NOTES

Civil Procedure 2
CIP301-K

CIVIL PROCEEDINGS IN THE HIGH COURT

1. THE FORMS OF PROCEEDINGS

1.1. **Background**

Documents are exchanged by the parties to formulate their claims and defences called process documents or pleadings, depending on the type of action:

Proceedings	Application	Summons
Approach court by means of	Notice of Motion	Summons
Formal documents	Process documents	Pleadings and processes

When incorrect form used, court may:

- refuse to hear the case or to hear it in its present form;
- penalise the party when issuing an order for costs, even prepared to condone the use.

Some advantages to different forms, including speed and cost savings.

1.2. **The maxim *audi alteram partem* (hear the other side)**

Every person is entitled to be heard before an order or judgment is granted against him. This requirement is meticulously enforced in that an opponent must:

- be notified timeously of the steps to be taken against him; and
- afforded an opportunity to reply; and
- be able to place a defence before court.

Necessary so that each party knows the basis of the opposing party's claim and prevent being caught unprepared during trial.

1.3. **The distinction**

- Summons proceedings

  Illiquid summons proceedings characterised by a clear distinction between stages: -

Pleading stage	Trial stage
• Printed or written statements made and exchanged between parties • Concisely setting out material facts of claim / defence in summary form • Thus conclusions of fact pleaded • Signed by legal representative unless party appearing in person	• Once pleadings completed, action set down for trial where parties endeavour to prove the facts in pleadings by means of witnesses personally giving oral (*viva voce*) or documentary evidence • After all evidence has been led, argument is addressed to court on the pleadings and evidence and judgment is then delivered

- Application proceedings
  - Documents called processes containing formulation of factual dispute and evidence in the form of affidavits containing the claims or defences and all evidence in possession of parties and there is no clear distinction between stages.
  - When case before court, claims, defences and evidence in court's possession and hearing consequently consists of arguments of legal representatives. Only in exceptional cases, ***viva voce*** (oral) evidence may be heard.
  - If application is unopposed, facts are accepted as set out in the document and not disputed. Only question remaining is whether a case can be made for granting the requested order.

1.4. **The identification of the applicable form of proceedings**

Applications are cheaper and quicker than summonses (trial), therefore used more often. One must determine whether application (motion) proceedings permissible in a particular case by asking the following questions:

- Does legislation or the URC prescribe whether the application procedure must be used?

  Example: Applications in respect of marital matters (Rule 43 of the URC) or liquidation of a company (Section 346 of Companies Act)

- Is it compulsory to use summons proceedings?

  Example: Divorces and unliquidated claims for damages, compensation or enrichment.

- If neither of the above, application by means of a Notice of Motion may be made if -
  - there is no real dispute over any fundamental question of fact; or
  - if there is such dispute, it can satisfactorily be decided without giving oral evidence

1.5. **When is there a "dispute of facts"?**

- Respondent denies material allegations made by applicant's deponents and produces positive evidence by deponents to the contrary.
- Respondent admits applicant's allegations alleging other facts which applicant disputes.
- Respondent concedes he has no knowledge of allegations, but denies them, putting Applicant to the proof, and giving or proposing to give evidence indicating applicant and deponents are biased, untruthful or otherwise unreliable.

No dispute of fact where respondent simply disputes / denies applicant's allegations with no evidential reply to them, i.e. bare denial.

1.6. **Procedure where a dispute of facts arises**

Court may in terms of **Rule 6(5)(g)**:

- Dismiss the application;
- Order oral evidence to be heard on specified issues;
- Order the parties to trial with appropriate directions as to pleadings etc.

2. THE CONDUCT OF APPLICATION PROCEEDINGS

2.1. **Applications forms**

- *Ex parte* - **Form 2 [Rule 6(4)(a)-(c) read with Rule 6(2)]**

  Without notice to persons, therefore being an exception to the rule that notice of legal proceedings must be given to every person whose rights may be affected by any order made or has an interest in any order made (*audi alteram partem* principle). Used in exceptional circumstances:
  - Applicant is only party interested or affected by the relief sought, e.g. admission as sworn translator / attorney;
  - Relief sought is preliminary step in the proceedings, e.g. sue by edictal citation / attach property ***ad fundandam jurisdictionem*** (to find jurisdiction in a court which would otherwise not have jurisdiction);
  - Where procedure has been laid down by an Act or the URC;
  - Where immediate relief is essential as delay could be dangerous although other parties may be affected and notice would hasten the harm, e.g. urgent interdict or an arrest ***suspectus de fuga*** (as if suspected of being a fugitive);
  - Where the respondents are so numerous that it would be highly inconvenient, very expensive and time-consuming to serve the application on all.

  Onus on applicant to disclose fully all material facts which may affect court's decision, including those which are detrimental to applicant's case.
  - *Rule nisi*
    - Issued when other persons may be affected by an order granted to an *ex parte* application before final order is granted
    - Calling upon respondent or interested parties to show cause why the relief specified should not be finally granted on the return day of the rule nisi.
    - Where immediate relief is essential, the court may order that the *rule nisi* operate as an interim interdict pending the confirmation or discharge of the *rule nisi* on the return day.
    - Court may order that the *rule nisi* be served on interested parties who may not be parties to the application, e.g. the Master of the High Court or the Registrar of Companies.

- Ordinary - **Form 2(a) [Rule 6(5) read with Rule 6(2)]**
  - With notice to persons appointing an address within 8km of the office of the Registrar.
  - Respondent to reply on or before stated date (not less than 5 days after service) appointing an address within 8km of the office of the Registrar, failing which applicant may apply for a hearing date allocation.

- Respondent to deliver answering affidavit within 15 days from notice to oppose.
- Applicant may deliver a replying affidavit within 10 days of service of the answering affidavit or apply for hearing date allocation within 5 days.

Related forms

- Interlocutory

  To approach the court for relief in respect of proceedings already instituted, e.g. notice in terms of Rule 35(7) to compel disclosure of documents. **Rule 6(11)** determines must be brought on notice (not notice of motion – similar to Form 2 used) supported by affidavit/s and set down at a time allocated by Registrar or judge served on other party's attorney of record (not by Sheriff).

- Urgent

  Rule 6(12) determines that the provided forms and services may be dispensed with and the matter disposed of as necessary. Applicant to set forth explicitly the circumstances which he avers render the matter urgent and why a hearing in due course will not afford him substantial redress (urgency not created by applicant). Respondent against whom an order was granted in his absence may, by notice, set down the matter for reconsideration.

2.2. **Formal aspects**

Rule 6(1) determines application consist of 2 parts: Notice of Motion + Supporting Affidavit

Form 2 - **Rule 6(4)(a)**

- Application will be made on **X** for an order: **1, 2, 3**
- Affidavit of applicant attached
- Request to place matter on the roll
- Notice to Registrar

Form 2(a) - **Rule 6(5)**

- Application will be made for an order: **1, 2, 3**
- Affidavit of applicant attached
- Address within 8km appointed
- Date stated for intention to oppose to be filed and that answering affidavits to be filed 15 days after such filing
- Application will be made on **X** if notice to oppose not given
- Notice to Registrar and respondent

Affidavit

Affidavit setting out sufficient facts to disclose a cause of action in consecutively numbered paragraphs executed before a Commissioner of Oaths. Types:

- Supporting: Attached to Notice of Motion – only one in *ex parte* and unopposed applications.
- Answering: Respondent dealing paragraph by paragraph with the allegations and evidence contained in the supporting affidavit.
- Replying: Applicant dealing paragraph by paragraph with the allegations and evidence contained in the answering affidavit, in so far as necessary.

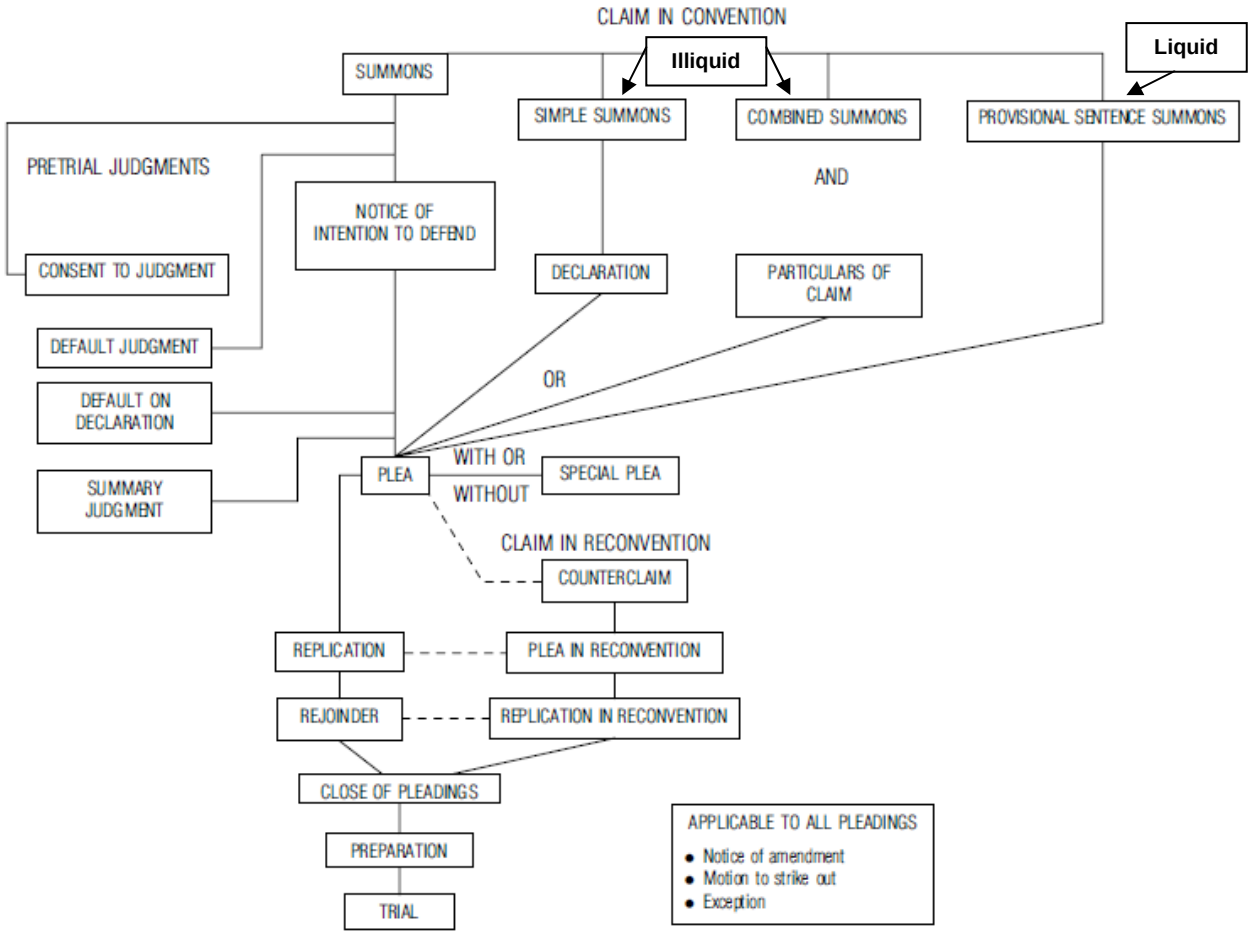
Court may in its discretion permit the filing of further affidavits, but this only in exceptional circumstances.

Remedy in case of defects

Motion to strike out brought by opposing party to strike out the offending matter when affidavit contains hearsay or inadmissible evidence or when matter is argumentative, irrelevant, vexatious or scandalous in terms of **Rule 6(15)**.

3. THE CONDUCT FO SUMMONS PROCEEDINGS

An **illiquid summons** is issued in respect of liquidated claims and the amount and nature of the claim are merely stated on summons. A **liquid summons** is issued in respect of unliquidated claims and the particulars of claim is attached to the summons. A **claim in convention** is the claim instituted by the plaintiff against the defendant and a **claim in reconvention** is the counterclaim a defendant (now called the plaintiff in reconvention) institutes against the plaintiff (now called the defendant in reconvention). A schematic outline setting out the possible pleadings and processes after each type of summons has been issued follows:



4. THE PARTIES TO THE LITIGATION

4.1. Description of the parties

Plaintiff: Party who seeks relief

Defendant: Party against whom relief is sought

Address: Within 8km of office of the Registrar by person signing, being either plaintiff or attorney

To institute action, plaintiff must have:

- a vested interest in the subject-matter; and
- ***locus standi in iudicio*** (standing in court - full legal capacity to litigate without assistance). Persons without it can still litigate with the necessary support.

Citation of both parties in terms of **Rule 17(4)** must set out:

- Full names;
- Residence or place of business;
- Occupation;
- Capacity where in a representative position; and
- Sex (if female, marital status).

4.2. Power of attorney

A **power of attorney** is a written document to give agent authority to act on behalf of principal in specific situation or in respect of all actions, which the principal could perform him/herself.

Although the client may terminate his mandate to an attorney at any time, the attorney himself can only withdraw with sound reasons and he must adhere to the instructions of the client, provided they are not improper.

- When is a power of attorney required in litigation?
  - The authority of a legal practitioner is disputed within 10 days after it has come to notice or on leave of the court on good cause shown (Rule 7(1));
  - For the conduct or defence of a civil appeal (Rules 7(2) & (3)); and
  - In the SCA only when authority is disputed (Rule 5(1)).

- Why is a power of attorney drawn up?
  - Protection of client against expensive and protracted litigation or appeals not contemplated and done without his knowledge
  - Protection of attorney as far as costs are concerned

  In terms of **Rule 7(1)**, a party may dispute the attorney's authority to act on behalf of another:
  - within 10 days of knowing that the attorney is so acting; or
  - with the leave of the court on good cause shown at any time before judgment,

  whereafter the attorney can no longer act unless he satisfies the court that he is authorised so to act and, to enable him to do so, the court may postpone hearing of the action / application.

4.3. **Joinder**

- Voluntary
  - Plaintiff – **Rule 10(1)**

    Requirement: Each person must have a claim
    + must act against the same defendant(s)
    + 1 or more must be entitled to act against defendant(s) in separate action

    Circumstances: Depend on substantially the same question of law or fact
  - Defendant – **Rule 10(3)**

    Requirement: The question arising between the defendant(s) and plaintiff(s) would arise in separate actions

    Circumstances: Depend on substantially the same question of law or fact
- Compulsory

  Where the court will not hand down judgment or make an order unless another party, who may have a direct and real interest in any order, or who might be prejudiced by such order, and has not distanced itself, is joined in the action.
- Joining of persons as plaintiff or defendant

  Rule 12 provides that a plaintiff or defendant may join or be joined on application after notice to all parties at any stage of the action provided a *prima facie* and serious case. The court may make an order (also costs) and lay down further procedure.

4.4. **Third party procedures**

A third party notice in terms of **Rule 13** may be issued whereby the third party will become a party to the action and both matters will be heard and given judgment in jointly. Third party may not oppose the joinder, but may request case to be tried separately.

- Purpose
  - Enables a litigant to avoid instituting multiple actions in respect of the same matter;
  - Enables a third party's liability (if any) to be determined by a court at the same time as the liability of the other party is determined.
- Circumstances

  Any party (plaintiff of defendant) may employ this procedure where a party claims that:
  - he is entitled to a contribution or indemnity from the third party in respect of any payment he 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 and the third party, and should be decided not only between the parties to the action, but also between one or more of them and the third party.
- Effect
  - After service on the third party, such party becomes a party to the action (Rule 13(5)).
  - ''Joinder'' then occurs irrespective of the third party's wishes and he cannot oppose.
  - He may request case to be tried separately and except and plead to the notice (Rule 13(9)).

The third party procedure is typically employed in situations such as a multiple vehicle accident where sole negligence not determined. Practically, the notice may be seen as a summons and the third party is a party to the action after service, pleadings being exchanged are the same as those exchanged in the normal litigation process. However, there is no ***dies indiciae*** (specified period) within which the third party must give notice of intention to defend the claim.

4.5. ***In forma pauperis*** **(may sue without liability for costs)**

Indigent / needy persons may obtain free legal aid by approaching the Registrar.

- Who qualifies? - **Rule 40(2)(a)**

  A person stating on affidavit that, excepting household goods, wearing apparel and tools of trade, he is not possessed of property to the amount of R 10,000 and will not be able within a reasonable time to provide such sum from his earnings.

- Documentation - **Rule 40(2)**
  - Affidavit setting forth financial position;
  - Statement signed by advocate and attorney stating they are satisfied that the person concerned in unable to pay their fees and that they are acting for such person in their respective professional capacities gratuitously in the proceedings to be instituted by him;
  - A certificate of ***probalis causa litigandi*** (reasonable cause for the litigation) by advocate.
- Steps - **Rule 40(6)**

  Opponent may, in addition, apply to court at any time to dismiss the claim or defence or debarring continuation *in forma pauperis*.
- Costs payable if litigant *in forma pauperis* is successful - **Rule 40(7)**

  If, on the conclusion of proceedings, a litigant *in forma pauperis* is awarded costs, his attorney may include in his bill of costs such fees and disbursements to which he would ordinarily have been entitled. Upon receipt of these costs (in whole or in part), he must pay out in the following order:
  - Registrar (revenue stamps due);
  - Deputy Sheriff (service and execution);
  - Attorney and advocate fees as allowed on taxation.

5. SERVICE OF SUMMONS

A fundamental principle is that the process and documents arising out of any proceeding must be brought to the attention of the opposite party.

5.1. Issuing

- Summons is issued before service by taking it to the Registrar.
- The Registrar or his assistant signs it, opens a court file, assigns a case number to it and cancel the revenue stamps on the original summons.
- All copies of the summons receive an official stamp[1], whereafter the summons may be served by the Sheriff or his deputy.
- After service, the Sheriff's return of service as proof of service and the original summons must be filed on the court file.

5.2. Manner of service

- Normal service - **Rule 4(1)**
  - Be personal, if possible, and if not, leaving copy at defendant's place of residence or business with someone older than 16 apparently in charge.
  - At place of employment.
  - By delivering or leaving a copy at the chosen *domicilium citandi et executandi*.
  - On a company by service on a responsible employee at its registered addres and if not possible, by affixing copy to the main door.
  - Delivery to agent authorised in writing to accept service.
  - On a partnership, firm or voluntary association on its business address or on partner, proprietor or chairman / secretary personally.
  - Local authority or statutory body served by delivery to town clerk, assistant town clerk, mayor, secretary or similar officer or member of the board.
  - If sued in joint capacity, service on each as set out above.
- Substituted service - **Rule 4(2) read with Rule 5(2)**
  - Application made to court on notice of motion seeking permission for substituted service as defendant believed to be in Republic, but not known exactly where he is to be found and normal service not possible.
  - An abbreviated summons must accompany the application.
  - On hearing and if satisfied, the court will give direction as to how the summons is to be served, e.g. registered post, service on a relative, publication in Government Gazette.

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

- Edictal citation - **Rule 5**
  - Application made to court on notice of motion seeking permission for service by edictal citation as defendant is, or believe to be, outside Republic even where address is known and personal service is possible.
  - Consent of the court must be obtained to serve -
    - **any process or document which initiates proceedings – Rule 5(2)**

      Make application to court setting forth:

      i) nature and extent of claim;

      ii) grounds it's based on;

      iii) grounds upon which court has jurisdiction;

      iv) requested manner of service[2].
    - **any process or document which does not initiate proceedings – Rule 5(3)**

      Application in terms of Rule 5(2) or request such leave at any hearing in the matter, in which case no papers needs to be filed and court may act upon information from the advocate appearing.

5.3. **Outside court's jurisdiction – Section 26(1) of SCA**

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.

6. THE ILLIQUID SUMMONS

A **summons** is a written instruction to Sheriff to notify defendant of plaintiff's claim to give notice within specified time of intention to defend the action if the claim is disputed.

6.1. **Distinguishing between a simple or combined summons**

- The nature of the claim in respect of which each is applied;
- Procedural grounds;
- The form used in respect of each.

Certain penalties apply if the wrong type of summons is used, thus the circumstances in which each type of summons is the correct or most appropriate one is important.

6.2. **Simple - Form 9**

Also known as "ordinary summons" or "summons for a debt or liquidated demand" and the cause of action need be set out concisely.

- When?

  Where plaintiff's claim is for a debt or liquidated demand.
- "A debt or liquidated demand"?
  - A claim for a fixed or definite thing, e.g. a claim for transfer or ejectment, for the delivery of goods, for rendering an account by a partner, for the cancellation of a contract etc.
  - Debt is liquidated where it is admitted or where the monetary value is capable of being ascertained speedily, being a question of fact and court will exercise discretion in deciding, e.g. current market price of a particular article which is sold or the reasonable, accepted remuneration for the rendering of specific services.
  - The demand must be described in such a way that the amount thereof may be determined by a mere mathematical calculation.

  Thus, not an action for divorce or an action for damages.
- Procedural events
  - Defendant fails to react
    - Plaintiff may make application for judgment by default
  - Serve and file notice of intention to defend within *dies induciae*
    - Plaintiff must serve and file a declaration within 15 days; or
    - May apply for summary judgment
- Declaration

  A **declaration** is a document containing a concise statement of the facts on which plaintiff's claim is based.

[2] If not personal, all details of last known whereabouts and queries to ascertain. Court may grant and order time for notice of intention to defend to be given. If publication is ordered, in the form of Form 1 approved and signed by Registrar.

- When?
  - Plaintiff's claim is for a debt or liquidated demand;
  - Defendant has delivered a notice of intention to defend and within 15 days of receipt.
- Contents - **Rule 20(2)**;
  - nature of claim;
  - legal conclusion which plaintiff will be entitled to deduce from the facts indicated therein;
  - prayer for relief;

  with sufficient particularity to enable the opposite party to reply thereto (**Rule 18(4)**).

6.3. **Combined - Form 10**

- When?

  Where plaintiff's claim is unliquidated.
- "Unliquidated claim"?

  Any claim in respect of which the quantum must be determined (e.g. claim for damages) or the parties' status is affected (e.g. divorce).
- Particulars of claim – **Rule 17(2)**
  - Annexed to the summons, forming an inseparable unit (not separate pleading).
  - It is a clear and concise statement setting out the material facts relied on by the plaintiff in support of his claim with sufficient particulars to enable the defendant to plead thereto
  - Must comply with the provisions of **Rule 18 & 20** and reflect:
    - nature of claim;
    - legal conclusion;
    - prayer for relief.

7. THE LIQUID SUMMONS (PROVISIONAL SENTENCE SUMMONS)

Provisional sentence is an extraordinary and summary procedure where the case can be decided before trial, accelerating the granting of judgment (provisionally) based on *prima facie* proof, being a liquid document (assumed genuine and valid), entitling successful plaintiff to execute immediately, subject to security *de restituendo* being furnished.

7.1. **Purpose**

Providing the creditor with a remedy for recovering his money without lengthy and expensive illiquid summons proceedings and payment not delayed by the mere wilful action of the debtor.

7.2. **Debtor**

Debtor isn't unprotected as he will only have to pay after plaintiff provides security *de restituendo*. He may also defend by way of affidavit to which plaintiff may reply, also by way of affidavit. Provisional sentence may then follow and after that defendant may enter the principal case, which follows the course of any other litigation process.

7.3. **Form - Form 3**

Rule 8 (1), 8 (3) – 8 (7) provides: -

- Proceedings shall be instituted by way of a summons in the form of Form 3 calling upon the debtor to pay the amount claim or, failing such payment, to appear personally or by counsel or by an attorney upon a day named in such summons, not being less than 10 days after the service upon him, to admit or deny his liability.
- Copies of all documents upon which claim is based must be attached to summons and served with it.
- Plaintiff shall set down the case for hearing before noon on the court day preceding the day it is to be heard.
- Defendant may deliver an affidavit setting out the grounds on which he disputes liability before noon on the court day preceding the day he is called upon to appear and, in such event, plaintiff must have a reasonable opportunity to reply to this affidavit.
- If defendant admits liability, the court may give final judgement against him.
- Court may hear oral evidence relating to authenticity of defendant's signature (or his agent's) or as to the authority of defendant's agent.

7.4. **Requirements**

The nature of the claim determines whether such summons can be used and the court will allow it:

- if plaintiff's claim is based on a liquid document; and

- if defendant is not able to provide such counter-proof to the satisfaction of the court that the probabilities of success in the principal action will probably not be in the plaintiff's favour.

The aspects of the two requirements are:

- Liquid document

A **liquid document** is a document in which the debtor acknowledges, by his signature or that of his duly authorised representative, his liability for the payment of a certain and ascertainable amount of money or is legally deemed to have acknowledged such liability without the signature in fact having been appended thereto.

- Must attest to a monetary debt (obligation to perform a specific act = unliquidated).
- Amount must be certain and ascertainable from the document itself.
- Indebtedness must appear unconditionally and clearly *ex facie* the document. No evidence must be needed to establish the indebtedness or identity of the parties, thus an unconditional acknowledgment of debt.
- Where payment in terms of the document depends on the happening of a simple event, the document may still be liquid. Extrinsic evidence may be led if such event is disputed, but if not, it is proved by merely alleging in the summons that such event occurred. Such a simple condition is, for example, the provision that payment of a certain amount will be made only after debtor receives a notice from creditor to do so. If the debtor doesn't dispute receipt of the notice, a mere averment that such notice has been sent will be sufficient.
- Examples of liquid documents:
  - Negotiable instruments (bills of exchange, cheques and promissory notes);
  - Acknowledgment of debt.

- Probability of success and onus of proof

Onus relevant in two situations: -

In the provisional sentence case itself	In the principal case
• Plaintiff initially needs to prove nothing and simply states he is the holder of a liquid document, which is handed in with a request for judgment. • A presumption of law regarding liability exists as judgment is given assuming that documents submitted are authentic and valid. • If defendant disputes his signature or the fulfilment of the *ex facie* condition appearing on the document, then the plaintiff bears the onus of proving defendant signed document or the *ex facie* condition has been fulfilled. • Defendant bears onus of showing that the probabilities of success in the principal case lie in his favour.	• Onus may rest on either plaintiff or defendant and the question regarding the onus is relevant to determine what the probabilities of success are in the principal action. • If the court is of the opinion that the probabilities of success do not lie in favour of either plaintiff or defendant, provisional sentence must be granted.

7.5. Nature and effect of provisional sentence - Rules 8(8) – 8(11)

- Plaintiff has a right to payment and, if not made, may issue a writ of execution against defendant's property once security ***de restituendo*** (security for restitution of money received in terms of judgment if defendant successfully defends principal case) has been provided.
- Defendant may still defend principal action as judgment is provisional, but within two months of granting of provisional sentence and only if he has paid the judgment debt and costs.
- To defend, defendant must deliver notice of his intention to defend within the two month period. The summons will then be deemed to be a combined summons and defendant must deliver a plea within 10 days, failing which the provisional sentence becomes a final judgment and the security given by plaintiff falls away.

8. PRINCIPLES OR PLEADING

8.1. Basic principles

- Pleading stage

It extends from the issue of summons up to close of pleadings and is normally relevant in illiquid summons proceedings.

- Pleading

A written document, exchanged between the parties, containing averments by the parties to the action in which the material facts on which they rely in support of their claim or defence are concisely set out.

- Process

  As interpreted in ***Dorfman v Deputy Sheriff, Witwatersrand***, it is something which 'proceeds' from the court: some step in legal proceedings which can only be taken with the aid of the court or one of its officers, e.g. subpoenas, notices.

8.2. **Function**

- Defining and limiting the disputed issues of fact and law for the benefit of both the court and the parties to: save time and money; dispense of justice more quickly and effectively; encourage the settlement of a dispute.
- Informing each party of the case he is expected to answer, affording them the opportunity to prepare their cases and evidence they intend to lead in support of their own argument and in rebuttal of their opponent's to prevent time and money consuming adjournments.
- Constituting a formal, summary record of the issues in dispute between the parties which may be decided at the trial to prevent future disputes between the parties regarding issues which have already been adjudicated on.

8.3. **Rules for the drafting of pleadings**

- **Rule 18(4) – Most important**

  Every pleading shall contain a **clear and concise statement** of the **material facts** upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with **sufficient particularity to enable the other party to reply** thereto.

- **Rules 18(3), 18(5) and 18(7)**
  - Divided into consecutively numbered paragraphs containing separate averments/allegations
  - When denying an allegation of fact, not do so evasively but answer point of substance
  - Not necessary to state circumstances from which an alleged implied term can be gathered
- Other rules
  - Form must be clear, logical and comprehensive with adequate details so that the pleadings are not vague and embarrassing.
  - Facts must be pleaded – not law or evidence
  - Failure to comply with Rule 18 shall entitle the opponent to act in accordance with Rule 30.

9. PROCEEDINGS UP TO AND INCLUDING CLOSE OF PLEADINGS

Pleadings and processes exchanged after summons has been served and defendant indicated that he wants to defend the action.

9.1. **Notice of intention to defend**

- How

  By filing a notice of intention to defend with the Registrar and delivering a copy thereof to plaintiff.

- Purpose

  Simply to give notice of intention to defend and is not a means of raising a defence, this is done with a plea.

- When – **Rule 19(1)**

  Within 10 days after service of summons as stated in summons (the *dies induciae*).

- Form

  Notice advising of intention to defend action, providing address within 8km of Court where filing of all documents and process can be effected (not P O Box or ***poste restante*** (Private Box)) to give plaintiff a convenient address for delivery of all further process / documents.

- Failure

  Risks having default judgment being granted against him.

- **Rule 19(5)**

  Notice may be delivered after expiry of the *dies induciae*, but before default judgment has been granted, provided that plaintiff be entitled to costs if application for default judgment had already been lodged.

9.2. **Plea on the merits**

- Purpose

  The only way in which the defendant may raise a defence against the plaintiff's claim by dealing with the merits of the plaintiff's declaration or particulars of claim.

- When – **Rule 22(1)**

  When notice of intention to defend has been delivered, within 20 days (*dies induciae*): -

  - after service of the declaration; or
  - after delivery of the notice of intention to defend in respect of a combined summons.

- How – **Rule 22(2) & Rule 22(3)**

  Responding to each of the plaintiff's factual allegations by either: -

  - admitting;
  - denying;
  - confessing and avoiding; or
  - placing in issue,

  and all the material facts upon which the defendant relies are stated clearly and concisely. If warranted, may plead he has no knowledge of allegation, therefore can't admit or deny.

9.3. **Counterclaim – Rule 24(1)**

- What

  A claim instituted against the plaintiff, known as a counterclaim or claim in reconvention.

- When

  At the same time that defendant delivers his plea or at a later stage with leave of the plaintiff or, if refused, the court.

- How

  The claim in reconvention must be set out either: -

  - in a separate document; or
  - in a portion of the document containing the plea.

  It must be headed "Claim in Reconvention" or "Counterclaim" and it is unnecessary to repeat the citation of the parties to the claim in convention. Plaintiff may reply with a plea on the counterclaim, corresponding in form and content to the defendant's plea. Thereafter, same pleadings exchanged between the parties in reconvention as between parties in convention, just in reverse order (plaintiff = defendant in reconvention etc.)

9.4. **Replication**

- What

  Contains plaintiff's reply to defendant's plea, necessary only when defendant raises new allegations as to facts in his plea.

- When – **Rule 25(1)**

  Within 15 days after service of plea (*dies induciae*).

- Failure

  Plaintiff will be ***ipso facto*** (automatically) barred from replication if failed to deliver replication within *dies induciae* (**Rule 26 read with Rule 25(1)**).

- Unnecessary – **Rule 25(2)**

  - Replication would be a mere joinder of issue; or
  - Replication would be a bare denial of allegations in the plea.

  In these circumstances, joinder of issues will be assumed and the pleadings will be deemed to be closed when the last day for filing the replication has elapsed.

Further pleadings may be exchanged within the *dies induciae* stipulated in **Rule 25(5)**, being 10 days after delivery of the previous pleading. The most common is the rejoinder.

9.5. **Rejoinder**

Only necessary where plaintiff raises new factual allegations in his replication, the defendant may respond with a rejoinder.

9.6. **Close of Pleadings – Rule 29**

Pleadings shall be considered closed: -

- if either party has joined issue without alleging any new matter, and without adding any further pleading;
- if the last day allowed for filing a replication or subsequent pleading has elapsed and it has not been filed;
- if parties agree in writing that pleadings are closed and such agreement is filed with Registrar;

- if the parties are unable to agree as to the close of pleadings, and the court upon the application of a party declares them closed.

10. FURTHER PLEADINGS AND PROCESSES UP TO AND INCLUDING CLOSE OF PLEADINGS

Rules in regard to pleading aren't rigid and unbending, and not every technical mistake in a particular pleading will render it open to objection. Where there's 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 pleadings or to enable him to deliver a pleading.

(See also interlocutory applications – CIP201-G)

10.1. Inspection – Rule 35(14)

After appearance to defend has been entered, any party to an action may, for purposes of pleading, require the other party to make available for inspection within 5 days a clearly specified document or tape recording in his possession which is relevant to a reasonably anticipated issue in the action and to allow a copy / transcription to be made thereof.

10.2. Application to strike out – Rule 23(2)

- A party may make application to strike out that part of an opponent's pleading (not as a whole) which contains offending allegations which are **scandalous, vexatious or irrelevant** (in relation to the points in dispute raised and which must be decided by the court). Also used for passages in affidavits in motion proceedings.
- If a court is satisfied that the applicant will be prejudiced in conducting his claim or defence if the application is not granted, it will grant such interlocutory (approach court in proceedings that have already been instituted for relief) application.
- Application will be set down for trial (hearing) in terms of **Rule 6(5)(f)**.

10.3. Amendment of pleadings and documents

Rule 28(1): Any party may amend his own pleadings or documents (not affidavits) already served and filed by giving notice to all other parties of his intention to amend and furnishing particulars of the amendment.

Rule 28(2): Notice to state that unless written objection is made to the proposed amendment within 10 days of delivery of the notice, the amendment will be effected.

Rule 28(3): An objection to a proposed amendment must state clearly and concisely the grounds upon which the objection is founded.

Rule 28(4): If written objection is made within the 10 days period, the party wishing to amend may, within 10 days lodge an application for leave to amend.

Rule 28(5): If no objection is made, the party receiving notice of the proposed amendment is deemed to have consented thereto and the party giving notice of the proposed amendment may effect it within 10 days after the expiry of 10 day objection period.

Rule 28(6): Unless the court orders otherwise, an amendment authorised by the court may not be effected later than 10 days after such authorisation.

Rule 28(7): The party entitled to amend must effect the amendment by delivering each page in its amended form.

Rule 28(8): Any party affected by an amendment may, within 15 days after the amendment, make any consequential adjustments to his own documents. He can also make an application to strike out, raise an exception, or apply to court to have an irregular step set aside.

Rule 28(9): Any party giving notice of amendment shall, unless the court directs otherwise, be liable for the costs of any other party thereby occasioned.

Rule 28(10): The court may, at any stage before judgment, grant leave to amend any pleading or document on other terms as to costs or other matters as it deems fit.

Court will grand amendment as a general rule, unless:

- Application is made *mala fide*;
- Opposing party will suffer prejudice which cannot be compensated for by a postponement and / or order as to costs (***Embling v Two Oceans Aquarium***);
- It would render the pleading excipiable.

10.4. Exception – Rule 23(1)

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

- the pleading as drafted is **vague and embarrassing**; or
- it discloses **no cause of action or defence** - even if the party is accepted to be able to prove all allegations contained in such pleading, pleading won't constitute a valid claim or defence in law.

- Purpose
  - Vague and embarrassing

    To prevent the person excepting from being taken by surprise or being prejudiced in his pleading or at the trial.
  - No cause of action or defence

    To provide a speedy, inexpensive method of determining the issue without embarking on a lengthy, expensive full trial.
- How

  The exception must appear ex facie the pleading being excepted to and be a legal argument only, thus no new facts may be alleged in the exception, taken to the pleading as a whole and not to a portion of a pleading unless such portion constituted a separate cause of action or defence. Exception must clearly and concisely (**Rule 23(3)**) state the grounds upon which it is based and is like an interlocutory application in nature. For the purpose of deciding the exception, the facts stated in the pleading being attacked are taken to be true.
- When must an exception be filed?

  Within the period allowed for filing any subsequent pleading. Where a party intends excepting to a pleading on the ground of it being vague and embarrassing, he must, by notice, afford his opponent an opportunity of removing the cause for complaint. **NB!**
- When is an exception decided upon?

  Separately before a trial after set down in terms of **Rule 6(5)(f)**.

10.5. **Special Plea**

- What

  A means of raising an objection on the basis of certain facts which don't appear in the plaintiff's declaration or particulars of claim and has the effect to:
  - destroy the action; or
  - postpone the action.

  A plea on the merits must still be filed, otherwise he runs the risk that default judgment will be granted against him.
- The difference between the special plea and the exception

Exception	Special plea
• Limited to an attack on the allegations in the pleading as a whole • No factual allegation outside the pleading attacked may be introduced • Assuming allegations attacked are true • An exception can be raised against any pleading	• It alleges special facts unconnected with the merits, resulting in the action being either destroyed or postponed • Doesn't deal with merits of action at all • Assuming all the allegations are true • A special plea can be raised only against a declaration or particulars of claim

- Categories
  - Pleas in abatement - seeking to destroy the action
    - Prescription
    - Non-joinder or mis-joinder
    - *Res iudicata*
    - Plea in bar – regarding jurisdiction of the court
  - Dilatory pleas - seeking to postpone the action
    - Defendant disputes plaintiff's authority to sue in the absence of a formal requirement, which is a condition for suing.
    - *Lis pendens* – An action instituted by the plaintiff is already pending in the same / a different court relating to the same cause / subject-matter.
    - Arbitration - Where parties have previously agreed to submit dispute to arbitration.

10.6. **Application to set aside irregular proceedings – Rule 30** **NB!**

- Procedure

  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.

Rule 30(2): An application to set aside an irregular step must be on notice to all parties specifying particulars of the irregularity alleged and may only be made if:

(a) applicant hasn't himself taken a further step in the cause with knowledge of the irregularity;

(b) applicant has, within 10 days of becoming aware of the step, afforded his opponent an opportunity of removing the cause of complaint within 10 days by written notice.

(c) application is delivered within 15 days after expiry of second 10 day period.

In ***Minister of Law and Order v Taylor*** court held that the period within which applicant must act, starts as soon as he takes notice that a step or proceeding has been taken or that a proceeding has occurred, and not once irregularity thereof has come to his notice. Thus, period commences on receipt of the notice/step and not when it comes to the attention of the applicant.

Rule 30(3): The court may, if it is of the opinion that a step/procedure is irregular, set the step aside in whole or in part; grant leave to amend or any order it deems fit.

Rule 30(4): Until the responding comply with the order, he may not take any further steps in the main action.

Rule 30A(1): Where a party is in default in complying with a request or notice in terms of Rule 30, any other party who made the request or gave the notice may approach court (after notice of intention to do so has been given to the defaulting party) for an order that the notice or request be complied with, or that the claim or defence be struck out.

- Irregular proceeding

Formal irregularities being non-compliance with formal requirements in procedural matters.

- Examples: -
  - When a Rule specifically states that non-compliance with its provisions will be deemed to be an irregular step, such as:

    Rule 18(12): Rules relating to pleadings generally;

    Rule 22(5): Plea;

    Rule 24(5): Claim in reconvention.
  - Failure by an advocate and attorney to sign the particulars of claim (Rule 18(1)).
  - Premature set down of a case.
  - Using the incorrect type of summons.
- Further step
  - In ***Kopari v Moeti*** a step is described as *"some act which advances the proceedings one step nearer completion"*, being the next sequential exchange of pleading or objection to the content of a pleading.
  - This does not include a notice to defend as our courts have held that this is merely an act done to enable the defendant to put forward his defence.

11. OFFER TO SETTLE, TENDER AND INTERIM PAYMENTS

Settlement is often reached by agreement between parties, but where negotiations fail, defendant can utilise the Rule 34 procedure. Advantages are that: (i) the action is extinguished; and (ii) no further costs are incurred.

11.1. Offer to settle – Rule 34

A defendant may, **at any time, unconditionally or without prejudice**, offer to settle a plaintiff's claim where the plaintiff is claiming:

- Payment of a sum of money – **Rule 34(1)**

Rule 34(3): An offer to pay a sum of money must be **in writing** and must be signed by defendant or duly authorised attorney.

Rule 34(4): One of several defendants may make an offer to settle. A defendant includes any person:

- joined as a defendant.
- joined as a third party in terms of Rule 13.
- being a defendant in reconvention.
- being a respondent in application proceedings.

Rule 34(5): Notice of any offer must be given to all parties to action stating whether the offer:

- is unconditional or without prejudice[3];
- is accompanied by an offer to pay all or part of the costs of the party to whom the offer is made and if it is made subject to certain conditions;
- is made by way of settlement of both claim and costs or of claim only;
- denies liability for the payment of costs or part thereof, and if so, reasons to be provided, whereafter action may be set down on question of costs only.

Rule 34(6): Plaintiff may, within 15 days of receiving offer (or later with consent of defendant / court), accept offer by delivering a notice of acceptance at defendant's address.

Rule 34(7): Defendant must make payment as offered within 10 days of receiving notice of acceptance, failing which plaintiff may apply for judgment in terms of offer plus costs after 5 days written notice. Disadvantage of this procedure: -

- To receive payment, plaintiff would have to obtain execution against defendant (prior to 1987, the amount offered was paid into court).
- Finalisation of the matter may be delayed.
- Defendant may not have sufficient means to pay the judgment.
- Taking such further steps may be costly for both parties.

Rule 34(10): No without prejudice offer may be disclosed to court before judgment has been given and the court file may contain no reference.

Rule 34(11): The fact that an offer has been made may be brought to court's notice after judgment has been given as it is relevant to the question of costs.

Rule 34(13): If a party discloses the offer to the court in contravention of this Rule, such party will be liable to have costs given against him, even if he is successful in the action.

- Performance of an act – **Rule 34(2)**

  Where the performance of an act is claimed, defendant may at any time tender to perform such act and, unless such act must be performed personally, he must execute an irrevocable power of attorney authorising someone to perform on his behalf, which must be deliver to the Registrar with the offer. Should the offer be accepted, the Registrar must hand the power of attorney to plaintiff or his attorney after having been satisfied with compliance (**Rule 34(6)**).

11.2. **Common-law tender**

A tender is equivalent to payment made by way of an offer of settlement made and can be made even before proceedings are instituted. Common law requires that payment be made in money and it's not required to be paid into court, but needs to be available in the form of money / a cheque. Plaintiff must be notified of the manner in which the payment is available. A tender must be **unconditional**. The object of a tender is to:

- protect defendant against costs which accrue from the summons stage;
- prevent impending action being instituted;
- end litigation already instituted.

A tender must be pleaded and, therefore, be proved in the same way as any other fact. Where a tender is raised as a defence, it is done to show that the tender is accepted and the cause of action thus extinguished, or plaintiff is not entitled to costs from date of tender. If tender not accepted, the tendered amount must be paid back. If tender accepted, plaintiff may not sue for balance of claim.

11.3. **Interim payments – Rule 34A**

The **Vivier Commission** identified a need for interim payments in actions for damages as a result of personal injuries and death in view of the delay in the finalisation of litigation. These delays may lead to undue financial hardship for the plaintiff and/or his next of kin and interim payments:

- try to eliminate this hardship;
- facilitate a reasonable and equitable settlement; and
- shorten litigation proceedings.

Rule 34A(1): In an action for damages for personal injuries or death of a person plaintiff may at any time after the expiry of the period for the delivery of the notice of the intention to defend apply to court for an order to make an interim payment in respect of his claim for medical costs and loss of income arising from his physical disability or the death of a person.

[3] For the purpose of this Rule, the expressions have the following meaning: **unconditional** = liability in respect of claim is accepted; **without prejudice** = liability is denied.

Rule 34A(2): Subject to the provisions of **Rule 6**, the affidavit in support of the application shall contain the amount of damages claimed and the grounds for the application and all documentary proof on which the applicant relies must accompany the affidavit.

Rule 34A(4): The court may, if it thinks fit, order the defendant to make such payment of such amount it thinks just if it is satisfied, at the hearing of the application that:

(a) defendant has made a written admission of liability for plaintiff's damages; or

(b) plaintiff has obtained judgment against the defendant for damages to be determined.

Rule 34A(5): No order shall be made unless it appears to the court that:

- the defendant is insured in respect of the plaintiff's claim; or
- has the means at this disposal to make such payment.

Rule 34A(6): Interim payment shall be aid in full unless ordered otherwise.

Rule 34A(8): The fact that an order has been made in terms of Rule 34A(4) must not be pleaded and no disclosure of that fact must be made to the court at the trial or at the hearing of questions or issues as to the quantum of damages until such questions or issues have been determined.

Rule 34A(9): Action cannot be discontinued or the claim withdrawn without the consent of court.

12. PRE-TRIAL JUDGMENTS

12.1. Consent to judgment – Rule 31(1)

A defendant may, at any time, confess in whole or in part the claim contained in the summons.

- Exceptions
  - Actions for relief in terms of the Divorce Act; or
  - Actions for nullity of marriage.
- Formal requirements
  - The consent must be signed by the defendant personally and his signature shall be witnessed by an attorney acting for him, and not the plaintiff, or be verified by affidavit.
  - The consent must be furnished to the plaintiff.
- Consequence

  The plaintiff may apply in writing through the Registrar to a judge for judgment according to such confession, usually granted in the judge's office and not in open court.

12.2. Default judgment and bar

If a party fails to deliver a pleading / process document in time, he's "in default". Depending on type of pleading or process, judgment may be requested immediately or notice of bar must be given.

- Bar – **Rule 26**

  Any party who fails to deliver a replication or subsequent pleading within the time stated in **Rule 25** shall be *ipso facto* barred from doing so. If any party fails to deliver any other pleading: -
  - any other party may serve a notice of bar on him requiring delivery of such pleading within 5 days; and
  - if the party still fails to deliver pleading within the 5 day period or within such period agreed upon between the parties, he will be in default of filing such pleading and *ipso facto* barred.

  In terms of **Rule 27**, the court may: -
  - On application and good cause shown, make an order extending or abridging any time prescribed order of court for doing any act or taking any step in connection with any proceedings on any terms the court deems fit.
  - Such extension may be ordered although application is not made until expiry of time.
  - Condone any non-compliance with the rules.
- Default Judgement
  - Failure to file a notice of intention to defend OR plea

    Rule 31(2)(a): Whenever the claim is **unliquidated** (not a debt or liquidated demand) and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as to sees fit.

Note: Some divisions of the court require that, under certain circumstances, evidence must be led in respect of the cause of action, but the practice isn't yet uniform.

Rule 31(2)(b): A defendant may, within 20 days after knowing of judgment, apply to court upon notice to plaintiff to set aside such judgment and the court may, upon good cause shown, set aside default judgment on such terms as it deems fit.

Rule 31(5)(a): Whenever claim is for **a debt or liquidated demand** and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may file with the Registrar a written application for judgment against such defendant and no evidence need be led - provided that when a defendant is in default of delivery of a plea, plaintiff shall give such defendant not less than 5 days' notice of his or her intention to apply for default judgment.

Rule 31(5)(b): The Registrar may -

- grant judgment as requested;
- grant judgment for part of the claim only or on amended terms;
- refuse judgment wholly or in part;
- postpone the application on such terms as he may consider just;
- request or receive oral or written submissions;
- require that the matter be set down for hearing in open court.

Rule 31(5)(c): Registrar shall record any judgment granted or direction given by him.

Rule 31(5)(d): Any party dissatisfied with a judgment granted or direction given by the Registrar may, within 20 days after he has acquired knowledge of such judgment or direction, set the matter down for reconsideration by the court.

Rule 31(5)(e): The registrar shall grant judgment for costs in an amount of R200 plus the sheriff's fees if the value of the claim as stated in the summons, apart from any consent to jurisdiction, is within the jurisdiction of the magistrate's court and, in other cases, unless the application for default judgment requires costs to be taxed or the registrar requires a decision on costs from the Court, R650 plus the sheriff's fees.

Late filing

A defendant may file notice of intention to defend after expiry of the *dies induciae*, but before default judgment is granted. Plaintiff may not ignore it, but may approach court to have the appearance set aside as an irregular proceeding. See **Rule 19(5)** above regarding costs.

Plea

Notice of bar must first be delivered where defendant fails to deliver a plea before application for default judgment may be made – see **Rule 31(4)** below for set down procedure in respect unliquidated claim.

- Failure of plaintiff to deliver a declaration

Rule 31(3): Where plaintiff has been barred from delivering a declaration, defendant may set down as provided in **Rule 31(4)** and apply for absolution from the instance[4] or, after giving evidence, for judgment[5]. Court may make such order as it sees fit.

Note: If 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. Further failure = *ipso facto* barred.

Rule 31(4): Proceedings in **Rules 31(2) & (3)** shall be set down for hearing on not less than 5 days' notice to default party, provided that no notice of set down need be given to any party in default of delivery of notice of intention to defend.

- Failure to appear at the trial

Rule 39(1): If plaintiff appears, but defendant not, at a trial, plaintiff may prove his **unliquidated** claim so far as burden of proof lies upon him and judgment shall be given accordingly. No evidence necessary for **a debt or liquidated demand** unless the court orders otherwise.

[4] Plaintiff has not proved his claim.
[5] Against plaintiff for claim to be dismissed.

Rule 39(3): If, defendant appears, but plaintiff not, at a trial, defendant entitled to an order granting absolution from the instance with costs or final judgment after leading evidence.

- Setting aside of default judgment

Refer to **Rule 31(2)(b)** and **Rule 31(5)(d)** above. Court has discretion whether or not to set aside a judgment on sound reasons for the failure advanced by defendant. Courts have held that "sound reasons" mean that -

- a reasonable explanation must be given for the failure;
- the application must be *bona fide* and not merely a delaying tactic;
- defendant must have a *bona fide* defence.

Application does **not** refer to a notice of motion

12.3. **Summary judgment**

- Purpose

Designed to protect plaintiff, who has a claim of a particular nature, against a defendant who has no valid defence and who has simply entered an appearance to defend for the purposes of gaining time and preventing the plaintiff from obtaining the relief he seeks and deserves. Court will approach it cautiously as it infringes the *audi alteram partem* rule and case must be clear.

- Grounds

Rule 32(1): Where a notice of intention to defend has been delivered, plaintiff may apply to court for summary judgment on a claim in the summons as is only -

(a) on a liquid document;
(b) for a liquidated amount in money;
(c) for delivery of specified movable property; or
(d) for ejectment;

together with any claim for interest and costs.

A debt or liquidated demand → Simple summons

- Procedure and content of affidavit

Rule 32(2): Plaintiff shall within 15 days after delivery of notice of intention to defend, deliver notice of application for summary judgment, together with an affidavit made by himself or by any other person who can swear positively to the facts verifying the cause of action and the amount, if any, claimed and stating that –

- in his opinion there is no *bona fide* defence to the action; and
- notice of intention to defend has been delivered solely for purpose of delay.

If claim is founded on a liquid document, a copy thereof must be annexed to such affidavit and the notice of application for summary judgment must state the set down date, not being less than 10 days from the date of the delivery thereof.

- Courses of action the defendant can take in response to the application

Rule 32(3): Upon hearing of an application for summary judgment defendant may -

(a) give security to plaintiff to satisfaction of Registrar for any judgment including costs which may be given, or
(b) satisfy the court by affidavit, delivered before noon on the preceding court day of the set down date) or by oral evidence (with leave of court) of himself or any other person who can swear positively to the fact that he has a *bona fide* defence to the action; such affidavit or evidence disclosing **fully the nature and grounds of the defence** and the material facts relied upon.

- Powers of the court when hearing the application

Although parties are not permitted to cross-examine anyone who gives *viva voce* evidence or evidence under oath, court may put questions for clarification. Court will grant leave to defend when defendant –

- provides security; or
- convince court that he has a *bona fide* defence,

and 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.

- Costs

  Rule 32(9) provides if either party acts unreasonably or improperly in summary judgment proceedings, court may order that party to pay the other party's costs, even on an attorney and own client scale.

- Summary dismissal

  Counterpart of summary judgment procedure and affording defendant an inexpensive and speedy method of dismissing plaintiff's action if it is **vexatious or frivolous** (amounting to an abuse of the process of the court), which court has inherent jurisdiction to prevent.

13. PREPARATION FOR TRIAL

The following steps are taken either to obtain information from another party to the action, or to allow the party taking them to lead certain evidence.

13.1. Steps which may be taken both before and after close of pleadings

- Medical examinations

  Rule 36(1): In proceedings which damages or compensation in respect of alleged bodily injury is claimed, any party shall have the right to require any party claiming such damage or compensation, whose state of health is relevant for the determination thereof, to submit to medical examination.

  Rule 36(2): Any party requiring another party to submit to such examination shall deliver a notice specifying -

  - the nature of the examination required;
  - the person/s by whom, where, the date (not less than 15 days from date of such notice) and time when such examination is desired to take place,

  and requiring such party to submit himself for the examination. Such notice shall –

  - state that such other party may have his own medical adviser present at such examination;
  - be accompanied by a tender in respect of the reasonable expense to be incurred by such party

  Rule36(3): The receiving party may object, within 5 days of receipt, in writing by notifying the person delivering it of the grounds thereof in relation to -

  (a) the nature of the proposed examination;
  (b) the person/s by whom the examination is to be conducted;
  (c) the place, date or time of the examination;
  (d) the amount of the expenses tendered to him;

  Rule 36(5): If apparent from a medical examination, that any further medical examination by any other person is necessary for purpose of giving full information on matters relevant to the assessment of such damages, any party may require a second and final medical examination.

  Rule 36(5A): Any party claiming damages resulting from the death of another person, shall undergo a medical examination if requested and it is alleged that his own state of health is relevant in determining the damages.

  Rule 36(8): Any party causing an examination to be made shall -

  (a) ensure the person making the examination gives a full written report of the results and his opinions;
  (b) furnish any other party with a complete copy of the report on request; and
  (c) bear the expense of the examination forming part of such party's costs.

- Examination of inanimate objects

  Rules 36(6) & (7) provides that if the state or condition of any movable or immovable property may be relevant in deciding a matter, any party may require the party relying thereon in writing to make it available for examination.

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

  Rule 36(4): Any party entitled to demand a medical examination may, by written notice, require the abovementioned be made available to him within 10 days if they were relevant to the assessment of damages.

- Expert advice **NB!**

  Rule 39(9): No person shall –

- save with the leave of the court; or
- the consent of all parties to the suit

be entitled to call as a witness any person to give evidence as an expert upon any matter upon which the evidence of expert witnesses may be received unless he -

(a) delivered a notice of such intention to do so not less than 15 days before the hearing; and

(b) delivered a summary of such expert's opinion and reasons not less than 10 days before the trial.

- Purpose
  - To prevent a party being surprised at the trial;
  - To give opponent opportunity of being prepared to deny the expert evidence;
  - Should expert witnesses get together to exchange opinions, this could shorten the trial.
- Admission of plans, diagrams, models and photographs – **Rule 36(10)** **NB!**

36(10)(a): No person shall

- save with the leave of the court; or
- the consent of all the parties

be entitled to tender in evidence any plan, diagram, model or photograph unless he shall –

- not less than 15 days before the hearing have delivered a notice stating his intention to do so, offering inspection thereof; and
- requiring the party receiving notice to admit the same within 10 days after receipt of the notice.

36(10)(b): If the party receiving the notice fails to admit such item, it shall be received in evidence upon its mere production and without further proof thereof. Should such party state that he does not admit it, then the item may be proved at the hearing and he may be ordered to pay the cost of their proof.

13.2. **Steps which be taken only after the close of pleadings**

- Request for further particulars for trial

Rule 21(2): After close of pleadings, any party may deliver a notice requesting only such further particulars as are strictly necessary to enable him to prepare for trial, not less than 20 days before trial, to be complied with within 10 days after receipt thereof.

Rule 21(4): If party requested fails to deliver particulars timeously or sufficiently, the party requesting may apply to court for an order for the delivery or for the dismissal of the action or the striking out of the defence, whereupon the court may make such order it deems fit.

The request and reply do not form part of the pleadings exchanged and this procedure does not entitle the other party to know what evidence the other party is going to lead, only entitle him to be put in a position where he is able to prepare for trial and to prevent him from being taken by surprise by evidence given against him.

- The pre-trial conference

Rule 37(1): A party who receives notice of the trial date of an action shall, if he has not yet made discovery in terms of **Rule 35**, within 15 days deliver a sworn statement which complies with **Rule 35(2)**.

Rule 37(2)

(a): A plaintiff who receives notice contemplated in **Rule37(1)** shall, within 5 days, deliver notice appointing a date, time and place for a pre-trial conference.

(b): If plaintiff has failed to comply with **Rule 37(2)(a)**, defendant may, within 30 days after expiration of the 5 day period, deliver such notice.

Rule 37(3)

(a): Date, time and place for pre-trial conference may be amended by agreement, **provided** that conference shall be held not later than 6 weeks prior to hearing.

(b): If parties do not agree on date, time or place for the conference, the matter shall be submitted to the Registrar for his decision.

Rule 37(4): Each party shall, not later than 10 days prior to the pre-trial conference, furnish every other party with a list of –

(a): the admissions which he requires;

(b): the enquiries which he will direct and which are not included in a request for particulars for trial; and

(c): other matters regarding preparation for trial which he will raise for discussion.

Rule 37(5): At pre-trial conference matters mentioned in **Rules 37(4) & (6)** shall be dealt with.

Rule 37(6): Minutes of pre-trial conference shall be prepared and signed by or on behalf of every party.

Rule 37(7): The minutes shall be filed with the registrar not later than 5 weeks prior to the trial.

Rule 37(8): Pre-trial conference may be held before a judge in chambers.

Rule37(9)

(a): At the hearing of the matter, court shall consider whether or not it is appropriate to make a **special order as to costs** against a party or his attorney, because he or his attorney –

- did not attend a pre-trial conference; or
- failed to a material degree to promote the effective disposal of the litigation.

(b): Except in respect of an attendance in terms of **Rule (8)(a)**, no advocate's fees shall be allowed on a party-and-party basis in respect of a pre-trial conference held more than 10 days prior to the hearing.

Rule 37(10): Judge in chambers may, without hearing parties, order deviation from time limits.

Rule 37(11): A direction made before the commencement of the trial may be amended.

Purpose: To shorten the trial.

- Discovery of documents and tape recordings – **Rule 35 & Form 11**
  - Purpose
    - To ascertain from other parties what documents and tape recordings exist which might be relevant to the action;
    - Enabling a party to prepare properly for trial;
    - Prevents party being taken by surprise.
  - When

    After close of pleadings, not before.
  - Procedure

    Obtained by written notice to other party to make discovery under oath within 20 days of such request. Discovery is then made in an affidavit disclosing the necessary information.
  - Relating to

    All documents relevant to any matter in dispute in the action which are or have at any time been in the possession or under the control of that party.
  - Discovery affidavit

    Must set out those documents –
    - relating to the matters in dispute, which are in his possession or under his control;
    - which, although relating to the matters in dispute and being in the party's possession or control, the party objects to producing stating the reasons for such objection;
    - which he has had in his possession or which were under his control, but which he does not now have in his possession or which are not now under his control, stating when such documents were last in his possession or under his control and where such documents now are.
  - Non-disclosure

    If the party requiring discovery believes that certain documents have not been disclosed, he may require the other party –
    - to make them available for inspection (**Rule 35(3)** in accordance with **Rule 35(6)**); or
    - to state under oath that such documents are not in his possession, in which event he must state their present whereabouts, if known.
- Inspection of documents and tape recordings

Rule 35(6): The party who had discovered may be required to make available for inspection and copying the documents disclosed, except documents he may validly object to disclosing.

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

  After close of pleadings, a party may require any other party to specify in writing particulars concerning dates of and parties to any document which is intended to be used at trial on behalf of such party. Party so requested must specify whether or not document is in his pos-session and must provide particulars regarding such document as are required in **Rule 35(8)**.

- Production of documents and tape recordings

  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.

- Set-down of cases for trial

  Plaintiff is *dominus litus* and thus has the right to apply for set-down first after pleadings have closed by giving notice to Registrar, forthwith set down the case on the roll for the allocation of trial dates. If plaintiff fails to do so within a certain period, defendant may do so. Set-down is governed by the rules of the various provincial divisions, not by URC.

- Transfer of cases

  Section 9 of SCA provides that application may be made to have proceedings transferred from one division of the High Court to another, transfer being a **matter of discretion, not of right**. Each case judged by its own facts and whether it would be more convenient to hear or determine the case at the suggested new venue will be the broad basis on which court decides.

13.3. **Securing the necessary evidence**

- Advice on evidence

  Once preparation phase commenced, 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;
  - which witnesses will be necessary; and
  - usually, what the chances of success are in the action.

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

  Rule 38(1): If a person is within the Republic, he 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 (**Form 16**). If a witness is required by a subpoena to make available at the trial a: -

  - document;
  - instrument; or
  - object;

  } in his possession or under his control

  then the subpoena is called a *subpoena duces tecum*.

  Rule 38(2): Unless special circumstances exist, a witness must give evidence: -

  - *viva voce*; and
  - in *open* court.

  If a witness cannot give evidence in person, and if the necessary circumstances exist, he may be allowed to give evidence: -

  - on commission (*de bene esse* – subject to review) – **Rule 38(3) to (8)**
    - Application must be made to court
    - Court will order this when it appears convenient/ necessary for the purposes of justice.
    - Evidence is given before a commissioner of the court before or during the trial orally in the presence of the parties or their representatives.
    - Such evidence is recorded and the transcript is certified by the Commissioner and the person transcribing, whereafter the Commissioner it to the Registrar with his certificate that it is the record of evidence given before him
  - by way of interrogatories
    - Differs from evidence on commission, which is given generally.

- Specific evidence only is taken and, for this purpose, specific questions are formulated which must be put to the witness by the Commissioner.

✔ by way of affidavit

- In terms of Rule 38(2) evidence may be taken down by affidavit at any time for sufficient reason. When it appears to court that the other party reasonably requires the witness to attend to cross-examine him and that witness can be produced, the use of affidavit won't be permitted.

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

14. THE TRIAL AND COSTS

14.1. Conduct of the trial

General trial procedure – **Rule 39**

Every case is set down for trial on a specific date, on which day it is called. Advocates will indicate whether:

- they are ready to begin with a specific case (case not settled and no postponement);
- what the duration of the trial is expected to be.

A court and judge is allocated for the hearing of the case. If plaintiff has the burden of proof, his advocate will address the court first:

- briefly outlining the facts he intends to prove to support his cause of action;
- calling the various witnesses (including plaintiff) who can attest to these facts, asking each witness brief questions to guide them through their evidence-in-chief.

After each witness has given evidence, defendant's advocate may cross-examine him or her and plaintiff's advocate may re-examine them to minimise ambiguities, which arose from cross-examination. Once all plaintiff's witnesses have given evidence, the plaintiff will close his case. If defendant is of the opinion that the plaintiff has not proved a *prima facie* case, he may request absolution from the instance at this stage. If he doesn't request this, or does but it isn't granted, defendant's advocate will:

- briefly outline the facts he intends to prove; and
- call his witnesses, which may be cross-examined by plaintiff's advocate.

After defendant has closed his case, both advocates address court on interpretation of the facts presented to the court and any legal points arising therefrom. Judgment is either given immediately or the trial is postponed so that judge can consider the evidence and give judgment at a later date. Court will give judgment on the main issues and make an order as to costs. A record must be made of all evidence, arguments and judgments.

Re-opening a case already closed

General Rule: Once a party has closed his case, he may not present further evidence, but the court has a discretion to allow this. A party's application for leave to re-open a case for the purpose of leading new evidence will usually be judged according to the following principles:

- Applicant must show that he has displayed proper diligence to procure evidence at trial.
- If applicant shows that he did not obtain the evidence he now wants to present because he could not reasonably have know that it was relevant to the case, the court may grant him leave to re-open his case in order to present this evidence.
- The evidence, which the applicant proposes to lead, must be material.
- The court must take into account the danger of prejudice to the other party – he might not be able to recall his witnesses.

14.2. Costs of the action

After the court has delivered judgment, it has a wide discretion when awarding costs. Usually a party who loses a case will be ordered to pay winner's costs, but this isn't a foregone conclusion. The conduct of the parties and any fact that may be relevant will be taken into account and 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.

Attorney and client costs

Liability is based on the contractual relationship between attorney and client and not related to the outcome of the legal proceedings. Such costs include:

- remuneration for **all** professional services rendered by the attorney; and
- all expenses incurred by attorney (incl. counsel's fees) in execution of client's instructions.

A court will not lightly order a party to pay the other party's attorney and client costs, but grounds on which such order can be made include:

- where that party has been guilty of dishonesty or fraud in conducting the suit;
- his motives have been reckless, vexatious or malicious;
- he has seriously misconducted himself in the course of the proceedings.
- in terms of **Rule 32(9)** the court has authority to make such a cost order if summary judgment application was made knowing defendant had a valid defence.

↳ Party and party costs

Costs incurred by a party to legal proceedings and which the court orders the other party to pay him. 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 (officer of High Court who checks bills of costs).

Bills of costs are drawn up according to a tariff setting out the maximum fee allowed for each item in the litigation process and the Taxing Master decides whether the fee charged by the attorney is reasonable in view of the complexity of the case. Once a reasonable figure has been determined (taxed), the bill of costs is presented to the other party for payment. Only costs incurred in the actual litigation process are included in this amount.

A party who is awarded party and party costs does not have all his expenses paid by the other party as only his taxed party and party costs are paid. The balance owing to his attorneys will have to be paid out of his own pocket, unless attorney and client costs are awarded by the court. General principles of awarding party and party costs:

- the successful party is entitled to his costs (general rule).
- to determine who the successful party is, court must look to the substance, not merely the form, of the judgment.
- court has a discretion to deprive the successful party of part or all of his costs when:
  - whether the demands made are excessive;
  - how the litigation was conducted;
  - the taking of unnecessary steps or the adoption of an incorrect procedure;
  - misconduct.

↳ Costs *de bonis propriis*

These are costs which a litigant, acting in a representative capacity, is ordered to pay out of his own pocket by way of a penalty for some improper conduct. The court has a discretion to make a *de bonis propiis* costs order when an attorney has misconducted himself in a particular matter to the detriment of one or both of the parties. This would encompass situations where he has:

- behaved unprofessionally;
- acted unethically or dishonestly.

Such order must be specifically requested.

15. ENFORCEMENT OF JUDGMENT

The object of litigation is to obtain the relief requested, e.g. money or other relief. If defendant refuses to comply voluntarily with the judgment, steps must be taken to enforce it. The process whereby satisfaction of a judgment is enforced is known as execution. Judgment can either:

➲ be of immediate effect, which do not require enforcement (e.g. decree of divorce); or

➲ require compliance and must be enforced if they aren't complied with voluntarily, otherwise they're ineffective (e.g. order to pay a sum of money/perform an act). They can be divided into:

Judgments *ad pecuniam solvendam* - To pay a sum of money

Enforceable by means of a writ of execution against debtor's property.

Judgments *ad factum praestandum* - To perform or to refrain from performing some act

Enforceable by means of committal of debtor for contempt against debtor's person.

15.1. The enforcement of judgments *ad pecuniam solvendam*

↳ By means of execution against debtor's property

If debtor doesn't voluntarily comply with a judgment *ad pecuniam solvendam*, creditor may approach Registrar to issue a writ of execution. This is addressed to Sheriff, who is required to execute it by attaching debtor's property and by selling it in execution to satisfy the judgment. Here attachment takes place after judgment, and can take place anywhere in the Republic. Movable property must be attached and sold in execution before immovable property. Immovable property can only be attached and sold in 3 cases: -

- Where a writ has been issued against the movables and the Sheriff has made a ***nulla bona*** (no movables to attach) return;
- 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;
- Where, at the time judgment was obtained, the court made a special order declaring certain property executable.

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

- Against debtor's person

  Civil imprisonment has been abolished in 1977. If a debtor, therefore, has no assets or income against which execution can be levied, the judgment cannot be enforced.

15.2. **The enforcement of judgments *ad factum praestandum*[6]**

The general remedy available is the common law concept of contempt of court, which is a criminal offence. As contempt of court constitutes a criminal offence, it is possible to lay a criminal charge against judgment debtor and for the State to prosecute him. However, usually, judgment creditor institutes civil proceedings for contempt by applying to court on notice of motion for an order committing a debtor to prison for contempt of court. Court will usually suspend imprisonment pending compliance with original court order. Requirements for an order to commit debtor for contempt are:

- an order *ad factum praestandum*;
- knowledge by debtor of the order (usually by service);
- ability of debtor to comply with the order;
- disobedience of the order; and
- wilfulness on debtor's part in respect of the disobedience of the order.

16. INTERDICTS AND EXTRAORDINARY PROCEDURES

16.1. **The interdict[7]**

An **interdict** is a summary remedy of an extraordinary nature, the object of which is to protect a person against the unlawful deprivation of his rights.

- The different kinds of interdicts
  - Prohibitory Interdicts

    An order compelling a person to either abstain from:
    - committing a threatened wrong; or
    - continuing an existing wrong
  - Mandatory Interdicts

    An order compelling a person to: -
    - perform some positive act to remedy a wrongful state of affairs which that party has brought about; or
    - to do something which he is in law obliged to do so if other party is not to be deprived of his rights. Where act must be performed by a public official, order is called a *mandamus*.
  - Restitutory Interdict

    An order compelling a person to restore the possession of property of another whose possession of such property was disturbed unlawfully (even before the merits of the dispute are investigated by a court). This order restores the *status quo ante* and is known as a *mandamenten van spolie*[8].
- The requirements for an interdict

Final Interdict	Temporary Interdict
• Order granted permanently • Clear right established on balance of probabilities	• Order granted provisionally • Parties' rights not finally determined • Remains in force only until parties' rights final determined

  - Final Interdict

    The requirements for the granting of a final interdict are:

[6] Examples: Orders to transfer property, to deliver movable property, to allow a right of way.

[7] An interdict is a remedy, i.e. a form of relief, and not a specific procedure.

[8] Example: A leases a TV from B for 1 year. Before the lease has expired, B repossess the TV, although A has been paying the rental. A can get a restitutory interdict as he has been unlawfully disturbed in his possession of it.

- A clear right established on a balance of probabilities.
- An actionable wrong or interference already committed or reasonably anticipated.
- No other satisfactory remedy to protect the applicant.

General rule: An application for an interdict will be barred where the infringement of the right can be assessed in monetary terms, e.g. applicant may sue for damages which will provide adequate compensation.

Exceptions: 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.

✔ Temporary Interdict

The requirements for the granting of a temporary interdict are:

- There must be a clear right or a *prima facie* right established.
- If *prima facie* right is established, the applicant must also show that:
  - i) if interdict were to be refused → he would suffer irreparable harm
  - ii) if interdict were to be granted → respondent would not suffer irreparable harm.
- The balance of convenience must favour the granting of the interdict and court must weigh up the prejudice each party will suffer if interdict is granted or refused. If greater possible prejudice to the respondent = refuse to grant interdict.
- There must be no other satisfactory remedy available to the applicant.

↳ Procedure

✔ Final Interdicts

Usually sought by way of action (summons), but may also be sought by way of notice of motion when the facts are not in dispute.

✔ Temporary Interdicts

Always sought by way of notice of motion and, if granted, will be valid only until:

- action has been instituted to establish parties' rights, where dispute of fact exists; or
- the application launched to obtain the temporary interdict is finally determined; or
- the order is confirmed on the return day stated in the temporary order.

When dispute is finally determined, interdict will either be confirmed (have effect of a final interdict) or not confirmed (will have no effect).

✔ Urgent matters

Always sought by way of notice of motion, but without giving notice to respondent. A *rule nisi* is issued:

- calling on respondent to give reasons on the return day why the rule should not be confirmed and an interdict granted;
- and operates as a temporary interdict until the return day;

Court has wide discretion as to whether it should grant an interdict and, if so, on what terms. If there are facts in dispute, which can't be settled on the papers, these matters are usually referred to trial and temporary interdicts remain in force ***pendente lite*** (pending litigation).

16.2. **Extraordinary procedures**

↳ Cases where no pleadings or processes are filed

✔ Special cases

Where parties agree about the facts of the case, but not the legal conclusion which may be drawn from them, **Rule 33** provides that parties may (after proceedings have been instituted either by summons or notice of motion) agree to a written statement of facts in the form of a special case for the adjudication of the court – seldom implemented.

✔ Questions of law on appeal

- When the decision from a judge on appeal to a full bench depends exclusively on a point of law, parties may agree to submit the decision to court in the form of a special case. Copies of only such portion of the record as are necessary for a proper decision of the appeal made - **Rule 49(10)**.
- Where different divisions of High Court have given conflicting decisions on a point of law,

Minister of Justice may submit the question to Supreme Court of Appeal for argument and decision, whereafter all divisions will be bound by decision - **Section 23 of SCA**.

- Declaration of rights

  In terms of common law, courts couldn't decide the future rights of parties: there had to be actual infringement of a party's rights. Now, however, in terms of **Section 9(1)(a)(iii) of SCA**, the applicant must be "interested party" to an "existing, future or conditional right or obligation". A future right is an already existing right enforceable only in the future. Declaration of rights can be made by means of summons or motion proceedings, depending on whether there is a factual dispute or not.

- *De lunatico inquirendo*

  When it is suspected that a person is:

  - of unsound mind; or
  - incapable of managing his own affairs because of some mental or physical defect,

  application may be made to court for an order declaring that person as such and a curator is appointed to manage the affairs of such person. The *ex parte* application procedure is used as contained in **Rule 57**.

Perpetual silence

In the following circumstances, a prospective litigant may be ordered to institute litigation within a specified period or may be perpetually barred from doing so:

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

Court has a discretion to grant such order and will consider factors such as:

- nature of claim;
- likelihood of prejudice;
- balance of convenience;
- possibility of testimony being lost due to death of a witness or loss of documents.

Vexatious proceedings

In terms of the **Vexatious Proceedings Act**, if court is satisfied that **X** has persistently and without reasonable grounds instituted proceedings against **Y**, it may grant an order prohibiting the institution of proceedings for an indefinite period or such period as the court may determine.

16.3. Arrest *suspectus de fuga*[9]

When a creditor fears that a debtor is about to leave the country to avoid payment of a debt, he may apply for an order *suspectus de fuga* in order to prevent debtor from leaving the jurisdiction of the court, which remains in force until court can give an effective judgment. The debtor can avoid the arrest only if he gives security for the debt. Court will only grant arrest *suspectus de fuga* if it has jurisdiction to hear creditor's action.

NOTE: This form of arrest is used to abide by a judgment of court, not enforce a judgment.

Procedure → No application to court is necessary **NB!**

Rule 9(1): A person cannot use this procedure if his claim is less than R 400.00.

Rule 9(2): A writ of arrest (**Form 4**) must be addressed to the Sheriff and officer commanding the prison signed by the attorney or the plaintiff.

Rule 9(3): Writ is then issued by the Registrar, which must be accompanied by an affidavit by the plaintiff.

Rule 9(4): The affidavit must contain: -

- description of the person making the affidavit;
- his place of residence;
- a statement of the sum due to the plaintiff;
- the cause of the claim and where incurred;
- in the case of unlawful detention of any immovable property, the value and description of the property;
- an allegation that plaintiff has no or insufficient security for his claim (if there is security, then the nature and extent of it);

[9] Not an arrest to find or confirm jurisdiction, which serves to vest court with jurisdiction.

- that the sum or value of R 400.00 or more is totally unsecured;
- if claim for damages, that plaintiff has suffered damages of R 400.00 or more.

Rule 9(5): Affidavit must contain an allegation that the defendant is believed to be about to or is making preparations to depart from the Republic plus grounds for belief.

Note: Arrest can take place either before or after the summons has been issued.

To obtain his release, a debtor may:

- provide security at the time of his arrest or at any subsequent time; or
- pay the sheriff the amount mentioned in the writ plus costs; or
- satisfy the claim and costs mentioned in the writ; or
- be entitled when judgment is given (**Rule 9(8), (9) and (13)**).

PROCEEDINGS IN THE MAGISTRATE'S COURT

17. THE APPLICATION PROCEDURE

Litigation in the Magistrate's Court may occur by means of either the application procedure or action procedure, the choice is based on the same considerations that apply in the High Court.

17.1. ***Ex parte* applications - Rule 56**

An application where notice is not given to the person against whom legal relief is sought, prior to the initial hearing (***Claasens v Zeneca Suid-Afrika***) and applicant must show: -

- it is really necessary to bring the application without notice to the respondent;
- some urgency or good reason.

If the application is brought with undue haste and without good reason, the court will not grant that application and the applicant will have to bear the costs. The founding affidavit contains:

- the reasons for the application (facts upon which cause of action is based);
- why no notice has been given to the respondent;
- including adverse facts.

General rule: *Ex parte* applications may only be brought in those instances where the applicant cannot request an order against a person. An exception found in **Rule 56** is applications for:

- arrest *tanquam suspectus de fuga*;
- interdicts;
- attachments to secure claims; and
- *mandamenten van spolie*;

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. In ***Office Automation Specialists CC v Lotter*** court held that a spoliation order can be brought *ex parte*, without notice and without alleging urgency, but he does so at his peril if he doesn't make a good and proper case as to why an order should be granted without notice to the other party.

Court grants a temporary order and sets a return day on which the respondent must give reasons why the order should not be made final (*rule nisi*). Court may also require applicant to provide security for any losses which may be caused and may also require any additional evidence it deems relevant.

Any person affected by an *ex parte* order may apply to court, after at least 12 hours' prior notice, to have order discharged. An *ex parte* order is *ipso facto* discharged upon security being provided by respondent for amount to which order relates. With a *mandament van spolie*, however, providing security won't discharge the order, respondent must return property to which order relates.

17.2. **The application procedure where the respondent is cited**

- Types of applications
  - Applications by notice of motion without affidavits (**Rule 55(2)**)
  - Applications by notice of motion supported by affidavit. These applications are those in which an order is sought in terms of **Section 30**:
    - application for arrest *tanquam suspectus de fuga*;
    - attachments;
    - interdicts;
    - *mandamenten van spolie*.

- Application for which a special form is prescribed, that is:
  - summary judgment;
  - trials with assessors;
  - administration orders.

Procedures in terms of Section 30 orders

- Procedure for obtaining an interdict

  A final interdict is usually requested 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 and the provisions of **Rule 56** must be complied with. Applications must be accompanied by affidavits and court may call for more evidence before granting application. It may also require applicant to give security for damages which may be caused. After an order to an application has been granted, respondent is granted an opportunity to show court why it shouldn't have been granted and it may then be discharged, varied or confirmed.

- The procedure for obtaining a *mandamenten van spolie*

  Usually obtained by means of an *ex parte* application, but an action procedure may also be followed. In his sworn affidavit, applicant must show:
  - that he was in peaceful and undisturbed possession of the thing to which the application relates; and
  - that he was forcibly and unlawfully deprived of possession by respondent.

- Procedure for obtaining an order of arrest *suspectus de fuga*

  It is advisable to use the *ex parte* application as not to warn the debtor beforehand that the creditor intends to have him arrested. In terms of Section 30(3), applicant must allege that:
  - the cause of action amounts to at least R 40;
  - the applicant has no security for the debt;
  - the respondent is about to leave the Republic.

- Procedure to obtain attachments

  Attachment in terms of Section 30 will take place in terms of the Rule 56 *ex parte* application procedure. If property is attached which is subject to a credit instalment, an application for attachment must be made in terms of the Credit Agreements Act and not in terms of Rule 56.

Documentation

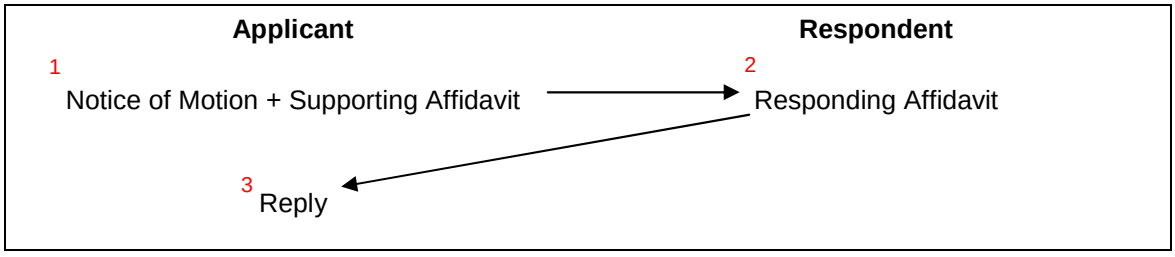
The notice of motion for the first 2 types of applications mentioned above is drawn up in accordance with **Schedule 1** to the Rules.

Steps respondent may take

Respondent may oppose application on the merits of case. If he wishes to raise a preliminary objection (objection *in limine*), it is not necessary for him to give notice of the objection. In ***Turkstra v Friis***, however, it was mentioned that especially in those cases where the objection is not clearly reflected on the papers, it is desirable that the grounds for objection should be set out clearly by respondent. 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.

Responding affidavit and reply

In the responding affidavit, respondent replies to the applicant's allegations embodied in his supporting affidavit. Court acts on the basis that those allegations of applicant which respondent doesn't deny, are true. Applicant can the reply to respondent's affidavit with a replying affidavit to adduce[10] new facts which serve as a reply to the respondent's defence. Further affidavits are permitted only if there is something in the replying affidavit which respondent must answer or there's good reason for placing further information before court. The following documentation is exchanged between the parties:



[10] To bring forward in argument

- Orders which the court is empowered to make

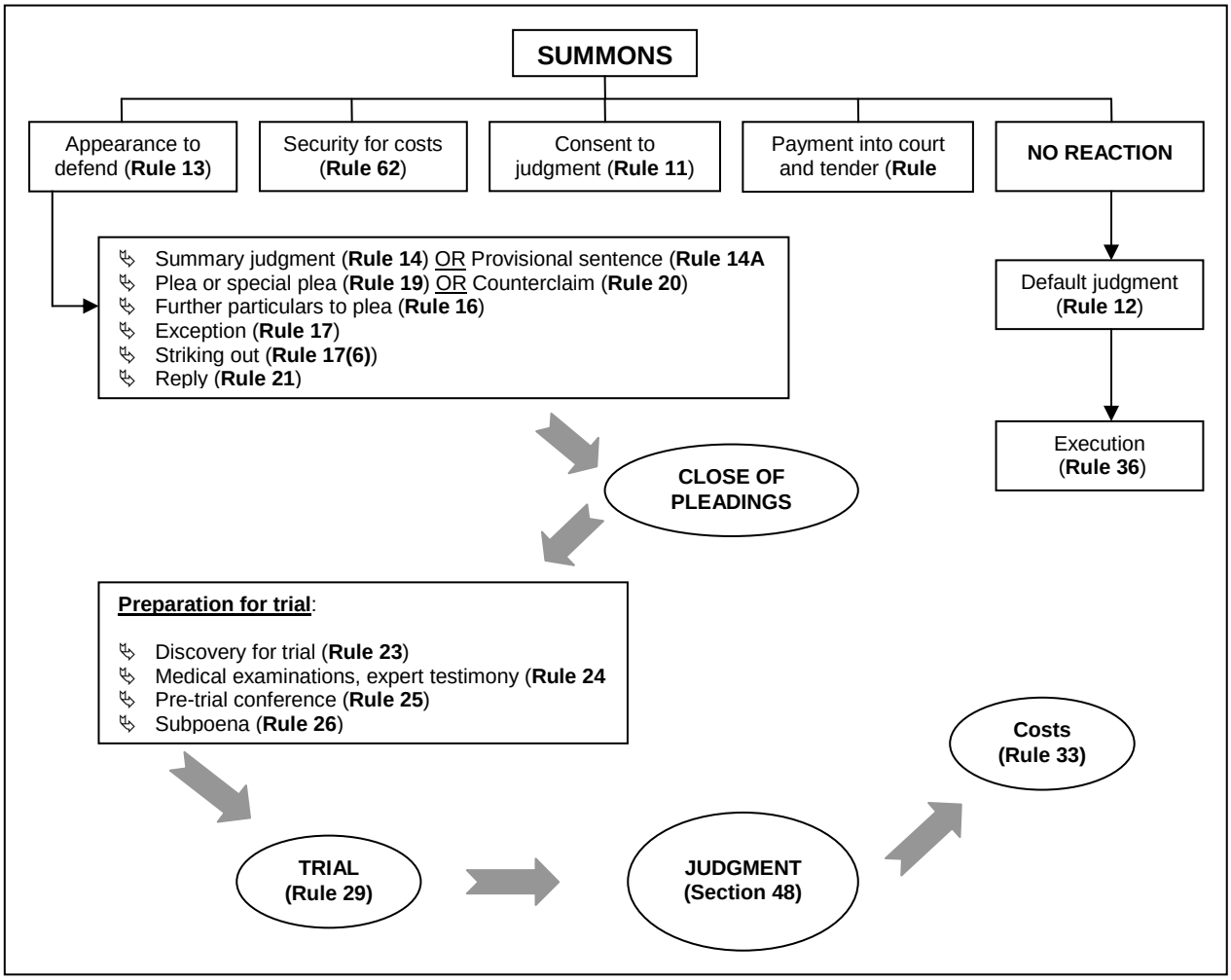
  The nature of the orders depends on whether or not a dispute of fact exists between the parties. Court obliged to apply the provisions of **Rule 55(2)** if a dispute of fact arise, which provides that court may, in case of a dispute of fact:

  - receive evidence either *viva voce* or in the form of an affidavit and try the issues in dispute in a summary form; or
  - order that issues be tried by means of action, coupled with an order that applicant will be plaintiff, respondent will be defendant and that notice of application will stand as a summons.

  If no dispute of fact has arisen, court may grant or dismiss application with costs to be awarded either in favour of the applicant or the respondent or costs can be deemed costs in the cause (interlocutory applications), in which case the Magistrate will make a special finding at the end of the trial stage of the main action.

18. INSTITUTING THE ACTION: THE SUMMONS

Action procedure in a Magistrate's Court is instituted by means of summons and below follows a schematic outline of Magistrate's Court proceedings:



18.1. The summons as the first document in the action

Summons is first document to be filed and revenue stamps to the correct amount must be affixed to it. A power of attorney needn't be filed as provided in **Rule 52(2)**. However, authority of a person acting for a party may be challenged by other party within 10 days after he has received notice that such party is so acting, or with court's leave for good cause shown at any time before judgment. When a person's authority is challenged, he may not, without court's leave, act any further without satisfying court that he had authority to act. Proceedings may be adjourned to enable him to do so.

18.2. Form and content of the summons

The summons calls upon the defendant to appear in person to defend the action within a certain period and to respond to the plaintiff's claim, warning him of the consequences of failure to do so. Types of summons used in Magistrate's Courts are:

- Ordinary summons (**Form 2**).
- Automatic rent interdict (**Form 3**).

Particulars to be included in the summons in terms of **Rules 5 and 6** are:

- The *dies induciae*;
- Warning of consequences which will ensue if defendant fails to comply with request in summons;
- A notice of consent to judgment;
- A notice of intention to defend;
- A notice drawing defendant's attention to the provisions of **Section 109**;
- A notice in which defendant's attention is drawn to **Sections 57, 58, 65A & 65D**;
- The address at which plaintiff will receive pleadings;
- A description of the parties;
- Averments in respect of jurisdiction;
- Particulars of claim;
- Prayers.

Note the important provisions set out below:

- *Dies induciae*

  Defendant is called upon to enter into an appearance to defend within 10 days after service of summons – **Rule 5(1)**.

- Address for service of pleadings

  If the address is situated in a place where 3 or more attorneys are practising independently of one another, such place may not be more than 8km from the court house – **Rule 6(2)(c)**.

- Particulars of claim

  The particulars contain the basis of the action and the relief sought by plaintiff. If it comprises more than 100 words, it may be contained in a separate page, which must form part of the summons – **Rule 6(3)(d)**. Sufficient detail should be contained to enable defendant to identify the claim – ***San Sen Woodworks v Govender***.

- Plaintiff as cessionary

  Where 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)**.

- Averments of jurisdiction

  Usually plaintiff doesn't have to allege that the court has jurisdiction, except when he:

  - ✔ relies on jurisdiction in terms of **Section 28(1)(d)** → he must state that the whole cause of action arose within the court's area of jurisdiction – **Rule 6(5)(f)**.
  - ✔ relies on the court's jurisdiction in terms of **Section 28(1)(g)** → he must allege that property is situated within the district – **Rule 6(5)(g)**.

18.3. **Issue of summons**

The Clerk of Court issues summons by furnishing it with a case number and by signing and dating it. He 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. In ***Bianchelli v Vic Procter*** it was held that, although the summons was invalid due to it not being signed, defendant would be running the risk of default judgment against him if he did not take steps to defend, although costs were awarded in his favour.

The action is instituted at the time the summons is issued and not by service thereof. However, prescription is only interrupted by the service of summons and not by issuing.

18.4. **Service of summons – Rule 9(3)**

Similar to service of summons in the High Court, except:

- Summons is served by Sheriff of the Magistrate's Court and not Sheriff of the High Court
- Summons is addressed to defendant, whereas in High Court in form of an order to Sheriff.

In ***Barens v Lottering*** the court considered proper service and held that 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 rules relating to edictal citation and substituted service are same as those for High Court.

18.5. **Amendment of summons**

Before service: Clerk of the Court initialling the changes (**Rule 7(2)**).

After service: By following the procedure in **Rule 55A** (**Rule 7(3)(b)**).

Amendments concerning defendant's first name or initials can be brought about at the plaintiff's request without the court's intervention - **Rule 7(3)(a)**.

18.6. **Delay in the continuance of the action**

The summons lapses if it:

- isn't served within 12 months after issue; or
- is served and plaintiff fails to take further steps within 12 moths thereafter.

However, plaintiff may obtain an extension in terms of **Rule 10**. The phrase "summons in an action" implies that **Rule 10** applies to both defended and undefended actions – ***Manyasha v Minister of Law and Order***.

19. STEPS THAT MAY BE TAKEN BY THE DEFENDANT AFTER SERVICE OF THE SUMMONS

The defendant must decide within a certain period after receipt of the summons, what steps to take and the various options are set out below.

19.1. **Security for costs by plaintiff - Rule 62**

Defendant may require plaintiff to provide security for costs in terms of **Rule 62** if plaintiff: -

- is not a resident or working within the Republic;
- is an unrehabilitated insolvent;
- is a registered or incorporated company or CC;
- has no substantial interest in the cause of action;
- is someone in respect of which the court has made a **Section 74** (Administration) order;
- is a person to whom assistance is rendered in terms of the Agricultural Credit Act;

Plaintiff must then provide security within 10 days of request, failing which court may, on request, suspend or even dismiss proceedings. "Plaintiff" doesn't include a plaintiff in reconvention.

19.2. **Consent to judgment**

If defendant admits that he owes the amount claimed (liquidated claim), he may pay the amount of the claim and if he is not in a position to pay the amount immediately, he may consent to judgment and an instalment order – **Sections 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. The following should be noted:

- Consent may be given before or after entering appearance to defend.
- If consent occurs before entering appearance, defendant must sign the prescribed form on original summons, which Sheriff returns to court and the Clerk must notify plaintiff thereof. If defendant and two witnesses sign the form on his copy of the summons, he must lodge it with the Clerk of the Court himself.
- If consent is given before Sheriff is ordered to serve summons, defendant won't be responsible for the costs of service. Same applies if consent is given before expiry of the *dies induciae*.
- If consent is given after entering appearance, plaintiff may take judgment in the amount for which consent is given, but would have to prove balance of claim as he would in normal trial.
- Defendant may also consent to judgment in an amount less than that claimed in the summons and may file notice of intention to defend regarding the balance of the claim.
- Purpose: To limit costs in the following ways: -
  - ✔ to ensure 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.
- Where defendant has consented to judgment, judgment must be recorded for such amount.

19.3. **Notice of intention to defend - Rule 13**

If defendant wishes to defend the action, he must file a notice of intention to defend and if such notice is defective in that it:

- has not been properly served;
- has not been properly signed; or
- does not comply with the requirements in respect of the address for service,

plaintiff must file a written notice requesting defendant to file a proper within 5 days of service of plaintiff's notice in terms of **Rule 12(2)(a)**. Plaintiff is entitled to apply for default judgment if defendant fails to submit a proper notice of intention to defend. However, late notice will be valid if it is submitted before the request for default judgment has been granted.

19.4. **Failure to take steps: Default Judgment - Rule 12**

A **default judgment** is regarded as a judgment entered or given in the absence of the party against whom it is given.

If defendant does not react to the summons, plaintiff is entitled to apply for default judgment by submitting the following to court:

- The original summons with return of service;
- The written request for default judgment in duplicate (**Form 5**);
- In unliquidated claims (damages), affidavits proving the nature and extent of the damages;
- In a claim based on a liquid document, the original document duly stamped or an affidavit setting out reasons why the original can't be filed;
- In a claim based on a credit agreement in terms of the Credit Agreements Act, the agreement and/or affidavits.
- In a claim based on a written agreement, the agreement duly stamped.

Default judgment may be granted: -

- if defendant fails to file notice of intention to defend timeously;
- Where defendant files a notice of intention to defend, but fails to deliver a plea after plaintiff has filed a notice of bar (**Rule 12(1)(b)**) affording defendant 5 days to comply. In ***Speelman v Duncan*** it was held that 5 days in the notice of bar means 5 days from receipt of the notice and not 5 days from delivery to the Clerk of the Court;
- If plaintiff or applicant doesn't appear at time set down for hearing in trial of action/application.
- If a party fails to comply with a court order obliging him to comply with the rules of court in terms of **Rule 60(2) and (3)**.

The following aspects of **Rule 12** are important: -

- Application for default judgment not heard in open court; written request merely lodged with the Clerk of the Court. The proceedings only take place in open court when evidence is led
- The Clerk may grant judgment in all liquidated claims.
- In unliquidated claims, request for judgment must be referred to a Magistrate in chambers and plaintiff must give evidence regarding his *quantum* of damages. Plaintiff does not need to prove his cause of action as held in ***Barclays Western Bank v Creser***.
- Request for judgment made in respect of a claim arising out of a credit agreement must also be referred to the court.
- If application is based on a liquid document, it must be filed before judgment is entered.

19.5. **Payment into court and tender - Rule 18**

Defendant may try to achieve a settlement with plaintiff, but if negotiation does not succeed, he may utilise one of the following procedures: -

- Unconditional payment into court;
- Payment into court without prejudice of rights by way of an offer in settlement of the claim;
- Tender.

An attorney is under a duty to obey client's instructions and written instructions should be obtained from client to accept an amount in settlement, it should also be explained what the settlement offer entails.

- Unconditional payment into court – **Rule 18(1)**

  Defendant unconditionally pays the amount claimed into court to try and dispose of the matter and save additional legal costs, but remains liable for costs until date of payment thus it being in his best interests to make payment as soon as possible. Plaintiff can recover the costs as at the date of the payment as if an order had been granted by the court. This procedure can only be used when the claim sounds in money and not in claims for the delivery of property or an order of ejectment.

- Payment without prejudice of rights by way of an offer in settlement – **Rule 18(2)**

  It is referred to as "payment into court" and is used only in claims sounding in money. Defendant must indicate in the notice he has to deliver with payment whether payment includes settlement of both claim and costs. If plaintiff doesn't accept payment and, at trial, doesn't succeed in proving that he is entitled to more than the amount of the payment, he will be liable for the costs incurred after the date of payment. The payment into court is, however, not disclosed to the court in the pleadings until after the court decides liability. If plaintiff accepts payment, litigation is terminated and the whole cause of action destroyed – ***Hallick v Plumtree Motors***.

- Tender

  Defendant makes an offer by means of tender to plaintiff to settle the matter for the amount tendered and could be made even before issue of summons. If tender is accepted, plaintiff is not entitled to recover balance of claim not tendered. A tender implies an undertaking by defendant to pay the costs as at the date of the tender.

19.6. **What steps may the court take when a request for judgment is referred to it by the clerk of the court?**

- If default judgment is sought, court may call upon plaintiff to produce written or oral evidence to support his claim.
- If judgment by consent is sought, court may call upon plaintiff to produce evidence to satisfy court that consent has been signed by defendant and it is consent to the judgment sought.
- Give judgment in terms of plaintiff's request or that part of the claim as has been established to its satisfaction.
- Give judgment in terms of defendant's consent.
- Refuse judgment.
- Make such order as may be just – **Rule 12(7)**.

20. SUMMARY JUDGMENT AND PROVISIONAL SENTENCE

20.1. **Summary judgment - Rule 14**

As in the High Court, plaintiff may apply for summary judgment after defendant has given notice of intention to defend and if his application is successful, the action is finalised. If he doesn't succeed, the action proceeds. Summary judgment protects plaintiff against a defendant who is merely defending the matter in order to delay its finalisation. Application for summary judgment must be brought within 10 days after receipt of notice of intention to defend.

- Claims in respect of which summary judgment may be granted
  - Claims based on a liquid document such as a cheque.
  - Claims for a liquidated amount of money.
  - Claims for the delivery of a specified movable property.
  - Claims for ejectment.

A **liquid document** is a document from which an acknowledgement of debt or an undertaking to pay is clearly apparent, in respect of which no extrinsic evidence is required to prove debt.

A liquid document needn't be a single document and may comprise a number of documents, e.g. hire-purchase agreement and a cession thereof – ***Van Eeden v Sasol Pensioenfonds***. General test: Would the High Court grant provisional sentence on such document?

A **liquidated amount of money** is an amount that is fixed and certain, precisely quantified, readily capable of accurate determination and that is not in dispute.

In ***S Dreyer and Sons Transport v General Services*** adopted a literal interpretation of the concept and held that the claim sounded in money where it was calculated down to the last cent and was *prima facie* liquidated. An unliquidated estimate such as a claim for damages remains unliquidated until it is determined and an award made. A liquidated amount of money includes a claim for work done and material supplied, an account rendered to a shopkeeper, insurance premiums and taxed bills of costs.

- Initiating the application - **Rule 14(2)**

When: After defendant has entered appearance on at least 10 days' notice to defendant not more than 10 days after delivery of the notice of intention to defend.

How: By way of application. If claim is based on a liquidated amount of money or delivery of specified movable property or ejectment, plaintiff must attach an affidavit made by him or someone else who is able to confirm the facts under oath which:

- must be signed by person personally stating that he has personal knowledge of the facts (legal person = signed by a person who alleges that he is duly authorised to make the affidavit stating his capacity and that he has personal knowledge of the facts);
- verifies or confirms the cause of action;
- must aver that in his belief there is no *bona fide* defence to the claim and that notice of intention to defend has been given solely for purpose of delay.

If claim is based on a liquid document, plaintiff is required to attach a copy of the document to the application and hand in the original at the hearing.

- Steps which defendant may take to ward off a summary judgment application - **Rule 14(3)**
  - Pay into court the amount claimed plus such costs as the court may determine or he may give security to the satisfaction of plaintiff for such sum.
  - Give security that he will satisfy whatever judgment may be given against him.
  - Satisfy the court by affidavit that he has a *bona fide* defence or counterclaim against plaintiff. The opposing affidavit must contain the following:
    - The allegation that he has a *bona fide* defence.
    - A denial that appearance to defend has been entered solely for purpose of delay.
    - A disclosure of the nature and grounds of the defence or counterclaim.
- Procedure

  Rule 14(5): No evidence shall be adduced by plaintiff at the hearing nor shall any person giving oral evidence at such hearing be cross-examined by plaintiff, but such person may be examined by the court after examination by defendant.

  Rule 14(6): If defendant does not pay into court or find security or satisfy the court, the court may give summary judgment for plaintiff.

  Rule 14(7): If defendant pays into court, provides security or satisfies court he has a *bona fide* defence, the court shall give defendant leave to defend and the action shall proceed as if no application has been made.

  Rule 14(8): Where leave to defend is given, no evidence given on hearing of the application for summary judgment shall be admissible in favour of party on whose behalf it was given (except by consent).
- Orders - **Rule 14(9)**
  - The court may give leave to defend to a defendant so entitled and give judgment against a defendant not so entitled.
  - It may give leave to defend to a defendant as to such part of the claim and give judgment against defendant as to the balance of the claim unless the defendant shall have paid such balance into court.
  - It may make both such orders.

20.2. **Provisional Sentence - Rule 14A**

This is a speedy remedy for a creditor in possession of a liquid document. If debtor is unable to dispute the validity of the document, a provisional judgment will be entered against him. 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.

- Procedure for applying for provisional sentence – **Form 2A**

  Rule 14A(1): Person summoned by way of provisional sentence proceedings must be given at least 10 days to admit or deny his liability.

  Rule 14A(2): The summons is issued by the Clerk of the Court.

  Rule 14A(3): Copies of documents on which claim is founded must be annexed to summons.

  Rule 14A(4): Plaintiff must set the matter down for hearing not later than 3 days before the day it is to be heard.

  Rule 14A(5): Defendant may appear personally or by practitioner to admit or deny his liability, or may deliver an affidavit setting forth grounds upon which he disputes liability, and plaintiff must be afforded a reasonable opportunity of replying thereto.

  Rule 14A(6): If at hearing, defendant admits liability court may give final judgment against him.

  Rule 14A(7): Court may hear oral evidence as to the authenticity of defendant's signature or that of his agent.

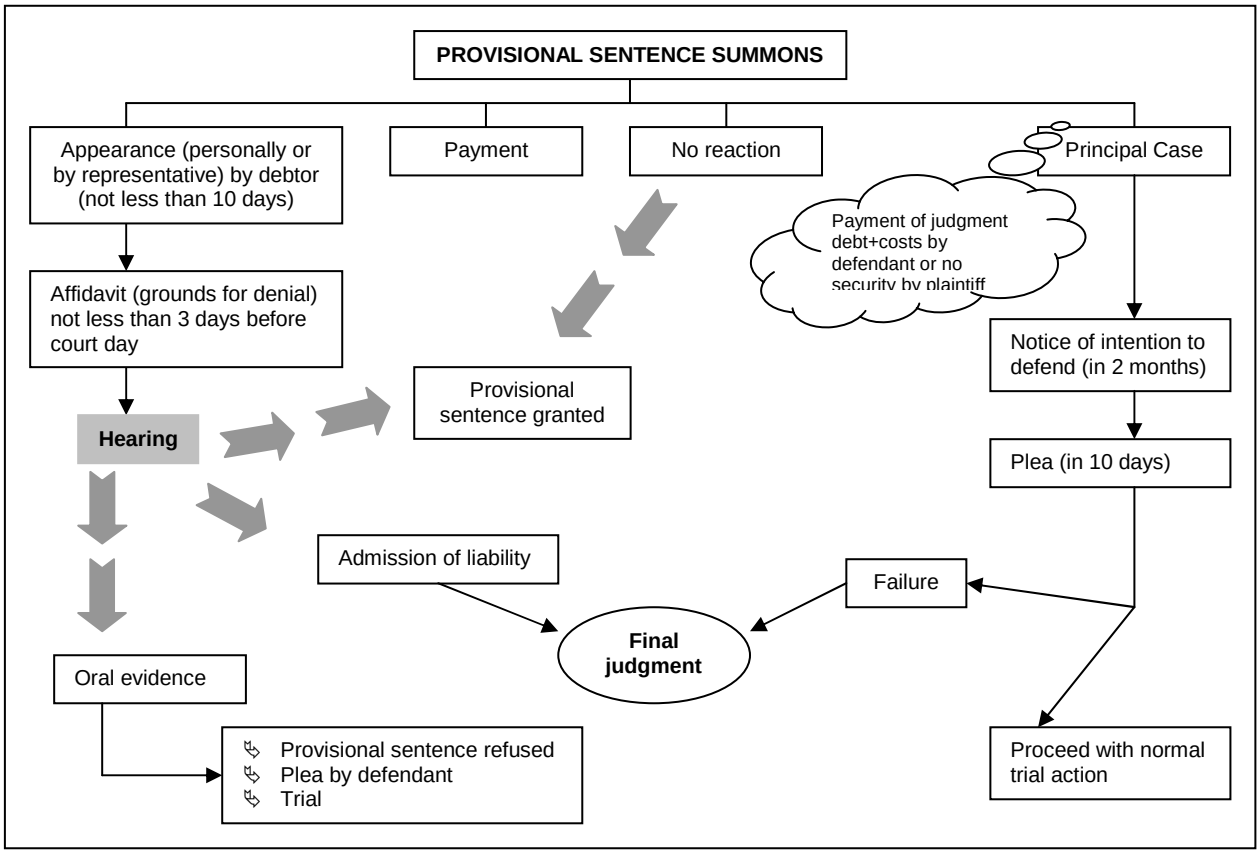
  Rule 14A(8): Should court refuse provisional sentence, it may order defendant to file a plea.

  Rule 14A(9): Plaintiff shall, on demand, furnish defendant with security *de restituendo* to the satisfaction of Clerk, against payment of the amount due under the judgment.

  Rule 14A(10): Debtor may only enter principal case if he's satisfied the amount of judgment of provisional sentence and costs, or if plaintiff on demand fails to furnish security.

  Rule 14A(11): A defendant entitled and wishing to enter the principal case within 2 months of granting of provisional sentence, must deliver notice of his intention to do so and deliver a plea within 10 days thereafter. Failing such notice or plea, provisional sentence shall *ipso facto* become a final judgment and security given by plaintiff shall lapse.

The following is a diagram on provisional sentence in the Magistrate's Court:



21. STEPS TAKEN BY THE DEFENDANT IN THE CASE OF A DEFECTIVE SUMMONS OR A SUMMONS WITH INCOMPLETE PARTICULARS

If a summons contains insufficient particulars, defendant may act in accordance with **Rules 15 and 16**. 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.

21.1. Application for copies of documents or accounts upon which action is founded - Rule 15

A defendant who has:

- entered an appearance to defend; and
- not been served with a notice of bar; and
- has not yet pleaded

may request plaintiff to furnish copies of documents[11] upon which action is founded within 10 days of a notice to that effect. This procedure is strictly limited to documents or accounts on which the action is based and doesn't apply to documents which are:

- incidental or collateral to the action; or
- merely of evidentiary value

Plaintiff must, within 10 days of the request, deliver the necessary copies of the documents and accounts to defendant. Plaintiff should also allow defendant access to the original documents should he request it. The inspection of the originals may be important when a claim is based on a written contract, a liquid document or a suretyship. Should Plaintiff fail to deliver the documents or fail to make them available for inspection, the court may, in terms of **Rules 60(2) and (3)** dismiss the action with costs.

21.2. Request for Further Particulars – Rule 16

Unlike the High Court, there is no provision for a request for particulars for the purposes of trial in Magistrate's Court. The purpose of particulars in terms of Rule 16 is merely intended for pleading and will be to put oneself in a position to take the next step in the proceedings without being at a disadvantage. Where summons fails to disclose sufficient detail to enable a plea in the case where a tender or payment into court is pleaded, defendant may ask for further particulars. This doesn't apply to actions for damages or compensation in that further particulars may not be requested to establish the other party's evidence.

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[11] Examples of such documents include: an arbitrator's award, a foreign judgment, a taxed bill of costs.

Further particulars can be requested from either plaintiff or defendant and if the party from whom particulars are requested fails to comply timeously with a legitimate request, party so requesting may apply to court in terms of **Rule 60(2)** for an order compelling other party to furnish particulars. If the party further doesn't comply with the order referred to within the time limit stipulated in the order, the court will be empowered to grant judgment against him immediately on application in terms of **Rule 60(3)**. Court will usually grant judgment:

- when plaintiff is in wilful failure if responding;
- where plaintiff's case seems hopeless;
- court is convinced plaintiff does not seriously intend proceeding with his case.

A plaintiff may ignore a request for further particulars which is delivered late as defendant may not approach the court in terms of **Rule 60(2)** if he requested such particulars outside the prescribed time limit as held in ***Service Master Eastern Transvaal v V&S Engineering***. Defendant may apply for condonation regarding a late filing in terms of **Rule 60(5)**. Request for further particulars must be submitted within 10 days of delivery of a notice of intention to defend or any other pleading and does not in itself constitute a pleading.

21.3. **Exception - Rule 17**

Exception to a summons may be taken before or after a request for further particulars and is used to object to plaintiff's summons when it would be unfair to defendant to allow the matter to proceed to trial if he is prejudiced in his defence by a defective summons or by defective service of a summons. It provides a cheap and quick way of settling a dispute without resorting to a lengthy trial. The only exception which may be taken by defendant are that:

- summons does not disclose a cause of action;
- summons is vague and embarrassing;
- summons does not comply with the requirements of **Rules 5 or 6**;
- summons has not been properly served;
- the copy of summons served on Defendant differs materially from the original.

If the particulars of claim don't contain an averment that the cause of action occurred wholly within the district of the court out of which summons is issued, summons will be excipiable because it doesn't comply with the provisions of **Rule 6(5)(f)**. A summons hasn't been served properly where Defendant is advised of the summons, but a copy is not handed to him at the time of service. Exception is taken by way of notice of motion without an affidavit and must be taken:

- within 10 days of the filing of a notice of intention to defend; or
- within 10 days of the delivery of further particulars; or
- within 10 days after defendant has given plaintiff notice that summons is vague and embarrassing and giving plaintiff 10 days to remove the cause of complaint.

When exception is taken on the ground that summons is vague and embarrassing, defendant must, before taking exception, deliver a notice to plaintiff setting out such passages in the summons which are vague and embarrassing and notifying plaintiff that, if he does not remove the cause of complaint from his summons, defendant intends excepting to it. A defendant who excepts on the grounds that the summons does not comply with the requirements of **Rules 5 or 6**, must set out particulars of the alleged non-compliance. Exception will be taken only if the court is satisfied that defendant will be prejudiced in his defence, if the summons were allowed to stand.

21.4. **Striking Out – Rule 17(6)(a)**

Defendant may apply to strike out any part of the summons where: -

- 2 or more claims, which are mutually inconsistent or are based on inconsistent averments of fact, not being in the alternative; or
- there is any argumentative, irrelevant, superfluous or contradictory matter.

22. PLEADINGS BY THE DEFENDANT

22.1. **Pleas on the merits – Rule 19**

There are many ways in which a defendant may defend a matter such as raising an exception, filing a special plea of making a payment into court. Most common way for a defendant to defend a matter is by raising a defence on the merits. The plea contains the defence and defendant's answer to plaintiff's allegations in the particulars of claim. Rule 19 provides the following regarding the form and content of the plea:

- The plea must have a case number (**Rule 3(2)**);
- The plea must be in writing (**Rule 19(1)**);
- The plea must be dated and signed by defendant or is attorney (**Rule 19(3)**);

- The plea must comply with the provisions of **Rules 19(4) and 19(6)**.

Defendant may file only one plea as held in ***Pretorius v Fourie*** and ***Du Plessis v Doubell's Transport***. 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.

- The provisions of **Rules 19(4) and 19(6)**

  Plea must be formulated sufficiently clear to inform plaintiff precisely of the basis of defendant's defence and a bare denial of liability is not permissible; every allegation must be dealt with separately in the defence. The defence must:

  - 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 defence rests.

  Every aspect is dealt with below.

  - Admission

    All facts admitted expressly or by necessary implication need not be proved at trial. Defendant may withdraw an admission only in exceptional circumstances and then only with the court's permission. Where permission is granted for such withdrawal, court will generally also issue an order for postponement and costs as may be reasonable in the circumstances.

  - Denial

    Defendant must clearly and explicitly deny all the facts which he wishes to deny. A vague denial may lead the court to find that certain facts have not been placed in issue and need not be proved. Instances may 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 and plea will read that the allegation falls outside defendant's knowledge, but he does not admit it and requires proof thereof.

  - Confess and avoid

    This plea arises where defendant admits all or certain of the facts in Plaintiff's summons, but proceeds to raise other facts which put a different complexion on the facts admitted, thereby neutralising it. An example of this is when defendant admits hitting plaintiff, but alleges that he did so in self defence.

  - The nature of the defence must be clear and concise

    Defendant must indicate whether he admits or denies the allegations, whether confession and avoidance will apply or whether he will file a special plea. In the last mentioned two instances, he must indicate fully the new facts or special plea he wishes to raise.

  - Material facts on which the defence rests

    Defendant must not only indicate the nature of his defence, he must also indicate the actual facts on which his defence rests.

22.2. **Special plea**[12]

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, for example:

- The court has no jurisdiction;
- Plaintiff's claim has become prescribed;
- Defendant or plaintiff has no *locus standi*;
- *Lis pendens* – special defence as action already pending;
- *Res iudicata* – special defence as matter already adjudicated upon;
- Arbitration;
- Splitting of claims;
- Non-joinder and misjoinder.

Usually the onus rests on the defendant to prove a special plea. **Rule 19(2)** 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 and creates the possibility of speedy adjudication without the need of a long, protracted trial.

[12] Refer to paragraph 10.5 above

22.3. **Counterclaim (Claim in Reconvention) – Rule 20**

The counterclaim 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. A counterclaim will not be rejected if it is delivered late by consent. A defendant who institutes a counterclaim is known as "**plaintiff in reconvention**". The same Magistrate's Court rules apply to claims in reconvention, except that the defendant in reconvention need not enter appearance.

23. STEPS BY THE PLAINTIFF AFTER SERVICE OF PLEA

23.1. **Further Particulars to plea - Rule 16**

Plaintiff is entitled to request further particulars in respect of defendant's plea.

23.2. **Exception – Rule 19**

Plaintiff may except to defendant's plea on the following grounds:

- It discloses no defence;
- It is vague and embarrassing;
- It does not comply with the requirements of **Rule 19**.

The same rules that apply to exceptions to a summons are applicable to exceptions to a plea, but a stricter view is, however, taken of the plea than of the summons – ***Naugebauer and Co v Bodiker and Co***. A notice similar to the one that must be given by defendant to plaintiff must be given by plaintiff to defendant, if he wishes to except to the latter's plea on the ground that it is vague and embarrassing.

23.3. **Striking Out – Rule 19**

Plaintiff may move to strike out any defence or matter in the plea on exactly the same grounds that defendant may strike out claims in the summons. The application to strike out matter from the plea, may be set down for hearing by either party on 10 days' notice.

23.4. **Reply to the plea – Rule 21**

Plaintiff may file a reply to the plea (known as a replication in High Court) and is the final pleading that may be delivered by parties during the exchange of pleadings in a trial action in a Magistrate's Court. The purpose of the reply is to answer to any new allegations made by defendant in his plea and plaintiff may file a reply within 10 days of delivery of the plea or further particulars. Plaintiff will deliver a reply only if he wishes to qualify the allegations made by the defendant in his plea and examples of pleas which may be replied to are: estoppel, benefits of suretyship, novation and prescription. If Plaintiff fails to reply, he is deemed to have denied all allegations in defendant's plea. Upon delivery of the reply (or where none is delivered, upon expiry of the period limited for reply) the pleadings are deemed to be closed.

Close of pleadings means the exchange of all pleadings, in which plaintiff and defendant formulate their respective cases, is complete.

24. AMENDMENT OF PLEADINGS

In ***Rosner v Lydia Swanepoel Trust*** the court held that the general rule is that an amendment of a notice of motion, summons or pleading in an action, will always be allowed, unless the application to amend is made *mala fide* or the amendment will cause an injustice or prejudice to the other side that can not be compensated by an order for costs. The main aim in allowing amendment is to obtain a proper solution to the dispute between the parties and to identify the real issues in the matter. A party seeking to amend its pleading should, however, not consider itself to have the right to that effect, but rather as seeking an indulgence and has to offer an explanation as to the reasons for amendment – ***Embling v Two Oceans Aquarium***.

24.1. **Amendment of Pleadings**

Section 111(1): Court may, at any time before judgment, amend a pleading. The considerations for amendment which are applicable in the High Court, also apply in Magistrate's Court.

Rule 55A: This rule provides an easy way of effecting amendments to pleadings and the party wishing to amend, must deliver a notice of intention to amend. The wording should read:

"Take notice that Plaintiff intends to amend his particulars of claim as follows:

{amendment}

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.

25. PREPARATION FOR TRIAL

Adjudication of the dispute between the parties occurs at the trial and pleadings delimit the issues. 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 pre-trial 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.

25.1. Set down of trial – Rule 22

As *dominus litis* it is plaintiff's duty to set down a matter for trial, but should plaintiff fail to set down the matter timeously (within 15 days after close of pleadings), defendant may set down the trial. Defendant may decide not to pursue the matter further and not set it down or he has the option of applying for dismissal of plaintiff's action in terms of **Rule 27(5)**.

25.2. Discovery of documents – Rule 23 NB!

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 disapprove its case.

Rule 23(1): **After close of pleadings**, but not later than 15 days before the trial, either party may deliver a notice to the other party calling on him to deliver a schedule specifying the books and documents in his possession or under his control relating to the action or which tend to prove or disprove either party's case. Such schedule, verified on affidavit, shall be delivered by the party required to do so within 10 days after the delivery of the notice.

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 court's leave. However, other party may call for and use such book or document in cross-examination of a witness.

Rule 23(3): Each party shall allow the other party to inspect and make copies of all books and documents disclosed and shall, on repayment thereof, forthwith furnish the other party with such copies thereof or extracts therefrom as may be requested.

Rule 23(4): Either party may require the other to produce, on the trial of the action, the books or documents disclosed and also any other books and documents specified in detail. Such notice shall have the effect of a subpoena under Rule 26 as regards all suck books or documents.

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. Confidential communications between attorney and client are "privileged" from disclosure and the legal professional privilege between attorney and client apply where:

- the communication pertains to the professional or intended professional relationship;
- made for the dominant purpose of seeking or giving legal advice, or for use in existing or anticipated legal proceedings;
- whether written or oral, or even;
- where the client confesses to the attorney the commission of a prior crime or fraud.

One party can compel the other to make discovery by means of **Rule 60(2)** and if an order is made compelling discovery within a certain period and the other party persists in his default, a further application can be made for judgment against the defaulting party.

25.3. The provisions of Rule 24

Rule 24 contains similar provisions in respect of medical examinations, examination of objects and adducing of expert evidence in the form of a plan, diagram, model or photograph as in the High Court. A medical examination is relevant if damages or compensation in respect of alleged bodily injury is claimed, any party to proceedings may require any party claiming such damages or compensation whose state of health is relevant to determination of such damages or compensation to submit to an examination by one or more duly registered medical practitioners.

25.4. Pretrial Conference – Section 54(1) read with Rule 25

A party to a suit may request the court to convene a pretrial conference, at which the parties attempt to limit the points in issue. Matters which may be discussed:

- The simplification of the issues;
- The necessity or desirability of amendments to the proceedings;
- The possibility of obtaining admissions of fact and of documents with a view to avoiding unnecessary proof;

- The limitation of the number of expert witnesses;
- Such other matters as may aid in the disposal of the action in the most expeditious and least costly manner.

25.5. **Subpoenas – Section 51, Rule 26 and Form 24**

Witnesses can be summoned to appear in court, which summons is called a subpoena. The subpoena directing a witness to make books or documents in his possession or under his control available at the trial and produce them to the court is called a subpoena *duces tecum*. A witness failing to comply with a subpoena may be fined with an amount not exceeding R 300.00 or imprisonment not exceeding 3 months. In ***Marais v Smith*** it was held that if a witness intends claiming privilege in respect of documents he was called to produce, he must do so in person, not through legal representative.

26. THE TRIAL

26.1. **Place of trial**

Save in exceptional circumstances, the trial must take place in open court, at the courthouse from which the summons was issued, unless the court has ordered otherwise – **Rule 29(1)**.

26.2. **Procedure and conduct**

A witness who is not a party to the action may be ordered to leave the court until his evidence is required. Before presenting the evidence, court may require the parties to state the issues of fact and questions of law which are in dispute. If it appears to court that there is a question of law or fact which may be decided separately, it may order proceedings to be stayed until the question has been disposed of. If the parties are agreed on the facts, these may be admitted in court *viva voce* or by way of a written statement by parties. Judgment may then be given without further evidence.

The party on whom the onus of proof rests according to the pleadings, has the duty to lead his evidence first and is usually plaintiff. Defendant is required to prove a special defence raised by him and, unless absolution from the instance is granted, defendant must then adduce his evidence. In the case of a disagreement as to the party on whom the onus rests, the court must direct which party must first adduce evidence. Court may, of its own motion or on application by either party and at any time before judgment, recall any witness for further examination. It is, however, not competent of its own motion to call any **new** witness as held in ***Rowe v Assistant Magistrate, Pretoria***.

27. JUDGMENT

Section 48 sets out the following judgments which a Magistrate's Court may make: -

- for the plaintiff in respect of his claim in so far as he has proved same;
- for the defendant in respect of his defence in so far as he has proved same;
- absolution from the instance, if it appears to the court that the evidence does not justify the court giving judgment for either party;
- such judgment as to costs (including attorney and client costs) as may be just;
- 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 judgment for a specified period pending arrangements by the other party for satisfaction of the judgment;
- 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 **Section 65J** or **Section 73**.

27.1. **Absolution from the Instance**

Such an order leaves the parties in the same position as if the case had never been brought. Plaintiff may take out a summons and sue on the identical cause of action. Absolution may be granted at the close of plaintiff's case or at the close of defendant's case.

- Absolution from the instance at the close of plaintiff's case

  Absolution will be granted if there is insufficient evidence upon which court may reasonably find for plaintiff. It should be refused where there is evidence on which a reasonable person may find for plaintiff. The principles were laid down in ***Gordon Lloyd Page and Associates v Riviera*** and plaintiff has to make out a *prima facie* case regarding all the elements of the claim in order to survive absolution. Court should be concerned with its own judgment and not with another "reasonable" person or court. Absolution at the end of plaintiff's case should be granted sparingly, but it should be ordered if it is in the interests of justice.

- Absolution from the instance at the close of defendant's case
  - Onus rests on plaintiff

    Where court is unable to find that plaintiff has proved his case on a balance of probabilities at the close of defendant's case and court cannot find that defendant has established his defence on a balance of probabilities, it must grant absolution from the instance. If court cannot decide where the truth lies, the proper judgment is absolution. However, if court has, on the evidence, found against plaintiff, judgment for defendant, rather than absolution, must be granted. If the final decision depends on entirely upon the credibility of witnesses and the court cannot find either set of witnesses is untruthful, it should also grant absolution in terms of ***Forbes v Golach and Cohen*** and ***Hairmand v Wessels***.
  - Onus rests on defendant

    Where the onus is on defendant, the court can never grant absolution. If defendant fails to discharge the burden on a balance of probabilities, court must give judgment against him. Where defendant discharges the burden on a balance of probabilities, the court must give judgment in his favour. There is no room for a judgment of absolution in this situation – ***Hirschfeld v Espach*** and ***Ah Mun v Ah Pak***.

28. COSTS

In terms of **Section 48(d)**, court may grant such judgment as to costs as may be just. In ***Hoosan v Joubert*** it was held that a Magistrate's Court had no jurisdiction to grand costs on an attorney and client scale. However, in terms of **Section 3** the power to make an order for attorney and client costs was specifically conferred on Magistrate's Courts as the question of costs is a matter within the discretion of the Magistrate, but the discretion must be exercised judicially.

It is imperative that the attorney clarify the aspect of costs with client at commencement of mandate. He must be careful to avoid excessive fees, because to charge seriously in excess of what is reasonable is to **overreach the payer** and, if he is found guilty of overreaching, can expect to be **struck off the roll**. An attorney must also be careful regarding trust monies deposited on his trust account and must strive to invest his client's funds, for the benefit of client, in an interest-bearing account.

28.1. Attorney and client costs

Amount due for services rendered and expenses incurred for which client is liable to his attorney.

28.2. Party and party costs

Court usually makes an order at the end of a case to the effect that one of the parties is to pay the legal costs incurred by the other party. One party, therefore, reimburse the other for costs that he must pay to his attorney. Party and party costs are determined by a tariff rather than a contract between attorney and client.

28.3. Costs *de bonis propriis*

These are costs of suit that the court directs to be paid by the unsuccessful party out of his own pocket where he instituted proceedings or defended the matter in a representative capacity. This applies where the litigation has been *mala fide*, negligent or unreasonable.

29. THE ENFORCEMENT OF JUDGEMENT

If defendant refuses to comply voluntarily with the judgment, steps must be taken to enforce it.

Execution is a court process whereby a successful litigant can enforce the court judgment or order granted in his favour.

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 shown so directs, immovable property. Thereafter a sale in execution takes place, and the proceeds are distributed.

29.1. The judgment debtor's person

Execution against the judgment debtor's person has been abolished. **Sections 65F** and **65G**, which ordered the committal of debtors to prison for failure to satisfy the judgment debt, were declared unconstitutional in ***Coetzee v Government of the Republic of South Africa*** and ***Matiso v Commanding Officer, Port Elizabeth Prison***.

29.2. The judgment debtor's property

Section 68 contains provisions regarding which property of a debtor is executable. Execution may be levied against the following property of the judgment debtor:

- Movable property;
- Immovable property;
- Certain incorporeal property.

The Sheriff of the Magistrate's Court is expressly authorised to attach certain incorporeal property in terms of **Sections 68(1) to (3)**. The following will qualify as attachable movables: Corporeal things, incorporeal things, bills of exchange, cheques, promissory notes, bonds and securities for money belonging to the execution debtor.

The following items are exempt from execution in terms of Section 67:

- the necessary beds, bedding and wearing apparel of the execution debtor and of his family;
- the necessary furniture (other than beds) and household utensils in so far as they do not exceed in value the sum of R 2,000;
- stocks, tools and agricultural implements of a farmer in so far as they do not exceed in value the sum of R 2,000;
- the supply of food and drink in the house sufficient for the needs of such debtor and of his family during one month;
- tools and implements of trade, in so far as they do not exceed in value the sum of R 2,000;
- 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 R 2,000;
- 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 above.

29.3. **Procedure**

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 an instalment at the time and in the manner ordered by the court.

Section 65E(4): 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): Execution must be levied in the following order:

- movable property of the judgment debtor; then
- immovable property (provided that there is not sufficient movable 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): On execution against immovable property which is subject to a preferent claim, such execution will not be allowed:

- unless the judgment creditor gives personal notice in writing of the intended sale to the preferent creditor; or
- 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
- unless the proceeds of the sale are sufficient to satisfy the preferent creditor's claim in full; or
- The preferent creditor confirms the sale in writing.

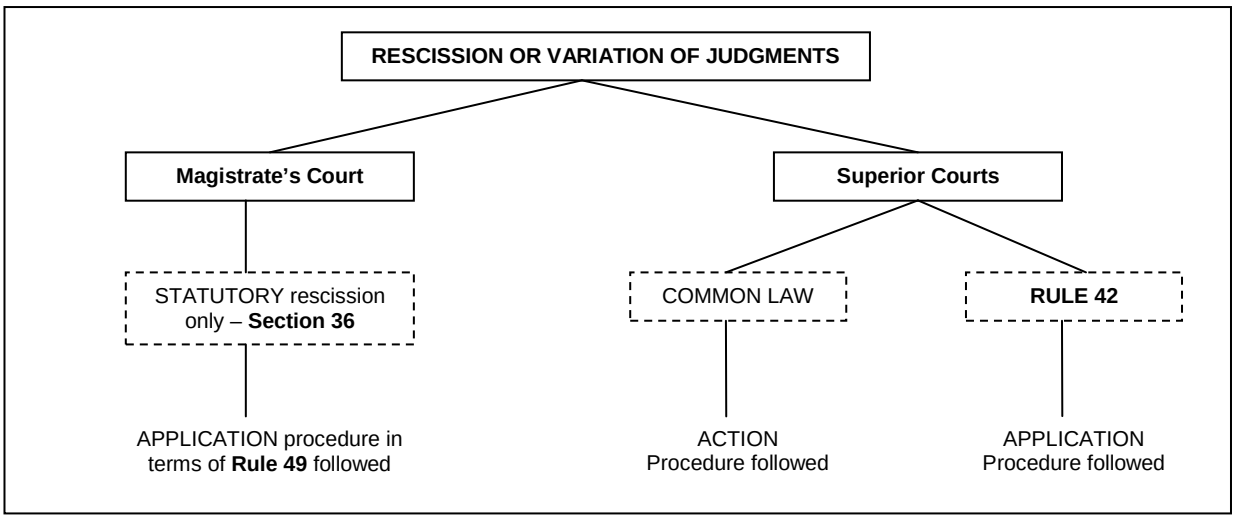
It will often still be necessary to approach the High Court for an order declaring such property executable where a Magistrate has given directions (***Middelburg Town Council v McKenzie***), which is equally applicable to the amended section and which was followed regarding the amended section in ***Johannesburg City Council v Swale***.

VARIATION OF JUDGMENTS, REVIEW AND APPEALS

30. THE RECISSION OR VARIATION OF JUDGMENTS

A court's judgment becomes final and unalterable by it under common law when the judgment is pronounced by the judicial officer, who then becomes *functus officio*. However, there may be reasons why the judgment does not correctly reflect the intention of the parties or the judicial officer. In such circumstances, a party to the action may request that the judgment be:

- ➲ varied in terms of certain statutory provisions; or
- ➲ set aside in terms of the common law.



30.1. **Grounds for the rescission or variation of judgments**

↳ Magistrates' courts

Judgments given by a Magistrate's Court may only be statutorily rescinded and no common law rescission is possible.

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*** (from the origin or commencement) 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.

Section 36(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.

The following judgments[13] may varied in terms of Section 36:

✔ any judgment granted by it in the absence of the person against whom that judgment was granted

Judgment may be granted in the following instances:

- against defendant who failed to file appearance to defend - **Rule 12**;
- against defendant in respect of consent to judgment – **Rule 11**;
- failure to plead - **Rule 12(1)(b)**;
- failure to comply with court order compelling compliance with rules of court - **Rule 60**;
- failure to appear at the trial and withdrawal – **Rule 32**.

In ***De Allende v Baraldi*** the court found that if a practitioner represents a natural or artificial person who is a party to litigation, that person, even if he/she isn't 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.

✔ any judgment granted by it which was void *ab origine* (i.e. from the beginning), or was obtained by fraud or by mistake common to the parties.

✔ court may correct patent errors in any judgment in respect of which no appeal is pending.

✔ any judgments in respect of which no appeal lies.

One must first determine whether an appeal lies from such a judgment: those affected do not have the effect of a final judgment. Refer to the discussion of Section 83(b) and test applied in ***Pretoria Garrison Institute v Danish Variety Products*** in paragraph 32.1 below.

[13] Decrees, orders and rules are also regarded as judgments in terms of the definition of a judgment.

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 and will consequently be appealable – **Rule 49(9)**. However, the application must have been dismissed on the merits and not because of a procedural fault when it should rather be struck from the roll. A successful application for rescission or variation doesn't become a final judgment and won't be appealable.

- Superior courts

A judgment may be set aside or varied in the High Court as follows:

- The common-law

A judgment will be set aside in terms of the common law on the following grounds:

- **Fraud**

A judgment procured by fraud committed by one of the parties cannot be allowed to stand. It must be shown that the successful litigant was a party to the fraud or perjury. In ***Swart v Wessels*** it was held that a party wanting to have a judgment set aside on the ground of fraudulent evidence must prove that:

i) the evidence was in fact incorrect;

ii) it was given fraudulently and with intent to mislead;

iii) it diverged to such an extent from the true facts that the court would, had the facts been placed before it, have given different judgment from that which it had given based on the incorrect evidence.

- **New documents**

If new documents come to light which, had they been available at the trial, could have entitled the party claiming relief to judgment in his favour, then judgment can be set aside in certain circumstances such as where:

i) judgment had been given regarding a will and a later will is discovered;

ii) a document wasn't produced at the trial owing to fraud by the other party;

iii) the document wasn't produced although this wasn't the fault of party claiming relief.

- **Error**

Although Rule 42 lays down provisions for rescission or variation of a judgment because of error, non-fraudulent misrepresentation inducing ***iustus error*** (reasonable error) on the part of the court is not a ground for setting aside a judgment induced by such error in terms of the common law – ***Groenewald v Gracia***.

- **Irregularities in procedure**

A party may apply for judgment to be set aside if it was obtained in his absence and he wasn't in court owing to improper service or the lack of service.

- Statutory rescission – **Rule 42(1)**

The High Court may, in addition to any powers it may have *mero motu* or upon application of any party affected, rescind or vary:

- an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
- 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;
- an order or judgment granted as the result of a mistake common to the parties.

Note: To establish *locus standi*, the applicant must show that he has an interest in the subject-matter of the judgment which is sufficiently direct to entitle him to have intervened in the original litigation in respect of which the judgment was given.

30.2. **Procedure for the variation of judgments**

- Magistrates' Courts

The application procedure in general as governed by Rule 55 must be complied with along with the specific provisions to set aside judgments contained in Rule 49.

Rule 49(1): A party to proceedings in which a default judgment has been given may apply, within 20 days after the judgment has come to his knowledge and on notice to all parties, for a rescission or variation of the judgment and the court may, on good cause show, rescind or vary the default judgment on terms it deems fit[14].

[14] In ***Phillips t/a Southern Cross Optical*** it was held that a court may rescind or vary a default judgment on such terms as it may deem fit upon good cause shown and the term "good cause" is generally accepted to mean that applicant must provide a reasonable explanation for his default; he must show that he has a *bona fide* defence; and that the application is made *bona fide*.

Rule 49(2): It will be presumed that applicant had knowledge of default judgment 10 days after the date on which it was granted, unless the applicant proves otherwise.

Rule 49(3): The application must be supported by an affidavit setting out the reasons for his absence or default and the ground of his defendant to the claim.

Rule 49(4): Should the applicant not which to defend the proceedings, he must satisfy the court that he was not in wilful default and that the judgment was satisfied, or that arrangements were made to satisfy the judgment, within a reasonable time after it came to his knowledge.

Rule 49(5): Where the plaintiff has agreed in writing that judgment be rescinded or varied, either plaintiff of defendant may, by notice to all parties, request court to rescind or vary the default judgment, which request shall be accompanied by written proof of plaintiff's consent.

Rule 49(6): Where application is made by anyone other than a defendant against whom or the plaintiff in whose favour default judgment was given, the application must be supported by an affidavit setting out the reasons why the application seeks rescission or variation of the judgment.

Rule 49(7): All applications for rescission or variation of a judgment other than a default judgment must be brought on notice to all parties, supported by an affidavit setting out the ground on which the applicant seeks the rescission or variation and the court may rescind or vary such judgment if it is satisfied that there is good reason to do so.

Rule 49(8): An application on the ground set out in Section 36(1)(b) may be made within one year of the applicant becoming aware of such voidness, fraud or mistake.

Rule 49(9): The court may correct errors in a judgment *mero motu* in the cases mentioned in Section 36(1)(c).

- Superior Courts

  Procedure for setting aside:

  - common law → action procedure (***Seme v Incorporated Law Society***)
  - variation in terms of Rule 42 → application procedure.

  Rule 6, which govern application procedures in general, must be complied with, as well as the specific provision governing applications for variation or rescission in Rule 42.

  Rule 42(2): Any party desiring any relief under Rule 42 shall make application under notice to all parties whose interests may be affected by any variation sought.

  Rule 42(3): The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.

31. REVIEW

31.1. Meaning of the term "review"

Review is the process by which the proceedings of inferior courts are brought before this court in respect of grave irregularities or illegalities occurring during the course of such proceedings

→ ***Johannesburg Consolidated Investment Company Ltd v Johannesburg Town Council***

Since both appeal and review are aimed at correcting the proceedings before a lower court, overlapping sometimes occurs in which event the applicant / appellant will have a choice of which procedure to adopt. "Review" is also used when the proceedings of various statutory bodies are reconsidered by a superior court.

A superior court's authority to review proceedings of:	Is derived from
Inferior courts	Statute
Other bodies	Superior court's inherent jurisdiction

A matter is brought on review by way of a notice of motion (use of summons has been abolished), except where a statute provides otherwise.

31.2. Distinction between appeal and review

	Review	Appeal
Aimed at	The method by which the result is obtained	The result of the trial
Object	To show that the proceedings were improperly conducted and seeks to have the judgment set aside on these grounds without being concerned with the merits of the case	To show that the presiding officer made false deductions and findings of fact on the evidence or incorrect legal conclusions, but the record is accepted to correctly reflect the proceedings.
In arguing	The parties may go beyond the record	The parties are restricted to the record
	Generally no fixed period within which the proceeding must be brought, but this must be done within a "reasonable time"	Must be noted within a stipulated number of days and the steps to prosecute it must be taken in a further limited period
Procedure	Brought on notice of motion	Must be noted and prosecuted according to statutory provisions, supplemented by the rules of court

31.3. Grounds for review

Lower courts

The following grounds are laid down in **Section 24(1) of SCA** upon which the proceedings of any lower court may be reviewed:

- absence of jurisdiction on the part of the court;
- interest in the cause, bias, malice or corruption on the part of the presiding officer;
- gross irregularity[15] in the proceedings;
- the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

Quasi-judicial bodies

If a statutory body (e.g. a liquor licensing board) doesn't conduct its proceedings in a fair and reasonable manner, a superior court will have the inherent jurisdiction necessary to correct such shortcomings (often termed a "review under the common law"). 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 in ***Africa Realty Trust v Johannesburg Municipality***:

- If a public body or individual exceeds its powers, the court will exercise a restraining influence.
- 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.

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***). Where it has been proved that a party has suffered prejudice as a result of an irregularity, the onus of disproving prejudice must be discharged by the tribunal that committed the irregularity (***Virginia Land and Estate v Virginia Valuation Court***). In addition to review under the common law, various statutes also make provision for the review of decisions taken by tribunals or officials.

31.4. Procedure on review – Rule 53

Rule 53(1): Proceedings to review the decision of any inferior court or quasi-judicial body shall be by way of notice of motion directed and delivered by the party seeking review to all the parties affected and calls upon:

(a) such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and

(b) the presiding officer to dispatch (within 15 days of receiving the notice of motion) to the Registrar the record of the original proceedings and any reasons for judgment which he must or may furnish.

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[15] "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. If a court makes a ruling against a party without giving him the opportunity to present his 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.
For example: (1) Court *a quo* had no jurisdiction: proceedings may be reviewed in terms of Section 24(1)(a) of SCA. However, the judgment can also be appealed against - ***King's Transport v Viljoen***; (2) Magistrate has admitted inadmissible or incompetent evidence: proceedings may be reviewed in terms of Section 24(1)(d) of SCA. It's also permissible to appeal in a proper case (***Retief Bros v Du Plessis***), but then the appellant is restricted to the record.

Rule 53(2): Notice of motion must be accompanied by supporting affidavit setting out the grounds, facts and circumstances on which applicant rely for requesting review.

Rule 53(3): Registrar must make available to applicant the record dispatched to him and applicant must make copies of such portions necessary for review and furnish Registrar with 2 copies and 1 copy to every other party to the proceedings.

Rule 53(4): After receiving the record, applicant may within 10 days amend, add to or vary the terms of his notice of motion and supplement the supporting affidavit by delivery of a notice and accompanying affidavit.

Rule 53(5): Should the presiding officer or any party affected desire to oppose the granting of the order prayed for in the notice of motion, he shall:

(a) file a notice of intention to oppose within 15 days of receiving such notice;

(b) file an answering affidavit within 30 days of the filing of the applicant's supplementary affidavit.

Rule 53(6): Applicant shall have the rights and obligations in regard to replying affidavits set out in Rule 6.

Rule 53(7): The provisions of Rule 6 as to set down of applications shall *mutatis mutandis* apply to the set down of review proceedings.

The normal, opposed application procedure is followed in review proceedings, with two important additions:

- the record is made available to all parties; and
- the applicant may amend or add to the documents on the basis of which he institutes review proceedings, after receiving the record

31.5. **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. The court will, however, not substitute its own discretion for that of the body or official whose decision it has reviewed, unless there are exceptional circumstances – ***Roopsingh v Rural Licensing Board for Lower Tugela***. Court will not remit the matter to the particular body whose proceedings are reviewed, in the following circumstances:

- 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.

32. APPEALS

Appeal is an approach to a higher court for relief from the decision of a lower one.

A **court of first instance** is the court before which a matter was first heard.

Court *a quo* is the court against whose decision an appeal is noted.

A **full bench** or **full court** is usually 3 judges of the relevant provincial or local division

32.1. **Appeals against judgments of a Magistrates Court**

Appeals are brought to the appropriate provincial or local division of the High Court and an unsatisfied litigant is allowed only one appeal as of right appeal as of right.

Section 82: If the parties have lodged with the court a written agreement that the decision of the court would be final before the hearing starts, no appeal shall lie from the decision of the court.

Section 83: A party to any civil suit or proceeding in a court may appeal to the provincial or local division of the Supreme Court having jurisdiction to hear the appeal against:

(a) any judgment described in Section 48;

(b) any rule or order having effect of final judgment, including an order relating to execution in terms of Chapter IX of the Act and any order as to costs; and

(c) in certain circumstances, any decision overruling an exception.

What is meant in Section 83(b) by a rule or order "having the effect of a final judgment"?

As held in ***Pretoria Garrison Institute v Danish Variety Products***:

Test: Does the rule or order dispose of any issue, or any part thereof, in the main action or irreparably anticipates or precludes some of the relief which would be given at the main hearing?

Examples of orders that are final and definite 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*** 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.

Examples of orders which are interlocutory with no final effect:

- A refusal to grant absolution from the instance at end of plaintiff's case
- an order for (or refusal to order) further particulars.

In ***Livanos v Absa Bank*** the court held that an order granting leave to execute subject to security *de restituendo* is interlocutory and not appealable.

Note: A judgment which may be rescinded or varied in terms of Section 36 is not immediately appealable – a party must first exhaust his remedies in the lower court before appealing.

Section 83(b) renders any order as to costs appealable. In deciding whether the award of costs was correctly made, the merits of the dispute in the lower court must be investigated. Thus, a court of appeal may allow an appeal as to costs where it is of the opinion that the dispute in respect of which the costs were awarded, was wrongly decided, but it cannot alter the judgment or order - even if it considers that such judgment or order was incorrectly made!.

32.2. **Appeals against judgments of Superior courts**

No appeal as of right is available to an unsatisfied litigant in respect of decisions of the High Court and leave from the court concerned or, failing that, leave from the SCA must be obtained. If leave to appeal is granted, appeal may be brought to either the full bench of the appropriate provincial or local division or the SCA. In terms of **Section 20(4)**:

- Decisions of a single judge

  The leave of the court appealed from, or, if this is refused, then the leave of the SCA is required.
- Decisions of a full bench sitting as a court of first instance

  The leave of the court appealed against, or, if it's refused, then the leave of the SCA is required.
- Decisions of a full bench sitting as a court of appeal

  The leave of the SCA is required.

32.3. **The effect of noting an appeal against the original judgment**

- Magistrates' Courts
  - Execution of judgment

    The noting an appeal automatically suspends execution of judgment, pending the outcome of the appeal. Upon application, however, court may order that judgment be put into effect – Section 78. The onus is on the successful party seeking to execute to approach court.
  - Peremption (lapse) of appeal

    Section 85: No peremption of appeal by satisfaction of judgment – a party shall not lose the right to appeal through satisfying or offering to satisfy the judgment in respect of which he appeals or any part thereof or by accepting any benefit of such judgment, decree or order.

    Under common law, peremption of appeal may be brought about by unsuccessful litigant's conduct, which necessarily points to the conclusion that he has consented to the judgment.
  - Abandonment of judgment

    If the party in whose favour the judgment in the lower court was given, decides that he cannot support the judgment on appeal, he 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 is done by a written notice of abandonment filed with the clerk of the court and served on the other party stating whether it is abandonment of whole or part (which part) of the judgment.

    If defendant abandons, judgment in respect of the part abandoned is entered for plaintiff in terms of the claim in the summons or application. If plaintiff abandons, judgment in respect of the part abandoned is entered for the defendant, with costs. Then, these judgments have the same effect as if originally pronounced by the court.

- Higher Courts
  - Execution of judgment

    It isn't merely the right to levy execution which is suspended, but "operation and execution" thereof. Execution of a judgment is automatically suspended on noting an appeal in terms of the common law rule – ***South Cape Corporation v Engineering Management Services***.

    Rule 49(11): Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of a court has been made, the operation and execution of the order in question will be suspended, pending the outcome of the appeal or application, unless the court which gave such order, on the application of a party, otherwise directs.

    Applicant must show why judgment should be executed and, if his application is successful, he must furnish security *de restituendo*. Rule 49(11) relates to appeals to a full bench, but the position is the same in respect of appeals to the SCA.
  - Peremption (lapse) of appeal

    In terms of the common law, a person who has consented to a judgment cannot subsequent-tly appeal against it. Such acquiescence or consent will be inferred from any act which is inconsistent with the intention to appeal (e.g. payment or accepting payment in terms of a judgment).
  - Abandonment of judgment

    Rule 41(2): A party in whose favour the judgment was given may abandon such judgment in whole or in part by delivering notice thereof.

    No specific provision, but it appears that the party abandoning would be liable for costs up to the date of abandonment.

32.4. **The various courts of appeal**

- The Supreme Court of Appeal

  Final court of appeal in all matters, except constitutional matters, and is located in Bloemfontein. A quorum of the SCA in all civil matters is 5 judges. However, the Chief Justice may direct that an appeal in a civil matter be heard before 3 judges and also that such appeal be heard before a larger number of judges than is specified in the Act.
- The full bench

  All provincial divisions of the High Court have appeal jurisdiction, but no local division except the Witwatersrand Local Division. An appeal against the decision of a single judge of the WLD must be heard by a full bench of the Transvaal Provincial Division, unless the Judge President of the TPD directs that a full bench of the WLD hear the appeal.

  A court of first instance is usually constituted before a single judge. A court hearing an appeal from an inferior court must comprise of at least 2 judges. A full bench hearing an appeal against the judgment or order of a single judge must comprise of at least 3 judges. However, the single judge whose judgment or order is being appealed against, is precluded from sitting on the full bench hearing the appeal.

32.5. **Procedure on appeal**

- Procedure on appeal from a Magistrate's Court

  An appeal may be noted by an appellant personally or his duly authorised legal representative. The **procedural steps** to be taken in an appeal from a Magistrate's Court decision are:
  - Reasons for judgment before noting an appeal:

    Rule 51(1): Upon a request in writing by any party within 10 days after judgment and before noting an appeal and upon payment of such party of a fee of R70, which shall be affixed to such request in the form of a revenue stamp, the judicial officer shall within 15 days hand to the clerk of the court a written judgment which shall become part of the record showing:

    (a) the facts he found to be proved; and

    (b) his reasons for judgment:

    provided that the fee referred to herein shall not be payable by a party who, together with his request in writing, also lodges a document in which he is authorized by an officer or agent of a legal aid board, established by statute, to make such request.

    Rule 51(2): The clerk of the court must supply to the party applying for it a copy of the written judgment.

- Noting an appeal

Rule 51(3): An appeal may be noted within 20 days after date of judgment appealed against or within 20 days after clerk of the court has so supplied a copy of the written judgment to the party applying therefore, whichever period shall be longer.

Rule 51(4): An appeal shall be noted by the delivery of notice, and, unless the court of appeal shall otherwise order, by giving security for the respondent's costs of appeal to the amount of R 1,000.

Rule 51(7): A notice of appeal or cross-appeal shall state:

(a) whether the whole or only part of the judgment is appealed against, and if only part, then what part;

(b) the grounds of appeal, specifying the findings of fact or rulings of law appealed against.

- Reasons for judgment after the appeal has been noted

Rule 51(8): Upon the delivery of a notice of appeal the judicial officer shall within 15 days hand to the clerk of the court a statement in writing showing (so far as may be necessary having regard to any written judgment already delivered by him):

(a) the facts he found to be proved;

(b) the grounds upon which he arrived at any finding of fact specified in the notice of appeal as appealed against; and

(c) his reasons for any ruling of law or for the admission or rejection of any evidence so specified as appealed against.

In ***Regent Insurance d v Maseko*** it was held that Rule 51(8) was peremptory and had to be complied as placing the court of appeal in a position to get to the heart of the appeal were to deal with it in a speedy, efficient and cost-effective manner. Failure to comply with the provision undermined and delayed effective legal administration.

- Prosecution of appeal

Rule 50(1): An appeal to the court against the decision of a magistrate in a civil matter shall be prosecuted within 60 days after the noting of such appeal, and unless to prosecuted it shall be deemed to have lapsed.

Rule 50(4): (a) The appellant shall, within 40 days after noting the appeal, apply to the Registrar in writing and with notice to all other parties for the assignment of a date for the hearing of the appeal and shall at the same time make available to the Registrar in writing his full residential and postal addresses and the address of his attorney if he is represented.

(b) In the absence of such an application by the appellant, the respondent may at any time before the expiry of the period of 60 days referred to in Rule 50(1) apply for a date of heating in like manner.

This application must be accompanied by 2 copies of the record. The Registrar then selects date for hearing and immediately gives applicant written notice of the date. Thereafter, applicant must deliver a notice of set-down immediately and give the clerk of the court from which the appeal emanated, written notice thereof.

At the hearing, the parties must be represented in person or by counsel and the appeal must be heard by at least 2 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. It the respondent is in default, the appellant must persuade the court of appeal that the lower court's judgment should be reversed. The powers of the High Court when hearing an appeal from a magistrate are set out in Section 87.

Section 87: The court of appeal may:

(a) confirm, vary or reverse the judgment appealed from;

(b) if the record doesn't furnish sufficient evidence or information for the determination of the appeal, remit the matter to the court from which the appeal is brought, with instructions in regard to the taking of further evidence or the setting out of further information;

(c) order the parties or either of them to produce such further proof as it seems necessary;

(d) take any other course which may lead to the just, speedy and inexpensive settlement of the case; and

(e) make such order as to costs as justice may require.

- Further appeal

  General rule: Only 1 appeal as of right!

  If a magistrate's decision has been taken on appeal to a provincial division, there is a further appeal to SCA, but only with the leave of that provincial division appealed to in the first instance, or, if it refuses leave, with the leave of the SCA.

- The higher courts which hear appeals

  Section 20(1): An appeal from a judgment or order of the court of a provincial or local division in any civil proceedings or against any judgment or order of such court given on appeal shall be heard by the appellate division or full court, as the case may be.

  Section 20(2): (a) 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 SCA.

  (b) Any direction in terms of Section 20(2)(a) may be set aside by the SCA on application made to it by any interested party within 21 days.

  (c) Any application to the SCA under Section 20(2)(b) shall be submitted by petition addressed to the Chief Justice.

  Section 20(3): Where an appeal is to be heard by a full court:

  (a) appeal against judgment of a provincial division → heard by the full bench of that provincial division.

  (b) appeal against judgment of a local division other than WLD → heard by full bench of the provincial division having concurrent jurisdiction;

  (c) appeal against judgment of WLD → heard by:

  i) the full bench of the TPD; or

  ii) the full bench of the WLD, if the Judge President has directed this.

  In some cases, a right to appeal directly to the SCA has been created by statute (e.g. judgment of a water court or income tax appeal court). The SCA also has jurisdiction at common law to grant special leave to appeal where no appeal lies, to prevent "substantial and grave injustice" – ***Enyati Colliery v Alleson***: a provincial division wrongly allows appeal in a matter in which no right of appeal exists and the SCA intervened to restore the ***status quo ante*** (the way things were before).

- Procedure on appeal from higher courts

  - Procedure on appeal to a full bench

    Rule 49(1): Leave to appeal may be requested at the time the judgment or order is made. If this is not done, application for leave to appeal must be filed within 15 days of the order appealed against. This application is heard by judge who made the judgment or order.

    Rule 49(2): Notice of appeal must be delivered within 20 days after leave was granted.

    Rule 49(3): Notice must state whether whole or only part of judgment or order is appealed against and must specify the findings of fact or rulings of law appealed against.

    Rule 49(6)(a): Within 60 days of delivering his notice of appeal, appellant must submit a written application to the Registrar for a date for the hearing of the appeal.

    Rule 49(7): At the same time, appellant must file 3 copies of the appeal record with Registrar and must provide respondent with 2 copies.

    Rule 49(13): Appellant must furnish security for respondent's costs of appeal and if parties can't agree on the amount it will be determined by Registrar.

    The Registrar the assigns a date for the hearing and gives both parties at least 20 days' notice of it.

  - Procedure on appeal to the SCA

    - If leave of the SCA is necessary, an application for leave to appeal plus verifying affidavit addressed to President of the SCA must be filed in duplicate within 20 days of judgment or order and must contain all information necessary to decide whether leave should be granted and a copy of the judgment of the court a quo must accompany it.
    - 2 judges then consider the petition and, if leave is granted, an order as to time within which records must be filed is made.
    - The notice of appeal must be lodged with the Registrar of SCA, the Registrar of court *a quo* and the respondent. It must state whether whole or only a part of the judgment or

order is being appealed against. The grounds of appeal needn't be set out as these appear from counsel's heads of argument.

- Appellant must prepare the record within 3 months (usually) of the judgment or order appealed against. Copies must be delivered to respondent and 6 copies lodged with the Registrar of SCA.
- Appellant must furnish security for respondent's costs of appeal (if parties can't agree on amount, Registrar of court appealed from determines it).
- Registrar fixes date of hearing
- Heads of argument:
  - → Contain the main points to be made in counsel's address to court.
  - → Contain a list of the appellant's authorities to be quoted in support of each point.
  - → 6 copies must be lodged with Registrar not later than 10 days before the hearing.
  - → 1 copy must be served on respondent not later than 15 days before the hearing
  - → Not later than 10 days before the hearing, respondent must serve and lodge his heads of argument in the same way.