(1) No, John is allowed one appeal as of right in terms of section 83 of the Magistrates' Courts Act of 1944. The appeal lies to the appropriate provincial or local division of the High Court from judgments of magistrates' courts. See section 83.

(2) An appeal from an inferior court must be heard by not fewer than two judges. See section 13(2)(a)(i) of the Supreme Court Act of 1959.

(3) This matter is regulated by rule 51(3). John must note the appeal within 20 days of the date of judgment appealed against, or within 20 days of the clerk of the court's providing a copy of the written judgment, whichever period is the longer. John notes the appeal by delivering a notice and, unless the court of appeal directs otherwise, by furnishing security for the respondent's costs of appeal to an amount of R1 000. A notice of appeal must state the following:

— whether the judgment as a whole, or only part of the judgment or order, is being appealed against, and if only part, then what part
— the grounds of appeal, specifying the findings of fact or rulings of law appealed against

The grounds of appeal must be clearly specified in order for the notice to pass muster.

See 32.4.1 to answer this question.

(4) Jane was the plaintiff in the original application. If a plaintiff abandons any part of a judgment granted in his or her favour judgment in respect of the part abandoned is entered for the defendant (John) with costs in terms of section 86(2) of the Magistrates' Courts Act 32 of 1944. See section 86(2).

(5) The noting of an appeal automatically suspends execution of the judgment, pending the

outcome of the appeal. Upon application, however, the court may order that the judgment be put into effect. The court's discretion will be made on such terms as the court may determine about security for the due performance of any judgment which may be given upon the appeal or application. See section 78 of the Magistrates' Courts Act.

32.4.2 The higher courts which hear appeals

In terms of section 20(1), any appeal from a civil judgment or order given by a provincial or local division of the High Court, sitting either as a court of first instance or as a court of appeal, must be heard by the Supreme Court of Appeal or a full bench. Section 20(2)(a) provides that an appeal from a judgment or order of a single judge must be heard by a full bench of the relevant provincial division, unless the court against whose order an appeal has been noted, is of the opinion that the matter requires the attention of the Supreme Court of Appeal. However, provision has been made for an interested party to request leave from the Supreme Court of Appeal to have the appeal heard there, rather than by a full bench (s 20(2)(b)). Such an application must be submitted in the form of a petition to the Chief Justice, and must be filed within 21 days after it has been directed that the appeal be heard by a full bench (s 20(2)(b)(c)).

The courts try to ensure that only important questions of law are decided on appeal by the Supreme Court of Appeal, and that questions of fact are usually heard by a full bench.

In certain instances, a right to appeal directly to the Supreme Court of Appeal has been created by statute, for example from the judgment of a water court or an income tax appeal court. These provisions remain unaffected by the amendments introduced by the Appeals Amendment Act of 1982.

Enyati Colliery Ltd v Alleson 1922 AD 24

The Supreme Court of Appeal also has jurisdiction at common law to grant special leave to appeal where no appeal lies, to prevent "substantial and grave injustice": *Enyati Colliery Ltd v Alleson* 1922 AD 24. This would be the case where a provincial division wrongly allowed an appeal in a matter in which no right of appeal in fact exists. Here the Supreme Court of Appeal would intervene and restore the *status quo ante.*

32.4.3 Procedure on appeal from higher courts

32.4.3.1 Procedure on appeal to full bench

Leave to appeal may be requested at the time the judgment or order is made. If this is not done, an application for leave to appeal must be filed within 15 days of the order appealed against. This application is heard by the judge who made the judgment or order (Rule 49(1)).

The appellant must, within 60 days of delivering his or her notice of appeal, submit a written application to the Registrar for a date for the hearing of the appeal (Rule 49(6)(a)).

The appellant must simultaneously file three copies of the appeal record with the Registrar and must provide the respondent with two copies (Rule 49(7)). At this stage, the appellant must also furnish security for the respondent's costs of appeal. If the parties cannot agree on the amount, the Registrar will determine the amount. Rule 49(13).

Rule 49(13) has been amended to allow the court on application to it, to release the appellant wholly or partially from the obligation to enter into good and sufficient security for the respondent's costs of appeal (GN R 1299 of 29 October 1999).

The Registrar then assigns a date for the hearing of the appeal, and gives both parties at least 20 days' notice thereof (Rule 49(7)(c)).

32.4.3.2 Procedure on appeal to the Supreme Court of Appeal

If leave of the Supreme Court of Appeal is necessary, an application for leave to appeal, shall be lodged in **duplicate** with the Registrar within the time limits prescribed by that law. The application for leave to appeal must furnish all the information necessary to decide the application and deal with the merits of the case only where it is necessary to explain and support the particular grounds upon which leave to appeal is sought or opposed.

The application must be accompanied by the following: a copy of the order of the court a *quo* appealed against; where leave to appeal has been refused, a copy of that order of the court a *quo*; a copy of the judgment of the court a *quo*; and where leave to appeal has been refused by that court, a copy of the judgment refusing such appeal.

The Registrar may, on written request, extend the period for filing a copy of the judgment or judgments. Every affidavit in answer to the application must be lodged in **duplicate within one month** after service of the application on the respondent. An applicant who has applied for leave to appeal, must within **10 days** after receipt of the aforesaid affidavit, lodge an affidavit in reply dealing only with new matters raised in the answer.

The application is then considered by the judges, who may request submissions or further affidavits; the record or portions of it; and additional copies of the application. The party concerned must lodge the required documents within the period prescribed by the Registrar. If the party concerned fails to comply with the Registrar's direction or fails to cure the defects in the application within the prescribed period, the Registrar shall refer the matter to the designated judges who may dispose of it in its incomplete form.

A notice of appeal must then be lodged with the Registrar of the Supreme Court of Appeal and the Registrar of the court a *quo*. The notice of appeal must be lodged within one month after the date of granting of the judgment or order appealed against where leave to appeal is not required; the granting of leave to appeal where leave to appeal is required; or the setting aside of a high court's direction in terms of section 20(2)(b) of the Supreme Court Act.

The notice of appeal and cross-appeal must state **what part of the judgment or order** is appealed against, and also state the **particular respect** in which the variation of the judgment or order is sought. The notice of appeal must be accompanied by a certified copy of the order (if any) granting leave to appeal. The parties to the appeal may extend the time limit for lodging the notice of appeal by written agreement.

The appellant must **within three months** of the lodging of the notice of appeal, lodge with the Registrar six copies of the record of the proceedings in the court a *quo*. The appellant must also deliver copies to the respondent. The respondent may decide on the number of copies that are necessary. The time limit for lodging of the record may be extended by written agreement of all the parties to the appeal, and by the Registrar upon written request, with notice to all the parties. However, the Registrar may not extend the period for more than two months. The appeal will lapse if the appellant fails to lodge the record within the prescribed period or within the extended period.

The appellant may be ordered by the court granting leave to appeal, to **provide security** for the

respondent's costs of appeal. The appellant must furnish the requisite security before lodging the record with the registrar, and inform the Registrar accordingly. If the parties contest the form or amount of security, the Registrar of the court a *quo* will determine the issue and this decision will be final.

Unless the Chief Justice otherwise directs, the appellant must lodge **six copies of his or her main heads of argument** with the Registrar of the Supreme Court of Appeal **within three months** form the lodging of the record. The respondent must lodge with the Registrar of the Supreme Court of Appeal six copies of his or her main heads of argument **within two months** after receiving the appellant's heads of arguments. The heads of arguments will comprise the main points to be made in counsel's address to court, be accompanied by a list of authorities to be quoted in support of the argument, and define the form of order sought from the Court. A copy of subordinate legislation may accompany the heads of argument if reliance is placed on such legislation.

The Chief Justice or the Court may *mero muto* or on application, extend or reduce any time period prescribed in these rules and may condone non-compliance with these rules. The Registrar shall notify each party by registered letter of the date of the hearing. If the appellant fails to appear at the designated date, the appeal will be dismissed for non-prosecution, unless the Court otherwise directs. The court made pertinent remarks regarding an application for condonation in terms of Rule 12 in *Darries v Sheriff, Magistrate's Court, Wynberg* 1998 (3) SA 34 (SCD). It held that condonation of the non-observance of the Rules of Supreme Court of Appeal is not a mere formality and that some acceptable explanation must be given for any delay in seeking condonation. The appellant should apply for condonation as soon as possible, and the petition should set forth briefly and succinctly essential information which might enable the court to assess the appellant's prospects of success. This is so because the appellant's prospects of success is one of the factors relevant to the exercise of the court's discretion. However, where non-observance of the rules of court has been flagrant and gross, an application for condonation should not be granted whatever the prospects of success might be.

***Darries v Sheriff, Magistrate's Court, Wynberg* 1998 (3) SA 34 (SCD)**

All appeals are heard in Bloemfontein, although the court may sit elsewhere in exceptional circumstances.

ACTIVITY

Go back and read through the second set of facts at the beginning of this study unit, and then answer the following questions:

(1) What procedure must Fanie follow to apply to appeal to the Supreme Court of Appeal?

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(2) If leave to appeal is granted, what is the next step that Fanie must take?

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(3) What essential information must be included in a notice of appeal?

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(4) What is meant by the term "heads of argument"?

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(5) Suppose that Fanie is unsuccessful in his appeal. Can he now apply to the Constitutional Court?

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FEEDBACK

(1) An application for leave to appeal must be lodged in duplicate with the Registrar of the Supreme Court of Appeal within the time limits prescribed by the law.

(2) A notice of appeal must be lodged with the Registrar of the Supreme Court of Appeal and with the Registrar of the court *a quo* within one month after the date of the granting of leave to appeal.

(3) The notice of appeal must state what part of the judgment or order is appealed against and state the particular respect in which the variation of the judgment or order is sought.

(4) The "heads of arguments" comprise the main points to be made in counsel's address to court as well as a list of the authorities to be quoted in support of each point. The heads of argument will also define the form of order sought from the Court.

(5) No. The Constitutional Court only hears constitutional issues. The Supreme Court of Appeal is the highest court in non-constitutional matters.